



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

March 11, 2020

Emma Lewis
Sara Kaiser Creighton
American Oversight
1030 15th Street, NW, B255
Washington, DC 20005

Re: *American Oversight v. U.S. Department of Education*
Civil Action No.: 1:19-cv-03029
FOIA Request Nos.: 19-02224-F, 19-02225-F, 19-02226-F, 19-02227-F

Dear Ms. Lewis and Ms. Creighton:

This letter is the Department of Education's response to your four requests, dated September 10, 2019, for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Copies of your requests are enclosed with this letter.

Also, enclosed with this letter you will find one DVD containing 723 pages of documents that have been found responsive to your requests. Certain information, however, has been withheld according to the FOIA exemptions specified below:

1. Proprietary information has been withheld under exemption (b)(4) of the FOIA, 5 U.S.C. § 552 of the FOIA;
2. Records or portions of records relating to certain intra-agency information is exempt from disclosure pursuant to 5 U.S.C. § 552 (b)(5) of the FOIA. This exemption permits the withholding of inter- or intra-agency information that could be withheld under civil discovery, including information subject to the deliberative process, attorney-client, or attorney-work product privileges; and
3. Records or portions of records relating to personal information are exempt pursuant to 5 U.S.C. § 552(b)(6) of the FOIA. Disclosure of this information would constitute a clearly unwarranted invasion of personal privacy.

Please note that the Department's search yielded no responsive records for FOIA request # 19-02225-F.

Because these requests are in litigation, if you have questions regarding this response, please contact AUSA Charles E.T. Roberts at Charles.e.roberts@usdoj.gov.

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100
www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Sincerely,



Lydia T. Makande
General Attorney

Enclosure: as stated

cc: AUSA Charles Roberts

From: Barren, Morris
To: Menashi, Steven
Subject: RE: Ethics Advice
Date: Wednesday, October 11, 2017 3:16:07 PM

Thanks, Steven. I will add the list of clients to your report. I will also update your ethics advice to reflect that your wife is no longer employed by (b)(6) (b)(5)

(b)(5)

Thanks,

Morris

From: Menashi, Steven
Sent: Tuesday, October 10, 2017 6:44 PM
To: Barren, Morris
Subject: RE: Ethics Advice

Morris,

I want to clarify that my wife is no longer employed by (b)(6) but works only for Palisades Media Ventures LLC. It turns out, as we discussed, that George Mason University continues to pay for (b)(6) while I am on leave. I understand that while I am on leave from GMU I cannot participate in particular matters involving specific parties that include GMU but I can participate in particular matters of general applicability per 5 C.F.R. § 2640.203(b).

I have pasted below a list of clients.

Regards,
Steven

American Federation for Children
Amneal Pharmaceuticals
BP America
Centurylink Inc.
GlaxoSmithKline PLC
IBM Corporation
Johnson and Johnson
Ranbaxy Inc.
Safelite Group Inc.
Special Committee of Independent Directors of Sauer-Danfoss Inc.
Sun Pharmaceutical Industries Ltd.
Teva Pharmaceuticals North America
Third Point LLC

Upsher-Smith Laboratories Inc.
Verizon Communications Inc.

From: Barren, Morris
Sent: Tuesday, October 03, 2017 3:10 PM
To: Menashi, Steven
Subject: Ethics Advice
Importance: High

Hi Steven,

Thank you for meeting a couple weeks ago concerning your Public Financial Disclosure Report (Report), and I look forward to receiving the information needed to complete your Report. Though your Report is not yet complete, I provide the following ethics advice based upon the information currently in your Report. If needed, I will update this advice once your Report is completed.

(b)(5)

(b)(5)

(b)(5)

Please let me know if you have any questions.

Morris Barren

Attorney

Office of the General Counsel, Ethics Division

U.S. Department of Education

(b)(6)

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From: [Spencer, Kristina](#)
To: [Menashi, Steven](#)
Cc: [Wallace, Taronda](#); [Venable, Joshua](#)
Subject: RE: Outside Activity
Date: Thursday, March 15, 2018 1:44:09 PM
Attachments: [2018-03-15 Outside Activity Request - Steven Menashi \(Food Allergy Fund\).pdf](#)

Hi Steven,

The Ethics Division concurs with Josh's approval of your outside activity request to serve on the (b)(6) subject to the attached ethics guidance.

Please let me know if you have any questions.

Thanks,
Kristina

Kristina Spencer

Alternate Designated Agency Ethics Official
Acting Deputy Assistant General Counsel for Ethics
Office of the General Counsel
U.S. Department of Education

(b)(6)

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From: Menashi, Steven
Sent: Wednesday, March 14, 2018 2:22 PM
To: Spencer, Kristina
Subject: Fwd: Outside Activity

Here's the supervisor approval. Forgot to send it along.

Begin forwarded message:

From: "Venable, Joshua" <Joshua.Venable@ed.gov>
Date: March 5, 2018 at 2:41:07 PM EST
To: "Menashi, Steven" <Steven.Menashi@ed.gov>
Subject: Re: Outside Activity

Thanks, no issues here. Approved.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

March 15, 2018

MEMORANDUM

TO: Steven Menashi
Deputy General Counsel/Acting General Counsel
Office of the General Counsel

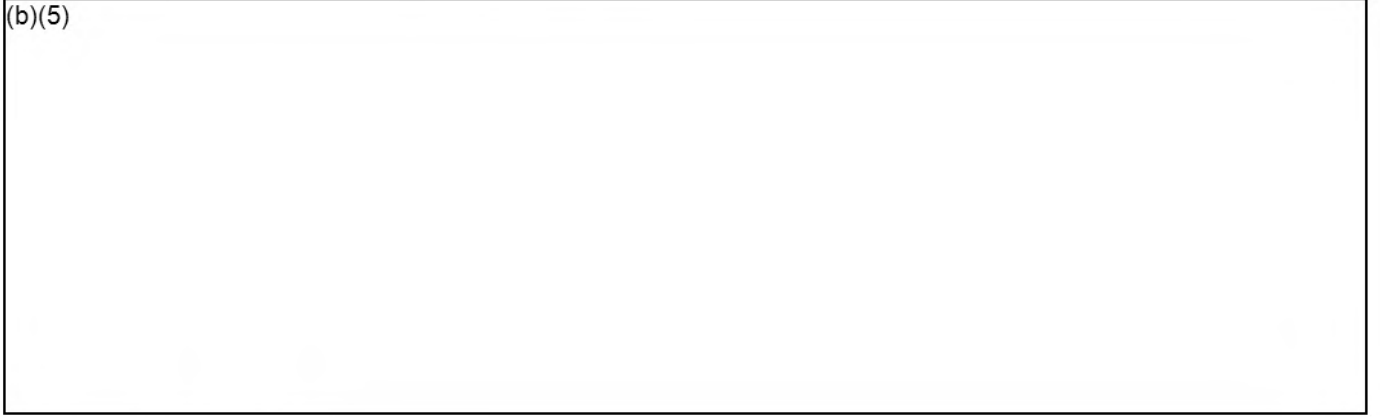
FROM: Kristina Spencer
Acting Deputy Assistant General Counsel for Ethics
Office of the General Counsel

SUBJECT: Outside Activity Request: (b)(6)

(b)(5)

(b)(5)

(b)(5)



cc: Josh Venable

¹ A “prohibited source” of the Department is any person who (1) is seeking official action by the Department; (2) does business or seeks to do business with the Department; (3) conducts activities regulated by the Department; (4) has interests that may be substantially affected by the performance or nonperformance of your official duties; or (5) is an organization a majority of whose members are described in (1)-(4) above. 5 C.F.R. § 2635.203(d).

Sent from my iPhone

On Mar 5, 2018, at 14:31, Menashi, Steven <Steven.Menashi@ed.gov> wrote:

As we discussed last week, I submitted an outside activities request form to the Ethics Division because I am joining (b)(6)

(b)(6)

I only need supervisor approval for the activity. Please reply indicating such approval.

Thanks,
Steven



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

March 15, 2018

MEMORANDUM

TO: Steven Menashi
Deputy General Counsel/Acting General Counsel
Office of the General Counsel

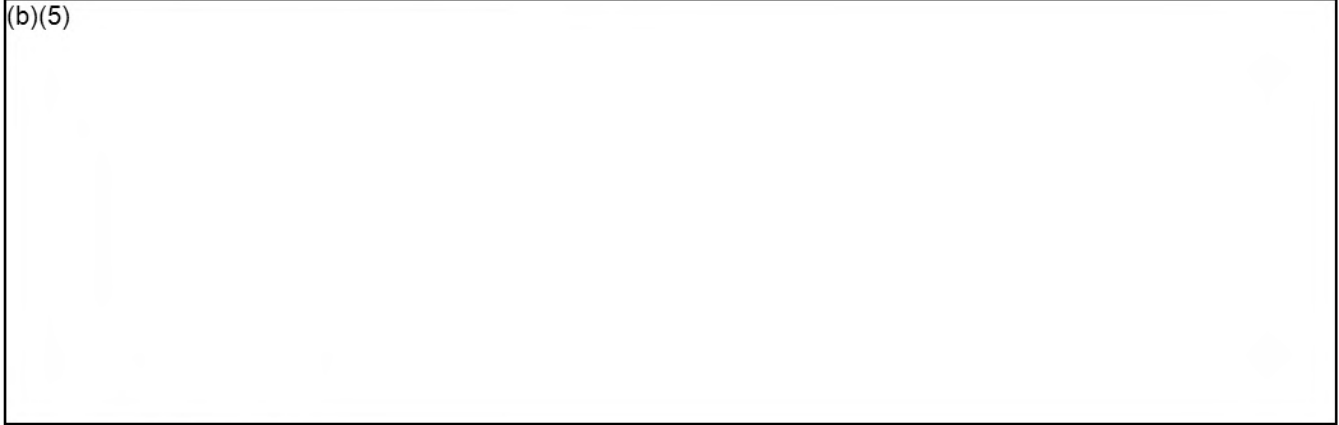
FROM: Kristina Spencer
Acting Deputy Assistant General Counsel for Ethics
Office of the General Counsel

SUBJECT: Outside Activity Request: (b)(6)

(b)(5)

(b)(5)

(b)(5)



cc: Josh Venable

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Barren, Morris

From: Barren, Morris
Sent: Wednesday, October 18, 2017 11:35 AM
To: Menashi, Steven
Subject: Ethics Advice (Updated)

Importance: High

Hi Steven,

Again, thank you for the information. I added the list of clients you provided to Part 4 (Filer's Sources of Compensation Exceeding \$5,000 in a Year) of your Public Financial Disclosure Report. Also, please see below for updated ethics advice that replaces the advice I provided on October 03, 2017.

(b)(5)

(b)(5)

(b)(5)

Please let me know if you have any questions.

Morris Barren

Attorney

Office of the General Counsel, Ethics Division

U.S. Department of Education

(b)(6)

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Sent: Wednesday, October 11, 2017 3:16 PM

To: Menashi, Steven

Subject: RE: Ethics Advice

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(b)(5)

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Morris

From: Menashi, Steven

Sent: Tuesday, October 10, 2017 6:44 PM

To: Barren, Morris
Subject: RE: Ethics Advice

Morris,

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I have pasted below a list of clients.

Regards,
Steven

American Federation for Children
Amneal Pharmaceuticals
BP America
Centurylink Inc.
GlaxoSmithKline PLC
IBM Corporation
Johnson and Johnson
Ranbaxy Inc.
Safelite Group Inc.
Special Committee of Independent Directors of Sauer-Danfoss Inc.
Sun Pharmaceutical Industries Ltd.
Teva Pharmaceuticals North America
Third Point LLC
Upsher-Smith Laboratories Inc.
Verizon Communications Inc.

From: Barren, Morris
Sent: Tuesday, October 03, 2017 3:10 PM
To: Menashi, Steven
Subject: Ethics Advice
Importance: High

Hi Steven,

Thank you for meeting a couple weeks ago concerning your Public Financial Disclosure Report (Report), and I look forward to receiving the information needed to complete your Report. Though your Report is not yet complete, I provide the following ethics advice based upon the information currently in your Report. If needed, I will update this advice once your Report is completed.

(b)(5)

(b)(5)

(b)(5)

Please let me know if you have any questions.

Morris Barren

Attorney

Office of the General Counsel, Ethics Division

U.S. Department of Education

(b)(6)

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

March 15, 2018

MEMORANDUM

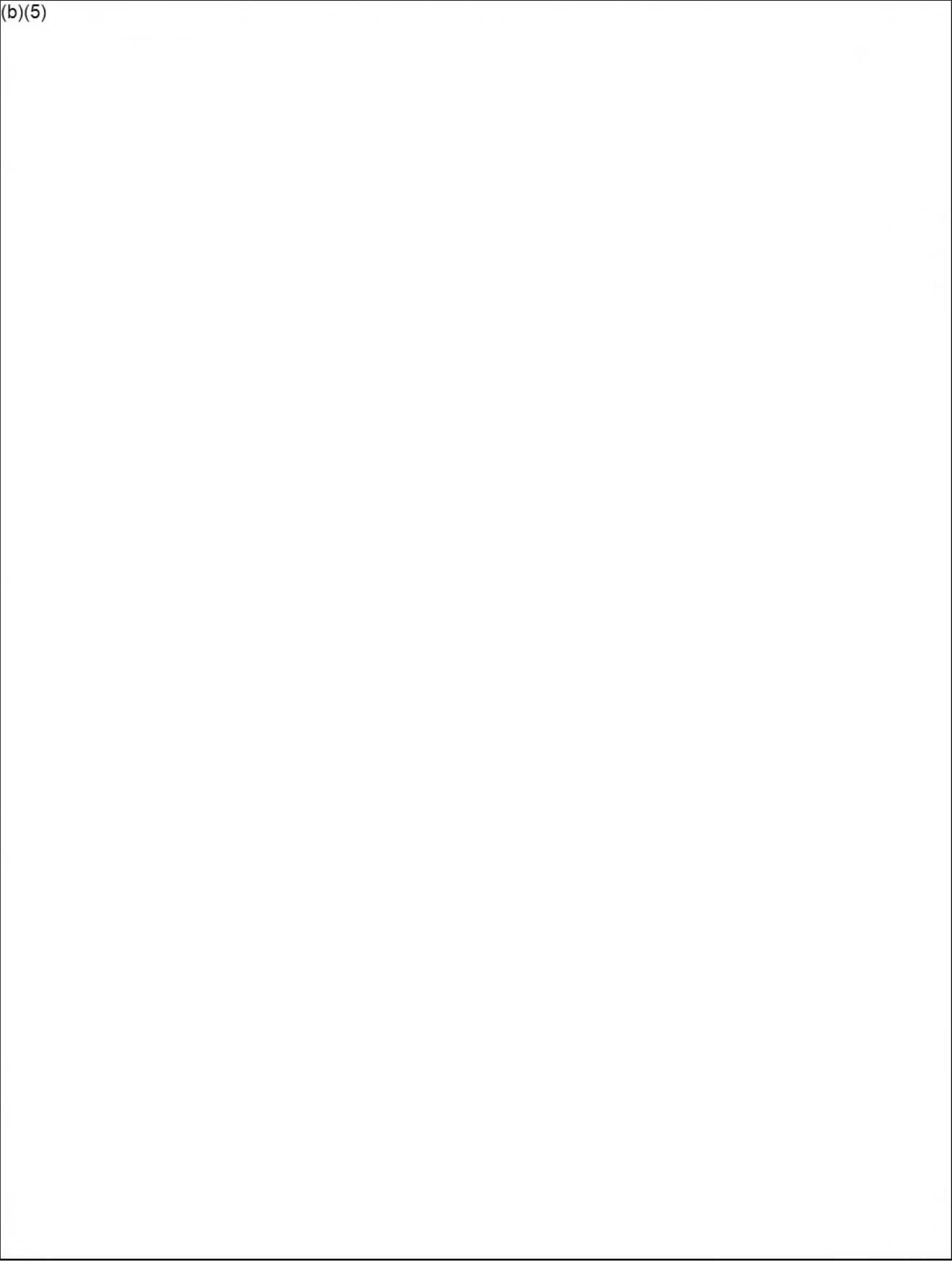
TO: Steven Menashi
Deputy General Counsel/Acting General Counsel
Office of the General Counsel

FROM: Kristina Spencer (b)(6)
Acting Deputy Assistant General Counsel for Ethics
Office of the General Counsel

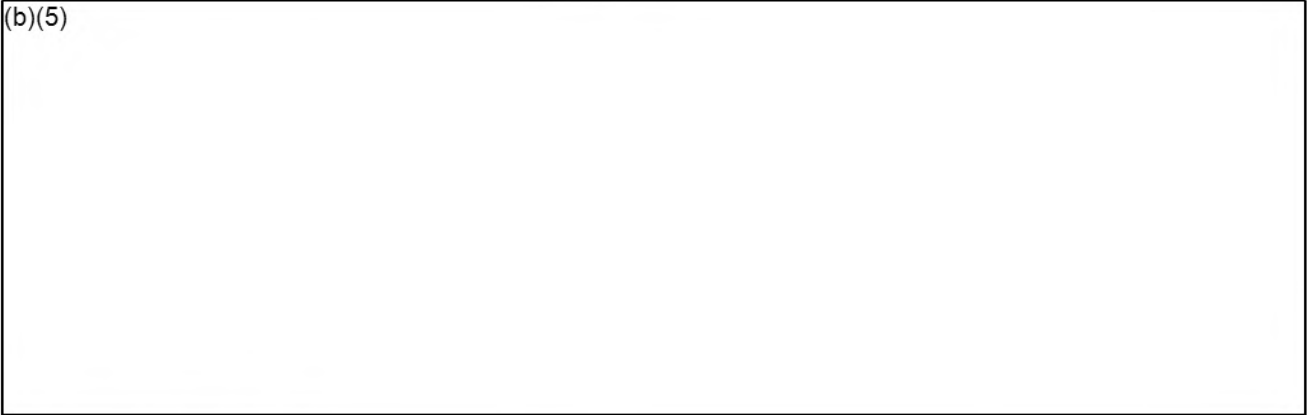
SUBJECT: Outside Activity Request: (b)(6)

(b)(5)

(b)(5)



(b)(5)



cc: Josh Venable



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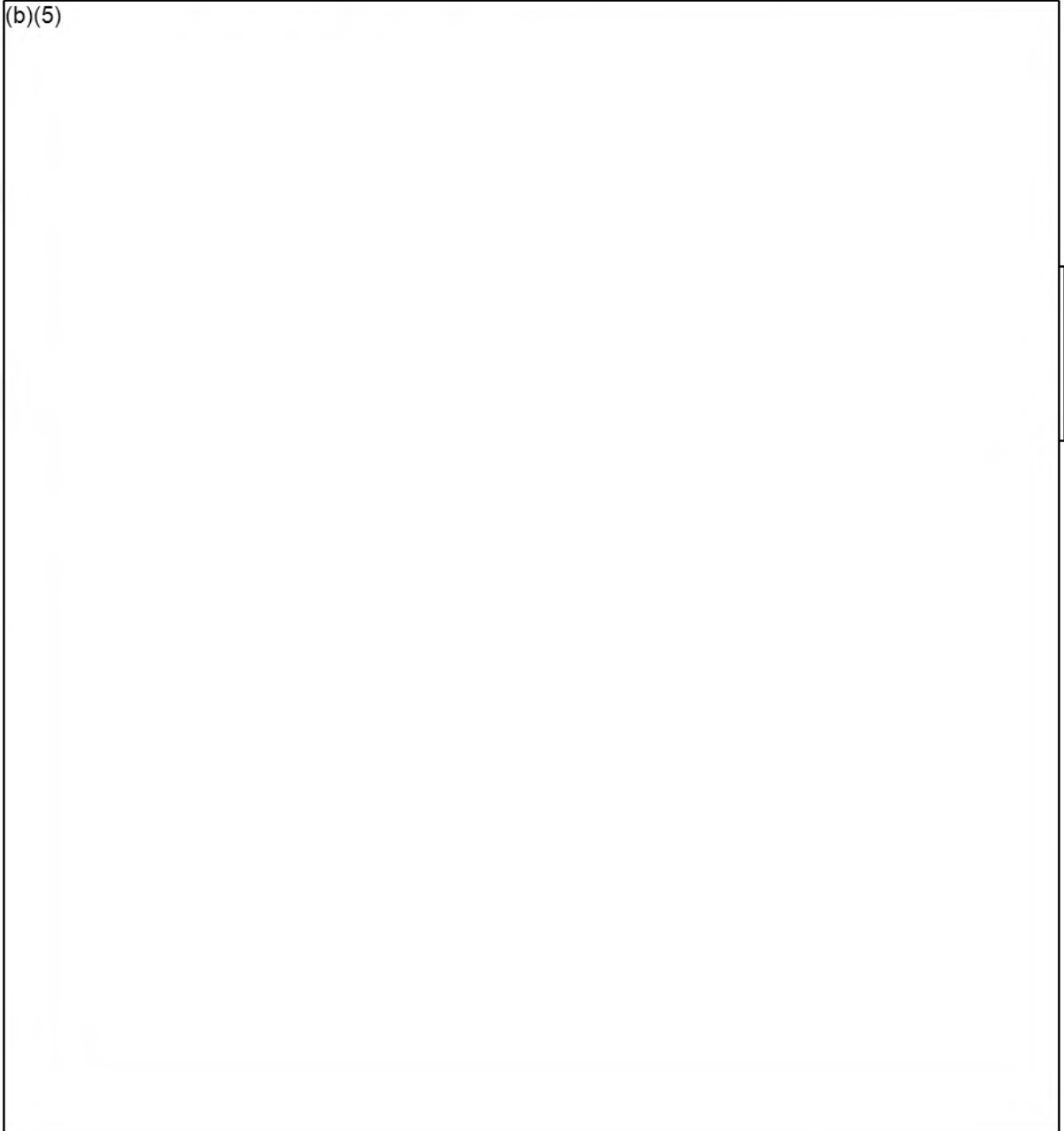
UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

April 12, 2018

Note to Steven Menashi, Deputy General Counsel/Acting General Counsel, Office of the General Counsel, Washington, DC.

(b)(5)



(b)(5)

(b)(5)

Please let me know if you have any questions or concerns. You may contact me at (b)(6)

(b)(6)

By: (b)(6)

Michael L. Shields, Esq.
Attorney, Ethics Division, OGC

Jackson, Candice

Subject: Meeting with FIRE
Location: 400 Maryland AVE SW Washington DC 20202-0000 HQ - 400 Maryland AVE SW Washington DC 20202-0000 HQ

Start: Tuesday, June 6, 2017 8:00 AM
End: Tuesday, June 6, 2017 9:00 AM

Recurrence: (none)

Meeting Status: Declined

Organizer: Jackson, Candice
Required Attendees: robert@thefire.org; Menashi, Steven
Optional Attendees: Susan Kruth; jdillon@kaiserdillon.com; Joe Cohn

I'll meet you in our ED building lobby. Steve - I understand if you pass on an 8am meeting but wanted to invite you because this meeting will discuss some pending litigation.

Jackson, Candice

Subject: Meeting with FIRE
Location: 400 Maryland AVE SW Washington DC 20202-0000 HQ - 400 Maryland AVE SW Washington DC 20202-0000 HQ

Start: Tuesday, June 6, 2017 8:00 AM
End: Tuesday, June 6, 2017 9:00 AM
Show Time As: Tentatively accepted

Recurrence: (none)

Meeting Status: Not yet responded

Organizer: Jackson, Candice
Required Attendees: robert@thefire.org; Menashi, Steven
Optional Attendees: Susan Kruth; jdillon@kaiserdillon.com

I'll meet you in our ED building lobby. Steve - I understand if you pass on an 8am meeting but wanted to invite you because this meeting will discuss some pending litigation.

Jackson, Candice

Subject: FW: Academic Freedom Listening Session
Location: DOE

Start: Thursday, June 8, 2017 8:00 AM
End: Thursday, June 8, 2017 11:00 AM
Show Time As: Tentatively accepted

Recurrence: (none)

Organizer: Jackson, Candice
Required Attendees: Venable, Joshua; Menashi, Steven; Eitel, Robert; Manning, James

From: Kellie Fiedorek
Sent: Friday, June 2, 2017 7:23:39 PM UTC
To: Kellie Fiedorek; Jackson, Candice
Subject: Academic Freedom Listening Session
When: Thursday, June 8, 2017 12:00 PM-3:00 PM.
Where: DOE

Kellie Fiedorek
Legal Counsel
Alliance Defending Freedom
202-393-8690
202-888-7633
202-905-6197
202-347-3622
KFiedorek@ADFlegal.org
ADFlegal.org

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Kellie Fiedorek

Subject: FW: Academic Freedom Listening Session
Location: DOE

Start: Thursday, June 8, 2017 8:00 AM
End: Thursday, June 8, 2017 11:00 AM
Show Time As: Tentatively accepted

Recurrence: (none)

Meeting Status: Tentatively accepted

Organizer: Kellie Fiedorek
Required Attendees: Venable, Joshua; Menashi, Steven; Eitel, Robert; Manning, James; Jackson, Candice

From: Kellie Fiedorek
Sent: Friday, June 2, 2017 7:23:39 PM UTC
To: Kellie Fiedorek; Jackson, Candice
Subject: Academic Freedom Listening Session
When: Thursday, June 8, 2017 12:00 PM-3:00 PM.
Where: DOE

Kellie Fiedorek
Legal Counsel
Alliance Defending Freedom
202-393-8690
202-888-7633
202-905-6197
202-347-3622
KFiedorek@ADFlegal.org
ADFlegal.org

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Kellie Fiedorek

Subject: FW: Academic Freedom Listening Session

Location: DOE

Start: Thursday, June 8, 2017 8:00 AM

End: Thursday, June 8, 2017 11:00 AM

Show Time As: Tentatively accepted

Recurrence: (none)

Meeting Status: Tentatively accepted

Organizer: Kellie Fiedorek

Required Attendees: Venable, Joshua; Menashi, Steven; Eitel, Robert; Manning, James; Jackson, Candice

Menashi, Steven

Subject: Tentative: Academic Freedom Listening Session

Location: DOE

Start: Thursday, June 8, 2017 8:00 AM

End: Thursday, June 8, 2017 11:00 AM

Recurrence: (none)

Organizer: Menashi, Steven

Required Attendees: Kellie Fiedorek

Rosenfelt, Phil

From: Rosenfelt, Phil
Sent: Monday, September 25, 2017 1:39 PM
To: David Cortman
Cc: Dowling, Maureen; Allen, Pamela; Menashi, Steven
Subject: RE: Trinity Lutheran Session at 2017 National Private School Leadership Conference

David: Unfortunately, 9 did not work for Steven, so I am copying Steven and he will try to reach you directly. I am sorry for the difficulty in setting this up.

I will be providing some introductory remarks and will then introduce the two of you, so I will adapt to whatever you and Steven decide as the plan for the session. Thanks again for your cooperation.

Phil

From: Rosenfelt, Phil
Sent: Monday, September 25, 2017 1:19 PM
To: 'David Cortman'
Cc: Dowling, Maureen; Allen, Pamela
Subject: RE: Trinity Lutheran Session at 2017 National Private School Leadership Conference

David: 9 would work for me; I will ask Steven and get back to you. Thanks.

Phil

From: David Cortman [<mailto:dcortman@adflegal.org>]
Sent: Monday, September 25, 2017 1:16 PM
To: Rosenfelt, Phil
Cc: Dowling, Maureen; Allen, Pamela
Subject: Re: Trinity Lutheran Session at 2017 National Private School Leadership Conference

How about 9 or 930 am? I leave at 10 to go speak at an event. Thanks.

On Sep 25, 2017, at 1:14 PM, Rosenfelt, Phil <Phil.Rosenfelt@ed.gov> wrote:

David: Unfortunately, 5 does not work for Steven (he could do earlier like 4). If that does not work is there any time tomorrow that would work for you? Thanks.

Phil

From: David Cortman [<mailto:dcortman@adflegal.org>]
Sent: Monday, September 25, 2017 7:08 AM
To: Rosenfelt, Phil
Cc: Dowling, Maureen; Allen, Pamela
Subject: Re: Trinity Lutheran Session at 2017 National Private School Leadership Conference

Phil. How about 5pm? I can jump out of another meeting a bit early? Does that work? Thanks

On Sep 24, 2017, at 11:18 PM, Rosenfelt, Phil <Phil.Rosenfelt@ed.gov> wrote:

David: I appreciate your getting back to me. I do not think 9-11 will work for me, because I am booked solid until noon; is there any time in the late afternoon tomorrow that might work? Thanks.

Phil

From: David Cortman [<mailto:dcortman@adflegal.org>]
Sent: Sunday, September 24, 2017 8:59 PM
To: Rosenfelt, Phil
Cc: Dowling, Maureen; Allen, Pamela
Subject: Re: Trinity Lutheran Session at 2017 National Private School Leadership Conference

I'm free tomorrow from 9-11 and Tuesday I have to travel but can make time if we need to. Thanks.

On Sep 24, 2017, at 8:51 PM, Rosenfelt, Phil <Phil.Rosenfelt@ed.gov> wrote:

David: I hope you are doing well. Steven Menashi, our Acting General Counsel, will be joining us on the panel on Wednesday; he is also very knowledgeable about the Trinity Lutheran case.

What is your schedule like tomorrow or Tuesday for a call? I will try to coordinate our schedules and arrange a preparation call. Please let me know if you have any questions. Thanks.

Phil

From: David Cortman [<mailto:dcortman@adflegal.org>]
Sent: Tuesday, September 12, 2017 9:53 PM
To: Allen, Pamela
Cc: Dowling, Maureen; Rosenfelt, Phil
Subject: Re: Trinity Lutheran Session at 2017 National Private School Leadership Conference

All of that sounds great. We can do as much Q&A as you all think is best. Phil, we can talk whenever you are available. I'll be traveling for the next few days but can jump on a call. Thanks. Dave.

<image001.png>

David Cortman
Senior Counsel, Vice President of US Litigation
770-339-0774 (Office)
770-339-6744 (Fax)
dcortman@ADFlegal.org
ADFlegal.org

Jackson, Candice

Subject: FW: Listening Session - Victim Centered Investigations
Location: WDCFB6-4E333

Start: Friday, September 29, 2017 2:00 PM
End: Friday, September 29, 2017 3:30 PM
Show Time As: Tentatively accepted

Recurrence: (none)

Meeting Status: Not yet responded

Organizer: Jackson, Candice
Required Attendees: Menashi, Steven; Kissel, Adam; 'cperry@saveservices.org'; 'nconway@saveservices.org'; (b)(6)@gmail.com'; (b)(6)@aol.com'; (b)(6)@gmail.com'; (b)(6)@gmail.com'; (b)(6)@gmail.com'; Henderson, Chelsea; 'sae1212@sbcglobal.net'; 'PHamill@conradobrien.com'; 'Ronald.Henry@apks.com'; (b)(6)@gmail.com'; Edward Bartlett; Karvonides, Mia; Sherman, Brandon; Gettler, Rachel; Wheeler, Joseph; Patel, Shiwali; Faiella, Matt; Reyes, Alejandro
Optional Attendees: Nasheia Conway

-----Original Appointment-----

From: Henderson, Chelsea **On Behalf Of** Jackson, Candice
Sent: Tuesday, September 12, 2017 10:58 AM
To: Jackson, Candice; 'cperry@saveservices.org'; 'nconway@saveservices.org'; (b)(6)@gmail.com'; (b)(6)@aol.com'; (b)(6)@gmail.com'; (b)(6)@gmail.com'; (b)(6)@gmail.com'; Henderson, Chelsea; 'sae1212@sbcglobal.net'; 'PHamill@conradobrien.com'; 'Ronald.Henry@apks.com'; (b)(6)@gmail.com'; Edward Bartlett; Karvonides, Mia; Sherman, Brandon; Gettler, Rachel; Wheeler, Joseph; Patel, Shiwali; Faiella, Matt; Reyes, Alejandro
Cc: Nasheia Conway
Subject: Listening Session - Victim Centered Investigations
When: Friday, September 29, 2017 2:00 PM-3:30 PM (UTC-05:00) Eastern Time (US & Canada).
Where: WDCFB6-4E333
Sensitivity: Private

Hello,

Our location is 400 Maryland Ave SW, Washington DC 20202 (the US Department of Education building)--Please arrive 10 minutes early with your ID to clear security. Call me at 202-453-5799 to be escorted upstairs. As always, If you have any questions please feel free to reach out to me.

We look forward to having you!

Chelsea C. Henderson
Office for Civil Rights
US Department of Education
O: 2024535799
C: 2027147942
E: Chelsea.Henderson@ed.gov

Jackson, Candice

Subject: FW: Listening Session - Victim Centered Investigations
Location: WDCFB6-4E333

Start: Friday, September 29, 2017 2:00 PM
End: Friday, September 29, 2017 3:30 PM

Recurrence: (none)

Meeting Status: Accepted

Organizer: Jackson, Candice
Required Attendees: 'cperry@saveservices.org'; 'nconway@saveservices.org';
(b)(6)@gmail.com'; (b)(6)@aol.com';
(b)(6)@gmail.com'; (b)(6)@gmail.com';
(b)(6)@gmail.com'; Henderson, Chelsea;
'sae1212@sbcglobal.net'; 'PHamill@conradobrien.com';
'Ronald.Henry@apks.com'; (b)(6)@gmail.com';
Edward Bartlett; Karvonides, Mia; Sherman, Brandon;
Gettler, Rachel; Wheeler, Joseph; Patel, Shiwali; Faiella,
Matt; Reyes, Alejandro
Optional Attendees: Nasheia Conway; Menashi, Steven; Kissel, Adam

-----Original Appointment-----

From: Henderson, Chelsea **On Behalf Of** Jackson, Candice
Sent: Tuesday, September 12, 2017 10:58 AM
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(b)(6)@aol.com'; (b)(6)@gmail.com'; (b)(6)@gmail.com'; (b)(6)@gmail.com'; Henderson,
Chelsea; 'sae1212@sbcglobal.net'; 'PHamill@conradobrien.com'; 'Ronald.Henry@apks.com'; (b)(6)@gmail.com';
Edward Bartlett; Karvonides, Mia; Sherman, Brandon; Gettler, Rachel; Wheeler, Joseph; Patel, Shiwali; Faiella, Matt;
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We look forward to having you!

Office for Civil Rights
US Department of Education
O: 2024535799
C: 2027147942
E: Chelsea.Henderson@ed.gov

Hoblitzell, Barbara

From: Hoblitzell, Barbara
Sent: Friday, December 29, 2017 8:35 AM
To: 'pres@usstudents.org'; 'stevaughn.bush@law.bison.howard.edu'; 'Ashley.harrington@responsiblelending.org'; 'smartindale@consumer.org'; 'ashafroth@nclc.org'; 'jfredman@baylegal.org'; 'will.hubbard@studentveterans.org'; 'walter@veteranseducationsuccess.org'; 'John.Ellis@oag.texas.gov'; 'Evan.Daniels@azag.gov'; 'randerson@sheeo.org'; 'mccomis@accsc.org'; 'ksolinski@hlcommission.org'; 'sharpv@evangel.edu'; 'Kimberly.Brown@dmu.edu'; 'alacey@thompsoncoburn.com'; '(b)(6)@gmail.com'; 'hudsok@rpi.edu'; 'drobinson@roanokechowan.edu'; 'rflaniga@spelman.edu'; 'lodriguez.murray@uncf.org'; 'dmadzelan@acenet.edu'; 'NassirianB@aascu.org'; 'Alyssa.Dobson@sru.edu'; 'sklewis@uw.edu'; 'aareich@liberty.edu'; 'gjones@CompassRoseFoundation.org'; 'MB@Ayers.edu'; 'Chris@DeLucaLawLLC.com'; 'm.bottrill@sae.edu'; 'Linda@rawleslaw.com'; 'whall'; 'colleens@mohela.com'; 'oconnell@vsac.org'; 'srepp@ncher.us'
Cc: ebantle@fmcs.gov; mcaruso@fmcs.gov; rmiller@fmcs.gov; Weisman, Annmarie
Subject: Draft Issue Papers for Second Round of Negotiated Rulemaking
Attachments: BD Issue Paper 1 Session 2 12.28.17.docx; BD Issue Paper 2 Session 2 12.28.17.docx; BD Issue Paper 3 Session 2 12.28.17.docx; BD Issue Paper 4 Session 2 12.28.17.docx; BD Issue Paper 5 Session 2 12.28.17.docx; BD Issue Paper 6 Session 2 12.28.17.docx; BD Issue Paper 7 Session 2 12.28.17.docx; BD Issue Paper 8 Session 2 12.28.17.docx

Good morning (and an early Happy New Year!).

Attached please find red-lined versions of draft regulatory language on the following issues to begin discussions at the next rulemaking session:

Issue 1: Federal Standard for Borrower Defense Claims
Issue 2: Borrower Defense Claim Process
Issue 3: Financial Responsibility and Administrative Capability
Issue 4: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes
Issue 5: Closed School Discharge
Issue 6: False Certification Discharge
Issue 7: Guaranty Agency Collection Fees
Issue 8: Recalculation of Subsidized Usage Period

As a reminder, we will meet for the second session of negotiated rulemaking on these topics January 8-11, 2018. Our sessions will begin at 9:00 am and end at 5:00 pm and will be held in the Training Center at the Federal Student Aid Offices at 830 First Street, N.E., Washington, D.C.

Please feel free to contact Annmarie our facilitators – Ted Bantle, Moira Caruso, or Rozmyn Miller – or me, if you have any questions. I look forward to seeing you all on the 8th.

Kind regards,

b.



Barbara A.

Hoblitzell

Borrower Defense Team Lead

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Issue Paper 1
Session 2: January 8-11, 2018

Issue: Whether to establish a Federal standard for the purpose of determining if a borrower can establish a defense to the repayment of a Direct Loan or recover for amounts already paid on a Direct Loan based on an act or omission of an institution.

Statutory cite: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 685.206(c), 685.222, 685.300, 685.308

Summary of changes: Creates a regulatory section that establishes, for loans first disbursed on or after July 1, 2019, a new Federal standard applicable to borrower defense claims made by borrowers and for Department recovery actions against institutions. Under the proposed regulations, borrowers with an eligible Direct Loan would be entitled to a discharge (or recover amounts already paid) of all or a portion of the loan if the borrower establishes either: (1) an institutional misrepresentation, (2) a court judgment against an institution, or (3) a final judgment from an arbitrator against an institution. The proposed regulations would also describe in detail how a borrower establishes the basis for a claim.

Changes: See regulatory text below.

[Note to negotiators: §685.222 is a new section. For ease of readability and editing during negotiated rulemaking, the section is formatted as plain text, rather than redline.]

§685.222 Borrower defense and Department recovery actions against institutions

(a) Introduction.

(1) For the purposes of this section and § 685.206(c), a “borrower defense” refers to an act or omission of an institution at which the borrower enrolled that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was made, and includes one or both of the following:

(i) A defense to the repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) A borrower may assert a borrower defense of a Direct Consolidation Loan that repaid a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, or Loan for Disadvantaged

Students under subpart II of part A of title VII of the Public Health Service Act; or a Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act on which the borrower had a basis for a borrower defense claim prior to the consolidation.

(3) For loans first disbursed prior to July 1, 2019, the borrower may assert a borrower defense of a Direct Loan consistent with section 685.206(c).

(4) For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense of a Direct Loan consistent with this section.

(5) The Department may initiate a recovery action against an institution consistent with paragraph (c) of this section.

(6) The Department administers this section consistent with the procedures described in section 685.206(c) and 34 CFR Part 668, Subpart G.

(b) Borrower defense.

(1) For loans first disbursed on or after July 1, 2019, the Secretary will discharge the borrower's obligation to repay a Direct Loan and will refund amounts paid on the loan, in whole or in part, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the borrower establishes a defense by clear and convincing evidence that--

(i) The institution at which the borrower enrolled acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth in making a misrepresentation of material fact, opinion, intention, or law upon which the borrower reasonably relied in deciding to obtain a Direct Loan to enroll or continue enrollment in a program at the institution, and which resulted in financial harm to the borrower;

(ii) The borrower has obtained, from a court of competent jurisdiction, a nondefault contested State or Federal judgment and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained; or

(iii) The borrower has obtained, from an arbitrator or a hearing official in a State or Federal administrative tribunal agreed to by the borrower and the institution, a nondefault contested judgment, or equivalent final determination, and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained.

(2) For the purposes of this section--

(i) A misrepresentation is a statement, act, or omission by an institution that would mislead a reasonable person regarding the nature of the educational program, the nature of financial charges, the employability of graduates of an educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the educational program, or an

accreditor approval of an institution or educational program. Evidence that a misrepresentation described in paragraph (b)(1)(i) of this section has occurred includes, but is not limited to:

(A) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(B) Actual job placement rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(C) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications or approvals not actually obtained or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when invalidated or withdrawn;

(D) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(E) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation;

(F) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is not fulfilled following the enrollment of the borrower;

(G) A representation regarding the amount of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(H) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, or governmental officials when no such endorsements exist as stated;

(I) A representation regarding the institution's size, location, facilities, training equipment or the number, availability, or qualifications of its personnel that are materially different from the institution's actual circumstances at the time the representation is made;

(J) The nature or extent of prerequisites for enrollment in a course or program; or

(K) Any other circumstances as determined by the Secretary.

(ii) A violation by the institution of a requirement of the Higher Education Act or the Department's regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(c), as applicable. The Secretary will not approve a borrower defense claim under this section or section 685.206(c) of this Part when the borrower submits a claim based on—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage claims;

(F) Educational malpractice, which is a tortious claim about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services; or

(G) Academic disputes and disciplinary matters.

(iii) Financial harm to the borrower has occurred when the borrower suffers monetary loss as a consequence of a misrepresentation described in paragraph (b)(1)(i) of this section or as found by a court, arbitrator, or hearing official pursuant to a judgment as described in paragraphs (b)(1)(ii) and (b)(1)(iii). Financial harm does not include damages for nonmonetary loss such as inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions. Evidence of financial harm includes, but is not limited to the following circumstances:

(A) A significant difference between the borrower's earnings after completing the program and the earnings listed for the borrower's program of study in the institution's marketing materials, website, or other communication made to the student;

(B) A significant difference between the borrower's earnings after completing the program and the earnings for similar borrowers employed in the program's intended occupational field, determined by, for example, earnings below the lowest income quintile for the program of study's intended occupational field according to the Standard Occupational Classification (SOC) code as published by the U.S. Bureau of Labor Statistics;

(C) Lower or lost wages, extended periods of involuntary unemployment, or the cost of obtaining nontransferable credits;

(D) A significant difference in the amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed and the amount or nature of the tuition and fees the borrower reasonably believed the institution would charge or was charging;

(E) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; or

(F) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled.

(3) The Secretary may determine at any time that a borrower defense claim should not be approved based on evidence that rebuts the borrower's claim, including any evidence provided by the institution at which the borrower enrolled. Such evidence may include, but is not limited to--

(i) For a claim based on licensure exam passage rates, the institution or program has a licensure exam passage rate associated with the program in which the borrower enrolls that, at a minimum, reasonably approximates the passage rates included in the institution's marketing materials, website, or other communication made when recruiting the student;

(ii) For a claim based on the inability of the borrower to obtain the necessary certification or licensure for employment in the program's intended field of employment, the borrower has obtained a certification or licensure related to the program in which the borrower enrolled without needing to complete additional coursework after completing the program;

(iii) The institution provided information to the borrower to correct the misrepresentation prior to the borrower enrolling in the program; or

(iv) The institution demonstrated that its representative or agent made a misrepresentation that was inconsistent with or prohibited by the institution's policies, procedures and training at the time it was made.

(4) For purposes of this section, the term "institution" includes an eligible institution, its representatives and agents, or any institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

(c) *Department recovery actions against institutions.* The Secretary may initiate a recovery action against an institution when the Secretary determines that the borrower has asserted a successful borrower defense against the institution as described in this section or section 685.206(c) of this Part.

(d) *Limitations period.* A borrower must file a claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation.

§685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) *General.* Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school must—

* * *

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

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* * *

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to sections 685.206, 685.214, 685.216, and 685.222;

§685.308 Remedial actions.

(a) *General.* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of-- --

Deleted: the unenforceability of a loan or loans, or the disbursement of loan amounts for which the borrower was ineligible, resulted in whole or in part from

(1) The school's violation of a Federal statute or regulation; --

Deleted: or

(2) The school's negligent or willful false certification under section 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to sections 685.206, 685.214, 685.216, and 685.222.

Issue Paper 2
Session 2: January 8 -11, 2018

Issue: Developing a regulatory framework for the process of submitting and evaluating a borrower defense (BD) to repayment claim.

Statutory cite: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 682.211, 682.410, 685.205, 685.206, and 685.212

Summary of change:

Establishes a regulatory framework for processing BD claims for Direct Loans first disbursed on or after July 1, 2019, including provisions for:

- Forbearance
- The application process
- Adjudication of a BD claim
- Notification of the borrower and school of the Department’s decision
- Reconsideration of denials
- Relief that a borrower may receive if a BD claim is approved

Changes: See regulatory text below.

§682.211 Forbearance

(i) *Mandatory administrative forbearance.*

* * * * *

(7) The lender must grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k). The lender must grant mandatory administrative forbearance in yearly increments or for a period designated by the Secretary, until the loan is consolidated or the lender is notified by the Secretary to discontinue the forbearance.

* * * * *

§682.410 Fiscal, Administrative, and Enforcement Requirements

* * * * *

(b) * * *

(6) *Collection efforts on defaulted loans.*

* * * * *

(viii) Upon notification by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k), the guaranty agency must suspend all collection activities on the affected loan for the period designated by the Secretary.

* * * * *

§685.205 Forbearance

* * * * *

(b) *Administrative forbearance.* In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to—

* * * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under §685.206

(ii) Under §685.214;

(iii) Under §685.215;

(iv) Under §685.216;

(v) Under §685.217;

(vi) Under §685.222; or

(vii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

§685.206 Borrower responsibilities and defenses.

* * * * *

(c) *Borrower defenses for loans first disbursed prior to July 1, 2019* (1) In any proceeding to collect on a Direct Loan first disbursed prior to July 1, 2019, the borrower may assert as a defense against repayment any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

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(i) Tax refund offset proceedings under 26 U.S.C. 6402(d), 31 U.S.C. 3716 and 3720A.

Deleted: 34 CFR 30.33.

(ii) Wage garnishment proceedings under section 488A of the Act or under 31 U.S.C. 3720D and regulations at 34 CFR part 34.

(iii) Salary offset proceedings for Federal employees under 34 CFR part 31, 5 U.S.C. 5514 and 31 U.S.C. 3716.

(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(f).

(2) If the borrower's defense against repayment claim is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G.

Deleted: However, the Secretary does not initiate such a proceeding after the period for the retention of records described in §685.309(c) unless the school received actual notice of the claim during that period.

(d) Borrower defenses for loans first disbursed on or after July 1, 2019. (1) To assert a borrower defense under § 685.221, a borrower must submit an application on a form approved by the Secretary—

(i) Certifying that the borrower received the proceeds of a loan to attend the named school;

(ii) Providing documentation that supports the borrower defense claim; and

(iii) Indicating whether the borrower has made a claim based on the information underlying the borrower defense with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation.

(2) Forbearance and suspension of collection activity. (i) Upon receipt of a borrower's application and at the request of the borrower the Secretary

(A) Grants forbearance if the borrower is not in default on the loan for which a borrower defense has been asserted; or

(B) Suspends collection activity on a defaulted loan until the Secretary issues a decision on the borrower's claim.

(ii) Interest that accrues during the forbearance period or during the suspension of collection activity is not capitalized.

(iii) If the borrower's claim is denied, the forbearance or suspension of collection activity will not be reinstated if the borrower resubmits that claim, unless the resubmission meets the eligibility criteria in paragraph (e)(5) of this section.

(3) *Adjudication of borrower defense claim.* The Secretary **determines whether the borrower has presented** a qualifying borrower defense claim in accordance with the standards in § 685.222.

(i) Within 60 days of the date of the Department's receipt of the borrower defense application, the Secretary provides written notice of the submission of the borrower defense application and a copy of the application to the school. The notice to the school provides the school with the opportunity to submit a response to the borrower defense claim, including any relevant documentation or information, to the Department.

(ii) In resolving the borrower defense claim the Secretary will consider relevant evidence, including, --

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(A) Department records;

(B) The borrower defense application and any supporting documentation submitted by the borrower; and

(C) Any response or information submitted by the school.

(iii) In resolving the borrower defense claim, the Secretary may also consider other relevant information obtained by the Secretary.

(4) *Written decision.* The Secretary issues a written decision--

(i) Notifying the borrower and the school of the decision;

(ii) Providing the reasons for the decision;

(iii) Informing the borrower of the relief, if any, that the borrower will receive; and

(iv) Informing the borrower and the school of their opportunity to request reconsideration of the claim based on newly discovered evidence pursuant to paragraph (d)(5) of this section.

(5) *Reconsideration of denials.* The decision of the Secretary is final as to the merits of the borrower's claim and any relief that may be granted on the claim. Notwithstanding the foregoing--

(i) If the borrower defense application is denied in full or in part, the borrower may request that the Secretary reconsider the borrower defense upon the submission of newly discovered evidence which supports the borrower's claim.

(ii) If the borrower defense is granted in full or in part, the school may request that the Secretary reconsider the borrower defense upon the submission of newly discovered evidence in support of the school's defense.

(iii) If the Secretary accepts a borrower's request for reconsideration, the Secretary follows the procedures in paragraph (d)(2) of this section for granting forbearance or suspending collection activity, as applicable, and also notifies the borrower and the school that the Secretary has taken such action.

(iv) A request for reconsideration must be submitted within 60 days of the date the written decision under paragraph (d)(4) of this section is issued.

(v) "Newly discovered evidence" is relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the Secretary's decision on the borrower defense claim and was not relied upon by the Secretary in determination of the borrower defense claim.

(6) Relief. If the Secretary grants a borrower's application for a discharge based on the borrower's claim of a borrower defense, the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief includes, if applicable:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection;

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act; and

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(7) Cooperation by the borrower. The Secretary may revoke any relief granted to a borrower who fails to cooperate with the Secretary in any proceeding under paragraph (d) of this section or under § 685.222. Such cooperation includes, but is not limited to--

(i) Providing testimony regarding any representation made by the borrower to support a request for discharge; and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(8) Transfer to the Secretary of the borrower's right of recovery against third parties. (i) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school its principals, its affiliates, and their successors or its sureties and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the

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Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (d)(8) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (d)(8) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (d)(8) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(9) Recovery from the school. The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G.

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* * * * *

§685.212 Discharge of a Loan Obligation

* * * * *

(k) Borrower defenses. (1) If a borrower's application for a discharge of a loan based on a borrower defense is approved under the standards set forth in §§ 685.206(c) or 685.222, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in §§ 685.206(c) or 685.206(d) respectively. (2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under the standards set forth in §§ 685.206(c) or 685.222 with respect to a loan that was repaid by the Direct Consolidation Loan.

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(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining--

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section, other than a Direct Subsidized, Unsubsidized, or PLUS Loan, establishes a borrower defense under § 685.206(c) for a Direct Consolidation Loan made before July 1, 2019, or under the standard set forth in § 685.222, for a Direct Consolidation Loan made on or after July 1, 2019; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on or after July 1, 2019 that was paid off by the Direct Consolidation Loan, establishes a borrower defense under § 685.222.

(ii) If the borrower defense claim is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan.

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Issue Paper 3

Session 2: January 8-11, 2018

Issue: Financial Responsibility and Administrative Capability

Statutory cite: §498 of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 668.171, 668.175

Summary of changes: For institutions that are not financially responsible, we propose to expand the types of financial protection those institutions may provide. In addition, we propose to recalculate the composite score for institutions that incur debts and liabilities from borrower defense claims.

Changes: See regulatory text below.

§ 668.171 General.

(a) Purpose. To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to--

(1) Provide the services described in its official publications and statements;

(2) Meet all of its financial obligations; and,

(3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.

(b) General standards of financial responsibility. Except as provided under paragraph (c) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that--

(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;

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(3)

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(2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;

(3) The institution is current in its debt payments. An institution is not current in its debt payments if—

(i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or

(ii) It fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover funds under those obligations; ~~and~~

(4) The institution is otherwise able to meet all of its financial obligations and otherwise provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c) of this section. The Secretary may consider those actions or events in determining whether the institution is financially responsible; and

(5) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).

(c) Other factors or events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(4) of this section if—

(1) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution incurs a debt or liability from borrower defense claims adjudicated by the Secretary, and as a result of that debt or liability the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (d) of this section;

(2) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend. This

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provision does not apply if the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated;

(3) For a publicly traded institution, the institution is currently subject to one or more of the following actions or events—

(i) The SEC warns the institution that it may suspend trading on the institution's stock;

(ii) The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25; or

(iii) The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted; or

(4) For its most recently completed fiscal year, a proprietary institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(d) Recalculating the composite score. As specified in Appendix C of this subpart, the Secretary recognizes and accounts for the actual debt or liability incurred by an institution for borrower defense claims under paragraph (c)(1) of this section and based on that accounting, may recalculate the institution's most recent composite score using the financial statements on which the institution's composite score has been calculated under § 668.172.

(e) Reporting requirements. (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the actions or events identified in paragraph (c) of this section no later than--

(i) For a withdrawal of owner's equity described in paragraph (c)(2), 10 days after the withdrawal is made. In its notice to the Secretary, the institution must identify whether the reported withdrawal of owner's equity was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

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(ii) For the SEC and stock exchange provisions for publicly traded institutions described in paragraph (c)(3), 10 days after the SEC or exchange warns, notifies, or takes an action against the institution, or 10 days after any extension granted by the SEC; or

(iii) For the non-title IV revenue provision in paragraph (c)(4), 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

(2) The Secretary may take an administrative action under paragraph (h) of this section against the institution if it fails to provide timely notice of the actions or events under this paragraph.

(f) Public institutions. (1) The Secretary considers a domestic public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

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(g) Audit opinions. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not significantly bear on the institution's financial condition.

(h) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may--

- (1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or
- (2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

§ 668.175 Alternative standards and requirements.

(a) *General.* An institution that is not financially responsible under the general standards and provisions in §668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) *Letter of credit alternative for new institutions.* A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other surety described under paragraph (h)(1)(i) of this section, that is acceptable and payable to the Secretary, for an amount equal to at least one-half of the amount of title IV, HEA program

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(e) *Administrative actions.*

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funds that the Secretary determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Letter of credit alternative for participating institutions. A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b) or (c), or because of an audit opinion described under § 668.171(g), qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other financial protection described under paragraph (h) of this section, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.

(d) Zone alternative. (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

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(ii) ~~An institution that qualified under this alternative for three consecutive years, or for one of~~ those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) ~~Under the~~ zone alternative, the Secretary--

(i) ~~Requires the institution to make disbursements to eligible students and parents, and to~~ otherwise comply with the provisions, under either the ~~heightened~~ cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events--

(A) ~~Any event that causes the institution, or related entity as defined in Accounting Standards~~ Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement; ~~or~~

(B) ~~Any losses that are unusual in nature or infrequently occur, or both, as defined in~~ accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;

(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must--

(i) ~~For any oversight or financial event described in paragraph (d)(2)(ii) of this section for which~~ the institution is required to provide information, ~~in accordance with procedures established by~~ the Secretary, ~~notify the Secretary no later than 10 days after that event occurs; and~~

(ii) ~~As part of its compliance audit, require its auditor to express an opinion on the institution's~~ compliance with the requirements under the zone alternative, including the institution's

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administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

(e) [Reserved]

(f) Provisional certification alternative. (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if, as determined annually by the Secretary--

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(d) is less than 1.0, is subject to an action or event under § 668.171(c), or because of an audit opinion described in § 668.171(g); or

(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and

(iii) The institution provides to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.

(2) Under this alternative, the institution must comply with the provisions of the zone alternative, as provided under paragraph (d)(2) and (3).

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(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary--

(i) May permit the institution to participate under a provisional certification, but--

(A) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), or both, to provide to the Secretary financial protection for an amount determined by the Secretary; and

(B) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs; and

(ii) May permit the institution to continue to participate under a provisional certification but requires the institution to provide, or continue to provide, the financial protection resulting from an event described in § 668.171(c) until the institution meets the requirements of paragraph (f)(5) of this section.

* * * * *

(h) Financial protection. (1) In lieu of providing a letter of credit for the amount determined by the Secretary under this section, the Secretary may permit an institution to--

(i) Provide the amount required under this section in the form of other surety or form of financial protection as specified by the Secretary in a notice published in the Federal Register;

(ii) Provide cash for the amount required under this section; or

(iii) Enter into an arrangement under which the Secretary offsets the amount of title IV, HEA program funds that an institution has earned in a manner that ensures that, no later than the end of a nine-month period, the amount offset equals the amount of financial protection the institution is required to provide. The Secretary uses the funds to satisfy the debts and liabilities owed to the Secretary that are not otherwise paid directly by the institution, and provides to the

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institution any funds not used for this purpose during the period covered by the agreement, or provides the institution any remaining funds if the institution subsequently submits a letter of credit or other surety under this paragraph.

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Issue Paper 4
Session 2: January 8-11, 2018

Issue: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes

Statutory cites: §§455(a)(6) and 455(h) of the Higher Education Act, as amended

Regulatory cites: §§ 668.41 and 685.304

Summary of Changes: To facilitate transparency and fully inform prospective, enrolled, and departing students:

- Amend “Reporting and disclosure of information” [§ 668.41] to (1) require schools that use pre-dispute arbitration agreements and/or class action waivers to disclose that information in an easily accessible format for students, prospective students, and the public, and (2) require these schools to provide an annual notification of this information to enrolled students.
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement (similar to the current requirement that schools provide information regarding the FSA Ombudsman) that the school review with the student borrower information on the availability of the school’s internal dispute resolution process and provide to the student a written disclosure explaining any internal dispute process;
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement for schools using pre-dispute arbitration agreements and/or class action waivers, that the school review with the student borrower the pre-dispute arbitration and/or class action waiver process.

Changes: See regulatory text below.

§668.41 Reporting and disclosure of information.

(a) Definitions. The following definitions apply to this subpart:

* * * * *

Undergraduate students, for purposes of §§ 668.45 and 668.48 only, means students enrolled in a bachelor’s degree program, an associate degree program, or a vocational or technical program below the baccalaureate level.

(b) Disclosure through Internet or Intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for—

(1) Enrolled students or current employees by posting the information on an Internet website or an Intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and

(2) Prospective students or prospective employees by posting the information on an Internet website.

(c) Notice to enrolled students. (1) An institution annually must distribute to all enrolled students a notice of the availability of the information required to be disclosed pursuant to paragraphs (d), (e), (g), and (h) of this section, and pursuant to 34 CFR 99.7 (§ 99.7 sets forth the notification requirements of the Family Educational Rights and Privacy Act of 1974). The notice must list and briefly describe the information and tell the student how to obtain the information.

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(2) An institution that discloses information to enrolled students as required under paragraph (d), (e), (g), or (h) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

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(i) The exact electronic address at which the information is posted; and

(ii) A statement that the institution will provide a paper copy of the information on request.

(d) General disclosures for enrolled or prospective students. An institution must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning—

(1) Financial assistance available to students enrolled in the institution (pursuant to §668.42).

(2) The institution (pursuant to §668.43).

* * * * *

(h) Enrolled students, prospective students, and the public—disclosure of an institution's use of pre-dispute arbitration agreements and/or class action waivers for students receiving Title IV Federal student aid. (1) An institution of higher education must make available to enrolled students, prospective students, and the public, information regarding any class action waiver or pre-dispute arbitration agreement in agreements between the institution and students receiving Title IV Federal student aid. The school must make the information easily accessible to students, prospective students, and the public. The institution may not use an Intranet website for the purpose of providing this notice to prospective students or the public.

(2) The institution must provide an annual notice to all enrolled students, pursuant to paragraph (c)(1) of this section of the information described in paragraph (h)(1). If the institution chooses to make the disclosure available by posting the disclosure on an Internet website or an Intranet website, such disclosure must include the exact electronic address at which the disclosure is posted, a brief description of the disclosure, and a statement that the institution will provide a paper copy of the disclosure upon request.

(3) For the purposes of this paragraph (h), the following definitions apply:

(i) Class action means a lawsuit or an arbitration proceeding in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(ii) Class action waiver means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student that prevents an individual from filing or participating in a class action lawsuit.

(iii) Pre-dispute arbitration agreement means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student requiring arbitration of any future dispute between the parties.

(Authority: 20 U.S.C. 1092)

§685.304 Counseling borrowers.

(a) Entrance counseling. (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized or Unsubsidized Federal Stafford Loan, or Federal SLS Loan from that school.

(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior student Direct PLUS Loan or student Federal PLUS Loan from that school.

(3) Entrance counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) (A) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(B) If a standardized interactive electronic tool is used to provide entrance counseling to the borrower, the school must provide any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written form provided to the borrower that the borrower signs and returns to the school.

(4) If entrance counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and

participates in and completes the entrance counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence, distance education, or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

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(6) Entrance counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

(ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

(x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

(xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records;

(xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan;

(xiii) Provide a description of the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

(xiv) If the school requires borrowers to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xv) If the school requires borrowers to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions; and

(xvi) For first-time borrowers as defined in § 685.200(f)(1)(i), explain the limitation on eligibility for Direct Subsidized Loans and possible borrower responsibility for accruing interest described in § 685.200(f), including—

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(A) The possible loss of eligibility for additional Direct Subsidized Loans;

(B) How a borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are calculated;

(C) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans; and

(D) The impact of borrower responsibility for accruing interest on the borrower's total debt.

(7) Entrance counseling for graduate or professional student Direct PLUS Loan borrowers must—

(i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, of student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student Direct PLUS Loan borrower who has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in § 685.301(a)(3)(i)(A) through (a)(3)(i)(C); and

(iv) For a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xiii) of this section.

(8) A school may adopt an alternative approach for entrance counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to entrance counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) Exit counseling. (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must, within 30 days after the school learns

that the student borrower has withdrawn from school or failed to complete the exit counseling as required, be provided either through interactive electronic means, by mailing written counseling materials to the student borrower at the student borrower's last known address, or by sending written counseling materials to an email address provided by the student borrower that is not an email address associated with the school sending the counseling materials.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for enrollment in the same school or in the same program of study at the same school;

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(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income-contingent repayment, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

(vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;

(vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;

(viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(ix) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;

(xi) Review for the student borrower the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

(xii) If the school required the borrower to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xiii) If the school required the borrower to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions;

(xiv) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;

(xv) Explain to first-time borrowers, as defined in § 685.200(f)(1)(i)—

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(A) How the borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are determined under § 685.200(f);

(B) The sum of the borrower's subsidized usage periods, as determined under § 685.200(f)(1)(iii), at the time of the exit counseling;

(C) The consequences of continued borrowing or enrollment, including--

(1) The possible loss of eligibility for additional Direct Subsidized Loans; and

(2) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans;

(D) The impact of the borrower becoming responsible for accruing interest on total student debt;

(E) That the Secretary will inform the student borrower of whether he or she is responsible for accruing interest on his or her Direct Subsidized Loans; and

(F) That the borrower can access NSLDS to determine whether he or she is responsible for accruing interest on any Direct Subsidized Loans as provided in § 685.200(f)(3);

(xv*i*) A general description of the types of tax benefits that may be available to borrowers; and

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(xv*ii*) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).

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(5) The school must ensure that the information required in paragraph (b)(4)(xv*i*) of this section is provided to the Secretary within 60 days after the student borrower provides the information.

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(6)(A) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.

(B) If a standardized interactive electronic tool is used to provide exit counseling to the borrower, including the electronic interactive exit counseling offered by the Secretary, the school must provide any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written form provided to the borrower that the borrower signs and returns to the school.

(7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(8)(i) For students who have received loans under both the FFEL Program and the Direct Loan Program for enrollment in a school, the school's compliance with the exit counseling requirements in paragraph (b) of this section satisfies the exit counseling requirements in 34 CFR 682.604(a) if the school ensures that the exit counseling also provides the borrower with the information described in 34 CFR 682.604(a)(2)(i) and (ii).

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(ii) A student's completion of electronic interactive exit counseling offered by the Secretary satisfies the requirements of paragraph (b) of this section and, for students who have also received FFEL Program loans for enrollment in the school, 34 CFR 682.604(a).

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(Authority: 20 U.S.C. 1087a et seq.)

Issue Paper 5
Session 1: January 8 - 11, 2018

Issue: Closed School Discharge

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 674.33(g), 682.402(d), and 685.214

Summary of change:

Amends the application requirements for closed school discharges to reflect current practice, which requires that a borrower applying for a closed school discharge submit a completed application form, rather than a sworn statement. The proposed regulations also would expand the window for closed school discharges from 120 days to 150 days.

Changes: See regulatory text below.

§ 674.33 Repayment.

* * * * *

(g) *Closed school discharge*—(1) *General*.

* * * * *

(4) *Borrower qualification for discharge*. Except as provided in paragraph (g)(3) of this section, in order to qualify for discharge of an NDSL or Federal Perkins Loan, a borrower must submit to the holder of the loan a written request on an application approved by the Secretary, and the factual assertions in the application must be true. The application need not be notarized but all statements made therein must be made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower—

(A) Received the proceeds of a loan to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to the school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accreditation agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency that the school violated State or Federal law; and

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(C) Did not complete and is not in the process of completing the program of study through a teach-out at another school as defined in 34 CFR 602.2 and administered in accordance with 34 CFR 602.207(b)(6), by transferring academic credit earned at the closed school to another school, or by any other comparable means;

* * * * *

(v) If the borrower fails to submit the application, described in paragraph (g)(4) of this section within 60 days of the holder of the loan's mailing the discharge application, the holder of the loan resumes collection and grants forbearance of principal and interest for the period during which collection activity was suspended.

* * * * *

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(d) *Closed school—(1) General.*

* * * * *

(6) ***

(ii) ***

(B) If a guaranty agency determines that a school appears to have closed, it shall, within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 150 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency shall—

(1) Notify all lenders participating in its program to mail a discharge application approved by the Secretary to all borrowers who may be eligible for a closed school discharge; and

(2) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 150 days prior to the closure date, and mail a discharge application to the borrower. The application informs the borrower of the procedures and eligibility criteria for obtaining a discharge.

* * * * *

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(ii)(C) or (D) of this section does not qualify for a discharge, the agency shall notify the borrower in writing of that determination and the reasons for it within 30 days after the date the agency—

(1) Made that determination based on information available to the guaranty agency;

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(2) Was notified by the Secretary that the school had not closed;

(3) Was notified by the Secretary that the school had closed on a date that was more than 150 days after the borrower (or student) withdrew from the school;

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(4) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(5) Received the borrower's completed application,

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(G) Upon receipt of a closed school discharge claim filed by a lender, the agency shall review the borrower's completed application in light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations, and shall take the following actions—

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(1) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (d) of this section, it shall pay the claim in accordance with § 682.402(h) not later than 90 days after the agency received the claim; or

(2) If the agency determines that the borrower does not qualify for a discharge, the agency shall, not later than 90 days after the agency received the claim, return the claim to the lender with an explanation of the reasons for its determination.

(H) If a borrower fails to submit the completed application described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender or guaranty agency shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The lender or guaranty agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

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§685.214 Closed school discharge.

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(c) *Borrower qualification for discharge.* (1) In order to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application, and the factual assertions in the application must be true. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

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(i) Certify that the borrower (or the student on whose behalf a parent borrowed)—

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(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 120 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the revocation or withdrawal by an accreditation agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction or adjudication by a Federal or State administrative agency, that the school violated State or Federal law; and

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(C) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

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(f) *Discharge procedures.* (1) After confirming the date of the school's closure, the Secretary identifies any Direct Loan borrowers (or students on whose behalf a parent borrowed) who appears to have been enrolled at the school on the closure date or to have withdrawn not more than 150 days prior to the closure date.

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(4) If a borrower fails to submit a completed application described in paragraph (c) of this section within 60 days of the Secretary's mailing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

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Issue Paper 6
Session 2: January 8 -11, 2018

Issue: False Certification

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cites: 34 CFR 685.215

Summary of change: Amends application requirements for false certification discharges to reflect current practice, which requires that a borrower applying for a false certification discharge submit a completed application form, rather than a sworn statement. The proposed regulations also update the regulatory requirements regarding false certification of eligibility of non-high school graduates for Direct Loans.

Changes: See regulatory text below.

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment

(a) *Basis for discharge—(1) False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers 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 with the knowledge that the student did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements, described in 34 CFR part 668 and section 484(d) of the Act, applicable at the time the loan was originated;

* * * * *

(c) *Borrower qualification for discharge.* In order to qualify for discharge under this section, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary, and the factual assertions in the application must be true and made under penalty of perjury. In the application, the borrower's responses must demonstrate to the satisfaction of the Secretary that the requirements in paragraphs (c) (1) through (6) of this section have been met.

(1) High school diploma or equivalent. In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative eligibility requirements, the application requires the borrower to certify that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received a disbursement of a loan, in whole or in part, on or after January 1, 1986, to attend a school; and

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(ii) Received a Direct Loan at that school, did not have a high school diploma or its recognized equivalent, and did not meet the alternative to graduation from high school eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower an the application described in paragraph (d), which explains the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit a completed application described in paragraph (c) of this section within 60 days of the date the Secretary suspended collection efforts, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits the completed application described in paragraph (c) of the section, the Secretary determines whether to grant a request for discharge under this section by reviewing the application in light of information available from the Secretary's records and from other sources, including but not limited to guaranty agencies, State authorities, and cognizant accrediting associations.

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Issue Paper 7
Session 2: January 8-11, 2018

Issue: Guaranty Agency Collection Fees

Statutory cites: §§428F(a) and 484A(a) of the Higher Education Act, as amended

Regulatory cites: 34 CFR 682.202(b), 682.405(b), and 682.410(b)(2)

Summary of Changes: Prospectively bars guaranty agencies from charging collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency within 60 days of receiving notice of default from the agency.

Prospectively bars guaranty agencies from capitalizing interest on a loan that is sold following the completion of loan rehabilitation.

Changes: See regulatory text below.

§ 682.202 Permissible charges by lenders to borrowers.

[* * *]

(b) Capitalization. (1) Except as provided in §682.405(b)(4), a lender may add accrued interest and unpaid insurance premiums or Federal default fees to the borrower's unpaid principal balance in accordance with this section. This increase in the principal balance of a loan is called "capitalization."

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§682.405 Loan rehabilitation agreement.

[* * *]

(b) Terms of agreement. In the loan rehabilitation agreement, the guaranty agency agrees to ensure that its loan rehabilitation program meets the following requirements at all times:

[* * *]

(4)(i) An eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan and must permit the borrower to choose any statutorily available repayment plan for that loan type. The lender must treat the first payment made under the nine payments as the first payment under the applicable maximum repayment term, as defined under § 682.209(a) or (e). For Consolidation loans, the maximum repayment term is based on the balance outstanding at the time of loan rehabilitation.

(ii) The purchase of a rehabilitated loan is not considered a borrower's entry into repayment or resumption of repayment for the purposes of interest capitalization under § 682.202(b).

[* * *]

(vi) Within 15 business days of its determination of the borrower's loan rehabilitation payment amount, the guaranty agency must provide the borrower with a written rehabilitation agreement which includes

the borrower's payment amount calculated under paragraph (b)(1)(iii), a prominent statement that the borrower may object orally or in writing to the payment amount, with the method and timeframe for raising such an objection, and an explanation of any other terms and conditions applicable to the required series of payments that must be made before the borrower's account can be considered for repurchase by an eligible lender or assignment to the Secretary (i.e., rehabilitated). To accept the agreement, the borrower must sign and return the agreement or accept the agreement electronically under a process provided by the agency. The agency may not impose any conditions unrelated to the amount or timing of the rehabilitation payments in the rehabilitation agreement. The written rehabilitation agreement must inform the borrower—

(A) Of the effects of having the loans rehabilitated (e.g., removal of the record of default from the borrower's credit history and return to normal repayment); and

(B) That the rehabilitation agreement is null and void if the borrower fails to provide the documentation required to confirm the monthly payment calculated under paragraph (b)(1)(iii) of this section.

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§682.410 Fiscal, administrative, and enforcement requirements.

[* * *]

(2) Collection charges. (i) Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim unless, within the 60-day period following the initial notice described in paragraph (b)(6)(ii) of this section, the borrower enters into an acceptable repayment agreement, including a rehabilitation agreement, and honors that agreement, in which case the guaranty agency shall not charge a borrower any collection costs.

(ii) An acceptable repayment agreement may include an agreement described in §682.200(b) (Satisfactory repayment arrangement), §682.405, or paragraphs (b)(5)(ii) of this section. An acceptable repayment agreement constitutes a repayment arrangement or agreement on repayment terms satisfactory to the guaranty agency, under this section.

(iii) The costs under this paragraph (b)(2) include, but are not limited to, all attorney's fees, collection agency charges, and court costs. Except as provided in §§682.401(b)(18)(i) and 682.405(b)(1)(iv)(B), the amount charged a borrower must equal the lesser of—

(A) The amount the same borrower would be charged for the cost of collection under the formula in 34 CFR 30.60; or

(B) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

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(4) *Capitalization of unpaid interest.* The guaranty agency shall capitalize any unpaid interest due on the loan at the time the agency pays a default claim to the lender, but shall not capitalize any unpaid interest thereafter.

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Issue Paper 8
Session 2: January 8-11, 2018

Issue: Whether to recalculate a borrower's Subsidized Usage Period and interest accrual, if applicable, when the borrower receives a discharge of a loan for which he or she has not received all or part of the educational benefit of the loan

Statutory cite: § 455(q) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cite: 34 CFR 685.200(f)

Summary of Change: To eliminate or recalculate the subsidized usage period and, if applicable, restore interest subsidy associated with the Direct Subsidized Loan(s) fully or partially discharged based on school closure, false certification, unpaid refund, or borrower defense, amend 34 CFR 685.200(f)(4)(iii) and 34 CFR 685.200(f)(3)(v).

Changes: See regulatory text below.

§ 685.200 Borrower eligibility.

[* * *]

(f) Limitations on eligibility for Direct Subsidized Loans and borrower responsibility for accruing interest for first-time borrowers on or after July 1, 2013

[* * *]

(3) Borrower responsibility for accruing interest.

(i) Notwithstanding any provision of this part that provides for the borrower to not be responsible for accruing interest on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, and except as provided in paragraphs (f)(6)(v) and (f)(7)(iv) of this section, a first-time borrower becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan beginning on the date—

(A) The borrower has no remaining eligibility period; and

(B) The borrower attends any undergraduate program or preparatory coursework on at least a half-time basis at an eligible institution that participates in the title IV, HEA programs.

(ii) The borrower continues to be responsible for the interest that accrues on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan for which the borrower previously became responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section.

(iii) For any loan for which the borrower becomes responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section, the borrower is responsible for only the interest that accrues after the borrower meets the criteria in paragraph (f)(3)(i) of this section and unpaid interest is capitalized in the same manner as for a Direct Unsubsidized Loan.

(iv) A borrower who completes an undergraduate program and who has not become responsible for accruing interest on Direct Subsidized Loans as a result of attendance in that program does not become responsible for accruing interest under paragraph (f)(3)(i) of this section on any Direct Subsidized Loans received for attendance in any program prior to completing that undergraduate program and for which the borrower has not previously become responsible for accruing interest, regardless of subsequent attendance in any other program.

(v) A borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge that results in a remaining eligibility period greater than zero is not responsible for the interest that accrues on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan unless the borrower once again becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, for the life of the loan, as described in paragraph (f)(3)(i) of this section.

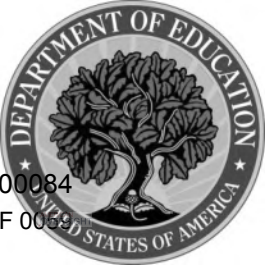
(4) Exceptions to the calculation of subsidized usage periods.

(i) For a first-time borrower who receives a Direct Subsidized Loan in an amount that is equal to the full annual loan limit for a loan period that is less than a full academic year in length, the subsidized usage period is one year.

(ii) For a first-time borrower who is enrolled on a half-time or three-quarter-time basis, the borrower's prorated subsidized usage period is calculated by multiplying the borrower's subsidized usage period by 0.5 or 0.75, respectively.

(iii) For a first-time borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge on a Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan, the Subsidized Usage Period is reduced. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in full, the Subsidized Usage Period of those loans is zero years. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in part, the Subsidized Usage Period may be reduced if the discharge results in the inapplicability of paragraph (f)(4)(i) of this section.

(Authority: 20 U.S.C. 1087a *et seq.*)



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Hoblitzell, Barbara

From: Hoblitzell, Barbara
Sent: Monday, February 5, 2018 6:01 PM
To: 'pres@usstudents.org'; 'stevaughn.bush@law.bison.howard.edu'; 'Ashley.harrington@responsiblelending.org'; 'smartindale@consumer.org'; 'ashafroth@nclc.org'; 'jfredman@baylegal.org'; 'will.hubbard@studentveterans.org'; 'walter@veteranseducationsuccess.org'; 'John.Ellis@oag.texas.gov'; 'Evan.Daniels@azag.gov'; 'randerson@sheeo.org'; 'mccomis@accsc.org'; 'ksolinski@hlcommission.org'; 'sharpv@evangel.edu'; 'Kimberly.Brown@dmu.edu'; 'alacey@thompsoncoburn.com'; '(b)(6)@gmail.com'; 'hudsok@rpi.edu'; 'drobinson@roanokechowan.edu'; 'rflaniga@spelman.edu'; 'lodriguez.murray@uncf.org'; 'dmadzelan@acenet.edu'; 'NassirianB@aascu.org'; 'Alyssa.Dobson@sru.edu'; 'sklewis@uw.edu'; 'aareich@liberty.edu'; 'gjones@CompassRoseFoundation.org'; 'MB@Ayers.edu'; 'Chris@DeLucaLawLLC.com'; 'm.bottrill@sae.edu'; 'Linda@rawleslaw.com'; 'whall'; 'colleens@mohela.com'; 'oconnell@vsac.org'; 'srepp@ncher.us'
Cc: 'ebantle@fmcs.gov'; 'mcaruso@fmcs.gov'; 'rmiller@fmcs.gov'; Weisman, Annmarie
Subject: Draft Issue Papers for ThurdRound of Negotiated Rulemaking
Attachments: BD Issue Paper 3 Session 3 _Appendix B_NFP.xlsx; BD Issue Paper 3 Session 3_Appendix B_NFP.xlsx; BD Issue Paper 1 Session 3 02.05.18 CLEAN.docx; BD Issue Paper 1 Session 3 02.05.18 REDLINE.docx; BD Issue Paper 2 Session 3 02.05.2018 CLEAN.docx; BD Issue Paper 2 Session 3 02.05.2018 REDLINE.docx; BD Issue Paper 3 Proprietary Schools section 1.docx; BD Issue Paper 3 Session 02.05.2018 CLEAN.docx; BD Issue Paper 3 Session 02.05.2018 REDLINE.docx; BD Issue Paper 3 Session 3 Appendix Section 1 NFP_02-5-2018.docx; BD Issue Paper 4 Session 3 02.05.2018 CLEAN.docx; BD Issue Paper 4 Session 3 02.05.2018 REDLINE.docx; BD Issue Paper 5 Session 3 02.05.2018 CLEAN.docx; BD Issue Paper 5 Session 3 02.05.2018 REDLINE.docx; BD Issue Paper 6 Session 3 02.05.2018 CLEAN.docx; BD Issue Paper 6 Session 3 02.05.2018 REDLINE.docx; BD Issue Paper 7 Session 3 02.05.2018 CLEAN.docx; BD Issue Paper 7 Session 3 02.05.2018 REDLINE.docx; BD Issue Paper 8 Session 3 01.31.2018 CLEAN.docx; BD Issue Paper 8 Session 3 02.05.2018 REDLINE.docx
Importance: High

Good afternoon.

Attached please find clean and red-lined versions of draft regulatory language on the following issues to inform the continued discussions at the next rulemaking session:

Issue 1: Federal Standard for Borrower Defense Claims
Issue 2: Borrower Defense Claim Process
Issue 3: Financial Responsibility and Administrative Capability
Issue 4: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes
Issue 5: Closed School Discharge
Issue 6: False Certification Discharge
Issue 7: Guaranty Agency Collection Fees
Issue 8: Recalculation of Subsidized Usage Period

As a reminder, we will meet for the third session of negotiated rulemaking on these topics February 12-15, 2018. Our sessions will begin at 9:00 am and end at 5:00 pm and will be held in the Barnard Auditorium at the Department of Education, 400 Maryland Ave. S.W., Washington, D.C.

Please feel free to contact Annmarie our facilitators – Ted Bantle, Moira Caruso, or Rozmyn Miller – or me, if you have any questions. I look forward to seeing you all on the 12th.

Kind regards,

b.



Barbara A.

Hoblitzell

Borrower Defense Team Lead

U.S. Department of Education | Office of Postsecondary Education
Policy, Planning, and Innovation

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Issue Paper 1
Session 2: January 8-11, 2018

Issue: Whether to establish a Federal standard for the purpose of determining if a borrower can establish a defense to the repayment of a Direct Loan or recover for amounts already paid on a Direct Loan based on an act or omission of an institution.

Statutory cite: Section 455(h) of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 685.206(c), 685.222, 685.300, 685.308

Summary of changes: Creates a regulatory section that establishes, for loans first disbursed on or after July 1, 2019, a new Federal standard applicable to borrower defense claims made by borrowers and for Department recovery actions against institutions. Under the proposed regulations, borrowers with an eligible Direct Loan would be entitled to a discharge (or recover amounts already paid) of all or a portion of the loan if the borrower establishes either: (1) an institutional misrepresentation, (2) a court judgment against an institution, or (3) a final judgment from an arbitrator or administrative tribunal against an institution. The proposed regulations would also describe in detail how a borrower establishes the basis for a claim.

Changes: See regulatory text below.

[Note to negotiators: Section 685.222 is a new section. For ease of readability and editing during negotiated rulemaking, the section is formatted as plain text. Changes made subsequent to the second session of negotiated rulemaking are noted in redlined text.]

Section 685.222 Borrower defense

(a) Introduction.

(1) For the purposes of this section and section 685.206(d), a “borrower defense” refers to an act or omission of an institution at which the borrower enrolled that relates to the making of a Direct Loan or the making of a loan that was repaid by a Direct Consolidation Loan for enrollment at the institution or the provision of educational services for which the loan was made, and includes one or both of the following:

(i) A defense to the repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) For loans first disbursed prior to July 1, 2019, the borrower may assert a borrower defense claim consistent with section 685.206(c).

(3) For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense claim consistent with this section.

(4) For purposes of this section, a borrower may assert a borrower defense claim regarding the “provision of educational services” for an act or omission of the by an institution concerning the nature of the institution’s educational program, the nature of the institution’s financial charges, the employability of graduates of the institution’s educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the institution or educational program, or an accreditor approval of the institution or educational program.

(b) Borrower defense.

(1) For loans first disbursed on or after July 1, 2019, the Secretary will discharge the borrower’s obligation to repay a Direct Loan and will refund amounts paid on the loan, in whole or in part, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the substantial weight of the evidence demonstrates that --

(i) The institution at which the borrower enrolled made a misrepresentation of material fact, opinion, intention, or law upon which the borrower reasonably relied under the circumstances in deciding to obtain a Direct Loan to enroll or continue enrollment in a program at the institution that resulted in financial harm to the borrower;

(ii) The borrower has obtained, from a State or Federal court of competent jurisdiction, a final, definitive judgment rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained; or

(iii) The borrower has obtained, from an arbitrator or a hearing official in a State or Federal administrative tribunal agreed to by the borrower and the institution, a final, definitive judgment, or equivalent final determination, rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained.

(iv) For the purpose of (b)(1)(ii), a “final, definitive judgment rendered in a contested proceeding” includes a Proof of Claim filed against the bankruptcy estate of the institution once the claim is adjudicated in a contested matter or adversary proceeding, such that the claim is no longer contingent, disputed, or unliquidated in a case arising Chapter 11 of the Bankruptcy Code, or allowed by a trustee in a case arising under Chapter 7 of the Bankruptcy Code.

(2) A borrower must file a borrower defense claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation.

(3) The Secretary will find that the substantial weight of the evidence supports the approval of a borrower defense claim when the borrower's statement is supported by corroborating evidence provided by the borrower or otherwise in the possession of the Secretary.

(4) For the purposes of this section—

(i) A "misrepresentation" is a statement, act, or omission by an eligible institution to a borrower that is intentionally false or misleading or made with a reckless disregard for the truth and that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation described in paragraph (b)(1)(i) of this section has occurred includes, but is not limited to:

(A) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(B) Actual employment rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(C) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when invalidated or withdrawn;

(D) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(E) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation;

(F) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is not fulfilled following the enrollment of the borrower;

(G) A representation regarding the amount of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(H) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, the United States armed forces, or other individuals or entities when the institution has no permission to use such an endorsement;

(I) A representation regarding the educational resources provided by the institution that are necessary for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, which may include representations regarding the institution's size, location, facilities, training equipment, or the number, availability, or qualifications of its personnel;

(J) The nature or extent of prerequisites for enrollment in a course or program.

(ii) A violation by the institution of a requirement of the Higher Education Act or the Department's regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(c), as applicable. The Secretary will not approve a borrower defense claim under this section or section 685.206(c) of this Part when the borrower submits a claim based on—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage claims;

(F) Claims about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services; or

(G) Academic disputes and disciplinary matters.

(iii) Financial harm to the borrower has occurred when the borrower suffers monetary loss as a consequence of a misrepresentation described in paragraph (b)(1)(i) of this section or as found by a court, arbitrator, or hearing official pursuant to a judgment as described in paragraphs (b)(1)(ii) and (b)(1)(iii). Financial harm does not include damages for nonmonetary loss such as inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary. Evidence of financial harm includes, but is not limited to the following circumstances:

(A) A significant difference between the borrower's earnings after completing the program and the earnings listed for the borrower's program of study in the institution's marketing materials, website, or other communication made to the student;

(B) Lower or lost wages, extended periods of involuntary unemployment, or the cost of obtaining nontransferable credits;

(C) A significant difference in the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed and the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging;

(D) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; or

(E) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled.

(5) For purposes of this section, the term "institution" includes an eligible institution, its representatives and agents, or any institution, organization, or person with whom the eligible institution has a written agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

Issue Paper 1
Session 2: January 8-11, 2018

Issue: Whether to establish a Federal standard for the purpose of determining if a borrower can establish a defense to the repayment of a Direct Loan or recover for amounts already paid on a Direct Loan based on an act or omission of an institution.

Statutory cite: Section 455(h) of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 685.206(c), 685.222, 685.300, 685.308

Summary of changes: Creates a regulatory section that establishes, for loans first disbursed on or after July 1, 2019, a new Federal standard applicable to borrower defense claims made by borrowers and for Department recovery actions against institutions. Under the proposed regulations, borrowers with an eligible Direct Loan would be entitled to a discharge (or recover amounts already paid) of all or a portion of the loan if the borrower establishes either: (1) an institutional misrepresentation, (2) a court judgment against an institution, or (3) a final judgment from an arbitrator or administrative tribunal against an institution. The proposed regulations would also describe in detail how a borrower establishes the basis for a claim.

Changes: See regulatory text below.

[Note to negotiators: Section 685.222 is a new section. For ease of readability and editing during negotiated rulemaking, the section is formatted as plain text. Changes made subsequent to the second session of negotiated rulemaking are noted in redlined text.]

Section 685.222 Borrower defense

(a) Introduction.

(1) For the purposes of this section and section 685.206(d), a “borrower defense” refers to an act or omission of an institution at which the borrower enrolled that relates to the making of a Direct Loan or the making of a loan that was repaid by a Direct Consolidation Loan for enrollment at the institution or the provision of educational services for which the loan was made, and includes one or both of the following:

(i) A defense to the repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

Deleted: and Department recovery actions against institutions

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(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) For loans first disbursed prior to July 1, 2019, the borrower may assert a borrower defense claim consistent with section 685.206(c).

(3) For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense claim consistent with this section.

(4) For purposes of this section, a borrower may assert a borrower defense claim regarding the "provision of educational services" for an act or omission of the by an institution concerning the nature of the institution's educational program, the nature of the institution's financial charges, the employability of graduates of the institution's educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the institution or educational program, or an accreditor approval of the institution or educational program.

(b) Borrower defense.

(1) For loans first disbursed on or after July 1, 2019, the Secretary will discharge the borrower's obligation to repay a Direct Loan and will refund amounts paid on the loan, in whole or in part, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the substantial weight of the evidence demonstrates that—

(i) The institution at which the borrower enrolled made a misrepresentation of material fact, opinion, intention, or law upon which the borrower reasonably relied under the circumstances in deciding to obtain a Direct Loan to enroll or continue enrollment in a program at the institution that resulted in financial harm to the borrower;

(ii) The borrower has obtained, from a State or Federal court of competent jurisdiction, a final, definitive judgment rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained; or

(iii) The borrower has obtained, from an arbitrator or a hearing official in a State or Federal administrative tribunal agreed to by the borrower and the institution, a final, definitive judgment, or equivalent final determination, rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained.

(iv) For the purpose of (b)(1)(ii), a "final, definitive judgment rendered in a contested proceeding" includes a Proof of Claim filed against the bankruptcy estate of the institution once the claim is adjudicated in a contested matter or adversary proceeding, such that the claim is no longer contingent, disputed, or unliquidated in a case arising Chapter 11 of the Bankruptcy Code, or allowed by a trustee in a case arising under Chapter 7 of the Bankruptcy Code.

Deleted: (2) A borrower may assert a borrower defensea Direct Consolidation Loan that repaid a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, or Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act; or a Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act which the borrower had a basis for a borrower defense claim prior to the consolidation.¶

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Deleted: (5) The Department may initiate a recovery action against an institution consistent with paragraph (c) of this section.¶

(6) The Department administers this section consistent with the procedures described in section 685.206(c) and 34 CFR Part 668, Subpart G.¶

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(2) A borrower must file a borrower defense claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation.

(3) The Secretary will find that the substantial weight of the evidence supports the approval of a borrower defense claim when the borrower's statement is supported by corroborating evidence provided by the borrower or otherwise in the possession of the Secretary.

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(4) For the purposes of this section—

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(i) A "misrepresentation" is a statement, act, or omission by an eligible institution to a borrower that is intentionally false or misleading or made with a reckless disregard for the truth and that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation described in paragraph (b)(1)(i) of this section has occurred includes, but is not limited to:

Deleted: that would mislead a reasonable person regarding

Deleted: the nature of the educational program, the nature of financial charges, the employability of graduates of an educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the educational program, or an accreditor approval of an institution or educational program

(A) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(B) Actual employment rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

Deleted: job placement

(C) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when invalidated or withdrawn;

(D) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(E) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation;

(F) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is not fulfilled following the enrollment of the borrower;

(G) A representation regarding the amount of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(H) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, the United States armed forces, or other individuals or entities when the institution has no permission to use such an endorsement;

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(I) A representation regarding the educational resources provided by the institution that are necessary for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, which may include representations regarding the institution's size, location, facilities, training equipment, or the number, availability, or qualifications of its personnel;

Deleted: program's size, location, facilities, training equipment of similar learning resources necessary for a student to complete the program, or the number, availability, of qualifications of its personnel

(J) The nature or extent of prerequisites for enrollment in a course or program;

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(ii) A violation by the institution of a requirement of the Higher Education Act or the Department's regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(c), as applicable. The Secretary will not approve a borrower defense claim under this section or section 685.206(c) of this Part when the borrower submits a claim based on—

Deleted: (K) Any other circumstances as determined by the Secretary; or

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(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage claims;

(F) Claims about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services; or

Deleted: Educational malpractice, which is tortious c

(G) Academic disputes and disciplinary matters.

(iii) Financial harm to the borrower has occurred when the borrower suffers monetary loss as a consequence of a misrepresentation described in paragraph (b)(1)(i) of this section or as found by a court, arbitrator, or hearing official pursuant to a judgment as described in paragraphs (b)(1)(ii) and (b)(1)(iii). Financial harm does not include damages for nonmonetary loss such as inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary. Evidence of financial harm includes, but is not limited to the following circumstances:

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(A) A significant difference between the borrower's earnings after completing the program and the earnings listed for the borrower's program of study in the institution's marketing materials, website, or other communication made to the student;

(B) Lower or lost wages, extended periods of involuntary unemployment, or the cost of obtaining nontransferable credits;

(C) A significant difference in the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed and the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging;

(D) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; or

(E) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled.

(5) For purposes of this section, the term "institution" includes an eligible institution, its representatives and agents, or any institution, organization, or person with whom the eligible institution has a written agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

Deleted: (B) A significant difference between the borrower's earnings after completing the program and the earnings for similar borrowers employed in the program's intended occupational field, determined by, for example, earnings below the second lowest income quintile for the program of study's intended occupational field according to the Standard Occupational Classification (SOC) code as published by the U.S. Bureau of Labor Statistics;¶

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Deleted: The the Secretary may determine at any time that a borrower defense claim the application should not be approved based on evidence that rebuts the borrower's claim, including any evidence provided by the institution at which the borrower enrolled. Such evidence may include, but is not limited to—¶
(i) For a claim based on licensure exam passage rates, the institution or program has a licensure exam passage rate associated with the program in which the borrower enrolls that, at a minimum, reasonably approximates the passage rates included in the institution's marketing materials, website, or other communication made when the student enrolled;¶
(ii) For a claim based on the inability of the borrower to obtain the necessary certification or licensure for employment in the program's intended field of employment, the borrower has obtained a certification or licensure related to the program in which the borrower enrolled without needing to complete additional coursework after completing the program; or¶
(iii) The institution provided information to the borrower to correct the misrepresentation prior to the borrower enrolling in the program.; or¶
(iv) The institution demonstrated that its representative or agent made a misrepresentation that was inconsistent with or prohibited by the institution's policies, procedures and training at the time it was made.¶

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Deleted: (c) *Department recovery actions against institutions.* The Secretary may initiate a recovery action against an institution when the Secretary determines that the borrower has asserted a successful borrower defense against the institution as described in this section or section 685.206(c) of this Part. ¶

(d) *Limitations period.* A borrower must file a claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation. ¶

§685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.¶

(a) *General.* Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school must—¶
* * *¶

(8) Provide that the school will accept Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;¶
* * *¶

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts

Issue Paper 2

Session 3: February 12 – 15, 2018

Issue: Developing a regulatory framework for the process of submitting and evaluating a borrower defense to repayment claim.

Statutory cite: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 682.211, 682.410, 685.205, 685.206, and 685.212

Summary of change:

Establishes a regulatory framework for processing borrower defense claims, including provisions for:

- Forbearance;
- The application process;
- Adjudication of a borrower defense claim;
- Notification of the borrower and school of the Department's decision;
- Reconsideration of denials;
- Relief that a borrower may receive if a borrower defense claim is approved.

Changes: See regulatory text below.

§682.211 Forbearance

(i) Mandatory administrative forbearance.

* * * * *

(7) The lender must grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has made a borrower defense claim related to a loan or loans that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k). The lender must grant mandatory administrative forbearance in yearly increments or for a period designated by the Secretary, until the loan is consolidated or the lender is notified by the Secretary to discontinue the forbearance.

* * * * *

§682.410 Fiscal, Administrative, and Enforcement Requirements

* * * * *

(b) * * *

(6) Collection efforts on defaulted loans.

* * * * *

(viii) Upon notification by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k), the guaranty agency must suspend all collection activities on the affected loan for the period designated by the Secretary.

* * * * *

§685.205 Forbearance

* * * * *

(b) Administrative forbearance. In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to—

* * * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under §685.206

(ii) Under §685.214;

(iii) Under §685.215;

(iv) Under §685.216;

(v) Under §685.217;

(vi) Under §685.222; or

(vii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

§685.206 Borrower responsibilities and defenses.

* * * * *

(c) Borrower defenses for loans first disbursed prior to July 1, 2019. (1) In any proceeding to collect on a Direct Loan first disbursed prior to July 1, 2019, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

(i) Tax refund offset proceedings under 26 U.S.C. 6402(d), 31 U.S.C. 3716 and 3720A.

(ii) Wage garnishment proceedings under section 488A of the Act or under 31 U.S.C. 3720D and 34 CFR part 34.

(iii) Salary offset proceedings for Federal employees under 34 CFR part 31, 5 U.S.C. 5514, and 31 U.S.C. 3716.

(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(e).

(2) If the borrower's defense against repayment claim is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G. The Secretary will not initiate such a proceeding more than three years after the date of the final determination of the borrower's defense against repayment claim

(d) Borrower defenses for loans first disbursed on or after July 1, 2019. (1) To assert a borrower defense under § 685.222, a borrower must submit an application under penalty of perjury on a form approved by the Secretary—

(i) Certifying that the borrower received the proceeds of a loan to attend the named school;

(ii) Providing evidence that supports the borrower defense claim; and

(iii) Indicating whether the borrower has made a claim based on the same act or omission of the school on which the borrower defense claim is based with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation.

(2) *Forbearance and suspension of collection activity.* (i) Upon receipt of a borrower's application and at the request of the borrower, the Secretary--

(A) Grants forbearance, if the borrower is not in default on the loan for which a borrower defense has been asserted; or

(B) Suspends collection activity on a defaulted loan.

(ii) If the borrower's claim is denied, the Secretary ends the forbearance or resumes collection 60 days after the date of the denial, unless a request for reconsideration under paragraph (d)(5) of this section is accepted.

(iii) Interest that accrues during the forbearance period or during the suspension of collection activity is not capitalized.

(iv) If the borrower's claim is denied, the forbearance or suspension of collection activity will be reinstated if the borrower submits a request for reconsideration that meets the criteria in paragraph ~~(e)~~(d)(5) of this section.

(3) *Adjudication of borrower defense claim.* The Secretary determines whether the borrower has presented a qualifying borrower defense claim in accordance with the standards in § 685.222.

(i) If the Secretary determines that the borrower's claim does not meet the minimum threshold for consideration of a borrower defense claim, the Secretary provides a written notification to the borrower denying the claim.

(ii) A borrower meets the minimum threshold for consideration of a borrower defense claim if—

(A) The borrower's application provides the information specified in paragraph (d)(1) of this section;

(B) The claim alleges a misrepresentation on the part of the school as described in 685.222(b)(1)(i) or establishes that the borrower has obtained a judgment as described in 685.222(b)(1)(ii) or (iii); and

(C) Provides minimum supporting evidence to corroborate the borrower defense claim.

(iii) If the Secretary determines that the borrower meets the minimum threshold for consideration of a borrower defense claim as described in paragraph (d)(3)(ii) of this section, the Secretary provides written notification of the determination to the borrower and the school. The notification to the school provides the school with a copy of the borrower's application and any supporting evidence submitted with the application. The school may submit a response to the borrower's claim as described in (d)(3)(v)(C) of this section.

(iv) The borrower and the school may provide the Secretary any additional relevant evidence within 45 days of the date of the notification specified in paragraph (d)(3)(iii) of this section.

(v) In resolving the borrower defense claim the Secretary will consider relevant evidence, including --

(A) Department records;

(B) The borrower defense application and any supporting evidence submitted by the borrower; and

(C) Any response or information submitted by the school.

(vi) In resolving the borrower defense claim, the Secretary may—

(A) Consider other relevant information obtained by the Secretary; and

(B) Request additional relevant information from the borrower or the school.

(vii) Upon request, the Secretary provides the borrower any information submitted by the school and provides the school any additional information provided by the borrower. The Secretary further provides the borrower and the school with any other relevant information obtained by the Secretary in resolving the borrower defense claim.

(4) *Written decision.* The Secretary issues a written decision--

(i) Notifying the borrower and the school of the decision on the borrower's borrower defense claim;

(ii) Providing the reasons for the decision;

(iii) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (d)(6) of this section; and

(iv) Informing the borrower and the school of their opportunity to request reconsideration of the claim based on newly discovered evidence pursuant to paragraph (d)(5) of this section.

(5) *Reconsideration of denials.* g (i) The borrower or the school may request reconsideration from the Secretary by submitting newly discovered evidence within 60 days of the date of the written decision in paragraph (d)(4) of this section.

(ii) If the Secretary accepts a request for reconsideration, the Secretary follows the procedures in paragraph (d)(2) of this section for granting forbearance or suspending collection activity, as applicable, and also notifies the borrower and the school that the Secretary has taken such action.

(iii) "Newly discovered evidence" is relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the Secretary's decision on the borrower defense claim and that the Secretary did not rely upon in determination of the borrower defense claim.

(6) *Relief.* (i) If the Secretary grants a borrower's application for a discharge based on the borrower's claim of a borrower defense, the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. In determining the appropriate amount of relief to be provided to the borrower, the factors the Secretary will consider, in a practicable manner, include but are not limited to—

(A) The value of the education that the borrower received from the school; and

(B) The borrower's earning potential.

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief includes, if applicable:

~~(i)~~ (A) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection;

~~(ii)~~ (B) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act; and

~~(iii)~~ (C) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(7) *Cooperation by the borrower.* The Secretary may revoke any relief granted to a borrower who fails to cooperate with the Secretary in any proceeding under paragraph (d)(9) of this section or under Subpart G. Such cooperation includes, but is not limited to--

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense claim; and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(8) *Transfer to the Secretary of the borrower's right of recovery against third parties.* (i) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school its principals, its affiliates, and their successors or its sureties and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (d)(8) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (d)(8) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (d)(8) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(9) *Recovery from the school.* (i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense claim with respect to a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G.

(ii) The Secretary initiates a recovery action against a school no later than three years after the date of the final determination of the borrower's defense to repayment claim.

(iii) The school must repay the Secretary for the amount of the loan which has been discharged and amounts refunded to a borrower for payments made by the borrower to the Secretary unless the school demonstrates that the Secretary's decision to approve the borrower defense claim was clearly erroneous.

(iv) The school may present relevant evidence in the recovery proceeding.* * * * *

§685.212 Discharge of a Loan Obligation

* * * * *

(k) Borrower defenses. (1) If a borrower's application for a discharge of a loan based on a borrower defense is approved under the standards set forth in §§ 685.206(c) or 685.222, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in §§ 685.206(c) or 685.206(d), respectively.(2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under the standards set forth in §§ 685.206(c) or 685.222 with respect to a loan that was repaid by the Direct Consolidation Loan.

(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining--

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section, other than a Direct Subsidized, Unsubsidized, or PLUS Loan, establishes a borrower defense under § 685.206(c) for a Direct Consolidation Loan made before July 1, 2019, or under the standard set forth in § 685.222, for a Direct Consolidation Loan made on or after July 1, 2019; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on or after July 1, 2019 that was paid off by the Direct Consolidation Loan, establishes a borrower defense under § 685.222.

(ii) If the borrower defense claim is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan and affords the borrower further relief, as applicable, in accordance with §685.206(c)(2) or 685.206 (d)(6)(ii).

* * * * *

Section 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) * * *

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to--

* * *

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

* * *

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to sections 685.206, 685.214, 685.215, 685.216, and 685.222 and for which the institution has been determined to be liable as described in Subpart G;

Section 685.308 Remedial actions.

(a) *General.* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of --

(1) The school's violation of a Federal statute or regulation;

(2) The school's negligent or willful false certification under section 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to sections 685.206, 685.214, 685.216, and 685.222

* * * * *

Issue Paper 2

Session 3: February 12 – 15, 2018

Issue: Developing a regulatory framework for the process of submitting and evaluating a borrower defense to repayment claim.

Deleted: (BD)

Statutory cite: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 682.211, 682.410, 685.205, 685.206, and 685.212

Summary of change:

Establishes a regulatory framework for processing borrower defense claims, including provisions for:

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- Forbearance;
- The application process;
- Adjudication of a borrower defense claim;
- Notification of the borrower and school of the Department's decision;
- Reconsideration of denials;
- Relief that a borrower may receive if a borrower defense claim is approved.

Deleted: claims for Direct Loans first disbursed on or after July 1, 2019,

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Changes: See regulatory text below.

§682.211 Forbearance

(i) Mandatory administrative forbearance.

* * * * *

(7) The lender must grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has made a borrower defense claim related to a loan or loans that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k). The lender must grant mandatory administrative forbearance in yearly increments or for a period designated by the Secretary, until the loan is consolidated or the lender is notified by the Secretary to discontinue the forbearance.

* * * * *

§682.410 Fiscal, Administrative, and Enforcement Requirements

* * * * *

(b) * * *

(6) Collection efforts on defaulted loans.

* * * * *

(viii) Upon notification by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k), the guaranty agency must suspend all collection activities on the affected loan for the period designated by the Secretary.

* * * * *

§685.205 Forbearance

* * * * *

(b) Administrative forbearance. In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to—

* * * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under §685.206

(ii) Under §685.214;

(iii) Under §685.215;

(iv) Under §685.216;

(v) Under §685.217; ,

(vi) Under §685.222; or

(vii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

§685.206 Borrower responsibilities and defenses.

* * * * *

(c) Borrower defenses for loans first disbursed prior to July 1, 2019. (1) In any proceeding to collect on a Direct Loan first disbursed prior to July 1, 2019, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

(i) Tax refund offset proceedings under 26 U.S.C. 6402(d), 31 U.S.C. 3716 and 3720A.

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(ii) Wage garnishment proceedings under section 488A of the Act or under 31 U.S.C. 3720D and 34 CFR part 34.

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(iii) Salary offset proceedings for Federal employees under 34 CFR part 31, 5 U.S.C. 5514, and 31 U.S.C. 3716.

(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(e).

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(2) If the borrower's defense against repayment claim is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G. The Secretary will not initiate such a proceeding more than three years after the date of the final determination of the borrower's defense against repayment claim.

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(d) Borrower defenses for loans first disbursed on or after July 1, 2019. (1) To assert a borrower defense under § 685.2224, a borrower must submit an application under penalty of perjury on a form approved by the Secretary—

(i) Certifying that the borrower received the proceeds of a loan to attend the named school;

(ii) Providing ~~documentation~~ evidence that supports the borrower defense claim; and

(iii) Indicating whether the borrower has made a claim based on the same act or omission of the school on which the borrower defense claim is based with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation.

(2) Forbearance and suspension of collection activity. (i) Upon receipt of a borrower's application and at the request of the borrower, the Secretary--

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(A) Grants forbearance, if the borrower is not in default on the loan for which a borrower defense has been asserted; or

(B) Suspends collection activity on a defaulted loan.

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(ii) If the borrower's claim is denied, the Secretary ends the forbearance or resumes collection 60 days after the date of the denial, unless a request for reconsideration under paragraph (d)(5) of this section is accepted.

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(iii) Interest that accrues during the forbearance period or during the suspension of collection activity is not capitalized.

(iv) If the borrower's claim is denied, the forbearance or suspension of collection activity will be reinstated if the borrower submits a request for reconsideration that meets the criteria in paragraph (e)(d)(5) of this section.

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(3) *Adjudication of borrower defense claim.* The Secretary determines whether the borrower has presented a qualifying borrower defense claim in accordance with the standards in § 685.222.

(i) If the Secretary determines that the borrower's claim does not meet the minimum threshold for consideration of a borrower defense claim, the Secretary provides a written notification to the borrower denying the claim.

(ii) A borrower meets the minimum threshold for consideration of a borrower defense claim if—

(A) The borrower's application provides the information specified in paragraph (d)(1) of this section;

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(B) The claim alleges a misrepresentation on the part of the school as described in 685.222(b)(1)(i) or establishes that the borrower has obtained a judgment as described in 685.222(b)(1)(ii) or (iii); and

(C) Provides minimum supporting evidence to corroborate the borrower defense claim.

(iii) ~~60.~~ If the Secretary determines that the borrower meets the minimum threshold for consideration of a borrower defense claim as described in paragraph (d)(3)(ii) of this section, the Secretary provides written notification of the determination to the borrower and the school. The notification to the school provides the school with a copy of the borrower's application and any supporting evidence submitted with the application. The school may submit a response to the borrower's claim as described in (d)(3)(v)(C) of this section. The notice to the school provides the school with the opportunity to submit a response to the borrower defense claim, including any relevant documentation or information, to the Department.

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(iv) The borrower and the school may provide the Secretary any additional relevant evidence within 45 days of the date of the notification specified in paragraph (d)(3)(iii) of this section.

(v) In resolving the borrower defense claim the Secretary will consider relevant evidence, including --

(A) Department records;

(B) The borrower defense application and any supporting evidence submitted by the borrower; and

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(C) Any response or information submitted by the school.

(vi) In resolving the borrower defense claim, the Secretary may—

(A) Consider other relevant information obtained by the Secretary; and

(B) Request additional relevant information from the borrower or the school.

(vii) Upon request, the Secretary provides the borrower any information submitted by the school and provides the school any additional information provided by the borrower. The Secretary further provides the borrower and the school with any other relevant information obtained by the Secretary in resolving the borrower defense claim.

(4) *Written decision.* The Secretary issues a written decision--

(i) Notifying the borrower and the school of the decision on the borrower's borrower defense claim;

(ii) Providing the reasons for the decision;

(iii) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (d)(6) of this section; and

(iv) Informing the borrower and the school of their opportunity to request reconsideration of the claim based on newly discovered evidence pursuant to paragraph (d)(5) of this section.

(5) *Reconsideration of denials.* g. (i) The borrower or the school may request reconsideration from the Secretary by submitting newly discovered evidence within 60 days of the date of the written decision in paragraph (d)(4) of this section.

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(ii) If the Secretary accepts a request for reconsideration, the Secretary follows the procedures in paragraph (d)(2) of this section for granting forbearance or suspending collection activity, as applicable, and also notifies the borrower and the school that the Secretary has taken such action.

(i) If the borrower defense is denied in full or in part, the borrower may request that the Secretary reconsider the borrower defense new evidence support the borrower's claim. ¶

¶

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(iii) "Newly discovered evidence" is relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the Secretary's decision on the borrower defense claim and that the Secretary did not rely upon in determination of the borrower defense claim.

(iiv) The borrower or the school may request reconsideration from the Secretary by submitting newly discovered evidence within 60 days of the date of the written decision as outlined in paragraph (d)(4) of this section. A request for reconsideration must be submitted within 60 days of the date the written decision under paragraph (d)(4) of this section issued. ¶

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(6) *Relief.* (i) If the Secretary grants a borrower's application for a discharge based on the borrower's claim of a borrower defense, the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. In determining the appropriate amount of relief to be provided to the borrower, the factors the Secretary will consider, in a practicable manner, include but are not limited to—

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(A) The value of the education that the borrower received from the school; and

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(B) The borrower's earning potential.

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief includes, if applicable:

(i) (A) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection;

(ii) (B) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act; and

(iii) (C) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(7) Cooperation by the borrower. The Secretary may revoke any relief granted to a borrower who fails to cooperate with the Secretary in any proceeding under paragraph (d)(9) of this section or under Subpart G. Such cooperation includes, but is not limited to--

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense claim; and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(8) Transfer to the Secretary of the borrower's right of recovery against third parties. (i) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school its principals, its affiliates, and their successors or its sureties and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (d)(8) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (d)(8) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (d)(8) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(9) Recovery from the school. (i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense claim with

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respect to a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G.

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(ii) The Secretary initiates a recovery action against a school no later than three years after the date of the final determination of the borrower's defense to repayment claim.

(iii) The school must repay the Secretary for the amount of the loan which has been discharged and amounts refunded to a borrower for payments made by the borrower to the Secretary unless the school demonstrates that the Secretary's decision to approve the borrower defense claim was clearly erroneous.

(iv) The school may present relevant evidence in the recovery proceeding. * * * * *

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§685.212 Discharge of a Loan Obligation

* * * * *

(k) *Borrower defenses.* (1) If a borrower's application for a discharge of a loan based on a borrower defense is approved under the standards set forth in §§ 685.206(c) or 685.222, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in §§ 685.206(c) or 685.206(d), respectively. (2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under the standards set forth in §§ 685.206(c) or 685.222 with respect to a loan that was repaid by the Direct Consolidation Loan.

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(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining--

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section, other than a Direct Subsidized, Unsubsidized, or PLUS Loan, establishes a borrower defense under § 685.206(c) for a Direct Consolidation Loan made before July 1, 2019, or under the standard set forth in § 685.222, for a Direct Consolidation Loan made on or after July 1, 2019; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on or after July 1, 2019 that was paid off by the Direct Consolidation Loan, establishes a borrower defense under § 685.222.

(ii) If the borrower defense claim is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan and affords the borrower further relief, as applicable, in accordance with §685.206(c)(2) or 685.206 (d)(6)(iii).

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Section 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) * * *

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to--

* * *

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

Deleted: Provide that the school will a

* * *

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to sections 685.206, 685.214, 685.215, 685.216, and 685.222 and for which the institution has been determined to be liable as described in Subpart G;

Section 685.308 Remedial actions.

(a) *General.* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of: --

Deleted: unenforceability of a loan or loans, or the disbursement of loan amounts for which the borrower was ineligible resulted in whole or in part from-

(1) The school's violation of a Federal statute or regulation;

Deleted: or

(2) The school's negligent or willful false certification under section 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to sections 685.206, 685.214, 685.216, and 685.222

* * * * *

Appendix A: Ratio Methodology for Proprietary Institutions

SECTION 1: Ratio and Ratio Terms

Primary Reserve Ratio $\frac{\text{Adjusted Equity}}{\text{Total Expenses and Losses}}$

Equity Ratio $\frac{\text{Modified Equity}}{\text{Modified Assets}}$

Net Income Ratio $\frac{\text{Income Before Taxes}}{\text{Total Revenues and Gains}}$

Definitions:

Adjusted Equity = (total owner's equity) - (intangible assets) - (unsecured related-party receivables)* - (net property, plant and equipment)** + (post-employment and defined benefit pension liabilities) + (all debt obtained for long-term purposes, not to exceed total net property, plant and equipment)***

Total Expenses and Losses (excludes income tax, discontinued operations, or change in accounting principle), less any losses on investments****, post-employment and defined benefit pension plans, and annuities. (Total expenses include the nonservice component of net periodic pension and other post-employment plan expenses that are classified as non-operating).

Modified Equity = (total owner's equity) - (intangible assets) - (unsecured related-party receivables)

Modified Assets = (total assets) - (intangible assets) - (unsecured related-party receivables)

Income Before Taxes is taken directly from the audited financial statement

Total Revenues and Gains = (total operating revenues) + (non-operating revenue and gains). Investment gains should be recorded net of investment losses. Revenues and gains does not include discontinued operations not considered an operating expense for reporting purposes, or change in accounting principle

* Unsecured related party receivables as required at 34 C.F.R 668.23(d)

** The value of property, plant and equipment includes construction in progress and lease right-of-use assets, and is net of accumulated depreciation/amortization.

*** Debt obtained for long-term purposes, not to exceed total net property, plant and equipment includes lease liabilities for lease right-of-use assets and the short-term portion of the debt, up to the amount of net property, plant and equipment. If an institution wishes to include the debt obtained through long term lines of credit in total debt obtained for long term purposes, the institution must include a disclosure in the financial statements that the lines of credit exceed twelve months and were used to fund capitalized assets (i.e. property, plant and equipment or capitalized expenditures per Generally Accepted Accounting Principles). The disclosure must include the issue date, term, nature of capitalized amounts and amounts capitalized. Institutions that do not include long term lines of credit in total debt obtained for long term purposes do not need to provide the additional disclosure. The debt obtained for long-term purposes will be limited to only those

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ED 19-02224-F 0089

amounts disclosed in the financial statements that were used to fund capitalized assets. Any amount from long term lines of credit used to fund operations must be excluded from debt obtained for long-term purposes.

***For investments, any loss is the net loss for investments.

Issue Paper 3
Session 3: February 12-15, 2018

Issue: Financial Responsibility and Administrative Capability

Statutory cite: §498 of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 668.91, 668.94, 668.171, 668.172, and 668.175

Summary of changes: Updates the actions of the hearing official.

Identifies actions or events that the Secretary may consider in determining whether an institution is financially responsible.

Provides that the Secretary may accept other types of surety or financial protection in lieu of letters of credit.

Provides for a four-year transition period for operating leases entered into before January 1, 2019.

Updates the Appendices to Subpart L to account for changes in accounting standards and terminology.

Changes: See attached regulatory text.

§ 668.91 Initial and final decisions.

(a)...

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of §668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of §668.82(d)(1), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

(iii) If an action brought against an institution or third-party servicer involves its failure to provide a letter of credit or other financial protection under §668.15 or §668.171, the hearing official finds that the amount of the letter of credit or other financial protection established by the Secretary under

§668.15 or §668.175 was appropriate, unless the institution can demonstrate that the amount was not warranted;

(iv) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to submit a required audit by the deadlines established in §668.23 or otherwise failed to comply with the requirements of §668.23, if the hearing official finds that the institution or servicer failed to meet those deadlines or requirements, the hearing official finds that the termination is warranted;

(v)(A) In a termination action against an institution based on the grounds that the institution is not financially responsible under §668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in §668.15(d)(4) have been met; or

(B) In a limitation or termination action against an institution on the grounds that the institution is not financially responsible-

(1) Upon proof of the conditions in §668.174(a), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all the conditions in §668.174(f) have been met; or

(2) Upon proof of the conditions in §668.174(b)(1), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all applicable conditions described in §668.174(b)(2) or §668.175(g) have been met.

* * *

§ 668.94 Limitation.

* * *

(h) A change in the participation status of the institution from fully certified to participate to provisionally certified to participate under §668.13(c).

(i) A requirement that a third-party servicer obtain surety, in a specified amount, to assure the servicer's ability to meet the servicer's financial obligations under a contract; or

(j) Other conditions as may be determined by the Secretary to be reasonable and appropriate.

§ 668.171 General.

(a) Purpose. To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to--

- (1) Provide the services described in its official publications and statements;
 - (2) Meet all of its financial obligations; and
 - (3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.
- (b) General standards of financial responsibility. Except as provided under paragraph (c) and (d) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that--

- (1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;
 - (2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;
 - (3) The institution is current in its debt payments. An institution is not current in its debt payments if—
 - (i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or
 - (ii) It fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover funds under those obligations;
 - (4) The institution is able to meet all of its financial obligations (including making refunds under its refund policy and returning title IV, HEA program funds for which it is responsible under §668.22 and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c) of this section that has or is likely to have an adverse material effect on the institution's operations or ability to continue as a going concern; and
 - (ii) Repayments to the Secretary for debts and liabilities arising from the institution's participation in the title IV, HEA programs.
 - (5) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).
- (c) Other factors or events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(4) of this section if—
- (1) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution incurs a debt or liability from borrower defense claims adjudicated by

the Secretary, and as a result of that debt or liability the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (d) of this section;

(2) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated;

(3) For a publicly traded institution—

(i) The U.S. Securities and Exchange Commission (SEC) notifies or warns the institution that it may suspend trading on the institution's stock or suspends trading on its stock;

(ii) The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25; or

(iii) The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted for any reason; or

(4) For its most recently completed fiscal year, a proprietary institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(d) Recalculating the composite score. The Secretary recognizes the actual amount of the debt or liability incurred by an institution for borrower defense claims under paragraph (c)(1) of this section as an expense, and accounts for that expense by—

(1) For the Primary Reserve ratio, increasing expenses and decreasing adjusted equity by that amount;

(2) For the Equity ratio, decreasing modified by that amount; and

(3) For the Net Income ratio, decreasing income before taxes in the net income ratio by that amount.

(e) Reporting requirements. (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events--

(i) For a withdrawal of owner's equity described in paragraph (c)(2), no later than 10 days after the withdrawal is made;

(ii) For the SEC and stock exchange provisions for publicly traded institutions described in paragraph (c)(3), no later than 10 days after the SEC or exchange notifies, warns, or takes an action against the institution, or 10 days after any extension granted by the SEC; or

(iii) For the non-title IV revenue provision in paragraph (c)(4), no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

(2) The Secretary may take an administrative action under paragraph (h) of this section against the institution if it fails to provide timely notice under this paragraph (e) .

(3) In its notice to the Secretary under this paragraph, or in its response to a determination by the Secretary that the institution is not financially responsible because of an action or event under paragraph (c) of this section, the institution may—

(i) Demonstrate that the reported withdrawal of owner’s equity under paragraph (c)(2) was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(ii) Show that the action or event has been resolved, or demonstrate that the institution has insurance that will cover all or part of the debts and liabilities that arise from borrower defense claims under paragraph (c)(1); or

(iii) Explain or provide information about the conditions or circumstances that precipitated that action or event that demonstrates that the action or event has not or will not have a material adverse effect on the institution.

(f) Public institutions. (1) The Secretary considers a domestic public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

(g) Audit opinions. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if , in the institution's audited financial statements, the opinion expressed by the auditor

was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition.

(h) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may--

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

§ 668.172 Financial Ratios.

* * *

(d) Transition period for certain operating leases. (1) As a result of changes to the accounting for leases required by Financial Accounting Standards Board Accounting Codification ASC 842 (Leases), for an institution's four consecutive fiscal years beginning on or after January 1, 2019 for which the Secretary calculates the institution's composite score, the Secretary also calculates a transition score by excluding from the calculation operating leases that the institution entered into before July 1, 2019, provided that those leases are properly disclosed in the Supplemental Schedule required under Appendix A or B of this subpart. For each year of the transition period, the Secretary uses the higher of the composite or transition score in determining, in part, whether the institution is financially responsible.

(2) For the transition period described in paragraph (d)(1), the Secretary suspends the conditions in § 668.175(d)(1)(i)(B) and (ii) under which an institution continues to qualify for the zone alternative. For any fiscal year following the transition period, the institution's transition period scores have no bearing on whether the institution qualifies under an alternative standard in §668.175(c), (d), or (f).

§ 668.175 Alternative standards and requirements.

(a) General. An institution that is not financially responsible under the general standards and provisions in §668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) Letter of credit alternative for new institutions. A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other surety described under paragraph (h)(1)(i) of this section, that is acceptable and payable to the Secretary, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines

the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Letter of credit alternative for participating institutions. A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b) or (c), or because of an audit opinion described under § 668.171(g), qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other financial protection described under paragraph (h) of this section, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this provision does not apply to a public institution.

(d) Zone alternative. (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary--

(i) Requires the institution to make disbursements to eligible students and parents under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any adverse action, including a probation or similar action, taken against the institution by its accrediting agency;

(B) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement;

- (C) Any violation by the institution of any loan agreement;
- (D) Any failure of the institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations; or
- (F) Any extraordinary losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;
- (iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and
- (iv) May require the institution to provide information about its current operations and future plans.
- (3) Under the zone alternative, the institution must--
 - (i) For any oversight or financial event described under paragraph (d)(2)(ii) of this section, in accordance with procedures established by the Secretary,, notify the Secretary no later than 10 days after that event occurs; and
 - (ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.
- (4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.
- (e) [Reserved]
- (f) Provisional certification alternative. (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if—
 - (i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(d) is less than 1.0, it is subject to an action or event under § 668.171(c) that has or is likely to have an adverse material effect on the institution, or because of an audit opinion described in § 668.171(g); or
 - (ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and
- (2) Under this alternative, the institution must—
 - (i) Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received

by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution

(ii) Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3) and (b)(4), for its two most recent fiscal years; and

(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d) (2) and (3) of this section.

(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary—

(i) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), or both, to provide to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs; and

(B) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs.

* * *

(h) Financial protection. (1) In lieu of providing a letter of credit for the amount determined by the Secretary under this section, the Secretary may permit an institution to—

(i) Provide the amount required under this section in the form of other surety or form of financial protection as specified by the Secretary in a notice published in the Federal Register;

(ii) Provide cash for the amount required under this section; or

(iii) Enter into an arrangement under which the Secretary offsets the amount of title IV, HEA program funds that an institution has earned in a manner that ensures that, no later than the end of a six to twelve-month period, the amount offset equals the amount of financial protection the institution is required to provide. The Secretary uses the funds to satisfy the debts and liabilities owed to the Secretary that are not otherwise paid directly by the institution, and provides to the institution any funds not used for this purpose during the period covered by the agreement, or provides the institution any remaining funds if the institution

Issue Paper 3
Session 3: February 12-15, 2018

Issue: Financial Responsibility and Administrative Capability

Statutory cite: §498 of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 668.91, 668.94, 668.171, 668.172, and 668.175

Summary of changes:

Updates the actions of the hearing official.

Identifies actions or events that the Secretary may consider in determining whether an institution is financially responsible.

Provides that the Secretary may accept other types of surety or financial protection in lieu of letters of credit.

Provides for a four-year transition period for operating leases entered into before January 1, 2019.

Updates the Appendices to Subpart L to account for changes in accounting standards and terminology.

Changes: See attached regulatory text.

§ 668.91 Initial and final decisions.

(a)...

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of §668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of §668.82(d)(1), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

Deleted: For institutions that are not financially responsible, we propose to expand the types of financial protection those institutions may provide. In addition, we propose to recalculate the composite score for institutions that incur debts and liabilities from borrower defense claims.

(iii) If an action brought against an institution or third-party servicer involves its failure to provide a letter of credit or other financial protection under §668.15 or §668.171, the hearing official finds that the amount of the letter of credit or other financial protection established by the Secretary under §668.15 or §668.175 was appropriate, unless the institution can demonstrate that the amount was not warranted;

Deleted: surety in the amount specified by the Secretary

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(iv) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to submit a required audit by the deadlines established in §668.23 or otherwise failed to comply with the requirements of §668.23, if the hearing official finds that the institution or servicer failed to meet those deadlines or requirements, the hearing official finds that the termination is warranted;

Deleted: (c)(3),

(v)(A) In a termination action against an institution based on the grounds that the institution is not financially responsible under §668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in §668.15(d)(4) have been met; or

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(B) In a limitation or termination action against an institution on the grounds that the institution is not financially responsible-

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(1) Upon proof of the conditions in §668.174(a), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all the conditions in §668.174(f) have been met; or

(2) Upon proof of the conditions in §668.174(b)(1), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all applicable conditions described in §668.174(b)(2) or §668.175(g) have been met.

* * *

§ 668.94 Limitation.

* * *

(h) A change in the participation status of the institution from fully certified to participate to provisionally certified to participate under §668.13(c).

(i) A requirement that a third-party servicer obtain surety, in a specified amount, to assure the servicer's ability to meet the servicer's financial obligations under a contract; or

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(j) Other conditions as may be determined by the Secretary to be reasonable and appropriate.

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§ 668.171 General.

(a) Purpose. To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to--

(1) Provide the services described in its official publications and statements;

(2) Meet all of its financial obligations; and

Deleted: Administer properly the title IV, HEA programs in which it participates; and

(3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.

(b) General standards of financial responsibility. Except as provided under paragraph (c) and (d) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that--

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(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;

(2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;

(3) The institution is current in its debt payments. An institution is not current in its debt payments if--

(i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or

(ii) It fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover funds under those obligations;

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(4) The institution is able to meet all of its financial obligations (including making refunds--

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(i) under its refund policy, and returning title IV, HEA program funds for which it is responsible under §668.22 and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c) of this section that has or is likely to have an adverse material effect on the institution's operations or ability to continue as a going concern; and

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(i)

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(ii) Repayments to the Secretary for debts and liabilities arising from the institution's participation in the title IV, HEA programs.

(5) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).

(c) Other factors or events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(4) of this section if—

(1) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution incurs a debt or liability from borrower defense claims adjudicated by the Secretary, and as a result of that debt or liability the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (d) of this section;

(2) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated;

(3) For a publicly traded institution—

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(i) The U.S. Securities and Exchange Commission (SEC) notifies or warns the institution that it may suspend trading on the institution's stock or suspends trading on its stock;

(ii) The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25; or

(iii) The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted for any reason; or

(4) For its most recently completed fiscal year, a proprietary institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(d) Recalculating the composite score. The Secretary recognizes the actual amount of the debt or liability incurred by an institution for borrower defense claims under paragraph (c)(1) of this section as an expense, and accounts for that expense by—

(1) For the Primary Reserve ratio, increasing expenses and decreasing adjusted equity by that amount;

(2) For the Equity ratio, decreasing modified by that amount; and

(3) For the Net Income ratio, decreasing income before taxes in the net income ratio by that amount.

(e) Reporting requirements. (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events--

(i) For a withdrawal of owner's equity described in paragraph (c)(2), no later than 10 days after the withdrawal is made;

(ii) For the SEC and stock exchange provisions for publicly traded institutions described in paragraph (c)(3), no later than 10 days after the SEC or exchange notifies, warns, or takes an action against the institution, or 10 days after any extension granted by the SEC; or

(iii) For the non-title IV revenue provision in paragraph (c)(4), no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

(2) The Secretary may take an administrative action under paragraph (h) of this section against the institution if it fails to provide timely notice under this paragraph (e).

(3) In its notice to the Secretary under this paragraph, or in its response to a determination by the Secretary that the institution is not financially responsible because of an action or event under paragraph (c) of this section, the institution may—

(i) Demonstrate that the reported withdrawal of owner's equity under paragraph (c)(2) was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(ii) Show that the action or event has been resolved, or demonstrate that the institution has insurance that will cover all or part of the debts and liabilities that arise from borrower defense claims under paragraph (c)(1); or

(iii) Explain or provide information about the conditions or circumstances that precipitated that action or event that demonstrates that the action or event has not or will not have a material adverse effect on the institution.

(f) Public institutions. (1) The Secretary considers a domestic public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

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(g) Audit opinions. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition.

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(h) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may--

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Deleted: (2) As provided under the past performance provisions in §668.174 (a) and (b)(1), the institution violated a title IV, HEA program requirement, or the persons or entities affiliated with the institution owe a liability for a violation of a title IV, HEA program requirement.¶

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(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

§ 668.172 Financial Ratios.

* * *

(d) Transition period for certain operating leases. (1) As a result of changes to the accounting for leases required by Financial Accounting Standards Board Accounting Codification ASC 842 (Leases), for an institution's four consecutive fiscal years beginning on or after January 1, 2019 for which the Secretary calculates the institution's composite score, the Secretary also calculates a transition score by excluding from the calculation operating leases that the institution entered into before July 1, 2019, provided that those leases are properly disclosed in the Supplemental Schedule required under Appendix A or B of this subpart. For each year of the transition period, the Secretary uses the higher of the composite or transition score in determining, in part, whether the institution is financially responsible.

(2) For the transition period described in paragraph (d)(1), the Secretary suspends the conditions in § 668.175(d)(1)(i)(B) and (ii) under which an institution continues to qualify for the zone alternative. For any fiscal year following the transition period, the institution's transition period scores have no bearing on whether the institution qualifies under an alternative standard in §668.175(c), (d), or (f).

§ 668.175 Alternative standards and requirements.

(a) General. An institution that is not financially responsible under the general standards and provisions in §668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) Letter of credit alternative for new institutions. A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a

financially responsible institution by submitting an irrevocable letter of credit or other surety described under paragraph (h)(1)(i) of this section, that is acceptable and payable to the Secretary, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Letter of credit alternative for participating institutions. A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b) or (c), or because of an audit opinion described under § 668.171(g), qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other financial protection described under paragraph (h) of this section, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year. except that this provision does not apply to a public institution.

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(d) Zone alternative. (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary--

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(i) Requires the institution to make disbursements to eligible students and parents under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

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(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any adverse action, including a probation or similar action, taken against the institution by its accrediting agency;

(B) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement;

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(C) Any violation by the institution of any loan agreement;

(D) Any failure of the institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations; or

(F) Any extraordinary losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;

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(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must—

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(i) For any oversight or financial event described under paragraph (d)(2)(ii) of this section, in accordance with procedures established by the Secretary, notify the Secretary no later than 10 days after that event occurs; and

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(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

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(e) [Reserved]

(f) Provisional certification alternative. (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if—

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(d) is less than 1.0, it is subject to an action or event under § 668.171(c) that has or is likely to have an adverse material effect on the institution, or because of an audit opinion described in § 668.171(g); or

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(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and

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(2) Under this alternative, the institution must—

(i) Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution.

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(ii) Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3) and (b)(4), for its two most recent fiscal years; and

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(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d) (2) and (3) of this section.

(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary—

Deleted: may again permit the institution to participate under a provisional certification, but the Secretary

(i) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), or both, to provide to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs; and

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(B) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs.

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* * *

(h) Financial protection. (1) In lieu of providing a letter of credit for the amount determined by the Secretary under this section, the Secretary may permit an institution to—

(i) Provide the amount required under this section in the form of other surety or form of financial protection as specified by the Secretary in a notice published in the Federal Register;

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Deleted: the zone alternative, as provided under paragraph (d)(2) and (3)

(ii) Provide cash for the amount required under this section; or

(iii) Enter into an arrangement under which the Secretary offsets the amount of title IV, HEA program funds that an institution has earned in a manner that ensures that, no later than the end of a six to twelve-month period, the amount offset equals the amount of financial protection the institution is required to provide. The Secretary uses the funds to satisfy the debts and liabilities owed to the Secretary that are not otherwise paid directly by the institution, and provides to the institution any funds not used for this purpose during the period covered by the agreement, or provides the institution any remaining funds if the institution

SECTION 3: Example Financial Statements and Composite Score Calculations

STATEMENT OF FINANCIAL POSITION

Line		
1	Cash and cash equivalents	1,720,000
2	Accounts receivable, net	6,000,000
3	Prepaid expenses	1,900,000
4	Related party receivable	100,000
5	Contributions receivable, net	2,000,000
6	Student loans receivable, net	8,000,000
7	Investments	6,000,000
8	Property, plant and equipment, net	40,000,000
9	Lease right-of-use asset, net	10,000,000
10	Goodwill	500,000
11	Deposits	20,000
12	Total Assets	76,240,000
13	Line of credit - short term	300,000
14	Accounts payable	1,000,000
15	Accrued expenses	3,500,000
16	Deferred revenue	650,000
17	Post-employment and pension liability	6,600,000
18	Line of credit - operating	200,000
19	Other liabilities	1,000,000
20	Notes payable	24,000,000
21	Lease right-of-use asset liability	10,000,000
22	Line of credit for long term purposes	2,000,000
23	Total Liabilities	49,250,000
24	Net Assets without Donor Restrictions	15,190,000
25	Net Assets with Donor Restrictions	
26	Annuities	300,000
27	Term endowments	50,000
28	Life income funds	150,000
29	Other restricted by purpose and time	2,500,000
30	Restricted in perpetuity	8,800,000
31	Total Net Assets with Donor Restrictions	11,800,000
32	Total Net Assets	26,990,000
	Total Liabilities and Net Assets	76,240,000

STATEMENT OF ACTIVITIES

Line		
	Changes in Net Assets Without Donor Restrictions	
	Operating Revenue and Other Additions:	
33	Tuition and fees, net	43,200,000
34	Contributions	1,200,000
35	Investment return appropriated for spending	200,000
36	Auxiliary enterprises	7,000,000
37	Net assets released from restriction	500,000
38	Total Operating Revenue and Other Additions	52,100,000
	Operating Expenses and Other Deductions:	
39	Education and research expenses	38,000,000
40	Depreciation and Amortization	5,000,000
41	Interest expense	2,880,000
42	Auxiliary enterprises	5,200,000
43	Total Operating Expenses	51,080,000
44	Change in Net Assets from Operations	1,020,000
	Non-Operating Changes	
45	Investments, net of annual spending, gain (loss)	(600,000)
46	Other components of net periodic pension costs	(1,000,000)
47	Pension-related changes other than net periodic pension	(350,000)
48	Change in value of split-interest agreements	(80,000)
49	Other gains (losses)	(70,000)
50	Sale of fixed assets, gains (losses)	1,000,000
	Total Non-Operating Changes	(1,100,000)
51	Change in Net Assets Without Donor Restrictions	(80,000)
	Change in Net Assets With Donor Restrictions	
52	Contributions	400,000
53	Net assets released from restriction	(500,000)
54	Change in Net Assets With Donor Restrictions	(100,000)
55	Change in Net Assets	(180,000)
56	Net Assets, Beginning of Year	27,170,000
31	Net Assets, End of Year	26,990,000

Calculating the Composite Score

Lines

	31-29-(25+26+27)-10-(8+9)+17		
Primary Reserve Ratio = Expendable Net Assets	+(20+21+22) -4	9,690,000	0.1855
/ Total expenses and Losses Without Donor Restrictions	43 +46 +48 +49	52,230,000	

Equity Ratio = Modified Net Assets	24 +30 -10 -4	26,340,000	0.3485
/ Modified assets	12 -10 -4	75,590,000	

Net Income Ratio = Change in Net Assets without Donor Restrictions	51	(80,000)	(0.0015)
Total Revenue and Gains Without Donor Restrictions	38 -35 +50	52,900,000	

Step 1: Calculate the strength factor score for each ratio by using the following algorithms:

Primary Reserve strength factor score = 10 x the primary reserve ratio result

Equity strength factor score = 6 x the equity ratio result

Negative net income ratio result:

Net Income strength factor = 1 + (25 x net income ratio result)

Positive net income ratio result:

Net income strength factor = 1 + (50 x net income ratio result)

Zero result for net income ratio:

Net income strength factor = 1

If the strength factor score for any ratio is greater than or equal to 3, the strength factor score for the ratio is 3.

If the strength factor score for any ratio is less than or equal to -1, the strength factor score for the ratio is -1.

Step 2: Calculate the weighted score for each ratio and calculate the composite score by adding the three weighted scores

Primary Reserve weighted score = 40% x the primary reserve strength factor score

Equity weighted score = 40% x the equity strength factor score

Net Income weighted score = 20% x the net income strength factor score

Composite Score = the sum of all weighted scores

Round the composite score to one digit after the decimal point to determine the final score

RATIO	Ratio	Factor	Weight	Composite Scores
Primary Reserve Ratio	0.1855	1.8553	40%	0.7421
Equity Ratio	0.3485	2.0908	40%	0.8363
Net Income Ratio	(0.0015)	0.9622	20%	<u>0.1924</u>
				1.7708

TOTAL Composite Score - Rounded

1.8

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

"Financial Responsibility Supplemental Schedule"		
Line for Example	Example location of number in the financial statements and/or notes - the number reference to sample numbers; however, could be more lines based on financial statements and/or notes	
Primary Reserve Ratio:		
Expendable Net Assets:		
31	Statement of Financial Position - Total Net Assets	Total net assets 26,990,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivable 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
8	Statement of Financial Position - Property, plant and equipment, net	Property, plant and equipment, net 40,000,000
9	Statement of Financial Position - Lease right-of-use assets, net	Lease right-of-use asset, net 10,000,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
17	Statement of Financial Position - Post-employment and pension liabilities	Post-employment and pension liabilities 6,600,000
20	Statement of Financial Position - Note Payable*	Long-term debt 24,000,000
21	Statement of Financial Position - Lease right-of-use of asset liability	Lease right-of-use asset liability 10,000,000
22	Statement of Financial Position - Line of credit - for long-term purposes*	Line of credit - for long-term purposes 2,000,000
25	Statement of Financial Position - Annuities**	Annuities with donor restrictions 300,000
26	Statement of Financial Position - Term Endowments**	Term endowments with donor restrictions 50,000
27	Statement of Financial Positions—Life Income Funds**	Life income funds with donor restrictions 150,000
29	Statement of Financial Position -Perpetual Funds**	Net assets with donor restrictions: restricted in perpetuity 8,800,000
Total Expenses and Losses:		
(35), 43, 45, 46, 47, 48, 49	Statement of Activities - (Investment return appropriated for spending), Total Operating Expenses, Investments, net of annual spending gain (loss), Other components of net periodic pension costs, Pension-related changes other than net periodic pension, Change in value of split-interest agreements and Other gains (loss)*	Total expenses without donor restrictions 52,980,000
(35), 45	Statement of Activities - (Investment return appropriated for spending) and Investments, net of annual spending, gain (loss)*	Net investment losses 400,000
47	Statement of Activities - Pension-related changes other than periodic pension*	Pension -related changes other than net periodic costs 350,000
Equity Ratio:		
Modified Net Assets:		
24	Statement of Financial Position - Net Assets without Donor Restrictions	Net assets without donor restrictions 15,190,000
30	Statement of Financial Position - Total Net Assets with Donor Restriction	Net assets with donor restrictions 11,800,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Modified Assets:		
12	Statement of Financial Position - Total assets	Total assets 76,240,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivables and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Net Income Ratio:		
51	Statement of Activities - Change in Net Assets Without Donor Restrictions	Change in Net Assets Without Donor Restrictions (80,000)
38, (35), 50	Statement of Activities - (Net assets released from restriction), Total Operating Revenue and Other Additions and Sale of Fixed Assets, gains (losses)	Total Revenues and Gains 52,900,000
		Lease right-of-use assets, net in place as of 7/1/2019 included in Financial Statements as a result of ASU 2016-02 8,000,000
		Related Lease right-of-use liability for the above Lease right-of-use assets as a result of ASU 2016-02 8,000,000

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

SECTION 1: Ratio and Ratio Terms

Primary Reserve Ratio	$\frac{\text{Expendable Net Assets}}{\text{Total Expenses without Donor Restrictions and Losses without Donor Restrictions}}$
Equity Ratio	$\frac{\text{Modified Net Assets}}{\text{Modified Assets}}$
Net Income Ratio	$\frac{\text{Change in Net Assets without Donor Restrictions}}{\text{Total Revenue without Donor Restrictions and Gains without Donor Restrictions}}$

Definitions:

Expendable Net Assets = (total net assets) - (net assets with donor restrictions: restricted in perpetuity)* - (annuities, term endowments and life income funds with donor restrictions)** - (intangible assets) - (net property, plant and equipment)*** + (post-employment and defined benefit pension plan liabilities) + (all long-term debt obtained for long-term purposes, not to exceed total net property, plant and equipment)**** - (unsecured related party transactions)*****

Total Expenses without Donor Restrictions and Losses without Donor Restrictions = All expenses and losses without donor restrictions from the Statement of Activities less any losses without donor restrictions on investments, post-employment and defined benefit pension plans, and annuities. (For institutions that have defined benefit pension and other post-employment plans, total expenses include the nonservice component of net periodic pension and other post-employment plan expenses, and these expenses will be classified as non-operating. Consequently such expenses will be labeled non-operating or included with “other changes –nonoperating changes—in net assets without donor restrictions” when the Statement of Activities includes an operating measure).

Modified Net Assets = (net assets without donor restrictions) + (net assets with donor restrictions) - (intangible assets) - (unsecured related party receivables)

Modified Assets = (total assets) - (intangible assets) - (unsecured related party receivables)

Change in net assets without donor restrictions is taken directly from the audited financial statements

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

Total Revenue without Donor Restriction and Gains without Donor Restrictions = total revenue (including amounts released from restriction) plus total gains. Investment returns are reported as a net amount (interest, dividends, unrealized and realized gains and losses net of external and direct internal investment expense). Institutions that separately report investment spending as operating revenue (e.g. spending from funds functioning as endowment) and remaining net investment return as a non-operating item, will need to aggregate these two amounts to determine if there is a net investment gain or a net investment loss. (net investment gains are included with total gains).

* Net assets with donor restrictions: restricted in perpetuity is subtracted from total net assets. The amount of net assets with donor restrictions: restricted in perpetuity is disclosed as a line item, part of line item, in a note, or part of a note in the financial statements. When the amount is zero, the institution should identify the source as NA (Not Applicable) in the supplemental schedule.

**_Annuities, term endowments, and life income funds with donor restrictions is subtracted from total net assets. The amount of annuities, term endowments, and life income funds with donor restrictions is disclosed in as a line item, part of line item, in a note, or part of a note in the financial statements. When the amount is zero, the institution should identify the source as NA (Not Applicable) in the supplemental schedule.

***The value of property, plant and equipment includes construction in progress and lease right-of-use assets, and is net of accumulated depreciation/amortization.

**** All Debt obtained for long-term purposes , not to exceed total net property, plant and equipment includes lease liabilities for lease right-of-use assets and the short-term portion of the debt, up to the amount of net property, plant and equipment. If an institution wishes to include the debt obtained through long term lines of credit in total debt obtained for long term purposes, the institution must include a disclosure in the financial statements that the lines of credit exceed twelve months and were used to fund capitalized assets (i.e. property, plant and equipment or capitalized expenditures per Generally Accepted Accounting Principles). The disclosure must include the issue date, term, nature of capitalized amounts and amounts capitalized. Institutions that do not include long term lines of credit in total debt obtained for long term purposes do not need to provide the additional disclosure. The debt obtained for long-term purposes will be limited to only those amounts disclosed in the financial statements that were used to fund capitalized assets. Any amount from long term lines of credit used to fund operations must be excluded from debt obtained for long-term purposes.

*** **Unsecured related party receivables as required at 34 C.F.R 668.23(d)

SECTION 3: Example Financial Statements and Composite Score Calculations

STATEMENT OF FINANCIAL POSITION

Line		
1	Cash and cash equivalents	1,720,000
2	Accounts receivable, net	6,000,000
3	Prepaid expenses	1,900,000
4	Related party receivable	100,000
5	Contributions receivable, net	2,000,000
6	Student loans receivable, net	8,000,000
7	Investments	6,000,000
8	Property, plant and equipment, net	40,000,000
9	Lease right-of-use asset, net	10,000,000
10	Goodwill	500,000
11	Deposits	20,000
12	Total Assets	76,240,000
13	Line of credit - short term	300,000
14	Accounts payable	1,000,000
15	Accrued expenses	3,500,000
16	Deferred revenue	650,000
17	Post-employment and pension liability	6,600,000
18	Line of credit - operating	200,000
19	Other liabilities	1,000,000
20	Notes payable	24,000,000
21	Lease right-of-use asset liability	10,000,000
22	Line of credit for long term purposes	2,000,000
23	Total Liabilities	49,250,000
24	Net Assets without Donor Restrictions	15,190,000
25	Net Assets with Donor Restrictions	
26	Annuities	300,000
27	Term endowments	50,000
28	Life income funds	150,000
29	Other restricted by purpose and time	2,500,000
30	Restricted in perpetuity	8,800,000
31	Total Net Assets with Donor Restrictions	11,800,000
32	Total Net Assets	26,990,000
	Total Liabilities and Net Assets	76,240,000

STATEMENT OF ACTIVITIES

Line		
	Changes in Net Assets Without Donor Restrictions	
	Operating Revenue and Other Additions:	
33	Tuition and fees, net	43,200,000
34	Contributions	1,200,000
35	Investment return appropriated for spending	200,000
36	Auxiliary enterprises	7,000,000
37	Net assets released from restriction	500,000
38	Total Operating Revenue and Other Additions	52,100,000
	Operating Expenses and Other Deductions:	
39	Education and research expenses	38,000,000
40	Depreciation and Amortization	5,000,000
41	Interest expense	2,880,000
42	Auxiliary enterprises	5,200,000
43	Total Operating Expenses	51,080,000
44	Change in Net Assets from Operations	1,020,000
	Non-Operating Changes	
45	Investments, net of annual spending, gain (loss)	(600,000)
46	Other components of net periodic pension costs	(1,000,000)
47	Pension-related changes other than net periodic pension	(350,000)
48	Change in value of split-interest agreements	(80,000)
49	Other gains (losses)	(70,000)
50	Sale of fixed assets, gains (losses)	1,000,000
	Total Non-Operating Changes	(1,100,000)
51	Change in Net Assets Without Donor Restrictions	(80,000)
	Change in Net Assets With Donor Restrictions	
52	Contributions	400,000
53	Net assets released from restriction	(500,000)
54	Change in Net Assets With Donor Restrictions	(100,000)
55	Change in Net Assets	(180,000)
56	Net Assets, Beginning of Year	27,170,000
31	Net Assets, End of Year	26,990,000

Calculating the Composite Score

Lines

	31-29-(25+26+27)-10-(8+9)+17		
Primary Reserve Ratio = Expendable Net Assets	+(20+21+22) -4	9,690,000	0.1855
/ Total expenses and Losses Without Donor Restrictions	43 +46 +48 +49	52,230,000	

Equity Ratio = Modified Net Assets	24 +30 -10 -4	26,340,000	0.3485
/ Modified assets	12 -10 -4	75,590,000	

Net Income Ratio = Change in Net Assets without Donor Restrictions	51	(80,000)	(0.0015)
Total Revenue and Gains Without Donor Restrictions	38 -35 +50	52,900,000	

Step 1: Calculate the strength factor score for each ratio by using the following algorithms:

Primary Reserve strength factor score = 10 x the primary reserve ratio result

Equity strength factor score = 6 x the equity ratio result

Negative net income ratio result:

Net Income strength factor = 1 + (25 x net income ratio result)

Positive net income ratio result:

Net income strength factor = 1 + (50 x net income ratio result)

Zero result for net income ratio:

Net income strength factor = 1

If the strength factor score for any ratio is greater than or equal to 3, the strength factor score for the ratio is 3.

If the strength factor score for any ratio is less than or equal to -1, the strength factor score for the ratio is -1.

Step 2: Calculate the weighted score for each ratio and calculate the composite score by adding the three weighted scores

Primary Reserve weighted score = 40% x the primary reserve strength factor score

Equity weighted score = 40% x the equity strength factor score

Net Income weighted score = 20% x the net income strength factor score

Composite Score = the sum of all weighted scores

Round the composite score to one digit after the decimal point to determine the final score

RATIO	Ratio	Factor	Weight	Composite Scores
Primary Reserve Ratio	0.1855	1.8553	40%	0.7421
Equity Ratio	0.3485	2.0908	40%	0.8363
Net Income Ratio	(0.0015)	0.9622	20%	<u>0.1924</u>
				1.7708

TOTAL Composite Score - Rounded

1.8

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

"Financial Responsibility Supplemental Schedule"		
Line for Example	Example location of number in the financial statements and/or notes - the number reference to sample numbers; however, could be more lines based on financial statements and/or notes	
Primary Reserve Ratio:		
Expendable Net Assets:		
31	Statement of Financial Position - Total Net Assets	Total net assets 26,990,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivable 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
8	Statement of Financial Position - Property, plant and equipment, net	Property, plant and equipment, net 40,000,000
9	Statement of Financial Position - Lease right-of-use assets, net	Lease right-of-use asset, net 10,000,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
17	Statement of Financial Position - Post-employment and pension liabilities	Post-employment and pension liabilities 6,600,000
20	Statement of Financial Position - Note Payable*	Long-term debt 24,000,000
21	Statement of Financial Position - Lease right-of-use of asset liability	Lease right-of-use asset liability 10,000,000
22	Statement of Financial Position - Line of credit - for long-term purposes*	Line of credit - for long-term purposes 2,000,000
25	Statement of Financial Position - Annuities**	Annuities with donor restrictions 300,000
26	Statement of Financial Position - Term Endowments**	Term endowments with donor restrictions 50,000
27	Statement of Financial Positions—Life Income Funds**	Life income funds with donor restrictions 150,000
29	Statement of Financial Position -Perpetual Funds**	Net assets with donor restrictions: restricted in perpetuity 8,800,000
Total Expenses and Losses:		
(35), 43, 45, 46, 47, 48, 49	Statement of Activities - (Investment return appropriated for spending), Total Operating Expenses, Investments, net of annual spending gain (loss), Other components of net periodic pension costs, Pension-related changes other than net periodic pension, Change in value of split-interest agreements and Other gains (loss)*	Total expenses without donor restrictions 52,980,000
(35), 45	Statement of Activities - (Investment return appropriated for spending) and Investments, net of annual spending, gain (loss)*	Net investment losses 400,000
47	Statement of Activities - Pension-related changes other than periodic pension*	Pension -related changes other than net periodic costs 350,000
Equity Ratio:		
Modified Net Assets:		
24	Statement of Financial Position - Net Assets without Donor Restrictions	Net assets without donor restrictions 15,190,000
30	Statement of Financial Position - Total Net Assets with Donor Restriction	Net assets with donor restrictions 11,800,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Modified Assets:		
12	Statement of Financial Position - Total assets	Total assets 76,240,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivables and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Net Income Ratio:		
51	Statement of Activities - Change in Net Assets Without Donor Restrictions	Change in Net Assets Without Donor Restrictions (80,000)
38, (35), 50	Statement of Activities - (Net assets released from restriction), Total Operating Revenue and Other Additions and Sale of Fixed Assets, gains (losses)	Total Revenues and Gains 52,900,000
		Lease right-of-use assets, net in place as of 7/1/2019 included in Financial Statements as a result of ASU 2016-02 8,000,000
		Related Lease right-of-use liability for the above Lease right-of-use assets as a result of ASU 2016-02 8,000,000

Issue Paper 4
Session 3: February 12-15, 2018

Issue:	Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes
Statutory cites:	§§455(a)(6) and 455(h) of the Higher Education Act, as amended
Regulatory cites:	§§ 668.41 and 685.304
Summary of Changes:	To facilitate transparency and fully inform prospective, enrolled, and departing students: ▪ Amend “Reporting and disclosure of information” [§ 668.41] to (1) require schools that use pre-dispute arbitration agreements and/or class action waivers to disclose that information in an easily accessible format for students, prospective students, and the public, and (2) require these schools to provide an annual notification of this information to enrolled students. ▪ Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement (similar to the current requirement that schools provide information regarding the FSA Ombudsman) that schools that use pre-dispute arbitration agreements and/or class action waivers review with the student borrower information on the availability of the school’s internal dispute resolution process and provide to the student a written disclosure explaining any internal dispute process; and ▪ Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement for schools using pre-dispute arbitration agreements and/or class action waivers, that the school review with the student borrower the pre-dispute arbitration and/or class action waiver process.
Changes:	See regulatory text below.

§ 668.41 Reporting and disclosure of information.

(a) Definitions. The following definitions apply to this subpart:

* * * * *

Undergraduate students, for purposes of §§ 668.45 and 668.48 only, means students enrolled in a bachelor's degree program, an associate degree program, or a vocational or technical program below the baccalaureate level.

(b) Disclosure through internet or intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for—

(1) Enrolled students or current employees by posting the information on an internet website or an intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and

(2) Prospective students or prospective employees by posting the information on an internet website.

(c) Notice to enrolled students. (1) An institution annually must distribute to all enrolled students a notice of the availability of the information required to be disclosed pursuant to paragraphs (d), (e), (g), and (h) of this section, and pursuant to 34 CFR 99.7 (§ 99.7 sets forth the notification requirements of the Family Educational Rights and Privacy Act of 1974). The notice must list and briefly describe the information and tell the student how to obtain the information.

(2) An institution that discloses information to enrolled students as required under paragraphs (d), (e), (g), or (h) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

(i) The exact electronic address at which the information is posted; and

(ii) A statement that the institution will provide a paper copy of the information on request.

(d) General disclosures for enrolled or prospective students. An institution must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning—

(1) Financial assistance available to students enrolled in the institution (pursuant to §668.42).

(2) The institution (pursuant to §668.43).

* * * * *

(h) *Enrolled students, prospective students, and the public -- disclosure of an institution's use of pre-dispute arbitration agreements and/or class action waivers for students receiving Title IV Federal student aid.* (1) An institution of higher education must make available to enrolled students, prospective students, and the public easily accessible information regarding any class action waiver or pre-dispute arbitration agreement that is included in any agreement between the institution and students receiving title IV Federal student aid. The institution may not use an intranet website for the purpose of providing this notice to prospective students or the public.

(2) The institution must provide an annual notice to all enrolled students, pursuant to paragraph (c)(1) of this section, of the information described in paragraph (h)(1). If the institution chooses to make the disclosure available by posting the disclosure on an internet website or an intranet website, such disclosure must include the exact electronic address at which the disclosure is posted, a brief description of the disclosure, and a statement that the institution will provide a paper copy of the disclosure upon request.

(3) For the purposes of this paragraph (h), the following definitions apply:

(i) *Class action* means a lawsuit or an arbitration proceeding in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(ii) *Class action waiver* means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student that prevents an individual from filing or participating in a class action.

(iii) *Pre-dispute arbitration agreement* means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student requiring arbitration of any future dispute between the parties.

(Authority: 20 U.S.C. 1092)

§ 685.304 Counseling borrowers.

(a) Entrance counseling. (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized or Unsubsidized Federal Stafford Loan, or Federal SLS Loan.

(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior student Direct PLUS Loan or student Federal PLUS Loan.

(3) Entrance counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) (A) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(B) If a standardized interactive electronic tool is used to provide entrance counseling to the borrower, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(4) If entrance counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the entrance counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence, distance education, or study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

(6) Entrance counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

- (ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;
- (x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;
- (xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records;
- (xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan;
- (xiii) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), provide a description of the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;
- (xiv) If the school requires borrowers to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;
- (xv) If the school requires borrowers to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions; and
- (xvi) For first-time borrowers as defined in § 685.200(f)(1)(i), explain the limitation on eligibility for Direct Subsidized Loans and possible borrower responsibility for accruing interest described in § 685.200(f), including—
 - (A) The possible loss of eligibility for additional Direct Subsidized Loans;
 - (B) How a borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are calculated;
 - (C) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans; and
 - (D) The impact of borrower responsibility for accruing interest on the borrower's total debt.
- (7) Entrance counseling for graduate or professional student Direct PLUS Loan borrowers must—
 - (i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, of student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student Direct PLUS Loan borrower who has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in § 685.301(a)(3)(i)(A) through (a)(3)(i)(C); and

(iv) For a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xii) of this section.

(v) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), for a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(xiii) through (a)(6)(xv) of this section.

(8) A school may adopt an alternative approach for entrance counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to entrance counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) Exit counseling. (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must, within 30 days after the school learns that the student borrower has withdrawn from school or failed to complete the exit counseling as required, be provided either through interactive electronic means, by mailing written counseling materials to the student borrower at the student borrower's last known address, or by sending written counseling materials to an email address provided by the student borrower that is not an email address associated with the school sending the counseling materials.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for enrollment in the same school or in the same program of study at the same school;

(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income-contingent repayment, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

- (vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;
- (vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;
- (viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;
- (ix) Provide—
 - (A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and
 - (B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;
- (x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;
- (xi) If the school required the borrower to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), review for the student borrower the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;
- (xii) If the school required the borrower to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;
- (xiii) If the school required the borrower to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions;
- (xiv) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;
- (xv) Explain to first-time borrowers, as defined in § 685.200(f)(1)(i)—
 - (A) How the borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are determined under § 685.200(f);
 - (B) The sum of the borrower's subsidized usage periods, as determined under § 685.200(f)(1)(iii), at the time of the exit counseling;
 - (C) The consequences of continued borrowing or enrollment, including--

- (1) The possible loss of eligibility for additional Direct Subsidized Loans; and
- (2) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans;
- (D) The impact of the borrower becoming responsible for accruing interest on total student debt;
- (E) That the Secretary will inform the student borrower of whether he or she is responsible for accruing interest on his or her Direct Subsidized Loans; and
- (F) That the borrower can access NSLDS to determine whether he or she is responsible for accruing interest on any Direct Subsidized Loans as provided in § 685.200(f)(3);
- (xvi) A general description of the types of tax benefits that may be available to borrowers; and
- (xvii) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).
- (5) The school must ensure that the information required in paragraph (b)(4)(xvi) of this section is provided to the Secretary within 60 days after the student borrower provides the information.
- (6)(A) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.
- (B) If a standardized interactive electronic tool is used to provide exit counseling to the borrower, including the electronic interactive exit counseling offered by the Secretary, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:
 - (1) In person; or
 - (2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.
- (7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.
- (8)(i) For students who have received loans under both the FFEL Program and the Direct Loan Program for enrollment in a school, the school's compliance with the exit counseling requirements in paragraph (b) of this section satisfies the exit counseling requirements in 34 CFR 682.604(a) if the school ensures that the exit counseling also provides the borrower with the information described in 34 CFR 682.604(a)(2)(i) and (ii).

(ii) A student's completion of electronic interactive exit counseling offered by the Secretary satisfies the requirements of paragraph (b) of this section and, for students who have also received FFEL Program loans for enrollment in the school, 34 CFR 682.604(a).

(Authority: 20 U.S.C. 1087a et seq.)

Issue Paper 4
Session 3: February 12-15, 2018

Issue: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes

Statutory cites: §§455(a)(6) and 455(h) of the Higher Education Act, as amended

Regulatory cites: §§ 668.41 and 685.304

Summary of Changes: To facilitate transparency and fully inform prospective, enrolled, and departing students:

- Amend “Reporting and disclosure of information” [§ 668.41] to (1) require schools that use pre-dispute arbitration agreements and/or class action waivers to disclose that information in an easily accessible format for students, prospective students, and the public, and (2) require these schools to provide an annual notification of this information to enrolled students.
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement (similar to the current requirement that schools provide information regarding the FSA Ombudsman) that schools that use pre-dispute arbitration agreements and/or class action waivers review with the student borrower information on the availability of the school’s internal dispute resolution process and provide to the student a written disclosure explaining any internal dispute process; and
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement for schools using pre-dispute arbitration agreements and/or class action waivers, that the school review with the student borrower the pre-dispute arbitration and/or class action waiver process.

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Changes: See regulatory text below.

§ 668.41 Reporting and disclosure of information.

(a) Definitions. The following definitions apply to this subpart:

* * * * *

Undergraduate students, for purposes of §§ 668.45 and 668.48 only, means students enrolled in a bachelor’s degree program, an associate degree program, or a vocational or technical program below the baccalaureate level.

(b) Disclosure through internet or intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for—

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(1) Enrolled students or current employees by posting the information on an internet website or an intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and

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(2) Prospective students or prospective employees by posting the information on an internet website.

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(c) Notice to enrolled students. (1) An institution annually must distribute to all enrolled students a notice of the availability of the information required to be disclosed pursuant to paragraphs (d), (e), (g), and (h) of this section, and pursuant to 34 CFR 99.7 (§ 99.7 sets forth the notification requirements of the Family Educational Rights and Privacy Act of 1974). The notice must list and briefly describe the information and tell the student how to obtain the information.

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(2) An institution that discloses information to enrolled students as required under paragraphs (d), (e), (g), or (h) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

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(i) The exact electronic address at which the information is posted; and

(ii) A statement that the institution will provide a paper copy of the information on request.

(d) General disclosures for enrolled or prospective students. An institution must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning—

(1) Financial assistance available to students enrolled in the institution (pursuant to §668.42).

(2) The institution (pursuant to §668.43).

* * * * *

(h) *Enrolled students, prospective students, and the public -- disclosure of an institution's use of pre-dispute arbitration agreements and/or class action waivers for students receiving Title IV Federal student aid.* (1) An institution of higher education must make available to enrolled students, prospective students, and the public information regarding any easily accessible information regarding any class action waiver or pre-dispute arbitration agreement, that is included in any agreement between the institution and students receiving title IV Federal student aid. The institution may not use an intranet website for the purpose of providing this notice to prospective students or the public.

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(2) The institution must provide an annual notice to all enrolled students, pursuant to paragraph (c)(1) of this section, of the information described in paragraph (h)(1). If the institution chooses to make the disclosure available by posting the disclosure on an internet website or an intranet website, such disclosure must include the exact electronic address at which the disclosure is posted, a brief description of the disclosure, and a statement that the institution will provide a paper copy of the disclosure upon request.

(3) For the purposes of this paragraph (h), the following definitions apply:

(i) Class action means a lawsuit or an arbitration proceeding in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(ii) Class action waiver means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student that prevents an individual from filing or participating in a class action.

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(iii) Pre-dispute arbitration agreement means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student requiring arbitration of any future dispute between the parties.

(Authority: 20 U.S.C. 1092)

§ 685.304 Counseling borrowers.

(a) Entrance counseling. (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized or Unsubsidized Federal Stafford Loan, or Federal SLS Loan.

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(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior student Direct PLUS Loan or student Federal PLUS Loan.

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(3) Entrance counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) (A) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(B) If a standardized interactive electronic tool is used to provide entrance counseling to the borrower, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(4) If entrance counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the entrance counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence, distance education, or study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

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(6) Entrance counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

(ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

(x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

(xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records;

(xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan;

(xiii) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), provide a description of the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

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(xiv) If the school requires borrowers to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xv) If the school requires borrowers to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions; and

(xvi) For first-time borrowers as defined in § 685.200(f)(1)(i), explain the limitation on eligibility for Direct Subsidized Loans and possible borrower responsibility for accruing interest described in § 685.200(f), including—

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(A) The possible loss of eligibility for additional Direct Subsidized Loans;

(B) How a borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are calculated;

(C) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans; and

(D) The impact of borrower responsibility for accruing interest on the borrower's total debt.

(7) Entrance counseling for graduate or professional student Direct PLUS Loan borrowers must—

(i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, of student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student Direct PLUS Loan borrower who has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in § 685.301(a)(3)(i)(A) through (a)(3)(i)(C); and

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(iv) For a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xii) of this section.

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(v) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), for a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(xiii) through (a)(6)(xv) of this section.

(8) A school may adopt an alternative approach for entrance counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to entrance counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) Exit counseling. (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must, within 30 days after the school learns that the student borrower has withdrawn from school or failed to complete the exit counseling as required, be provided either through interactive electronic means, by mailing written counseling materials to the student borrower at the student borrower's last known address, or by sending written counseling materials to an email address provided by the student borrower that is not an email address associated with the school sending the counseling materials.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for enrollment in the same school or in the same program of study at the same school;

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(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income-contingent repayment, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

(vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;

(vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;

(viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(ix) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;

(xi) If the school required the borrower to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), review for the student borrower the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

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(xii) If the school required the borrower to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xiii) If the school required the borrower to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions;

(xiv) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;

(xv) Explain to first-time borrowers, as defined in § 685.200(f)(1)(i)—

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(A) How the borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are determined under § 685.200(f);

(B) The sum of the borrower's subsidized usage periods, as determined under § 685.200(f)(1)(iii), at the time of the exit counseling;

(C) The consequences of continued borrowing or enrollment, including--

(1) The possible loss of eligibility for additional Direct Subsidized Loans; and

(2) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans;

(D) The impact of the borrower becoming responsible for accruing interest on total student debt;

(E) That the Secretary will inform the student borrower of whether he or she is responsible for accruing interest on his or her Direct Subsidized Loans; and

(F) That the borrower can access NSLDS to determine whether he or she is responsible for accruing interest on any Direct Subsidized Loans as provided in § 685.200(f)(3);

(xvi) A general description of the types of tax benefits that may be available to borrowers; and

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(xvii) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).

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(5) The school must ensure that the information required in paragraph (b)(4)(xvi) of this section is provided to the Secretary within 60 days after the student borrower provides the information.

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(6)(A) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.

(B) If a standardized interactive electronic tool is used to provide exit counseling to the borrower, including the electronic interactive exit counseling offered by the Secretary, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(8)(i) For students who have received loans under both the FFEL Program and the Direct Loan Program for enrollment in a school, the school's compliance with the exit counseling requirements in paragraph (b) of this section satisfies the exit counseling requirements in 34 CFR 682.604(a) if the school ensures that the exit counseling also provides the borrower with the information described in 34 CFR 682.604(a)(2)(i) and (ii).

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(ii) A student's completion of electronic interactive exit counseling offered by the Secretary satisfies the requirements of paragraph (b) of this section and, for students who have also received FFEL Program loans for enrollment in the school, 34 CFR 682.604(a).

(Authority: 20 U.S.C. 1087a et seq.)

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Issue Paper 5
Session 3: February 12 - 15, 2018

Issue: Closed School Discharge

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 674.33(g), 682.402(d), and 685.214

Summary of change:

Amends the application requirements for closed school discharges to reflect current practice, which requires that a borrower applying for a closed school discharge submit a completed application form, rather than a sworn statement. The proposed regulations also would expand the window for closed school discharges from 120 days to 150 days, and provide for Departmental review of a closed school discharge claim denied by a guaranty agency.

Changes: See regulatory text below.

§ 674.33 Repayment.

* * * * *

(g) Closed school discharge—(1) General.

* * * * *

(4) Borrower qualification for discharge. Except as provided in paragraph (g)(3) of this section, in order to qualify for discharge of an NDSL or Federal Perkins Loan, a borrower must submit to the holder of the loan a completed application on the form approved by the Secretary, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower—

(A) Received the proceeds of a loan to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to the school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law; and

(C) Did not complete and is not in the process of completing the program of study through a teach-out at another school as defined in 34 CFR 602.2 and administered in accordance with 34 CFR 602.207(b)(6), by transferring academic credit earned at the closed school to another school, or by any other comparable means;

* * * * *

(v) If the borrower fails to submit the application described in paragraph (g)(4) of this section within 60 days of the holder of the loan's mailing the discharge application, the holder of the loan resumes collection and grants forbearance of principal and interest for the period during which collection activity was suspended.

* * * * *

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(d) *Closed school*—(1) *General*. (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges the borrower's obligation with respect to the loan in accordance with the provisions of paragraph (d) of this section, if the borrower (or the student for whom a parent received a PLUS loan) could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled closed, or the borrower (or student) withdrew from the school not more than 150 days prior to the date the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law.

* * * * *

(6) ***

(ii) ***

(B) If a guaranty agency determines that a school appears to have closed, it, must within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 150 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency must—

(1) Notify all lenders participating in its program to mail a discharge application approved by the Secretary to all borrowers who may be eligible for a closed school discharge; and

(2) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 150 days prior to the closure date, and mail a discharge application to the borrower. The application informs the borrower of the procedures and eligibility criteria for obtaining a discharge.

* * * * *

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(ii)(C) or (D) of this section does not qualify for a discharge, the agency must notify the borrower in writing of that determination, the reasons for the decision, and how the borrower may ask the Secretary to review the decision within 30 days after the date the agency—

(1) Made that determination based on information available to the guaranty agency;

(2) Was notified by the Secretary that the school had not closed;

(3) Was notified by the Secretary that the school had closed on a date that was more than 150 days after the borrower (or student) withdrew from the school;

(4) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(5) Received the borrower's completed application.

* * * * *

(G) Upon receipt of a closed school discharge claim filed by a lender, the agency must review the borrower's completed application in light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations, and must take the following actions—

(1) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (d) of this section, it must pay the claim in accordance with § 682.402(h) not later than 90 days after the agency received the claim; or

(2) If the agency determines that the borrower does not qualify for a discharge, the agency must, not later than 90 days after the agency received the claim, return the claim to the lender with an explanation of the reasons for its determination.

(H) If a borrower fails to submit the completed application described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender or guaranty agency must resume collection and must be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The lender or guaranty agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

* * * * *

(J)(1) Within 30 days after receiving the borrower's request for review of its decision that the borrower did not qualify for a discharge under paragraph (d)(6)(ii)(F) of this section, the agency must forward the borrower's discharge request and all relevant documentation to the Secretary.

(2) After reviewing the documents provided by the agency, the Secretary notifies the agency and the borrower of the decision on the borrower's application for a discharge. If the Secretary determines that the borrower is not eligible for a discharge under paragraph (d) of this section, within 30 days after being informed of the Secretary's decision, the agency must take the actions described in paragraph (d)(6)(ii)(H) of this section, as applicable.

(3) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (d) of this section, the agency must, within 30 days after being informed of the Secretary's decision, take the actions required under paragraphs (d)(6)(ii)(E) and (d)(6)(ii)(G)(1) of this section and the lender must take the actions described in paragraph (d)(7)(iv) of this section, as applicable.

§685.214 Closed school discharge.

* * * * *

(c) *Borrower qualification for discharge.* (1) In order to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to —

(i) Certify that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction or adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law; and

(C) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

* * * * *

(f) *Discharge procedures.*(1) After confirming the date of the school's closure, the Secretary identifies any Direct Loan borrowers (or students on whose behalf a parent borrowed) who appears to have been enrolled at the school on the closure date or to have withdrawn not more than 150 days prior to the closure date.

* * * * *

(4) If a borrower fails to submit a completed application described in paragraph (c) of this section within 60 days of the Secretary's mailing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

* * * * *

Issue Paper 5
Session 3: February 12 - 15, 2018

Issue: Closed School Discharge

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 674.33(g), 682.402(d), and 685.214

Summary of change:

Amends the application requirements for closed school discharges to reflect current practice, which requires that a borrower applying for a closed school discharge submit a completed application form, rather than a sworn statement. The proposed regulations also would expand the window for closed school discharges from 120 days to 150 days, and provide for Departmental review of a closed school discharge claim denied by a guaranty agency.

Changes: See regulatory text below.

§ 674.33 Repayment.

* * * * *

(g) *Closed school discharge—(1) General.*

* * * * *

(4) *Borrower qualification for discharge.* Except as provided in paragraph (g)(3) of this section, in order to qualify for discharge of an NDSL or Federal Perkins Loan, a borrower must submit to the holder of the loan a completed application on the form approved by the Secretary, and the factual assertions in the application, must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower—

(A) Received the proceeds of a loan to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to the school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law; and

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(C) Did not complete and is not in the process of completing the program of study through a teach_out at another school as defined in 34 CFR 602.2 and administered in accordance with 34 CFR 602.207(b)(6), by transferring academic credit earned at the closed school to another school, or by any other comparable means;

* * * * *

(v) If the borrower fails to submit the application described in paragraph (g)(4) of this section within 60 days of the holder of the loan's mailing the discharge application, the holder of the loan resumes collection and grants forbearance of principal and interest for the period during which collection activity was suspended.

* * * * *

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(d) *Closed school*—(1) *General*. (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges the borrower's obligation with respect to the loan in accordance with the provisions of paragraph (d) of this section, if the borrower (or the student for whom a parent received a PLUS loan) could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled closed, or the borrower (or student) withdrew from the school not more than 150 days prior to the date the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency, concluding that the school violated State or Federal law.

* * * * *

(6) ***

(ii) ***

(B) If a guaranty agency determines that a school appears to have closed, it must within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 150 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency must—

(1) Notify all lenders participating in its program to mail a discharge application approved by the Secretary to all borrowers who may be eligible for a closed school discharge; and

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(2) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 150 days prior to the closure date, and mail a discharge application to the borrower. The application informs the borrower of the procedures and eligibility criteria for obtaining a discharge.

* * * * *

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(iii)(C) or (D) of this section does not qualify for a discharge, the agency must notify the borrower in writing of that determination, the reasons for the decision, and how the borrower may ask the Secretary to review the decision within 30 days after the date the agency—

(1) Made that determination based on information available to the guaranty agency;

(2) Was notified by the Secretary that the school had not closed;

(3) Was notified by the Secretary that the school had closed on a date that was more than 150 days after the borrower (or student) withdrew from the school;

(4) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(5) Received the borrower's completed application,

* * * * *

(G) Upon receipt of a closed school discharge claim filed by a lender, the agency must review the borrower's completed application in light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations, and must take the following actions—

(1) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (d) of this section, it must pay the claim in accordance with § 682.402(h) not later than 90 days after the agency received the claim; or

(2) If the agency determines that the borrower does not qualify for a discharge, the agency must, not later than 90 days after the agency received the claim, return the claim to the lender with an explanation of the reasons for its determination.

(H) If a borrower fails to submit the completed application described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender or guaranty agency must resume collection and must be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The lender or guaranty agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

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(1)(1) Within 30 days after receiving the borrower's request for review of its decision that the borrower did not qualify for a discharge under paragraph (d)(6)(ii)(F) of this section, the agency must forward the borrower's discharge request and all relevant documentation to the Secretary.

(2) After reviewing the documents provided by the agency, the Secretary notifies the agency and the borrower of the decision on the borrower's application for a discharge. If the Secretary determines that the borrower is not eligible for a discharge under paragraph (d) of this section, within 30 days after being informed of the Secretary's decision, the agency must take the actions described in paragraph (d)(6)(ii)(H) of this section, as applicable.

(3) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (d) of this section, the agency must, within 30 days after being informed of the Secretary's decision, take the actions required under paragraphs (d)(6)(ii)(E) and (d)(6)(ii)(G)(1) of this section and the lender must take the actions described in paragraph (d)(7)(iv) of this section, as applicable.

§685.214 Closed school discharge.

* * * * *

(c) *Borrower qualification for discharge.* (1) In order to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction or adjudication by a Federal or State administrative agency, concluding that the school violated State or Federal law; and

(C) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

* * * * *

(f) *Discharge procedures.* (1) After confirming the date of the school's closure, the Secretary identifies any Direct Loan borrowers (or students on whose behalf a parent borrowed) who appears to have been enrolled at the school on the closure date or to have withdrawn not more than 150 days prior to the closure date.

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(4) If a borrower fails to submit a completed application described in paragraph (c) of this section within 60 days of the Secretary's mailing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

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Issue Paper 6
Session 3: February 12-15, 2018

Issue: False Certification

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cites: 34 CFR 685.215

Summary of change: Amends application requirements for false certification discharges to reflect current practice, which requires that a borrower applying for a false certification discharge submit a completed application form, rather than a sworn statement. The proposed regulations also update the regulatory requirements regarding false certification of eligibility of non-high school graduates for Direct Loans.

Changes: See regulatory text below.

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment

(a) *Basis for discharge—(1) False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

(i) Certified eligibility for a Direct Loan for a student who did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(c) *Borrower qualification for discharge.* In order to qualify for discharge under this section, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary, and the factual assertions in the application must be true and made under penalty of perjury. In the application, the borrower must demonstrate to the satisfaction of the Secretary that the requirements in paragraphs (c) (1) through (6) of this section have been met.

(1) *High school diploma or equivalent.* In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative eligibility requirements, the borrower must certify that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received a disbursement of a loan, in whole or in part, on or after January 1, 1986, to attend a school; and

(ii) Received a Direct Loan at that school and did not have a high school diploma or its recognized equivalent, and did not meet the alternative to graduation from high school eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower the application described in paragraph (c), which explains the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit a completed application within 60 days of the date the Secretary suspended collection efforts, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits a completed application the Secretary determines whether to grant a request for discharge under this section by reviewing the application in light of information available from the Secretary's records and from other sources, including, but not limited to, guaranty agencies, State authorities, and cognizant accrediting associations.

* * * * *

Issue Paper 6
Session 3: February 12-15, 2018

Issue: False Certification

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cites: 34 CFR 685.215

Summary of change: Amends application requirements for false certification discharges to reflect current practice, which requires that a borrower applying for a false certification discharge submit a completed application form, rather than a sworn statement. The proposed regulations also update the regulatory requirements regarding false certification of eligibility of non-high school graduates for Direct Loans.

Changes: See regulatory text below.

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment

(a) *Basis for discharge*—(1) *False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

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(i) Certified eligibility for a Direct Loan for a student who did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

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(c) *Borrower qualification for discharge.* In order to qualify for discharge under this section, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary, and the factual assertions in the application must be true and made under penalty of perjury. In the application, the borrower must demonstrate to the satisfaction of the Secretary that the, requirements in paragraphs (c) (1) through (6) of this section have been met.

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(1) *High school diploma or equivalent.* In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative eligibility requirements, the the borrower must certify that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received a disbursement of a loan, in whole or in part, on or after January 1, 1986, to attend a school; and

(ii) Received a Direct Loan at that school and did not have a high school diploma or its recognized equivalent, and did not meet the alternative to graduation from high school eligibility requirements

described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower the application described in paragraph (c), which explains the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit a completed application within 60 days of the date the Secretary suspended collection efforts, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits a completed application the Secretary determines whether to grant a request for discharge under this section by reviewing the application in light of information available from the Secretary's records and from other sources, including, but not limited to, guaranty agencies, State authorities, and cognizant accrediting associations.

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Issue Paper 7
Session 3: February 12-15, 2018

Issue: Guaranty Agency Collection Fees

Statutory cites: §§428F(a) and 484A(a) of the Higher Education Act, as amended

Regulatory cites: 34 CFR 682.202(b), 682.405(b), and 682.410(b)(2)

Summary of Changes: Prospectively bars guaranty agencies from charging collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency within 60 days of receiving notice of default from the agency.

Prospectively bars guaranty agencies from capitalizing interest on a loan that is sold following the completion of loan rehabilitation.

Changes: See regulatory text below.

§ 682.202 Permissible charges by lenders to borrowers.

[* * *]

(b) Capitalization. (1) Except as provided in §682.405(b)(4), a lender may add accrued interest and unpaid insurance premiums or Federal default fees to the borrower's unpaid principal balance in accordance with this section. This increase in the principal balance of a loan is called "capitalization."

[* * * *]

§ 682.405 Loan rehabilitation agreement.

[* * *]

(b) Terms of agreement. In the loan rehabilitation agreement, the guaranty agency agrees to ensure that its loan rehabilitation program meets the following requirements at all times:

[* * *]

(4)(i) An eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan and must permit the borrower to choose any statutorily available repayment plan for that loan type. The lender must treat the first payment made under the nine payments as the first payment under the applicable maximum repayment term, as defined under § 682.209(a) or (e). For Consolidation loans, the maximum repayment term is based on the balance outstanding at the time of loan rehabilitation.

(ii) The purchase of a rehabilitated loan is not considered a borrower's entry into repayment or resumption of repayment for the purposes of interest capitalization under § 682.202(b).

[* * *]

§ 682.410 Fiscal, administrative, and enforcement requirements.

(b) *Administrative requirements –*

[* * *]

(2) Collection charges. (i) Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency may charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim unless, within the 60-day period following the initial notice described in paragraph (b)(6)(ii) of this section, the borrower enters into an acceptable repayment agreement, including a rehabilitation agreement, and honors that agreement, in which case the guaranty agency must not charge a borrower any collection costs.

(ii) An acceptable repayment agreement may include an agreement described in § 682.200(b) (Satisfactory repayment arrangement), § 682.405, or paragraph (b)(5)(ii)(D) of this section. An acceptable repayment agreement constitutes a repayment arrangement or agreement on repayment terms satisfactory to the guaranty agency, under this section.

(iii) The costs under this paragraph (b)(2) include, but are not limited to, all attorney's fees, collection agency charges, and court costs. Except as provided in §§ 682.401(b)(18)(i) and 682.405(b)(1)(vi)(B), the amount charged a borrower must equal the lesser of—

(A) The amount the same borrower would be charged for the cost of collection under the formula in 34 CFR 30.60; or

(B) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

[* * *]

(4) *Capitalization of unpaid interest.* The guaranty agency must capitalize any unpaid interest due on the loan at the time the agency pays a default claim to the lender, but must not capitalize any unpaid interest thereafter.

[* * *]

Issue Paper 7
Session 3: February 12-15, 2018

Issue: Guaranty Agency Collection Fees

Statutory cites: §§428F(a) and 484A(a) of the Higher Education Act, as amended

Regulatory cites: 34 CFR 682.202(b), 682.405(b), and 682.410(b)(2)

Summary of Changes: Prospectively bars guaranty agencies from charging collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency within 60 days of receiving notice of default from the agency.

Prospectively bars guaranty agencies from capitalizing interest on a loan that is sold following the completion of loan rehabilitation.

Changes: See regulatory text below.

§ 682.202 Permissible charges by lenders to borrowers.

[* * *]

(b) Capitalization. (1) Except as provided in §682.405(b)(4), a lender may add accrued interest and unpaid insurance premiums or Federal default fees to the borrower's unpaid principal balance in accordance with this section. This increase in the principal balance of a loan is called "capitalization."

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[* * * * *]

§ 682.405 Loan rehabilitation agreement.

[* * *]

(b) Terms of agreement. In the loan rehabilitation agreement, the guaranty agency agrees to ensure that its loan rehabilitation program meets the following requirements at all times:

[* * *]

(4)(i) An eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan and must permit the borrower to choose any statutorily available repayment plan for that loan type. The lender must treat the first payment made under the nine payments as the first payment under the applicable maximum repayment term, as defined under § 682.209(a) or (e). For Consolidation loans, the maximum repayment term is based on the balance outstanding at the time of loan rehabilitation.

(ii) The purchase of a rehabilitated loan is not considered a borrower's entry into repayment or resumption of repayment for the purposes of interest capitalization under § 682.202(b).

[* * *]

§ 682.410 Fiscal, administrative, and enforcement requirements.

(b) Administrative requirements –

[* * *]

(2) Collection charges. (i) Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency may charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim unless, within the 60-day period following the initial notice described in paragraph (b)(6)(ii) of this section, the borrower enters into an acceptable repayment agreement, including a rehabilitation agreement, and honors that agreement, in which case the guaranty agency, must not charge a borrower any collection costs.

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(ii) An acceptable repayment agreement may include an agreement described in § 682.200(b) (Satisfactory repayment arrangement), § 682.405, or paragraph (b)(5)(ii)(D) of this section. An acceptable repayment agreement constitutes a repayment arrangement or agreement on repayment terms satisfactory to the guaranty agency, under this section.

(iii) The costs under this paragraph (b)(2) include, but are not limited to, all attorney's fees, collection agency charges, and court costs. Except as provided in §§ 682.401(b)(18)(i) and 682.405(b)(1)(vi)(B), the amount charged a borrower must equal the lesser of—

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(A) The amount the same borrower would be charged for the cost of collection under the formula in 34 CFR 30.60; or

(B) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

[* * *]

(4) Capitalization of unpaid interest. The guaranty agency must capitalize any unpaid interest due on the loan at the time the agency pays a default claim to the lender, but, must not capitalize any unpaid interest thereafter.

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Issue Paper 8
Session 3: February 12-15, 2018

Issue: Whether to recalculate a borrower's Subsidized Usage Period and interest accrual, if applicable, when the borrower receives a discharge of a loan for which he or she has not received all or part of the educational benefit of the loan

Statutory cite: § 455(q) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cite: 34 CFR 685.200(f)

Summary of Change: To eliminate or recalculate the subsidized usage period and, if applicable, restore interest subsidy associated with the Direct Subsidized Loan(s) fully or partially discharged based on school closure, false certification, unpaid refund, or borrower defense, amend 34 CFR 685.200(f)(3)(v) and 685.200(f)(4)(iii).

Changes: See regulatory text below.

§ 685.200 Borrower eligibility.

[* * *]

(f) Limitations on eligibility for Direct Subsidized Loans and borrower responsibility for accruing interest for first-time borrowers on or after July 1, 2013

[* * *]

(3) Borrower responsibility for accruing interest.

(i) Notwithstanding any provision of this part that provides for the borrower to not be responsible for accruing interest on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, and except as provided in paragraphs (f)(6)(v) and (f)(7)(iv) of this section, a first-time borrower becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan beginning on the date—

(A) The borrower has no remaining eligibility period; and

(B) The borrower attends any undergraduate program or preparatory coursework on at least a half-time basis at an eligible institution that participates in the title IV, HEA programs.

(ii) The borrower continues to be responsible for the interest that accrues on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan for which the borrower previously became responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section.

(iii) For any loan for which the borrower becomes responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section, the borrower is responsible for only the interest that accrues after the borrower meets the criteria in paragraph (f)(3)(i) of this section and unpaid interest is capitalized in the same manner as for a Direct Unsubsidized Loan.

(iv) A borrower who completes an undergraduate program and who has not become responsible for accruing interest on Direct Subsidized Loans as a result of attendance in that program does not become responsible for accruing interest under paragraph (f)(3)(i) of this section on any Direct Subsidized Loans received for attendance in any program prior to completing that undergraduate program and for which the borrower has not previously become responsible for accruing interest, regardless of subsequent attendance in any other program.

(v) A borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge that results in a remaining eligibility period greater than zero is not responsible for the interest that accrues on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan unless the borrower once again becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, for the life of the loan, as described in paragraph (f)(3)(i) of this section.

(4) Exceptions to the calculation of subsidized usage periods.

(i) For a first-time borrower who receives a Direct Subsidized Loan in an amount that is equal to the full annual loan limit for a loan period that is less than a full academic year in length, the subsidized usage period is one year.

(ii) For a first-time borrower who is enrolled on a half-time or three-quarter-time basis, the borrower's prorated subsidized usage period is calculated by multiplying the borrower's subsidized usage period by 0.5 or 0.75, respectively.

(iii) For a first-time borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge on a Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan, the Subsidized Usage Period is reduced. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in full, the Subsidized Usage Period of those loans is zero years. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in part, the Subsidized Usage Period may be reduced if the discharge results in the inapplicability of paragraph (f)(4)(i) of this section.

(Authority: 20 U.S.C. 1087a *et seq.*)

Issue Paper 8
Session 3: February 12-15, 2018

Issue: Whether to recalculate a borrower's Subsidized Usage Period and interest accrual, if applicable, when the borrower receives a discharge of a loan for which he or she has not received all or part of the educational benefit of the loan

Statutory cite: § 455(q) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cite: 34 CFR 685.200(f)

Summary of Change: To eliminate or recalculate the subsidized usage period and, if applicable, restore interest subsidy associated with the Direct Subsidized Loan(s) fully or partially discharged based on school closure, false certification, unpaid refund, or borrower defense, amend 34 CFR 685.200(f)(3)(v) and 685.200(f)(4)(iii).

Changes: See regulatory text below.

§ 685.200 Borrower eligibility.

[* * *]

(f) Limitations on eligibility for Direct Subsidized Loans and borrower responsibility for accruing interest for first-time borrowers on or after July 1, 2013

[* * *]

(3) Borrower responsibility for accruing interest.

(i) Notwithstanding any provision of this part that provides for the borrower to not be responsible for accruing interest on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, and except as provided in paragraphs (f)(6)(v) and (f)(7)(iv) of this section, a first-time borrower becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan beginning on the date—

(A) The borrower has no remaining eligibility period; and

(B) The borrower attends any undergraduate program or preparatory coursework on at least a half-time basis at an eligible institution that participates in the title IV, HEA programs.

(ii) The borrower continues to be responsible for the interest that accrues on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan for which the borrower previously became responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section.

(iii) For any loan for which the borrower becomes responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section, the borrower is responsible for only the interest that accrues after the borrower meets the criteria in paragraph (f)(3)(i) of this section and unpaid interest is capitalized in the same manner as for a Direct Unsubsidized Loan.

(iv) A borrower who completes an undergraduate program and who has not become responsible for accruing interest on Direct Subsidized Loans as a result of attendance in that program does not become responsible for accruing interest under paragraph (f)(3)(i) of this section on any Direct Subsidized Loans received for attendance in any program prior to completing that undergraduate program and for which the borrower has not previously become responsible for accruing interest, regardless of subsequent attendance in any other program.

(v) A borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge that results in a remaining eligibility period greater than zero is not responsible for the interest that accrues on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan unless the borrower once again becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, for the life of the loan, as described in paragraph (f)(3)(i) of this section.

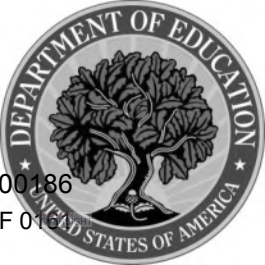
(4) Exceptions to the calculation of subsidized usage periods.

(i) For a first-time borrower who receives a Direct Subsidized Loan in an amount that is equal to the full annual loan limit for a loan period that is less than a full academic year in length, the subsidized usage period is one year.

(ii) For a first-time borrower who is enrolled on a half-time or three-quarter-time basis, the borrower's prorated subsidized usage period is calculated by multiplying the borrower's subsidized usage period by 0.5 or 0.75, respectively.

(iii) For a first-time borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge on a Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan, the Subsidized Usage Period is reduced. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in full, the Subsidized Usage Period of those loans is zero years. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in part, the Subsidized Usage Period may be reduced if the discharge results in the inapplicability of paragraph (f)(4)(i) of this section.

(Authority: 20 U.S.C. 1087a *et seq.*)



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From: Hoblitzell, Barbara
Sent: Monday, February 5, 2018 6:36 PM
To: pres@usstudents.org; stevaughn.bush@law.bison.howard.edu; Ashley.harrington@responsiblelending.org; smartindale@consumer.org; ashafroth@nclc.org; jfredman@baylegal.org; will.hubbard@studentveterans.org; walter@veteranseducationsuccess.org; John.Ellis@oag.texas.gov; Evan.Daniels@azag.gov; randerson@sheeo.org; mcomis@accsc.org; ksolinski@hlcommission.org; sharpv@evangel.edu; Kimberly.Brown@dmu.edu; alacey@thompsoncoburn.com; (b)(6)@gmail.com; hudsok@rpi.edu; drobinson@roanokechowan.edu; rflaniga@spelman.edu; lodriguez.murray@uncf.org; dmadzelan@acenet.edu; NassirianB@aascu.org; Alyssa.Dobson@sru.edu; sklewis@uw.edu; aareich@liberty.edu; gjones@CompassRoseFoundation.org; MB@Ayers.edu; Chris@DeLucaLawLLC.com; m.bottrill@sae.edu; Linda@rawleslaw.com; whall; colleens@mohela.com; oconnell@vsac.org; srepp@ncher.us
Cc: ebantle@fmcs.gov; mcaruso@fmcs.gov; rmiller@fmcs.gov; Weisman, Annmarie
Subject: Draft Issue Papers for Third Round of Negotiated Rulemaking
Attachments: image003.png; ATT00001.htm; BD Issue Paper 3 Session 3 _Appendix B_NFP.xlsx; ATT00002.htm; BD Issue Paper 3 Session 3 _Appendix B_NFP.xlsx; ATT00003.htm; BD Issue Paper 1 Session 3 02.05.18 CLEAN.docx; ATT00004.htm; BD Issue Paper 1 Session 3 02.05.18 REDLINE.docx; ATT00005.htm; BD Issue Paper 2 Session 3 02.05.2018 CLEAN.docx; ATT00006.htm; BD Issue Paper 2 Session 3 02.05.2018 REDLINE.docx; ATT00007.htm; BD Issue Paper 3 Proprietary Schools section 1.docx; ATT00008.htm; BD Issue Paper 3 Session 02.05.2018 CLEAN.docx; ATT00009.htm; BD Issue Paper 3 Session 02.05.2018 REDLINE.docx; ATT00010.htm; BD Issue Paper 3 Session 3 Appendix Section 1 NFP_02-5-2018.docx; ATT00011.htm; BD Issue Paper 4 Session 3 02.05.2018 CLEAN.docx; ATT00012.htm; BD Issue Paper 4 Session 3 02.05.2018 REDLINE.docx; ATT00013.htm; BD Issue Paper 5 Session 3 02.05.2018 CLEAN.docx; ATT00014.htm; BD Issue Paper 5 Session 3 02.05.2018 REDLINE.docx; ATT00015.htm; BD Issue Paper 6 Session 3 02.05.2018 CLEAN.docx; ATT00016.htm; BD Issue Paper 6 Session 3 02.05.2018 REDLINE.docx; ATT00017.htm; BD Issue Paper 7 Session 3 02.05.2018 CLEAN.docx; ATT00018.htm; BD Issue Paper 7 Session 3 02.05.2018 REDLINE.docx; ATT00019.htm; BD Issue Paper 8 Session 3 01.31.2018 CLEAN.docx; ATT00020.htm; BD Issue Paper 8 Session 3 02.05.2018 REDLINE.docx; ATT00021.htm
Importance: High

Good afternoon.

Attached please find clean and red-lined versions of draft regulatory language on the following issues to inform the continued discussions at the next rulemaking session:

- Issue 1: Federal Standard for Borrower Defense Claims
- Issue 2: Borrower Defense Claim Process
- Issue 3: Financial Responsibility and Administrative Capability

Issue 4: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes

Issue 5: Closed School Discharge

Issue 6: False Certification Discharge

Issue 7: Guaranty Agency Collection Fees

Issue 8: Recalculation of Subsidized Usage Period

As a reminder, we will meet for the third session of negotiated rulemaking on these topics February 12-15, 2018. Our sessions will begin at 9:00 am and end at 5:00 pm and will be held in the Barnard Auditorium at the Department of Education, 400 Maryland Ave. S.W., Washington, D.C.

Please feel free to contact Annmarie our facilitators – Ted Bantle, Moira Caruso, or Rozmyn Miller – or me, if you have any questions. I look forward to seeing you all on the 12th.

Kind regards,

b.

**Barbara A.
Hoblitzell**

Borrower Defense Team Lead

U.S. Department of Education |Office of Postsecondary Education

Policy, Planning, and Innovation

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Issue Paper 1
Session 2: January 8-11, 2018

Issue: Whether to establish a Federal standard for the purpose of determining if a borrower can establish a defense to the repayment of a Direct Loan or recover for amounts already paid on a Direct Loan based on an act or omission of an institution.

Statutory cite: Section 455(h) of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 685.206(c), 685.222, 685.300, 685.308

Summary of changes: Creates a regulatory section that establishes, for loans first disbursed on or after July 1, 2019, a new Federal standard applicable to borrower defense claims made by borrowers and for Department recovery actions against institutions. Under the proposed regulations, borrowers with an eligible Direct Loan would be entitled to a discharge (or recover amounts already paid) of all or a portion of the loan if the borrower establishes either: (1) an institutional misrepresentation, (2) a court judgment against an institution, or (3) a final judgment from an arbitrator or administrative tribunal against an institution. The proposed regulations would also describe in detail how a borrower establishes the basis for a claim.

Changes: See regulatory text below.

[Note to negotiators: Section 685.222 is a new section. For ease of readability and editing during negotiated rulemaking, the section is formatted as plain text. Changes made subsequent to the second session of negotiated rulemaking are noted in redlined text.]

Section 685.222 Borrower defense

(a) Introduction.

(1) For the purposes of this section and section 685.206(d), a “borrower defense” refers to an act or omission of an institution at which the borrower enrolled that relates to the making of a Direct Loan or the making of a loan that was repaid by a Direct Consolidation Loan for enrollment at the institution or the provision of educational services for which the loan was made, and includes one or both of the following:

(i) A defense to the repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) For loans first disbursed prior to July 1, 2019, the borrower may assert a borrower defense claim consistent with section 685.206(c).

(3) For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense claim consistent with this section.

(4) For purposes of this section, a borrower may assert a borrower defense claim regarding the “provision of educational services” for an act or omission of the by an institution concerning the nature of the institution’s educational program, the nature of the institution’s financial charges, the employability of graduates of the institution’s educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the institution or educational program, or an accreditor approval of the institution or educational program.

(b) Borrower defense.

(1) For loans first disbursed on or after July 1, 2019, the Secretary will discharge the borrower’s obligation to repay a Direct Loan and will refund amounts paid on the loan, in whole or in part, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the substantial weight of the evidence demonstrates that --

(i) The institution at which the borrower enrolled made a misrepresentation of material fact, opinion, intention, or law upon which the borrower reasonably relied under the circumstances in deciding to obtain a Direct Loan to enroll or continue enrollment in a program at the institution that resulted in financial harm to the borrower;

(ii) The borrower has obtained, from a State or Federal court of competent jurisdiction, a final, definitive judgment rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained; or

(iii) The borrower has obtained, from an arbitrator or a hearing official in a State or Federal administrative tribunal agreed to by the borrower and the institution, a final, definitive judgment, or equivalent final determination, rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained.

(iv) For the purpose of (b)(1)(ii), a “final, definitive judgment rendered in a contested proceeding” includes a Proof of Claim filed against the bankruptcy estate of the institution once the claim is adjudicated in a contested matter or adversary proceeding, such that the claim is no longer contingent, disputed, or unliquidated in a case arising Chapter 11 of the Bankruptcy Code, or allowed by a trustee in a case arising under Chapter 7 of the Bankruptcy Code.

(2) A borrower must file a borrower defense claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation.

(3) The Secretary will find that the substantial weight of the evidence supports the approval of a borrower defense claim when the borrower's statement is supported by corroborating evidence provided by the borrower or otherwise in the possession of the Secretary.

(4) For the purposes of this section—

(i) A "misrepresentation" is a statement, act, or omission by an eligible institution to a borrower that is intentionally false or misleading or made with a reckless disregard for the truth and that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation described in paragraph (b)(1)(i) of this section has occurred includes, but is not limited to:

(A) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(B) Actual employment rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(C) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when invalidated or withdrawn;

(D) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(E) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation;

(F) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is not fulfilled following the enrollment of the borrower;

(G) A representation regarding the amount of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(H) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, the United States armed forces, or other individuals or entities when the institution has no permission to use such an endorsement;

(I) A representation regarding the educational resources provided by the institution that are necessary for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, which may include representations regarding the institution's size, location, facilities, training equipment, or the number, availability, or qualifications of its personnel;

(J) The nature or extent of prerequisites for enrollment in a course or program.

(ii) A violation by the institution of a requirement of the Higher Education Act or the Department's regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(c), as applicable. The Secretary will not approve a borrower defense claim under this section or section 685.206(c) of this Part when the borrower submits a claim based on—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage claims;

(F) Claims about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services; or

(G) Academic disputes and disciplinary matters.

(iii) Financial harm to the borrower has occurred when the borrower suffers monetary loss as a consequence of a misrepresentation described in paragraph (b)(1)(i) of this section or as found by a court, arbitrator, or hearing official pursuant to a judgment as described in paragraphs (b)(1)(ii) and (b)(1)(iii). Financial harm does not include damages for nonmonetary loss such as inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary. Evidence of financial harm includes, but is not limited to the following circumstances:

(A) A significant difference between the borrower's earnings after completing the program and the earnings listed for the borrower's program of study in the institution's marketing materials, website, or other communication made to the student;

(B) Lower or lost wages, extended periods of involuntary unemployment, or the cost of obtaining nontransferable credits;

(C) A significant difference in the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed and the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging;

(D) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; or

(E) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled.

(5) For purposes of this section, the term "institution" includes an eligible institution, its representatives and agents, or any institution, organization, or person with whom the eligible institution has a written agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

Issue Paper 1
Session 2: January 8-11, 2018

Issue: Whether to establish a Federal standard for the purpose of determining if a borrower can establish a defense to the repayment of a Direct Loan or recover for amounts already paid on a Direct Loan based on an act or omission of an institution.

Statutory cite: Section 455(h) of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 685.206(c), 685.222, 685.300, 685.308

Summary of changes: Creates a regulatory section that establishes, for loans first disbursed on or after July 1, 2019, a new Federal standard applicable to borrower defense claims made by borrowers and for Department recovery actions against institutions. Under the proposed regulations, borrowers with an eligible Direct Loan would be entitled to a discharge (or recover amounts already paid) of all or a portion of the loan if the borrower establishes either: (1) an institutional misrepresentation, (2) a court judgment against an institution, or (3) a final judgment from an arbitrator or administrative tribunal against an institution. The proposed regulations would also describe in detail how a borrower establishes the basis for a claim.

Changes: See regulatory text below.

[Note to negotiators: Section 685.222 is a new section. For ease of readability and editing during negotiated rulemaking, the section is formatted as plain text. Changes made subsequent to the second session of negotiated rulemaking are noted in redlined text.]

Section 685.222 Borrower defense

(a) Introduction.

(1) For the purposes of this section and section 685.206(d), a “borrower defense” refers to an act or omission of an institution at which the borrower enrolled that relates to the making of a Direct Loan or the making of a loan that was repaid by a Direct Consolidation Loan for enrollment at the institution or the provision of educational services for which the loan was made, and includes one or both of the following:

(i) A defense to the repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

Deleted: and Department recovery actions against institutions

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(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) For loans first disbursed prior to July 1, 2019, the borrower may assert a borrower defense claim consistent with section 685.206(c).

(3) For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense claim consistent with this section.

(4) For purposes of this section, a borrower may assert a borrower defense claim regarding the "provision of educational services" for an act or omission of the by an institution concerning the nature of the institution's educational program, the nature of the institution's financial charges, the employability of graduates of the institution's educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the institution or educational program, or an accreditor approval of the institution or educational program.

(b) Borrower defense.

(1) For loans first disbursed on or after July 1, 2019, the Secretary will discharge the borrower's obligation to repay a Direct Loan and will refund amounts paid on the loan, in whole or in part, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the substantial weight of the evidence demonstrates that—

(i) The institution at which the borrower enrolled made a misrepresentation of material fact, opinion, intention, or law upon which the borrower reasonably relied under the circumstances in deciding to obtain a Direct Loan to enroll or continue enrollment in a program at the institution that resulted in financial harm to the borrower;

(ii) The borrower has obtained, from a State or Federal court of competent jurisdiction, a final, definitive judgment rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained; or

(iii) The borrower has obtained, from an arbitrator or a hearing official in a State or Federal administrative tribunal agreed to by the borrower and the institution, a final, definitive judgment, or equivalent final determination, rendered in a contested proceeding and was awarded monetary damages against the institution relating to the loan or the provision of educational services for which the loan was obtained.

(iv) For the purpose of (b)(1)(ii), a "final, definitive judgment rendered in a contested proceeding" includes a Proof of Claim filed against the bankruptcy estate of the institution once the claim is adjudicated in a contested matter or adversary proceeding, such that the claim is no longer contingent, disputed, or unliquidated in a case arising Chapter 11 of the Bankruptcy Code, or allowed by a trustee in a case arising under Chapter 7 of the Bankruptcy Code.

Deleted: (2) A borrower may assert a borrower defense Direct Consolidation Loan that repaid a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, or Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act; or a Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act which the borrower had a basis for a borrower defense claim prior to the consolidation.¶

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Deleted: (5) The Department may initiate a recovery action against an institution consistent with paragraph (c) of this section.¶

(6) The Department administers this section consistent with the procedures described in section 685.206(c) and 34 CFR Part 668, Subpart G.¶

Deleted: borrower establishes a defense by clear and convincing evidence that

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(2) A borrower must file a borrower defense claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation.

(3) The Secretary will find that the substantial weight of the evidence supports the approval of a borrower defense claim when the borrower's statement is supported by corroborating evidence provided by the borrower or otherwise in the possession of the Secretary.

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(4) For the purposes of this section—

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(i) A "misrepresentation" is a statement, act, or omission by an eligible institution to a borrower that is intentionally false or misleading or made with a reckless disregard for the truth and that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation described in paragraph (b)(1)(i) of this section has occurred includes, but is not limited to:

Deleted: that would mislead a reasonable person regarding

Deleted: the nature of the educational program, the nature of financial charges, the employability of graduates of an educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the educational program, or an accreditor approval of an institution or educational program

(A) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

(B) Actual employment rates materially different from those included in the institution's marketing materials, website, or other communication made to the student;

Deleted: job placement

(C) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when invalidated or withdrawn;

(D) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(E) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation;

(F) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is not fulfilled following the enrollment of the borrower;

(G) A representation regarding the amount of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(H) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, the United States armed forces, or other individuals or entities when the institution has no permission to use such an endorsement;

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(I) A representation regarding the educational resources provided by the institution that are necessary for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, which may include representations regarding the institution's size, location, facilities, training equipment, or the number, availability, or qualifications of its personnel;

Deleted: program's size, location, facilities, training equipment of similar learning resources necessary for a student to complete the program, or the number, availability, of qualifications of its personnel

(J) The nature or extent of prerequisites for enrollment in a course or program;

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(ii) A violation by the institution of a requirement of the Higher Education Act or the Department's regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(c), as applicable. The Secretary will not approve a borrower defense claim under this section or section 685.206(c) of this Part when the borrower submits a claim based on—

Deleted: (K) Any other circumstances as determined by the Secretary; or

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(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage claims;

(F) Claims about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services; or

Deleted: Educational malpractice, which is tortious c

(G) Academic disputes and disciplinary matters.

(iii) Financial harm to the borrower has occurred when the borrower suffers monetary loss as a consequence of a misrepresentation described in paragraph (b)(1)(i) of this section or as found by a court, arbitrator, or hearing official pursuant to a judgment as described in paragraphs (b)(1)(ii) and (b)(1)(iii). Financial harm does not include damages for nonmonetary loss such as inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary. Evidence of financial harm includes, but is not limited to the following circumstances:

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(A) A significant difference between the borrower's earnings after completing the program and the earnings listed for the borrower's program of study in the institution's marketing materials, website, or other communication made to the student;

(B) Lower or lost wages, extended periods of involuntary unemployment, or the cost of obtaining nontransferable credits;

(C) A significant difference in the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed and the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging;

(D) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; or

(E) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled.

(5) For purposes of this section, the term "institution" includes an eligible institution, its representatives and agents, or any institution, organization, or person with whom the eligible institution has a written agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

Deleted: (B) A significant difference between the borrower's earnings after completing the program and the earnings for similar borrowers employed in the program's intended occupational field, determined by, for example, earnings below the second lowest income quintile for the program of study's intended occupational field according to the Standard Occupational Classification (SOC) code as published by the U.S. Bureau of Labor Statistics;¶

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Deleted: The the Secretary may determine at any time that a borrower defense claim the application should not be approved based on evidence that rebuts the borrower's claim, including any evidence provided by the institution at which the borrower enrolled. Such evidence may include, but is not limited to—¶
(i) For a claim based on licensure exam passage rates, the institution or program has a licensure exam passage rate associated with the program in which the borrower enrolls that, at a minimum, reasonably approximates the passage rates included in the institution's marketing materials, website, or other communication made when the student enrolled;¶
(ii) For a claim based on the inability of the borrower to obtain the necessary certification or licensure for employment in the program's intended field of employment, the borrower has obtained a certification or licensure related to the program in which the borrower enrolled without needing to complete additional coursework after completing the program; or¶
(iii) The institution provided information to the borrower to correct the misrepresentation prior to the borrower enrolling in the program.; or¶
(iv) The institution demonstrated that its representative or agent made a misrepresentation that was inconsistent with or prohibited by the institution's policies, procedures and training at the time it was made.¶

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Deleted: (c) *Department recovery actions against institutions.* The Secretary may initiate a recovery action against an institution when the Secretary determines that the borrower has asserted a successful borrower defense against the institution as described in this section or section 685.206(c) of this Part. ¶

(d) *Limitations period.* A borrower must file a claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation. ¶

§685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.¶

(a) *General.* Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school must—¶
* * *¶

(8) Provide that the school will accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;¶
* * *¶

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts

Issue Paper 2

Session 3: February 12 – 15, 2018

Issue: Developing a regulatory framework for the process of submitting and evaluating a borrower defense to repayment claim.

Statutory cite: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 682.211, 682.410, 685.205, 685.206, and 685.212

Summary of change:

Establishes a regulatory framework for processing borrower defense claims, including provisions for:

- Forbearance;
- The application process;
- Adjudication of a borrower defense claim;
- Notification of the borrower and school of the Department's decision;
- Reconsideration of denials;
- Relief that a borrower may receive if a borrower defense claim is approved.

Changes: See regulatory text below.

§682.211 Forbearance

(i) Mandatory administrative forbearance.

* * * * *

(7) The lender must grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has made a borrower defense claim related to a loan or loans that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k). The lender must grant mandatory administrative forbearance in yearly increments or for a period designated by the Secretary, until the loan is consolidated or the lender is notified by the Secretary to discontinue the forbearance.

* * * * *

§682.410 Fiscal, Administrative, and Enforcement Requirements

* * * * *

(b) * * *

(6) Collection efforts on defaulted loans.

* * * * *

(viii) Upon notification by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k), the guaranty agency must suspend all collection activities on the affected loan for the period designated by the Secretary.

* * * * *

§685.205 Forbearance

* * * * *

(b) Administrative forbearance. In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to—

* * * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under §685.206

(ii) Under §685.214;

(iii) Under §685.215;

(iv) Under §685.216;

(v) Under §685.217;

(vi) Under §685.222; or

(vii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

§685.206 Borrower responsibilities and defenses.

* * * * *

(c) Borrower defenses for loans first disbursed prior to July 1, 2019. (1) In any proceeding to collect on a Direct Loan first disbursed prior to July 1, 2019, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

(i) Tax refund offset proceedings under 26 U.S.C. 6402(d), 31 U.S.C. 3716 and 3720A.

(ii) Wage garnishment proceedings under section 488A of the Act or under 31 U.S.C. 3720D and 34 CFR part 34.

(iii) Salary offset proceedings for Federal employees under 34 CFR part 31, 5 U.S.C. 5514, and 31 U.S.C. 3716.

(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(e).

(2) If the borrower's defense against repayment claim is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G. The Secretary will not initiate such a proceeding more than three years after the date of the final determination of the borrower's defense against repayment claim

(d) Borrower defenses for loans first disbursed on or after July 1, 2019. (1) To assert a borrower defense under § 685.222, a borrower must submit an application under penalty of perjury on a form approved by the Secretary—

(i) Certifying that the borrower received the proceeds of a loan to attend the named school;

(ii) Providing evidence that supports the borrower defense claim; and

(iii) Indicating whether the borrower has made a claim based on the same act or omission of the school on which the borrower defense claim is based with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation.

(2) *Forbearance and suspension of collection activity.* (i) Upon receipt of a borrower's application and at the request of the borrower, the Secretary--

(A) Grants forbearance, if the borrower is not in default on the loan for which a borrower defense has been asserted; or

(B) Suspends collection activity on a defaulted loan.

(ii) If the borrower's claim is denied, the Secretary ends the forbearance or resumes collection 60 days after the date of the denial, unless a request for reconsideration under paragraph (d)(5) of this section is accepted.

(iii) Interest that accrues during the forbearance period or during the suspension of collection activity is not capitalized.

(iv) If the borrower's claim is denied, the forbearance or suspension of collection activity will be reinstated if the borrower submits a request for reconsideration that meets the criteria in paragraph ~~(e)~~(d)(5) of this section.

(3) *Adjudication of borrower defense claim.* The Secretary determines whether the borrower has presented a qualifying borrower defense claim in accordance with the standards in § 685.222.

(i) If the Secretary determines that the borrower's claim does not meet the minimum threshold for consideration of a borrower defense claim, the Secretary provides a written notification to the borrower denying the claim.

(ii) A borrower meets the minimum threshold for consideration of a borrower defense claim if—

(A) The borrower's application provides the information specified in paragraph (d)(1) of this section;

(B) The claim alleges a misrepresentation on the part of the school as described in 685.222(b)(1)(i) or establishes that the borrower has obtained a judgment as described in 685.222(b)(1)(ii) or (iii); and

(C) Provides minimum supporting evidence to corroborate the borrower defense claim.

(iii) If the Secretary determines that the borrower meets the minimum threshold for consideration of a borrower defense claim as described in paragraph (d)(3)(ii) of this section, the Secretary provides written notification of the determination to the borrower and the school. The notification to the school provides the school with a copy of the borrower's application and any supporting evidence submitted with the application. The school may submit a response to the borrower's claim as described in (d)(3)(v)(C) of this section.

(iv) The borrower and the school may provide the Secretary any additional relevant evidence within 45 days of the date of the notification specified in paragraph (d)(3)(iii) of this section.

(v) In resolving the borrower defense claim the Secretary will consider relevant evidence, including --

(A) Department records;

(B) The borrower defense application and any supporting evidence submitted by the borrower; and

(C) Any response or information submitted by the school.

(vi) In resolving the borrower defense claim, the Secretary may—

(A) Consider other relevant information obtained by the Secretary; and

(B) Request additional relevant information from the borrower or the school.

(vii) Upon request, the Secretary provides the borrower any information submitted by the school and provides the school any additional information provided by the borrower. The Secretary further provides the borrower and the school with any other relevant information obtained by the Secretary in resolving the borrower defense claim.

(4) *Written decision.* The Secretary issues a written decision--

(i) Notifying the borrower and the school of the decision on the borrower's borrower defense claim;

(ii) Providing the reasons for the decision;

(iii) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (d)(6) of this section; and

(iv) Informing the borrower and the school of their opportunity to request reconsideration of the claim based on newly discovered evidence pursuant to paragraph (d)(5) of this section.

(5) *Reconsideration of denials.* g (i) The borrower or the school may request reconsideration from the Secretary by submitting newly discovered evidence within 60 days of the date of the written decision in paragraph (d)(4) of this section.

(ii) If the Secretary accepts a request for reconsideration, the Secretary follows the procedures in paragraph (d)(2) of this section for granting forbearance or suspending collection activity, as applicable, and also notifies the borrower and the school that the Secretary has taken such action.

(iii) "Newly discovered evidence" is relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the Secretary's decision on the borrower defense claim and that the Secretary did not rely upon in determination of the borrower defense claim.

(6) *Relief.* (i) If the Secretary grants a borrower's application for a discharge based on the borrower's claim of a borrower defense, the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. In determining the appropriate amount of relief to be provided to the borrower, the factors the Secretary will consider, in a practicable manner, include but are not limited to—

(A) The value of the education that the borrower received from the school; and

(B) The borrower's earning potential.

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief includes, if applicable:

~~(i)~~ (A) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection;

~~(ii)~~ (B) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act; and

~~(iii)~~ (C) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(7) *Cooperation by the borrower.* The Secretary may revoke any relief granted to a borrower who fails to cooperate with the Secretary in any proceeding under paragraph (d)(9) of this section or under Subpart G. Such cooperation includes, but is not limited to--

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense claim; and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(8) *Transfer to the Secretary of the borrower's right of recovery against third parties.* (i) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school its principals, its affiliates, and their successors or its sureties and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (d)(8) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (d)(8) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (d)(8) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(9) *Recovery from the school.* (i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense claim with respect to a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G.

(ii) The Secretary initiates a recovery action against a school no later than three years after the date of the final determination of the borrower's defense to repayment claim.

(iii) The school must repay the Secretary for the amount of the loan which has been discharged and amounts refunded to a borrower for payments made by the borrower to the Secretary unless the school demonstrates that the Secretary's decision to approve the borrower defense claim was clearly erroneous.

(iv) The school may present relevant evidence in the recovery proceeding.* * * * *

§685.212 Discharge of a Loan Obligation

* * * * *

(k) Borrower defenses. (1) If a borrower's application for a discharge of a loan based on a borrower defense is approved under the standards set forth in §§ 685.206(c) or 685.222, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in §§ 685.206(c) or 685.206(d), respectively.(2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under the standards set forth in §§ 685.206(c) or 685.222 with respect to a loan that was repaid by the Direct Consolidation Loan.

(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining--

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section, other than a Direct Subsidized, Unsubsidized, or PLUS Loan, establishes a borrower defense under § 685.206(c) for a Direct Consolidation Loan made before July 1, 2019, or under the standard set forth in § 685.222, for a Direct Consolidation Loan made on or after July 1, 2019; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on or after July 1, 2019 that was paid off by the Direct Consolidation Loan, establishes a borrower defense under § 685.222.

(ii) If the borrower defense claim is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan and affords the borrower further relief, as applicable, in accordance with §685.206(c)(2) or 685.206 (d)(6)(ii).

* * * * *

Section 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) * * *

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to--

* * *

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

* * *

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to sections 685.206, 685.214, 685.215, 685.216, and 685.222 and for which the institution has been determined to be liable as described in Subpart G;

Section 685.308 Remedial actions.

(a) *General.* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of --

(1) The school's violation of a Federal statute or regulation;

(2) The school's negligent or willful false certification under section 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to sections 685.206, 685.214, 685.216, and 685.222

* * * * *

Issue Paper 2

Session 3: February 12 – 15, 2018

Issue: Developing a regulatory framework for the process of submitting and evaluating a borrower defense to repayment claim.

Deleted: (BD)

Statutory cite: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 682.211, 682.410, 685.205, 685.206, and 685.212

Summary of change:

Establishes a regulatory framework for processing borrower defense claims, including provisions for:

Deleted: BD

- Forbearance;
- The application process;
- Adjudication of a borrower defense claim;
- Notification of the borrower and school of the Department's decision;
- Reconsideration of denials;
- Relief that a borrower may receive if a borrower defense claim is approved.

Deleted: claims for Direct Loans first disbursed on or after July 1, 2019,

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Changes: See regulatory text below.

§682.211 Forbearance

(i) Mandatory administrative forbearance.

* * * * *

(7) The lender must grant a mandatory administrative forbearance to a borrower upon being notified by the Secretary that the borrower has made a borrower defense claim related to a loan or loans that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k). The lender must grant mandatory administrative forbearance in yearly increments or for a period designated by the Secretary, until the loan is consolidated or the lender is notified by the Secretary to discontinue the forbearance.

* * * * *

§682.410 Fiscal, Administrative, and Enforcement Requirements

* * * * *

(b) * * *

(6) Collection efforts on defaulted loans.

* * * * *

(viii) Upon notification by the Secretary that the borrower has made a borrower defense claim related to a loan that the borrower intends to consolidate into the Direct Loan Program for the purpose of seeking relief in accordance with section 685.212(k), the guaranty agency must suspend all collection activities on the affected loan for the period designated by the Secretary.

* * * * *

§685.205 Forbearance

* * * * *

(b) Administrative forbearance. In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to—

* * * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge—

(i) Under §685.206

(ii) Under §685.214;

(iii) Under §685.215;

(iv) Under §685.216;

(v) Under §685.217; ,

(vi) Under §685.222; or

(vii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

§685.206 Borrower responsibilities and defenses.

* * * * *

(c) Borrower defenses for loans first disbursed prior to July 1, 2019. (1) In any proceeding to collect on a Direct Loan first disbursed prior to July 1, 2019, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

(i) Tax refund offset proceedings under 26 U.S.C. 6402(d), 31 U.S.C. 3716 and 3720A.

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(ii) Wage garnishment proceedings under section 488A of the Act or under 31 U.S.C. 3720D and 34 CFR part 34.

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(iii) Salary offset proceedings for Federal employees under 34 CFR part 31, 5 U.S.C. 5514, and 31 U.S.C. 3716.

(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(e).

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(2) If the borrower's defense against repayment claim is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G. The Secretary will not initiate such a proceeding more than three years after the date of the final determination of the borrower's defense against repayment claim.

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(d) Borrower defenses for loans first disbursed on or after July 1, 2019. (1) To assert a borrower defense under § 685.2224, a borrower must submit an application under penalty of perjury on a form approved by the Secretary—

(i) Certifying that the borrower received the proceeds of a loan to attend the named school;

(ii) Providing ~~documentation~~ evidence that supports the borrower defense claim; and

(iii) Indicating whether the borrower has made a claim based on the same act or omission of the school on which the borrower defense claim is based with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation.

(2) Forbearance and suspension of collection activity. (i) Upon receipt of a borrower's application and at the request of the borrower, the Secretary--

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(A) Grants forbearance, if the borrower is not in default on the loan for which a borrower defense has been asserted; or

(B) Suspends collection activity on a defaulted loan.

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(ii) If the borrower's claim is denied, the Secretary ends the forbearance or resumes collection 60 days after the date of the denial, unless a request for reconsideration under paragraph (d)(5) of this section is accepted.

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(iii) Interest that accrues during the forbearance period or during the suspension of collection activity is not capitalized.

(iv) If the borrower's claim is denied, the forbearance or suspension of collection activity will be reinstated if the borrower submits a request for reconsideration that meets the criteria in paragraph (e)(d)(5) of this section.

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(3) *Adjudication of borrower defense claim.* The Secretary determines whether the borrower has presented a qualifying borrower defense claim in accordance with the standards in § 685.222.

(i) If the Secretary determines that the borrower's claim does not meet the minimum threshold for consideration of a borrower defense claim, the Secretary provides a written notification to the borrower denying the claim.

(ii) A borrower meets the minimum threshold for consideration of a borrower defense claim if—

(A) The borrower's application provides the information specified in paragraph (d)(1) of this section;

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(B) The claim alleges a misrepresentation on the part of the school as described in 685.222(b)(1)(i) or establishes that the borrower has obtained a judgment as described in 685.222(b)(1)(ii) or (iii); and

(C) Provides minimum supporting evidence to corroborate the borrower defense claim.

(iii) 60. If the Secretary determines that the borrower meets the minimum threshold for consideration of a borrower defense claim as described in paragraph (d)(3)(ii) of this section, the Secretary provides written notification of the determination to the borrower and the school. The notification to the school provides the school with a copy of the borrower's application and any supporting evidence submitted with the application. The school may submit a response to the borrower's claim as described in (d)(3)(v)(C) of this section. The notice to the school provides the school with the opportunity to submit a response to the borrower defense claim, including any relevant documentation or information, to the Department.

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(iv) The borrower and the school may provide the Secretary any additional relevant evidence within 45 days of the date of the notification specified in paragraph (d)(3)(iii) of this section.

(v) In resolving the borrower defense claim the Secretary will consider relevant evidence, including --

(A) Department records;

(B) The borrower defense application and any supporting evidence submitted by the borrower; and

Deleted: documentation

(C) Any response or information submitted by the school.

(vi) In resolving the borrower defense claim, the Secretary may—

(A) Consider other relevant information obtained by the Secretary; and

(B) Request additional relevant information from the borrower or the school.

(vii) Upon request, the Secretary provides the borrower any information submitted by the school and provides the school any additional information provided by the borrower. The Secretary further provides the borrower and the school with any other relevant information obtained by the Secretary in resolving the borrower defense claim.

(4) *Written decision.* The Secretary issues a written decision--

(i) Notifying the borrower and the school of the decision on the borrower's borrower defense claim;

(ii) Providing the reasons for the decision;

(iii) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (d)(6) of this section; and

(iv) Informing the borrower and the school of their opportunity to request reconsideration of the claim based on newly discovered evidence pursuant to paragraph (d)(5) of this section.

(5) *Reconsideration of denials.* g. (i) The borrower or the school may request reconsideration from the Secretary by submitting newly discovered evidence within 60 days of the date of the written decision in paragraph (d)(4) of this section.

Deleted: The decision of the Secretary is final as to the merits of the borrower's claim and any relief that may be granted on the claim. Notwithstanding the foregoing

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(ii) If the Secretary accepts a request for reconsideration, the Secretary follows the procedures in paragraph (d)(2) of this section for granting forbearance or suspending collection activity, as applicable, and also notifies the borrower and the school that the Secretary has taken such action.

(i) If the borrower defense is denied in full or in part, the borrower may request that the Secretary reconsider the borrower defense new evidence support the borrower's claim. ¶

¶

(ii) ¶

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(iii) "Newly discovered evidence" is relevant evidence that the borrower or the school, with reasonable diligence, could not have discovered prior to the Secretary's decision on the borrower defense claim and that the Secretary did not rely upon in determination of the borrower defense claim.

(iiv) The borrower or the school may request reconsideration from the Secretary by submitting newly discovered evidence within 60 days of the date of the written decision as outlined in paragraph (d)(4) of this section. A request for reconsideration must be submitted within 60 days of the date the written decision under paragraph (d)(4) of this section issued. ¶

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(6) *Relief.* (i) If the Secretary grants a borrower's application for a discharge based on the borrower's claim of a borrower defense, the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. In determining the appropriate amount of relief to be provided to the borrower, the factors the Secretary will consider, in a practicable manner, include but are not limited to—

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(A) The value of the education that the borrower received from the school; and

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(B) The borrower's earning potential.

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief includes, if applicable:

(i) (A) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection;

(ii) (B) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act; and

(iii) (C) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(7) Cooperation by the borrower. The Secretary may revoke any relief granted to a borrower who fails to cooperate with the Secretary in any proceeding under paragraph (d)(9) of this section or under Subpart G. Such cooperation includes, but is not limited to--

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense claim; and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(8) Transfer to the Secretary of the borrower's right of recovery against third parties. (i) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school its principals, its affiliates, and their successors or its sureties and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (d)(8) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (d)(8) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (d)(8) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(9) Recovery from the school. (i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense claim with

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respect to a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR 668 subpart G.

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(ii) The Secretary initiates a recovery action against a school no later than three years after the date of the final determination of the borrower's defense to repayment claim.

(iii) The school must repay the Secretary for the amount of the loan which has been discharged and amounts refunded to a borrower for payments made by the borrower to the Secretary unless the school demonstrates that the Secretary's decision to approve the borrower defense claim was clearly erroneous.

(iv) The school may present relevant evidence in the recovery proceeding. * * * * *

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§685.212 Discharge of a Loan Obligation

* * * * *

(k) *Borrower defenses.* (1) If a borrower's application for a discharge of a loan based on a borrower defense is approved under the standards set forth in §§ 685.206(c) or 685.222, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in §§ 685.206(c) or 685.206(d), respectively. (2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under the standards set forth in §§ 685.206(c) or 685.222 with respect to a loan that was repaid by the Direct Consolidation Loan.

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(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining--

(A) Whether the act or omission of the school with regard to the loan described in paragraph (k)(2) of this section, other than a Direct Subsidized, Unsubsidized, or PLUS Loan, establishes a borrower defense under § 685.206(c) for a Direct Consolidation Loan made before July 1, 2019, or under the standard set forth in § 685.222, for a Direct Consolidation Loan made on or after July 1, 2019; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on or after July 1, 2019 that was paid off by the Direct Consolidation Loan, establishes a borrower defense under § 685.222.

(ii) If the borrower defense claim is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan and affords the borrower further relief, as applicable, in accordance with §685.206(c)(2) or 685.206 (d)(6)(iii).

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Section 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) * * *

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to--

* * *

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

Deleted: Provide that the school will a

* * *

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to sections 685.206, 685.214, 685.215, 685.216, and 685.222 and for which the institution has been determined to be liable as described in Subpart G;

Section 685.308 Remedial actions.

(a) *General.* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of: --

Deleted: unenforceability of a loan or loans, or the disbursement of loan amounts for which the borrower was ineligible resulted in whole or in part from-

(1) The school's violation of a Federal statute or regulation;

Deleted: or

(2) The school's negligent or willful false certification under section 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to sections 685.206, 685.214, 685.216, and 685.222

* * * * *

Appendix A: Ratio Methodology for Proprietary Institutions

SECTION 1: Ratio and Ratio Terms

Primary Reserve Ratio $\frac{\text{Adjusted Equity}}{\text{Total Expenses and Losses}}$

Equity Ratio $\frac{\text{Modified Equity}}{\text{Modified Assets}}$

Net Income Ratio $\frac{\text{Income Before Taxes}}{\text{Total Revenues and Gains}}$

Definitions:

Adjusted Equity = (total owner's equity) - (intangible assets) - (unsecured related-party receivables)* - (net property, plant and equipment)** + (post-employment and defined benefit pension liabilities) + (all debt obtained for long-term purposes, not to exceed total net property, plant and equipment)***

Total Expenses and Losses (excludes income tax, discontinued operations, or change in accounting principle), less any losses on investments****, post-employment and defined benefit pension plans, and annuities. (Total expenses include the nonservice component of net periodic pension and other post-employment plan expenses that are classified as non-operating).

Modified Equity = (total owner's equity) - (intangible assets) - (unsecured related-party receivables)

Modified Assets = (total assets) - (intangible assets) - (unsecured related-party receivables)

Income Before Taxes is taken directly from the audited financial statement

Total Revenues and Gains = (total operating revenues) + (non-operating revenue and gains). Investment gains should be recorded net of investment losses. Revenues and gains does not include discontinued operations not considered an operating expense for reporting purposes, or change in accounting principle

* Unsecured related party receivables as required at 34 C.F.R 668.23(d)

** The value of property, plant and equipment includes construction in progress and lease right-of-use assets, and is net of accumulated depreciation/amortization.

*** Debt obtained for long-term purposes, not to exceed total net property, plant and equipment includes lease liabilities for lease right-of-use assets and the short-term portion of the debt, up to the amount of net property, plant and equipment. If an institution wishes to include the debt obtained through long term lines of credit in total debt obtained for long term purposes, the institution must include a disclosure in the financial statements that the lines of credit exceed twelve months and were used to fund capitalized assets (i.e. property, plant and equipment or capitalized expenditures per Generally Accepted Accounting Principles). The disclosure must include the issue date, term, nature of capitalized amounts and amounts capitalized. Institutions that do not include long term lines of credit in total debt obtained for long term purposes do not need to provide the additional disclosure. The debt obtained for long-term purposes will be limited to only those

amounts disclosed in the financial statements that were used to fund capitalized assets. Any amount from long term lines of credit used to fund operations must be excluded from debt obtained for long-term purposes.

***For investments, any loss is the net loss for investments.

Issue Paper 3
Session 3: February 12-15, 2018

Issue: **Financial Responsibility and Administrative Capability**

Statutory cite: §498 of the Higher Education Act of 1965, as amended

Regulatory cite: 34 CFR 668.91, 668.94, 668.171, 668.172, and 668.175

Summary of changes: Updates the actions of the hearing official.

Identifies actions or events that the Secretary may consider in determining whether an institution is financially responsible.

Provides that the Secretary may accept other types of surety or financial protection in lieu of letters of credit.

Provides for a four-year transition period for operating leases entered into before January 1, 2019.

Updates the Appendices to Subpart L to account for changes in accounting standards and terminology.

Changes: See attached regulatory text.

§ 668.91 Initial and final decisions.

(a)...

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of §668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of §668.82(d)(1), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

(iii) If an action brought against an institution or third-party servicer involves its failure to provide a letter of credit or other financial protection under §668.15 or §668.171, the hearing official finds that the amount of the letter of credit or other financial protection established by the Secretary under

§668.15 or §668.175 was appropriate, unless the institution can demonstrate that the amount was not warranted;

(iv) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to submit a required audit by the deadlines established in §668.23 or otherwise failed to comply with the requirements of §668.23, if the hearing official finds that the institution or servicer failed to meet those deadlines or requirements, the hearing official finds that the termination is warranted;

(v)(A) In a termination action against an institution based on the grounds that the institution is not financially responsible under §668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in §668.15(d)(4) have been met; or

(B) In a limitation or termination action against an institution on the grounds that the institution is not financially responsible-

(1) Upon proof of the conditions in §668.174(a), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all the conditions in §668.174(f) have been met; or

(2) Upon proof of the conditions in §668.174(b)(1), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all applicable conditions described in §668.174(b)(2) or §668.175(g) have been met.

* * *

§ 668.94 Limitation.

* * *

(h) A change in the participation status of the institution from fully certified to participate to provisionally certified to participate under §668.13(c).

(i) A requirement that a third-party servicer obtain surety, in a specified amount, to assure the servicer's ability to meet the servicer's financial obligations under a contract; or

(j) Other conditions as may be determined by the Secretary to be reasonable and appropriate.

§ 668.171 General.

(a) Purpose. To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to--

- (1) Provide the services described in its official publications and statements;
 - (2) Meet all of its financial obligations; and
 - (3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.
- (b) General standards of financial responsibility. Except as provided under paragraph (c) and (d) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that--
- (1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;
 - (2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;
 - (3) The institution is current in its debt payments. An institution is not current in its debt payments if—
 - (i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or
 - (ii) It fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover funds under those obligations;
 - (4) The institution is able to meet all of its financial obligations (including making refunds under its refund policy and returning title IV, HEA program funds for which it is responsible under §668.22 and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c) of this section that has or is likely to have an adverse material effect on the institution's operations or ability to continue as a going concern; and
- (ii) Repayments to the Secretary for debts and liabilities arising from the institution's participation in the title IV, HEA programs.
- (5) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).
- (c) Other factors or events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(4) of this section if—
- (1) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution incurs a debt or liability from borrower defense claims adjudicated by

the Secretary, and as a result of that debt or liability the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (d) of this section;

(2) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated;

(3) For a publicly traded institution—

(i) The U.S. Securities and Exchange Commission (SEC) notifies or warns the institution that it may suspend trading on the institution's stock or suspends trading on its stock;

(ii) The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25; or

(iii) The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted for any reason; or

(4) For its most recently completed fiscal year, a proprietary institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(d) Recalculating the composite score. The Secretary recognizes the actual amount of the debt or liability incurred by an institution for borrower defense claims under paragraph (c)(1) of this section as an expense, and accounts for that expense by—

(1) For the Primary Reserve ratio, increasing expenses and decreasing adjusted equity by that amount;

(2) For the Equity ratio, decreasing modified by that amount; and

(3) For the Net Income ratio, decreasing income before taxes in the net income ratio by that amount.

(e) Reporting requirements. (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events--

(i) For a withdrawal of owner's equity described in paragraph (c)(2), no later than 10 days after the withdrawal is made;

(ii) For the SEC and stock exchange provisions for publicly traded institutions described in paragraph (c)(3), no later than 10 days after the SEC or exchange notifies, warns, or takes an action against the institution, or 10 days after any extension granted by the SEC; or

(iii) For the non-title IV revenue provision in paragraph (c)(4), no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

(2) The Secretary may take an administrative action under paragraph (h) of this section against the institution if it fails to provide timely notice under this paragraph (e) .

(3) In its notice to the Secretary under this paragraph, or in its response to a determination by the Secretary that the institution is not financially responsible because of an action or event under paragraph (c) of this section, the institution may—

(i) Demonstrate that the reported withdrawal of owner’s equity under paragraph (c)(2) was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(ii) Show that the action or event has been resolved, or demonstrate that the institution has insurance that will cover all or part of the debts and liabilities that arise from borrower defense claims under paragraph (c)(1); or

(iii) Explain or provide information about the conditions or circumstances that precipitated that action or event that demonstrates that the action or event has not or will not have a material adverse effect on the institution.

(f) Public institutions. (1) The Secretary considers a domestic public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

(g) Audit opinions. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if , in the institution's audited financial statements, the opinion expressed by the auditor

was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition.

(h) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may--

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

§ 668.172 Financial Ratios.

* * *

(d) Transition period for certain operating leases. (1) As a result of changes to the accounting for leases required by Financial Accounting Standards Board Accounting Codification ASC 842 (Leases), for an institution's four consecutive fiscal years beginning on or after January 1, 2019 for which the Secretary calculates the institution's composite score, the Secretary also calculates a transition score by excluding from the calculation operating leases that the institution entered into before July 1, 2019, provided that those leases are properly disclosed in the Supplemental Schedule required under Appendix A or B of this subpart. For each year of the transition period, the Secretary uses the higher of the composite or transition score in determining, in part, whether the institution is financially responsible.

(2) For the transition period described in paragraph (d)(1), the Secretary suspends the conditions in § 668.175(d)(1)(i)(B) and (ii) under which an institution continues to qualify for the zone alternative. For any fiscal year following the transition period, the institution's transition period scores have no bearing on whether the institution qualifies under an alternative standard in §668.175(c), (d), or (f).

§ 668.175 Alternative standards and requirements.

(a) General. An institution that is not financially responsible under the general standards and provisions in §668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) Letter of credit alternative for new institutions. A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other surety described under paragraph (h)(1)(i) of this section, that is acceptable and payable to the Secretary, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines

the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Letter of credit alternative for participating institutions. A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b) or (c), or because of an audit opinion described under § 668.171(g), qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other financial protection described under paragraph (h) of this section, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this provision does not apply to a public institution.

(d) Zone alternative. (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary--

(i) Requires the institution to make disbursements to eligible students and parents under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any adverse action, including a probation or similar action, taken against the institution by its accrediting agency;

(B) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement;

- (C) Any violation by the institution of any loan agreement;
- (D) Any failure of the institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations; or
- (F) Any extraordinary losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;
- (iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and
- (iv) May require the institution to provide information about its current operations and future plans.
- (3) Under the zone alternative, the institution must--
 - (i) For any oversight or financial event described under paragraph (d)(2)(ii) of this section, in accordance with procedures established by the Secretary,, notify the Secretary no later than 10 days after that event occurs; and
 - (ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.
- (4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.
- (e) [Reserved]
- (f) Provisional certification alternative. (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if—
 - (i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(d) is less than 1.0, it is subject to an action or event under § 668.171(c) that has or is likely to have an adverse material effect on the institution, or because of an audit opinion described in § 668.171(g); or
 - (ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and
- (2) Under this alternative, the institution must—
 - (i) Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received

by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution

(ii) Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3) and (b)(4), for its two most recent fiscal years; and

(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d) (2) and (3) of this section.

(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary—

(i) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), or both, to provide to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs; and

(B) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs.

* * *

(h) Financial protection. (1) In lieu of providing a letter of credit for the amount determined by the Secretary under this section, the Secretary may permit an institution to—

(i) Provide the amount required under this section in the form of other surety or form of financial protection as specified by the Secretary in a notice published in the Federal Register;

(ii) Provide cash for the amount required under this section; or

(iii) Enter into an arrangement under which the Secretary offsets the amount of title IV, HEA program funds that an institution has earned in a manner that ensures that, no later than the end of a six to twelve-month period, the amount offset equals the amount of financial protection the institution is required to provide. The Secretary uses the funds to satisfy the debts and liabilities owed to the Secretary that are not otherwise paid directly by the institution, and provides to the institution any funds not used for this purpose during the period covered by the agreement, or provides the institution any remaining funds if the institution

Issue Paper 3
Session 3: February 12-15, 2018

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Provides that the Secretary may accept other types of surety or financial protection in lieu of letters of credit.

Provides for a four-year transition period for operating leases entered into before January 1, 2019.

Updates the Appendices to Subpart L to account for changes in accounting standards and terminology.

Changes: See attached regulatory text.

§ 668.91 Initial and final decisions.

(a)...

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of §668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of §668.82(d)(1), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

Deleted: For institutions that are not financially responsible, we propose to expand the types of financial protection those institutions may provide. In addition, we propose to recalculate the composite score for institutions that incur debts and liabilities from borrower defense claims.

(iii) If an action brought against an institution or third-party servicer involves its failure to provide a letter of credit or other financial protection under §668.15 or §668.171, the hearing official finds that the amount of the letter of credit or other financial protection established by the Secretary under §668.15 or §668.175 was appropriate, unless the institution can demonstrate that the amount was not warranted;

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(iv) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to submit a required audit by the deadlines established in §668.23 or otherwise failed to comply with the requirements of §668.23, if the hearing official finds that the institution or servicer failed to meet those deadlines or requirements, the hearing official finds that the termination is warranted;

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(v)(A) In a termination action against an institution based on the grounds that the institution is not financially responsible under §668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in §668.15(d)(4) have been met; or

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(B) In a limitation or termination action against an institution on the grounds that the institution is not financially responsible-

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(1) Upon proof of the conditions in §668.174(a), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all the conditions in §668.174(f) have been met; or

(2) Upon proof of the conditions in §668.174(b)(1), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all applicable conditions described in §668.174(b)(2) or §668.175(g) have been met.

* * *

§ 668.94 Limitation.

* * *

(h) A change in the participation status of the institution from fully certified to participate to provisionally certified to participate under §668.13(c).

(i) A requirement that a third-party servicer obtain surety, in a specified amount, to assure the servicer's ability to meet the servicer's financial obligations under a contract; or

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(j) Other conditions as may be determined by the Secretary to be reasonable and appropriate.

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§ 668.171 General.

(a) Purpose. To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to--

(1) Provide the services described in its official publications and statements;

(2) Meet all of its financial obligations; and

Deleted: Administer properly the title IV, HEA programs in which it participates; and

(3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.

(b) General standards of financial responsibility. Except as provided under paragraph (c) and (d) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that--

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(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;

(2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;

(3) The institution is current in its debt payments. An institution is not current in its debt payments if--

(i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or

(ii) It fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover funds under those obligations;

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(4) The institution is able to meet all of its financial obligations (including making refunds--

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(i) under its refund policy, and returning title IV, HEA program funds for which it is responsible under §668.22 and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c) of this section that has or is likely to have an adverse material effect on the institution's operations or ability to continue as a going concern; and

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(i)

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(ii) Repayments to the Secretary for debts and liabilities arising from the institution's participation in the title IV, HEA programs.

(5) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).

(c) Other factors or events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(4) of this section if—

(1) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution incurs a debt or liability from borrower defense claims adjudicated by the Secretary, and as a result of that debt or liability the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (d) of this section;

(2) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated;

(3) For a publicly traded institution—

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(i) The U.S. Securities and Exchange Commission (SEC) notifies or warns the institution that it may suspend trading on the institution's stock or suspends trading on its stock;

(ii) The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25; or

(iii) The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted for any reason; or

(4) For its most recently completed fiscal year, a proprietary institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(d) Recalculating the composite score. The Secretary recognizes the actual amount of the debt or liability incurred by an institution for borrower defense claims under paragraph (c)(1) of this section as an expense, and accounts for that expense by—

(1) For the Primary Reserve ratio, increasing expenses and decreasing adjusted equity by that amount;

(2) For the Equity ratio, decreasing modified by that amount; and

(3) For the Net Income ratio, decreasing income before taxes in the net income ratio by that amount.

(e) Reporting requirements. (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events--

(i) For a withdrawal of owner's equity described in paragraph (c)(2), no later than 10 days after the withdrawal is made;

(ii) For the SEC and stock exchange provisions for publicly traded institutions described in paragraph (c)(3), no later than 10 days after the SEC or exchange notifies, warns, or takes an action against the institution, or 10 days after any extension granted by the SEC; or

(iii) For the non-title IV revenue provision in paragraph (c)(4), no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

(2) The Secretary may take an administrative action under paragraph (h) of this section against the institution if it fails to provide timely notice under this paragraph (e).

(3) In its notice to the Secretary under this paragraph, or in its response to a determination by the Secretary that the institution is not financially responsible because of an action or event under paragraph (c) of this section, the institution may—

(i) Demonstrate that the reported withdrawal of owner's equity under paragraph (c)(2) was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(ii) Show that the action or event has been resolved, or demonstrate that the institution has insurance that will cover all or part of the debts and liabilities that arise from borrower defense claims under paragraph (c)(1); or

(iii) Explain or provide information about the conditions or circumstances that precipitated that action or event that demonstrates that the action or event has not or will not have a material adverse effect on the institution.

(f) Public institutions. (1) The Secretary considers a domestic public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution--

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

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(g) Audit opinions. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition.

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(h) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may--

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Deleted: (2) As provided under the past performance provisions in §668.174 (a) and (b)(1), the institution violated a title IV, HEA program requirement, or the persons or entities affiliated with the institution owe a liability for a violation of a title IV, HEA program requirement.

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(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

§ 668.172 Financial Ratios.

(d) Transition period for certain operating leases. (1) As a result of changes to the accounting for leases required by Financial Accounting Standards Board Accounting Codification ASC 842 (Leases), for an institution's four consecutive fiscal years beginning on or after January 1, 2019 for which the Secretary calculates the institution's composite score, the Secretary also calculates a transition score by excluding from the calculation operating leases that the institution entered into before July 1, 2019, provided that those leases are properly disclosed in the Supplemental Schedule required under Appendix A or B of this subpart. For each year of the transition period, the Secretary uses the higher of the composite or transition score in determining, in part, whether the institution is financially responsible.

(2) For the transition period described in paragraph (d)(1), the Secretary suspends the conditions in § 668.175(d)(1)(i)(B) and (ii) under which an institution continues to qualify for the zone alternative. For any fiscal year following the transition period, the institution's transition period scores have no bearing on whether the institution qualifies under an alternative standard in §668.175(c), (d), or (f).

§ 668.175 Alternative standards and requirements.

(a) General. An institution that is not financially responsible under the general standards and provisions in §668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) Letter of credit alternative for new institutions. A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a

financially responsible institution by submitting an irrevocable letter of credit or other surety described under paragraph (h)(1)(i) of this section, that is acceptable and payable to the Secretary, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Letter of credit alternative for participating institutions. A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b) or (c), or because of an audit opinion described under § 668.171(g), qualifies as a financially responsible institution by submitting an irrevocable letter of credit or other financial protection described under paragraph (h) of this section, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year. except that this provision does not apply to a public institution.

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(d) Zone alternative. (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary--

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(i) Requires the institution to make disbursements to eligible students and parents under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

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(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any adverse action, including a probation or similar action, taken against the institution by its accrediting agency;

(B) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement;

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(C) Any violation by the institution of any loan agreement;

(D) Any failure of the institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations; or

(F) Any extraordinary losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;

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(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must—

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(i) For any oversight or financial event described under paragraph (d)(2)(ii) of this section, in accordance with procedures established by the Secretary, notify the Secretary no later than 10 days after that event occurs; and

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(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

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(e) [Reserved]

(f) Provisional certification alternative. (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if—

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(d) is less than 1.0, it is subject to an action or event under § 668.171(c) that has or is likely to have an adverse material effect on the institution, or because of an audit opinion described in § 668.171(g); or

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(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and

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(2) Under this alternative, the institution must—

(i) Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution.

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(ii) Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3) and (b)(4), for its two most recent fiscal years; and

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(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d) (2) and (3) of this section.

(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary—

Deleted: may again permit the institution to participate under a provisional certification, but the Secretary

(i) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), or both, to provide to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs; and

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(B) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(b)(1) and (c), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs.

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(h) Financial protection. (1) In lieu of providing a letter of credit for the amount determined by the Secretary under this section, the Secretary may permit an institution to—

(i) Provide the amount required under this section in the form of other surety or form of financial protection as specified by the Secretary in a notice published in the Federal Register;

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(ii) Provide cash for the amount required under this section; or

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(iii) Enter into an arrangement under which the Secretary offsets the amount of title IV, HEA program funds that an institution has earned in a manner that ensures that, no later than the end of a six to twelve-month period, the amount offset equals the amount of financial protection the institution is required to provide. The Secretary uses the funds to satisfy the debts and liabilities owed to the Secretary that are not otherwise paid directly by the institution, and provides to the institution any funds not used for this purpose during the period covered by the agreement, or provides the institution any remaining funds if the institution

SECTION 3: Example Financial Statements and Composite Score Calculations

STATEMENT OF FINANCIAL POSITION

Line		
1	Cash and cash equivalents	1,720,000
2	Accounts receivable, net	6,000,000
3	Prepaid expenses	1,900,000
4	Related party receivable	100,000
5	Contributions receivable, net	2,000,000
6	Student loans receivable, net	8,000,000
7	Investments	6,000,000
8	Property, plant and equipment, net	40,000,000
9	Lease right-of-use asset, net	10,000,000
10	Goodwill	500,000
11	Deposits	20,000
12	Total Assets	76,240,000
13	Line of credit - short term	300,000
14	Accounts payable	1,000,000
15	Accrued expenses	3,500,000
16	Deferred revenue	650,000
17	Post-employment and pension liability	6,600,000
18	Line of credit - operating	200,000
19	Other liabilities	1,000,000
20	Notes payable	24,000,000
21	Lease right-of-use asset liability	10,000,000
22	Line of credit for long term purposes	2,000,000
23	Total Liabilities	49,250,000
24	Net Assets without Donor Restrictions	15,190,000
25	Net Assets with Donor Restrictions	
26	Annuities	300,000
27	Term endowments	50,000
28	Life income funds	150,000
29	Other restricted by purpose and time	2,500,000
30	Restricted in perpetuity	8,800,000
31	Total Net Assets with Donor Restrictions	11,800,000
32	Total Net Assets	26,990,000
	Total Liabilities and Net Assets	76,240,000

STATEMENT OF ACTIVITIES

Line		
	Changes in Net Assets Without Donor Restrictions	
	Operating Revenue and Other Additions:	
33	Tuition and fees, net	43,200,000
34	Contributions	1,200,000
35	Investment return appropriated for spending	200,000
36	Auxiliary enterprises	7,000,000
37	Net assets released from restriction	500,000
38	Total Operating Revenue and Other Additions	52,100,000
	Operating Expenses and Other Deductions:	
39	Education and research expenses	38,000,000
40	Depreciation and Amortization	5,000,000
41	Interest expense	2,880,000
42	Auxiliary enterprises	5,200,000
43	Total Operating Expenses	51,080,000
44	Change in Net Assets from Operations	1,020,000
	Non-Operating Changes	
45	Investments, net of annual spending, gain (loss)	(600,000)
46	Other components of net periodic pension costs	(1,000,000)
47	Pension-related changes other than net periodic pension	(350,000)
48	Change in value of split-interest agreements	(80,000)
49	Other gains (losses)	(70,000)
50	Sale of fixed assets, gains (losses)	1,000,000
	Total Non-Operating Changes	(1,100,000)
51	Change in Net Assets Without Donor Restrictions	(80,000)
	Change in Net Assets With Donor Restrictions	
52	Contributions	400,000
53	Net assets released from restriction	(500,000)
54	Change in Net Assets With Donor Restrictions	(100,000)
55	Change in Net Assets	(180,000)
56	Net Assets, Beginning of Year	27,170,000
31	Net Assets, End of Year	26,990,000

Calculating the Composite Score

Lines

	31-29-(25+26+27)-10-(8+9)+17		
Primary Reserve Ratio = Expendable Net Assets	+(20+21+22) -4	9,690,000	0.1855
/ Total expenses and Losses Without Donor Restrictions	43 +46 +48 +49	52,230,000	

Equity Ratio = Modified Net Assets	24 +30 -10 -4	26,340,000	0.3485
/ Modified assets	12 -10 -4	75,590,000	

Net Income Ratio = Change in Net Assets without Donor Restrictions	51	(80,000)	(0.0015)
Total Revenue and Gains Without Donor Restrictions	38 -35 +50	52,900,000	

Step 1: Calculate the strength factor score for each ratio by using the following algorithms:

Primary Reserve strength factor score = 10 x the primary reserve ratio result

Equity strength factor score = 6 x the equity ratio result

Negative net income ratio result:

Net Income strength factor = 1 + (25 x net income ratio result)

Positive net income ratio result:

Net income strength factor = 1 + (50 x net income ratio result)

Zero result for net income ratio:

Net income strength factor = 1

If the strength factor score for any ratio is greater than or equal to 3, the strength factor score for the ratio is 3.

If the strength factor score for any ratio is less than or equal to -1, the strength factor score for the ratio is -1.

Step 2: Calculate the weighted score for each ratio and calculate the composite score by adding the three weighted scores

Primary Reserve weighted score = 40% x the primary reserve strength factor score

Equity weighted score = 40% x the equity strength factor score

Net Income weighted score = 20% x the net income strength factor score

Composite Score = the sum of all weighted scores

Round the composite score to one digit after the decimal point to determine the final score

RATIO	Ratio	Factor	Weight	Composite Scores
Primary Reserve Ratio	0.1855	1.8553	40%	0.7421
Equity Ratio	0.3485	2.0908	40%	0.8363
Net Income Ratio	(0.0015)	0.9622	20%	<u>0.1924</u>
				1.7708
TOTAL Composite Score - Rounded				1.8

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

"Financial Responsibility Supplemental Schedule"		
Line for Example	Example location of number in the financial statements and/or notes - the number reference to sample numbers; however, could be more lines based on financial statements and/or notes	
Primary Reserve Ratio:		
Expendable Net Assets:		
31	Statement of Financial Position - Total Net Assets	Total net assets 26,990,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivable 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
8	Statement of Financial Position - Property, plant and equipment, net	Property, plant and equipment, net 40,000,000
9	Statement of Financial Position - Lease right-of-use assets, net	Lease right-of-use asset, net 10,000,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
17	Statement of Financial Position - Post-employment and pension liabilities	Post-employment and pension liabilities 6,600,000
20	Statement of Financial Position - Note Payable*	Long-term debt 24,000,000
21	Statement of Financial Position - Lease right-of-use of asset liability	Lease right-of-use asset liability 10,000,000
22	Statement of Financial Position - Line of credit - for long-term purposes*	Line of credit - for long-term purposes 2,000,000
25	Statement of Financial Position - Annuities**	Annuities with donor restrictions 300,000
26	Statement of Financial Position - Term Endowments**	Term endowments with donor restrictions 50,000
27	Statement of Financial Positions—Life Income Funds**	Life income funds with donor restrictions 150,000
29	Statement of Financial Position -Perpetual Funds**	Net assets with donor restrictions: restricted in perpetuity 8,800,000
Total Expenses and Losses:		
(35), 43, 45, 46, 47, 48, 49	Statement of Activities - (Investment return appropriated for spending), Total Operating Expenses, Investments, net of annual spending gain (loss), Other components of net periodic pension costs, Pension-related changes other than net periodic pension, Change in value of split-interest agreements and Other gains (loss)*	Total expenses without donor restrictions 52,980,000
(35), 45	Statement of Activities - (Investment return appropriated for spending) and Investments, net of annual spending, gain (loss)*	Net investment losses 400,000
47	Statement of Activities - Pension-related changes other than periodic pension*	Pension -related changes other than net periodic costs 350,000
Equity Ratio:		
Modified Net Assets:		
24	Statement of Financial Position - Net Assets without Donor Restrictions	Net assets without donor restrictions 15,190,000
30	Statement of Financial Position - Total Net Assets with Donor Restriction	Net assets with donor restrictions 11,800,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Modified Assets:		
12	Statement of Financial Position - Total assets	Total assets 76,240,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivables and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Net Income Ratio:		
51	Statement of Activities - Change in Net Assets Without Donor Restrictions	Change in Net Assets Without Donor Restrictions (80,000)
38, (35), 50	Statement of Activities - (Net assets released from restriction), Total Operating Revenue and Other Additions and Sale of Fixed Assets, gains (losses)	Total Revenues and Gains 52,900,000
		Lease right-of-use assets, net in place as of 7/1/2019 included in Financial Statements as a result of ASU 2016-02 8,000,000
		Related Lease right-of-use liability for the above Lease right-of-use assets as a result of ASU 2016-02 8,000,000

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

SECTION 1: Ratio and Ratio Terms

Primary Reserve Ratio	$\frac{\text{Expendable Net Assets}}{\text{Total Expenses without Donor Restrictions and Losses without Donor Restrictions}}$
Equity Ratio	$\frac{\text{Modified Net Assets}}{\text{Modified Assets}}$
Net Income Ratio	$\frac{\text{Change in Net Assets without Donor Restrictions}}{\text{Total Revenue without Donor Restrictions and Gains without Donor Restrictions}}$

Definitions:

Expendable Net Assets = (total net assets) - (net assets with donor restrictions: restricted in perpetuity)* - (annuities, term endowments and life income funds with donor restrictions)** - (intangible assets) - (net property, plant and equipment)*** + (post-employment and defined benefit pension plan liabilities) + (all long-term debt obtained for long-term purposes, not to exceed total net property, plant and equipment)**** - (unsecured related party transactions)*****

Total Expenses without Donor Restrictions and Losses without Donor Restrictions = All expenses and losses without donor restrictions from the Statement of Activities less any losses without donor restrictions on investments, post-employment and defined benefit pension plans, and annuities. (For institutions that have defined benefit pension and other post-employment plans, total expenses include the nonservice component of net periodic pension and other post-employment plan expenses, and these expenses will be classified as non-operating. Consequently such expenses will be labeled non-operating or included with “other changes –nonoperating changes—in net assets without donor restrictions” when the Statement of Activities includes an operating measure).

Modified Net Assets = (net assets without donor restrictions) + (net assets with donor restrictions) - (intangible assets) - (unsecured related party receivables)

Modified Assets = (total assets) - (intangible assets) - (unsecured related party receivables)

Change in net assets without donor restrictions is taken directly from the audited financial statements

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

Total Revenue without Donor Restriction and Gains without Donor Restrictions = total revenue (including amounts released from restriction) plus total gains. Investment returns are reported as a net amount (interest, dividends, unrealized and realized gains and losses net of external and direct internal investment expense). Institutions that separately report investment spending as operating revenue (e.g. spending from funds functioning as endowment) and remaining net investment return as a non-operating item, will need to aggregate these two amounts to determine if there is a net investment gain or a net investment loss. (net investment gains are included with total gains).

* Net assets with donor restrictions: restricted in perpetuity is subtracted from total net assets. The amount of net assets with donor restrictions: restricted in perpetuity is disclosed as a line item, part of line item, in a note, or part of a note in the financial statements. When the amount is zero, the institution should identify the source as NA (Not Applicable) in the supplemental schedule.

**_Annuities, term endowments, and life income funds with donor restrictions is subtracted from total net assets. The amount of annuities, term endowments, and life income funds with donor restrictions is disclosed in as a line item, part of line item, in a note, or part of a note in the financial statements. When the amount is zero, the institution should identify the source as NA (Not Applicable) in the supplemental schedule.

***The value of property, plant and equipment includes construction in progress and lease right-of-use assets, and is net of accumulated depreciation/amortization.

**** All Debt obtained for long-term purposes , not to exceed total net property, plant and equipment includes lease liabilities for lease right-of-use assets and the short-term portion of the debt, up to the amount of net property, plant and equipment. If an institution wishes to include the debt obtained through long term lines of credit in total debt obtained for long term purposes, the institution must include a disclosure in the financial statements that the lines of credit exceed twelve months and were used to fund capitalized assets (i.e. property, plant and equipment or capitalized expenditures per Generally Accepted Accounting Principles). The disclosure must include the issue date, term, nature of capitalized amounts and amounts capitalized. Institutions that do not include long term lines of credit in total debt obtained for long term purposes do not need to provide the additional disclosure. The debt obtained for long-term purposes will be limited to only those amounts disclosed in the financial statements that were used to fund capitalized assets. Any amount from long term lines of credit used to fund operations must be excluded from debt obtained for long-term purposes.

*** **Unsecured related party receivables as required at 34 C.F.R 668.23(d)

SECTION 3: Example Financial Statements and Composite Score Calculations

STATEMENT OF FINANCIAL POSITION

Line		
1	Cash and cash equivalents	1,720,000
2	Accounts receivable, net	6,000,000
3	Prepaid expenses	1,900,000
4	Related party receivable	100,000
5	Contributions receivable, net	2,000,000
6	Student loans receivable, net	8,000,000
7	Investments	6,000,000
8	Property, plant and equipment, net	40,000,000
9	Lease right-of-use asset, net	10,000,000
10	Goodwill	500,000
11	Deposits	20,000
12	Total Assets	76,240,000
13	Line of credit - short term	300,000
14	Accounts payable	1,000,000
15	Accrued expenses	3,500,000
16	Deferred revenue	650,000
17	Post-employment and pension liability	6,600,000
18	Line of credit - operating	200,000
19	Other liabilities	1,000,000
20	Notes payable	24,000,000
21	Lease right-of-use asset liability	10,000,000
22	Line of credit for long term purposes	2,000,000
23	Total Liabilities	49,250,000
24	Net Assets without Donor Restrictions	15,190,000
25	Net Assets with Donor Restrictions	
26	Annuities	300,000
27	Term endowments	50,000
28	Life income funds	150,000
29	Other restricted by purpose and time	2,500,000
30	Restricted in perpetuity	8,800,000
31	Total Net Assets with Donor Restrictions	11,800,000
32	Total Net Assets	26,990,000
	Total Liabilities and Net Assets	76,240,000

STATEMENT OF ACTIVITIES

Line		
	Changes in Net Assets Without Donor Restrictions	
	Operating Revenue and Other Additions:	
33	Tuition and fees, net	43,200,000
34	Contributions	1,200,000
35	Investment return appropriated for spending	200,000
36	Auxiliary enterprises	7,000,000
37	Net assets released from restriction	500,000
38	Total Operating Revenue and Other Additions	52,100,000
	Operating Expenses and Other Deductions:	
39	Education and research expenses	38,000,000
40	Depreciation and Amortization	5,000,000
41	Interest expense	2,880,000
42	Auxiliary enterprises	5,200,000
43	Total Operating Expenses	51,080,000
44	Change in Net Assets from Operations	1,020,000
	Non-Operating Changes	
45	Investments, net of annual spending, gain (loss)	(600,000)
46	Other components of net periodic pension costs	(1,000,000)
47	Pension-related changes other than net periodic pension	(350,000)
48	Change in value of split-interest agreements	(80,000)
49	Other gains (losses)	(70,000)
50	Sale of fixed assets, gains (losses)	1,000,000
	Total Non-Operating Changes	(1,100,000)
51	Change in Net Assets Without Donor Restrictions	(80,000)
	Change in Net Assets With Donor Restrictions	
52	Contributions	400,000
53	Net assets released from restriction	(500,000)
54	Change in Net Assets With Donor Restrictions	(100,000)
55	Change in Net Assets	(180,000)
56	Net Assets, Beginning of Year	27,170,000
31	Net Assets, End of Year	26,990,000

Calculating the Composite Score

Lines			
	31-29-(25+26+27)-10-(8+9)+17		
Primary Reserve Ratio = Expendable Net Assets	+(20+21+22) -4	9,690,000	0.1855
/ Total expenses and Losses Without Donor Restrictions			
	43 +46 +48 +49	52,230,000	

Equity Ratio = Modified Net Assets	24 +30 -10 -4	26,340,000	0.3485
/ Modified assets	12 -10 -4	75,590,000	

Net Income Ratio = Change in Net Assets without Donor Restrictions	51	(80,000)	(0.0015)
Total Revenue and Gains Without Donor Restrictions	38 -35 +50	52,900,000	

Step 1: Calculate the strength factor score for each ratio by using the following algorithms:

Primary Reserve strength factor score = 10 x the primary reserve ratio result

Equity strength factor score = 6 x the equity ratio result

Negative net income ratio result:

Net Income strength factor = 1 + (25 x net income ratio result)

Positive net income ratio result:

Net income strength factor = 1 + (50 x net income ratio result)

Zero result for net income ratio:

Net income strength factor = 1

If the strength factor score for any ratio is greater than or equal to 3, the strength factor score for the ratio is 3.

If the strength factor score for any ratio is less than or equal to -1, the strength factor score for the ratio is -1.

Step 2: Calculate the weighted score for each ratio and calculate the composite score by adding the three weighted scores

Primary Reserve weighted score = 40% x the primary reserve strength factor score

Equity weighted score = 40% x the equity strength factor score

Net Income weighted score = 20% x the net income strength factor score

Composite Score = the sum of all weighted scores

Round the composite score to one digit after the decimal point to determine the final score

RATIO	Ratio	Factor	Weight	Composite Scores
Primary Reserve Ratio	0.1855	1.8553	40%	0.7421
Equity Ratio	0.3485	2.0908	40%	0.8363
Net Income Ratio	(0.0015)	0.9622	20%	<u>0.1924</u>
				1.7708
TOTAL Composite Score - Rounded				1.8

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Appendix B: Ratio Methodology for Private Non-Profit Institutions

"Financial Responsibility Supplemental Schedule"		
Line for Example	Example location of number in the financial statements and/or notes - the number reference to sample numbers; however, could be more lines based on financial statements and/or notes	
Primary Reserve Ratio:		
Expendable Net Assets:		
31	Statement of Financial Position - Total Net Assets	Total net assets 26,990,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivable 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
8	Statement of Financial Position - Property, plant and equipment, net	Property, plant and equipment, net 40,000,000
9	Statement of Financial Position - Lease right-of-use assets, net	Lease right-of-use asset, net 10,000,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
17	Statement of Financial Position - Post-employment and pension liabilities	Post-employment and pension liabilities 6,600,000
20	Statement of Financial Position - Note Payable*	Long-term debt 24,000,000
21	Statement of Financial Position - Lease right-of-use of asset liability	Lease right-of-use asset liability 10,000,000
22	Statement of Financial Position - Line of credit - for long-term purposes*	Line of credit - for long-term purposes 2,000,000
25	Statement of Financial Position - Annuities**	Annuities with donor restrictions 300,000
26	Statement of Financial Position - Term Endowments**	Term endowments with donor restrictions 50,000
27	Statement of Financial Positions—Life Income Funds**	Life income funds with donor restrictions 150,000
29	Statement of Financial Position -Perpetual Funds**	Net assets with donor restrictions: restricted in perpetuity 8,800,000
Total Expenses and Losses:		
(35), 43, 45, 46, 47, 48, 49	Statement of Activities - (Investment return appropriated for spending), Total Operating Expenses, Investments, net of annual spending gain (loss), Other components of net periodic pension costs, Pension-related changes other than net periodic pension, Change in value of split-interest agreements and Other gains (loss)*	Total expenses without donor restrictions 52,980,000
(35), 45	Statement of Activities - (Investment return appropriated for spending) and Investments, net of annual spending, gain (loss)*	Net investment losses 400,000
47	Statement of Activities - Pension-related changes other than periodic pension*	Pension -related changes other than net periodic costs 350,000
Equity Ratio:		
Modified Net Assets:		
24	Statement of Financial Position - Net Assets without Donor Restrictions	Net assets without donor restrictions 15,190,000
30	Statement of Financial Position - Total Net Assets with Donor Restriction	Net assets with donor restrictions 11,800,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivable and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Modified Assets:		
12	Statement of Financial Position - Total assets	Total assets 76,240,000
10	Statement of Financial Position - Goodwill	Intangible assets 500,000
4	Statement of Financial Position - Related party receivables and Related party note disclosure	Unsecured related party receivables 100,000
NA	Statement of Financial Position -Contribution receivable, net and Related party note disclosure**	Related party contribution receivable, net - only with significant relationship 0
Net Income Ratio:		
51	Statement of Activities - Change in Net Assets Without Donor Restrictions	Change in Net Assets Without Donor Restrictions (80,000)
38, (35), 50	Statement of Activities - (Net assets released from restriction), Total Operating Revenue and Other Additions and Sale of Fixed Assets, gains (losses)	Total Revenues and Gains 52,900,000
		Lease right-of-use assets, net in place as of 7/1/2019 included in Financial Statements as a result of ASU 2016-02 8,000,000
		Related Lease right-of-use liability for the above Lease right-of-use assets as a result of ASU 2016-02 8,000,000

Issue Paper 4
Session 3: February 12-15, 2018

- Issue:** Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes
- Statutory cites:** §§455(a)(6) and 455(h) of the Higher Education Act, as amended
- Regulatory cites:** §§ 668.41 and 685.304
- Summary of Changes:** To facilitate transparency and fully inform prospective, enrolled, and departing students:
- Amend “Reporting and disclosure of information” [§ 668.41] to (1) require schools that use pre-dispute arbitration agreements and/or class action waivers to disclose that information in an easily accessible format for students, prospective students, and the public, and (2) require these schools to provide an annual notification of this information to enrolled students.
 - Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement (similar to the current requirement that schools provide information regarding the FSA Ombudsman) that schools that use pre-dispute arbitration agreements and/or class action waivers review with the student borrower information on the availability of the school’s internal dispute resolution process and provide to the student a written disclosure explaining any internal dispute process; and
 - Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement for schools using pre-dispute arbitration agreements and/or class action waivers, that the school review with the student borrower the pre-dispute arbitration and/or class action waiver process.

Changes: See regulatory text below.

§ 668.41 Reporting and disclosure of information.

(a) Definitions. The following definitions apply to this subpart:

* * * * *

Undergraduate students, for purposes of §§ 668.45 and 668.48 only, means students enrolled in a bachelor's degree program, an associate degree program, or a vocational or technical program below the baccalaureate level.

(b) Disclosure through internet or intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for—

(1) Enrolled students or current employees by posting the information on an internet website or an intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and

(2) Prospective students or prospective employees by posting the information on an internet website.

(c) Notice to enrolled students. (1) An institution annually must distribute to all enrolled students a notice of the availability of the information required to be disclosed pursuant to paragraphs (d), (e), (g), and (h) of this section, and pursuant to 34 CFR 99.7 (§ 99.7 sets forth the notification requirements of the Family Educational Rights and Privacy Act of 1974). The notice must list and briefly describe the information and tell the student how to obtain the information.

(2) An institution that discloses information to enrolled students as required under paragraphs (d), (e), (g), or (h) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

(i) The exact electronic address at which the information is posted; and

(ii) A statement that the institution will provide a paper copy of the information on request.

(d) General disclosures for enrolled or prospective students. An institution must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning—

(1) Financial assistance available to students enrolled in the institution (pursuant to §668.42).

(2) The institution (pursuant to §668.43).

* * * * *

(h) *Enrolled students, prospective students, and the public -- disclosure of an institution's use of pre-dispute arbitration agreements and/or class action waivers for students receiving Title IV Federal student aid.* (1) An institution of higher education must make available to enrolled students, prospective students, and the public easily accessible information regarding any class action waiver or pre-dispute arbitration agreement that is included in any agreement between the institution and students receiving title IV Federal student aid. The institution may not use an intranet website for the purpose of providing this notice to prospective students or the public.

(2) The institution must provide an annual notice to all enrolled students, pursuant to paragraph (c)(1) of this section, of the information described in paragraph (h)(1). If the institution chooses to make the disclosure available by posting the disclosure on an internet website or an intranet website, such disclosure must include the exact electronic address at which the disclosure is posted, a brief description of the disclosure, and a statement that the institution will provide a paper copy of the disclosure upon request.

(3) For the purposes of this paragraph (h), the following definitions apply:

(i) *Class action* means a lawsuit or an arbitration proceeding in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(ii) *Class action waiver* means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student that prevents an individual from filing or participating in a class action.

(iii) *Pre-dispute arbitration agreement* means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student requiring arbitration of any future dispute between the parties.

(Authority: 20 U.S.C. 1092)

§ 685.304 Counseling borrowers.

(a) Entrance counseling. (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized or Unsubsidized Federal Stafford Loan, or Federal SLS Loan.

(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior student Direct PLUS Loan or student Federal PLUS Loan.

(3) Entrance counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) (A) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(B) If a standardized interactive electronic tool is used to provide entrance counseling to the borrower, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(4) If entrance counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the entrance counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence, distance education, or study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

(6) Entrance counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

- (ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;
- (x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;
- (xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records;
- (xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan;
- (xiii) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), provide a description of the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;
- (xiv) If the school requires borrowers to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;
- (xv) If the school requires borrowers to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions; and
- (xvi) For first-time borrowers as defined in § 685.200(f)(1)(i), explain the limitation on eligibility for Direct Subsidized Loans and possible borrower responsibility for accruing interest described in § 685.200(f), including—
 - (A) The possible loss of eligibility for additional Direct Subsidized Loans;
 - (B) How a borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are calculated;
 - (C) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans; and
 - (D) The impact of borrower responsibility for accruing interest on the borrower's total debt.
- (7) Entrance counseling for graduate or professional student Direct PLUS Loan borrowers must—
 - (i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, of student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student Direct PLUS Loan borrower who has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in § 685.301(a)(3)(i)(A) through (a)(3)(i)(C); and

(iv) For a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xii) of this section.

(v) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), for a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(xiii) through (a)(6)(xv) of this section.

(8) A school may adopt an alternative approach for entrance counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to entrance counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) Exit counseling. (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must, within 30 days after the school learns that the student borrower has withdrawn from school or failed to complete the exit counseling as required, be provided either through interactive electronic means, by mailing written counseling materials to the student borrower at the student borrower's last known address, or by sending written counseling materials to an email address provided by the student borrower that is not an email address associated with the school sending the counseling materials.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for enrollment in the same school or in the same program of study at the same school;

(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income-contingent repayment, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

- (vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;
- (vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;
- (viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;
- (ix) Provide—
 - (A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and
 - (B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;
- (x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;
- (xi) If the school required the borrower to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), review for the student borrower the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;
- (xii) If the school required the borrower to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;
- (xiii) If the school required the borrower to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions;
- (xiv) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;
- (xv) Explain to first-time borrowers, as defined in § 685.200(f)(1)(i)—
 - (A) How the borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are determined under § 685.200(f);
 - (B) The sum of the borrower's subsidized usage periods, as determined under § 685.200(f)(1)(iii), at the time of the exit counseling;
 - (C) The consequences of continued borrowing or enrollment, including--

- (1) The possible loss of eligibility for additional Direct Subsidized Loans; and
- (2) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans;
- (D) The impact of the borrower becoming responsible for accruing interest on total student debt;
- (E) That the Secretary will inform the student borrower of whether he or she is responsible for accruing interest on his or her Direct Subsidized Loans; and
- (F) That the borrower can access NSLDS to determine whether he or she is responsible for accruing interest on any Direct Subsidized Loans as provided in § 685.200(f)(3);
- (xvi) A general description of the types of tax benefits that may be available to borrowers; and
- (xvii) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).
- (5) The school must ensure that the information required in paragraph (b)(4)(xvi) of this section is provided to the Secretary within 60 days after the student borrower provides the information.
- (6)(A) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.
- (B) If a standardized interactive electronic tool is used to provide exit counseling to the borrower, including the electronic interactive exit counseling offered by the Secretary, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:
 - (1) In person; or
 - (2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.
- (7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.
- (8)(i) For students who have received loans under both the FFEL Program and the Direct Loan Program for enrollment in a school, the school's compliance with the exit counseling requirements in paragraph (b) of this section satisfies the exit counseling requirements in 34 CFR 682.604(a) if the school ensures that the exit counseling also provides the borrower with the information described in 34 CFR 682.604(a)(2)(i) and (ii).

(ii) A student's completion of electronic interactive exit counseling offered by the Secretary satisfies the requirements of paragraph (b) of this section and, for students who have also received FFEL Program loans for enrollment in the school, 34 CFR 682.604(a).

(Authority: 20 U.S.C. 1087a et seq.)

Issue Paper 4
Session 3: February 12-15, 2018

Issue: Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes

Statutory cites: §§455(a)(6) and 455(h) of the Higher Education Act, as amended

Regulatory cites: §§ 668.41 and 685.304

Summary of Changes: To facilitate transparency and fully inform prospective, enrolled, and departing students:

- Amend “Reporting and disclosure of information” [§ 668.41] to (1) require schools that use pre-dispute arbitration agreements and/or class action waivers to disclose that information in an easily accessible format for students, prospective students, and the public, and (2) require these schools to provide an annual notification of this information to enrolled students.
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement (similar to the current requirement that schools provide information regarding the FSA Ombudsman) that schools that use pre-dispute arbitration agreements and/or class action waivers review with the student borrower information on the availability of the school’s internal dispute resolution process and provide to the student a written disclosure explaining any internal dispute process; and
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement for schools using pre-dispute arbitration agreements and/or class action waivers, that the school review with the student borrower the pre-dispute arbitration and/or class action waiver process.

Changes: See regulatory text below.

§ 668.41 Reporting and disclosure of information.

(a) Definitions. The following definitions apply to this subpart:

* * * * *

Undergraduate students, for purposes of §§ 668.45 and 668.48 only, means students enrolled in a bachelor’s degree program, an associate degree program, or a vocational or technical program below the baccalaureate level.

(b) Disclosure through internet or intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for—

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(1) Enrolled students or current employees by posting the information on an internet website or an intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and

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(2) Prospective students or prospective employees by posting the information on an internet website.

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(c) Notice to enrolled students. (1) An institution annually must distribute to all enrolled students a notice of the availability of the information required to be disclosed pursuant to paragraphs (d), (e), (g), and (h) of this section, and pursuant to 34 CFR 99.7 (§ 99.7 sets forth the notification requirements of the Family Educational Rights and Privacy Act of 1974). The notice must list and briefly describe the information and tell the student how to obtain the information.

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(2) An institution that discloses information to enrolled students as required under paragraphs (d), (e), (g), or (h) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

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(i) The exact electronic address at which the information is posted; and

(ii) A statement that the institution will provide a paper copy of the information on request.

(d) General disclosures for enrolled or prospective students. An institution must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning—

(1) Financial assistance available to students enrolled in the institution (pursuant to §668.42).

(2) The institution (pursuant to §668.43).

* * * * *

(h) *Enrolled students, prospective students, and the public -- disclosure of an institution's use of pre-dispute arbitration agreements and/or class action waivers for students receiving Title IV Federal student aid.* (1) An institution of higher education must make available to enrolled students, prospective students, and the public information regarding any easily accessible information regarding any class action waiver or pre-dispute arbitration agreement, that is included in any agreement between the institution and students receiving title IV Federal student aid. The institution may not use an intranet website for the purpose of providing this notice to prospective students or the public.

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(2) The institution must provide an annual notice to all enrolled students, pursuant to paragraph (c)(1) of this section, of the information described in paragraph (h)(1). If the institution chooses to make the disclosure available by posting the disclosure on an internet website or an intranet website, such disclosure must include the exact electronic address at which the disclosure is posted, a brief description of the disclosure, and a statement that the institution will provide a paper copy of the disclosure upon request.

(3) For the purposes of this paragraph (h), the following definitions apply:

(i) Class action means a lawsuit or an arbitration proceeding in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(ii) Class action waiver means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student that prevents an individual from filing or participating in a class action.

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(iii) Pre-dispute arbitration agreement means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student requiring arbitration of any future dispute between the parties.

(Authority: 20 U.S.C. 1092)

§ 685.304 Counseling borrowers.

(a) Entrance counseling. (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized or Unsubsidized Federal Stafford Loan, or Federal SLS Loan.

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(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior student Direct PLUS Loan or student Federal PLUS Loan.

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(3) Entrance counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) (A) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(B) If a standardized interactive electronic tool is used to provide entrance counseling to the borrower, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(4) If entrance counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the entrance counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence, distance education, or study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

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(6) Entrance counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

(ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

(x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

(xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records;

(xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan;

(xiii) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), provide a description of the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

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(xiv) If the school requires borrowers to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xv) If the school requires borrowers to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions; and

(xvi) For first-time borrowers as defined in § 685.200(f)(1)(i), explain the limitation on eligibility for Direct Subsidized Loans and possible borrower responsibility for accruing interest described in § 685.200(f), including—

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(A) The possible loss of eligibility for additional Direct Subsidized Loans;

(B) How a borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are calculated;

(C) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans; and

(D) The impact of borrower responsibility for accruing interest on the borrower's total debt.

(7) Entrance counseling for graduate or professional student Direct PLUS Loan borrowers must—

(i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, of student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student Direct PLUS Loan borrower who has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in § 685.301(a)(3)(i)(A) through (a)(3)(i)(C); and

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(iv) For a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xii) of this section.

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(v) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), for a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(xiii) through (a)(6)(xv) of this section.

(8) A school may adopt an alternative approach for entrance counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to entrance counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) Exit counseling. (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must, within 30 days after the school learns that the student borrower has withdrawn from school or failed to complete the exit counseling as required, be provided either through interactive electronic means, by mailing written counseling materials to the student borrower at the student borrower's last known address, or by sending written counseling materials to an email address provided by the student borrower that is not an email address associated with the school sending the counseling materials.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for enrollment in the same school or in the same program of study at the same school;

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(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income-contingent repayment, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

(vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;

(vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;

(viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(ix) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;

(xi) If the school required the borrower to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), review for the student borrower the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

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(xii) If the school required the borrower to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xiii) If the school required the borrower to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions;

(xiv) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;

(xv) Explain to first-time borrowers, as defined in § 685.200(f)(1)(i)—

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(A) How the borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are determined under § 685.200(f);

(B) The sum of the borrower's subsidized usage periods, as determined under § 685.200(f)(1)(iii), at the time of the exit counseling;

(C) The consequences of continued borrowing or enrollment, including--

(1) The possible loss of eligibility for additional Direct Subsidized Loans; and

(2) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans;

(D) The impact of the borrower becoming responsible for accruing interest on total student debt;

(E) That the Secretary will inform the student borrower of whether he or she is responsible for accruing interest on his or her Direct Subsidized Loans; and

(F) That the borrower can access NSLDS to determine whether he or she is responsible for accruing interest on any Direct Subsidized Loans as provided in § 685.200(f)(3);

(xvi) A general description of the types of tax benefits that may be available to borrowers; and

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(xvii) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).

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(5) The school must ensure that the information required in paragraph (b)(4)(xvi) of this section is provided to the Secretary within 60 days after the student borrower provides the information.

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(6)(A) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.

(B) If a standardized interactive electronic tool is used to provide exit counseling to the borrower, including the electronic interactive exit counseling offered by the Secretary, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(8)(i) For students who have received loans under both the FFEL Program and the Direct Loan Program for enrollment in a school, the school's compliance with the exit counseling requirements in paragraph (b) of this section satisfies the exit counseling requirements in 34 CFR 682.604(a) if the school ensures that the exit counseling also provides the borrower with the information described in 34 CFR 682.604(a)(2)(i) and (ii).

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(ii) A student's completion of electronic interactive exit counseling offered by the Secretary satisfies the requirements of paragraph (b) of this section and, for students who have also received FFEL Program loans for enrollment in the school, 34 CFR 682.604(a).

(Authority: 20 U.S.C. 1087a et seq.)

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Issue Paper 5
Session 3: February 12 - 15, 2018

Issue: Closed School Discharge

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 674.33(g), 682.402(d), and 685.214

Summary of change:

Amends the application requirements for closed school discharges to reflect current practice, which requires that a borrower applying for a closed school discharge submit a completed application form, rather than a sworn statement. The proposed regulations also would expand the window for closed school discharges from 120 days to 150 days, and provide for Departmental review of a closed school discharge claim denied by a guaranty agency.

Changes: See regulatory text below.

§ 674.33 Repayment.

* * * * *

(g) Closed school discharge—(1) General.

* * * * *

(4) Borrower qualification for discharge. Except as provided in paragraph (g)(3) of this section, in order to qualify for discharge of an NDSL or Federal Perkins Loan, a borrower must submit to the holder of the loan a completed application on the form approved by the Secretary, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower—

(A) Received the proceeds of a loan to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to the school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law; and

(C) Did not complete and is not in the process of completing the program of study through a teach-out at another school as defined in 34 CFR 602.2 and administered in accordance with 34 CFR 602.207(b)(6), by transferring academic credit earned at the closed school to another school, or by any other comparable means;

* * * * *

(v) If the borrower fails to submit the application described in paragraph (g)(4) of this section within 60 days of the holder of the loan's mailing the discharge application, the holder of the loan resumes collection and grants forbearance of principal and interest for the period during which collection activity was suspended.

* * * * *

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(d) *Closed school*—(1) *General*. (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges the borrower's obligation with respect to the loan in accordance with the provisions of paragraph (d) of this section, if the borrower (or the student for whom a parent received a PLUS loan) could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled closed, or the borrower (or student) withdrew from the school not more than 150 days prior to the date the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law.

* * * * *

(6) ***

(ii) ***

(B) If a guaranty agency determines that a school appears to have closed, it, must within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 150 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency must—

(1) Notify all lenders participating in its program to mail a discharge application approved by the Secretary to all borrowers who may be eligible for a closed school discharge; and

(2) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 150 days prior to the closure date, and mail a discharge application to the borrower. The application informs the borrower of the procedures and eligibility criteria for obtaining a discharge.

* * * * *

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(ii)(C) or (D) of this section does not qualify for a discharge, the agency must notify the borrower in writing of that determination, the reasons for the decision, and how the borrower may ask the Secretary to review the decision within 30 days after the date the agency—

(1) Made that determination based on information available to the guaranty agency;

(2) Was notified by the Secretary that the school had not closed;

(3) Was notified by the Secretary that the school had closed on a date that was more than 150 days after the borrower (or student) withdrew from the school;

(4) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(5) Received the borrower's completed application.

* * * * *

(G) Upon receipt of a closed school discharge claim filed by a lender, the agency must review the borrower's completed application in light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations, and must take the following actions—

(1) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (d) of this section, it must pay the claim in accordance with § 682.402(h) not later than 90 days after the agency received the claim; or

(2) If the agency determines that the borrower does not qualify for a discharge, the agency must, not later than 90 days after the agency received the claim, return the claim to the lender with an explanation of the reasons for its determination.

(H) If a borrower fails to submit the completed application described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender or guaranty agency must resume collection and must be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The lender or guaranty agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

* * * * *

(J)(1) Within 30 days after receiving the borrower's request for review of its decision that the borrower did not qualify for a discharge under paragraph (d)(6)(ii)(F) of this section, the agency must forward the borrower's discharge request and all relevant documentation to the Secretary.

(2) After reviewing the documents provided by the agency, the Secretary notifies the agency and the borrower of the decision on the borrower's application for a discharge. If the Secretary determines that the borrower is not eligible for a discharge under paragraph (d) of this section, within 30 days after being informed of the Secretary's decision, the agency must take the actions described in paragraph (d)(6)(ii)(H) of this section, as applicable.

(3) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (d) of this section, the agency must, within 30 days after being informed of the Secretary's decision, take the actions required under paragraphs (d)(6)(ii)(E) and (d)(6)(ii)(G)(1) of this section and the lender must take the actions described in paragraph (d)(7)(iv) of this section, as applicable.

§685.214 Closed school discharge.

* * * * *

(c) *Borrower qualification for discharge.* (1) In order to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to —

(i) Certify that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction or adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law; and

(C) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

* * * * *

(f) *Discharge procedures.*(1) After confirming the date of the school's closure, the Secretary identifies any Direct Loan borrowers (or students on whose behalf a parent borrowed) who appears to have been enrolled at the school on the closure date or to have withdrawn not more than 150 days prior to the closure date.

* * * * *

(4) If a borrower fails to submit a completed application described in paragraph (c) of this section within 60 days of the Secretary's mailing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

* * * * *

Issue Paper 5
Session 3: February 12 - 15, 2018

Issue: Closed School Discharge

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 674.33(g), 682.402(d), and 685.214

Summary of change:

Amends the application requirements for closed school discharges to reflect current practice, which requires that a borrower applying for a closed school discharge submit a completed application form, rather than a sworn statement. The proposed regulations also would expand the window for closed school discharges from 120 days to 150 days, and provide for Departmental review of a closed school discharge claim denied by a guaranty agency.

Changes: See regulatory text below.

§ 674.33 Repayment.

* * * * *

(g) *Closed school discharge—(1) General.*

* * * * *

(4) *Borrower qualification for discharge.* Except as provided in paragraph (g)(3) of this section, in order to qualify for discharge of an NDSL or Federal Perkins Loan, a borrower must submit to the holder of the loan a completed application on the form approved by the Secretary, and the factual assertions in the application, must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower—

(A) Received the proceeds of a loan to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to the school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency concluding that the school violated State or Federal law; and

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(C) Did not complete and is not in the process of completing the program of study through a teach_out at another school as defined in 34 CFR 602.2 and administered in accordance with 34 CFR 602.207(b)(6), by transferring academic credit earned at the closed school to another school, or by any other comparable means;

* * * * *

(v) If the borrower fails to submit the application described in paragraph (g)(4) of this section within 60 days of the holder of the loan's mailing the discharge application, the holder of the loan resumes collection and grants forbearance of principal and interest for the period during which collection activity was suspended.

* * * * *

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(d) *Closed school*—(1) *General*. (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges the borrower's obligation with respect to the loan in accordance with the provisions of paragraph (d) of this section, if the borrower (or the student for whom a parent received a PLUS loan) could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled closed, or the borrower (or student) withdrew from the school not more than 150 days prior to the date the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; the State's revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction, or an adjudication by a Federal or State administrative agency, concluding that the school violated State or Federal law.

* * * * *

(6) ***

(ii) ***

(B) If a guaranty agency determines that a school appears to have closed, it must within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 150 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency must—

(1) Notify all lenders participating in its program to mail a discharge application approved by the Secretary to all borrowers who may be eligible for a closed school discharge; and

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(2) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 150 days prior to the closure date, and mail a discharge application to the borrower. The application informs the borrower of the procedures and eligibility criteria for obtaining a discharge.

* * * * *

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(iii)(C) or (D) of this section does not qualify for a discharge, the agency must notify the borrower in writing of that determination, the reasons for the decision, and how the borrower may ask the Secretary to review the decision within 30 days after the date the agency—

(1) Made that determination based on information available to the guaranty agency;

(2) Was notified by the Secretary that the school had not closed;

(3) Was notified by the Secretary that the school had closed on a date that was more than 150 days after the borrower (or student) withdrew from the school;

(4) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(5) Received the borrower's completed application,

* * * * *

(G) Upon receipt of a closed school discharge claim filed by a lender, the agency must review the borrower's completed application in light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations, and must take the following actions—

(1) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (d) of this section, it must pay the claim in accordance with § 682.402(h) not later than 90 days after the agency received the claim; or

(2) If the agency determines that the borrower does not qualify for a discharge, the agency must, not later than 90 days after the agency received the claim, return the claim to the lender with an explanation of the reasons for its determination.

(H) If a borrower fails to submit the completed application described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender or guaranty agency must resume collection and must be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The lender or guaranty agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

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(1)(1) Within 30 days after receiving the borrower's request for review of its decision that the borrower did not qualify for a discharge under paragraph (d)(6)(ii)(F) of this section, the agency must forward the borrower's discharge request and all relevant documentation to the Secretary.

(2) After reviewing the documents provided by the agency, the Secretary notifies the agency and the borrower of the decision on the borrower's application for a discharge. If the Secretary determines that the borrower is not eligible for a discharge under paragraph (d) of this section, within 30 days after being informed of the Secretary's decision, the agency must take the actions described in paragraph (d)(6)(ii)(H) of this section, as applicable.

(3) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (d) of this section, the agency must, within 30 days after being informed of the Secretary's decision, take the actions required under paragraphs (d)(6)(ii)(E) and (d)(6)(ii)(G)(1) of this section and the lender must take the actions described in paragraph (d)(7)(iv) of this section, as applicable.

§685.214 Closed school discharge.

* * * * *

(c) *Borrower qualification for discharge.* (1) In order to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 150 days before the school closed. The Secretary may extend the 150-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the revocation or withdrawal by an accrediting agency of the school's institutional accreditation; the school's discontinuation of the majority of its academic programs; revocation or withdrawal of the school's license to operate or to award academic credentials in the State; or a nondefault, contested Federal or State court judgment issued by a court of competent jurisdiction or adjudication by a Federal or State administrative agency, concluding that the school violated State or Federal law; and

(C) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

* * * * *

(f) *Discharge procedures.* (1) After confirming the date of the school's closure, the Secretary identifies any Direct Loan borrowers (or students on whose behalf a parent borrowed) who appears to have been enrolled at the school on the closure date or to have withdrawn not more than 150 days prior to the closure date.

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(4) If a borrower fails to submit a completed application described in paragraph (c) of this section within 60 days of the Secretary's mailing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

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Issue Paper 6
Session 3: February 12-15, 2018

Issue: False Certification

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cites: 34 CFR 685.215

Summary of change: Amends application requirements for false certification discharges to reflect current practice, which requires that a borrower applying for a false certification discharge submit a completed application form, rather than a sworn statement. The proposed regulations also update the regulatory requirements regarding false certification of eligibility of non-high school graduates for Direct Loans.

Changes: See regulatory text below.

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment

(a) *Basis for discharge—(1) False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

(i) Certified eligibility for a Direct Loan for a student who did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(c) *Borrower qualification for discharge.* In order to qualify for discharge under this section, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary, and the factual assertions in the application must be true and made under penalty of perjury. In the application, the borrower must demonstrate to the satisfaction of the Secretary that the requirements in paragraphs (c) (1) through (6) of this section have been met.

(1) *High school diploma or equivalent.* In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative eligibility requirements, the borrower must certify that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received a disbursement of a loan, in whole or in part, on or after January 1, 1986, to attend a school; and

(ii) Received a Direct Loan at that school and did not have a high school diploma or its recognized equivalent, and did not meet the alternative to graduation from high school eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower the application described in paragraph (c), which explains the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit a completed application within 60 days of the date the Secretary suspended collection efforts, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits a completed application the Secretary determines whether to grant a request for discharge under this section by reviewing the application in light of information available from the Secretary's records and from other sources, including, but not limited to, guaranty agencies, State authorities, and cognizant accrediting associations.

* * * * *

Issue Paper 6
Session 3: February 12-15, 2018

Issue: False Certification

Statutory cites: §437(c) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cites: 34 CFR 685.215

Summary of change: Amends application requirements for false certification discharges to reflect current practice, which requires that a borrower applying for a false certification discharge submit a completed application form, rather than a sworn statement. The proposed regulations also update the regulatory requirements regarding false certification of eligibility of non-high school graduates for Direct Loans.

Changes: See regulatory text below.

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment

(a) *Basis for discharge*—(1) *False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school—

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(i) Certified eligibility for a Direct Loan for a student who did not have a high school diploma or its recognized equivalent and did not meet the alternative eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

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(c) *Borrower qualification for discharge.* In order to qualify for discharge under this section, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary, and the factual assertions in the application must be true and made under penalty of perjury. In the application, the borrower must demonstrate to the satisfaction of the Secretary that the requirements in paragraphs (c) (1) through (6) of this section have been met.

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(1) *High school diploma or equivalent.* In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative eligibility requirements, the the borrower must certify that the borrower (or the student on whose behalf a parent borrowed) —

(i) Received a disbursement of a loan, in whole or in part, on or after January 1, 1986, to attend a school; and

(ii) Received a Direct Loan at that school and did not have a high school diploma or its recognized equivalent, and did not meet the alternative to graduation from high school eligibility requirements

described in 34 CFR part 668 and section 484(d) of the Act applicable at the time the loan was originated;

* * * * *

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower the application described in paragraph (c), which explains the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit a completed application within 60 days of the date the Secretary suspended collection efforts, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period.

(3) If the borrower submits a completed application the Secretary determines whether to grant a request for discharge under this section by reviewing the application in light of information available from the Secretary's records and from other sources, including, but not limited to, guaranty agencies, State authorities, and cognizant accrediting associations.

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Issue Paper 7
Session 3: February 12-15, 2018

Issue: Guaranty Agency Collection Fees

Statutory cites: §§428F(a) and 484A(a) of the Higher Education Act, as amended

Regulatory cites: 34 CFR 682.202(b), 682.405(b), and 682.410(b)(2)

Summary of Changes: Prospectively bars guaranty agencies from charging collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency within 60 days of receiving notice of default from the agency.

Prospectively bars guaranty agencies from capitalizing interest on a loan that is sold following the completion of loan rehabilitation.

Changes: See regulatory text below.

§ 682.202 Permissible charges by lenders to borrowers.

[* * *]

(b) Capitalization. (1) Except as provided in §682.405(b)(4), a lender may add accrued interest and unpaid insurance premiums or Federal default fees to the borrower's unpaid principal balance in accordance with this section. This increase in the principal balance of a loan is called "capitalization."

[* * * *]

§ 682.405 Loan rehabilitation agreement.

[* * *]

(b) Terms of agreement. In the loan rehabilitation agreement, the guaranty agency agrees to ensure that its loan rehabilitation program meets the following requirements at all times:

[* * *]

(4)(i) An eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan and must permit the borrower to choose any statutorily available repayment plan for that loan type. The lender must treat the first payment made under the nine payments as the first payment under the applicable maximum repayment term, as defined under § 682.209(a) or (e). For Consolidation loans, the maximum repayment term is based on the balance outstanding at the time of loan rehabilitation.

(ii) The purchase of a rehabilitated loan is not considered a borrower's entry into repayment or resumption of repayment for the purposes of interest capitalization under § 682.202(b).

[* * *]

§ 682.410 Fiscal, administrative, and enforcement requirements.

(b) *Administrative requirements –*

[* * *]

(2) Collection charges. (i) Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency may charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim unless, within the 60-day period following the initial notice described in paragraph (b)(6)(ii) of this section, the borrower enters into an acceptable repayment agreement, including a rehabilitation agreement, and honors that agreement, in which case the guaranty agency must not charge a borrower any collection costs.

(ii) An acceptable repayment agreement may include an agreement described in § 682.200(b) (Satisfactory repayment arrangement), § 682.405, or paragraph (b)(5)(ii)(D) of this section. An acceptable repayment agreement constitutes a repayment arrangement or agreement on repayment terms satisfactory to the guaranty agency, under this section.

(iii) The costs under this paragraph (b)(2) include, but are not limited to, all attorney's fees, collection agency charges, and court costs. Except as provided in §§ 682.401(b)(18)(i) and 682.405(b)(1)(vi)(B), the amount charged a borrower must equal the lesser of—

(A) The amount the same borrower would be charged for the cost of collection under the formula in 34 CFR 30.60; or

(B) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

[* * *]

(4) *Capitalization of unpaid interest.* The guaranty agency must capitalize any unpaid interest due on the loan at the time the agency pays a default claim to the lender, but must not capitalize any unpaid interest thereafter.

[* * *]

Issue Paper 7
Session 3: February 12-15, 2018

Issue: Guaranty Agency Collection Fees

Statutory cites: §§428F(a) and 484A(a) of the Higher Education Act, as amended

Regulatory cites: 34 CFR 682.202(b), 682.405(b), and 682.410(b)(2)

Summary of Changes: Prospectively bars guaranty agencies from charging collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency within 60 days of receiving notice of default from the agency.

Prospectively bars guaranty agencies from capitalizing interest on a loan that is sold following the completion of loan rehabilitation.

Changes: See regulatory text below.

§ 682.202 Permissible charges by lenders to borrowers.

[* * *]

(b) Capitalization. (1) Except as provided in §682.405(b)(4), a lender may add accrued interest and unpaid insurance premiums or Federal default fees to the borrower's unpaid principal balance in accordance with this section. This increase in the principal balance of a loan is called "capitalization."

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[* * * * *]

§ 682.405 Loan rehabilitation agreement.

[* * *]

(b) Terms of agreement. In the loan rehabilitation agreement, the guaranty agency agrees to ensure that its loan rehabilitation program meets the following requirements at all times:

[* * *]

(4)(i) An eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan and must permit the borrower to choose any statutorily available repayment plan for that loan type. The lender must treat the first payment made under the nine payments as the first payment under the applicable maximum repayment term, as defined under § 682.209(a) or (e). For Consolidation loans, the maximum repayment term is based on the balance outstanding at the time of loan rehabilitation.

(ii) The purchase of a rehabilitated loan is not considered a borrower's entry into repayment or resumption of repayment for the purposes of interest capitalization under § 682.202(b).

[* * *]

§ 682.410 Fiscal, administrative, and enforcement requirements.

(b) Administrative requirements –

[* * *]

(2) Collection charges. (i) Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency may charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim unless, within the 60-day period following the initial notice described in paragraph (b)(6)(ii) of this section, the borrower enters into an acceptable repayment agreement, including a rehabilitation agreement, and honors that agreement, in which case the guaranty agency, must not charge a borrower any collection costs.

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(ii) An acceptable repayment agreement may include an agreement described in § 682.200(b) (Satisfactory repayment arrangement), § 682.405, or paragraph (b)(5)(ii)(D) of this section. An acceptable repayment agreement constitutes a repayment arrangement or agreement on repayment terms satisfactory to the guaranty agency, under this section.

(iii) The costs under this paragraph (b)(2) include, but are not limited to, all attorney's fees, collection agency charges, and court costs. Except as provided in §§ 682.401(b)(18)(i) and 682.405(b)(1)(vi)(B), the amount charged a borrower must equal the lesser of—

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Deleted: may

Deleted: iv

(A) The amount the same borrower would be charged for the cost of collection under the formula in 34 CFR 30.60; or

(B) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

[* * *]

(4) Capitalization of unpaid interest. The guaranty agency must capitalize any unpaid interest due on the loan at the time the agency pays a default claim to the lender, but, must not capitalize any unpaid interest thereafter.

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Deleted: the lender from the borrower

Deleted: shall

[* * *]

Issue Paper 8
Session 3: February 12-15, 2018

Issue: Whether to recalculate a borrower's Subsidized Usage Period and interest accrual, if applicable, when the borrower receives a discharge of a loan for which he or she has not received all or part of the educational benefit of the loan

Statutory cite: § 455(q) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cite: 34 CFR 685.200(f)

Summary of Change: To eliminate or recalculate the subsidized usage period and, if applicable, restore interest subsidy associated with the Direct Subsidized Loan(s) fully or partially discharged based on school closure, false certification, unpaid refund, or borrower defense, amend 34 CFR 685.200(f)(3)(v) and 685.200(f)(4)(iii).

Changes: See regulatory text below.

§ 685.200 Borrower eligibility.

[* * *]

(f) Limitations on eligibility for Direct Subsidized Loans and borrower responsibility for accruing interest for first-time borrowers on or after July 1, 2013

[* * *]

(3) Borrower responsibility for accruing interest.

(i) Notwithstanding any provision of this part that provides for the borrower to not be responsible for accruing interest on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, and except as provided in paragraphs (f)(6)(v) and (f)(7)(iv) of this section, a first-time borrower becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan beginning on the date—

(A) The borrower has no remaining eligibility period; and

(B) The borrower attends any undergraduate program or preparatory coursework on at least a half-time basis at an eligible institution that participates in the title IV, HEA programs.

(ii) The borrower continues to be responsible for the interest that accrues on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan for which the borrower previously became responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section.

(iii) For any loan for which the borrower becomes responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section, the borrower is responsible for only the interest that accrues after the borrower meets the criteria in paragraph (f)(3)(i) of this section and unpaid interest is capitalized in the same manner as for a Direct Unsubsidized Loan.

(iv) A borrower who completes an undergraduate program and who has not become responsible for accruing interest on Direct Subsidized Loans as a result of attendance in that program does not become responsible for accruing interest under paragraph (f)(3)(i) of this section on any Direct Subsidized Loans received for attendance in any program prior to completing that undergraduate program and for which the borrower has not previously become responsible for accruing interest, regardless of subsequent attendance in any other program.

(v) A borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge that results in a remaining eligibility period greater than zero is not responsible for the interest that accrues on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan unless the borrower once again becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, for the life of the loan, as described in paragraph (f)(3)(i) of this section.

(4) Exceptions to the calculation of subsidized usage periods.

(i) For a first-time borrower who receives a Direct Subsidized Loan in an amount that is equal to the full annual loan limit for a loan period that is less than a full academic year in length, the subsidized usage period is one year.

(ii) For a first-time borrower who is enrolled on a half-time or three-quarter-time basis, the borrower's prorated subsidized usage period is calculated by multiplying the borrower's subsidized usage period by 0.5 or 0.75, respectively.

(iii) For a first-time borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge on a Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan, the Subsidized Usage Period is reduced. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in full, the Subsidized Usage Period of those loans is zero years. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in part, the Subsidized Usage Period may be reduced if the discharge results in the inapplicability of paragraph (f)(4)(i) of this section.

(Authority: 20 U.S.C. 1087a *et seq.*)

Issue Paper 8
Session 3: February 12-15, 2018

Issue: Whether to recalculate a borrower's Subsidized Usage Period and interest accrual, if applicable, when the borrower receives a discharge of a loan for which he or she has not received all or part of the educational benefit of the loan

Statutory cite: § 455(q) of the Higher Education Act of 1965, as amended (HEA)

Regulatory cite: 34 CFR 685.200(f)

Summary of Change: To eliminate or recalculate the subsidized usage period and, if applicable, restore interest subsidy associated with the Direct Subsidized Loan(s) fully or partially discharged based on school closure, false certification, unpaid refund, or borrower defense, amend 34 CFR 685.200(f)(3)(v) and 685.200(f)(4)(iii).

Changes: See regulatory text below.

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(f) Limitations on eligibility for Direct Subsidized Loans and borrower responsibility for accruing interest for first-time borrowers on or after July 1, 2013

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(i) Notwithstanding any provision of this part that provides for the borrower to not be responsible for accruing interest on a Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan, and except as provided in paragraphs (f)(6)(v) and (f)(7)(iv) of this section, a first-time borrower becomes responsible for the interest that accrues on a previously received Direct Subsidized Loan or on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan beginning on the date—

(A) The borrower has no remaining eligibility period; and

(B) The borrower attends any undergraduate program or preparatory coursework on at least a half-time basis at an eligible institution that participates in the title IV, HEA programs.

(ii) The borrower continues to be responsible for the interest that accrues on the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan for which the borrower previously became responsible for accruing interest in accordance with paragraph (f)(3)(i) of this section.

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(iv) A borrower who completes an undergraduate program and who has not become responsible for accruing interest on Direct Subsidized Loans as a result of attendance in that program does not become responsible for accruing interest under paragraph (f)(3)(i) of this section on any Direct Subsidized Loans received for attendance in any program prior to completing that undergraduate program and for which the borrower has not previously become responsible for accruing interest, regardless of subsequent attendance in any other program.

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(iii) For a first-time borrower who receives a closed school, false certification, unpaid refund, or borrower defense discharge on a Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan, the Subsidized Usage Period is reduced. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in full, the Subsidized Usage Period of those loans is zero years. If the Direct Subsidized Loan or a portion of a Direct Consolidation Loan that is attributable to a Direct Subsidized Loan is discharged in part, the Subsidized Usage Period may be reduced if the discharge results in the inapplicability of paragraph (f)(4)(i) of this section.

(Authority: 20 U.S.C. 1087a *et seq.*)



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1810-11

Hoblitzell, Barbara

From: Hoblitzell, Barbara
Sent: Monday, February 5, 2018 7:05 PM
To: 'pres@usstudents.org'; 'stevaughn.bush@law.bison.howard.edu';
'Ashley.harrington@responsiblelending.org'; 'smartindale@consumer.org';
'ashafroth@nclc.org'; 'jfredman@baylegal.org'; 'will.hubbard@studentveterans.org';
'walter@veteranseducationsuccess.org'; 'John.Ellis@oag.texas.gov';
'Evan.Daniels@azag.gov'; 'randerson@sheeo.org'; 'mccomis@accsc.org';
'ksolinski@hlcommission.org'; 'sharpv@evangel.edu'; 'Kimberly.Brown@dmu.edu';
'alacey@thompsoncoburn.com'; 'bryanblack@gmail.com'; 'hudsok@rpi.edu';
'drobinson@roanokechowan.edu'; 'rflaniga@spelman.edu';
'lodriguez.murray@uncf.org'; 'dmadzelan@acenet.edu'; 'NassirianB@aascu.org';
'Alyssa.Dobson@sru.edu'; 'sklewis@uw.edu'; 'aareich@liberty.edu';
'gjones@CompassRoseFoundation.org'; 'MB@Ayers.edu';
'Chris@DeLucaLawLLC.com'; 'm.bottrill@sae.edu'; 'Linda@rawleslaw.com'; whall;
'colleens@mohela.com'; 'oconnell@vsac.org'; 'srepp@ncher.us'
Cc: 'ebantle@fmcs.gov'; 'mcaruso@fmcs.gov'; 'rmiller@fmcs.gov'; Weisman, Annmarie
Subject: Recall: Draft Issue Papers for ThurdRound of Negotiated Rulemaking

Hoblitzell, Barbara would like to recall the message, "Draft Issue Papers for ThurdRound of Negotiated Rulemaking".

David Christensen

From: David Christensen
Sent: Thursday, April 26, 2018 4:36 PM
To: Menashi, Steven
Subject: Eric Treene suggested I contact you
Attachments: (b)(6) miscellaneous-resume-updated January 2017.pdf

Hey Steven,

I talked to Eric Treene and he suggested I contact you about a conservative's resume who is interested in getting back into the DC conservative movement. She's (b)(6)

(b)(6): She's sharp, conservative, and I've worked with her at 3 GOP platform where she as a delegate was able to get multiple good amendments passed (and she showed leadership working with other delegates who don't understand Roberts Rules of Order). As I said, she's interested in getting back into the DC conservative movement now that her kids are out of high school. I thought I'd forward for your review in case you have ideas.

Best,
David

*David Christensen
VP of Government Affairs
Family Research Council
202-393-2100 general
202-637-4672 direct
202-262-3350 cell*

Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Menashi, Steven

From: Menashi, Steven
Sent: Wednesday, May 31, 2017 6:51 PM
To: Rosenfelt, Phil
Subject: Plyler

I discussed the Plyler letter with Bob and (b)(5)

Menashi, Steven

From: Menashi, Steven
Sent: Monday, June 19, 2017 12:56 PM
To: Rosenfelt, Phil
Cc: Ellis, Kathryn; Eshbach, Roseann; Kole, Adina
Subject: RE: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program

(b)(5)

From: Rosenfelt, Phil
Sent: Saturday, June 17, 2017 5:17 PM
To: Menashi, Steven
Cc: Ellis, Kathryn; Eshbach, Roseann; Kole, Adina
Subject: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program
Importance: High
Sensitivity: Confidential

(b)(5)

Basic information about the program including links to the program statute and regulations is at the following web address:

<https://www2.ed.gov/programs/rsabvrs/index.html>

(b)(5)

Recently, WY VR program officials have raised the following question, and there is also the request from Oklahoma below --

Good morning, our Legislature...want to know our position on working with individuals that are not citizens of the United States. I know an individual does not have to live in Wyoming to be able to receive counseling and services. We ask individuals that report that they are not American citizens if they have a green card, an Employment Authorization Document (EAD) or in some case a student Visa.

Is there something more we should be doing? Can we legally provide services to illegal aliens? I don't think so, but want to be sure.

(b)(5)

Phil

From: Anthony, Edward
Sent: Thursday, June 08, 2017 4:34 PM
To: Dobak, Carol; Eshbach, Roseann
Subject: FW: Rehabilitation Services

We should discuss after you both have had a chance to look at the request.

*Edward Anthony, Ph.D.
Deputy Commissioner
Rehabilitation Services Administration
Office of Special Education and Rehabilitative Services
202-245-7256 (Phone)
202-245-7592 (Fax)
Edward.Anthony@ed.gov (email)*

From: Dixon, Doris
Sent: Thursday, June 08, 2017 4:30 PM
To: Anthony, Edward
Subject: FW: Rehabilitation Services

Ed -- do you know what this person is referring to? If you do, will you have someone provide the info being

requested/

Thanks. Doris

From: Stanley, Taylor
Sent: Thursday, June 08, 2017 3:58 PM
To: Dixon, Doris
Subject: Rehabilitation Services

Hi Doris,

I wanted to flag this for you again.

Taylor M. Stanley
Office of Legislation and Congressional Affairs (OLCA)
U.S. Department of Education
(202)453-7033

From: Marlin, Jacob [<mailto:Jacob.Marlin@mail.house.gov>]
Sent: Tuesday, June 06, 2017 4:29 PM
To: OLCA Inquiries
Subject: Rehabilitation Services

Good Afternoon,

We recently had a person contact our office with questions concerning the Oklahoma Department of Vocational Rehab that I believe falls under the federal rules and guidelines of the Dept. of Education Rehabilitation Services. They would like to receive a copy of the federal regulation stating that the state agency must provide services to illegal immigrants. Is this something that your office could provide? Any help that you can give me in answering this inquiry would be appreciated. Feel free to contact me if there are any further questions. Have a great day.

Jake Marlin, Veterans Caseworker
CONGRESSMAN MARKWAYNE MULLIN
3109 Azalea Park Drive | Muskogee, OK 74401
p 918-687-2533 | f 918-686-0128

From: Steven.Menashi@ed.gov
Sent: Monday, August 14, 2017 2:38 PM
To: Brinton, Jedediah
Subject: Fwd: Memo and Supporting Materials on FLSA Damages and Settlement
Attachments: 2010-16 Comp Time Owed to BU Employees Chart.doc; ATT00001.htm; 2010-16 Overtime Owed to BU Employees Chart.doc; ATT00002.htm; FLSA Damages Memo-Final.docx; ATT00003.htm; Recent FLSA Settlements Chart.doc; ATT00004.htm; FLSA Update -- July 21, 2017.doc; ATT00005.htm

Begin forwarded message:

From: "McFadden, Elizabeth" <Elizabeth.McFadden@ed.gov>
Date: August 11, 2017 at 1:56:01 PM EDT
To: "Menashi, Steven" <Steven.Menashi@ed.gov>
Cc: "Rosenfelt, Phil" <Phil.Rosenfelt@ed.gov>, "Sasser, Tracey" <Tracey.Sasser@ed.gov>, "Taylor, Michael" <Michael.Taylor@ed.gov>, "Mayo-Tall, Karen" <Karen.Mayo-Tall@ed.gov>, "Rountree, Schwanda" <Schwanda.Rountree@ed.gov>
Subject: Memo and Supporting Materials on FLSA Damages and Settlement

Steven –

Per our discussions from earlier this week, enclosed are the following documents:

- Memo providing a recommendation and supporting analysis regarding settlement of the FLSA litigation
- Tables with detail on overtime owed and unpaid compensatory time.
- Memo that we provided earlier this week providing the background on the litigation.
- Chart describing litigation outcomes for other agencies who have been sued under the FLSA

We will work on getting a meeting on the calendar to discuss strategy, timing, etc.

Thanks.

Elizabeth

Elizabeth A. M. McFadden
Deputy General Counsel for Ethics, Legislative Counsel,
and Regulatory Services
U.S. Department of Education
elizabeth.mcfadden@ed.gov
202-401-6307

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Sent: Monday, August 14, 2017 2:38 PM
To: Brinton, Jedediah
Subject: Fwd: Memo and Supporting Materials on FLSA Damages and Settlement
Attachments: 2010-16 Comp Time Owed to BU Employees Chart.doc; ATT00001.htm; 2010-16 Overtime Owed to BU Employees Chart.doc; ATT00002.htm; FLSA Damages Memo-Final.docx; ATT00003.htm; Recent FLSA Settlements Chart.doc; ATT00004.htm; FLSA Update -- July 21, 2017.doc; ATT00005.htm

Begin forwarded message:

From: "McFadden, Elizabeth" <Elizabeth.McFadden@ed.gov>
Date: August 11, 2017 at 1:56:01 PM EDT
To: "Menashi, Steven" <Steven.Menashi@ed.gov>
Cc: "Rosenfelt, Phil" <Phil.Rosenfelt@ed.gov>, "Sasser, Tracey" <Tracey.Sasser@ed.gov>, "Taylor, Michael" <Michael.Taylor@ed.gov>, "Mayo-Tall, Karen" <Karen.Mayo-Tall@ed.gov>, "Rountree, Schwanda" <Schwanda.Rountree@ed.gov>
Subject: Memo and Supporting Materials on FLSA Damages and Settlement

Steven –

Per our discussions from earlier this week, enclosed are the following documents:

- Memo providing a recommendation and supporting analysis regarding settlement of the FLSA litigation
- Tables with detail on overtime owed and unpaid compensatory time.
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Thanks.

Elizabeth

Elizabeth A. M. McFadden
Deputy General Counsel for Ethics, Legislative Counsel,
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elizabeth.mcfadden@ed.gov
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of the Freedom of Information and Privacy Act

From: Steven.Menashi@ed.gov
Sent: Tuesday, August 15, 2017 3:55 PM
To: Venable, Joshua; Manning, James; Smith, Kathleen
Subject: Fwd: NCDOJ Letter to US DoEd re: Charlotte School of Law
Attachments: image003.jpg; ATT00001.htm; 20170815 Ltr to B DeVos re CSL Closure - AS SENT.pdf; ATT00002.htm

Begin forwarded message:

From: "Zibel, Daniel" <Daniel.Zibel@ed.gov>
Date: August 15, 2017 at 3:22:21 PM EDT
To: "Menashi, Steven" <Steven.Menashi@ed.gov>, "Rosenfelt, Phil" <Phil.Rosenfelt@ed.gov>, "Urwitz, Jay" <Jay.Urwitz@ed.gov>
Subject: FW: NCDOJ Letter to US DoEd re: Charlotte School of Law

FYI

From: Frola, Michael
Sent: Tuesday, August 15, 2017 2:03 PM
To: Zibel, Daniel
Subject: FW: NCDOJ Letter to US DoEd re: Charlotte School of Law

From: Liles, Matthew [<mailto:mliles@ncdoj.gov>]
Sent: Tuesday, August 15, 2017 1:32 PM
Cc: Frola, Michael; Wood, Swain; Thomas C. Shanahan (tcshanahan@northcarolina.edu); Kimberly van Noort (kpvannoort@northcarolina.edu); Riley, Liz (LRiley@wcsr.com)
Subject: NCDOJ Letter to US DoEd re: Charlotte School of Law

Attached please find a copy of correspondence from my office regarding Charlotte School of Law sent to Secretary of Education Betsy DeVos earlier today.



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

REPLY TO:
MATT LILES
ASSISTANT ATTORNEY GENERAL
MLILES@NCDOJ.GOV

****Contains information designated by Charlotte School of Law as confidential and nonpublic – see endnote****

August 15, 2017

VIA US AND ELECTRONIC MAIL

The Honorable Betsy DeVos
The Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Notice of Closure - Charlotte School of Law

Dear Madam Secretary:

I am writing to ensure that you are aware of recent developments at Charlotte School of Law (“CSL”) that appear to us to require immediate action from the Department of Education to protect the former students of this now-closed school.

As of August 11, 2017, CSL’s license to operate in North Carolina expired. On June 21, 2017, the UNC Board of Governors (“UNC-BOG”), CSL’s state licensing entity, had placed certain preconditions on CSL’s license to operate a post-secondary school in North Carolina. CSL has failed to meet one or more of those conditions and its license therefore expired. It is our understanding that CSL is now in the process of informing faculty and students that the school is now legally closed. In light of these developments, I ask that you take swift action to protect CSL students, notify them of their rights, and to protect the public trust.

CSL’s closure has been imminent for some time now. As explained in my April 12 letter (copy enclosed for your reference), following actions by the American Bar Association and the U.S. Department of Education (“Department”) in late 2016, and after CSL signaled that its closure was likely, a large majority of CSL’s student body took steps towards withdrawing at the beginning of the Spring 2017 Semester. Now that CSL has closed, I reassert our belief that the fair application of the closed school discharge rule, 34 C.F.R. § 685.214, should afford students who attended CSL at the time of the Department’s December 2016 action, but who have yet to graduate, the option

of discharging their federal loans. Based on information recently provided to both of our entities by CSL, this could result in over (b)(4) in loan relief for approximately (b)(4) former CSL students.

The closed school discharge rule remains the most powerful tool for immediate relief for affected CSL students. For the reasons stated in our April 12th letter, and taking into account the considerations below, I respectfully ask that you act without delay to get CSL students the relief they deserve.

A. CSL Legally Closed on August 11th

As you are aware, in January 2017, the UNC-BOG began a review of CSL's license. This review was triggered by the school's being put on probation by its accreditor and by the Department's subsequent denial of CSL's application for recertification for participation in Title IV programs. On May 24, 2017, a UNC staff report made four findings of non-compliance with financial standards against CSL. The staff report also expressed serious concern about the continued quality of CSL's program of study – noting that CSL's objectives for addressing its academic issues were “not supported by detailed, feasible plans.”¹ On June 16, 2017, UNC President Margaret Spellings adopted the staff report's findings and recommended placing limitations and conditions on CSL's license.² These restrictions included, *inter alia*, preventing CSL from enrolling any new students and requiring CSL to receive both ABA approval for its plans and reinstatement to Title IV programs by August 10, 2017. On June 21, 2017, the UNC-BOG adopted President Spellings' recommendation.³

Based on available information, as of August 11, 2017, CSL had failed to meet at least two of the UNC-BOG's preconditions for continued licensure: 1) having a “teach out” or remedial plan approved by the ABA; and 2) being reinstated to Title IV programs by the Department. *See* June 21st Decision ¶ 4. According to the terms of the UNC-BOG's decision, failure to satisfy these two conditions by August 10, 2017 would result in the immediate expiration of CSL's license. *See* June 21st Decision ¶ 9.

Pursuant to 34 C.F.R. § 685.214(a)(2)(i), a school is closed for purposes of closed school discharge once it has “cease[d] to provide educational instruction in all programs.” CSL no longer holds a valid license to operate in North Carolina, meaning that it cannot legally provide educational instruction. N.C. Gen. Stat. § 116-15(b). CSL has confirmed to UNC that, as of August 10th, it had ceased classroom instruction. Accordingly, I respectfully request that you determine, in accordance with your duty in Section 685.214(a)(2)(i), that CSL is closed as of August 11, 2017.

¹ See May 24, 2017 UNC Staff Report *attached to* Memorandum from Margaret Spellings, Pres., Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs (Jun. 16, 2017).

² Memorandum from Margaret Spellings, Pres., Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs (Jun. 16, 2017).

³ Decision of Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs, Charlotte School of Law – License Restrictions (Jun. 21, 2017).

B. Considerations for Closed School Discharge Eligibility

Mere rote application of the closed school discharge rule in the case could deny necessary relief to many deserving student borrowers. We respectfully offer the following considerations to assist in guiding your application of the rule to this unique situation.

1. Students Who Attended CSL on or After April 13, 2017 Should Be Afforded Closed School Discharge Without Delay.

The key provision of the rule, 34 C.F.R. § 685.214(c)(1)(i)(B) requires that in order to “qualify for discharge of a loan,” the borrower must truthfully state that he or she:

“Did not complete the program of study at that school because the school closed **while the student was enrolled**, or the student **withdrew from the school not more than 120 days before the school closed.**”

(Emphasis added.) As of August 11, 2017, CSL is not licensed and cannot legally operate a post-secondary school in the state of North Carolina. *See* N.C. Gen. Stat. § 116-15. This should qualify any student who attended CSL after April 13, 2017, but who did not ultimately graduate, for a closed school discharge.

2. The Secretary Should Discharge the Loans of the Currently-Enrolled CSL Students Without Application From the Students.

The Department should automatically discharge the loans of the students currently enrolled at CSL without application from the students.⁴ Pursuant to 34 C.F.R. § 685.214(c)(2), you may discharge these borrowers’ loans “without an application from the borrower if the Secretary determines, based on information in the Secretary’s possession, that the borrower qualifies for the discharge.” Over the past year, CSL has been in regular contact with both of our offices, often providing status reports on its students. Given the recency of this information, it should be straightforward to determine which borrowers meet the qualifications of 34 C.F.R. § 685.214(c). Based on our office’s experience in analogous situations, including with the thousands of North Carolina borrowers entitled to streamlined relief because they attended Corinthian Colleges, making students take the extra step of applying – when we know they almost certainly qualify – will unduly diminish the number of qualified students who ultimately receive the loan relief they are entitled to.

⁴ I respectfully note that under the version of the rule recently revoked by the Department these students would have been automatically granted a closed school discharge without application three years after the closure date. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75296, 76081-82 (Nov. 1, 2016) (to be codified in part at 20 C.F.R. 685.214) *rescinded* by Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 27621, 27622 (Jun. 16, 2017).

3. Students on Leaves of Absence Should be Eligible

As advocated in our April 12 letter, CSL students on leaves of absence should be included in this group of students eligible for closed school discharge. CSL has represented to both of our agencies that it considers students on leaves of absence as still enrolled. In fact as recently as July 17th, CSL included these students on leaves of absence in its response to the Department's request to identify the federal borrowers that CSL believed may return for the Fall 2017 Semester. CSL believed that students on leaves of absence were still enrolled at CSL. There is no reason that the Department should find otherwise.

4. Exceptional Circumstances Exist Supporting Enlarging the Closed School Discharge Eligibility Period.

As discussed in our April 12th letter, the application of the closed school discharge rule in CSL's case is confused by a novel situation – CSL's continued operation despite the loss of more than half of its student body – and the school's numerous representations in January 2017 indicating an intent to close imminently. Many students saw the writing on the wall and made the understandable choice to leave. Many others had to leave because the unavailability of federal funds for their education made it financially impossible to continue. These students are affected by CSL's closure just as much as any student who managed to make it to April, but without your action they will not be eligible for a closed school discharge.

You have the discretion to extend the discharge period on the basis of "exceptional circumstances." 34 C.F.R. § 685.214(c)(1)(i)(B). The rule reads:

"The Secretary may extend the 120-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the school's loss of accreditation; the school's discontinuation of the majority of its academic programs; action by the State to revoke the school's license to operate or award academic credentials in the State; or a finding by a State or Federal government agency that the school violated State or Federal law...."

(Emphasis added.)

For at least the following seven reasons, the CSL matter should be regarded as "exceptional" under any reasonable interpretation.

- First, due to repeated mixed signals, CSL's loss of students has been an unusually slow-developing process that has played out over almost nine months. This would make application of a rigid 120-day deadline potentially defeat the purpose of the rule.
- Second, North Carolina's state licensing entity has revoked CSL's license, an exceptional circumstance specifically enumerated in the regulation. It is noteworthy that the revocation occurred only after the licensing entity gave CSL a substantial period of time to take certain steps to demonstrate compliance, which it was unable to do.
- Third, there is an unusually high potential for significant monetary injury to former CSL students because the cost of legal education is high compared to other programs.

- Fourth, a substantial portion of CSL's academic program was discontinued in January 2017, when CSL terminated clinical professors and bar exam coaches.
- Fifth, in January 2017, an exceptional event occurred – CSL accepted a teach-out plan proposed by the Department, only to eventually balk at the terms on the details of CSL's closure.⁵
- Sixth, CSL has experienced serious problems with its accreditation. The school is currently on probation. In its July 6 ruling, the ABA found that CSL is still out of compliance with three ABA standards and that the school's Reliable Plan "has not proven effective or reliable." And now the ABA has reportedly rejected CSL's teach-out plan.⁶
- Seventh, not extending the eligibility period in this case could potentially lead other schools to drag out their closures to minimize their closed school discharge liability.

Finding exceptional circumstances and extending the deadline for affected students would not harm the federal government, since it can recoup its closed school discharge losses from CSL and its owners, but it would do a great service for many of the students hurt by this situation.

Not extending the deadline would be unjust and in some cases would yield perverse results. For example, one of the conditions for reinstatement to Title IV programs the Department gave to CSL on July 27th was to offer refunds to students in their first year on December 19, 2016.⁷ These refunds were to be made available to all first-year students, whether they left CSL in the Spring of 2017 or not. (b)(4)

(b)(4) Unless you extend the closed school discharge eligibility period pursuant to Section 685.214(c)(1)(i)(B), a first year student who left CSL between the Department's action in December 2016 and April 12, 2017 would not receive any loan relief. It would be fundamentally unfair to offer these students refunds if CSL were to continue to operate, but not if the school closed.

There is no material difference between a student who left CSL before April 13, 2017 and one who left after. Yet, without your action, the student who left after April 13 will be afforded full forgiveness of their student debt while the one who left before, under essentially the same situation, might not. A just application of the closed school discharge rule would provide relief to all students who attended CSL after the Department's action in December, but ultimately did not graduate.

⁵ See Letter from Chidi Ogene and Jay Conison to CSL students, <http://www.charlottelaw.edu/jan-19-2017-update-from-president-ogene-and-dean-conison.html> ("After intense discussions, we accepted a two-page plan provided by the Department's Office of Federal Student Assistance.").

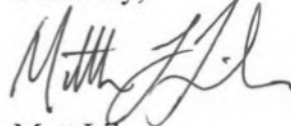
⁶ See Nick Oshsner, *Accrediting Body Denies Charlotte School of Law Teach-Out Plan*, WBTV, Aug. 14, 2017, available at <http://www.wbvtv.com/story/36134942/accrediting-body-denies-charlotte-school-of-law-teach-out-plan>.

⁷ Letter from Michael J. Frola, Dir., Multi-Regional and Foreign Sch. Participation Div., U.S. Dept. of Ed. to Chidi Ogene, Pres., Charlotte Sch. of Law, ¶ 4 (Jul. 27. 2017).

D. Continued Cooperation to Help Students

CSL's former students need your help. Our office stands ready to provide any assistance you may need, including in locating students and apprising them of their rights. Our office regularly hears from students that feel victimized by CSL. Now that CSL has officially closed, these students will undoubtedly appeal to our office for help. With swift action by the Department, we can direct these students to the process for seeking closed school discharge.

Sincerely,



Matt Liles

Assistant Attorney General

cc: Michael J. Frola, Director, Multi-Regional and Foreign Schools Participation Division,
U.S. Department of Education (*via email*)
Josh Stein, Attorney General of North Carolina
Swain Wood, General Counsel, N.C. Department of Justice (*via email*)
Thomas Shanahan, Senior Vice President and General Counsel, University of
North Carolina (*via email*)
Kimberly van Noort, Vice President for Academic Programs & Instructional Strategy,
University of North Carolina General Administration (*via email*)
Elizabeth LeVan Riley, Legal Counsel for Charlotte School of Law, at Womble Carlyle
Sandridge & Rice, LLP (*via email*)

Endnote:

This letter contains confidential information designated by Charlotte School of Law that, to the extent allowed by law, may be protected from disclosure. This information designated confidential, which I have denoted by highlighting it in the text, was provided to the N.C. Department of Justice through a March 29, 2017 Non-Disclosure Agreement with the Charlotte School of Law. I am sharing this information with you unredacted, as the official representative of a public agency per Paragraph 7(e) of that non-disclosure agreement.

Enclosures:

- April 12, 2017 Letter from M. Liles and H. Worley, N.C. Dep't of Justice to Hon. B. DeVos, Sec. of Ed. concerning Charlotte School of Law.
- June 16, 2017 Memorandum from Margaret Spellings, Pres., Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs
- June 21, 2017 Decision of Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs, Charlotte School of Law – License Restrictions.



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
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REPLY TO:
HARRIET WORLEY OR MATT LILES
CONSUMER PROTECTION DIVISION
HWORLEY@NCDOJ.GOV
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April 12, 2017

The Honorable Betsy DeVos
The Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Charlotte School of Law

Dear Madam Secretary:

We are writing to outline briefly recent developments at Charlotte School of Law ("CSL"), following up on two letters our office issued regarding CSL on March 10, 2017. We copied the U.S. Department of Education ("Department") on both of those letters.

Since we issued those letters, our concerns have intensified based on several new developments. We are troubled that CSL may proceed without the type of formal plan that would protect students under your Department's regulations. As of today, based on public information:

- Most CSL students have left the school.¹
- CSL's landlord recently stated that CSL is willing to sublet all of its classroom space.²
- CSL required 169 days after the due date to pay its city and county taxes, incurring thousands of dollars in interest.³
- CSL's current enrollment is well beneath the 500-student target that the school identified as its minimum for continuing operation in January.⁴

Realistically, CSL's ability to continue to operate is in considerable doubt. Under Department of Education regulations, the precise timing of any closure date will have significant financial consequences for students. The closed school discharge rule, 34 C.F.R. § 685.214, makes students eligible for loan forgiveness only if they withdrew "not more than 120 days before the school closed." A large majority of CSL's student body took steps towards withdrawing in January 2017 and early February 2017, at the beginning of the Spring Semester,

when CSL provided multiple signals that its closure was imminent. Those students' 120-day time limit under the regulations may run in the near future.

Our office, which is responsible *inter alia* for civil enforcement of North Carolina's unfair trade practice laws, opened an investigative file on CSL and is gathering information.* The Department's closed school discharge rule is among students' most powerful potential remedies. We would be very concerned if CSL were to close under timing that left doubtful whether students would receive loan forgiveness under the rule.

Therefore, in this letter we ask that the Department, in addition to continuing its own investigation and taking such further steps as it deems appropriate, confirm several features about how the rule would work in practice. First, we believe the date on which a student is deemed to have withdrawn should be no sooner than February 3, 2017, the last day of CSL's "drop/add" period for the Spring Semester. Second, we believe students should not be deemed to have withdrawn under the rule if they took a leave of absence or stated they would seek to transfer from CSL. Third, we suggest that exceptional circumstances exist in this case that would justify extending the 120-day discharge period under the rule.

A. New Developments

First of all, recent information has helped illustrate how decisions made many years ago by CSL management led directly to the untenable position faced by students today. CSL's new Dean, Scott Broyles, has acknowledged in recent interviews that in previous years, CSL management systematically lowered the school's admissions standards over the objections of CSL faculty.⁵ This strategy appears to have allowed CSL to bolster its enrollment during the first half of this decade, when the overall supply of law students dropped. As the students with lower qualifications passed through the school and graduated, CSL's bar passage rates diminished. When results were released last month from the February 2017 state bar examination, CSL's passage rate was 25%, down from 34.7% in the previous year.⁶

Second, it has become evident that even if the Department of Education restores Title IV funding, CSL will remain at risk of closure. As noted above, CSL appears to be in tenuous financial condition, as it is contemplating subleasing its classroom space, and had difficulty paying a significant tax bill. To reach its enrollment target, CSL must attract new students, but it has suffered significant, self-inflicted reputational damage that will make that more difficult. CSL students must pass a state bar exam in order to make use of their education, but repeatedly, the majority of CSL students taking the bar exam have failed it, and CSL admits that its pass rate is not acceptable.⁷ CSL's accreditor placed CSL on probation. Finally, both students and the Department of Education have argued that CSL made substantial misrepresentations to students.⁸

B. Students' Dilemma

CSL's actions, including its repeated mixed signals, have created an extremely difficult dilemma for students. In December 2016 and January 2017, the situation facing CSL students

* To avoid confidentiality concerns, this letter discusses only information in the public press, not any documents provided under the Civil Investigative Demand made by this office.

was changing almost daily. On January 4, CSL indicated to students that it was uncertain whether it would reopen for the 2017 Spring Semester.⁹ Two days later, on January 6, CSL announced it would reopen.¹⁰ Four days after that, on January 10, CSL and the Department of Education were reportedly discussing the immediate closure of CSL under a teach-out plan.¹¹ On January 16, CSL delayed its reopening date by a week.¹² On January 18, students were informed that negotiations had failed between the Department of Education and CSL.¹³ On January 19, CSL fired more than half of its employees and faculty.¹⁴ Nevertheless, classes convened on January 23, two business days later.¹⁵

During January 2017, students faced extreme uncertainty about whether CSL would reopen, and on many occasions were given information suggesting that it would not. Even when classes began on January 23, students could reasonably have expected that CSL would be unable to complete the semester, given the substantial uncertainty during the three weeks preceding that date. Even students who were fully comfortable with the revised CSL educational offerings would have been unable to use federal loan money – their primary means of finance – to pay their tuition and living expenses.

In this constantly shifting environment, many students likely would have made decisions about withdrawal from the school based on the understanding that it would be closing soon, only to learn later that it might not be. In these circumstances, we believe it should be understood by all that the date of formal withdrawal for any affected student cannot be earlier than February 3, 2017, the last day of CSL's drop/add period. As noted above, we believe it would be helpful if the Department would confirm that cut-off date to all potentially affected students.

Both withdrawn and present students carry a very significant debt burden. Students who graduate from CSL have a median of \$161,910 in debt.¹⁶ If CSL closes in Summer 2017 due to poor financial health, CSL's investors and officers would be free to walk away; at worst, they would have lost the value of their investment. CSL's students, on the other hand, would be left with debt they cannot discharge, incurred for a legal education of diminished value, which in many cases will not lead to their obtaining the professional qualification they sought at the outset of their studies. We believe the Department of Education's closed school discharge rule, 34 C.F.R. § 685.214, was created to resolve precisely this kind of problem.

C. The Closed School Discharge Rule

Should CSL close, one of the most powerful potential remedies for CSL students would be a closed school discharge pursuant to 34 C.F.R. § 685.214. Under the rule, discharge would remove "the obligation of the borrower and any endorser to make any further payments on the loan." 34 C.F.R. § 685.212(d). Discharge would allow the borrower to receive "reimbursement of amounts paid voluntarily on the loan" and would relieve the borrower of adverse credit history and accrued collection costs. 34 C.F.R. § 685.214(b).

More than half of CSL's student body ceased attending classes in January 2017. Some of these students may have gone on a leave of absence intending to re-enroll, others may have intended to transfer, and some may have intended to permanently withdraw. If CSL closes, these students' ability to seek loan forgiveness depends on three factors. First, on what date is the

student deemed to have withdrawn under the closed school discharge rule? Second, are students who went on a leave of absence deemed to have withdrawn under the rule? Third, will the Department determine that “exceptional circumstances” existed in January 2017 that justify extending the normal 120-day discharge period?

1. The Rule Should Deem CSL Students to Have Withdrawn No Sooner Than the Date When the Drop/Add Period Ended, February 3, 2017.

The key provision of the rule, 34 C.F.R. § 685.214(c)(1)(i)(B) requires that in order to “qualify for discharge of a loan,” the borrower must truthfully state that he or she:

“Did not complete the program of study at that school because the school closed **while the student was enrolled**, or the student **withdrew from the school not more than 120 days before the school closed**.”

(Emphasis added.) We are not aware of any applicable case law or interpretive decision to assist in calculating the date on which a student “withdrew.”

Confusion in application of this rule stems from a novel situation – CSL’s continued operation despite the loss of more than half of its student body – and the school’s numerous representations in January 2017 indicating an intent to close imminently. Unless the Department provides clarity, it would be natural for students to be concerned that each day CSL continues to operate reduces the number of students who would qualify for loan forgiveness. Indeed, since CSL and its associated companies are liable to the Department for any closed school discharges granted, CSL would appear to have a vested interest in continuing to operate to decrease their potential liability to your Department. The Department should not allow any self-serving delay.

On May 23, 2017, it will have been 120 days since January 23, 2017, CSL’s first day of classes for its spring semester. On June 3, 2017, it will have been 120 days since February 3, 2017, when CSL students’ drop/add period ended and students were disenrolled.

In light of the foregoing, we believe the rule should be applied so that students are deemed to have withdrawn no earlier than the time when CSL’s drop/add period appears to have ended, February 3, 2017. This is the most natural, plain reading of the rule – on this date, the student’s decision was locked in, and students not currently enrolled became unable to enroll in Spring Semester classes for credit. Any other interpretation of the rule would not only lead to confusion and uncertainty, but also would upset students’ reasonable reliance on statements made by CSL and the Department of Education. As noted above, throughout the month of January many CSL students would have reasonably understood statements from CSL and the Department of Education to indicate CSL was substantially likely to close.

As a result, we are asking that the Department confirm that the 120-day deadline will run 120 days after the end of the drop/add period, June 3, 2017.

2. Students Taking a Leave of Absence or Stating an Intent to Transfer Should Not Be Deemed to Have Withdrawn.

Given the extraordinary uncertainty in January 2017 about whether CSL would reopen and, if so, the conditions under which it would reopen, we believe it is essential that students be deemed to have withdrawn only if they unequivocally intended to withdraw, not temporarily disenroll. In January, a student could reasonably have hoped to sit out the 2017 Spring Semester, then return once CSL became stable and he or she had sufficient financial resources to attend. Other students may have hoped to transfer, given the recent reputational damage to CSL and the recent uncertainty about CSL's future, but may have been willing to attend CSL classes if transfer became impossible. We believe that the rule should not deem a student to have withdrawn if the student indicated a desire to take a leave of absence or, if possible, transfer to another school.

3. Exceptional Circumstances Exist in This Case.

You have the discretion to extend the discharge period on the basis of "exceptional circumstances." 34 C.F.R. § 685.214(c)(1)(i)(B). The rule reads:

"The Secretary may extend the 120-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the school's loss of accreditation; the school's discontinuation of the majority of its academic programs; action by the State to revoke the school's license to operate or award academic credentials in the State; or a finding by a State or Federal government agency that the school violated State or Federal law...."

(Emphasis added.)

For four reasons, the CSL matter should be regarded as "exceptional" under any reasonable interpretation.

- First, in this matter, due to repeated mixed signals, CSL's loss of students has been an unusually slow-developing process. This would make application of a rigid 120-day deadline potentially defeat the purpose of the rule.
- Second, there is an unusually high potential for significant monetary injury to former CSL students because the cost of legal education is high compared to other programs.
- Third, a substantial portion of CSL's academic program appears to have been discontinued in January, when CSL terminated clinical professors and bar exam coaches.
- Fourth, in January, an exceptional event occurred – CSL accepted a teach-out plan provided by the Department of Education, but then CSL and the Department were unable to come to terms on the details of CSL's closure.¹⁷

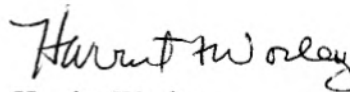
Finding exceptional circumstances and extending the deadline for affected students would not harm the federal government, since it can recoup its closed school discharge losses from CSL and its owners, but it would do a great service for many of the students hurt by this situation.

D. Our Goal to Cooperate and Share Information with Regard to CSL's Situation

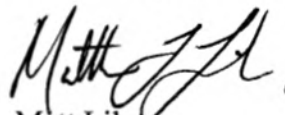
As you have noted in your public statements, educational institutions must be accountable. Inevitably, some schools will not be a success. When those unsuccessful schools shut down, their former students will be left with long-lasting impacts from debt. If CSL closes, this case will be the first opportunity to establish how your Department will protect students' interests when post-secondary educational institutions do not succeed.

As our office moves forward with its analysis of the facts, we hope to continue to build upon our working relationship with your Department. If any actions become necessary regarding CSL, I hope that our organizations will work together to take those actions in the way that best protects CSL's students.

Sincerely,



Harriet Worley
Special Deputy Attorney General



Matt Liles
Assistant Attorney General

cc: Josh Stein, Attorney General of North Carolina
Swain Wood, General Counsel, N.C. Department of Justice
Thomas Shanahan, Senior Vice President and General Counsel, University of North Carolina
Kimberly van Noort, Vice President for Academic Programs & Instructional Strategy, University of North Carolina General Administration
Elizabeth LeVan Riley, Legal Counsel for Charlotte School of Law, at Womble Carlyle Sandridge & Rice, LLP

Endnotes

¹ See, e.g., Jennifer Thomas, *Charlotte Law's Interim Dean Navigating Difficult Path Forward*, Charlotte Business Journal, Mar. 22, 2017, <http://www.bizjournals.com/charlotte/news/2017/03/22/charlotte-laws-interim-dean-navigating-difficult.html>.

² See Ashley Fahey, *Big Block of Space Available for Sublease in Charlotte Plaza*, Charlotte Business Journal, Mar. 31, 2017, <https://www.bizjournals.com/charlotte/news/2017/03/31/big-block-of-space-available-for-sublease-in.html>.

³ Bill Number 0007042776-2016-2016-0000-00 available at Mecklenburg County, NC Office of the Tax Collector Property Tax System, <http://charmeck.org/mecklenburg/county/TaxCollections/PTS/Pages/PTS.aspx>. Payment appears to have taken place only after a press story noted the delinquent tax payment. See Jennifer Thomas,

Charlotte Law delinquent on \$148K in taxes; School Says Check Issued, Feb. 17, 2017, <http://www.bizjournals.com/charlotte/news/2017/02/17/charlotte-law-delinquent-on-148k-in-taxes-school.html> . The law school's dean, when explaining why the school had not provided more financial assistance to its students, admitted, "Finances are tight." *Charlotte Talks* (WFAE-FM radio broadcast Apr. 6, 2017), at 16:10 in recording, available at <http://wfae.org/post/new-law-school-dean-challenges-ahead-cult-ignorance-wages-attack-expertise> .

⁴ Press reports indicate that in a Wednesday, January 4, 2017 meeting with students, school leaders told students "CSL needs at least 500 students ... to commit to taking classes this spring." Michael Gordon, *Students: Charlotte School of Law to Announce Fate of Classes This Week*, *Charlotte Observer*, Jan. 4, 2017, <http://www.charlotteobserver.com/news/politics-government/article124503289.html> . Nonetheless, CSL was able to open its Spring Semester with an enrollment beneath 500. Current enrollment is approximately 220, down from 787 in Spring 2016, and roughly one-half will graduate in May. See Jennifer Thomas article, *supra* note 1.

⁵ In a radio interview on April 6, 2017, CSL Interim Dean Scott Broyles spoke extensively about the process that led to CSL lowering its admissions standards. He said:

[At 2:08 in recording] "When we opened in 2006, we had a very strong faculty. And we were having high bar pass rates.... I think what happened at a certain point – I know what happened – the admissions began to drop, in terms of the criteria.... [T]he administrators had an unrealistic belief in how you could provide additional resources -- academic support – for students with low indicators coming in and that would address the problem of the low indicators.

[At 3:56] "No, they weren't only paying attention to the bottom line. They were paying close attention to the bottom line, but again, I think they were of the belief that if you add all these additional resources in academic support terms, then that could address these lower indicators. That turned out to be not the case. The faculty was pushing back against that on a consistent basis, but they were not sufficiently listened to."

[At 12:30] "Don't like to point fingers of blame, right? But it was the administration who made the decision to bring in students who were not capable of performing at the law school level."

[At 11:50] "The pressure we felt was that we were dealing with students that – that we could not properly teach, to put it simply."

Charlotte Talks (WFAE-FM radio broadcast Apr. 6, 2017), available at <http://wfae.org/post/new-law-school-dean-challenges-ahead-cult-ignorance-wages-attack-expertise> . When asked by another reporter, "Did you feel like you saw those red flags?", CSL Interim Dean Scott Broyles said, "Yes I did." He added, "Not only me, but a number of faculty members said we are not on the right path, we've got to stop this." *Eyewitness News* (WSOC-TV television broadcast Mar. 22, 2017), available at <http://www.wsoc.tv/news/local/interim-dean-at-charlotte-school-of-law-hopeful-it-will-stay-open/505133228> .

⁶ See Jennifer Thomas, *Charlotte Law Dean: Bar Passage Rates Not Acceptable*, Mar. 29, 2017, <http://www.bizjournals.com/charlotte/news/2017/03/29/charlotte-law-dean-bar-passage-rates-not.html> .

⁷ *Id.*

⁸ Dec. 19 letter from U.S. Department of Education to Chidi Ogene, President, Charlotte School of Law, p. 10.

⁹ See Michael Gordon, *Charlotte Observer*, Jan. 4, 2017, *supra* note 4.

¹⁰ See Mark Washburn and Michael Gordon, *Charlotte School of Law Will Reopen, Students Told*, *Charlotte Observer*, Jan. 6, 2017, <http://www.charlotteobserver.com/news/local/article125098999.html> .

¹¹ See Michael Gordon, *Is Charlotte School of Law Taking Steps to Shut Down?*, *Charlotte Observer*, Jan. 10, 2017, <http://www.charlotteobserver.com/news/local/education/article125737084.html> .

¹² See Kevin Sloan, *Is Doomsday Imminent for Charlotte Law School?*, National Law Journal, Jan. 16, 2017, <http://www.nationallawjournal.com/id=1202776513793/Is-Doomsday-Imminent-for-Charlotte-Law-School?slreturn=20170310184957>.

¹³ See Michael Gordon, *Feds, Charlotte School of Law Fail to Reach Agreement Over Federal Student Loans*, Charlotte Observer, Jan. 18, 2017, <http://www.charlotteobserver.com/news/local/education/article127341129.html>.

¹⁴ See Michael Gordon, *Charlotte School of Law Fires Dozens of Faculty*, Charlotte Observer, Jan. 19, 2017, <http://www.charlotteobserver.com/news/politics-government/article127438764.html>, and Michael Gordon, *Classes Reopen in Stripped-Down Charlotte School of Law*, Charlotte Observer, Jan. 23, 2017, <http://www.charlotteobserver.com/news/politics-government/article128275794.html>.

¹⁵ Concerning the rescheduled first day of classes, see Michael Gordon, *Classes Reopen in Stripped-Down Charlotte School of Law*, Charlotte Observer, Jan. 23, 2017, <http://www.charlotteobserver.com/news/politics-government/article128275794.html>.

¹⁶ Charlotte School of Law, *ABA Required Disclosures and Gainful Employment*, retrieved on Apr. 7, 2017, <http://www.charlottelaw.edu/gainful-employment-aba-required-disclosures.html>.

¹⁷ See Letter from Chidi Ogene and Jay Conison to CSL students, <http://www.charlottelaw.edu/jan-19-2017-update-from-president-ogene-and-dean-conison.html> (“After intense discussions, we accepted a two–page plan provided by the Department’s Office of Federal Student Assistance.”)

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

General Administration

Main: 919-962-1000

Web: www.northcarolina.edu

MEMORANDUM

TO: Committee on Educational Planning, Policies, and Programs

FROM: Margaret Spellings, President

DATE: June 16, 2017

SUBJECT: Recommended Findings and License Restrictions for Charlotte School of Law

I. BACKGROUND

Pursuant to N.C.G.S. § 116-15, the Board of Governors is responsible for the licensure of nonpublic post-secondary degree granting institutions in North Carolina. UNC General Administration (UNC-GA) has the authority to perform compliance reviews to ensure that licensed institutions continue to meet the statutory and regulatory standards for licensure, as set forth in the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*. If an institution is not in compliance, the Board of Governors may revoke the institution's license, or may place conditions on the license until the institution coming into compliance. It is generally expected that before closing an academic program, arrangements will be made to ensure that existing students can either complete the course of study or transition to another program without disadvantaging the students, an arrangement commonly referred to as a "teach out."

The Charlotte School of Law (CSL) has been licensed to conduct post-secondary degree activity in North Carolina since 2005. Effective November 14, 2016, the American Bar Association (ABA), CSL's accrediting organization, placed the institution on a two-year probation, finding "substantial and persistent" noncompliance with certain ABA accreditation standards. Shortly after the ABA action, the Department of Education denied CSL's application for recertification for participation in Title IV programs, a decision that was finalized by letter dated January 18, 2017. On January 24, 2017, UNC General Administration initiated a licensure review, which included engaging outside reviewers with expertise in financial operations and law school academic program matters. UNC General Administration had communicated its concerns about CSL to the North Carolina Department of Justice prior to initiating the compliance review.¹

¹ G.S. 116-15(j) states that [t]he Board shall call to the attention of the Attorney General, for such action as he may deem appropriate, any institution failing to comply with the requirements of this section."

General Administration's review resulted in a staff report finding:

- Noncompliance with Standard 10.A.(1) of the *Rules and Standards*, for failure to demonstrate financial resources indicating the institution is capable of maintaining operational continuity;
- Noncompliance with Standard 10.A.(3), for failure to demonstrate an adequate financial plan for long-range management of the institution;
- Noncompliance with Standard 10.A.(4), due to recent financial records and audit reports that do not demonstrate financial stability; and
- Noncompliance with Standard 10.A.(6), for failure to maintain an adequate tuition guaranty bond.

In addition, the report noted concerns regarding CSL's ability to continue to remain in compliance with Standard 3, which focusses on the quality of the program of study. The staff report is attached hereto.

Because the staff report could potentially lead to a decision by the Board to revoke CSL's license, the report was forwarded to CSL on May 24, 2017, in accordance with Section IX of the *Rules and Standards*.

As allowed by the *Rules and Standards*, CSL requested an interview and an opportunity to provide additional information regarding the findings in the report. CSL provided supplemental information, and met with staff on June 16, 2017, to discuss the report and explain the steps they have taken to address the findings.

CSL indicates they are working on a series of actions that will allow them to address the findings regarding Standard 10 and continue to operate on a financially stable base, including the restructuring of its debt agreements with certain investors. CSL has described the financial restructuring in detail, and has made their chief financial officer, president, and others available to meet with UNC-GA staff and external reviewers to answer questions about CSL's financial operations. CSL has committed to providing all documents and signed agreements regarding these arrangements as the restructuring progresses, but those materials are not yet available.

In addition, CSL shared with staff additional information regarding its remaining student population. According to CSL, they currently enroll 11 first-year students (most of whom are part-time students who have partially completed their first year), 55 second-year students, and 34 third year students. CSL has indicated that a significant number of these students hope to complete their education at CSL, and that many have no other options due to family or work considerations that prevent them from leaving the Charlotte area. There are currently 73 students who are on "leave of absence" status, meaning that they are not currently enrolled but have not officially withdrawn. CSL expects that many of these students would return if the Department of Education allows participation in Title IV programs.

CSL and UNC-GA staff have discussed and recognize the need to address issues associated with students who are still enrolled or are partway through their programs at CSL. Of paramount importance is the assurance of a path towards degree attainment for those students who wish to finish their legal education at CSL. In order to ensure that these students are protected and afforded the opportunity to continue with their education, informed and prompt action by the Board is appropriate. While much information about CSL is available now, further determinations regarding CSL's potential to continue to operate will need to be addressed as the necessary information becomes available. The information and materials that CSL has provided have been reviewed and considered, and these recommendations are presented to the Board of Governors for consideration and approval.

II. RECOMMENDED FINDINGS AND DISPOSITION OF LICENSE

At this time, it is recommended that the Board of Governors find as follows:

Standard 10: Finance and Organization - The institution must be financially sound and capable of fulfilling its commitments to students.

1. Standard 10.A.(1): Stability – Financial resources should be characterized by stability that indicates the institution is capable of maintaining operational continuity for an extended period of time. The minimum “extended period of time” is the duration of the most lengthy post-secondary degree program offered.

Finding -- CSL has indicated that it is working on addressing issues concerning its financial stability, and that it expects to remedy through a financial restructuring that is underway. CSL has also provided financial information in support of a plan for continued operations during a teach-out of current students, and is continuing to provide information concerning its finances and stability. Based on the information available at this time, CSL has not yet demonstrated that its financial resources are characterized by stability that indicates the institution is capable of maintaining operational continuity for an “extended period.”

2. Standard 10.A.(3): Plan for Financial Development – A coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution must be maintained.

Finding – CSL has presented documents setting forth a financial plan for a “teach out” of current students. Although CSL indicates that it is undertaking a financial restructuring, it has not yet provided revised or projected financial statements or budget documents demonstrating the effects of that restructuring. While CSL expects to provide this additional information, the facts and information provided by CSL and reviewed by staff and external reviewers to date support this finding.

3. Standard 10.A.(4): Financial Records and Audit Report – The institution's recent financial history must demonstrate financial stability.

Finding – Although CSL has indicated that it is working on addressing issues concerning its financial stability through a financial restructuring that would address certain matters in its financial records and audit report, CSL’s recent financial history as reflected in the materials presented during the review does not demonstrate financial stability at this time.

4. Standard 10.A.(6): Bonding – Tuition guaranty bond, or equivalent, of not less than \$10,000 and at least equal to or higher than the maximum amount of prepaid tuition held (i.e., unearned tuition held) existing at any time during the most recent fiscal year must be maintained

Finding – CSL does not currently maintain a surety bond in the required amount, and did not maintain a bond in the required amount during the last fiscal year. Given the substantially reduced current enrollment, the bonding requirement will be addressed further below.

These noncompliance issues must be considered in light of the fact that there is still a substantial number of students currently enrolled at CSL who would like to complete their course of study at that institution.

Standard 3: Program of Study – The substance of each course, program of study, equivalent experience, or achievement test must be such as may reasonably and adequately achieve the stated objective for which the study, experience, or test is offered in order to be certified as successfully completed.

Standard 5: Faculty and Other Personnel Qualifications – The education, experience, and other qualifications of directors, administrators, supervisors, and instructors must be such as may reasonably ensure that the students will receive, or will be reliably certified to have received, education of good quality consistent with the stated objectives of any course or program of study, equivalent experience, or achievement test offered by the institution.

Finding – While there are no findings specific to compliance with Standards 3 and 5, the staff report observed that CSL’s objectives for addressing the issues essential to compliance with Standard 3 are not clearly supported by detailed, feasible plans for achieving those objectives. Moreover, the steps necessary to achieve the objectives identified by CSL, as described in its remedial plan submitted to the ABA as a condition of its probation (the “Reliable Plan”), could potentially worsen CSL’s financial stability. CSL may provide additional information regarding its plans to achieve its goals. The Reliable Plan CSL submitted to the ABA for approval is currently under review.

III. PRESIDENT’S RECOMMENDATION FOR DISPOSITION OF CHARLOTTE SCHOOL OF LAW’S LICENSE

The American Bar Association (ABA) has placed Charlotte School of Law (CSL) on probation for two years, beginning November 14, 2016, based on its finding that CSL is in substantial and persistent noncompliance with ABA accreditation standards 301 and 501. In response, CSL has asked the ABA to approve: (a) a plan to teach-out any remaining CSL students in anticipation of possible closure of

the school; and (b) a remedial plan (which is referred to by the ABA as a “Reliable Plan”) in anticipation of CSL’s continued operation as an accredited law school. The U.S. Department of Education has suspended CSL’s continued participation in Title IV programs. CSL has petitioned the Department of Education for reinstatement in Title IV programs, and CSL’s request remains under consideration. CSL is currently under investigation by the North Carolina Department of Justice, Consumer Protection Division, based on the division’s concerns about CSL’s future viability, the effects of CSL’s viability on CSL students, and the Consumer Protection Division’s concerns about keeping students fully informed about CSL’s status.

Based on the foregoing, the CSL information and materials reviewed to date, CSL’s financial status, and the potential impact on current CSL students, I recommend that the Board of Governors impose the following limitations on CSL’s license, pending further action and review of CSL’s compliance with the Board of Governors Rules and Standards:

1. CSL shall not admit any new or additional students to CSL until such time as this condition may be removed by further action of the Board of Governors.
2. No later than August 1, 2017, and subject to item 3, below, CSL shall present to the Licensure Unit such evidence as the Licensure Unit may deem necessary to show that CSL has remedied any deficiencies and has come into full compliance with the licensure standards for which the Board has found it to be out of compliance or, at a minimum, that it is making substantial and expeditious progress toward remedying its financial licensure deficiencies.
3. CSL shall immediately obtain, maintain, and provide proof to the Licensure Unit of a tuition guaranty bond in an amount at least equivalent to the amount of prepaid tuition to be paid by the maximum number of students who may participate in the teach-out CSL has proposed for the ABA’s consideration. The bond shall otherwise comply with Standard 10 of the Rules and Standards.
4. CSL may continue to conduct post-secondary degree activity in North Carolina at this time and on a limited basis while it develops and seeks ABA approval of an appropriate teach-out plan that fully protects the interests of CSL students who may wish to complete their CSL degree programs, and/or approval for continued operation as an accredited law school, subject to the following requirements:
 - a. CSL’s plan for teaching out its remaining students and/or remedial plan for continued operation as an accredited law school, must be approved by the American Bar Association (ABA) no later than August 10, 2017; and
 - b. The Department of Education (DOE) must determine no later than August 10, 2017, that any CSL student who remains enrolled may participate in Title IV federal loan programs.

5. CSL shall keep the Licensure Unit fully informed of the progress and the status of:
 - a. The investigation of CSL by the Consumer Protection Division of the North Carolina Department of Justice;
 - b. The ABA's consideration of CSL's request to approve its teach-out plan and remedial plan; and
 - c. The Department of Education's consideration of CSL's request for reinstatement for participation in Title IV programs.
6. CSL shall promptly distribute the findings and determinations of the Board of Governors, including this document, to:
 - a. All CSL students, including currently enrolled students, and students who have the status of "leave of absence" or "withdrawn";
 - b. The ABA;
 - c. The Department of Education; and
 - d. The North Carolina Department of Justice, Consumer Protection Division.
7. Nothing herein shall limit the Licensure Unit from conducting additional review, or the Board of Governors from taking further action, on any matter relating to CSL's operations and licensure, including without limitation such further review, recommendations, and actions as the Licensure Unit or the President may deem to be appropriate due to changes in CSL's circumstances, the development of new information, and the actions of the ABA, the Department of Education, or the North Carolina Department of Justice.
8. CSL has indicated that it believes it has the ability to remain open and become financially stable. CSL also expects that, upon the occurrence of certain financial restructuring events that it expects to consummate in the immediate future, CSL will be recertified by the U.S. Department of Education to participate in the federal Title IV student loan program. Provided that all conditions and requirements in items 1 through 6 are met, and subject to item 7, the Licensure Unit at UNC General Administration shall expeditiously review and present for the President's consideration possible actions that the Board may take to adjust or remove limitations on CSL's license.
9. Unless the Board of Governors takes further action, CSL's license shall expire on the earlier of:
 - a. The failure to meet the conditions set forth in items 1 through 4(a) and (b), above; or
 - b. May 30, 2019.

Junius J. Gonzales, M.D., M.B.A.
Senior Vice President for Academic Affairs
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Email: jjgonzales@northcarolina.edu

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East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

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Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

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Western Carolina
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North Carolina
School of Science
and Mathematics

May 24, 2017

Mr. Chidi Ogene
President, Charlotte School of Law
201 S. College Street, Suite 400
Charlotte, NC 28244

Dear Mr. Ogene,

According to N.C.G.S. § 116-15(h), "[a]ny institution holding a license to conduct post-secondary degree activity in this State that is found by the Board of Governors not to satisfy the licensure requirements of this section shall have its license to conduct post-secondary degree activity in this State revoked by the Board; provided, that the Board of Governors may continue in force the license of an institution deemed by the Board to be making substantial and expeditious progress toward remedying its licensure deficiencies."

Section VIII.K of the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina* states that "[a]ny institution that acquires licensure shall be subject at any time to review by the Board of Governors to determine whether the institution continues to meet standards for licensure." Section IX of the *Rules and Standards* requires that "the institution . . . be notified in writing of any staff recommendations that might result in revocation, with the grounds set forth for the action contemplated. The institution may request, in writing, within ten days of receipt of the notification, an interview to respond to the recommendation of noncompliance."

In January, 2017, the Licensure Unit of the University of North Carolina General Administration initiated a compliance review for the Charlotte School of Law. The Licensure Unit made several document requests to the institution. The staff for the Licensure Unit engaged reviewers who reviewed the documents submitted by the institution and prepared the enclosed report, which considers the institution's compliance with Standards 3 (Program of Study), 5 (Faculty and Other Personnel Qualifications), and 10 (Finance and Organization). The staff has accepted the report, and recommends the following findings:

Standard 10.A.(1): Stability

Charlotte School of Law has not demonstrated that its financial resources are characterized by stability that indicates the institution is capable of maintaining operational continuity for an "extended period," which, in CSL's case, means at least three years.

Standard 10.A.(3): Plan for Financial Development

Charlotte School of Law has not demonstrated that it maintains a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution."

Standard 10.A.(4): Financial Records and Audit Report

Charlotte School of Law's recent financial history does not demonstrate financial stability.

Standard 10.A.(6): Charlotte School of Law has not demonstrated that it maintains a tuition guaranty bond of not less than \$10,000 and at least equal to or higher than the maximum amount of prepaid tuition held (i.e., unearned tuition held) existing at any time during the most recent fiscal year.

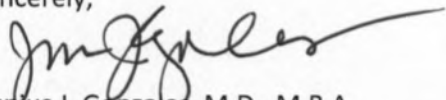
Standards 3 and 5

While there are no findings specific to compliance with Standards 3 and 5, the Reviewers observe that Charlotte School of Law's objectives for addressing the issues essential to compliance with Standard 3 are not supported by detailed, feasible plans for achieving those objectives. Moreover, the steps necessary to achieve the objectives identified by Charlotte School of Law would likely worsen the institution's financial stability.

This report and the staff's recommendation is hereby submitted to the Charlotte School of Law for its review, pursuant to the *Rules and Standards*. Because the staff recommendation could ultimately result in revocation of the institution's license, the institution has ten days from the receipt of this notification, pursuant to the *Rules and Standards*, to request an interview to respond to the recommendation of noncompliance. In order to facilitate this interview, we have scheduled June 7, 2017, at 2:00 pm, to meet with representatives of Charlotte School of Law at the University of North Carolina General Administration Building.

In accord with the *Rules and Standards*, any supplemental material submitted by the institution will be taken under consideration in developing the President's recommendation to the Board of Governors, notwithstanding the contents of the report or the staff's recommended findings that are being presented to Charlotte School of Law today based on that report. If you would like to submit additional documentation prior to the June 7, 2017, meeting, please direct any such documentation to Dr. Kimberly van Noort.

Sincerely,



Jurmus J. Gonzales, M.D., M.B.A.

Senior Vice President for Academic Affairs

cc: Thomas Shanahan, University of North Carolina General Administration
Kimberly van Noort, University of North Carolina General Administration
Liz Riley, Charlotte School of Law

Report to the University of North Carolina

**Charlotte School of Law's Compliance
with Licensure Standards**

Charlotte School of Law
Charlotte, North Carolina

Date of Report: May 24, 2017

REVIEWERS

Dr. Frank Prochaska (Chair), Retired Associate Vice President for Academic Affairs, University of North Carolina General Administration, Chapel Hill, North Carolina; and Professor of Chemistry Emeritus, Western Carolina University, Cullowhee, North Carolina

Paul Kurtz, Associate Dean & Professor Emeritus, University of Georgia School of Law, Athens, Georgia

Michael Juby, First Tryon Advisors, Charlotte, North Carolina

BACKGROUND

Charlotte School of Law (CSL), located in uptown Charlotte, is a for-profit law school wholly-owned by InfiLaw Corporation. It was founded in 2004 and granted licensure by the University of North Carolina Board of Governors in 2005 to offer the Juris Doctor degree program. After enrolling its first class in 2006, the School was granted provisional approval by the American Bar Association (ABA) in 2008. Charlotte School of Law received full approval from the ABA on June 10, 2011.

Charlotte School of Law is currently licensed by the University of North Carolina Board of Governors to offer the Juris Doctor (J.D.) and the Master of Laws (LL.M.) in American Legal Studies degree programs.

The American Bar Association is responsible for law school accreditation. Accreditation by a recognized accreditor is a prerequisite for participation in Title IV programs. Prior to its full approval by the ABA, CSL was able to participate in Title IV programs under a provisional Program Participation Agreement (PPA) that was executed in 2009. Charlotte School of Law's last PPA was executed in July 2011.

Following an on-site Three-Year Interval evaluation of CSL, the ABA issued an Inspection Report dated September 15, 2014, and invited Charlotte School of Law to provide comments and/or note any factual errors. The cover letter to the report stated that the ABA Accreditation Committee was to consider the school's continued accreditation at its January 22-24 2015 meeting. CSL submitted its response to this report in October 2014.

The Committee considered both the Inspection Report and Charlotte School of Law's response at its January 2015 meeting, and subsequently issued a decision, finding, among other things, that there was reason to believe that CSL was not in compliance with certain ABA standards. While some of the compliance issues were relatively minor, the Committee requested additional information to make a determination as to CSL's compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1. These standards pertain to the rigor of the educational program in preparing students for admission to the bar. Accordingly, the Committee requested that CSL submit a report "with all relevant information necessary to demonstrate compliance with the Standards."

- Standard 301(a) states, “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”
- Standard 501(a) states, “A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.”
- Standard 501(b) states, “A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”
- Interpretation 501-1 states, “Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.”

Charlotte School of Law submitted its response to the Committee in December 2015, after which the Accreditation Committee issued its decision on CSL’s status. The Committee concluded that Charlotte School of Law was not in compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1. The Committee requested that CSL submit a report with all relevant information necessary to demonstrate compliance, to be considered at the Committee’s June 2016 meeting. The Committee requested specific information regarding bar passages rates for students in the lower percentiles for LSAT scores and/or undergraduate GPAs. In addition, the Committee requested that the President and the Dean of CSL appear at a hearing before the Committee to determine whether sanctions should be imposed.

Following the June 2016 meeting, at which a hearing was held, the Committee issued a decision in which it found, once again, that Charlotte School of Law was not in compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1. The Committee stated that the issues of non-compliance “are substantial and have been persistent. The Law School’s plans for bringing itself into compliance with the Standards have not proven effective or reliable. Further, the Law School has not shown sufficient cause why it should not be directed to take specific remedial action to come into compliance with the Standards.” The remedial action

directed by the Committee included the development of a reliable plan to bring CSL into compliance, the reporting of its admissions data and methodology, a site visit to be conducted by October 1, 2016, notification to all CSL students of the remedial actions required by the American Bar Association, and specific notification requirements to CSL students regarding bar passage rates and its compliance status with the ABA. CSL appealed aspects of this, the third Committee decision, to the Council of the Section of Legal Education and Admissions to the Bar of the ABA (the Council).

At the October 2016 meeting of the Council, a hearing was held at which Charlotte School of Law accepted the finding of noncompliance with Standards 301 and 501, but requested that the Committee overturn its finding that its noncompliance was “substantial and persistent.” CSL also requested the elimination of the public disclosure requirement, requested that the remediation period begin in July 2016 rather than February 2016, and asked that the Committee provide greater clarity as to its expectations.

On November 14, 2016, the Council affirmed the Committee’s findings of noncompliance, including that the noncompliance was substantial and persistent, and that CSL’s plans for bringing itself into compliance have not proven effective or reliable. As a result of its findings, the Council placed Charlotte School of Law on a two-year probation, effective November 14, 2016, and directed that CSL take a number of remedial actions, including public notification of its probationary status.

On December 19, 2016, the Department of Education (DOE) informed Charlotte School of Law that it denied CSL’s application for recertification for participation in Title IV programs, and that CSL’s participation in those programs will conclude on December 31, 2016. (Attachment 1 – Letter from Department of Education) The DOE based its recertification denial largely on CSL’s failure to meet the requirements established by its accreditor, the American Bar Association, as evidenced by the Committee’s findings and the Council’s imposition of a two-year probation due to substantial and persistent noncompliance. In addition, the Department of Education cited substantial misrepresentations by Charlotte School of Law regarding the status of its accreditation and the nature of the educational program offered by CSL.

Charlotte School of Law was provided with an opportunity to respond to the DOE’s denial of its recertification, which it did by letter requesting reconsideration dated January 5, 2017.

The Department of Education denied the request for reconsideration by letter dated January 18, 2017. Despite their inability to participate in Title IV programs, the release of a substantial number of its faculty, and a sharp reduction in its enrollment as a result of the ABA and DOE actions, Charlotte School of Law continued its academic year and held classes for spring semester 2017. (Note: On or around May 5, 2017, the DOE agreed to release the second disbursement of Title IV funds, payable to the accounts of students who had been previously approved for fall-spring loans but had only received their fall disbursement.)

Following the DOE's denial in January of the request for reconsideration, the Licensure Unit of the Board of Governors initiated a review of Charlotte School of Law's compliance with licensure requirements. (Attachment 2 – Letter from UNC General Administration) The Licensure Unit has made several requests for documentation from Charlotte School of Law, to which CSL has responded, and has met with representatives of Charlotte School of Law and CSL's counsel on several occasions.

On March 10, 2017, the North Carolina Department of Justice sent Charlotte School of Law a Civil Investigative Demand, citing concerns in light of the American Bar Association's and Department of Education's actions, as well as CSL's lack of clear communication to its students about the future of the school. (Copies of that Investigative Demand, the cover letter to the demand from the North Carolina Department of Justice, the letter sent to UNC-GA from the Department of Justice expressing "serious concerns" about "the ability of Charlotte School of Law to fulfill its commitments and provide students with an adequate education...", and the letter sent in response by UNC-GA's Senior Vice President and General Counsel are all attached to this report as Attachments 3, 4, 5, and 6, respectively.)

As part of the Licensure Unit's review of Charlotte School of Law's compliance with licensure requirements, Dr. Kimberly van Noort, Vice President for Academic Programs, Faculty, and Research at the University of North Carolina General Administration appointed a Team of Reviewers to evaluate Charlotte School of Law's compliance with the standards contained in *The University of North Carolina Board of Governors' Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*. The Team of Reviewers focused on Standard 3 (Program of Study), Standard 5 (Faculty and Other Personnel Qualifications), and Standard 10 (Finance and Organization). In preparing its report,

the Reviewers reviewed and utilized the documentation and data provided by Charlotte School of Law.

STANDARD 10 of the UNC Board of Governors Rules and Standards for Licensing Nonpublic Institutions - FINANCE AND ORGANIZATION

First Tryon Advisors (“First Tryon”) conducted a comprehensive review (the “Review”) of the financial health and business model of the Charlotte School of Law (“CSL”) in relation to the Board of Governor’s *Rules and Standards*. First Tryon’s written report of its comprehensive review is provided at the end of this report as Attachment 7.

Under Standard 10 of the *Rules and Standards*, Charlotte School of Law must demonstrate to the Board’s satisfaction that CSL is “*financially sound and capable of fulfilling its commitments to students.*” The *Rules and Standards* further state that CSL must show that it possesses and maintains “*adequate financial resources to sustain its mission and purpose.*” CSL’s stated mission is “*to provide a student-centered education, that produces practice-ready lawyers and that serves underserved communities.*”

Summaries of the finance-related criteria established under the *Rules and Standards* are presented below, which serve as a guide for evaluating Charlotte School of Law’s compliance with Standard 10 of the *Rules and Standards*.

Overview of the Finance-Related Guidelines under Standard 10

- **Stability (Standard 10.A.(1))**

CSL must demonstrate to the Board’s satisfaction that CSL’s financial resources are characterized by stability that indicates the institution can maintain operational continuity for an “extended period,” which, in CSL’s case, means at least three years.

- **Adequacy (Standard 10.A.(2))**

CSL must demonstrate adequate financial support, which is determined, in part, based on an analysis of various ratios, as well as CSL’s financial policies, procedures and practices.

- **Plan for Financial Development (Standard 10.A.(3))**

CSL must demonstrate to the Board's satisfaction that CSL maintains a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution."

- **Financial Records and Audit Report (Standard 10.A.(4))**

The institution's recent financial history must demonstrate financial stability. CSL must submit financial statements, the most recent audit report, a description of any material **changes in the audit report and a detailed disclosure of legal and binding relationships** with any parent or subsidiary corporation or institution.

- **Other Criteria (Standards 10.A.(5) and 10.A.(6))**

CSL must also demonstrate to the Board's satisfaction that it maintains (1) adequate insurance to protect its financial interests and (2) a tuition guaranty bond at least equal to the maximum amount of unearned tuition held at any time during the most recent fiscal year.

First Tryon made the following findings, as set forth in more detail in Attachment 7:

1. Liquidity Concerns

As discussed in the *Put Option and Collateralized Obligations* and in the *Cash Pooling Arrangement* sections of Attachment 7 (page 2), CSL appears unable to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, as required by Standard 10.

2. Statistics and Trends

As discussed in the *Enrollment* section of Attachment 7 (pages 2-3), the uncertainty surrounding Charlotte School of Law's Title IV eligibility, its historical dependence on Title IV funding, and its status with the ABA, together with CSL's inability to forecast the impact of those factors on its enrollment, calls into question (1) the existence of a "coordinated, comprehensive, flexible financial plan" for its long-range management and (2) CSL's ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

As discussed in the *Financial Adequacy* section of Attachment 7 (pages 3-4), given CSL's declining enrollment, the data presented in this section raise concerns regarding the

adequacy, as evaluated under Standard 10, of CSL's financial support for its mission to provide a "student-centered education."

3. Going Concern Disclosures

As discussed on pages 4-5 of Attachment 7, the Going Concern Disclosures in the FY2016 Audit, along with the FY2016 Audit's disclosures regarding InfiLaw's recent inability to remain in compliance with its covenants under the Preferred Unit Purchase (PUP) and Credit Agreements, do not indicate a recent history of financial stability for CSL and its affiliates, nor do they support a finding that CSL has a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution" or the ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

4. Tuition Guaranty Bond

As discussed on page 5 of Attachment 7, Charlotte School of Law does not currently hold a tuition guaranty bond in compliance with the requirements of Standard 10. During the compliance review process, the Licensure Unit has repeatedly and consistently informed Charlotte School of Law that the failure to obtain a bond calculated according to the required formula constitutes continued noncompliance with state licensing requirements. To date, although CSL has placed money in escrow to hold students harmless in the event of closure, CSL has not obtained a proper bond.

To date, Charlotte School of Law also has not provided information sufficient to establish the "maximum amount of prepaid tuition held ... at any time" during the fiscal year ended July 31, 2016 in the manner prescribed under Standard 10, nor has CSL provided a statement from an independent certified public accountant stating that the existing principal amount of its tuition guaranty bond is at least equal to such amount, as required by Standard 10.

***STANDARD 3 - of the UNC Board of Governors Rules and Standards for Licensing Nonpublic Institutions* - PROGRAM OF STUDY**

Paul Kurtz, Associate Dean & Professor Emeritus, University of Georgia School of Law, reviewed Charlotte School of Law's compliance with Standards 3 and 5 of the *Rules and Standards*. As in previous licensure reviews of CSL, the *Rules and Standards* were supplemented by the American Bar Association's standards (chapters) as follows: Standard 3

(Program of Study) by Chapter 3, Program of Legal Education; and Standard 5 (Faculty and Other Personnel Qualifications) by Chapter 4, the Faculty. Dean Kurtz's written report is attached hereto as Attachment 8.

As stated in Standard 3 of the *Rules and Standards*, "*The program of study offered by an institution must reflect and support the mission of the institution and achieve the stated objectives.*" Furthermore, "*The institution shall have an academic curriculum that is designed to reasonably and adequately achieve its mission and educational objectives.*"

As presented in the Introduction to this report, and as discussed in more detail in Attachment 6, the American Bar Association (ABA) concluded in its most recent review that Charlotte School of Law is not in compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1 of the *ABA Standards and Rules of Procedure for Approval of Law Schools* (hereinafter *ABA Standards*). The ABA's findings of CSL's noncompliance with these four standards are discussed in more detail in Attachment 8, pages 13-18 and 26-28.

A brief summary of some of Dean Kurtz's major findings, as set forth in Attachment 6, are provided below.

One of the ABA Accreditation Committee's findings concerning Charlotte School of Law, in Finding (12) (p. 4, Accreditation Committee Decision, January, 2016) focused on bar passage rates:

The first-time bar passage differential has been worsening over the past few years, and the Law School has been taking measures to address the issue. The 2013 calendar year had a differential rate between the relevant state averages and the Law School average of -8.7 [%]; 2014 was -12.2 [%]; and 2015 was -18.4 [%]. Given the [declining performance of entering classes on the Law School Admissions Test] the bar passage rates might continue to be 15 points or more below [the relevant state averages].

Recent data obtained by the Reviewers from the North Carolina Attorney General's Office indicates that the negative trend identified by the ABA has continued to worsen, as the first-time bar passage differential for CSL students for the February, 2016 test was -16.4%, and the parallel number for the July, 2016 test was -20.70%, and for February, 2017 was -19.44%.

In its January, 2016 decision the Accreditation Committee concluded, on the basis of Finding (12) and findings dealing with bar preparation, curriculum, writing requirements, and other items, that Charlotte School of Law had not demonstrated compliance with Standard

301's mandate of a "rigorous program of legal education that prepares its students...for admission to the bar....." The Committee then asked the school to provide, by May 1, 2016, a report demonstrating compliance with Standard 301. CSL filed the requested report in May and appeared at a hearing before the Accreditation Committee in June, 2016. The Accreditation Committee's decision was issued in July, 2016.

After again finding Charlotte School of Law not in compliance with Standard 301, the Accreditation Committee concluded its decision of July, 2016 with a list of five remedial actions, including the submission of a "reliable plan" for "bringing the Law School into compliance with Standard() 301(a)...." (Accreditation Committee Decision of July, 2016 (p. 12)).

The school appealed the Accreditation Committee's decision to the Council of the ABA Section on Legal Education and Admissions to the Bar. The Council's resolution of the appeal, issued on November 14, 2016, affirmed the findings and conclusions of the Accreditation Committee and added an additional sanction. Because of what it concluded were "substantial and persistent" violations of these Standards, the Council placed the school on probation for two years and required the school to publicize this fact to all of its students and to place a notice of the probation on its website.

In December, 2016, Charlotte School of Law submitted to the Accreditation Committee a 38-page "reliable plan" for remedying its violations of the ABA Standards. The document identified five major goals.

In addition to restructuring the J.D. curriculum and bar preparation programs (Goals 2 and 3), the fundamental objective of this plan is the improvement of the quality of student being enrolled (Goal 1). The first stated goal of the "reliable plan" is to "[r]apidly increas[e] entering class academic indicators, particularly the LSAT profile." While this is a worthy goal, the Plan, other than including charts showing projected gradual increases in LSAT scores for the entering classes over the next several years to a level "comparable to those of earlier entering classes...before bar passage rates began to decline," offers no clear explanation of exactly how this goal will be achieved. In fact, the plan itself seems to acknowledge the difficulty of achieving this goal in light of the school's current probationary status with the ABA and the Department of Education's termination of Title IV eligibility for student loans (see Note 2 of the Reliable Plan, at page 5). Getting better-qualified students to enroll in the school while it is on

probation and while the ability to secure federal loans is at best uncertain and will be a significant challenge.

Furthermore, the school's ABA Annual Questionnaire filed in the fall of 2016 shows the 25th percentile of the entering class' LSAT scores to be 141, the 50th percentile as 144, and 75th percentile as 148. According to the projections in the "Reliable Plan," CSL hopes these numbers will be 145-46/149/151-152, respectively, for the class entering in August, 2018 (Reliable Plan, p. 6). This is an extremely ambitious goal for a two-year period, especially in the current environment of CSL in particular and of legal education in general. The only change to the admissions methodology identified in the Plan, however, is to require those students with LSAT scores of 142 or 143 to have an interview with two individuals, at least one of whom will be a member of the Faculty Admissions Team. CSL explains that the goal of the interview will be to determine "whether the candidate is qualified for admission despite the lower LSAT" (Reliable Plan, p. 10). This would seem to be at cross-purposes with the goal of raising the LSAT credentials of the entering class.

There are brief mentions of smaller class sizes and "generous scholarships to admitted students that are highly competitive, based on market analysis" (Id. at pp. 12, 13). As discussed in the *Financial Adequacy* section of Attachment 7 (pages 3-4) however, Charlotte School of Law's educational expenditures per student dipped more than 25% in 2016. Further, educational expenditures as a percentage of total expenditures have fallen in each of the past four years, while institutional support and management fees have risen from 30.9% of total expenditures in FY2012 to nearly half of total expenditures in FY2016. The Plan does not address what sources of funding might be available to pay for the smaller class sizes and "generous scholarships."

The asserted relationship between the Plan's goals of effectively "managing academic attrition," (Goal 4) and attracting highly qualified University of New Haven students to the CSL (Goal 5) and the improvement of bar passage rates can be examined by a reading of the Plan (pp. 31-38). As explained in the Plan, the strategy of Goal 4 is designed, at least in part, to "minimiz[e] the debt of unsuccessful law students (Plan, p. 3)." What this means in practice is a stricter grading curve which will result in the academic exclusion of more students and a winnowing of likely unsuccessful candidates for the bar examination upon graduation. The

stricter grading curve has already been implemented, beginning Fall 2015 (Plan, p. 32). The stricter grading curve, of course, will likely lead to lower retention rates during this period of critically low enrollment for CSL.

Because of the very ambitious nature of the Reliable Plan and the lack of details demonstrating that its goals can be met, the Reviewers are cautious about whether the Plan can be successfully implemented in an expedited period of time. Given Charlotte School of Law's perilous financial situation as discussed in Attachment 7, and given the reservations about whether the Reliable Plan can be successfully implemented quickly enough, the Reviewers are not optimistic about CSL's ability moving forward to maintain compliance with the requirements of Standard 3.

STANDARD 5 of the UNC Board of Governors Rules and Standards for Licensing Nonpublic Institutions - FACULTY AND OTHER PERSONNEL QUALIFICATIONS

A description of the quality of the Charlotte School of Law faculty is presented on pages 19-26 of Attachment 8.

FINDINGS OF THE REVIEWERS

For the detailed reasons presented in Attachment 7 and in Standard 10 of this report, the Reviewers find Charlotte School of Law not in compliance with the following Standards:

1. Standard 10.A.(1): Stability

Charlotte School of Law has not demonstrated that its financial resources are characterized by stability that indicates the institution is capable of maintaining operational continuity for an "extended period," which, in CSL's case, means at least three years.

2. Standard 10.A.(3): Plan for Financial Development

Charlotte School of Law has not demonstrated that it maintains a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution."

3. Standard 10.A.(4): Financial Records and Audit Report

Charlotte School of Law's recent financial history does not demonstrate financial stability.

4. Standard 10.A.(6): Bonding

Charlotte School of Law has not demonstrated that it maintains a tuition guaranty bond of not less than \$10,000 and at least equal to or higher than the maximum amount of prepaid tuition held (i.e., unearned tuition held) existing at any time during the most recent fiscal year.

5. Standards 3 and 5

While the Reviewers make no findings specific to compliance with Standards 3 and 5, the Reviewers observe that Charlotte School of Law's objectives for addressing the issues essential to compliance with Standard 3 are not supported by detailed, feasible plans for achieving those objectives. Moreover, the steps necessary to achieve the objectives identified by Charlotte School of Law would likely worsen Charlotte School of Law's financial stability.



DEC 19 2016

Mr. Chidi Ogene
President
Charlotte School of Law
201 South College Street, Suite #400
Charlotte, NC 28244

Sent Via UPS
Tracking #: 1Z37X7Y30198482316

Re: Denial of Recertification Application to Participate in the Federal Student Financial Assistance Programs – Charlotte School of Law, 201 South College Street, Suite #400, Charlotte, NC 28244; OPEID 04143500.

Dear Mr. Ogene:

The U.S. Department of Education (Department) has reviewed the application for recertification submitted by Charlotte School of Law (CSL) to continue to participate in the student financial assistance programs authorized pursuant to Title IV of the Higher Education Act (HEA) of 1965, as amended, 20 U.S.C. §§ 1070 *et seq.* (Title IV programs). CSL's most recent Program Participation Agreement (PPA) expired on June 30, 2015. CSL, however, timely submitted its recertification application prior to that date. As a result, the Department extended CSL's PPA on a month-to-month basis while evaluating the application and related matters. *See* 34 C.F.R. § 668.13(b)(2). This notice is to inform you that the Department has concluded its review and hereby denies CSL's application for continued participation. CSL's participation in Title IV programs will therefore conclude at the end of this month, on December 31, 2016.

For purposes of evaluating a recertification application, the Department reviews an institution's performance as a participant in the Title IV programs and must ensure that the institution has met the standards of administrative capability and financial responsibility, has complied with Title IV program requirements, and has operated under the high standards of care, trust, and diligence required of a fiduciary. A denial of an institution's recertification application is warranted if the Department determines that the institution does not meet all requirements and standards set forth in Title IV and regulations issued thereunder. HEA § 498, 20 U.S.C. § 1099c; 34 C.F.R. § 668.13.

In reaching a decision on CSL's recertification application, the Department reviewed all materials submitted by CSL in support of its application. The Department also reviewed other relevant documents and information, including but not limited to the institution's history as a participant in the Title IV programs and documents associated with the actions taken by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar

Federal Student Aid
An Office of the U.S. Department of Education

Administrative Actions and Appeals Service Group
830 First St., N.E. Washington, D.C. 20002-8003
StudentAid.gov

ED-19-1146, 19-1148, 19-1149-A-000384

ED 19-02226-F 0090

Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association (the Council) and the Accreditation Committee of the Council (Committee). Collectively, the Council and the Committee will be referred to herein as the ABA.

CSL was founded in 2004 as a member institution of The InfiLaw System, a consortium of for-profit law schools that includes Florida Coastal School of Law and Arizona Summit Law School. Each of the three InfiLaw schools is owned by InfiLaw Holding, LLC. According to the InfiLaw schools, nearly all of the voting units of InfiLaw Holding, LLC are held by Sterling Capital Partners, L.P. The ABA provisionally approved CSL in 2008 and granted full approval in 2011. CSL first began participating in the Title IV programs through its execution of a provisional PPA in February 2009. CSL executed its most recent PPA in July 2011.

As a participating institution in Title IV, HEA programs, CSL drew \$ 65,238,752 in Title IV funds during the 2014-15 award year and \$48,537,250 for the 2015-16 award year. With respect to the 2015-16 award year, those funds included \$29,434,902 in Direct, Graduate PLUS loans and \$19,102,348 in Direct Stafford Unsubsidized loans. During this same award year, CSL enrolled 946 students who received Title IV aid. For purposes of its participation in Title IV programs, the school is approved only to offer a juris doctor program.

As described below, the ABA has determined that CSL is, and has been, out of compliance with certain ABA standards and that this noncompliance was “substantial” and “persistent.” CSL also made substantial misrepresentations regarding the nature of its academic program in violation of the prohibition on substantial misrepresentations. 34 C.F.R Part 668, Subpart F. For the reasons discussed below, CSL’s noncompliance with its accreditor’s standards constitutes an independent basis for the Secretary to deny CSL’s application for recertification, as does each of CSL’s substantial misrepresentations. *See generally* HEA § 498, 20 U.S.C. § 1099c; 34 C.F.R. § 668.13.

Due to this denial, CSL is no longer eligible to participate in the Title IV programs, effective December 31, 2016. *See* 34 C.F.R. § 668.13(b)(2). This includes all Title IV programs listed on CSL’s most current Eligibility and Certification Approval Report, including: Federal Work-Study (FWS), Federal Perkins Loan (Perkins Loan), and William D. Ford Federal Direct Loan (Direct Loan) programs. The Direct Loan program includes the Federal Direct Unsubsidized Stafford/Ford Loan program and the Federal Direct PLUS Program.

CSL Violated the HEA, the Department’s Regulations and its PPA by Failing to Meet the Requirements Established by its Nationally Recognized Accreditor

As a condition of eligibility to participate in Title IV programs, an institution must be accredited by an accreditor recognized by the Secretary. HEA §§ 101, 102(a)(1)(A), 102(b)(1)(D), 20 U.S.C. §§ 1001, 1002(a)(1)(A), 1002(b)(1)(D). *See also* 34 C.F.R. § 600.5(a)(6). In addition to that eligibility requirement, as a separate condition of initial and continued participation, an institution must “meet the requirements established by” its accreditor. HEA § 487(a)(21), 20 U.S.C. § 1094(a)(21). Under Part H of Title IV, all accrediting agencies are required to have, apply, and enforce standards for accredited institutions of higher education. *See* HEA §§ 496(a)(4)-(6), 20 U.S.C. §§ 1099b(a)(4)-(6) (including the requirement that accrediting agencies

Association (the Council) and the Accreditation Committee of the Council (Committee). Collectively, the Council and the Committee will be referred to herein as the ABA.

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standards for an institution of higher education or program to be accredited”). *See also* 34 C.F.R. § 668.14(b)(23) (noting that “[b]y entering into a program participation agreement, an institution agrees that ... [i]t will meet the requirements established pursuant to part H of Title IV of the HEA by the Secretary and nationally recognized accrediting agencies”). In its PPA, CSL expressly agreed to this latter condition, certifying that it would meet the requirements set by its accreditor pursuant to Part H of Title IV. PPA at 5 ¶ 23.

Between March 16 and 19, 2014, an ABA “site team” conducted an on-site Three-Year Interval evaluation of CSL. During the course of this site visit, the team met with Rick Inatome (CEO of InfiLaw Holding, LLC), Jay Conison (Dean of CSL), Don Lively (then-President of CSL), numerous CSL administrators, members of the institution’s accreditation self-study Committee, CSL faculty, CSL staff, and CSL students. Members of the site team also visited a significant majority of the classes taught during its visit.

On September 15, 2014, the ABA provided CSL with a 72-page Inspection Report (Report) and invited the school to provide comments and note factual errors. The ABA informed CSL that the Report would provide the basis for its determination on whether CSL’s programs were operating in compliance with the ABA Standards for the Approval of Law Schools (Standards). Among its topics, the Report discussed CSL’s program of legal education (pp. 6-24), students (including both admissions qualifications and output metrics, including a discussion of bar passage statistics) (pp. 34-49), and financial operations (pp. 67-71). In October 2014, CSL responded in writing to the Report.

At its January 2015 meeting, the Committee reviewed both the Report and CSL’s written response. Following that meeting, the Committee issued a decision (the “First Committee Decision”) announcing that it had “reason to believe” that CSL had “not demonstrated compliance” with certain ABA standards. The Committee also “request[ed] additional information to make a determination” as to CSL’s compliance with additional standards and interpretations, including Standards 301(a), 501(a), and 501(b), and Interpretation 501-1, which are foundational to the educational enterprise and the nature of the educational program offered by CSL.¹ Those additional standards and interpretation are:

Standard 301(a): “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”

¹ As discussed *infra*, compliance with these standards is materially important to students and prospective students. Moreover, we note that versions of current Standards 301 and 501 have been in effect since the ABA first adopted and published the Standards and Rules of Procedures in 1973. Even as the ABA has amended its standards and interpretations, such amendments have highlighted the importance of these particular standards. For example, in a recent revision of Standard 301(a), effective for the 2014-15 year, the ABA moved the word “rigorous” from an interpretation to a standard (as it now exists in the language above) to “place[]upfront” the importance of the program of legal education. *See* ABA Section of Legal Education and Admission to the Bar Explanation of Changes (April 2014) (*available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/201404_src_meeting_materials_proposed_standards.authcheckdam.pdf). In that same revision, the ABA also expanded the scope of former Interpretation 501-3 and renumbered it as current Interpretation 501-1 (shown above), highlighting the importance of this particular interpretation.

Standard 501(a): “A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.”

Standard 501(b): “A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”

Interpretation 501-1: “Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.”

In December 2015, CSL provided the additional information requested by the Committee. On February 3, 2016, the Committee issued its second decision regarding CSL (the “Second Committee Decision”). In this decision, the Committee made twenty factual findings, thirteen of which pertained to the Committee’s request for additional information to determine CSL’s compliance with Standards 301(a), 501(a), and 501(b) and Interpretation 501-1. Although the Committee concluded that CSL was in compliance with the particular standards that previously led the Committee to assert its “reason to believe” that CSL was noncompliant with those standards, the Committee concluded that CSL was “not in compliance” with other standards, specifically with:

Standards 301(a), 501(a), 501(b), and Interpretation 501-1, in that the Law School has not demonstrated that it is maintaining a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession; maintaining sound admissions policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education; or is admitting applicants who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.

Second Committee Decision at 6 (citing Findings of Fact 8-20).

In the Second Committee Decision, the Committee also requested that CSL provide additional information consisting generally of “all relevant information necessary to demonstrate compliance” with Standards 301(a), 501(a), and 501(b), as well as specific information about students “between and including the fall 2010 entering class and the spring (May) 2016 entering class” that would show, with respect to individual students who had LSAT scores or undergraduate GPAs at or below CSL’s 25th and 50th percentiles, enrollment status (including attrition information) and bar passage information.² The Committee also requested that CSL’s

² ABA Interpretation 501-1 establishes that academic and admission test credentials, attrition rates, and bar passage rates are among the factors considered when the ABA assesses compliance with Standard 501.

President and Dean appear before its June 2016 hearing, the purpose of which was “to determine whether to impose sanctions in connection with the Law School’s noncompliance with the Standards.” Second Committee Decision at 7.

In May 2016, CSL submitted a 62-page report, later described by CSL as “very comprehensive,”³ accompanied by 29 pages of student-specific information, which, taken together, the school claimed “show[s] that the School of Law is in compliance with Standards 301(a), 501(a), and 501(b), and Interpretation 501-1.” On June 23, 2016, the Committee held a hearing at which you and Dean Jay Conison appeared, along with CSL’s Associate Dean for Academics, Associate Dean for Enrollment Management, and Shared Services Director of Bar Preparation.

Following that hearing, in July 2016, the Committee issued another decision (the “Third Committee Decision”) again finding CSL to be out of compliance with Standards 301(a), 501(a), and 501(b) and Interpretation 501-1. In this decision, the Committee also announced its conclusion that “the issues of non-compliance with Standards 301(a), 501(a), and 501(b), and Interpretation 501-1 *are substantial and have been persistent.*” Third Committee Decision at 12 (emphasis added). The Committee also found that CSL’s “plans for bringing itself into compliance with the Standards have not proven effective or reliable.” *Id.*

The Third Committee Decision was expressly based on 44 factual findings, on topics such as admissions, programming for admitted students, mentoring and related opportunities, the writing program, academic support, faculty, summer and intersession changes, attrition, bar preparation during law school, post-graduation bar preparation, and bar examinations. Among its factual findings, the Committee concluded:

- With respect to CSL’s admissions policies, “[i]t was not clear to the Committee how [CSL’s] admission practices demonstrate that applicants with low academic and admission test credentials appear capable of completing the Law School’s program of legal education and being admitted to the bar.” (Finding 11)
- “Attrition for the 25th and 50th percentile LSAT individuals for those who started in 2010 was 13%. It rose to 14% for those who started in 2011; 15% for those who started in 2012; 20% for those who started in 2013; 35% for those who started in 2014; and 24% for those who started in 2015. At the hearing, the Associate Dean for Academics indicated that 74 first-year students out of a class of 223 (33%) that began studies in the fall of 2015 were academically attrited in December 2015. In May 2016, 26 students attrited, with 21 of them being spring semester starts of the entering class of 77 (27%). *This attrition is substantial and suggests that the Law School’s admissions process is not*

³

See June 23, 2016 ABA Committee Hearing Transcript at 9:10-11 (Conison).

as predictive of academic success as it might be. The attrition target range for 2016-17 is 13%-17%” (Finding 23) (emphasis added).⁴

- “The Law School’s bar passage rates ... remain *low, often significantly so.*” (Finding 41) (emphasis added).
- “For the February 2016 bar examination in North Carolina, the state first-time pass rate for first-time takers was 51.1%. The Law School’s first-time February 2016 rate was 34.7% (75 takers), which placed it fifth in the state. This deviation is *more than 15 points*

⁴ This finding is consistent with data made public by the ABA, which requires institutions to report attrition each year and to categorize the type of attrition. In the reports submitted to, and made publicly available by, the ABA, CSL reported that:

- 49.2% (or 174 out of 354 students) of first-year CSL students left due to attrition as reported for 2016. As reported for 2015, 44.6% (or 203 out of 455 students) of first-year CSL students left due to attrition.
- Of the 174 first-year CSL students who attrited as reported for 2016, 130 students (or more than 36% of the entering class) left due to academic attrition. Similarly, as reported in 2015, of the 203 first-year CSL students who attrited, 121 students (or more than 25% of the entering class) left due to academic attrition.
- Of the 208 law schools accredited by the ABA as reported for 2016, CSL has the largest number (130) and highest percentage (36.7%) of first-year students attriting for academic reasons. (The school with the second highest number of first-year students leaving for academic reasons was InfiLaw’s Florida Coastal School of Law with 77 students.) CSL also had the largest number (174) and highest percentage (49.2%) of total first-year attrition.

See Standard 509 Information Report for Charlotte School of Law & “All Schools Data” compilation report for 2015 & 2016. (Available at <http://www.abarequireddisclosures.org>). In addition to the 2015 & 2016 figures, data submitted to and made publicly available by the ABA establishes that both the total attrition percentage and the academic attrition percentage of CSL students have been increasing in recent years. According to the ABA:

ABA REPORT YEAR	CSL 1 ST YEAR TOTAL ATTRITION %	CSL 1 ST YEAR ACADEMIC ATTRITION %
2016	49.2%	36.7%
2015	44.6%	26.6%
2014	32.1%	18.3%
2013	22.6%	8.34%

See Standard 509 Information Reports for Years 2013-2016 (available at <http://www.abarequireddisclosures.org/>). The ABA’s reports show the percentage of total attrition and raw numbers of the various types of attrition. The percentage of first year academic attrition was calculated by applying the percentage of academic attrition to the total attrition percentage. Academic attrition is defined by the ABA as referring to “those students who discontinued their education at a time when they were not in good academic standing (typically a g.p.a. below 2.0). It includes both students who have been dismissed because they did not satisfy the minimum standards of progress established by the law school in order to continue their legal studies at that school, and students who discontinued their enrollment at the school at a time when their g.p.a was below that required for good academic standing as of the end of the first year.” 2016 Annual Questionnaire Instructions Part II Admissions & Enrollment Information (available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_aq_part2.authcheckdam.pdf).

*below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.” (Finding 42) (emphasis added).*⁵

- The Law School’s ultimate bar passage rates were in compliance for 2011, 2012, and 2013. The school “may be in compliance for 2014, but the 17% missing or never passed could affect that compliance. It is *not in compliance for 2015 at this point, with 43% either missing or never [having] passed the bar.*” (Finding 44) (emphasis added).

In the Third Committee Decision, the Committee also directed CSL to take a series of remedial actions, including developing and submitting, by September 1, 2016, a plan to come into compliance with the Standards. The Committee further required CSL to supply the Committee with additional data and information, required CSL to disclose the Committee’s decision to students and the public, and provided for the appointment of a fact finder to review an array of topics, including CSL’s admissions policies, academic rigor, bar examination results, student loan default rates, and graduate employment outcomes.

In August 2016, CSL appealed aspects of the Third Committee Decision to the Council and, on October 21, 2016, the Council held a hearing at which you and Dean Conison testified on CSL’s behalf. At that hearing, Dean Conison testified that CSL is “not appealing that conclusion of noncompliance with Standards 301 and 501,” despite the school’s “disappointment” with the conclusion. Oct. 21, 2016 Council Hearing Transcript at 7:2-6 (Conison). CSL did, however, through Dean Conison, make four requests of the Council, that the Council (1) overturn the Committee’s finding that CSL’s noncompliance was “substantial and persistent”; (2) eliminate the requirement that CSL publicly disclose the findings of noncompliance or, in the alternative, delay such disclosure for one year; (3) start the two-year remediation period in July 2016, rather than in February 2016; and (4) provide “greater clarity” as to what was expected of CSL. *Id.* at 17:11-25.

On November 14, 2016, the Council issued a decision (the “Council Decision”) informing CSL that it had reviewed the Third Committee Decision, all material considered by the Committee in rendering that decision, the August 2016 appeal letter, a subsequent submission made by CSL on October 4, 2016, and the transcript of the October 21, 2016 hearing. After reviewing that record, the Council concluded, for the same reasons stated by the Committee, that CSL was “not in compliance” with Standards 301(a), 501(a), and 501(b), that the issues of noncompliance with these standards “are substantial and have been persistent,” and that CSL’s “plans for bringing itself into compliance with the Standards have not proven effective or reliable.” The Council

⁵ Here too, the ABA’s findings are consistent with publicly available data. For example, in July 2016, 45.2% of CSL graduates who took the North Carolina bar exam for the first time passed. The statewide average, including CSL and repeat takers who were unsuccessful on their first attempt, was 65.9%, almost 50% higher. See <http://www.charlottelaw.edu/gainful-employment-aba-required-disclosures.html> (last visited December 1, 2016). The Department also notes that, although CSL’s first-time bar passage rates for the North Carolina Bar increased between February and July 2016, the rates have trended downward since July 2010, and the July 2016 first time passage rate remains below the July 2015 rate.

ordered remedial actions, including public disclosure, and placed CSL on probation, effective November 14, 2016.⁶

The facts recited above make clear that on three separate occasions, in February 2016, July 2016, and November 2016, the ABA announced its determination that CSL was out of compliance with ABA Standards 301(a), 501(a), and 501(b), and Interpretation 501-1. CSL has conceded the noncompliance findings and certain remedial requirements. Per ABA Rule of Procedure for Approval of Law Schools No. 4, the ABA Appeals Panel does not have authority to consider an appeal of the Council Decision, thus rendering that decision final. Each of these decisions was made after the ABA provided CSL notice and an opportunity to submit evidence. The decisions announced in July 2016 and November 2016 were made after CSL officials presented testimony to the Committee and Council, respectively.

In reviewing this matter, the Department carefully considered the extent of process that the ABA afforded the institution when making its determinations, including the numerous opportunities CSL was given to present evidence and provide testimony. The Department also considered the particular accreditation standards that CSL was found to be noncompliant with, *see supra* 3-4 & n.1, the nature of those standards, the fact that the ABA found the noncompliance to be both “substantial” and persistent,” the fact that the ABA found CSL’s “plans for bringing itself into compliance with the Standards have not proven effective or reliable,” the fact that ABA believed the noncompliance to be so severe as to merit placing the institution on probation,⁷ corroborative evidence of the noncompliance, *see supra* at n.4 – n.5, and the institution’s administrative capability and fiduciary conduct.

After concluding the review, and based on the particular facts set out herein, the Department finds that CSL’s statutory, regulatory, and contractual failure to “meet the requirements” established by the ABA is of sufficient severity to merit the denial of recertification.⁸

⁶ See Letter from B. Currier, ABA Managing Director of Accreditation and Legal Education to C. Ogene & J. Conison (Nov. 14, 2016), attaching the Council Decision. The Council Decision is publicly available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/PublicNoticeAnnouncements/2016_november_charlotte_probation_public_notice.pdf.

⁷ Not only is the probation sanction the most severe sanction that can be imposed by the ABA, short of withdrawal of accreditation, *see* ABA Standards & Rules of Procedure for Approval of Law Schools at Rule 16(b)-(c), the Department is unaware of any instance in the last 10 years which the ABA has placed an accredited law school on probation.

⁸ The Department’s denial of CSL’s application for recertification should not be read to suggest that the Department will reach the same conclusion each time an accreditor finds an institution noncompliant with the accreditor’s standard. As it did in this case, the Department will continue to review, in the context of a recertification application, any finding of noncompliance by an institution’s accreditor in light of the specific facts regarding that finding, other relevant facts regarding the institution under review, and the appropriate statutory and regulatory standards.

CSL Breached its Fiduciary Duty to the Department and Demonstrated a Lack of Administrative Capability by Substantially Misrepresenting the Nature of its Educational Program

Through its PPA, CSL agreed to comply with all conditions specified therein, including compliance with all Title IV, HEA program requirements. *See also* 20 U.S.C. § 1094(a)(1); 34 C.F.R. § 668.14. By entering into the PPA, CSL and its officers also accepted fiduciary responsibility in the administration of the Title IV programs. 34 C.F.R. § 668.82(a). As fiduciaries, an institution and its officers must act with the highest standard of care and diligence in administering the Title IV programs and in accounting to the Secretary for the funds received. 34 C.F.R. §§ 668.82(a), (b). This standard of care and diligence includes prohibitions against substantial representations by an institution's officers or employees. *See e.g., In re Warnborough College*, Dkt Nos. 95-164-ST, 96-60-SF (Aug. 9, 1996) (finding an institution in violation of the required fiduciary standard due to its failure to properly oversee an employee who made substantial misrepresentations to students, and holding the institution responsible for that employee's misrepresentations). Additionally, in order to "continue participating" in any Title IV program, a school must be "capable of adequately administering that program." 34 C.F.R. § 668.16. A school is not considered to have such administrative capability if it fails to "administer[] the Title IV, HEA programs in accordance with all statutory provisions of or applicable to Title IV of the HEA" and "all applicable regulatory provisions prescribed under that authority." 34 C.F.R. § 668.16(a).

Under the Department's regulations, "[s]ubstantial misrepresentations are prohibited in all forms," 34 C.F.R. § 668.71(b), and the Department may deny institutional participation applications, including recertification applications, when it determines that an institution has engaged in a substantial misrepresentation. 34 C.F.R. § 668.71(a)(3). A "misrepresentation" is:

[a]ny false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to deceive. A statement is any communication made in writing, visually, orally, or through other means.

34 C.F.R. § 668.71(c).

A "substantial misrepresentation" is "any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment." *Id.* Substantial misrepresentations include misrepresentations made by the institution itself, or one of its representatives, regarding the nature of the institution's academic programs or the employability of its graduates. 34 C.F.R. § 668.71(b). Substantial misrepresentations involving

the nature of an institution's education program include misrepresentations concerning the "nature and extent" of the institution's accreditation and the "availability, frequency, and appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet." 34 C.F.R. §§ 668.72(a), (g). Substantial misrepresentations regarding the employability of an institution's graduates include misrepresentations regarding "requirements that are generally needed to be employed in the fields for which training is provided." 34 C.F.R. § 668.74(f). Each substantial misrepresentation serves as an independent ground for the Department to deny an institution's recertification application.

The Department's review established that CSL substantially misrepresented to students and prospective students the "nature and extent" of CSL's accreditation and the "appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet." 34 C.F.R. §§ 668.72(a), (g). As set forth above, since February 2016, CSL has been found to be out of compliance with ABA Standards 301(a), 501(a), and 501(b), and Interpretation 501-1. These standards are foundational to the educational enterprise insofar as they speak to whether the school "maintain[s] a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession," (Standard 301(a)); whether the school "maintains sound admission policies" that are "consistent with the Standards, [the school's] mission, and the objectives of [the school's] program of legal education" (Standard 501(a)); and whether the school refrains from admitting applicants "who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar" (Standard 501(b)).

In February 2016, the ABA first concluded that CSL was out of compliance with the standards and interpretation discussed above. However, neither CSL nor the ABA publicly disclosed this fact until November 2016, when the ABA first announced that CSL was being placed on probation. Prior to the ABA's November 2016 announcement, the Department was unaware of *any* public statements that would have informed a student or prospective student that the ABA had found the school to be out of compliance with the Standards, or that the ABA had determined that CSL had "not demonstrated that it is maintaining a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession." Second Committee Decision at 6, Third Committee Decision at 12, Council Decision at 2. Nor is the Department aware of any statement or disclosure during that period by CSL that the ABA had determined that the school was "admitting applicants who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar." *Id.*

In contrast, beginning no later than February 2016 and continuing at least until December 2016, CSL made public statements to students and prospective students that constitute misrepresentations regarding the nature of the educational program that CSL offered.

First, CSL promoted, and continues to promote, on its website that it "has been awarded full accreditation" by the ABA in 2011, which required the school to "ha[ve] established *full compliance with each of the ABA's standards*, including standards *relating to bar passage*, job

placement and diversity.”⁹ In the same section, CSL promoted, and continues to promote, that, although it had received only provisional approval by the ABA in 2008, the Council had determined in June 2011 that CSL was “in full compliance with the ABA Standards for Approval of Law Schools.” A student or prospective student could reasonably read these statements and conclude that the 2011 finding of “full compliance” by the ABA was the final word as to the institution’s compliance with the ABA’s accreditation standards. This is particularly true because the school disclosed prior accreditation events, such as its initial “provisional” approval. Accordingly, beginning in February 2016, when the Committee determined that CSL was “not in compliance” with Standards 301(a), 501(a), and 501(b) and Interpretation 501-1, the above-mentioned statements were misleading insofar as they had the likelihood or tendency to deceive reasonable students and prospective students about the current status, nature, and extent of CSL’s accreditation. The misrepresentation became even more pronounced in July 2016 when the Committee again notified CSL of its noncompliance and also found that the noncompliance was “substantial” and “persistent.” Although the school appealed the July 2016 determination as to the findings of the “substantial” and “persistent” nature of the noncompliance, the school did not appeal the finding of noncompliance itself. Nonetheless, the school did not amend, update, or otherwise correct its continuing and misleading representation on its website.

Second, CSL promoted, and continues to promote, on its website to students and prospective students (under the heading “Practical Preparation is Critical”) that it “created” a “rigorous curriculum ... to ensure that [CSL] students are equipped with practical skills that will allow them to thrive in a professional setting.” See Enclosure 1. This statement appears directly beneath the section of the webpage in which CSL promotes its “full compliance” with ABA standards, which includes Standard 301(a), which provides that law schools should maintain a “rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” In this context, CSL’s promotion of its “rigorous curriculum” is misleading insofar as: (1) as described above, the ABA has specifically and repeatedly concluded that CSL has not maintained a “rigorous” program of legal education, that its failures in this regard are “substantial” and “persistent,” and that CSL’s plans to come into compliance with that standard have not proven effective or reliable; and (2) the positioning of CSL’s description of its curriculum as “rigorous” directly beneath the discussion of compliance with the ABA standards (which use the word “rigorous” to describe what is expected of a compliant program) has the likelihood or tendency to leave students and prospective students with the false impression that CSL was compliant with that very requirement by the ABA.

Each of these misleading statements constitutes a substantial misrepresentation because students and prospective students could reasonably be expected to rely on each of these statements to their detriment. 34 C.F.R. § 668.71(b). Indeed, CSL argued to the ABA that if students and prospective students were aware of the ABA’s findings of noncompliance, that would have a “profound impact on admissions” because: (1) knowledge of the ABA’s findings would make

⁹ See <http://www.charlottelaw.edu/our-mission.html> (last visited Dec. 16, 2016) (attached hereto as Enclosure 1) (emphasis added).

applicants “much less likely to enroll;”¹⁰ and (2) such a disclosure would “effectively tell applicants to beware of attending the Charlotte School of Law.”¹¹ In addition, CSL argued to the ABA that public disclosure of its noncompliance would “have an adverse impact on [CSL’s] ability to retain high-performing students,” because it would “inevitably create anxiety on the part of high-performing students and make their transfer more likely.” *Id.* Thus, under CSL’s own arguments, the truth about its noncompliance would have impacted the decisions made by prospective students and current students to either enroll or continue their studies at CSL.

CSL’s assertion that knowledge of noncompliance would be material to student admissions and retention decisions was not conjecture. Indeed, in the Third Committee Decision, the Committee ordered CSL to disclose to its admitted students and the public, via its webpage, a statement disclosing the ABA’s noncompliance findings and required remedial actions. As part of its appeal of this requirement, CSL commissioned (and provided to the ABA) a market study that tested the impact of disclosure on CSL applicants. The study analyzed the views of individuals with LSAT scores above 142 who had applied to one or more of the InfiLaw schools. These individuals were asked to assess the impact on the likelihood of their respective enrollment at a particular law school if acceptance materials from that school included a statement that the school failed to meet accreditation standards dealing with admissions, educational programs, and bar passage. The study concluded that approximately 3 in 4 applicants (or 74%) stated that they would be “much less likely to enroll” after reading such a statement – establishing that reasonable students were highly likely to rely on the disclosure of information regarding the accreditation failures that CSL sought to keep from public view.

Finally, the Department finds that CSL substantially misrepresented the bar passage rates of CSL graduates in an interview you had with the Charlotte Business Journal published on November 30, 2016.¹² In that interview, you stated that “[i]f you look at bar pass rates between 2009 and 2013, we were consistently *at or above* the state bar average pass rate. That is an incredible feat for a new school.” (emphasis added). However, bar passage data published on CSL’s website shows that, out of the nine sittings of the North Carolina bar exam (between July 2009 and July 2013), CSL’s first-time bar passage rate was actually *below* the state average *five times* (with a maximum differential of -13.33%) and above the state average only four times (with a maximum differential of 7.4%).¹³ Thus, your statement was false and/or misleading, particularly when you were making representations as a law school president responding to questions about an accreditor’s finding of the school’s substantial and persistent failures to prepare students for admission to the bar. Substantial misrepresentations about the success that CSL graduates have on bar examinations constitute substantial misrepresentations about both the “appropriateness of [CSL’s] courses and programs to the employment objects that [CSL] states

¹⁰ Letter from J. Conison & C. Ogene to G. Murphy, Chair, Council of the ABA Section of Legal Education & Admissions to the Bar (Oct. 4, 2016).

¹¹ Letter from J. Conison to G. Murphy (Aug. 22, 2016) (enclosing Appeal) & Appeal at 11.

¹² Jennifer Thomas, *Charlotte School of Law president talks probation, considers nonprofit status*, CHARLOTTE BUS. J., Nov. 30, 2016 available at 2016 WLNR 36711693 (Nov. 30, 2016).

¹³ Bar passage data published at: <http://www.charlottelaw.edu/gainful-employment-aba-required-disclosures.html>.

its programs are designed to meet,” 34 C.F.R. § 668.72(g), and the schools’ success in training its students to meet “requirements that are generally needed to be employed in the fields for which the training is provided,” 34 C.F.R. § 668.74(f). You either knew or reasonably should have known that this interview was to be made public and could be viewed by current or prospective students.¹⁴ Because a reasonable student or prospective student would have understood your comments to be misleading in its representation of CSL graduates’ prior success on the bar examination, these statements constituted substantial misrepresentations in violation of 34 C.F.R. § 668.71.

* * * *

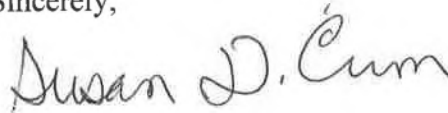
The denial of recertification will be effective on December 31, 2016. Should CSL have factual evidence to dispute the Department’s findings and demonstrate their inaccuracy, CSL may submit that evidence via overnight mail to me at the following address:

Administrative Actions and Appeals Service Group
U.S. Department of Education
Federal Student Aid/Enforcement
830 First Street, NE (UCP-3, Room 84F2)
Washington, DC 20002-8019

If any such material is received by **January 3, 2017**, the Department will review it and notify CSL whether the recertification denial will be modified, rescinded, or left in place. If the recertification denial remains in effect following the Department’s review of such submission, or if CSL opts not to make such a submission, the Multi-Regional School Participation Division will contact CSL concerning the proper procedures for closing out CSL’s Title IV program accounts.

In the event that CSL submits an application to participate in the Title IV, HEA programs in the future, that application must address the deficiencies noted in this letter. If you have any questions about this letter, you may contact Mitch Cary of my staff at (303) 844-3145.

Sincerely,



Susan D. Crim
Director
Administrative Actions and Appeals Service Group

Enclosure

cc: Rick Inatome (InfiLaw), via rinatome@infilaw.com
Jonathon Glass (Cooley LLP), via jglass@cooley.com

¹⁴ Notably, the question immediately preceding the question that elicited your statement about bar passage rates was: “What’s the message to current students?”

Barry A. Currier, Managing Director, Accreditation and Legal Education, ABA Section of Legal Education and Admissions to the Bar, via barry.currier@americanbar.org

Dr. Tim Gallimore, Associate VP for Academic Planning and State Authorization, The University of North Carolina – General Administration, via tagallimore@northcarolina.edu

Department of Defense, via osd.pentagon.ousd-p-r.mbx.vol-edu-compliance@mail.mil

Department of Veteran Affairs, via INCOMING.VBAVACO@va.gov

Consumer Financial Protection Bureau, via CFPB_ENF_Students@cfpb.gov



910 Raleigh Rd.
Chapel Hill, NC 27514

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

January 24, 2017

Mr. Jay Conison, Dean
Charlotte School of Law
201 South College Street
Suite 400
Charlotte, NC 28244
Email: jconison@charlottelaw.edu

Tim Gallimore, Ph.D.
**Associate Vice President for Academic
Planning and State Authorization**

Office: (919) 843-4538
Email: tagallimore@northcarolina.edu

Required Documentation of Compliance with Licensure Standards

Dear Dean Conison:

Pursuant to North Carolina General Statutes Section 116-15 and the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*, any institution that acquires licensure shall be subject at any time to review by the University of North Carolina Board of Governors to determine whether the institution continues to meet the standards for licensure.

Our discussion on January 20, 2017, along with the communications that my office has had with the U.S. Department of Education concerning its recent adverse action against the Charlotte School of Law, and a submission to the North Carolina Post-Secondary Education Complaints have raised questions about the School's compliance with the license standards.

Therefore, I am requesting that the Charlotte School of Law provide to the Licensure Division at the University of North Carolina-General Administration the documentation/information listed below to demonstrate its continued compliance with the license standards.

The documentation/information must be submitted for review no later than January 31, 2017.

Please be advised that based on staff recommendation, "Any institution holding a license to conduct post-secondary degree activity in North Carolina that is found by the Board of Governors not to satisfy these licensure requirements shall have its license to conduct post-secondary degree activity revoked by the Board."

I am available to answer any questions that you may have concerning this compliance review.

Sincerely,

Tim Gallimore

Charlotte School of Law -- Required Documentation

Current organizational chart showing any controlling entities and their relationship to the Charlotte School of Law (CSL)

List of current governing board members and their contact information

Policies and articulation agreements for transferring academic credit and copies of the policies and agreements as publicized in recruitment materials and in the institution's catalog

Description of curriculum approval procedures

Description of course approval methods

Description of course evaluation procedures

Copies of contractual agreements with other libraries

Copies of lease agreements for facilities not owned by the institution

Faculty qualifications, size, and stability (complete faculty matrix form)

Definition/description of faculty responsibilities

Description of faculty role in governance and decision-making of the School

Description of official action/procedure by which faculty is appointed

Procedure for annual evaluation of faculty

Published policies on academic freedom

Evidence/examples of ongoing professional development for faculty

Resumes showing the qualifications of all senior administrators/officers of CSL

Copy of policy and description of practices for verifying and issuing program completion credentials

Copy of policies for determining amount of credit awarded for each course

Copy of record-keeping procedures

Evidence that student attendance, progress, and performance standards are enforced

Copy of admissions policy and copies of recruitment, advertisement, and marketing materials describing that policy

Copies of policies and procedures regarding financial aid administration and distribution

Graduation and job placement rates (2014-2017) and explanation of how rates were calculated

Job placement records for students who graduated in 2014-2017 and copies of recruitment, advertising, and marketing materials mentioning CSL job placement record

Description of job placement assistance provided by CSL and copies of recruitment, advertising, and marketing materials containing that description

Description of health care services provided by CSL

Copies of counseling and guidance policies

Report of student satisfaction with all student services and education quality

Copy of annual Compliance Report

Policies and compliance record concerning the Americans with Disabilities Act

Copy of Clery Act Reporting (2014-2017)

Copy Title IX Reporting (2014-2017)

List of any significant correspondence with regulatory agencies and officials

Statement about any record of non-compliance/violations of health and safety laws/ordinances

Evidence of financial stability (current financial statement, detailed description of any material changes contained in the audit report, financial development plan)

Tuition guaranty bond – based on all current student charges & fees as well as enrollment

Signed statement/description of how the bond amount was calculated

Statement from an Independent CPA attesting to accuracy of tuition bond

Evidence of Adequate Casualty and Liability Insurance

Detailed disclosure of binding legal relationship with any parent or subsidiary corporation or institution

Plan for short-term financial management

Evidence of adequate casualty and liability insurance

Copies of policy and process for monitoring conflicts of interest

Policy describing and distinguishing administration and policy-making functions of the governing board, academic administration, and faculty

Description of the role of the governing board, academic administration, faculty, and students in determining policy and resolving issues

Institutional Effectiveness Plan

Current catalog and all required disclosures to students and the public

Copies of financial policies and procedures governing business practices

Advertising, marketing, recruiting and promotional materials

Bar examination pass rate and other indicators of student/graduates' success

Statement about ongoing and pending litigation

Description of all adverse regulatory and accreditation actions for last 3 years

Statements about any record of unprofessional conduct by School personnel

Copy of student complaint process

Record/log of student complaints for last 3 years and summary of resolution

Copies of cancellation and refund policies

Statements about any record of unprofessional conduct by vendors and contractors

Copies of policies and procedures for determining credit hours awarded in courses and programs and three examples of the application of these policies and procedures in courses and programs



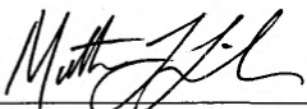
State of North Carolina
Department of Justice
INVESTIGATIVE DEMAND

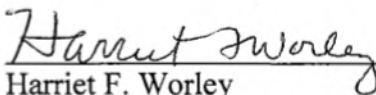
TO: Charlotte School of Law
 c/o Johnny M. Loper
 Counsel for Charlotte School of Law
 Womble Carlyle Sandridge & Rice, LLP
Via electronic mail to jloper@wcsr.com

TAKE NOTICE: YOU ARE REQUIRED to produce for inspection and copying the records set forth in the attached document production request and tender such documents to the undersigned on **March 20, 2017**, at 10:00 a.m. at the Office of the Attorney General, Consumer Protection Division, 114 W. Edenton Street, Raleigh, North Carolina, or at such other time and place to which the parties may agree. In the alternative, copies of the requested documents and answers to the questions may be delivered to the undersigned on or before the foregoing date.

Issued this 10th day of March, 2017, under my hand and seal pursuant to the authority vested in me by Section 75-10 of the General Statutes of North Carolina.

JOSH STEIN
 Attorney General of North Carolina

By: 
 Matthew L. Liles
 Assistant Attorney General


 Harriet F. Worley
 Special Deputy Attorney General
 North Carolina Department of Justice

INVESTIGATIVE DEMAND FOR PRODUCTION OF DOCUMENTS

I. DEFINITIONS

As used in this investigative demand, the following definitions shall apply:

1. "Communication(s)" means every disclosure, transfer, exchange, or transmission of information, whether oral, written, or electronic, and whether face to face, by telecommunications, computer, U.S. Mail, corporate internal mail, telecopier, telephone, text, email, facsimile machine, or otherwise.

2. "Document," unless otherwise specified, means written, computerized, programmed, recorded or graphic materials, information or data of every kind and description, including but not limited to: letters, correspondence, telegrams, facsimiles, voice mail, e-mail, memoranda, reports, studies, summaries, analyses, bulletins, circulars, advertisements, instructions, books, records, notes, records and notes of telephone or personal conversations and conferences, minutes, worksheets, contracts, charts, graphs, photographs, film, audiotape and videotape recordings, and all other data compilations or information resources from which information can be obtained or translated into reasonably usable form. "Document" includes the original of any document in whatever medium it may exist and all copies that differ in any way from the original, including the addition of any notations, underlining, markings, or electronically imbedded comments or codes. "Document" also includes information stored in, or accessible through, computer diskettes and hard drives or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations.

3. "You," "your," and "CSL" means Charlotte School of Law, LLC, and, unless otherwise noted, all of its officers, board members, members, employees, agents, representatives, parent companies, subsidiaries, predecessors, successors, assigns, and all persons acting on its behalf. Without limiting the foregoing, "you," "your," and "CSL" include any persons who were employees of other entities who were acting for the benefit of or on behalf of an educational institution or business holding itself out as "Charlotte School of Law."

II. INSTRUCTIONS

1. This Civil Investigative Demand requests production of all described documents in your possession, custody or control without regard to the person or persons by whom or for whom the documents were prepared. Unless otherwise stated, these Requests seek documents from January 1, 2014 to the present.
2. This request includes documents in possession of your employees, agents, representatives, and attorneys, unless privileged. If any document or information is withheld under claim of privilege, identify the document and state the basis for the privilege, and provide a detailed privilege log that contains at least the following information for each document or information that you have withheld:
 - a. The name of each author, writer, sender, creator, or initiator of such document;

- b. The name of each recipient, addressee, or party for whom such document was intended or to whom the document was sent;
 - c. The date of such document, or an estimate thereof if no date appears on the document;
 - d. The general subject matter of the document; and
 - e. The claimed grounds for withholding the document, including, but not limited to, the nature of any claimed privilege and grounds in support thereof.
3. These document requests impose a continuing duty to produce promptly any responsive information or item that is not objected to, which comes into your knowledge, possession, custody or control after your initial production of responses to the requests.
4. In each instance in which a document is produced in response to a request, produce the current edition, along with all earlier editions or predecessor documents serving the same function, even though the title of earlier documents may differ from current versions.
5. The following procedures shall apply to the production of documents and information in response to this Civil Investigative Demand:
 - a. The recipient of this Civil Investigative Demand shall label each responsive document (i.e., Response to Request No. 1, Response to Request No. 2, and so forth), group all documents responsive to a particular request together, and place a label on each group of documents which identifies the corresponding Request;
 - b. All attachments to responsive documents or information shall be produced with, and attached to, the responsive documents (or digitally in corresponding order);
 - c. Each responsive document or information shall be produced in its entirety and no portion of any document or information shall be edited, cut, masked, redacted or otherwise altered, unless for applicable privilege which shall be logged according to the procedures set forth above; and
 - d. The recipient of this Civil Investigative Demand shall provide a key to all abbreviations used in the documents or information and shall attach the key to the corresponding documents or information.
6. Documents or information that may be responsive to more than one numbered request in these Requests need not be submitted more than once. However, for each such document or information, the recipient of this Civil Investigative Demand shall identify all of the numbered requests to which the document or information is responsive. If any responsive document or information has been previously supplied to the North Carolina Attorney General's Office, you shall identify the document(s) or information previously provided and the date(s) of submission.
7. You shall consecutively number each page of all documents or information produced with your response and indicate the total number of pages produced with your response. This page numbering must be separate from and must not alter any original page numbering on the responsive documents or information.
8. Your responses to these requests for production should include all relevant electronically stored information in your possession, custody, or control.

9. The following procedures shall apply to the production of electronic Documents.
- A. Documents should be produced in Bates labeled single-page TIF format with associated searchable text files including extracted and OCR where applicable, together with Concordance load files (DAT and OPT). The DAT file should include the following fields: BegBates; EndBates; BegAttach; EndAttach; Request Number; Custodian; Subject; From; To; CC; BCC ; Date Sent; Time Sent; Date Received; Time Received; Original File Name; Title; Author; Date Created; Date Last Modified; Document Extension; File Size; Folder; NativeFile. Reference the appendix at the end of this document for technical descriptions of each required field.
 - B. Spreadsheet, database, audio, and video files should be produced in native format with a Bates labeled single-page slipsheet image with the message "This Document has been Produced Natively." Full image conversion for these file types is not required. If responsive data exists in non-portable databases (such as SQL, Oracle or other proprietary software), export in Comma Separated Value (CSV) text file format. If a list must be compiled to respond to a particular request because that information does not exist in the normal course of business, produce as an Excel Spreadsheet in your response to this CID.
 - C. Microsoft PowerPoint files should be converted to images to show "Slides and Notes" and to unhide hidden slides. Microsoft Word files should reveal hidden text, display Track Changes, and show comments. Responsive Documents produced in electronic format must be produced in a format that accurately captures each version and draft of the document, including handwritten notes and signatures.
 - D. The North Carolina Department of Justice may request that certain Documents be produced in native format, indicating on a document-by-document basis that the Documents are difficult to read in the produced format or contain embedded information that is potentially relevant. As such, your duty to preserve the original Documents in native format continues beyond the production of the Documents.
 - E. You shall submit electronically stored data on a generally supported storage medium. Currently supported storage media include the following: CD-readable disks formatted to ISO 9660 specifications; DVD-ROMs; USB mass storage; or delivery via secure FTP.
10. If you are unable to fully answer any particular interrogatory or request for documents, supply all of whatever information is actually available. Designate such incomplete information as incomplete and accompany the information with an explanation that includes the reasons for the incomplete answer; a description of any and all of your efforts to obtain the information; and the source from which the Office of the Attorney General may obtain information to complete your response. If books, records, or other sources that provide accurate answers are not available, provide your best estimates and describe how you derived the estimates, including the sources or bases of such estimates. Designate estimated data as such by marking it with the "est." notation. If there is no reasonable way for you to make an estimate, provide an explanation.

11. If particular documents responsive to this Civil Investigative Demand no longer exist for reasons other than the ordinary course of business but you have reason to believe they have been in existence, describe the documents, state the circumstances under which such documents were lost or destroyed, and identify persons having knowledge of the content of the documents.
12. In order for your response to this Demand to be complete, submit with your response the attached certification form, as executed by the official supervising your compliance with this Demand.

III. INFORMATION REQUESTED TO BE PRODUCED

Produce the following documents:

1. All documents, following the decision by the Accreditation Committee of the Council of the ABA Section of Legal Education and Admissions to the Bar ("ABA Accreditation Committee") to place CSL on probationary status and/or following the U.S. Department of Education's ("USDOE") decision in December 2016 to terminate CSL's participation in Title IV programs, which discussed or explained CSL's plans for continued operations or which communicated CSL's plans for continued operations to CSL students;
2. All documents describing what CSL termed "alternative financing" for CSL students, including but not limited to options referenced in the letter of January 13, 2017;
3. All documents CSL sent to current or potential CSL students, from December 19, 2016, to present, concerning the availability of Title IV funds or how their student debt may be affected by the continued operations of CSL after the loss of Title IV funds;
4. All documents explaining any plan by CSL, as referenced in CSL's January 19, 2017, statement, to credit CSL students for federal funds and what will happen to these credits if CSL's Title IV eligibility is not reinstated;
5. All promotional materials intended to be reviewed by prospective CSL students and made available by CSL to students at any time from January 1, 2016 to the present;
6. A roster of students, identified by class, currently enrolled at CSL for the 2017 Spring Semester, including identification of those who are in a position to receive a degree after successful completion of course work at the end of the 2017 Spring Semester;
7. A roster of students, identified by class, enrolled at CSL for the 2016 Fall Semester, including current e-mail addresses and any other contact information in the possession of CSL for those students;
8. A copy of CSL's course offering schedules for the 2016 Fall Semester and 2017 Spring Semester, including the names and contact information for the professors teaching those classes and the number of students enrolled in each class;
9. Copies of all complaints, whether received in written or electronic form and including any notes from telephone conversations, that CSL has received since January 1, 2016, to the present from current and past CSL students;
10. Copies of any responses by CSL to those complaints identified in Request Number 10;
11. Copies of all documents reflecting the current application process for students applying

for admission to CSL in the summer or fall of 2017;

12. All documents related to the program under which CSL financially assisted students who deferred taking the bar examination after graduation ("Deferral Program"), including but not limited to:
 - a. the total amount of financial assistance provided to students who participated in the Deferral Program;
 - b. the total number of students who received financial assistance under the Deferral Program;
 - c. the total number of students who participated in the Deferral Program and ultimately took a bar exam; and
 - d. the total number of students who participated in the Deferral Program and ultimately passed a bar exam;
13. All documents CSL gathered or created in connection with the American Bar Association's ("ABA") review of CSL's accreditation and its subsequent decision to place CSL on probation, including any documents CSL has provided to the ABA in response to the ABA's decision;
14. All documents CSL gathered or created in connection with the USDOE's decision to withdraw student funding for students attending CSL including all documents CSL has provided to USDOE while appealing its decision to withdraw funding;
15. Copies of all market studies CSL conducted, or had conducted on its behalf, concerning the impact of potential disclosures on CSL applicants, including, but not limited to, the market study discussed on page 12 of the December 19, 2016, letter USDOE sent to CSL;
16. All records of the interview Mr. Ogene had with the *Charlotte Business Journal* on or about November 30, 2016; and
17. To the extent not provided in response to Request No. 14, provide a copy of the following documents:
 - (a) The September 15, 2014, Inspection Report provided to the ABA;
 - (b) The January 2015 decision of the ABA Accreditation Committee;
 - (c) The February 3, 2016, decision the ABA Accreditation Committee issued;
 - (d) The May 2016 report CSL submitted to the ABA;
 - (e) All records of the testimony of CSL at the June 23, 2016, ABA hearing;
 - (f) The ABA Accreditation Committee's decision issued in the summer of 2016;
 - (g) All documents CSL submitted to the ABA Accreditation Committee in August and October 2016; and
 - (h) All records relating to CSL's October 2016 hearing before the ABA Accreditation Committee.

CERTIFICATION

I, _____, having made the foregoing responses to requests for production of documents, certify under penalty of perjury under the laws of the State of North Carolina, that I am authorized to sign legal documents on respondent's behalf and know the responses herein to be true, correct and complete.

Signature:

Title or Position:

Date:

City and State:

APPENDIX

Field Name	Description
BegBates	First Bates number of the document
EndBates	Last Bates number of the document
BegAttach	BegBates number of the parent document in an attachment range
EndAttach	EndBates number of the last document in an attachment range
Custodian	Individual who possessed the document in the normal course of business or the shared repository from which the document was collected
Request Number	Request number(s) to which the document is responsive. Where multiple numbers apply, separate with a semi-colon
Subject	Subject line of the email
From	Sender of the email
To	Recipient(s) of the email
CC	Carbon copy recipient(s) of the email
BCC	Blind carbon copy recipient(s) of the email
DateSent	Date on which the email was sent
TimeSent	Time the email was sent
DateRcvd	Date on which the email was received
TimeRcvd	Time the email was received
FileName	File name of the original non-email file
Title	Title metadata of non-email file
Author	Author metadata of non-email file
DateCreated	Date on which the non-email file was created
DateLastMod	Date on which the non-email file was last modified
DocExt	File extension of the non-email file
FileSize	Size of the file in bytes
Folder	For e-docs, the full path of source files. For emails/attachments, the folder path contained within a mail store
NativeFile	Hyperlink to natively produced documents

Dates should appear in MM/DD/YYYY format.



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

JOSH STEIN
ATTORNEY GENERAL

REPLY TO: MATT LILES
Assistant Attorney General
mliles@ncdoj.gov

March 10, 2017

Mr. Chidi Ogene
President, Charlotte School of Law
201 S. College Street, Suite 400
Charlotte, NC 28244

Jay Conison, Esq.
Dean, Charlotte School of Law

Re: Civil Investigative Demand to Charlotte School of Law

Dear Mr. Ogene and Dean Conison:

We are writing concerning (1) the recent actions by the U.S. Department of Education ("USDOE") and the American Bar Association ("ABA") against Charlotte School of Law ("CSL"); and (2) in light of those actions, your decision to begin classes for the Spring Semester of 2017 after you released a substantial number of the school's faculty. We have questions about CSL's future viability and how, in turn, that affects the CSL students, many of whom have incurred substantial student debt while attending CSL. We also are concerned that CSL's statements to students have not fully apprised them of all material facts, including most recently students' options going forward and how they might best minimize that substantial debt. For these reasons, in the attached civil investigative demand, we request information concerning CSL's statements to students, CSL's interactions with the ABA and USDOE, CSL's plans for its ongoing and continued operation, and how CSL's students will be protected.

We are aware that USDOE's recent action revoked CSL's ability to receive Title IV funding. Likewise, we are aware that in the fall of 2016, the ABA put CSL on probationary status for noncompliance with the ABA's accreditation standards. The cumulative result of these actions is that CSL students cannot currently use federal funds to pay for their education at CSL. Additionally, if the ABA decides to revoke CSL's accreditation, students are in jeopardy of not graduating from an accredited law school and, therefore, being unable to take a bar examination in certain states. These actions are obviously significant for students and for CSL's continued operation.

Many students' ability to attend CSL is predicated upon access to Title IV funds. Therefore, the loss of these funds prevented students from enrolling for the spring semester. At the close of the fall semester, students were faced with the decision to continue to attend a school where they could not use federal student loans and were not given clear directives on whether the school would even reopen for the spring semester as reports abounded about the school's impending closure. Hundreds of students made the decision not to enroll at CSL for the spring semester without any guidance from the school as to the effect failure to reenroll might have on their ability to discharge their debt if the school did close. Despite numerous reports that CSL planned to close, you issued a statement on January 19th indicating that you planned to contest the revocation and to begin the spring semester four days later.

While reopening the school for the spring semester protected CSL's financial interests by reducing its liability for closed school discharges in the event of closure, our office is concerned that your continued operation potentially endangers students' eligibility for a closed school discharge, absent extraordinary action by the USDOE. See 34 C.F.R. § 685.214(c)(1)(i)(B) (providing a closed school discharge only to students who attended a school within 120 days of the date of closure). Consequently, your failure to challenge the USDOE's final agency decision to revoke Title IV funding, combined with your decision to reopen for the spring semester have left students with no clarity on how to proceed. We understand the majority of CSL students did not return for the spring semester due to the uncertainty of CSL's future. Therefore, by continuing to operate, CSL endangers these students' eligibility for a closed school discharge – should you eventually close – because they would not have attended the school within 120 days of the closure.

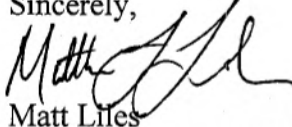
Failure to Communicate with Students

One of the most troubling aspects of this situation is that throughout the process students have felt uninformed. Students have contacted the Consumer Protection Division looking for information both on CSL's status and their options. Though your statement on January 19th confirmed that CSL would open on January 23rd and that students would be given some sort of credit for their federal loans, it otherwise provided very little detail on CSL's future.

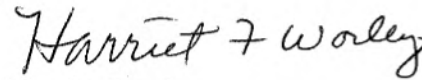
The details matter here. We have not seen any public statements where you have informed students about their rights should CSL close, how those rights are affected by their decisions to attend this semester, or the actual viability of CSL's plans to remain open despite the loss of Title IV funding and the termination of the majority of its faculty. Students who have spent tens of thousands of dollars to attend your school should not be kept in the dark about such important details and to do so is fundamentally unfair to them.

Due to the urgency of this matter, we ask that you respond to the attached civil investigative demand by March 20, 2017. If you have any questions, we are happy to discuss this matter with you at your convenience.

Sincerely,



Matt Liles
Assistant Attorney General
Consumer Protection Division



Harriet Worley
Special Deputy Attorney General
Consumer Protection Division

cc: Dr. Tim Gallimore Associate VP for Academic Planning and State Authorization,
UNC General Administration
Barry A. Currier, Managing Director, Accreditation and Legal Education, ABA Section
of Legal Education and Admissions to the Bar
Dan Zibel, Deputy Assistant General Counsel for Postsecondary Education, U.S.
Department of Education

Attachment



**STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE**

JOSH STEIN
ATTORNEY GENERAL

REPLY TO: MATT LILES
Assistant Attorney General
mliles@ncdoj.gov

March 10, 2017

Dr. Tim Gallimore
Associate VP for Academic Planning and State Authorization
UNC General Administration
910 Raleigh Rd.
P.O. Box 2688
Chapel Hill, NC 27514

Re: Charlotte School of Law – Continued Licensure Under N.C. Gen. Stat. § 116-15

Dear Dr. Gallimore:

We write to share our serious concerns, based on recent findings of the American Bar Association (“ABA”) and the U.S. Department of Education (“USDOE”), about the ability of Charlotte School of Law (“CSL”) to fulfill its commitments and provide students with an adequate education consistent with CSL’s stated objectives. Our office is taking steps to obtain more information. However, we believe these concerns merit review by the Board of Governors as it fulfills its responsibility under N.C. Gen. Stat. § 116-15 to determine whether CSL should continue to be licensed to conduct post-secondary degree activity in the State of North Carolina.

These issues are not only important, but also urgent. It appears that many CSL students left CSL after the 2016 fall semester. As described further below, when a school closes a federal program provides automatic forgiveness of student debt to any student who has not graduated and was enrolled within 120 days of the school’s closure. In early April 2017, this deadline would pass for students who recently left CSL.

As you know, in November 2016, CSL’s accreditor – the American Bar Association (“ABA”) – put CSL on probationary status and required remedial actions, following a years-long investigation and appeals process. The ABA concluded that CSL was not in compliance with three ABA accreditation standards:

- The ABA found that CSL did not comply with Standard 301(a), which requires a rigorous legal education that prepares graduates to pass the bar examination and participate in the legal profession.
- The ABA found that CSL did not comply with Standard 501(a), which requires sound admission policies and practices consistent with the ABA standards, CSL’s mission, and the objectives of CSL’s program.

Post Office Box 629 | Raleigh, North Carolina 27602-0629

Telephone 919.716.6000 | Facsimile 919.716.6767

ED-19-1146, 19-1148, 19-1149-A-000414

ED 19-02226-F 0120

- The ABA found that CSL did not comply with Standard 501(b), which is violated by admitting applicants who do not appear capable of satisfactorily completing the course of study and gaining admission to the bar.

Then, in December 2016, the USDOE revoked CSL's ability to receive Title IV funds. In its December 19, 2016 letter to CSL, USDOE found that CSL "made substantial misrepresentations regarding the nature of its academic program" in violation of federal regulations. USDOE wrote that its "review established that CSL substantially misrepresented to students and prospective students the 'nature and extent' of CSL's accreditation and the 'appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet.'"

These statements by the law school's accreditation authority and by the USDOE are troubling. In the meantime, despite the ABA's probation sanction and USDOE's action on Title IV funds, CSL has remained open, albeit with a greatly reduced faculty and student body.

With their school at risk of closure, CSL students are left in an untenable position. Students still attending CSL cannot use federal loan money – their primary means of finance – to pay their tuition. The school has decided to stay open but has offered few details on how it plans to do so long term. Students who try to leave have found that few schools will honor their credits. Students who stay are attending a school that has fired half of its employees, thus diminishing the quality of their legal education. Students who graduate from CSL have on average \$161,000 in debt for a degree that has suffered considerable reputational damage. Finally, as explained further below, students who left CSL after the fall semester may lose their right to loan forgiveness if CSL does not close before early April 2017.

Since the ABA and USDOE's actions, our office has received numerous student inquiries about CSL's future. We previously shared with you the four official complaints we received. We have received two additional complaints since we sent you the other complaints, and those are included with this letter. We have also reviewed several civil lawsuits filed by former CSL students, which allege that CSL actively concealed its substandard educational program and bad student outcomes.

Based on student complaints and our past experience with failing schools, we highlight a few areas of particular concern for CSL students that we ask you to consider before making your recommendation to the Board of Governors:

Students Report a Lack of Transparency from CSL

Since November, students have had very real questions about CSL's future. The students report the school has not been forthcoming with information during that time. For example, students reported not having class schedules just days before the school's first day of spring classes. Similarly, CSL in a January 19, 2017 message announced students would be given credits for their previous federal aid dollars, but it did not offer students any details about how that would work. CSL has repeatedly left students in the dark about important matters that affect their future and the thousands of dollars in personal debt they have amassed while students at CSL.

The Timing of Any Closure Will Affect Students' Rights to Discharge Their Student Debt

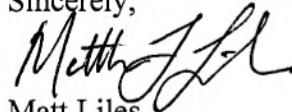
When a school closes, any student who has not graduated and was in attendance within 120 days of closure has the right to discharge their federal student loan debt. *See* 34 C.F.R. § 685.214 (known as "closed school discharge") and 34 C.F.R. § 685.214(c)(1)(i)(B) (discharge limited to students who attended within 120 days of closure). The U.S. Secretary of Education may, in her sole discretion, extend the discharge period for an additional 120 days on the basis of "exceptional circumstances." *Id.* This discharge could be a significant benefit for CSL students who already owe considerable federal student loan debt. CSL's future has been in question since November 2016, causing the majority of CSL students to leave already. Therefore, the longer CSL's future is uncertain, the more likely it becomes that some students will lose their right to a closed school discharge. For this reason, the timing of any closure of CSL is of crucial importance to hundreds of students.

Future Educational Quality at CSL is in Doubt

Given that CSL has fired a significant portion of its faculty and staff, we are worried that a stripped-down version of CSL will not be able to deliver the level of education it originally advertised to students. The ABA and USDOE found that CSL offered a substandard legal education and poor student outcomes. These findings are echoed by the class action filings and consumer complaints. CSL is rumored to have proposed a teach-out¹ plan whereby remaining CSL students would receive instruction through CSL's sister school, Florida Coastal Law School. While this plan would obviously protect CSL's monetary interests, it may not best serve students. Florida Coastal has not been authorized to operate in North Carolina, and the quality of the education it provides has likewise been seriously questioned. Continued substandard instruction will compound, not remedy, the injury here.

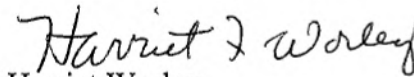
As explained above, this matter requires prompt and decisive action to protect North Carolina students. If you have any questions about these comments, please contact us.

Sincerely,



Matt Liles

Assistant Attorney General



Harriet Worley

Special Deputy Attorney General

cc: Barry A. Currier, Managing Director, Accreditation and Legal Education, ABA
Dan Zibel, Deputy Assistant General Counsel for Postsecondary Education, USDOE
Chidi Ogene, President & Jay Conison, Dean, Charlotte School of Law

Attachments

¹ Any teach-out plan should clearly advise students that accepting a teach-out will make them ineligible for a closed school discharge. 34 C.F.R. § 685.214(c)(1)(i)(C)(teach out students ineligible for closed school discharge).



PO Box 2688
Chapel Hill, NC 27515-2688

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

Thomas C. Shanahan
Senior Vice President and General Counsel

Phone: 919-962-4588

Fax: 919-962-0477

Email: tcshanahan@northcarolina.edu

March 23, 2017

Matt Liles, Assistant Attorney General
Harriet F. Worley, Special Deputy Attorney General
North Carolina Department of Justice
Consumer Protection Division
Post Office Box 629
Raleigh, North Carolina 27699-0629

Dear Mr. Liles and Ms. Worley:

This responds to your letter dated March 10, 2017, regarding the Charlotte School of Law ("CSL"). Thank you for forwarding your correspondence with CSL, as well as the Investigative Demand issued by your office to CSL's counsel, and the student complaints received by your office regarding CSL.

As you know, the Licensure Unit at UNC General Administration has already initiated a review of CSL's license and compliance with the Board of Governors' requirements for licensure of non-public post-secondary institutions. This review is ongoing, and has been underway for some time. As part of the University's review process, we have requested records from CSL relating to its program, which CSL has provided to the University. Following review of the CSL records and responses to the University's inquiries, the President will make a recommendation to the Board of Governors concerning the disposition of CSL's license, which could include revocation of the license to operate in North Carolina. Under Section IX of the Rules and Standards for Licensing Non-Public Institutions, CSL must be notified in writing in advance of the recommendation that the President intends to make to the Board of Governors. CSL then has ten days from the receipt of the notification to request an interview to respond to the President's recommendation. A recommendation to revoke CSL's license, if any, would not go before the Board of Governors until after that interview, if requested.

We understand that you agree with our assessment that the authority of the Board of Governors is limited to granting, reviewing, and revoking licenses to institutions of higher education, and that the Board of Governors lacks any statutory authority to compel any institution to close. Pursuant to G.S. § 116-15(j), enforcement authority for noncompliance with the licensure statute lies with the Attorney General. The Board of Governors "shall call to the attention of the Attorney General, for any action as he may deem appropriate, any institution failing to comply with the requirements of this section." License revocation by the Board of Governors does not, per se, close an institution. We agree that the concerns involving CSL require prompt attention, and the University has responded by initiating a prompt and thorough licensure review as described in this correspondence.

March 23, 2017

Page 2 of 2

The University stands ready to provide any information or assistance the Attorney General's office may require as it conducts its own investigation of CSL.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Shanahan", enclosed within a thin black rectangular border.

Thomas C. Shanahan

cc: Margaret Spellings, President, University of North Carolina General Administration
Kimberly van Noort, Vice President for Academic Programs & Instructional Strategy, University of
North Carolina General Administration
Daniel A. Zibel, U.S. Department of Education (via email)
Daniel Harrison, U.S. Department of Education (via email)

Charlotte School of Law
North Carolina Post-Secondary Activity
Licensure Review



1355 Greenwood Cliff, Suite 400

Charlotte, NC 28204

Office: (704) 831-5202

Email: mjuby@firsttryon.com

Executive Summary

On behalf of the Board of Governors of the University of North Carolina (the “Board”), the University of North Carolina General Administration (“UNCGA”) has asked First Tryon Advisors (“First Tryon”) to conduct a comprehensive review of the financial health and business model of the Charlotte School of Law (“CSL”) in support of the Board’s review of CSL’s license to conduct post-secondary degree activity in North Carolina (the “Review”).

Specifically, First Tryon has been asked to evaluate all financial information submitted by CSL in connection with the Review for compliance with the finance-related standards set forth in N.C. Gen. Stat. § 116-15 (the “Act”) and the Board’s Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina (the “Rules and Standards”).

Under Standard 10 of the Rules and Standards, CSL must demonstrate to the Board’s satisfaction that CSL is “*financially sound and capable of fulfilling its commitments to students.*” The Rules and Standards further state that CSL must show that it possesses and maintains “*adequate financial resources to sustain its mission and purpose.*” CSL’s stated mission is “*to provide a student-centered education, that produces practice-ready lawyers and that serves underserved communities.*”

Set forth below are summaries of the finance-related criteria established under the Rules and Standards, which serve as a guide for evaluating CSL’s compliance with the Act and Standard 10 of the Rules and Standards.

Overview of the Finance-Related Guidelines under Standard 10

Stability

CSL must demonstrate to the Board’s satisfaction that CSL’s financial resources are characterized by stability that indicates the institution can maintain operational continuity for an “extended period,” which, in CSL’s case, means at least three years.

Adequacy

CSL must demonstrate adequate financial support, which is determined, in part, based on an analysis of various ratios, as well as CSL’s financial policies, procedures and practices.

Plan for Financial Development

CSL must demonstrate to the Board’s satisfaction that CSL maintains a “coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution.”

Financial Records and Audit Report

The institution’s recent financial history must demonstrate financial stability. CSL must submit financial statements, the most recent audit report, a description of any material changes in the audit report and a detailed disclosure of legal and binding relationships with any parent or subsidiary corporation or institution.

Other Criteria

CSL must also demonstrate to the Board’s satisfaction that it maintains (1) adequate insurance to protect its financial interests and (2) a tuition guaranty bond at least equal to the maximum amount of unearned tuition held at any time during the most recent fiscal year.

Overview of Certain Regulatory Matters

The American Bar Association (“ABA”) placed CSL on probation on November 14, 2016, citing CSL’s failure to comply with the ABA’s accreditation standards and directing CSL to take specific remedial actions. On December 19, 2016, the Department of Education (“DOE”) informed CSL that its application for continued participation in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended (“Title IV”), had been denied.

1. Liquidity Concerns

Put Option and Collateralized Obligations

CSL is wholly-owned by InfiLaw Corporation (“InfiLaw”), which is wholly-owned by InfiLaw Holding, LLC.

In 2011, InfiLaw entered into a Preferred Unit Purchase Agreement (“PUP Agreement”) and a five-year Credit Agreement with Ares Capital Corporation. InfiLaw has pledged all its assets, including those of CSL, to secure its obligations under the Credit Agreement, which is cross-defaulted with the PUP Agreement.

Preferred dividends are due under the PUP Agreement quarterly and are currently paid out at a preferred dividend rate of 15%. In December of 2016, the PUP Agreement was amended to defer payments due with respect to the preferred shares until February 1, 2018. Under the PUP Agreement, the holders of InfiLaw’s Series A and Series A-1 preferred units may put their shares back to InfiLaw on July 31, 2018 (180 days after the February 1, 2018 maturity date) or earlier, based on certain trigger events, at a purchase price equal to 100% of the par amount of such shares plus accrued dividends and paid-in-kind distributions. As of December 31, 2016, InfiLaw owed \$8.49 million in preferred dividends on \$132 million in Series A preferred units. Unless InfiLaw renegotiates the PUP Agreement or obtains alternative financing, Note 5 to CSL’s most recent audit (the “FY2016 Audit”) states that InfiLaw will be unable to provide the more than \$140 million in cash required to cover the put option, if exercised.

InfiLaw has consistently violated the terms of the PUP Agreement and Credit Agreement, forcing it to rely on waivers from its investors and the payment-in-kind or deferral of its payment obligations under the agreements. Given InfiLaw’s current financial condition, it is unlikely InfiLaw will be able to obtain alternative financing on reasonable terms prior to the put date, and no assurance has been given that InfiLaw’s investors will continue to forbear from exercising its remedies under the agreements in response to InfiLaw’s ongoing noncompliance.

Cash Pooling Arrangement

CSL participates in a pooled cash arrangement that is managed by InfiLaw. Approximately \$10.5 million in CSL’s cash is held by InfiLaw under the arrangement, which is reflected as an account receivable on CSL’s balance sheet. First Tryon has not reviewed the pooling agreement, but InfiLaw’s liquidity and solvency concerns may negatively affect CSL’s ability to convert the receivable into cash when needed to meet CSL’s operational requirements.

Taken together, these liquidity concerns cast doubt on CSL’s ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, as required by Standard 10.

2. Statistics and Trends

Enrollment

Enrollment is a key leading indicator of financial health and operational stability. CSL’s enrollment has deteriorated significantly in recent years, from a high of 1,410 FTE in Fall 2013 to 712 FTE in Fall 2016. Mid-April 2017 data suggests that this downward trend has accelerated, with Spring 2017 enrollment estimated at 220 students. Approximately half of CSL’s remaining students are expected to graduate at the end of the current semester. The following factors have contributed to CSL’s enrollment declines:

- National law school enrollment has dropped by 30% over the past five years to 42-year lows
- CSL’s bar passage rates and job placement statistics have weakened in recent years, raising concerns over the value of CSL’s degree programs
- The ABA’s decision to place CSL on probation
- DOE’s denial of CSL’s application for continued participation in Title IV funding programs, which significantly increased the cost of attendance for many prospective students

CSL’s Reliable Plan for Compliance with Standards 301 and 501 (the “Reliable Plan”), which it submitted to the ABA on December 29, 2016, included enrollment targets and projections that were developed before DOE informed CSL that it was ineligible to continue its participation in Title IV programs. CSL notes on page 5 of the Reliable Plan that, “As of the

date of submission of this Reliable Plan, [CSL] does not have sufficient information to determine the extent to which [CSL] will have to modify [its] projections” in light of its ineligibility. In each of the last three fiscal years, Title IV funding has accounted for at least 88% of CSL’s annual institutional revenues (as calculated in accordance with Title IV regulations).

CSL also concedes in the Reliable Plan that changes to its enrollment strategies, as proposed to meet ABA standards, “will result in a significant decline in revenue” in the short-term, and that its current ABA-imposed probation “presents a challenge for both attracting applicants and yielding matriculants.”

The uncertainty surrounding CSL’s Title IV eligibility, its historical dependence on Title IV funding and its status with the ABA, together with CSL’s inability to forecast the impact of those factors on its enrollment, calls into question (1) the existence of a “coordinated, comprehensive, flexible financial plan” for its long-range management and (2) CSL’s ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

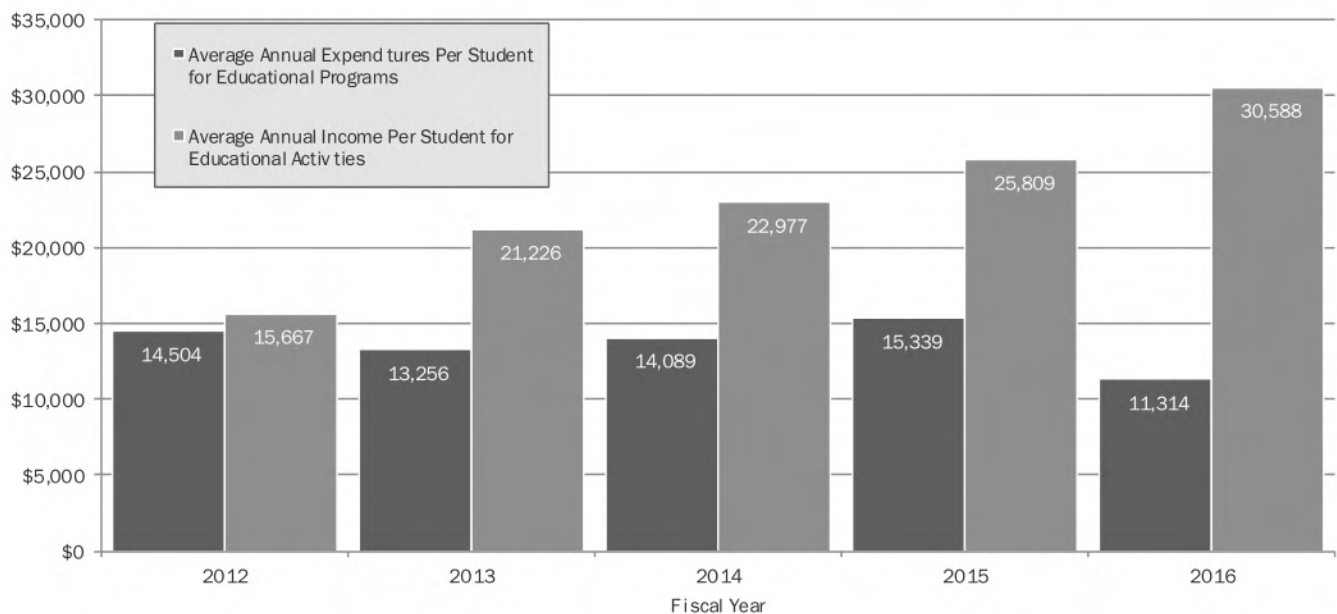
Financial Adequacy

Under the guidelines set forth in the Rules and Standards, the adequacy of an institution’s financial support is based, in part, on the following three metrics:

- Average annual expenditures per student for educational programs
- Average annual income per student for educational programs
- Ratio of net profit to debt service costs (debt service coverage ratio)¹

The chart below tracks the per student metrics, which First Tryon has calculated using financial data from the end of CSL’s last five fiscal years and the average of FTE enrollment from the Fall semesters immediately before and after the end of each fiscal year.

Charlotte School of Law – Standard 10 – Financial Adequacy Metrics (FY2012 through FY2016)



CSL’s educational expenditures per student have remained relatively flat since 2012, though they dipped more than 25% in 2016. Over the same period, CSL’s educational income per student has risen steadily, nearly doubling since FY2012.

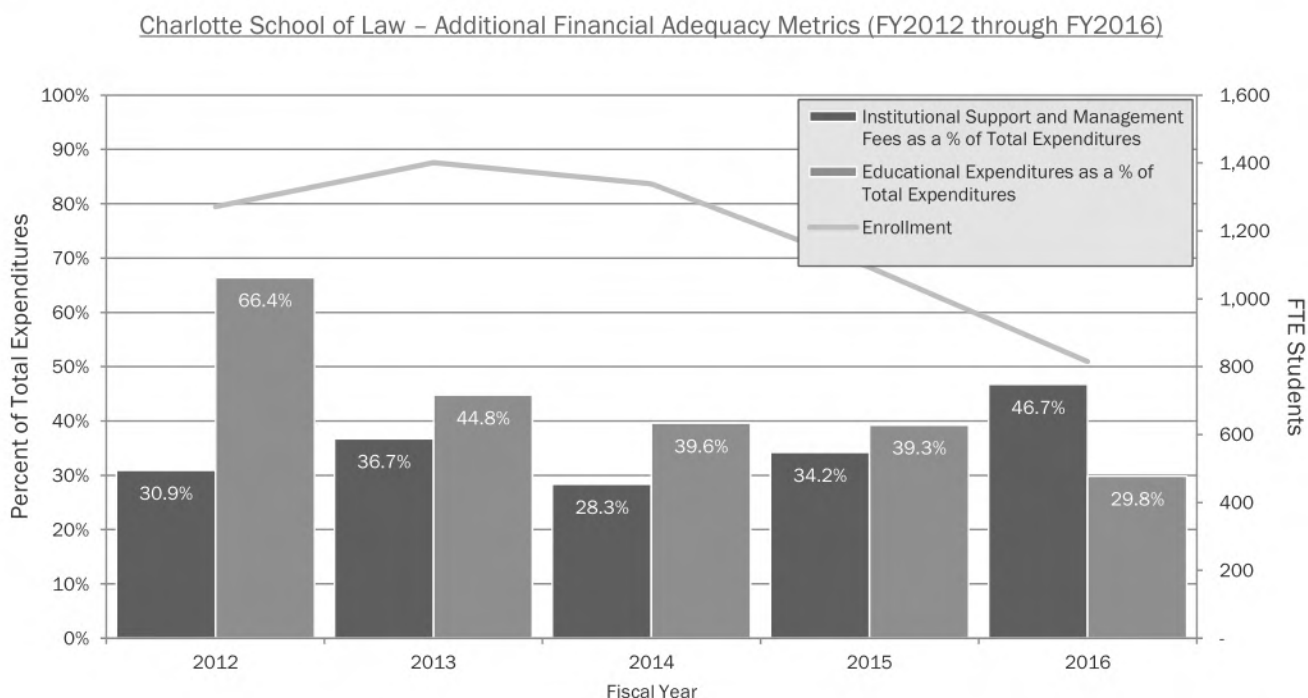
¹ First Tryon has not calculated CSL’s debt service coverage ratio because CSL has no direct debt outstanding. CSL’s assets have been pledged, however, to secure InfiLaw’s outstanding debt under the Credit Agreement, and a portion of InfiLaw’s annual interest expense is allocated to CSL. As of July 31, 2016, there was approximately \$10.3 million outstanding under the Credit Agreement, and InfiLaw charged CSL \$350,000 in allocated interest expenses for the fiscal year ended July 31, 2016.

In a stable or rising enrollment environment, this data might indicate that CSL has realized efficiencies that allow it to deliver both a quality educational product and significant value to its investors. In the context of a declining enrollment environment, however, the data suggest that CSL's cost management initiatives may be designed to maintain profitability at the expense of CSL's core educational programming.

To address CSL's recent enrollment volatility and the interpretive challenges that volatility presents for per capita-based ratios, First Tryon has calculated the two ratios described below to provide additional perspective on CSL's financial commitment to adequately support its educational mission:

- Institutional support and management fees as a percentage of CSL's total expenditures
- Educational expenditures as a percentage of CSL's total expenditures

The chart below plots these two metrics as of the end of CSL's last five fiscal years against CSL's average enrollment, using the same enrollment calculation as in the first chart:



Educational expenditures as a percentage of total expenditures has fallen in each of the past four years, while institutional support and management fees have risen from 30.9% of total expenditures in FY2012 to nearly half of total expenditures in FY2016.

Given CSL's declining enrollment, the data reflected in the charts above raise concerns regarding the adequacy, as evaluated under Standard 10, of CSL's financial support for its mission to provide a "student-centered education."

3. Going Concern Disclosures

The Financial Accounting Standards Board has issued Accounting Standards Update No. 2014-15 ("FASB ASU 2014-15") to provide guidance on determining when and how reporting entities must disclose going-concern uncertainties in their financial statements. The guidance requires, among other things, that the reporting entity provide certain disclosures if there is "substantial doubt about the entity's ability to continue as a going concern."

The audit report in the FY2016 Audit states that it was prepared under the assumption that CSL "will continue as a going concern" but that CSL's ineligibility under DOE's Title IV programs "*raises substantial doubt about [CSL's] ability to continue as a going concern*" (emphasis added). The audit report also states that no adjustments were made to CSL's

financial statements to account for the uncertainty surrounding CSL's Title IV eligibility. The FY2016 Audit also describes CSL's obligations under FASB ASU 2014-15 and states that the disclosures under Note 11 of the FY2016 Audit address management's "assessment of going concern considerations for the year-end July 31, 2017."

Note 11 describes CSL's ongoing negotiations with DOE regarding its Title IV eligibility and the possibility of restoring Title IV funding under a mutually-acceptable plan of action. Note 11 also states that management cannot predict the outcome of the negotiations with DOE, nor can it forecast the likelihood of CSL's continued participation in the Title IV programs. Note 11 states that without the successful implementation of a plan of action and the reinstatement of Title IV funding, there is substantial doubt about CSL's ability to continue as a going concern, and CSL may be forced to cease operations.

The going concern disclosures in the FY2016 Audit, along with the FY2016 Audit's disclosures regarding InfiLaw's recent inability to remain in compliance with its covenants under the PUP and Credit Agreements, do not indicate a recent history of financial stability for CSL and its affiliates, nor do they support a finding that CSL has a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution" or the ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

4. Tuition Guaranty Bond

Standard 10 requires each institution to maintain a tuition guaranty bond in a principal amount not less than the greater of (1) \$10,000 and (2) the maximum amount of prepaid tuition held by the institution at any time during its most recent fiscal year. Under Standard 10, "prepaid tuition held" on any given date equals the difference, if positive, of (a) the amount of tuition and related required fees collected by the institution and (b) the amount of such tuition and fees actually earned by the institution on such date. For the purposes of calculating "prepaid tuition held," Standard 10 makes no distinction regarding the source of any such payments, stating only that collections include "the amount of cash received by an institution for a student's account as payment for the applicable tuition and related required fees."

As part of its annual report to the Board for the 2015-16 academic year, CSL included a letter to UNCGA describing a change in the methodology CSL unilaterally adopted in determining the required amount of its tuition guaranty bond. The change in methodology, which included only prepaid tuition received directly from students and excluded prepaid tuition received from the federal government on a student's behalf, reduced CSL's tuition guaranty bond requirement from \$13,284,363 for the 2014-2015 academic year to \$2,388,890 for the 2015-16 academic year. CSL used a similar methodology to calculate its tuition bond guaranty requirement for the current academic year.

UNCGA has informed CSL (along with a small number of other institutions who have used a similar approach in calculating its tuition bond requirement) that its methodology is not supported by the plain language of Standard 10 and that CSL's calculation of its "maximum amount of prepaid tuition held" must take into account any prepaid tuition received from the federal government.

To date, CSL has not provided the Board with information sufficient to establish the "maximum amount of prepaid tuition held ... at any time" during the fiscal year ended July 31, 2016 in the manner prescribed under Standard 10, nor has CSL provided a statement from an independent certified public accountant stating that the existing principal amount of its tuition guaranty bond is at least equal to such amount, as required by Standard 10.

5. Further Inquiry

As part of its review, First Tryon has not reviewed evidence that would support a finding that CSL maintains adequate insurance to protect its financial interests, as required by Standard 10

In addition, First Tryon is not aware of any materials submitted by CSL that would constitute a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution." The limited projections CSL has provided to date were developed, according to CSL, under the assumption that CSL would remain eligible for funding under Title IV, which is not currently the case. To the extent any such long-range plans have been developed to address CSL's lack of participation under Title IV funding programs, First Tryon would welcome the opportunity to review them in light of the guidelines promulgated under Standard 10.

Finally, First Tryon has not had the opportunity to review (1) the agreement pursuant to which CSL is obligated to pay InfiLaw for certain shared and management-related expenses, (2) any agreements relating to the PUP and Credit Agreements and (3) any pooled cash management agreements among CSL and its affiliates. We note that the guidelines for Standard 10 require CSL to provide “detailed disclosure of legal and binding relationships with any parent or subsidiary corporation or institution.” Absent our ability to review those documents, First Tryon has made certain assumptions regarding the content of those agreements and the impact those arrangements might have on CSL’s ability to meet the requirements set forth under Standard 10.

**Review of Charlotte School of Law for Compliance with
North Carolina Licensure Requirements**

May 8, 2017

**Paul Kurtz
Associate Dean & Professor Emeritus
University of Georgia School of Law, Athens, Georgia**

Program of Legal Education

“Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

(a) A law school shall maintain a rigorous program ... that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession....”

This language, taken from the 2016-17 ABA Standards and Rules of Procedure for Approval of Law Schools (hereinafter ABA Standards), serves two functions. First, it serves as the general principle describing the American Bar Association’s mandate to American law schools concerning the type of educational program which is pre-requisite to the grant and maintenance of accreditation by the ABA. The rest of the Standards in Chapter 3 are more specific in explaining the contents of a “rigorous program...that prepares...law students.....for admission to the bar and....effective, ethical and responsible participation as members of the legal profession....”

Standard 301, however, has a second, more specific, function as well. This is to stress the importance of the role of an accredited law school in preparing its graduates for passing the examination required for admission to the bar. Each state has its own examination, the passage of which serves as a gatekeeper to the legal profession. The requirements concerning the preparation for bar admission are made even more specific in Standard 316, one of the Standards alluded to in the prior paragraph.

This section of our report will outline the most important of the Program of Legal Education Standards in Chapter 3 of the ABA Standards and provide available data relevant to whether the Charlotte School of Law measures up to the Standards. It should be emphasized, however, that this review and report has been prepared solely on the basis of documents provided to this committee by the CSL at the request of the committee.¹ Likewise, it should be emphasized that, while this report is similar to a report filed with the ABA by a Site Visit team², it is neither as thorough nor as detailed as such a report.

“Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(a) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit

¹ The CSL generally has been prompt and thorough in its cooperation with our committee.

² The most recent onsite visit to the CSL by a joint ABA/AALS team was in the fall of 2014. The ABA is the American Bar Association, which the accrediting agency for American law schools. The AALS is the Association of American Law Schools, a membership organization, which is the leading professional group for American legal educators. This committee is in receipt of and has utilized the report made by the site team (hereinafter Site Committee Report), which was sent to the ABA Accreditation Committee. The committee has received and relied on the Decision of the ABA’s Accreditation Committee based on that site committee report (hereinafter Accreditation Committee Decision (2015)).

hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.³

- (b) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.
- (c) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation....”

The Accreditation Committee Decision (2015) (p. 3, Findings (7), (8) and (9)) specifically finds that the CSL is in compliance with the requirements of subsections (a), (b) and (c) of Standard 311. A review of the current Student Rights & Responsibilities Manual (SRRM) (August 2016) (hereinafter Student Handbook) confirms that the school remains in compliance with these subsections. See pp. 17-18, 21, 25, 38-39, and 51.

“Standard 303. Curriculum

- (a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:
 - (1) one course of at least two credit hours in professional responsibility...;
 - (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and
 - (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:
 - (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more ... professional skills....;
 - (ii) develop the concepts underlying the professional skills being taught;
 - (iii) provide multiple opportunities for performance; and
 - (iv) provide opportunities for self-evaluation.
- (b) A law school shall provide substantial opportunities to students for:
 - (1) law clinics or field placement(s); and
 - (2) student participation in pro bono legal services, including law-related public service activities.”

The Accreditation Committee Decision (2015) (pp. 4-8, Findings (14) through (24)) specifically found that all provisions of this Standard were being met at the time of the 2014

³ This is to be distinguished from time spent in credit-bearing activities such as Moot Court, Law Review, Externships, law-related courses in other parts of a university and other similar educational experiences. Most American law schools, including the CSL, award credits to such activities.

Site Visit. The Student Handbook confirms that the school remains in compliance with this Standard. Student Handbook, p. 51. Additionally, the CSL currently requires all students to perform 50 hours of “Access to Justice” work and 10 hours of community service work over the course of their legal education. *Id.* at p. 34.

Each year the ABA requires all accredited schools to complete and submit the ABA Annual Questionnaire⁴ in which the school reports on a range of matters, including admission, curriculum, graduation rates, bar passage rates, etc. The CSL submission for Fall, 2014, reported all 1,625 positions available in simulation courses were filled in the prior academic year. Additionally, 205 of the 256 clinical seats were filled and 215 field placements were made. The Fall, 2015 submission reported 2,481 positions available in simulation courses with 1,941 positions filled in the prior year. Additionally, 167 of the 253 available clinic course seats were filled and field placements for 351 students were made. The Fall, 2016 submission showed in the prior year 756 of the 935 seats filled in simulation courses, 190 of 196 of the clinic seats filled, and 237 field placements made. While a decline in overall enrollment apparently resulted in a contraction of the number of seats offered and filled, it is obvious that the school continues to be committed to experiential learning of all types and that its students are very interested in such coursework.⁵

While no ABA Standards require the teaching of particular courses outside Standard 303, it should be noted that the CSL has consistently required a fairly large number of courses. Unlike many schools which require only a set of first-year courses (and sometimes not all of the first year is devoted to required courses), the CSL had a total of 69 hours of required course work for those seeking the J.D. degree according to its 2014 submission, 63 according to its 2015 submission, and 62 in its 2016 submission. The required courses for students entering in the Fall of 2015 or later are a fairly traditional package of first year courses, plus Professional Responsibility, Practice in Context: Litigation **or** Practice in Context: Real Estate, North/South Carolina Distinctions **or** Multi-State Bar Exam Strategies, Constitutional Law, Criminal Procedure, Evidence, Business Associations, Secured Transactions, Decedent’s Estates, First Amendment and Sales. Student Handbook, pp. 33-4. Additionally, the courses in Federal

⁴ The CSL was asked by the Committee to provide the school’s responses to the 2014, 2015, and 2016 ABA questionnaires. Complete materials for 2015 and 2016 were provided, with substantially all of 2014 provided as well.

⁵ The CSL provided to the Committee a list of the courses and instructors being offered during the current academic year. This document is on file with Dean Kurtz. During the current semester, with enrollment significantly reduced from prior levels, the following clinics are being operated: Driver’s License Restoration Clinic, Criminal Litigation Drafting Clinic, Criminal Justice Clinic, and Wills Practitioner Clinic. Additionally, Advanced Externship, Civil Practice Externship, and Judicial Externship are being offered. During the fall semester 2016, the school offered its clinics in Homeless Prevention, Domestic Violence, Criminal Prosecution, Immigration, Human Rights Practice, Family Advocacy, Entrepreneurship, and Wills. Along with a number of externship courses, this reflects the school’s continuing commitment to experiential learning. The current required course work for all students entering in the fall of 2015 and later includes a requirement of at least five credit hours in “practice ready courses”, which include all the clinics, all the externship programs and simulation courses, where students engage in simulation of professional roles. Student Handbook, p. 34.

Income Tax, Administrative Law, Remedies, Family Law, Real Estate Finance (North Carolina), and Insurance Law (South Carolina) are “highly recommended.” *Id.* at p. 35.

There is a tradition of a rich upper-level elective curriculum and a history of small classes at CSL. During the current academic year, for example, courses are being offered in Undocumented Children and the Law, National Security Law, Consumer Bankruptcy, International Sales and Commercial Arbitration, E-Discovery, Media Law, Insurance Law, and Military Law. In 2014, according to the school’s ABA Questionnaire, 80% of upper-class courses had enrollments of 49 students or fewer. In 2015, small classes accounted for 87% of the upper-level course work, and in 2016 the parallel percentage was 90%.⁶ The average first year class ranged from 60 in the evening division in 2014 down to 43 in the 2016 submission which included both day and night divisions. While no precise comparative data is available to the committee, a first-year section of 60 or fewer students is smaller than the sections in many, if not, most American law schools. There are obvious educational benefits to a small class and most of the school’s classes are small.

“Standard 306. DISTANCE EDUCATION

- (a) A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.**
- (b) Credit for a distance education course shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.**
- (c) A law school shall have the technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education.**
- (d) A law school may award credit for distance education and may count that credit toward the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction required ... if:**
 - (1) there is opportunity for regular and substantive interaction between faculty member and student and among students;**
 - (2) there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and**

⁶ In the Questionnaire for 2014, there was a total of 222 upper division classes with 25 or fewer students. The parallel numbers for 2015 and 2016 were 167 and 140, respectively. The declining numbers are traceable to the declining total enrollment.

(3) the learning outcomes for the course are consistent with Standard 302.

(e) A law school shall not grant a student more than a total of 15 credit hours toward the J.D. degree ... under this Standard.

(f) A law school shall not enroll a student in courses ... under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(g) A law school shall establish an effective process for verifying the identity of students taking distance education courses and that also protects student privacy....”

The Accreditation Committee Decision (2015) (pp. 8-9; Finding (25)), in its analysis of the school’s compliance with Standard 306, found that

...online courses must first be approved by the Curriculum and Professional Readiness Team...even if the course is already offered as a traditional classroom course. The Law School uses an externally hosted, web-based platform (to deliver the course to students). It is presented in a comprehensive and secure online delivery format. The system presents a student from signing up for more than one online course at a time, thus assuring that a student will not take more than four credit hours in a semester. The Registrar’s office conducts a degree check every summer to assure that a student does not have more than 12 credit hours of online courses....Students must verify their identity when signing into an online course by using a secure user login and passcode. Final exams are administered as proctored examinations.

Currently, 15 online course credits may be applied toward satisfaction of the 90 credits required for graduation. Student Handbook, p. 37.⁷ Students in the J.D. program are not permitted to take online courses until they have completed 28 credit hours of “in person” coursework. Id. at p. 38.⁸

The CSL has had a robust online education program for a number of years. In its 2015 ABA Questionnaire, it reported 36 courses having been offered in the prior year online.⁹ Most of those courses were presented by iLaw Ventures, one of the leading providers of such coursework in American legal education. The school appears to have made good use of the online course platform to broaden the curriculum (offering such courses as White Collar Crime, International and Comparative Antitrust Law, and Small and Solo Firm Practice) as well as

⁷ While this is more than the 12 hours permitted at the time of the Site Visit, it is consistent with the provisions of Standard 306(e) above.

⁸ Standard 306(f) prohibits first-year coursework from being offered online.

⁹ The 2014 ABA Questionnaire reported 17 online courses in the prior year and the 2016 Questionnaire listed 28 online courses in 2015-16.

providing scheduling flexibility for those students taking more traditional courses (such as Evidence, Family Law, Personal Income Tax, Remedies, Decedents' Estates, and Corporate Taxation).

"Standard 308. ACADEMIC STANDARDS

- (a) A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance, good standing, academic integrity, graduation, and dismissal.**
- (b) A law school shall adopt, publish, and adhere to written due process policies with regard to taking any action that adversely affects the good standing or graduation of a student."**

The Accreditation Committee Decision (2015) described and implicitly approved the CSL policies concerning regular class attendance (p. 3, Finding (8)), academic good standing and dismissal (p. 10, Finding (30)), and graduation requirements (pp. 2, 3, 4, 5, 7, Findings (6), (9), (11), (16), and (22)). The current Student Handbook contains provisions on regular class attendance (pp. 21-22), good standing and dismissal (pp. 48-51), and graduation requirements (p. 51),¹⁰ all of which are consistent with Standard 308.

Inexplicably, the Accreditation Committee Decision (2015) made no mention explicit or implicit of the CSL's policies on "academic integrity" or "due process [regarding] any action that adversely affects the good standing or graduation of a student." Therefore, a careful review of the Student Honor Code in the Student Handbook (pp. 54-61) was undertaken for the purposes of this report. The Code thoroughly defines academic dishonesty (unfair advantage, plagiarism, unauthorized assistance and misrepresentation) and describes it as a violation of the Honor Code (pp. 54-55). Further, the Code defines and prohibits unprofessional and disrespectful conduct and gives examples of such conduct (pp. 55-56). The Code imposes an obligation on all students to "protect the integrity of the Honor Code" and gives examples of a violation of this obligation, including failure to report a violation by another student, knowingly making a false report of an Honor Code violation, falsifying or destroying evidence in an Honor Code proceeding, failing to appear in an Honor Code proceeding without reasonable excuse or good cause, breaching an obligation of confidentiality under the Code and failing to report to school officials any "federal, state, or local charges or offenses" occurring after admission to the school. (p. 56)

The Student Handbook, on pp. 57-61, outlines the procedures involved in dealing with claims of an Honor Code violation. Any member of the CSL community can report alleged violations to the law school administration. The Assistant Dean for Academic Affairs or the Director of Student Engagement then informally investigates the complaint, interviews

¹⁰ The CSL is one of the relatively few American law schools which require completion of 90 academic credits for the J.D. degree. Most schools require 88 or sometimes 86 credits.

witnesses, and examines relevant documents. Before any formal hearing is convened the student is provided with a written allegation of the offending behavior. A plea bargain, which includes acknowledgment of guilt and imposition of discipline, may be reached before the hearing.

The Academic Disciplinary Team is a standing committee of five or more faculty members, appointed by the Dean. A Hearing Panel is composed of both students and faculty. A faculty member from the Academic Disciplinary Team chairs the Hearing Panel.¹¹ Hearings shall be held in private. The accused student is entitled to know the names of the witnesses against him/her no less than 24 hours before the hearing.

The accused student may have a student advisor to provide counsel, who is not permitted to ask questions, introduce evidence, or otherwise represent the accused student. No mention is made of representation by an attorney. The accused student may ask questions of the witnesses. The formal rules of evidence are inapplicable, but “every effort will be made to obtain the most reliable evidence for consideration.” The Panel Chair’s evidentiary rulings may be overruled by majority vote of the Panel. The Panel may make further investigation of the allegations after the hearing is concluded.

The Panel will decide whether the allegations were “proved or not proved.” If not proved, the Chair will write a letter to the Dean noting the decision, along with the Panel’s findings of fact and conclusions, along with a recommended sanction. The sanctions range from an oral reprimand to expulsion from the institution, with many options between those two extremes. The Student Handbook provides a list of the permissible considerations for the Hearing Panel in recommending a sanction (p. 60). The Dean, after receiving the Panel’s findings and recommended sanction, will implement the sanction unless “for compelling reasons he or she wishes to modify” it. Written notice of the decision is to be provided to the student as quickly as practicable.

While the Accreditation Committee of the ABA did not determine the acceptability of these provisions, they would seem to satisfy Standard 308, both in the procedures provided and in the notice provided to CSL students by the material in the Student Handbook.

“Standard 309. ACADEMIC ADVISING AND SUPPORT

- (a) A law school shall provide academic advising for students that communicates effectively the school’s academic standards and graduation requirements, and that provides guidance on course selection.**

¹¹ The Handbook describes this person as a Facilitator, but it is clear that the function which is being served is that of Chair of the Hearing Panel.

(b) A law school shall provide academic support designed to afford students a reasonable opportunity to complete the program of legal education, graduate, and become members of the legal profession.”

Academic advising was found by the Accreditation Committee Decision (2015) to be “handled by the Associate Dean for Academic Services and Faculty Development, the Assistant Dean for Academic Services, the Registrar’s Office and the Student Success Department.” (p. 10, (Finding 32)). Additionally, faculty members are expected to hold regular office hours to consult with students and students are encouraged to identify a faculty mentor either formally (in a program operated by a student organization, such as the Black Law Students Association) or informally.

The CSL academic support program required by subsection (b) of Standard 309 was described by the Accreditation Committee as “comprehensive” and the Site Team Report found it evidenced a “strong commitment to an academic success oriented program rather than mere remedial assistance for students.” (p. 21). The Student Success Department is charged with providing direct support for full-time and part-time students on academic probation, students who are on “academic alert,”¹² those students admitted through the CSL conditional admission program (AAMPLE), and students referred to the Department by professors teaching in the first year program. Additionally, it provides assistance to the student body at large.

In December, 2016,¹³ the CSL submitted a “Reliable Plan for Compliance with Standards 301 and 501” (hereinafter Reliable Plan or Plan). It described the current structure of academic support at the school as follows:

[a] stand-alone academic skills development courses;¹⁴ [b] academic skills development laboratory components (“Labs”) to doctrinal courses;¹⁵ [c] first-year and upper-level

¹² Such students are those not on probation, but close to it.

¹³ The plan was prepared in response to an Accreditation Committee letter of November 14, 2016 which, in addition to placing the CSL on probation, directed the school to submit “a written reliable plan for bringing the Law School into compliance with Standards 301(a) [and two Standards dealing with the Admissions program].” It should be noted that the letter cites Standard 301, the general introductory Standard in Chapter 3 of the ABA Standards and **not** Standard 316, *infra*, which deals specifically with bar passage. The ABA has not specifically found the CSL to be in non-compliance with Standard 316.

¹⁴ Two such courses are mentioned in the Reliable Plan: Lawyering Fundamentals (a voluntary one-week course begun in 2016 before the start of the first semester for students with a 145 LSAT score or lower, which is designed to “demystify the case method, to begin to develop the skills necessary to achieve academic success”; a critical part of this course was daily assessments, which provided students with continuous feedback on their level of readiness for law school); Legal Methods (required for second-semester 1L students who are on academic probation or alert focusing on issue spotting, critical reading, time management, rule synthesis, analysis and outlining; Criminal Law is deferred for a term for those students taking this course) (pp. 14-15). The plan also mentions five courses designed specifically for bar preparation (pp. 20-23).

¹⁵ These labs (begun in fall semester, 2016) are team-taught by a doctrinal professor and an Academic Success professor. They are designed to allow for “individualized attention and feedback” and “allow students to practice the concepts they are learning.”

workshops, one-on-one counseling, and other support mechanisms delivered by the academic success faculty. (p. 14)¹⁶

“Standard 316. BAR PASSAGE

- (a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:**
 - (1) That for students who graduated from the law school within the five most recently completed calendar years:**
 - (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or**
 - (ii) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.**

In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

- (2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.**

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

(b) A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2).

[Subsection (c) is omitted].”

¹⁶ The Plan goes on to describe the current staffing of the Academic Success department as follows: “four full-time faculty (including the Director), one half-time faculty member (who was formerly head of the Academic Success team) and approximately one-half of the time of one of the Librarians. There are also six Academic Success teaching assistants.”

Standard 316 is very complex and, in at least one respect, misleading. The reason for its inclusion in the ABA Standards Chapter on the Program of Legal Education, however, seems fairly clear. The ABA, not to mention potential students and the public, intuit a link between success on a bar examination and the quality of the program of legal education at the school which produced the bar applicant.

Three methods of satisfying the Standard are presented in subsection (a). Two of these methods, which measure ultimate bar passage, are outlined in subsection (a)(1), under which compliance is achieved if either:

75% of the students who have graduated from the law school in the prior 5 calendar years have passed a bar examination; or

In at least three of those 5 years, 75% of that class have passed a bar examination.¹⁷

The last portion of subsection (a)(1), however, makes clear that the 75% required pass rate in both of the above provisions is illusory. This is because the ABA requires the school to account for the bar exam performance of only 70% of the members of any class. Thus, theoretically, if a particular graduating class had 100 students all of whom took a bar examination and the school only had the results for 70 of them, Standard 316(a)(1) would be satisfied if merely 53 students eventually had passed a bar. This would be 75% of the “class” of 70 graduates for whom the school had bar results.¹⁸

Subsection (a)(2) provides the third alternative method of satisfying Standard 316. This subsection focuses on the performance of graduates on their first attempt to pass a bar exam. It requires that in at least “three....of the five most recently completed calendar years, the school’s first-time bar passage rate...is no more than 15 points below the average first-time bar passage rate [in the jurisdictions reported by the school].”¹⁹ Just as in the prior subsection, only 70% of the school’s graduates who took the exam in a particular calendar year need be accounted for.

¹⁷ In light of the second method of satisfying the Standard, one might wonder what purpose is served by the first one. Apparently, it was designed to deal with the possibility that an overwhelming number of the graduates of two years might have passed a bar, but in the other three years, the school came up just short of the required 75% pass rate.

¹⁸ A conversation with the Deputy Managing Director of the ABA Section on Legal Education and Admission to the Bar indicates that a revision to Standard 316 is under consideration. It would require schools to account for more than 70% of their graduates’ performance on the bar examination. It should be noted that in our mobile society a law school’s graduates may take a bar exam in any one of 50 states and staying in touch with them and getting bar exam performance information from them is not always easy.

¹⁹ Note that this third method of satisfying the Standard is based on the performance of a school’s graduates taking a bar exam for the first time in a particular year, regardless of when they might have graduated. The first two methods of satisfying the Standard use a graduating class as the measuring stick, not a calendar year. Because some graduates may wait one or more years before attempting to pass a bar exam, bar pass rates focusing on the year in which the exam is taken may vary drastically from bar pass rates focused on the graduation year.

A school which is found to have failed to satisfy any of the three methods of compliance is given two years to become compliant. It may seek to extend the two-year period remedial by offering one or more of 8 types of evidence delineated in subsection (c).²⁰

Compliance with Standard 316 by CSL

In its report on the 2014 Site Visit, the ABA Accreditation Committee Decision (2015) (pp. 21-22, Finding (64)) focused solely on data showing compliance with subsection (c)'s provisions. Its charts, (covering 2009-2014)²¹ showed that in 5 of the 6 years the CSL first-time pass rate was lower than the North Carolina statewide first-time pass rate. In order, the deficit (in percentages) were 7.77 (2009), 1 (2011), 11.74 (2012), 8.88 (2013), and 11.7 (2014). The only year in which the CSL alumni bettered the statewide average was in 2010 (+6.6). It should be noted that under subsection (c), all 6 years (not merely the three required by the Standard) were compliant because the school was within the 15% deficit permitted by the subsection.

In the Accreditation Committee's Decision, the Committee requested additional information from the CSL²² in order for it to make a determination as to the school's compliance with several Standards, including Standard 301(a)'s requirement that a school's "rigorous program of legal education prepares its students, upon graduation, for admission to the bar." The Accreditation Committee referenced Finding (64) (dealing with bar passage rates) detailed above. As noted earlier, the Accreditation Committee did not find the law school in violation of Standard 316.²³

The CSL Response to the Accreditation Committee's Decision of 2015 was filed in December of that year and included a description of the school's efforts specifically designed to insure bar examination success (see pp. 17-24 of Response of CSL to Decision of the ABA Accreditation Committee, December 2, 2015). It also described a new program established in November, 2015 described as a "bar outcome improvement project." This project included incorporating learning science methodologies into core courses in the school's curriculum, including such features as increased testing, review of first-year and other core knowledge in advanced courses, and a review of the entire curriculum. It also involved a culture change at the school "in respect of grit and professionalism," building a more effective mentoring system,

²⁰ Illustrative types of such evidence are: a trend in the performance of the school's graduates whether upward or downward, demonstrated likelihood that students from the law school to other schools will pass a bar examination, and temporary circumstances beyond the law school's control (such as natural disaster or a significant increase in the standard for passing the relevant bar examination(s)), which are being addressed by the law school.

²¹ Six years were covered rather than the usual five apparently because final 2014 data came out after the Site Visit report was submitted to the Accreditation Committee.

²² The Committee asked the school for a response by December 1, 2015.

²³ There has never been a finding by the Accreditation Committee of a violation by the CSL of a violation of Standard 316.

optimization of academic attrition and more attention to financial literacy and planning for students.

The Accreditation Committee subsequently issued a decision responding to the CSL December, 2015 presentation.²⁴ This decision, in Finding (12) (p. 4, Accreditation Committee Decision, January, 2016) stated:

The first-time bar passage differential has been worsening over the past few years, and the Law School has been taking measures to address the issue. The 2013 calendar year had a differential rate between the relevant state averages and the Law School average of -8.7 points.; 2014 was -12.2 points; and 2015 was -18.4 points. Given the [declining performance of entering classes on the Law School Admissions Test] the bar passage rates might continue to be 15 points or more below [the relevant state averages].²⁵

The Accreditation Committee concluded, on the basis of Finding (12) and other findings dealing with bar preparation, curriculum, including the writing requirements, etc., that the CSL had not demonstrated compliance with Standard 301's mandate of a "rigorous program of legal education that prepares its students...for admission to the bar...." The Committee then asked the school to provide, by May 1, 2016, a report demonstrating compliance with Standard 301. The CSL filed the requested report in May and appeared at a hearing before the Accreditation Committee in June, 2016.

The Accreditation Committee's decision was issued in July, 2016. The Committee, after making findings concerning Admissions, Programming for Admitted Students, Mentoring and Related Opportunities, the Writing Program, Academic Support, the Faculty, Attrition, Bar Preparation During Law School, and Post-Graduation Bar Preparation, made findings regarding bar passage. It noted that the results of the February, 2016 bar exams in North Carolina showed CSL students 16.4% below the state first-time taker pass rate and the South Carolina results in February, 2016 showed CSL students 10.8% below the state first-time taker pass rate.

The Committee then made findings regarding the ultimate bar pass rate performance, under Standard 316 (a)(ii). Its conclusion (Finding (44)) was that the school "is in compliance for 2011, 2012, and 2013 with respect to ultimate bar passage. It may be in compliance for 2014, the 17% missing or never passed could affect that compliance. It is not in compliance for 2015 at this point, with 43% either missing or never passed the bar." While the Accreditation Committee did not point this out, it should be noted that Standard 316(a)(ii) requires satisfaction of the 75% bar pass rate in three of the immediately prior five years and as of the writing of the July, 2016 decision, the school was in compliance with that rule. The Committee

²⁴ The Committee, in its decision, also considered "the history of decisions made by the Committee with respect to the Law School since its last regular site evaluation visit." (p. 1, Accreditation Committee Decision, January, 2016).

²⁵ Indeed, data obtained by this committee in an email from North Carolina Assistant Attorney General Matt Liles indicates that the first-time bar passage differential for CSL students for the February, 2016 test was -16.4%, and the parallel number for the July, 2016 test was -20.70%, and for February, 2017 was -19.44%.

did not, and, in light of the data and the language of Standard 316, could not find the school in violation of that Standard.

After finding the CSL not in compliance with Standard 301, the Accreditation Committee concluded its decision of July, 2016 with a list of 5 remedial actions, including the submission of a “reliable plan” for “bringing the Law School into compliance with Standard() 301(a)....” Accreditation Committee Decision of July, 2016 (p. 12). The law school was also required to inform all admitted students of the required remedial actions. Similarly, the Managing Director of the Section of Legal Education and Admissions to the Bar was directed to make public the decision of the Committee and the remedial actions which were ordered.

The school appealed the Accreditation Committee’s decision to the Council of the ABA Section on Legal Education and Admissions to the Bar. The school’s basic claim was that the Accreditation Committee’s sanction requiring the publication of the required remedial actions to both admitted students and to the public was overly harsh and counterproductive. The appeal was heard in October, 2016 and the Council’s resolution of it was issued on November 14, 2016. It affirmed the Findings made by the Accreditation Committee, as well as its conclusions, including a finding of non-compliance with Standards 301(a), 501(a) and 501(b). The Council, however, added an additional sanction. Because of what it concluded were “substantial and persistent” violations of these Standards, the Council placed the school on probation for two years and required the school to publicize this fact to all of its students and to place a notice of the probation on its website.²⁶

In December, 2016, the CSL submitted to the Accreditation Committee, pursuant to the sanctions issued in the fall by the Committee and affirmed by the Council, a 38-page “reliable plan” for remedying its violations of the ABA Standards. After recounting prior efforts to strengthen bar preparation and enhance the profile of the students being admitted, the document identified five goals of the “reliable plan”:

- (1) Rapidly increasing entering class academic indicators, particularly the LSAT profile, to levels that will yield strong and sustainable bar outcomes and graduation rates. The indicators also will be comparable to those of earlier entering classes in the School before bar passage rates began to decline.
- (2) Implementing a restructured curriculum, which builds on our experience with curriculum, academic support, and writing; and which, with our substantial improvements to academic support and pedagogy, form an integrated program of core J.D. education and academic support. The entire academic experience is designed to deliver robust legal knowledge and competencies, long-term retention, and preparation for success on the bar examination and beyond.

²⁶ This notice does currently appear on the law school’s website, but it should be noted that it is not on the front page of the site.

- (3) Implementing, and continuously assessing and improving, a comprehensive approach to focused bar preparation, involving courses in the J.D. curriculum, counseling and services, and post-graduation programs for both first-time bar takers and repeaters.
- (4) Managing academic attrition so as to continue to provide opportunity for students, while at the same time ensuring compliance with ABA Standards and minimizing the debt of unsuccessful law students.
- (5) Further developing our relationship with the University of New Haven, a comprehensive non-profit university with which we are already working on recruiting high academic caliber students to the School of Law and on prospective joint degree and certificate programs to provide marketable competencies in growing areas of legal services and elsewhere in the economy.

Charlotte School of Law, Reliable Plan for Compliance with Standards 301 and 501 (pp. 2-3 (December, 2016).

While the Plan articulates five different goals, upon careful inspection it is clear that all five of these strategic initiatives are focused on the same ultimate goal---improvement of the performance of the school's graduates on the bar examination. This is not a criticism of the plan. To the contrary, the school has wisely acknowledged that the most important task ahead is significantly raising the bar pass rate.

The part of the Reliable Plan most relevant to the Program of Legal Education is the reshaping of the first-year curriculum to return to a more traditional set of two-semester courses in the traditional first-year subjects which are tested on the Multi-State Bar exam and often on state-specific portions of the bar exam as well. This restructuring is described as follows by the school:

The School of Law has developed a restructured curriculum that will be implemented for the class entering in fall 2017. Some details will be further developed in early 2017, but the key features that make it an improvement over the current curriculum have been approved by the faculty....

The current curriculum, implemented in fall 2013, changed the first-year structure from two-semester doctrinal courses to one-semester courses with reduced credits for the courses. Central features of the new, restructured curriculum are: (a) a return to a first-year program framework in which the core doctrinal courses are taught over two semesters, with (b) increased credits for each such course. Thus, Contracts, Property, Civil Procedure, and Torts will be two-semester courses, with six total credits for each

course, rather than the one semester and four credits in the current curriculum. Evidence, Constitutional Law, and Professional Responsibility (all second-year courses) will each add a credit hour over the current levels, with Evidence increasing to four credits, Constitutional Law to six credits, and Professional Responsibility to three credits.

Another central feature is to tightly integrate into both the doctrinal courses and the curriculum as a whole the academic support programs the School has implemented.... Thus, in light of positive experience with the Labs, over an hour of extra class time per week in the first-year doctrinal courses (Contracts, Property, Civil Procedure, and Torts) will be allocated to Lab activities, such as creating and answering hypotheticals, writing, and improving one's legal analysis based on self-editing and feedback. Academic Success faculty will co-teach with a member of the doctrinal faculty one of the Lab components in one of the first-semester first-year doctrinal classes. This collaboration will allow the success of the current format of integrated first-semester Labs to continue into the new curriculum. In the second year, Criminal Procedure and Evidence will also meet for over an hour of Lab work per week.

In addition, required two-credit courses, such as Sales and Secured Transactions, which meet once a week under the current curriculum, will meet twice a week with an additional hour of class time. The additional hour and the more frequent class meetings will allow reinforcement of the material taught to students.

Because of the data showing the positive impact of Lawyering Fundamentals, we will now require the course for all incoming students, effective in fall 2017. The first week of the student's first semester will be allocated to the course. The course will be required, but will not have any credit hours assigned.

In addition, in the second semester of their first year, students will spend the first week in Lawyering Fundamentals II....The course will expressly integrate the first-year curriculum to both remind students of content from the prior semester, and demonstrate how concepts from various classes are related.

Id. at pp. 17-18 (footnotes omitted).

The return to a more traditional first-year curriculum which provides all-year instruction in the core courses such as Property, Contracts, Civil Procedure and Torts would seem to be solid step forward toward improving bar exam passage rates. Under such an approach students will spend twice as much time focusing on these subjects which are tested on the Multi-State Bar Exam, as well as many state-law portions of the bar examination. The addition of a Lab component in which the student actively engages the subject matter by responding to hypotheticals, creating hypotheticals and rewriting answers seems likely to provide students with a deeper knowledge of the material and, thus, more confidence in approaching the bar

exam. The two-semester courses will also provide more time to teach extra material in these subject matter areas and give the student more time to reflect on material covered in class.

While doing a better and more thorough job of covering the substance of the “bar courses” would be very helpful, a more fundamental goal of this plan is the improvement of the quality of student being enrolled. The first stated goal of the “reliable plan” is to “[r]apidly increas[e] entering class academic indicators, particularly the LSAT profile.” This is a most worthy goal, but the Plan itself, other than including charts showing gradually increasing LSAT scores for the entering classes over the next several years to a level “comparable to those of earlier entering classes...before bar passage rates began to decline,” offers no clear explanation of exactly how this goal will be achieved.²⁷ There are brief mentions of smaller class sizes and “generous scholarships to admitted students that are highly competitive, based on market analysis,” *Id.* at pp. 12, 13,²⁸ but there are not very many details offered on how the LSAT scores of applicants will be raised very quickly in order to meet the projections of future entering classes.²⁹

The asserted relationship between the Plan’s goals of 1) improving bar preparation during law school and after graduation, 2) effectively “managing academic attrition,”³⁰ and 3) attracting highly qualified University of New Haven students to the CSL and the improvement of bar passage rates can be examined by a reading of the Plan (pp. 14-38). It would seem that these three parts of the Plan are of distinctly secondary importance to the school as compared to improving the quality of students admitted and revamping the curriculum.

²⁷ The plan itself seems to acknowledge the difficulty of achieving this goal in light of the school’s current probationary status with the ABA and the Department of Education’s termination of Title IV eligibility for student loans. See Note 2 of the Reliable Plan, at p. 5 (acknowledging that in light of the situation “as of the date of submission of this Reliable Plan, the School does not have sufficient information to determine the extent it will have to modify those projections [of ‘Expected Matriculant Characteristics 2017-18’]”). Getting better-qualified students to enroll in the school while it is on probation and the ability to secure loans is at best uncertain would be a challenge to say the least.

²⁸ Because of the financial implications to the school of reducing class size and increasing scholarship totals, this topic is only touched on at this point and will be more thoroughly canvassed in the portion of this report devoted to finances.

²⁹ The school’s ABA Annual Questionnaire filed in the fall of 2016 shows the 25th percentile of the entering class to be 141, the 50th percentile as 144 and 75th percentile as 148. According to the projections in the “Reliable Plan” these numbers will be 145-46/149/151-152, respectively, for the class entering in August, 2018. Reliable Plan, p. 6. This is an extremely ambitious goal for a two-year period, particularly in the current environment of the school in particular and legal education in general. The only change to the admissions methodology identified in the Plan is to require those students with LSAT scores of 142 or 143 to have an interview with two individuals, at least one of whom will be a member of the Faculty Admissions Team. The goal of the interview will be to determine “whether the candidate is qualified for admission despite the lower LSAT.” Reliable Plan, p. 10. This would seem to be at cross-purposes with the goal of raising the LSAT credentials of the entering class.

³⁰ As explained in the Plan, this strategy is designed, at least in part, to “minimiz[e] the debt of unsuccessful law students.” Plan, p. 3. What this means is a stricter grading curve which will result in the academic exclusion of more students and a winnowing of likely unsuccessful candidates for the bar examination upon graduation. The stricter grading curve has already been implemented. Plan, p. 32 (reporting a strengthening of the grade curve in the fall of 2015).

Because of the very ambitious nature of the Reliable Plan and the lack of details demonstrating that its goals can be met, the licensing authorities of the school need to be very wary of anything other than a temporary or probationary renewing of the school's license.

Faculty

"Standard 401. QUALIFICATIONS

A law school shall have a faculty whose qualifications and experience enable the law school to operate in compliance with the Standards and carry out its program of legal education. The faculty shall possess a high degree of competence, as demonstrated by academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship."

The most recent systematic review of the CSL faculty was conducted in the fall of 2014 during the ABA/AALS Site Inspection. The Site Committee reported to the Accreditation Committee that:

[t]he faculty is highly qualified. Nine faculty members hold LL.M. degrees, 14 hold various other masters degrees, and three hold P.D. degrees. Combined the full-time faculty [of 25 tenured and tenure-track individuals and 49 others not on the tenure track] has 429 years of teaching experience. Fourteen members of the faculty have between 10 and 35 years of experience.

Site Report, p.24.

Because of the recent drastic decline of enrollment³¹, it is not surprising that the current faculty is a good deal smaller than the one reported in the 2014 site visit. It is, however, a qualified teaching corps. Upon request of the committee, the President of the Charlotte School of Law submitted to the committee the resumes of 25 individuals represented to be currently on the full-time faculty of the school. One of those individuals did not appear in the Profile Section of CSL's 2016 ABA Annual Questionnaire.³² Another is the Director of the Law Library

³¹ The ABA/AALS Site Team, during its Fall, 2014 visit reported a total of 1,410 students (1,141 full-time, 269 part-time). One year later, the school's ABA Questionnaire data for October 1, 2015 indicate a total of 918 students (658 full-time and 260 part-time), while the total on October 1, 2016 was 638 (490 full-time and 148 part-time). Thus, total enrollment dropped from 2014 to 2016 from 1,410 to 638, a decrease of well more than 50%. No figures were obtained concerning the enrollment during the current semester, but the ABA's sanction of probation, issued late in fall 2016, apparently caused a further shrinkage of the student body. See Stancill and Marusak, NC Attorney General Tells DeVos He is Investigating Charlotte School of Law (<http://www.charlotteobserver.com/news/local/article147548644.html#storylink=cpy>) (reporting only 220 students currently enrolled).

³² She is, however, identified on the CSL website as an Academic Success Lecturer. No further information about her is provided. She is listed on the class schedule for the Spring, 2017 semester teaching a 1-credit distant

and clearly does not teach full-time. Of the 23 remaining individuals in the group of resumes submitted by the CSL President, 10 were designated as tenure or tenure-track in the Profile Section of CSL's 2016 ABA Annual Questionnaire and 13 were listed as "other."³³

The J.D. degrees of these 23 full-time faculty are all from accredited U.S. law schools, including Georgetown, University of Texas, Emory University, the University of North Carolina, Stanford, Wake Forest, Hastings and Northwestern. A number of the faculty earned membership as students in the Order of the Coif, the leading American honor society within legal education whose membership is limited to the top 10% of a graduating class. Collectively, the 23 faculty members have 212 years of legal practice experience and 218 years of law school teaching experience. They have earned a total of 8 advanced degrees in addition to the J.D., which is the terminal degree in American legal education. In response to a request by the committee, the CSL submitted a list of a total of 31 books, articles, book chapters and other pieces authored by these individuals in the last three years.

Judging the teaching effectiveness of the faculty is a difficult task, given that this report is based on a desk review of documents. However, the ABA/AALS Site Inspection Team in 2014 was extremely complimentary of the classroom teaching it observed.

The site team observed parts of approximately three dozen classes taught by full-time faculty and adjunct faculty during the visit. On a scale of one to ten, the team rated the teaching as a whole between eight and ten, with more nines and tens on average. The team observed that the faculty generally engaged the students from the start of the class time and that a good mix of teaching techniques was employed (e.g., lecture, discussion, Socratic method, and small group work). Most of the classes visited were found to be intellectually stimulating or rigorous. The team is of the opinion that the faculty members were prepared for class. Faculty members consistently made use of technology, such as PowerPoint, in the classroom and visual aids and white boards were used to highlight key information. Students were responsive and actively participating in conversation both voluntarily and when called upon.

Site Visit Report (p. 29); *see also* Accreditation Committee Decision (2015), pp. 23-24 (Finding 43).

In light of the fact that all 23 members of the full-time faculty presently at the school were also teaching at CSL at the time of the site visit, it is pretty clear that the quality of teaching continues to satisfy Standard 401.

learning course on MPT (Multistate Performance Test) Fundamentals. The MPT is a portion of many bar examinations.

³³ This generally refers to clinicians or those teachers who are on either long- or short-term contracts. It is pretty clear that the CSL full-time faculty, using the approach adopted by the ABA, is actually larger than 23. *See* fn. 34, *infra*.

“Standard 403. INSTRUCTIONAL ROLE OF FACULTY

(a) The full-time faculty shall teach substantially all of the first one-third of each student’s coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.”

The Site Visit Report affirmed that the “(f)ull-time faculty members teach the major portion of the Law School Curriculum, including substantially all of the first one-third of the curriculum. No adjunct faculty members teach first-year required courses.”
Site Visit Report, p. 14.

A review of the class schedule for the current academic year indicates that the entire first-year curriculum is being taught by full-time faculty members³⁴ It also makes clear that the majority of the credit hours offered by the law school are being taught by full-time faculty members.

(b) A law school shall ensure effective teaching by all persons providing instruction to its students.”

See the discussion under Standard 401, *supra*.

“Standard 404. RESPONSIBILITIES OF FULL-TIME FACULTY

(a) A law school shall adopt, publish, and adhere to written policies with respect to full-time faculty members’ responsibilities. The policies shall require that the full-time faculty, as a collective body, fulfill these core responsibilities:

- (1) Teaching, preparing for classes, being available for student consultation about those classes, assessing student performance in those classes, and remaining current in the subjects being taught;**
- (2) Participating in academic advising, creating an atmosphere in which students and faculty may voice opinions and exchange ideas, and assessing student learning at the law school;**
- (3) Engaging in scholarship, as defined by the law school;**

³⁴ It should be noted that all the teachers of Legal Process (the traditional first-year course in legal research and writing) are full-time faculty and designated as such in the Profiles section of the ABA Annual Questionnaire. Because we have not been given resumes for most of these teachers, they were not included in the tally of full-time faculty reported in the discussion above under Standard 401.

(4) Service to the law school and university community, including participation in the governance of the law school, curriculum development, and other institutional responsibilities described in the Standards;

(5) Service to the profession, including working with judges and practicing lawyers to improve the profession; and

(6) Service to the public, including participation in pro bono activities.

(b) The law school shall periodically evaluate the extent to which the faculty discharges its core responsibilities under the law school's policies and the contributions of each full-time faculty member to meeting the core responsibilities of the faculty."

The CSL has an extensive and carefully drafted Faculty Handbook (hereinafter Handbook), which was last revised in the summer of 2014, presumably in preparation for the school's ABA/AALS inspection of the institution in the fall of that year. On pp. 66-73 of the Handbook, the faculty's basic obligations are outlined. Teaching is described as a faculty member's "primary responsibility" and, in this role, the professor is "accountable for student learning by developing, assessing and contributing to student learning outcomes." The section on teaching goes into great detail in defining and describing course content expertise, teaching effectiveness and student learning.

The expectations in regard to scholarship, which are focused on tenured and tenure track faculty (Handbook, pp. 68-69), are also outlined very clearly, with quantifiable production required for promotion in rank and tenure also described. Concerning the evaluation of scholarship in the context of promotion, tenure and salary consideration:

Each piece ... should be evaluated according to at least one of the following six criteria: aligns with the mission of serving the underserved; aligns with the mission of student-centered outcomes; aligns with the mission of creating practice ready lawyers; improves teaching and learning pedagogy and theory; contributes to faculty member's subject-matter expertise and provides corollary benefit to their larger faculties.

Handbook, p. 69.

A lengthy section describes the type of service, both inside and outside the school, required of all faculty, including service on faculty committees, assistance with co-curricular activities, service as a mentor for colleagues, participation in professional organizations, service as a scholarship reviewer, engagement in pro bono legal services and consulting, and service as a media expert or interviewee. Handbook, pp. 71-72.

Importantly, the mentoring of students is a requirement for all faculty members. The Handbook, p. 88, requires at least six hours per week of office hours for each full-time faculty member. “Social interaction and regular office hours may facilitate mentoring, but, by themselves, do not satisfy the mentoring requirement.” Handbook, p. 72. All faculty members are expected to carry an “equitable load” of student academic advisees “as determined by the Dean’s office.” *Id.*

A number of the standard types of faculty committees exist at CSL (e.g., Admissions, Curriculum, Information Technology, Faculty Appointments, etc.) but, in an effort to stress the goal of cooperative work by such groups they are labelled “teams” not “committees.” Handbook, p. 30. In addition to the standard types of committees usually found in law schools, the CSL has an Adjunct Faculty team to review the work of adjuncts and assist in their recruitment and training, a Culture team to “promote understanding of culture among faculty by serving as role models and sources of knowledge,” and an Academic Discipline team to serve as the hearing panel in assertions of student academic dishonesty and plagiarism. Handbook, p. 32.

In addition to the reviews of faculty performance in the promotion and tenure process, the Handbook describes an annual formal evaluation by the Dean of each faculty member. *See generally* Handbook, pp. 51-53. Student evaluations are completed and provided to the faculty member. Each faculty member is required to annually submit to the Dean an Individual Plan of Performance and Professional Development and the Dean shall review and respond to each faculty member’s IPPD. *Id.* at p. 52. After the grant of tenure (the tenure process is described at Handbook, pp. 57-61), each faculty member is evaluated in an “extensive review” by the Dean and the Faculty Evaluation Team every four years. A faculty member found not to be meeting the “same performance standards that govern an application for tenure,” is given one year to achieve compliance or otherwise face “loss of tenure and termination of the employment relationship” one year after the initial year. Handbook, p. 62.

The CSL has created three separate tracks for faculty members. Handbook, pp. 43-44. 1) Traditional tenure track faculty receive one-year contracts until tenure is attained, teach 12-14 credit hours annually, and produce scholarship consistent with the school’s expectations as expressed in the Handbook. 2) Those faculty on the teaching track begin with one or two one-year contracts, followed by a three-year contract and then successive five-year terms. They teach either 15-18 credit hours annually, or 12-14 hours with additional “extraordinary service as defined by the School.” No scholarship is required of such faculty. 3) The alternative track has a contract sequence identical to the teaching track and teaching responsibilities of 12-14 credit hours annually, no expectations of scholarship or extraordinary service and a “lower pay scale than the other two tracks.”

In discussing the faculty, the Accreditation Report was complimentary about its diversity and the policies producing that diversity, the faculty’s role in the formation and development of the school’s goals and policies, its monitoring the curriculum, and the inclusive nature of the school’s policies regarding membership on faculty committees, attendance, and voting

privileges at faculty meetings. Accreditation Report (2015), pp. 12-13, 15 (Findings (36), (37), (39), (40), (46). *See also* Site Committee Report, pp. 24-33.

“Standard 405. PROFESSIONAL ENVIRONMENT

....

- (b) A law school shall have an established and announced policy with respect to academic freedom and tenure....**
- (c) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members....**
- (d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction..., and (2) safeguard academic freedom.”**

The CSL definition of and protection of Academic Freedom appears at p. 77 of the Faculty Handbook:

Each member of the faculty is entitled to full freedom in research and in the publication of the results of that research, subject to the acceptable performance of her/his other academic duties....

Each member of the faculty is entitled to freedom in the classroom in discussing his/her subject, but he/she should be careful not to introduce in his/her teaching controversial matter which has no relation to his/her subject.

The Accreditation Committee Decision (2015) specifically referenced and implicitly approved the school’s academic freedom protection. (p. 15, Finding (48)).

The CSL philosophy and purpose regarding tenure is as follows (Handbook, p. 58):

The School recognizes the value of tenure as promoting favorable conditions for the exercise of academic freedom and for the orderly development of the School as a community of teachers and scholars.

In tenure reviews, decisions made by the School are of extreme importance in the institution’s pursuit of academic excellence.

Achievement of tenure should never be regarded as a routine or automatic award. It must, rather, reflect and affirm professional competence and performance measured against national standards at comparable institutions. Tenure is dependent not only on demonstrating a record of excellence necessary for promotion, but on indications of a certain promise of continuing high productivity in a tenured capacity.

The School's decision to grant tenure is subject to the determination by the School that the faculty member's services will continue to be needed and that the institution's financial resources are sufficient to meet a long-time commitment. It is also required that the tenured faculty member's level of performance will be maintained or improved.

Unlike faculty handbooks at other schools, there is no explicit explanation in the Handbook of the nature of the protections of tenure at the CSL. However, the Accreditation Committee Decision (2015) specifically referenced and implicitly approved the school's definition of tenure. (p. 15, Finding (48)).

Subsections (c) and (d) of Standard 405 specifically require job security for those teachers of clinical subjects and legal writing, respectively. This has led many law schools to provide separate protections for each of these groups of teachers. The CSL has what the ABA Accreditation Committee called a "unified" faculty in which the distinctions between faculty members are based solely on the track they are on (tenure track, teacher track and alternative track), rather than on the subjects they teach. Thus a "clinical teacher" could be on the tenure track, the teacher track or the alternative track. Similarly, a "legal writing" teacher could be on any one of those tracks.³⁵

A member of one of the latter two groups on any of the three tracks would not only have substantially similar job security as a full-time teacher of Torts or Constitutional Law on one of those tracks, but would actually have exactly the same job security. While not explicitly analyzing why the CSL does not have separate provisions for clinicians and legal writing instructors, the Accreditation Committee in Findings (49), (50), and (51) made clear that there were no status issues extant regarding those two groups of faculty members. The only outstanding issue for the "clinical, externship and pro bono" faculty at that time was the issue of what constituted a full load. Accreditation Committee Decision (2015), p. 16 (Finding (51)). It is not clear whether that issue has since been resolved and, if so, how.

³⁵ At the time of the Accreditation Committee Decision, six of the clinicians were on the teaching track and the seventh was a visiting professor. Accreditation Committee Decision (2015) (p. 16 (Finding 49)). Of the legal writing faculty (the course is actually titled Legal Process at CSL), six were on the teaching track and five were on the alterative track). Id. at (Finding (51)).

Admissions

“Standard 501. ADMISSIONS

- (a) A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.
- (b) A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.

Interpretation 501-1

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.”

Since January, 2015, the ABA, the accrediting agency for American legal education, has dealt with the admissions policies and practices of the Charlotte School of Law on four occasions. These four occasions will be treated and described in order.

1. ABA Accreditation Committee Decision, January 2015

This document was a review of the joint ABA/AALS Site Visit performed in the fall of 2014. It was prepared by the Committee after reviewing the Site Visit team’s written report. A number of findings³⁶ by the Committee focused in whole or in part on the school’s admissions policies and practices. In the Committee’s Conclusions, it asked the school to provide “additional information [for the Committee] to make a determination as to the Law School’s compliance with...Standards...501(a), 501(b) and Interpretation 501-1...” That is, the Committee determined that it was not yet in a position to determine whether the school was in compliance with the primary ABA Admissions Standard and its primary interpretation. The Committee asked for the information by December 1, 2015.

2. ABA Accreditation Committee Decision, January 2016

This decision, issued after the school had submitted the information requested by the Committee, made four Findings devoted to compliance with Standard 501 and Interpretation 501-1.³⁷ One finding focused on the LSAT profiles of the entering classes of 2012 through 2015. A second focused on a program begun in early 2015 to improve an existing conditional

³⁶ See especially Findings (55), (57), (58), (61), (62), (63), and (65).

³⁷ These were Findings (8), (9), (10), and (11).

admission program.³⁸ A third finding focused on attrition rates and the school's explanation of why the academic profile of the entering class of 2014 had declined, particularly with regard to the LSAT 25th percentile score.³⁹ The fourth finding noted a recent change in the Admissions process involving clarification of decision criteria and improvement of coordination between the Admissions committee and the Admissions Office and the Dean's Office.

After reviewing the information submitted by the law school, the Committee concluded that the school was "not in compliance with...Standard 501(a), 501(b) and Interpretation 501-1." It asked the school to provide, by May 1, 2016, "information to demonstrate that is in compliance" with these provisions, in essence repeating its request of January, 2015. The Committee also summoned the President and the Dean of the Charlotte School of Law to appear before the Committee in June, 2016 at its regular meeting at a hearing to assist it in the determination of "whether to impose sanctions in connection with the Law School's non-compliance with the Standards."

3. ABA Accreditation Committee Decision, June 2016

After the submission of the school's requested information and the hearing before the Accreditation Committee, a decision was rendered in June, 2016. The Committee made seven Findings directly related to the Admissions program.⁴⁰ These findings detailed, among other items, the current Admissions methodology, the conditional admissions program, the LSAT and GPA profiles of recent admitted classes, the school's size, and an additional question being added to the school's application designed to assess the applicant's "grit," defined in terms of "perseverance, motivation, and commitment." The final Finding on Admissions stated, in its entirety:

It was not clear to the Committee how these admissions practices demonstrate that applicants with low academic and admission test credentials appear capable of completing the Law School's program of legal education and being admitted to the bar.

In its conclusions, the Accreditation Committee reiterated its prior conclusion that the school was not in compliance with Standard 501(a) and 501(b) and Interpretation 501-1. It also concluded that the noncompliance had been "substantial and ... persistent." It mandated a number of remedial actions be taken by the school, including the preparation by the school of a

³⁸ New entry requirements were added, the amount of academic support was reduced in order to insure that the student's performance in the program reflected "student motivation and ability," and "qualitative factors" were added in the decision to admit students to the conditional admissions program. The Committee found that after the changes, fewer students were granted admission to the law school.

³⁹ As explained by the school, it "may have set the criteria for the admission to the J.D. program from the [conditional admission program] too low" and "used an assessment, which [it] believed might serve as an alternative to [the conditional admission program] for certain lower-indicator students." The law school relatively quickly determined that the alternative assessment "did not serve students and the Law School well" and was abandoned.

⁴⁰ These are Findings (5) through (11).

“written reliable plan” stating it intended to become compliant with, among others, Standard 501(a) and (b), along with Interpretation 501-1. It also directed the appointment of a fact finder by the Managing Director of the Section of Legal Education and Admissions to the Bar.⁴¹

4. Decision of the Council of the ABA Section on Legal Education and Admission to the Bar, October 2016

Proceeding under Rule 23 of the ABA Rules of Procedure for Approval of Law Schools, the Charlotte School of Law appealed the Accreditation Committee’s June, 2016 decision to the Council of the Section. A hearing was held on October 21, 2016, at which the President and the Dean of the law school appeared. The Council affirmed the Findings of Fact and Conclusions of the Accreditation Committee and affirmed all of the sanctions imposed by the Committee. Additionally, it placed the school on probation, effective November 14, 2016. There is no explanation, either in the Council’s decision or in the ABA’s Rules of Procedure for Approval of Law Schools, of the contours of probation. The Council, of course, may withdraw “approval” (accreditation) of a law school because of non-compliance with a Standard.⁴²

⁴¹ The fact finder is directed to monitor the admissions data and methodology, the rigor of the school’s program of legal education, and report on a number of matters, including the bar results, admission policies and any plan beyond the “reliable plan” referenced in the text. Other sanctions included the requirement that the school inform all admitted students of the remedial actions ordered by the ABA and a requirement that the mandate of remedial actions be posted on the school’s website. The school has also been ordered to, within 30 days of the assignment of grades each semester, provide each of its students information about the North Carolina and South Carolina bar results for the prior six semesters including the pass rates by the quartile of the applicant. The school must also inform each student within 30 days of assignment of grades of his or her placement in the quartiles of his or her class.

⁴² See ABA Rules of Procedure for Approval of Law Schools, Rule 16 (b) (8).

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
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Committee on Educational Planning, Policies, and Programs

RE: Charlotte School of Law – License Restrictions

DECISION

Pursuant to N.C.G.S. § 116-15, the Board of Governors is responsible for the licensure of nonpublic post-secondary degree granting institutions in North Carolina. UNC General Administration (UNC-GA) has the authority to perform compliance reviews to ensure that licensed institutions continue to meet the statutory and regulatory standards for licensure, as set forth in the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*. If an institution is not in compliance, the Board of Governors may, on the President's recommendation, revoke the institution's license, or may place conditions on the license until the institution coming into compliance.

The Committee on Educational Planning, Policies, and Programs has been delegated the authority and responsibility for considering recommendations from the President concerning licensure matters, and acting on behalf of the Board of Governors.

The Committee convened on June 21, 2017, to consider recommended findings and license conditions presented by President Margaret Spellings concerning the Charlotte School of Law, which has been licensed to conduct post-secondary degree activity in North Carolina since 2005. The recommendations are set forth in the attached document.

The Committee observes that the American Bar Association (ABA) has placed Charlotte School of Law (CSL) on probation for two years, beginning November 14, 2016, based on its finding that CSL is in substantial and persistent noncompliance with ABA accreditation standards 301 and 501. In response, CSL has asked the ABA to approve: (a) a plan to teach-out any remaining CSL students in anticipation of possible closure of the school; and (b) a remedial plan (which is referred to by the ABA as a "Reliable Plan") in anticipation of CSL's continued operation as an accredited law school. The U.S. Department of Education has suspended CSL's continued participation in Title IV programs. CSL has petitioned the Department of Education for reinstatement in Title IV programs, and CSL's request remains under consideration. CSL is currently under investigation by the North Carolina Department of Justice, Consumer Protection Division,

based on the division's concerns about CSL's future viability, the effects of CSL's viability on CSL students, and the Consumer Protection Division's concerns about keeping students fully informed about CSL's status.

Based on its review and consideration of the matter concerning the Charlotte School of Law, the Committee, on behalf of the Board of Governors, hereby adopts the President's recommendations, and imposes the following conditions and limitations on the Charlotte School of Law's license following limitations on CSL's license, pending further action and review of CSL's compliance with the Board of Governors Rules and Standards:

1. CSL shall not admit any new or additional students to CSL until such time as this condition may be removed by further action of the Board of Governors.
2. No later than August 1, 2017, and subject to item 3, below, CSL shall present to the Licensure Unit such evidence as the Licensure Unit may deem necessary to show that CSL has remedied any deficiencies and has come into full compliance with the licensure standards for which the Board has found it to be out of compliance.
3. CSL shall immediately obtain, maintain, and provide proof to the Licensure Unit of a tuition guaranty bond in an amount at least equivalent to the amount of prepaid tuition to be paid by the maximum number of students who may participate in the teach-out CSL has proposed for the ABA's consideration. The bond shall otherwise comply with Standard 10 of the Rules and Standards.
4. CSL may continue to conduct post-secondary degree activity in North Carolina at this time and on a limited basis while it develops and seeks ABA approval of an appropriate teach-out plan that fully protects the interests of CSL students who may wish to complete their CSL degree programs, and/or approval for continued operation as an accredited law school, subject to the following requirements:
 - a. CSL's plan for teaching out its remaining students and/or remedial plan for continued operation as an accredited law school, must be approved by the American Bar Association (ABA) no later than August 10, 2017; and
 - b. The Department of Education (DOE) must determine no later than August 10, 2017, that any CSL student who remains enrolled may participate in Title IV federal loan programs.
5. CSL shall keep the Licensure Unit fully informed of the progress and the status of:
 - a. The investigation of CSL by the Consumer Protection Division of the North Carolina Department of Justice;
 - b. The ABA's consideration of CSL's request to approve its teach-out plan and remedial plan; and
 - c. The Department of Education's consideration of CSL's request for reinstatement for participation in Title IV programs.

6. CSL shall promptly distribute this determination of the Board of Governors and the attached document, to:
 - a. All CSL students, including currently enrolled students, and students who have the status of "leave of absence" or "withdrawn";
 - b. The ABA;
 - c. The Department of Education; and
 - d. The North Carolina Department of Justice, Consumer Protection Division.
7. Nothing herein shall limit the Licensure Unit from conducting additional review, or the Board of Governors from taking further action, on any matter relating to CSL's operations and licensure, including without limitation such further review, recommendations, and actions as the Licensure Unit or the President may deem to be appropriate due to changes in CSL's circumstances, the development of new information, and the actions of the ABA, the Department of Education, or the North Carolina Department of Justice.
8. CSL has indicated that it believes it has the ability to remain open and become financially stable. CSL also expects that, upon the occurrence of certain financial restructuring events that it expects to consummate in the immediate future, CSL will be recertified by the U.S. Department of Education to participate in the federal Title IV student loan program. Provided that all conditions and requirements in items 1 through 6 are met, and subject to item 7, the Licensure Unit at UNC General Administration shall expeditiously review and present for the President's consideration possible actions that the Board may take to adjust or remove limitations on CSL's license.
9. Unless the Board of Governors takes further action, CSL's license shall expire on the earlier of:
 - a. The failure to meet the conditions set forth in items 1 through 4(a) and (b), above; or
 - b. May 30, 2019.

Anna Spangler Nelson

Anna S. Nelson

Chair, Committee on Educational Planning, Policy, and Programs

June 21, 2017
Date

Matt Liles

Assistant Attorney General

Consumer Protection Division

919.716.0141

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114 W. Edenton St., Raleigh, NC 27603

ncdoj.gov

Please note messages to or from this address may be public records.



Menashi, Steven

From: Menashi, Steven
Sent: Tuesday, August 15, 2017 3:55 PM
To: Venable, Joshua; Manning, James; Smith, Kathleen
Subject: Fwd: NCDOJ Letter to US DoEd re: Charlotte School of Law
Attachments: image003.jpg; ATT00001.htm; 20170815 Ltr to B DeVos re CSL Closure - AS SENT.pdf; ATT00002.htm

Begin forwarded message:

From: "Zibel, Daniel" <Daniel.Zibel@ed.gov>
Date: August 15, 2017 at 3:22:21 PM EDT
To: "Menashi, Steven" <Steven.Menashi@ed.gov>, "Rosenfelt, Phil" <Phil.Rosenfelt@ed.gov>, "Urwitz, Jay" <Jay.Urwitz@ed.gov>
Subject: FW: NCDOJ Letter to US DoEd re: Charlotte School of Law

FYI

From: Frola, Michael
Sent: Tuesday, August 15, 2017 2:03 PM
To: Zibel, Daniel
Subject: FW: NCDOJ Letter to US DoEd re: Charlotte School of Law

From: Liles, Matthew [<mailto:mliles@ncdoj.gov>]
Sent: Tuesday, August 15, 2017 1:32 PM
Cc: Frola, Michael; Wood, Swain; Thomas C. Shanahan (tcshanahan@northcarolina.edu); Kimberly van Noort (kpvannoort@northcarolina.edu); Riley, Liz (LRiley@wcsr.com)
Subject: NCDOJ Letter to US DoEd re: Charlotte School of Law

Attached please find a copy of correspondence from my office regarding Charlotte School of Law sent to Secretary of Education Betsy DeVos earlier today.



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

REPLY TO:
MATT LILES
ASSISTANT ATTORNEY GENERAL
MLILES@NCDOJ.GOV

****Contains information designated by Charlotte School of Law as confidential and nonpublic – see endnote****

August 15, 2017

VIA US AND ELECTRONIC MAIL

The Honorable Betsy DeVos
The Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Notice of Closure - Charlotte School of Law

Dear Madam Secretary:

I am writing to ensure that you are aware of recent developments at Charlotte School of Law (“CSL”) that appear to us to require immediate action from the Department of Education to protect the former students of this now-closed school.

As of August 11, 2017, CSL’s license to operate in North Carolina expired. On June 21, 2017, the UNC Board of Governors (“UNC-BOG”), CSL’s state licensing entity, had placed certain preconditions on CSL’s license to operate a post-secondary school in North Carolina. CSL has failed to meet one or more of those conditions and its license therefore expired. It is our understanding that CSL is now in the process of informing faculty and students that the school is now legally closed. In light of these developments, I ask that you take swift action to protect CSL students, notify them of their rights, and to protect the public trust.

CSL’s closure has been imminent for some time now. As explained in my April 12 letter (copy enclosed for your reference), following actions by the American Bar Association and the U.S. Department of Education (“Department”) in late 2016, and after CSL signaled that its closure was likely, a large majority of CSL’s student body took steps towards withdrawing at the beginning of the Spring 2017 Semester. Now that CSL has closed, I reassert our belief that the fair application of the closed school discharge rule, 34 C.F.R. § 685.214, should afford students who attended CSL at the time of the Department’s December 2016 action, but who have yet to graduate, the option

of discharging their federal loans. Based on information recently provided to both of our entities by CSL, this could result in over (b)(4) in loan relief for approximately (b)(4) former CSL students.

The closed school discharge rule remains the most powerful tool for immediate relief for affected CSL students. For the reasons stated in our April 12th letter, and taking into account the considerations below, I respectfully ask that you act without delay to get CSL students the relief they deserve.

A. CSL Legally Closed on August 11th

As you are aware, in January 2017, the UNC-BOG began a review of CSL's license. This review was triggered by the school's being put on probation by its accreditor and by the Department's subsequent denial of CSL's application for recertification for participation in Title IV programs. On May 24, 2017, a UNC staff report made four findings of non-compliance with financial standards against CSL. The staff report also expressed serious concern about the continued quality of CSL's program of study – noting that CSL's objectives for addressing its academic issues were “not supported by detailed, feasible plans.”¹ On June 16, 2017, UNC President Margaret Spellings adopted the staff report's findings and recommended placing limitations and conditions on CSL's license.² These restrictions included, *inter alia*, preventing CSL from enrolling any new students and requiring CSL to receive both ABA approval for its plans and reinstatement to Title IV programs by August 10, 2017. On June 21, 2017, the UNC-BOG adopted President Spellings' recommendation.³

Based on available information, as of August 11, 2017, CSL had failed to meet at least two of the UNC-BOG's preconditions for continued licensure: 1) having a “teach out” or remedial plan approved by the ABA; and 2) being reinstated to Title IV programs by the Department. *See* June 21st Decision ¶ 4. According to the terms of the UNC-BOG's decision, failure to satisfy these two conditions by August 10, 2017 would result in the immediate expiration of CSL's license. *See* June 21st Decision ¶ 9.

Pursuant to 34 C.F.R. § 685.214(a)(2)(i), a school is closed for purposes of closed school discharge once it has “cease[d] to provide educational instruction in all programs.” CSL no longer holds a valid license to operate in North Carolina, meaning that it cannot legally provide educational instruction. N.C. Gen. Stat. § 116-15(b). CSL has confirmed to UNC that, as of August 10th, it had ceased classroom instruction. Accordingly, I respectfully request that you determine, in accordance with your duty in Section 685.214(a)(2)(i), that CSL is closed as of August 11, 2017.

¹ *See* May 24, 2017 UNC Staff Report *attached to* Memorandum from Margaret Spellings, Pres., Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs (Jun. 16, 2017).

² Memorandum from Margaret Spellings, Pres., Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs (Jun. 16, 2017).

³ Decision of Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs, Charlotte School of Law – License Restrictions (Jun. 21, 2017).

B. Considerations for Closed School Discharge Eligibility

Mere rote application of the closed school discharge rule in the case could deny necessary relief to many deserving student borrowers. We respectfully offer the following considerations to assist in guiding your application of the rule to this unique situation.

1. Students Who Attended CSL on or After April 13, 2017 Should Be Afforded Closed School Discharge Without Delay.

The key provision of the rule, 34 C.F.R. § 685.214(c)(1)(i)(B) requires that in order to “qualify for discharge of a loan,” the borrower must truthfully state that he or she:

“Did not complete the program of study at that school because the school closed **while the student was enrolled**, or the student **withdrew from the school not more than 120 days before the school closed.**”

(Emphasis added.) As of August 11, 2017, CSL is not licensed and cannot legally operate a post-secondary school in the state of North Carolina. *See* N.C. Gen. Stat. § 116-15. This should qualify any student who attended CSL after April 13, 2017, but who did not ultimately graduate, for a closed school discharge.

2. The Secretary Should Discharge the Loans of the Currently-Enrolled CSL Students Without Application From the Students.

The Department should automatically discharge the loans of the students currently enrolled at CSL without application from the students.⁴ Pursuant to 34 C.F.R. § 685.214(c)(2), you may discharge these borrowers’ loans “without an application from the borrower if the Secretary determines, based on information in the Secretary’s possession, that the borrower qualifies for the discharge.” Over the past year, CSL has been in regular contact with both of our offices, often providing status reports on its students. Given the recency of this information, it should be straightforward to determine which borrowers meet the qualifications of 34 C.F.R. § 685.214(c). Based on our office’s experience in analogous situations, including with the thousands of North Carolina borrowers entitled to streamlined relief because they attended Corinthian Colleges, making students take the extra step of applying – when we know they almost certainly qualify – will unduly diminish the number of qualified students who ultimately receive the loan relief they are entitled to.

⁴ I respectfully note that under the version of the rule recently revoked by the Department these students would have been automatically granted a closed school discharge without application three years after the closure date. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75296, 76081-82 (Nov. 1, 2016) (to be codified in part at 20 C.F.R. 685.214) *rescinded* by Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 27621, 27622 (Jun. 16, 2017).

3. Students on Leaves of Absence Should be Eligible

As advocated in our April 12 letter, CSL students on leaves of absence should be included in this group of students eligible for closed school discharge. CSL has represented to both of our agencies that it considers students on leaves of absence as still enrolled. In fact as recently as July 17th, CSL included these students on leaves of absence in its response to the Department's request to identify the federal borrowers that CSL believed may return for the Fall 2017 Semester. CSL believed that students on leaves of absence were still enrolled at CSL. There is no reason that the Department should find otherwise.

4. Exceptional Circumstances Exist Supporting Enlarging the Closed School Discharge Eligibility Period.

As discussed in our April 12th letter, the application of the closed school discharge rule in CSL's case is confused by a novel situation – CSL's continued operation despite the loss of more than half of its student body – and the school's numerous representations in January 2017 indicating an intent to close imminently. Many students saw the writing on the wall and made the understandable choice to leave. Many others had to leave because the unavailability of federal funds for their education made it financially impossible to continue. These students are affected by CSL's closure just as much as any student who managed to make it to April, but without your action they will not be eligible for a closed school discharge.

You have the discretion to extend the discharge period on the basis of "exceptional circumstances." 34 C.F.R. § 685.214(c)(1)(i)(B). The rule reads:

"The Secretary may extend the 120-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the school's loss of accreditation; the school's discontinuation of the majority of its academic programs; action by the State to revoke the school's license to operate or award academic credentials in the State; or a finding by a State or Federal government agency that the school violated State or Federal law...."

(Emphasis added.)

For at least the following seven reasons, the CSL matter should be regarded as "exceptional" under any reasonable interpretation.

- First, due to repeated mixed signals, CSL's loss of students has been an unusually slow-developing process that has played out over almost nine months. This would make application of a rigid 120-day deadline potentially defeat the purpose of the rule.
- Second, North Carolina's state licensing entity has revoked CSL's license, an exceptional circumstance specifically enumerated in the regulation. It is noteworthy that the revocation occurred only after the licensing entity gave CSL a substantial period of time to take certain steps to demonstrate compliance, which it was unable to do.
- Third, there is an unusually high potential for significant monetary injury to former CSL students because the cost of legal education is high compared to other programs.

- Fourth, a substantial portion of CSL's academic program was discontinued in January 2017, when CSL terminated clinical professors and bar exam coaches.
- Fifth, in January 2017, an exceptional event occurred – CSL accepted a teach-out plan proposed by the Department, only to eventually balk at the terms on the details of CSL's closure.⁵
- Sixth, CSL has experienced serious problems with its accreditation. The school is currently on probation. In its July 6 ruling, the ABA found that CSL is still out of compliance with three ABA standards and that the school's Reliable Plan "has not proven effective or reliable." And now the ABA has reportedly rejected CSL's teach-out plan.⁶
- Seventh, not extending the eligibility period in this case could potentially lead other schools to drag out their closures to minimize their closed school discharge liability.

Finding exceptional circumstances and extending the deadline for affected students would not harm the federal government, since it can recoup its closed school discharge losses from CSL and its owners, but it would do a great service for many of the students hurt by this situation.

Not extending the deadline would be unjust and in some cases would yield perverse results. For example, one of the conditions for reinstatement to Title IV programs the Department gave to CSL on July 27th was to offer refunds to students in their first year on December 19, 2016.⁷ These refunds were to be made available to all first-year students, whether they left CSL in the Spring of 2017 or not. (b)(4)

(b)(4) Unless you extend the closed school discharge eligibility period pursuant to Section 685.214(c)(1)(i)(B), a first year student who left CSL between the Department's action in December 2016 and April 12, 2017 would not receive any loan relief. It would be fundamentally unfair to offer these students refunds if CSL were to continue to operate, but not if the school closed.

There is no material difference between a student who left CSL before April 13, 2017 and one who left after. Yet, without your action, the student who left after April 13 will be afforded full forgiveness of their student debt while the one who left before, under essentially the same situation, might not. A just application of the closed school discharge rule would provide relief to all students who attended CSL after the Department's action in December, but ultimately did not graduate.

⁵ See Letter from Chidi Ogene and Jay Conison to CSL students, <http://www.charlottelaw.edu/jan-19-2017-update-from-president-ogene-and-dean-conison.html> ("After intense discussions, we accepted a two-page plan provided by the Department's Office of Federal Student Assistance.").

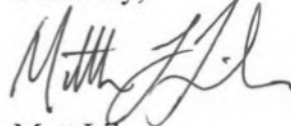
⁶ See Nick Oshsner, *Accrediting Body Denies Charlotte School of Law Teach-Out Plan*, WBTV, Aug. 14, 2017, available at <http://www.wbvtv.com/story/36134942/accrediting-body-denies-charlotte-school-of-law-teach-out-plan>.

⁷ Letter from Michael J. Frola, Dir., Multi-Regional and Foreign Sch. Participation Div., U.S. Dept. of Ed. to Chidi Ogene, Pres., Charlotte Sch. of Law, ¶ 4 (Jul. 27. 2017).

D. Continued Cooperation to Help Students

CSL's former students need your help. Our office stands ready to provide any assistance you may need, including in locating students and apprising them of their rights. Our office regularly hears from students that feel victimized by CSL. Now that CSL has officially closed, these students will undoubtedly appeal to our office for help. With swift action by the Department, we can direct these students to the process for seeking closed school discharge.

Sincerely,



Matt Liles

Assistant Attorney General

cc: Michael J. Frola, Director, Multi-Regional and Foreign Schools Participation Division,
U.S. Department of Education (*via email*)
Josh Stein, Attorney General of North Carolina
Swain Wood, General Counsel, N.C. Department of Justice (*via email*)
Thomas Shanahan, Senior Vice President and General Counsel, University of
North Carolina (*via email*)
Kimberly van Noort, Vice President for Academic Programs & Instructional Strategy,
University of North Carolina General Administration (*via email*)
Elizabeth LeVan Riley, Legal Counsel for Charlotte School of Law, at Womble Carlyle
Sandridge & Rice, LLP (*via email*)

Endnote:

This letter contains confidential information designated by Charlotte School of Law that, to the extent allowed by law, may be protected from disclosure. This information designated confidential, which I have denoted by highlighting it in the text, was provided to the N.C. Department of Justice through a March 29, 2017 Non-Disclosure Agreement with the Charlotte School of Law. I am sharing this information with you unredacted, as the official representative of a public agency per Paragraph 7(e) of that non-disclosure agreement.

Enclosures:

- April 12, 2017 Letter from M. Liles and H. Worley, N.C. Dep't of Justice to Hon. B. DeVos, Sec. of Ed. concerning Charlotte School of Law.
- June 16, 2017 Memorandum from Margaret Spellings, Pres., Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs
- June 21, 2017 Decision of Univ. of North Carolina to Comm. on Ed. Planning, Policies, and Programs, Charlotte School of Law – License Restrictions.



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
PO Box 629
RALEIGH, NORTH CAROLINA 27602

REPLY TO:
HARRIET WORLEY OR MATT LILES
CONSUMER PROTECTION DIVISION
HWORLEY@NCDOJ.GOV
MLILES@NCDOJ.GOV

April 12, 2017

The Honorable Betsy DeVos
The Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Charlotte School of Law

Dear Madam Secretary:

We are writing to outline briefly recent developments at Charlotte School of Law ("CSL"), following up on two letters our office issued regarding CSL on March 10, 2017. We copied the U.S. Department of Education ("Department") on both of those letters.

Since we issued those letters, our concerns have intensified based on several new developments. We are troubled that CSL may proceed without the type of formal plan that would protect students under your Department's regulations. As of today, based on public information:

- Most CSL students have left the school.¹
- CSL's landlord recently stated that CSL is willing to sublet all of its classroom space.²
- CSL required 169 days after the due date to pay its city and county taxes, incurring thousands of dollars in interest.³
- CSL's current enrollment is well beneath the 500-student target that the school identified as its minimum for continuing operation in January.⁴

Realistically, CSL's ability to continue to operate is in considerable doubt. Under Department of Education regulations, the precise timing of any closure date will have significant financial consequences for students. The closed school discharge rule, 34 C.F.R. § 685.214, makes students eligible for loan forgiveness only if they withdrew "not more than 120 days before the school closed." A large majority of CSL's student body took steps towards withdrawing in January 2017 and early February 2017, at the beginning of the Spring Semester,

when CSL provided multiple signals that its closure was imminent. Those students' 120-day time limit under the regulations may run in the near future.

Our office, which is responsible *inter alia* for civil enforcement of North Carolina's unfair trade practice laws, opened an investigative file on CSL and is gathering information.^{*} The Department's closed school discharge rule is among students' most powerful potential remedies. We would be very concerned if CSL were to close under timing that left doubtful whether students would receive loan forgiveness under the rule.

Therefore, in this letter we ask that the Department, in addition to continuing its own investigation and taking such further steps as it deems appropriate, confirm several features about how the rule would work in practice. First, we believe the date on which a student is deemed to have withdrawn should be no sooner than February 3, 2017, the last day of CSL's "drop/add" period for the Spring Semester. Second, we believe students should not be deemed to have withdrawn under the rule if they took a leave of absence or stated they would seek to transfer from CSL. Third, we suggest that exceptional circumstances exist in this case that would justify extending the 120-day discharge period under the rule.

A. New Developments

First of all, recent information has helped illustrate how decisions made many years ago by CSL management led directly to the untenable position faced by students today. CSL's new Dean, Scott Broyles, has acknowledged in recent interviews that in previous years, CSL management systematically lowered the school's admissions standards over the objections of CSL faculty.⁵ This strategy appears to have allowed CSL to bolster its enrollment during the first half of this decade, when the overall supply of law students dropped. As the students with lower qualifications passed through the school and graduated, CSL's bar passage rates diminished. When results were released last month from the February 2017 state bar examination, CSL's passage rate was 25%, down from 34.7% in the previous year.⁶

Second, it has become evident that even if the Department of Education restores Title IV funding, CSL will remain at risk of closure. As noted above, CSL appears to be in tenuous financial condition, as it is contemplating subleasing its classroom space, and had difficulty paying a significant tax bill. To reach its enrollment target, CSL must attract new students, but it has suffered significant, self-inflicted reputational damage that will make that more difficult. CSL students must pass a state bar exam in order to make use of their education, but repeatedly, the majority of CSL students taking the bar exam have failed it, and CSL admits that its pass rate is not acceptable.⁷ CSL's accreditor placed CSL on probation. Finally, both students and the Department of Education have argued that CSL made substantial misrepresentations to students.⁸

B. Students' Dilemma

CSL's actions, including its repeated mixed signals, have created an extremely difficult dilemma for students. In December 2016 and January 2017, the situation facing CSL students

^{*} To avoid confidentiality concerns, this letter discusses only information in the public press, not any documents provided under the Civil Investigative Demand made by this office.

was changing almost daily. On January 4, CSL indicated to students that it was uncertain whether it would reopen for the 2017 Spring Semester.⁹ Two days later, on January 6, CSL announced it would reopen.¹⁰ Four days after that, on January 10, CSL and the Department of Education were reportedly discussing the immediate closure of CSL under a teach-out plan.¹¹ On January 16, CSL delayed its reopening date by a week.¹² On January 18, students were informed that negotiations had failed between the Department of Education and CSL.¹³ On January 19, CSL fired more than half of its employees and faculty.¹⁴ Nevertheless, classes convened on January 23, two business days later.¹⁵

During January 2017, students faced extreme uncertainty about whether CSL would reopen, and on many occasions were given information suggesting that it would not. Even when classes began on January 23, students could reasonably have expected that CSL would be unable to complete the semester, given the substantial uncertainty during the three weeks preceding that date. Even students who were fully comfortable with the revised CSL educational offerings would have been unable to use federal loan money – their primary means of finance – to pay their tuition and living expenses.

In this constantly shifting environment, many students likely would have made decisions about withdrawal from the school based on the understanding that it would be closing soon, only to learn later that it might not be. In these circumstances, we believe it should be understood by all that the date of formal withdrawal for any affected student cannot be earlier than February 3, 2017, the last day of CSL's drop/add period. As noted above, we believe it would be helpful if the Department would confirm that cut-off date to all potentially affected students.

Both withdrawn and present students carry a very significant debt burden. Students who graduate from CSL have a median of \$161,910 in debt.¹⁶ If CSL closes in Summer 2017 due to poor financial health, CSL's investors and officers would be free to walk away; at worst, they would have lost the value of their investment. CSL's students, on the other hand, would be left with debt they cannot discharge, incurred for a legal education of diminished value, which in many cases will not lead to their obtaining the professional qualification they sought at the outset of their studies. We believe the Department of Education's closed school discharge rule, 34 C.F.R. § 685.214, was created to resolve precisely this kind of problem.

C. The Closed School Discharge Rule

Should CSL close, one of the most powerful potential remedies for CSL students would be a closed school discharge pursuant to 34 C.F.R. § 685.214. Under the rule, discharge would remove "the obligation of the borrower and any endorser to make any further payments on the loan." 34 C.F.R. § 685.212(d). Discharge would allow the borrower to receive "reimbursement of amounts paid voluntarily on the loan" and would relieve the borrower of adverse credit history and accrued collection costs. 34 C.F.R. § 685.214(b).

More than half of CSL's student body ceased attending classes in January 2017. Some of these students may have gone on a leave of absence intending to re-enroll, others may have intended to transfer, and some may have intended to permanently withdraw. If CSL closes, these students' ability to seek loan forgiveness depends on three factors. First, on what date is the

student deemed to have withdrawn under the closed school discharge rule? Second, are students who went on a leave of absence deemed to have withdrawn under the rule? Third, will the Department determine that “exceptional circumstances” existed in January 2017 that justify extending the normal 120-day discharge period?

1. The Rule Should Deem CSL Students to Have Withdrawn No Sooner Than the Date When the Drop/Add Period Ended, February 3, 2017.

The key provision of the rule, 34 C.F.R. § 685.214(c)(1)(i)(B) requires that in order to “qualify for discharge of a loan,” the borrower must truthfully state that he or she:

“Did not complete the program of study at that school because the school closed **while the student was enrolled**, or the student **withdrew from the school not more than 120 days before the school closed**.”

(Emphasis added.) We are not aware of any applicable case law or interpretive decision to assist in calculating the date on which a student “withdrew.”

Confusion in application of this rule stems from a novel situation – CSL’s continued operation despite the loss of more than half of its student body – and the school’s numerous representations in January 2017 indicating an intent to close imminently. Unless the Department provides clarity, it would be natural for students to be concerned that each day CSL continues to operate reduces the number of students who would qualify for loan forgiveness. Indeed, since CSL and its associated companies are liable to the Department for any closed school discharges granted, CSL would appear to have a vested interest in continuing to operate to decrease their potential liability to your Department. The Department should not allow any self-serving delay.

On May 23, 2017, it will have been 120 days since January 23, 2017, CSL’s first day of classes for its spring semester. On June 3, 2017, it will have been 120 days since February 3, 2017, when CSL students’ drop/add period ended and students were disenrolled.

In light of the foregoing, we believe the rule should be applied so that students are deemed to have withdrawn no earlier than the time when CSL’s drop/add period appears to have ended, February 3, 2017. This is the most natural, plain reading of the rule – on this date, the student’s decision was locked in, and students not currently enrolled became unable to enroll in Spring Semester classes for credit. Any other interpretation of the rule would not only lead to confusion and uncertainty, but also would upset students’ reasonable reliance on statements made by CSL and the Department of Education. As noted above, throughout the month of January many CSL students would have reasonably understood statements from CSL and the Department of Education to indicate CSL was substantially likely to close.

As a result, we are asking that the Department confirm that the 120-day deadline will run 120 days after the end of the drop/add period, June 3, 2017.

2. Students Taking a Leave of Absence or Stating an Intent to Transfer Should Not Be Deemed to Have Withdrawn.

Given the extraordinary uncertainty in January 2017 about whether CSL would reopen and, if so, the conditions under which it would reopen, we believe it is essential that students be deemed to have withdrawn only if they unequivocally intended to withdraw, not temporarily disenroll. In January, a student could reasonably have hoped to sit out the 2017 Spring Semester, then return once CSL became stable and he or she had sufficient financial resources to attend. Other students may have hoped to transfer, given the recent reputational damage to CSL and the recent uncertainty about CSL's future, but may have been willing to attend CSL classes if transfer became impossible. We believe that the rule should not deem a student to have withdrawn if the student indicated a desire to take a leave of absence or, if possible, transfer to another school.

3. Exceptional Circumstances Exist in This Case.

You have the discretion to extend the discharge period on the basis of "exceptional circumstances." 34 C.F.R. § 685.214(c)(1)(i)(B). The rule reads:

"The Secretary may extend the 120-day period if the Secretary determines that exceptional circumstances related to a school's closing justify an extension. Exceptional circumstances for this purpose may include, but are not limited to: the school's loss of accreditation; the school's discontinuation of the majority of its academic programs; action by the State to revoke the school's license to operate or award academic credentials in the State; or a finding by a State or Federal government agency that the school violated State or Federal law...."

(Emphasis added.)

For four reasons, the CSL matter should be regarded as "exceptional" under any reasonable interpretation.

- First, in this matter, due to repeated mixed signals, CSL's loss of students has been an unusually slow-developing process. This would make application of a rigid 120-day deadline potentially defeat the purpose of the rule.
- Second, there is an unusually high potential for significant monetary injury to former CSL students because the cost of legal education is high compared to other programs.
- Third, a substantial portion of CSL's academic program appears to have been discontinued in January, when CSL terminated clinical professors and bar exam coaches.
- Fourth, in January, an exceptional event occurred – CSL accepted a teach-out plan provided by the Department of Education, but then CSL and the Department were unable to come to terms on the details of CSL's closure.¹⁷

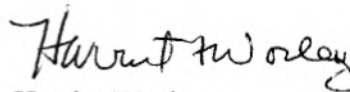
Finding exceptional circumstances and extending the deadline for affected students would not harm the federal government, since it can recoup its closed school discharge losses from CSL and its owners, but it would do a great service for many of the students hurt by this situation.

D. Our Goal to Cooperate and Share Information with Regard to CSL's Situation

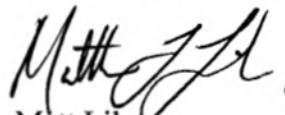
As you have noted in your public statements, educational institutions must be accountable. Inevitably, some schools will not be a success. When those unsuccessful schools shut down, their former students will be left with long-lasting impacts from debt. If CSL closes, this case will be the first opportunity to establish how your Department will protect students' interests when post-secondary educational institutions do not succeed.

As our office moves forward with its analysis of the facts, we hope to continue to build upon our working relationship with your Department. If any actions become necessary regarding CSL, I hope that our organizations will work together to take those actions in the way that best protects CSL's students.

Sincerely,



Harriet Worley
Special Deputy Attorney General



Matt Liles
Assistant Attorney General

cc: Josh Stein, Attorney General of North Carolina
Swain Wood, General Counsel, N.C. Department of Justice
Thomas Shanahan, Senior Vice President and General Counsel, University of North Carolina
Kimberly van Noort, Vice President for Academic Programs & Instructional Strategy, University of North Carolina General Administration
Elizabeth LeVan Riley, Legal Counsel for Charlotte School of Law, at Womble Carlyle Sandridge & Rice, LLP

Endnotes

¹ See, e.g., Jennifer Thomas, *Charlotte Law's Interim Dean Navigating Difficult Path Forward*, Charlotte Business Journal, Mar. 22, 2017, <http://www.bizjournals.com/charlotte/news/2017/03/22/charlotte-laws-interim-dean-navigating-difficult.html>.

² See Ashley Fahey, *Big Block of Space Available for Sublease in Charlotte Plaza*, Charlotte Business Journal, Mar. 31, 2017, <https://www.bizjournals.com/charlotte/news/2017/03/31/big-block-of-space-available-for-sublease-in.html>.

³ Bill Number 0007042776-2016-2016-0000-00 available at Mecklenburg County, NC Office of the Tax Collector Property Tax System, <http://charmeck.org/mecklenburg/county/TaxCollections/PTS/Pages/PTS.aspx>. Payment appears to have taken place only after a press story noted the delinquent tax payment. See Jennifer Thomas,

Charlotte Law delinquent on \$148K in taxes; School Says Check Issued, Feb. 17, 2017, <http://www.bizjournals.com/charlotte/news/2017/02/17/charlotte-law-delinquent-on-148k-in-taxes-school.html> . The law school's dean, when explaining why the school had not provided more financial assistance to its students, admitted, "Finances are tight." *Charlotte Talks* (WFAE-FM radio broadcast Apr. 6, 2017), at 16:10 in recording, available at <http://wfae.org/post/new-law-school-dean-challenges-ahead-cult-ignorance-wages-attack-expertise> .

⁴ Press reports indicate that in a Wednesday, January 4, 2017 meeting with students, school leaders told students "CSL needs at least 500 students ... to commit to taking classes this spring." Michael Gordon, *Students: Charlotte School of Law to Announce Fate of Classes This Week*, *Charlotte Observer*, Jan. 4, 2017, <http://www.charlotteobserver.com/news/politics-government/article124503289.html> . Nonetheless, CSL was able to open its Spring Semester with an enrollment beneath 500. Current enrollment is approximately 220, down from 787 in Spring 2016, and roughly one-half will graduate in May. See Jennifer Thomas article, *supra* note 1.

⁵ In a radio interview on April 6, 2017, CSL Interim Dean Scott Broyles spoke extensively about the process that led to CSL lowering its admissions standards. He said:

[At 2:08 in recording] "When we opened in 2006, we had a very strong faculty. And we were having high bar pass rates.... I think what happened at a certain point – I know what happened – the admissions began to drop, in terms of the criteria.... [T]he administrators had an unrealistic belief in how you could provide additional resources -- academic support – for students with low indicators coming in and that would address the problem of the low indicators.

[At 3:56] "No, they weren't only paying attention to the bottom line. They were paying close attention to the bottom line, but again, I think they were of the belief that if you add all these additional resources in academic support terms, then that could address these lower indicators. That turned out to be not the case. The faculty was pushing back against that on a consistent basis, but they were not sufficiently listened to."

[At 12:30] "Don't like to point fingers of blame, right? But it was the administration who made the decision to bring in students who were not capable of performing at the law school level."

[At 11:50] "The pressure we felt was that we were dealing with students that – that we could not properly teach, to put it simply."

Charlotte Talks (WFAE-FM radio broadcast Apr. 6, 2017), available at <http://wfae.org/post/new-law-school-dean-challenges-ahead-cult-ignorance-wages-attack-expertise> . When asked by another reporter, "Did you feel like you saw those red flags?", CSL Interim Dean Scott Broyles said, "Yes I did." He added, "Not only me, but a number of faculty members said we are not on the right path, we've got to stop this." *Eyewitness News* (WSOC-TV television broadcast Mar. 22, 2017), available at <http://www.wsoc.com/news/local/interim-dean-at-charlotte-school-of-law-hopeful-it-will-stay-open/505133228> .

⁶ See Jennifer Thomas, *Charlotte Law Dean: Bar Passage Rates Not Acceptable*, Mar. 29, 2017, <http://www.bizjournals.com/charlotte/news/2017/03/29/charlotte-law-dean-bar-passage-rates-not.html> .

⁷ *Id.*

⁸ Dec. 19 letter from U.S. Department of Education to Chidi Ogene, President, Charlotte School of Law, p. 10.

⁹ See Michael Gordon, *Charlotte Observer*, Jan. 4, 2017, *supra* note 4.

¹⁰ See Mark Washburn and Michael Gordon, *Charlotte School of Law Will Reopen, Students Told*, *Charlotte Observer*, Jan. 6, 2017, <http://www.charlotteobserver.com/news/local/article125098999.html> .

¹¹ See Michael Gordon, *Is Charlotte School of Law Taking Steps to Shut Down?*, *Charlotte Observer*, Jan. 10, 2017, <http://www.charlotteobserver.com/news/local/education/article125737084.html> .

¹² See Kevin Sloan, *Is Doomsday Imminent for Charlotte Law School?*, National Law Journal, Jan. 16, 2017, <http://www.nationallawjournal.com/id=1202776513793/Is-Doomsday-Imminent-for-Charlotte-Law-School?slreturn=20170310184957> .

¹³ See Michael Gordon, *Feds, Charlotte School of Law Fail to Reach Agreement Over Federal Student Loans*, Charlotte Observer, Jan. 18, 2017, <http://www.charlotteobserver.com/news/local/education/article127341129.html> .

¹⁴ See Michael Gordon, *Charlotte School of Law Fires Dozens of Faculty*, Charlotte Observer, Jan. 19, 2017, <http://www.charlotteobserver.com/news/politics-government/article127438764.html> , and Michael Gordon, *Classes Reopen in Stripped-Down Charlotte School of Law*, Charlotte Observer, Jan. 23, 2017, <http://www.charlotteobserver.com/news/politics-government/article128275794.html> .

¹⁵ Concerning the rescheduled first day of classes, see Michael Gordon, *Classes Reopen in Stripped-Down Charlotte School of Law*, Charlotte Observer, Jan. 23, 2017, <http://www.charlotteobserver.com/news/politics-government/article128275794.html> .

¹⁶ Charlotte School of Law, *ABA Required Disclosures and Gainful Employment*, retrieved on Apr. 7, 2017, <http://www.charlottelaw.edu/gainful-employment-aba-required-disclosures.html> .

¹⁷ See Letter from Chidi Ogene and Jay Conison to CSL students, <http://www.charlottelaw.edu/jan-19-2017-update-from-president-ogene-and-dean-conison.html> (“After intense discussions, we accepted a two–page plan provided by the Department’s Office of Federal Student Assistance.”)

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

General Administration

Main: 919-962-1000

Web: www.northcarolina.edu

MEMORANDUM

TO: Committee on Educational Planning, Policies, and Programs

FROM: Margaret Spellings, President

DATE: June 16, 2017

SUBJECT: Recommended Findings and License Restrictions for Charlotte School of Law

I. BACKGROUND

Pursuant to N.C.G.S. § 116-15, the Board of Governors is responsible for the licensure of nonpublic post-secondary degree granting institutions in North Carolina. UNC General Administration (UNC-GA) has the authority to perform compliance reviews to ensure that licensed institutions continue to meet the statutory and regulatory standards for licensure, as set forth in the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*. If an institution is not in compliance, the Board of Governors may revoke the institution's license, or may place conditions on the license until the institution coming into compliance. It is generally expected that before closing an academic program, arrangements will be made to ensure that existing students can either complete the course of study or transition to another program without disadvantaging the students, an arrangement commonly referred to as a "teach out."

The Charlotte School of Law (CSL) has been licensed to conduct post-secondary degree activity in North Carolina since 2005. Effective November 14, 2016, the American Bar Association (ABA), CSL's accrediting organization, placed the institution on a two-year probation, finding "substantial and persistent" noncompliance with certain ABA accreditation standards. Shortly after the ABA action, the Department of Education denied CSL's application for recertification for participation in Title IV programs, a decision that was finalized by letter dated January 18, 2017. On January 24, 2017, UNC General Administration initiated a licensure review, which included engaging outside reviewers with expertise in financial operations and law school academic program matters. UNC General Administration had communicated its concerns about CSL to the North Carolina Department of Justice prior to initiating the compliance review.¹

¹ G.S. 116-15(j) states that [t]he Board shall call to the attention of the Attorney General, for such action as he may deem appropriate, any institution failing to comply with the requirements of this section."

General Administration's review resulted in a staff report finding:

- Noncompliance with Standard 10.A.(1) of the *Rules and Standards*, for failure to demonstrate financial resources indicating the institution is capable of maintaining operational continuity;
- Noncompliance with Standard 10.A.(3), for failure to demonstrate an adequate financial plan for long-range management of the institution;
- Noncompliance with Standard 10.A.(4), due to recent financial records and audit reports that do not demonstrate financial stability; and
- Noncompliance with Standard 10.A.(6), for failure to maintain an adequate tuition guaranty bond.

In addition, the report noted concerns regarding CSL's ability to continue to remain in compliance with Standard 3, which focusses on the quality of the program of study. The staff report is attached hereto.

Because the staff report could potentially lead to a decision by the Board to revoke CSL's license, the report was forwarded to CSL on May 24, 2017, in accordance with Section IX of the *Rules and Standards*.

As allowed by the *Rules and Standards*, CSL requested an interview and an opportunity to provide additional information regarding the findings in the report. CSL provided supplemental information, and met with staff on June 16, 2017, to discuss the report and explain the steps they have taken to address the findings.

CSL indicates they are working on a series of actions that will allow them to address the findings regarding Standard 10 and continue to operate on a financially stable base, including the restructuring of its debt agreements with certain investors. CSL has described the financial restructuring in detail, and has made their chief financial officer, president, and others available to meet with UNC-GA staff and external reviewers to answer questions about CSL's financial operations. CSL has committed to providing all documents and signed agreements regarding these arrangements as the restructuring progresses, but those materials are not yet available.

In addition, CSL shared with staff additional information regarding its remaining student population. According to CSL, they currently enroll 11 first-year students (most of whom are part-time students who have partially completed their first year), 55 second-year students, and 34 third year students. CSL has indicated that a significant number of these students hope to complete their education at CSL, and that many have no other options due to family or work considerations that prevent them from leaving the Charlotte area. There are currently 73 students who are on "leave of absence" status, meaning that they are not currently enrolled but have not officially withdrawn. CSL expects that many of these students would return if the Department of Education allows participation in Title IV programs.

CSL and UNC-GA staff have discussed and recognize the need to address issues associated with students who are still enrolled or are partway through their programs at CSL. Of paramount importance is the assurance of a path towards degree attainment for those students who wish to finish their legal education at CSL. In order to ensure that these students are protected and afforded the opportunity to continue with their education, informed and prompt action by the Board is appropriate. While much information about CSL is available now, further determinations regarding CSL's potential to continue to operate will need to be addressed as the necessary information becomes available. The information and materials that CSL has provided have been reviewed and considered, and these recommendations are presented to the Board of Governors for consideration and approval.

II. RECOMMENDED FINDINGS AND DISPOSITION OF LICENSE

At this time, it is recommended that the Board of Governors find as follows:

Standard 10: Finance and Organization - The institution must be financially sound and capable of fulfilling its commitments to students.

1. Standard 10.A.(1): Stability – Financial resources should be characterized by stability that indicates the institution is capable of maintaining operational continuity for an extended period of time. The minimum “extended period of time” is the duration of the most lengthy post-secondary degree program offered.

Finding -- CSL has indicated that it is working on addressing issues concerning its financial stability, and that it expects to remedy through a financial restructuring that is underway. CSL has also provided financial information in support of a plan for continued operations during a teach-out of current students, and is continuing to provide information concerning its finances and stability. Based on the information available at this time, CSL has not yet demonstrated that its financial resources are characterized by stability that indicates the institution is capable of maintaining operational continuity for an “extended period.”

2. Standard 10.A.(3): Plan for Financial Development – A coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution must be maintained.

Finding – CSL has presented documents setting forth a financial plan for a “teach out” of current students. Although CSL indicates that it is undertaking a financial restructuring, it has not yet provided revised or projected financial statements or budget documents demonstrating the effects of that restructuring. While CSL expects to provide this additional information, the facts and information provided by CSL and reviewed by staff and external reviewers to date support this finding.

3. Standard 10.A.(4): Financial Records and Audit Report – The institution's recent financial history must demonstrate financial stability.

Finding – Although CSL has indicated that it is working on addressing issues concerning its financial stability through a financial restructuring that would address certain matters in its financial records and audit report, CSL’s recent financial history as reflected in the materials presented during the review does not demonstrate financial stability at this time.

4. Standard 10.A.(6): Bonding – Tuition guaranty bond, or equivalent, of not less than \$10,000 and at least equal to or higher than the maximum amount of prepaid tuition held (i.e., unearned tuition held) existing at any time during the most recent fiscal year must be maintained

Finding – CSL does not currently maintain a surety bond in the required amount, and did not maintain a bond in the required amount during the last fiscal year. Given the substantially reduced current enrollment, the bonding requirement will be addressed further below.

These noncompliance issues must be considered in light of the fact that there is still a substantial number of students currently enrolled at CSL who would like to complete their course of study at that institution.

Standard 3: Program of Study – The substance of each course, program of study, equivalent experience, or achievement test must be such as may reasonably and adequately achieve the stated objective for which the study, experience, or test is offered in order to be certified as successfully completed.

Standard 5: Faculty and Other Personnel Qualifications – The education, experience, and other qualifications of directors, administrators, supervisors, and instructors must be such as may reasonably ensure that the students will receive, or will be reliably certified to have received, education of good quality consistent with the stated objectives of any course or program of study, equivalent experience, or achievement test offered by the institution.

Finding – While there are no findings specific to compliance with Standards 3 and 5, the staff report observed that CSL’s objectives for addressing the issues essential to compliance with Standard 3 are not clearly supported by detailed, feasible plans for achieving those objectives. Moreover, the steps necessary to achieve the objectives identified by CSL, as described in its remedial plan submitted to the ABA as a condition of its probation (the “Reliable Plan”), could potentially worsen CSL’s financial stability. CSL may provide additional information regarding its plans to achieve its goals. The Reliable Plan CSL submitted to the ABA for approval is currently under review.

III. PRESIDENT’S RECOMMENDATION FOR DISPOSITION OF CHARLOTTE SCHOOL OF LAW’S LICENSE

The American Bar Association (ABA) has placed Charlotte School of Law (CSL) on probation for two years, beginning November 14, 2016, based on its finding that CSL is in substantial and persistent noncompliance with ABA accreditation standards 301 and 501. In response, CSL has asked the ABA to approve: (a) a plan to teach-out any remaining CSL students in anticipation of possible closure of

the school; and (b) a remedial plan (which is referred to by the ABA as a “Reliable Plan”) in anticipation of CSL’s continued operation as an accredited law school. The U.S. Department of Education has suspended CSL’s continued participation in Title IV programs. CSL has petitioned the Department of Education for reinstatement in Title IV programs, and CSL’s request remains under consideration. CSL is currently under investigation by the North Carolina Department of Justice, Consumer Protection Division, based on the division’s concerns about CSL’s future viability, the effects of CSL’s viability on CSL students, and the Consumer Protection Division’s concerns about keeping students fully informed about CSL’s status.

Based on the foregoing, the CSL information and materials reviewed to date, CSL’s financial status, and the potential impact on current CSL students, I recommend that the Board of Governors impose the following limitations on CSL’s license, pending further action and review of CSL’s compliance with the Board of Governors Rules and Standards:

1. CSL shall not admit any new or additional students to CSL until such time as this condition may be removed by further action of the Board of Governors.
2. No later than August 1, 2017, and subject to item 3, below, CSL shall present to the Licensure Unit such evidence as the Licensure Unit may deem necessary to show that CSL has remedied any deficiencies and has come into full compliance with the licensure standards for which the Board has found it to be out of compliance or, at a minimum, that it is making substantial and expeditious progress toward remedying its financial licensure deficiencies.
3. CSL shall immediately obtain, maintain, and provide proof to the Licensure Unit of a tuition guaranty bond in an amount at least equivalent to the amount of prepaid tuition to be paid by the maximum number of students who may participate in the teach-out CSL has proposed for the ABA’s consideration. The bond shall otherwise comply with Standard 10 of the Rules and Standards.
4. CSL may continue to conduct post-secondary degree activity in North Carolina at this time and on a limited basis while it develops and seeks ABA approval of an appropriate teach-out plan that fully protects the interests of CSL students who may wish to complete their CSL degree programs, and/or approval for continued operation as an accredited law school, subject to the following requirements:
 - a. CSL’s plan for teaching out its remaining students and/or remedial plan for continued operation as an accredited law school, must be approved by the American Bar Association (ABA) no later than August 10, 2017; and
 - b. The Department of Education (DOE) must determine no later than August 10, 2017, that any CSL student who remains enrolled may participate in Title IV federal loan programs.

5. CSL shall keep the Licensure Unit fully informed of the progress and the status of:
 - a. The investigation of CSL by the Consumer Protection Division of the North Carolina Department of Justice;
 - b. The ABA's consideration of CSL's request to approve its teach-out plan and remedial plan; and
 - c. The Department of Education's consideration of CSL's request for reinstatement for participation in Title IV programs.
6. CSL shall promptly distribute the findings and determinations of the Board of Governors, including this document, to:
 - a. All CSL students, including currently enrolled students, and students who have the status of "leave of absence" or "withdrawn";
 - b. The ABA;
 - c. The Department of Education; and
 - d. The North Carolina Department of Justice, Consumer Protection Division.
7. Nothing herein shall limit the Licensure Unit from conducting additional review, or the Board of Governors from taking further action, on any matter relating to CSL's operations and licensure, including without limitation such further review, recommendations, and actions as the Licensure Unit or the President may deem to be appropriate due to changes in CSL's circumstances, the development of new information, and the actions of the ABA, the Department of Education, or the North Carolina Department of Justice.
8. CSL has indicated that it believes it has the ability to remain open and become financially stable. CSL also expects that, upon the occurrence of certain financial restructuring events that it expects to consummate in the immediate future, CSL will be recertified by the U.S. Department of Education to participate in the federal Title IV student loan program. Provided that all conditions and requirements in items 1 through 6 are met, and subject to item 7, the Licensure Unit at UNC General Administration shall expeditiously review and present for the President's consideration possible actions that the Board may take to adjust or remove limitations on CSL's license.
9. Unless the Board of Governors takes further action, CSL's license shall expire on the earlier of:
 - a. The failure to meet the conditions set forth in items 1 through 4(a) and (b), above; or
 - b. May 30, 2019.

Junius J. Gonzales, M.D., M.B.A.
Senior Vice President for Academic Affairs
Office: 919-962-4614
Email: jjgonzales@northcarolina.edu

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

May 24, 2017

Mr. Chidi Ogene
President, Charlotte School of Law
201 S. College Street, Suite 400
Charlotte, NC 28244

Dear Mr. Ogene,

According to N.C.G.S. § 116-15(h), "[a]ny institution holding a license to conduct post-secondary degree activity in this State that is found by the Board of Governors not to satisfy the licensure requirements of this section shall have its license to conduct post-secondary degree activity in this State revoked by the Board; provided, that the Board of Governors may continue in force the license of an institution deemed by the Board to be making substantial and expeditious progress toward remedying its licensure deficiencies."

Section VIII.K of the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina* states that "[a]ny institution that acquires licensure shall be subject at any time to review by the Board of Governors to determine whether the institution continues to meet standards for licensure." Section IX of the *Rules and Standards* requires that "the institution . . . be notified in writing of any staff recommendations that might result in revocation, with the grounds set forth for the action contemplated. The institution may request, in writing, within ten days of receipt of the notification, an interview to respond to the recommendation of noncompliance."

In January, 2017, the Licensure Unit of the University of North Carolina General Administration initiated a compliance review for the Charlotte School of Law. The Licensure Unit made several document requests to the institution. The staff for the Licensure Unit engaged reviewers who reviewed the documents submitted by the institution and prepared the enclosed report, which considers the institution's compliance with Standards 3 (Program of Study), 5 (Faculty and Other Personnel Qualifications), and 10 (Finance and Organization). The staff has accepted the report, and recommends the following findings:

Standard 10.A.(1): Stability

Charlotte School of Law has not demonstrated that its financial resources are characterized by stability that indicates the institution is capable of maintaining operational continuity for an "extended period," which, in CSL's case, means at least three years.

Standard 10.A.(3): Plan for Financial Development

Charlotte School of Law has not demonstrated that it maintains a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution."

Standard 10.A.(4): Financial Records and Audit Report

Charlotte School of Law's recent financial history does not demonstrate financial stability.

Standard 10.A.(6): Charlotte School of Law has not demonstrated that it maintains a tuition guaranty bond of not less than \$10,000 and at least equal to or higher than the maximum amount of prepaid tuition held (i.e., unearned tuition held) existing at any time during the most recent fiscal year.

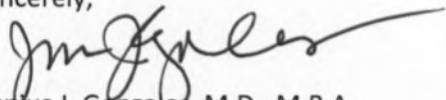
Standards 3 and 5

While there are no findings specific to compliance with Standards 3 and 5, the Reviewers observe that Charlotte School of Law's objectives for addressing the issues essential to compliance with Standard 3 are not supported by detailed, feasible plans for achieving those objectives. Moreover, the steps necessary to achieve the objectives identified by Charlotte School of Law would likely worsen the institution's financial stability.

This report and the staff's recommendation is hereby submitted to the Charlotte School of Law for its review, pursuant to the *Rules and Standards*. Because the staff recommendation could ultimately result in revocation of the institution's license, the institution has ten days from the receipt of this notification, pursuant to the *Rules and Standards*, to request an interview to respond to the recommendation of noncompliance. In order to facilitate this interview, we have scheduled June 7, 2017, at 2:00 pm, to meet with representatives of Charlotte School of Law at the University of North Carolina General Administration Building.

In accord with the *Rules and Standards*, any supplemental material submitted by the institution will be taken under consideration in developing the President's recommendation to the Board of Governors, notwithstanding the contents of the report or the staff's recommended findings that are being presented to Charlotte School of Law today based on that report. If you would like to submit additional documentation prior to the June 7, 2017, meeting, please direct any such documentation to Dr. Kimberly van Noort.

Sincerely,



Juris J. Gonzales, M.D., M.B.A.

Senior Vice President for Academic Affairs

cc: Thomas Shanahan, University of North Carolina General Administration
Kimberly van Noort, University of North Carolina General Administration
Liz Riley, Charlotte School of Law

Report to the University of North Carolina

**Charlotte School of Law's Compliance
with Licensure Standards**

Charlotte School of Law
Charlotte, North Carolina

Date of Report: May 24, 2017

REVIEWERS

Dr. Frank Prochaska (Chair), Retired Associate Vice President for Academic Affairs, University of North Carolina General Administration, Chapel Hill, North Carolina; and Professor of Chemistry Emeritus, Western Carolina University, Cullowhee, North Carolina

Paul Kurtz, Associate Dean & Professor Emeritus, University of Georgia School of Law, Athens, Georgia

Michael Juby, First Tryon Advisors, Charlotte, North Carolina

BACKGROUND

Charlotte School of Law (CSL), located in uptown Charlotte, is a for-profit law school wholly-owned by InfiLaw Corporation. It was founded in 2004 and granted licensure by the University of North Carolina Board of Governors in 2005 to offer the Juris Doctor degree program. After enrolling its first class in 2006, the School was granted provisional approval by the American Bar Association (ABA) in 2008. Charlotte School of Law received full approval from the ABA on June 10, 2011.

Charlotte School of Law is currently licensed by the University of North Carolina Board of Governors to offer the Juris Doctor (J.D.) and the Master of Laws (LL.M.) in American Legal Studies degree programs.

The American Bar Association is responsible for law school accreditation. Accreditation by a recognized accreditor is a prerequisite for participation in Title IV programs. Prior to its full approval by the ABA, CSL was able to participate in Title IV programs under a provisional Program Participation Agreement (PPA) that was executed in 2009. Charlotte School of Law's last PPA was executed in July 2011.

Following an on-site Three-Year Interval evaluation of CSL, the ABA issued an Inspection Report dated September 15, 2014, and invited Charlotte School of Law to provide comments and/or note any factual errors. The cover letter to the report stated that the ABA Accreditation Committee was to consider the school's continued accreditation at its January 22-24 2015 meeting. CSL submitted its response to this report in October 2014.

The Committee considered both the Inspection Report and Charlotte School of Law's response at its January 2015 meeting, and subsequently issued a decision, finding, among other things, that there was reason to believe that CSL was not in compliance with certain ABA standards. While some of the compliance issues were relatively minor, the Committee requested additional information to make a determination as to CSL's compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1. These standards pertain to the rigor of the educational program in preparing students for admission to the bar. Accordingly, the Committee requested that CSL submit a report "with all relevant information necessary to demonstrate compliance with the Standards."

- Standard 301(a) states, “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”
- Standard 501(a) states, “A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.”
- Standard 501(b) states, “A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”
- Interpretation 501-1 states, “Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.”

Charlotte School of Law submitted its response to the Committee in December 2015, after which the Accreditation Committee issued its decision on CSL’s status. The Committee concluded that Charlotte School of Law was not in compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1. The Committee requested that CSL submit a report with all relevant information necessary to demonstrate compliance, to be considered at the Committee’s June 2016 meeting. The Committee requested specific information regarding bar passages rates for students in the lower percentiles for LSAT scores and/or undergraduate GPAs. In addition, the Committee requested that the President and the Dean of CSL appear at a hearing before the Committee to determine whether sanctions should be imposed.

Following the June 2016 meeting, at which a hearing was held, the Committee issued a decision in which it found, once again, that Charlotte School of Law was not in compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1. The Committee stated that the issues of non-compliance “are substantial and have been persistent. The Law School’s plans for bringing itself into compliance with the Standards have not proven effective or reliable. Further, the Law School has not shown sufficient cause why it should not be directed to take specific remedial action to come into compliance with the Standards.” The remedial action

directed by the Committee included the development of a reliable plan to bring CSL into compliance, the reporting of its admissions data and methodology, a site visit to be conducted by October 1, 2016, notification to all CSL students of the remedial actions required by the American Bar Association, and specific notification requirements to CSL students regarding bar passage rates and its compliance status with the ABA. CSL appealed aspects of this, the third Committee decision, to the Council of the Section of Legal Education and Admissions to the Bar of the ABA (the Council).

At the October 2016 meeting of the Council, a hearing was held at which Charlotte School of Law accepted the finding of noncompliance with Standards 301 and 501, but requested that the Committee overturn its finding that its noncompliance was “substantial and persistent.” CSL also requested the elimination of the public disclosure requirement, requested that the remediation period begin in July 2016 rather than February 2016, and asked that the Committee provide greater clarity as to its expectations.

On November 14, 2016, the Council affirmed the Committee’s findings of noncompliance, including that the noncompliance was substantial and persistent, and that CSL’s plans for bringing itself into compliance have not proven effective or reliable. As a result of its findings, the Council placed Charlotte School of Law on a two-year probation, effective November 14, 2016, and directed that CSL take a number of remedial actions, including public notification of its probationary status.

On December 19, 2016, the Department of Education (DOE) informed Charlotte School of Law that it denied CSL’s application for recertification for participation in Title IV programs, and that CSL’s participation in those programs will conclude on December 31, 2016. (Attachment 1 – Letter from Department of Education) The DOE based its recertification denial largely on CSL’s failure to meet the requirements established by its accreditor, the American Bar Association, as evidenced by the Committee’s findings and the Council’s imposition of a two-year probation due to substantial and persistent noncompliance. In addition, the Department of Education cited substantial misrepresentations by Charlotte School of Law regarding the status of its accreditation and the nature of the educational program offered by CSL.

Charlotte School of Law was provided with an opportunity to respond to the DOE’s denial of its recertification, which it did by letter requesting reconsideration dated January 5, 2017.

The Department of Education denied the request for reconsideration by letter dated January 18, 2017. Despite their inability to participate in Title IV programs, the release of a substantial number of its faculty, and a sharp reduction in its enrollment as a result of the ABA and DOE actions, Charlotte School of Law continued its academic year and held classes for spring semester 2017. (Note: On or around May 5, 2017, the DOE agreed to release the second disbursement of Title IV funds, payable to the accounts of students who had been previously approved for fall-spring loans but had only received their fall disbursement.)

Following the DOE's denial in January of the request for reconsideration, the Licensure Unit of the Board of Governors initiated a review of Charlotte School of Law's compliance with licensure requirements. (Attachment 2 – Letter from UNC General Administration) The Licensure Unit has made several requests for documentation from Charlotte School of Law, to which CSL has responded, and has met with representatives of Charlotte School of Law and CSL's counsel on several occasions.

On March 10, 2017, the North Carolina Department of Justice sent Charlotte School of Law a Civil Investigative Demand, citing concerns in light of the American Bar Association's and Department of Education's actions, as well as CSL's lack of clear communication to its students about the future of the school. (Copies of that Investigative Demand, the cover letter to the demand from the North Carolina Department of Justice, the letter sent to UNC-GA from the Department of Justice expressing "serious concerns" about "the ability of Charlotte School of Law to fulfill its commitments and provide students with an adequate education...", and the letter sent in response by UNC-GA's Senior Vice President and General Counsel are all attached to this report as Attachments 3, 4, 5, and 6, respectively.)

As part of the Licensure Unit's review of Charlotte School of Law's compliance with licensure requirements, Dr. Kimberly van Noort, Vice President for Academic Programs, Faculty, and Research at the University of North Carolina General Administration appointed a Team of Reviewers to evaluate Charlotte School of Law's compliance with the standards contained in The University of North Carolina Board of Governors' *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*. The Team of Reviewers focused on Standard 3 (Program of Study), Standard 5 (Faculty and Other Personnel Qualifications), and Standard 10 (Finance and Organization). In preparing its report,

the Reviewers reviewed and utilized the documentation and data provided by Charlotte School of Law.

STANDARD 10 of the UNC Board of Governors Rules and Standards for Licensing Nonpublic Institutions - FINANCE AND ORGANIZATION

First Tryon Advisors (“First Tryon”) conducted a comprehensive review (the “Review”) of the financial health and business model of the Charlotte School of Law (“CSL”) in relation to the Board of Governor’s *Rules and Standards*. First Tryon’s written report of its comprehensive review is provided at the end of this report as Attachment 7.

Under Standard 10 of the *Rules and Standards*, Charlotte School of Law must demonstrate to the Board’s satisfaction that CSL is “*financially sound and capable of fulfilling its commitments to students.*” The *Rules and Standards* further state that CSL must show that it possesses and maintains “*adequate financial resources to sustain its mission and purpose.*” CSL’s stated mission is “*to provide a student-centered education, that produces practice-ready lawyers and that serves underserved communities.*”

Summaries of the finance-related criteria established under the *Rules and Standards* are presented below, which serve as a guide for evaluating Charlotte School of Law’s compliance with Standard 10 of the *Rules and Standards*.

Overview of the Finance-Related Guidelines under Standard 10

- **Stability (Standard 10.A.(1))**

CSL must demonstrate to the Board’s satisfaction that CSL’s financial resources are characterized by stability that indicates the institution can maintain operational continuity for an “extended period,” which, in CSL’s case, means at least three years.

- **Adequacy (Standard 10.A.(2))**

CSL must demonstrate adequate financial support, which is determined, in part, based on an analysis of various ratios, as well as CSL’s financial policies, procedures and practices.

- **Plan for Financial Development (Standard 10.A.(3))**

CSL must demonstrate to the Board's satisfaction that CSL maintains a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution."

- **Financial Records and Audit Report (Standard 10.A.(4))**

The institution's recent financial history must demonstrate financial stability. CSL must submit financial statements, the most recent audit report, a description of any material **changes in the audit report and a detailed disclosure of legal and binding relationships** with any parent or subsidiary corporation or institution.

- **Other Criteria (Standards 10.A.(5) and 10.A.(6))**

CSL must also demonstrate to the Board's satisfaction that it maintains (1) adequate insurance to protect its financial interests and (2) a tuition guaranty bond at least equal to the maximum amount of unearned tuition held at any time during the most recent fiscal year.

First Tryon made the following findings, as set forth in more detail in Attachment 7:

1. Liquidity Concerns

As discussed in the *Put Option and Collateralized Obligations* and in the *Cash Pooling Arrangement* sections of Attachment 7 (page 2), CSL appears unable to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, as required by Standard 10.

2. Statistics and Trends

As discussed in the *Enrollment* section of Attachment 7 (pages 2-3), the uncertainty surrounding Charlotte School of Law's Title IV eligibility, its historical dependence on Title IV funding, and its status with the ABA, together with CSL's inability to forecast the impact of those factors on its enrollment, calls into question (1) the existence of a "coordinated, comprehensive, flexible financial plan" for its long-range management and (2) CSL's ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

As discussed in the *Financial Adequacy* section of Attachment 7 (pages 3-4), given CSL's declining enrollment, the data presented in this section raise concerns regarding the

adequacy, as evaluated under Standard 10, of CSL's financial support for its mission to provide a "student-centered education."

3. Going Concern Disclosures

As discussed on pages 4-5 of Attachment 7, the Going Concern Disclosures in the FY2016 Audit, along with the FY2016 Audit's disclosures regarding InfiLaw's recent inability to remain in compliance with its covenants under the Preferred Unit Purchase (PUP) and Credit Agreements, do not indicate a recent history of financial stability for CSL and its affiliates, nor do they support a finding that CSL has a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution" or the ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

4. Tuition Guaranty Bond

As discussed on page 5 of Attachment 7, Charlotte School of Law does not currently hold a tuition guaranty bond in compliance with the requirements of Standard 10. During the compliance review process, the Licensure Unit has repeatedly and consistently informed Charlotte School of Law that the failure to obtain a bond calculated according to the required formula constitutes continued noncompliance with state licensing requirements. To date, although CSL has placed money in escrow to hold students harmless in the event of closure, CSL has not obtained a proper bond.

To date, Charlotte School of Law also has not provided information sufficient to establish the "maximum amount of prepaid tuition held ... at any time" during the fiscal year ended July 31, 2016 in the manner prescribed under Standard 10, nor has CSL provided a statement from an independent certified public accountant stating that the existing principal amount of its tuition guaranty bond is at least equal to such amount, as required by Standard 10.

STANDARD 3 - of the UNC Board of Governors Rules and Standards for Licensing Nonpublic Institutions - PROGRAM OF STUDY

Paul Kurtz, Associate Dean & Professor Emeritus, University of Georgia School of Law, reviewed Charlotte School of Law's compliance with Standards 3 and 5 of the *Rules and Standards*. As in previous licensure reviews of CSL, the *Rules and Standards* were supplemented by the American Bar Association's standards (chapters) as follows: Standard 3

(Program of Study) by Chapter 3, Program of Legal Education; and Standard 5 (Faculty and Other Personnel Qualifications) by Chapter 4, the Faculty. Dean Kurtz's written report is attached hereto as Attachment 8.

As stated in Standard 3 of the *Rules and Standards*, "*The program of study offered by an institution must reflect and support the mission of the institution and achieve the stated objectives.*" Furthermore, "*The institution shall have an academic curriculum that is designed to reasonably and adequately achieve its mission and educational objectives.*"

As presented in the Introduction to this report, and as discussed in more detail in Attachment 6, the American Bar Association (ABA) concluded in its most recent review that Charlotte School of Law is not in compliance with Standards 301(a), 501(a), 501(b), and Interpretation 501-1 of the *ABA Standards and Rules of Procedure for Approval of Law Schools* (hereinafter *ABA Standards*). The ABA's findings of CSL's noncompliance with these four standards are discussed in more detail in Attachment 8, pages 13-18 and 26-28.

A brief summary of some of Dean Kurtz's major findings, as set forth in Attachment 6, are provided below.

One of the ABA Accreditation Committee's findings concerning Charlotte School of Law, in Finding (12) (p. 4, Accreditation Committee Decision, January, 2016) focused on bar passage rates:

The first-time bar passage differential has been worsening over the past few years, and the Law School has been taking measures to address the issue. The 2013 calendar year had a differential rate between the relevant state averages and the Law School average of -8.7 [%]; 2014 was -12.2 [%]; and 2015 was -18.4 [%]. Given the [declining performance of entering classes on the Law School Admissions Test] the bar passage rates might continue to be 15 points or more below [the relevant state averages].

Recent data obtained by the Reviewers from the North Carolina Attorney General's Office indicates that the negative trend identified by the ABA has continued to worsen, as the first-time bar passage differential for CSL students for the February, 2016 test was -16.4%, and the parallel number for the July, 2016 test was -20.70%, and for February, 2017 was -19.44%.

In its January, 2016 decision the Accreditation Committee concluded, on the basis of Finding (12) and findings dealing with bar preparation, curriculum, writing requirements, and other items, that Charlotte School of Law had not demonstrated compliance with Standard

301's mandate of a "rigorous program of legal education that prepares its students...for admission to the bar....." The Committee then asked the school to provide, by May 1, 2016, a report demonstrating compliance with Standard 301. CSL filed the requested report in May and appeared at a hearing before the Accreditation Committee in June, 2016. The Accreditation Committee's decision was issued in July, 2016.

After again finding Charlotte School of Law not in compliance with Standard 301, the Accreditation Committee concluded its decision of July, 2016 with a list of five remedial actions, including the submission of a "reliable plan" for "bringing the Law School into compliance with Standard() 301(a)...." (Accreditation Committee Decision of July, 2016 (p. 12)).

The school appealed the Accreditation Committee's decision to the Council of the ABA Section on Legal Education and Admissions to the Bar. The Council's resolution of the appeal, issued on November 14, 2016, affirmed the findings and conclusions of the Accreditation Committee and added an additional sanction. Because of what it concluded were "substantial and persistent" violations of these Standards, the Council placed the school on probation for two years and required the school to publicize this fact to all of its students and to place a notice of the probation on its website.

In December, 2016, Charlotte School of Law submitted to the Accreditation Committee a 38-page "reliable plan" for remedying its violations of the ABA Standards. The document identified five major goals.

In addition to restructuring the J.D. curriculum and bar preparation programs (Goals 2 and 3), the fundamental objective of this plan is the improvement of the quality of student being enrolled (Goal 1). The first stated goal of the "reliable plan" is to "[r]apidly increas[e] entering class academic indicators, particularly the LSAT profile." While this is a worthy goal, the Plan, other than including charts showing projected gradual increases in LSAT scores for the entering classes over the next several years to a level "comparable to those of earlier entering classes...before bar passage rates began to decline," offers no clear explanation of exactly how this goal will be achieved. In fact, the plan itself seems to acknowledge the difficulty of achieving this goal in light of the school's current probationary status with the ABA and the Department of Education's termination of Title IV eligibility for student loans (see Note 2 of the Reliable Plan, at page 5). Getting better-qualified students to enroll in the school while it is on

probation and while the ability to secure federal loans is at best uncertain and will be a significant challenge.

Furthermore, the school's ABA Annual Questionnaire filed in the fall of 2016 shows the 25th percentile of the entering class' LSAT scores to be 141, the 50th percentile as 144, and 75th percentile as 148. According to the projections in the "Reliable Plan," CSL hopes these numbers will be 145-46/149/151-152, respectively, for the class entering in August, 2018 (Reliable Plan, p. 6). This is an extremely ambitious goal for a two-year period, especially in the current environment of CSL in particular and of legal education in general. The only change to the admissions methodology identified in the Plan, however, is to require those students with LSAT scores of 142 or 143 to have an interview with two individuals, at least one of whom will be a member of the Faculty Admissions Team. CSL explains that the goal of the interview will be to determine "whether the candidate is qualified for admission despite the lower LSAT" (Reliable Plan, p. 10). This would seem to be at cross-purposes with the goal of raising the LSAT credentials of the entering class.

There are brief mentions of smaller class sizes and "generous scholarships to admitted students that are highly competitive, based on market analysis" (Id. at pp. 12, 13). As discussed in the *Financial Adequacy* section of Attachment 7 (pages 3-4) however, Charlotte School of Law's educational expenditures per student dipped more than 25% in 2016. Further, educational expenditures as a percentage of total expenditures have fallen in each of the past four years, while institutional support and management fees have risen from 30.9% of total expenditures in FY2012 to nearly half of total expenditures in FY2016. The Plan does not address what sources of funding might be available to pay for the smaller class sizes and "generous scholarships."

The asserted relationship between the Plan's goals of effectively "managing academic attrition," (Goal 4) and attracting highly qualified University of New Haven students to the CSL (Goal 5) and the improvement of bar passage rates can be examined by a reading of the Plan (pp. 31-38). As explained in the Plan, the strategy of Goal 4 is designed, at least in part, to "minimiz[e] the debt of unsuccessful law students (Plan, p. 3)." What this means in practice is a stricter grading curve which will result in the academic exclusion of more students and a winnowing of likely unsuccessful candidates for the bar examination upon graduation. The

stricter grading curve has already been implemented, beginning Fall 2015 (Plan, p. 32). The stricter grading curve, of course, will likely lead to lower retention rates during this period of critically low enrollment for CSL.

Because of the very ambitious nature of the Reliable Plan and the lack of details demonstrating that its goals can be met, the Reviewers are cautious about whether the Plan can be successfully implemented in an expedited period of time. Given Charlotte School of Law's perilous financial situation as discussed in Attachment 7, and given the reservations about whether the Reliable Plan can be successfully implemented quickly enough, the Reviewers are not optimistic about CSL's ability moving forward to maintain compliance with the requirements of Standard 3.

STANDARD 5 of the UNC Board of Governors Rules and Standards for Licensing Nonpublic Institutions - FACULTY AND OTHER PERSONNEL QUALIFICATIONS

A description of the quality of the Charlotte School of Law faculty is presented on pages 19-26 of Attachment 8.

FINDINGS OF THE REVIEWERS

For the detailed reasons presented in Attachment 7 and in Standard 10 of this report, the Reviewers find Charlotte School of Law not in compliance with the following Standards:

1. Standard 10.A.(1): Stability

Charlotte School of Law has not demonstrated that its financial resources are characterized by stability that indicates the institution is capable of maintaining operational continuity for an "extended period," which, in CSL's case, means at least three years.

2. Standard 10.A.(3): Plan for Financial Development

Charlotte School of Law has not demonstrated that it maintains a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution."

3. Standard 10.A.(4): Financial Records and Audit Report

Charlotte School of Law's recent financial history does not demonstrate financial stability.

4. Standard 10.A.(6): Bonding

Charlotte School of Law has not demonstrated that it maintains a tuition guaranty bond of not less than \$10,000 and at least equal to or higher than the maximum amount of prepaid tuition held (i.e., unearned tuition held) existing at any time during the most recent fiscal year.

5. Standards 3 and 5

While the Reviewers make no findings specific to compliance with Standards 3 and 5, the Reviewers observe that Charlotte School of Law's objectives for addressing the issues essential to compliance with Standard 3 are not supported by detailed, feasible plans for achieving those objectives. Moreover, the steps necessary to achieve the objectives identified by Charlotte School of Law would likely worsen Charlotte School of Law's financial stability.



DEC 19 2016

Mr. Chidi Ogene
President
Charlotte School of Law
201 South College Street, Suite #400
Charlotte, NC 28244

Sent Via UPS
Tracking #: 1Z37X7Y30198482316

Re: Denial of Recertification Application to Participate in the Federal Student Financial Assistance Programs – Charlotte School of Law, 201 South College Street, Suite #400, Charlotte, NC 28244; OPEID 04143500.

Dear Mr. Ogene:

The U.S. Department of Education (Department) has reviewed the application for recertification submitted by Charlotte School of Law (CSL) to continue to participate in the student financial assistance programs authorized pursuant to Title IV of the Higher Education Act (HEA) of 1965, as amended, 20 U.S.C. §§ 1070 *et seq.* (Title IV programs). CSL's most recent Program Participation Agreement (PPA) expired on June 30, 2015. CSL, however, timely submitted its recertification application prior to that date. As a result, the Department extended CSL's PPA on a month-to-month basis while evaluating the application and related matters. *See* 34 C.F.R. § 668.13(b)(2). This notice is to inform you that the Department has concluded its review and hereby denies CSL's application for continued participation. CSL's participation in Title IV programs will therefore conclude at the end of this month, on December 31, 2016.

For purposes of evaluating a recertification application, the Department reviews an institution's performance as a participant in the Title IV programs and must ensure that the institution has met the standards of administrative capability and financial responsibility, has complied with Title IV program requirements, and has operated under the high standards of care, trust, and diligence required of a fiduciary. A denial of an institution's recertification application is warranted if the Department determines that the institution does not meet all requirements and standards set forth in Title IV and regulations issued thereunder. HEA § 498, 20 U.S.C. § 1099c; 34 C.F.R. § 668.13.

In reaching a decision on CSL's recertification application, the Department reviewed all materials submitted by CSL in support of its application. The Department also reviewed other relevant documents and information, including but not limited to the institution's history as a participant in the Title IV programs and documents associated with the actions taken by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar

Federal Student Aid
An Office of the U.S. Department of Education

Administrative Actions and Appeals Service Group
830 First St., N.E. Washington, D.C. 20002-8003
StudentAid.gov

ED-19-1146, 19-1148, 19-1149-A-000495
ED 19-02226-F 0201

Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association (the Council) and the Accreditation Committee of the Council (Committee). Collectively, the Council and the Committee will be referred to herein as the ABA.

CSL was founded in 2004 as a member institution of The InfiLaw System, a consortium of for-profit law schools that includes Florida Coastal School of Law and Arizona Summit Law School. Each of the three InfiLaw schools is owned by InfiLaw Holding, LLC. According to the InfiLaw schools, nearly all of the voting units of InfiLaw Holding, LLC are held by Sterling Capital Partners, L.P. The ABA provisionally approved CSL in 2008 and granted full approval in 2011. CSL first began participating in the Title IV programs through its execution of a provisional PPA in February 2009. CSL executed its most recent PPA in July 2011.

As a participating institution in Title IV, HEA programs, CSL drew \$ 65,238,752 in Title IV funds during the 2014-15 award year and \$48,537,250 for the 2015-16 award year. With respect to the 2015-16 award year, those funds included \$29,434,902 in Direct, Graduate PLUS loans and \$19,102,348 in Direct Stafford Unsubsidized loans. During this same award year, CSL enrolled 946 students who received Title IV aid. For purposes of its participation in Title IV programs, the school is approved only to offer a juris doctor program.

As described below, the ABA has determined that CSL is, and has been, out of compliance with certain ABA standards and that this noncompliance was “substantial” and “persistent.” CSL also made substantial misrepresentations regarding the nature of its academic program in violation of the prohibition on substantial misrepresentations. 34 C.F.R Part 668, Subpart F. For the reasons discussed below, CSL’s noncompliance with its accreditor’s standards constitutes an independent basis for the Secretary to deny CSL’s application for recertification, as does each of CSL’s substantial misrepresentations. *See generally* HEA § 498, 20 U.S.C. § 1099c; 34 C.F.R. § 668.13.

Due to this denial, CSL is no longer eligible to participate in the Title IV programs, effective December 31, 2016. *See* 34 C.F.R. § 668.13(b)(2). This includes all Title IV programs listed on CSL’s most current Eligibility and Certification Approval Report, including: Federal Work-Study (FWS), Federal Perkins Loan (Perkins Loan), and William D. Ford Federal Direct Loan (Direct Loan) programs. The Direct Loan program includes the Federal Direct Unsubsidized Stafford/Ford Loan program and the Federal Direct PLUS Program.

CSL Violated the HEA, the Department’s Regulations and its PPA by Failing to Meet the Requirements Established by its Nationally Recognized Accreditor

As a condition of eligibility to participate in Title IV programs, an institution must be accredited by an accreditor recognized by the Secretary. HEA §§ 101, 102(a)(1)(A), 102(b)(1)(D), 20 U.S.C. §§ 1001, 1002(a)(1)(A), 1002(b)(1)(D). *See also* 34 C.F.R. § 600.5(a)(6). In addition to that eligibility requirement, as a separate condition of initial and continued participation, an institution must “meet the requirements established by” its accreditor. HEA § 487(a)(21), 20 U.S.C. § 1094(a)(21). Under Part H of Title IV, all accrediting agencies are required to have, apply, and enforce standards for accredited institutions of higher education. *See* HEA §§ 496(a)(4)-(6), 20 U.S.C. §§ 1099b(a)(4)-(6) (including the requirement that accrediting agencies

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standards for an institution of higher education or program to be accredited”). *See also* 34 C.F.R. § 668.14(b)(23) (noting that “[b]y entering into a program participation agreement, an institution agrees that ... [i]t will meet the requirements established pursuant to part H of Title IV of the HEA by the Secretary and nationally recognized accrediting agencies”). In its PPA, CSL expressly agreed to this latter condition, certifying that it would meet the requirements set by its accreditor pursuant to Part H of Title IV. PPA at 5 ¶ 23.

Between March 16 and 19, 2014, an ABA “site team” conducted an on-site Three-Year Interval evaluation of CSL. During the course of this site visit, the team met with Rick Inatome (CEO of InfiLaw Holding, LLC), Jay Conison (Dean of CSL), Don Lively (then-President of CSL), numerous CSL administrators, members of the institution’s accreditation self-study Committee, CSL faculty, CSL staff, and CSL students. Members of the site team also visited a significant majority of the classes taught during its visit.

On September 15, 2014, the ABA provided CSL with a 72-page Inspection Report (Report) and invited the school to provide comments and note factual errors. The ABA informed CSL that the Report would provide the basis for its determination on whether CSL’s programs were operating in compliance with the ABA Standards for the Approval of Law Schools (Standards). Among its topics, the Report discussed CSL’s program of legal education (pp. 6-24), students (including both admissions qualifications and output metrics, including a discussion of bar passage statistics) (pp. 34-49), and financial operations (pp. 67-71). In October 2014, CSL responded in writing to the Report.

At its January 2015 meeting, the Committee reviewed both the Report and CSL’s written response. Following that meeting, the Committee issued a decision (the “First Committee Decision”) announcing that it had “reason to believe” that CSL had “not demonstrated compliance” with certain ABA standards. The Committee also “request[ed] additional information to make a determination” as to CSL’s compliance with additional standards and interpretations, including Standards 301(a), 501(a), and 501(b), and Interpretation 501-1, which are foundational to the educational enterprise and the nature of the educational program offered by CSL.¹ Those additional standards and interpretation are:

Standard 301(a): “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”

¹ As discussed *infra*, compliance with these standards is materially important to students and prospective students. Moreover, we note that versions of current Standards 301 and 501 have been in effect since the ABA first adopted and published the Standards and Rules of Procedures in 1973. Even as the ABA has amended its standards and interpretations, such amendments have highlighted the importance of these particular standards. For example, in a recent revision of Standard 301(a), effective for the 2014-15 year, the ABA moved the word “rigorous” from an interpretation to a standard (as it now exists in the language above) to “place[]upfront” the importance of the program of legal education. *See* ABA Section of Legal Education and Admission to the Bar Explanation of Changes (April 2014) (available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/201404_src_meeting_materials_proposed_standards.authcheckdam.pdf). In that same revision, the ABA also expanded the scope of former Interpretation 501-3 and renumbered it as current Interpretation 501-1 (shown above), highlighting the importance of this particular interpretation.

Standard 501(a): “A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.”

Standard 501(b): “A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”

Interpretation 501-1: “Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.”

In December 2015, CSL provided the additional information requested by the Committee. On February 3, 2016, the Committee issued its second decision regarding CSL (the “Second Committee Decision”). In this decision, the Committee made twenty factual findings, thirteen of which pertained to the Committee’s request for additional information to determine CSL’s compliance with Standards 301(a), 501(a), and 501(b) and Interpretation 501-1. Although the Committee concluded that CSL was in compliance with the particular standards that previously led the Committee to assert its “reason to believe” that CSL was noncompliant with those standards, the Committee concluded that CSL was “not in compliance” with other standards, specifically with:

Standards 301(a), 501(a), 501(b), and Interpretation 501-1, in that the Law School has not demonstrated that it is maintaining a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession; maintaining sound admissions policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education; or is admitting applicants who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.

Second Committee Decision at 6 (citing Findings of Fact 8-20).

In the Second Committee Decision, the Committee also requested that CSL provide additional information consisting generally of “all relevant information necessary to demonstrate compliance” with Standards 301(a), 501(a), and 501(b), as well as specific information about students “between and including the fall 2010 entering class and the spring (May) 2016 entering class” that would show, with respect to individual students who had LSAT scores or undergraduate GPAs at or below CSL’s 25th and 50th percentiles, enrollment status (including attrition information) and bar passage information.² The Committee also requested that CSL’s

² ABA Interpretation 501-1 establishes that academic and admission test credentials, attrition rates, and bar passage rates are among the factors considered when the ABA assesses compliance with Standard 501.

President and Dean appear before its June 2016 hearing, the purpose of which was “to determine whether to impose sanctions in connection with the Law School’s noncompliance with the Standards.” Second Committee Decision at 7.

In May 2016, CSL submitted a 62-page report, later described by CSL as “very comprehensive,”³ accompanied by 29 pages of student-specific information, which, taken together, the school claimed “show[s] that the School of Law is in compliance with Standards 301(a), 501(a), and 501(b), and Interpretation 501-1.” On June 23, 2016, the Committee held a hearing at which you and Dean Jay Conison appeared, along with CSL’s Associate Dean for Academics, Associate Dean for Enrollment Management, and Shared Services Director of Bar Preparation.

Following that hearing, in July 2016, the Committee issued another decision (the “Third Committee Decision”) again finding CSL to be out of compliance with Standards 301(a), 501(a), and 501(b) and Interpretation 501-1. In this decision, the Committee also announced its conclusion that “the issues of non-compliance with Standards 301(a), 501(a), and 501(b), and Interpretation 501-1 *are substantial and have been persistent.*” Third Committee Decision at 12 (emphasis added). The Committee also found that CSL’s “plans for bringing itself into compliance with the Standards have not proven effective or reliable.” *Id.*

The Third Committee Decision was expressly based on 44 factual findings, on topics such as admissions, programming for admitted students, mentoring and related opportunities, the writing program, academic support, faculty, summer and intersession changes, attrition, bar preparation during law school, post-graduation bar preparation, and bar examinations. Among its factual findings, the Committee concluded:

- With respect to CSL’s admissions policies, “[i]t was not clear to the Committee how [CSL’s] admission practices demonstrate that applicants with low academic and admission test credentials appear capable of completing the Law School’s program of legal education and being admitted to the bar.” (Finding 11)
- “Attrition for the 25th and 50th percentile LSAT individuals for those who started in 2010 was 13%. It rose to 14% for those who started in 2011; 15% for those who started in 2012; 20% for those who started in 2013; 35% for those who started in 2014; and 24% for those who started in 2015. At the hearing, the Associate Dean for Academics indicated that 74 first-year students out of a class of 223 (33%) that began studies in the fall of 2015 were academically attrited in December 2015. In May 2016, 26 students attrited, with 21 of them being spring semester starts of the entering class of 77 (27%). *This attrition is substantial and suggests that the Law School’s admissions process is not*

³

See June 23, 2016 ABA Committee Hearing Transcript at 9:10-11 (Conison).

as predictive of academic success as it might be. The attrition target range for 2016-17 is 13%-17%” (Finding 23) (emphasis added).⁴

- “The Law School’s bar passage rates ... remain *low, often significantly so.*” (Finding 41) (emphasis added).
- “For the February 2016 bar examination in North Carolina, the state first-time pass rate for first-time takers was 51.1%. The Law School’s first-time February 2016 rate was 34.7% (75 takers), which placed it fifth in the state. This deviation is *more than 15 points*

⁴ This finding is consistent with data made public by the ABA, which requires institutions to report attrition each year and to categorize the type of attrition. In the reports submitted to, and made publicly available by, the ABA, CSL reported that:

- 49.2% (or 174 out of 354 students) of first-year CSL students left due to attrition as reported for 2016. As reported for 2015, 44.6% (or 203 out of 455 students) of first-year CSL students left due to attrition.
- Of the 174 first-year CSL students who attrited as reported for 2016, 130 students (or more than 36% of the entering class) left due to academic attrition. Similarly, as reported in 2015, of the 203 first-year CSL students who attrited, 121 students (or more than 25% of the entering class) left due to academic attrition.
- Of the 208 law schools accredited by the ABA as reported for 2016, CSL has the largest number (130) and highest percentage (36.7%) of first-year students attriting for academic reasons. (The school with the second highest number of first-year students leaving for academic reasons was InfiLaw’s Florida Coastal School of Law with 77 students.) CSL also had the largest number (174) and highest percentage (49.2%) of total first-year attrition.

See Standard 509 Information Report for Charlotte School of Law & “All Schools Data” compilation report for 2015 & 2016. (Available at <http://www.abarequireddisclosures.org>). In addition to the 2015 & 2016 figures, data submitted to and made publicly available by the ABA establishes that both the total attrition percentage and the academic attrition percentage of CSL students have been increasing in recent years. According to the ABA:

ABA REPORT YEAR	CSL 1 ST YEAR TOTAL ATTRITION %	CSL 1 ST YEAR ACADEMIC ATTRITION %
2016	49.2%	36.7%
2015	44.6%	26.6%
2014	32.1%	18.3%
2013	22.6%	8.34%

See Standard 509 Information Reports for Years 2013-2016 (available at <http://www.abarequireddisclosures.org/>). The ABA’s reports show the percentage of total attrition and raw numbers of the various types of attrition. The percentage of first year academic attrition was calculated by applying the percentage of academic attrition to the total attrition percentage. Academic attrition is defined by the ABA as referring to “those students who discontinued their education at a time when they were not in good academic standing (typically a g.p.a. below 2.0). It includes both students who have been dismissed because they did not satisfy the minimum standards of progress established by the law school in order to continue their legal studies at that school, and students who discontinued their enrollment at the school at a time when their g.p.a was below that required for good academic standing as of the end of the first year.” 2016 Annual Questionnaire Instructions Part II Admissions & Enrollment Information (available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_aq_part2.authcheckdam.pdf).

*below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.” (Finding 42) (emphasis added).*⁵

- The Law School’s ultimate bar passage rates were in compliance for 2011, 2012, and 2013. The school “may be in compliance for 2014, but the 17% missing or never passed could affect that compliance. It is *not in compliance for 2015 at this point, with 43% either missing or never [having] passed the bar.*” (Finding 44) (emphasis added).

In the Third Committee Decision, the Committee also directed CSL to take a series of remedial actions, including developing and submitting, by September 1, 2016, a plan to come into compliance with the Standards. The Committee further required CSL to supply the Committee with additional data and information, required CSL to disclose the Committee’s decision to students and the public, and provided for the appointment of a fact finder to review an array of topics, including CSL’s admissions policies, academic rigor, bar examination results, student loan default rates, and graduate employment outcomes.

In August 2016, CSL appealed aspects of the Third Committee Decision to the Council and, on October 21, 2016, the Council held a hearing at which you and Dean Conison testified on CSL’s behalf. At that hearing, Dean Conison testified that CSL is “not appealing that conclusion of noncompliance with Standards 301 and 501,” despite the school’s “disappointment” with the conclusion. Oct. 21, 2016 Council Hearing Transcript at 7:2-6 (Conison). CSL did, however, through Dean Conison, make four requests of the Council, that the Council (1) overturn the Committee’s finding that CSL’s noncompliance was “substantial and persistent”; (2) eliminate the requirement that CSL publicly disclose the findings of noncompliance or, in the alternative, delay such disclosure for one year; (3) start the two-year remediation period in July 2016, rather than in February 2016; and (4) provide “greater clarity” as to what was expected of CSL. *Id.* at 17:11-25.

On November 14, 2016, the Council issued a decision (the “Council Decision”) informing CSL that it had reviewed the Third Committee Decision, all material considered by the Committee in rendering that decision, the August 2016 appeal letter, a subsequent submission made by CSL on October 4, 2016, and the transcript of the October 21, 2016 hearing. After reviewing that record, the Council concluded, for the same reasons stated by the Committee, that CSL was “not in compliance” with Standards 301(a), 501(a), and 501(b), that the issues of noncompliance with these standards “are substantial and have been persistent,” and that CSL’s “plans for bringing itself into compliance with the Standards have not proven effective or reliable.” The Council

⁵ Here too, the ABA’s findings are consistent with publicly available data. For example, in July 2016, 45.2% of CSL graduates who took the North Carolina bar exam for the first time passed. The statewide average, including CSL and repeat takers who were unsuccessful on their first attempt, was 65.9%, almost 50% higher. See <http://www.charlottelaw.edu/gainful-employment-aba-required-disclosures.html> (last visited December 1, 2016). The Department also notes that, although CSL’s first-time bar passage rates for the North Carolina Bar increased between February and July 2016, the rates have trended downward since July 2010, and the July 2016 first time passage rate remains below the July 2015 rate.

ordered remedial actions, including public disclosure, and placed CSL on probation, effective November 14, 2016.⁶

The facts recited above make clear that on three separate occasions, in February 2016, July 2016, and November 2016, the ABA announced its determination that CSL was out of compliance with ABA Standards 301(a), 501(a), and 501(b), and Interpretation 501-1. CSL has conceded the noncompliance findings and certain remedial requirements. Per ABA Rule of Procedure for Approval of Law Schools No. 4, the ABA Appeals Panel does not have authority to consider an appeal of the Council Decision, thus rendering that decision final. Each of these decisions was made after the ABA provided CSL notice and an opportunity to submit evidence. The decisions announced in July 2016 and November 2016 were made after CSL officials presented testimony to the Committee and Council, respectively.

In reviewing this matter, the Department carefully considered the extent of process that the ABA afforded the institution when making its determinations, including the numerous opportunities CSL was given to present evidence and provide testimony. The Department also considered the particular accreditation standards that CSL was found to be noncompliant with, *see supra* 3-4 & n.1, the nature of those standards, the fact that the ABA found the noncompliance to be both “substantial” and persistent,” the fact that the ABA found CSL’s “plans for bringing itself into compliance with the Standards have not proven effective or reliable,” the fact that ABA believed the noncompliance to be so severe as to merit placing the institution on probation,⁷ corroborative evidence of the noncompliance, *see supra* at n.4 – n.5, and the institution’s administrative capability and fiduciary conduct.

After concluding the review, and based on the particular facts set out herein, the Department finds that CSL’s statutory, regulatory, and contractual failure to “meet the requirements” established by the ABA is of sufficient severity to merit the denial of recertification.⁸

⁶ See Letter from B. Currier, ABA Managing Director of Accreditation and Legal Education to C. Ogene & J. Conison (Nov. 14, 2016), attaching the Council Decision. The Council Decision is publicly available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/PublicNoticeAnnouncements/2016_november_charlotte_probation_public_notice.pdf.

⁷ Not only is the probation sanction the most severe sanction that can be imposed by the ABA, short of withdrawal of accreditation, *see* ABA Standards & Rules of Procedure for Approval of Law Schools at Rule 16(b)-(c), the Department is unaware of any instance in the last 10 years which the ABA has placed an accredited law school on probation.

⁸ The Department’s denial of CSL’s application for recertification should not be read to suggest that the Department will reach the same conclusion each time an accreditor finds an institution noncompliant with the accreditor’s standard. As it did in this case, the Department will continue to review, in the context of a recertification application, any finding of noncompliance by an institution’s accreditor in light of the specific facts regarding that finding, other relevant facts regarding the institution under review, and the appropriate statutory and regulatory standards.

CSL Breached its Fiduciary Duty to the Department and Demonstrated a Lack of Administrative Capability by Substantially Misrepresenting the Nature of its Educational Program

Through its PPA, CSL agreed to comply with all conditions specified therein, including compliance with all Title IV, HEA program requirements. *See also* 20 U.S.C. § 1094(a)(1); 34 C.F.R. § 668.14. By entering into the PPA, CSL and its officers also accepted fiduciary responsibility in the administration of the Title IV programs. 34 C.F.R. § 668.82(a). As fiduciaries, an institution and its officers must act with the highest standard of care and diligence in administering the Title IV programs and in accounting to the Secretary for the funds received. 34 C.F.R. §§ 668.82(a), (b). This standard of care and diligence includes prohibitions against substantial representations by an institution's officers or employees. *See e.g., In re Warnborough College*, Dkt Nos. 95-164-ST, 96-60-SF (Aug. 9, 1996) (finding an institution in violation of the required fiduciary standard due to its failure to properly oversee an employee who made substantial misrepresentations to students, and holding the institution responsible for that employee's misrepresentations). Additionally, in order to "continue participating" in any Title IV program, a school must be "capable of adequately administering that program." 34 C.F.R. § 668.16. A school is not considered to have such administrative capability if it fails to "administer[] the Title IV, HEA programs in accordance with all statutory provisions of or applicable to Title IV of the HEA" and "all applicable regulatory provisions prescribed under that authority." 34 C.F.R. § 668.16(a).

Under the Department's regulations, "[s]ubstantial misrepresentations are prohibited in all forms," 34 C.F.R. § 668.71(b), and the Department may deny institutional participation applications, including recertification applications, when it determines that an institution has engaged in a substantial misrepresentation. 34 C.F.R. § 668.71(a)(3). A "misrepresentation" is:

[a]ny false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to deceive. A statement is any communication made in writing, visually, orally, or through other means.

34 C.F.R. § 668.71(c).

A "substantial misrepresentation" is "any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment." *Id.* Substantial misrepresentations include misrepresentations made by the institution itself, or one of its representatives, regarding the nature of the institution's academic programs or the employability of its graduates. 34 C.F.R. § 668.71(b). Substantial misrepresentations involving

the nature of an institution's education program include misrepresentations concerning the "nature and extent" of the institution's accreditation and the "availability, frequency, and appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet." 34 C.F.R. §§ 668.72(a), (g). Substantial misrepresentations regarding the employability of an institution's graduates include misrepresentations regarding "requirements that are generally needed to be employed in the fields for which training is provided." 34 C.F.R. § 668.74(f). Each substantial misrepresentation serves as an independent ground for the Department to deny an institution's recertification application.

The Department's review established that CSL substantially misrepresented to students and prospective students the "nature and extent" of CSL's accreditation and the "appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet." 34 C.F.R. §§ 668.72(a), (g). As set forth above, since February 2016, CSL has been found to be out of compliance with ABA Standards 301(a), 501(a), and 501(b), and Interpretation 501-1. These standards are foundational to the educational enterprise insofar as they speak to whether the school "maintain[s] a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession," (Standard 301(a)); whether the school "maintains sound admission policies" that are "consistent with the Standards, [the school's] mission, and the objectives of [the school's] program of legal education" (Standard 501(a)); and whether the school refrains from admitting applicants "who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar" (Standard 501(b)).

In February 2016, the ABA first concluded that CSL was out of compliance with the standards and interpretation discussed above. However, neither CSL nor the ABA publicly disclosed this fact until November 2016, when the ABA first announced that CSL was being placed on probation. Prior to the ABA's November 2016 announcement, the Department was unaware of *any* public statements that would have informed a student or prospective student that the ABA had found the school to be out of compliance with the Standards, or that the ABA had determined that CSL had "not demonstrated that it is maintaining a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession." Second Committee Decision at 6, Third Committee Decision at 12, Council Decision at 2. Nor is the Department aware of any statement or disclosure during that period by CSL that the ABA had determined that the school was "admitting applicants who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar." *Id.*

In contrast, beginning no later than February 2016 and continuing at least until December 2016, CSL made public statements to students and prospective students that constitute misrepresentations regarding the nature of the educational program that CSL offered.

First, CSL promoted, and continues to promote, on its website that it "has been awarded full accreditation" by the ABA in 2011, which required the school to "ha[ve] established *full compliance with each of the ABA's standards*, including standards *relating to bar passage*, job

placement and diversity.”⁹ In the same section, CSL promoted, and continues to promote, that, although it had received only provisional approval by the ABA in 2008, the Council had determined in June 2011 that CSL was “in full compliance with the ABA Standards for Approval of Law Schools.” A student or prospective student could reasonably read these statements and conclude that the 2011 finding of “full compliance” by the ABA was the final word as to the institution’s compliance with the ABA’s accreditation standards. This is particularly true because the school disclosed prior accreditation events, such as its initial “provisional” approval. Accordingly, beginning in February 2016, when the Committee determined that CSL was “not in compliance” with Standards 301(a), 501(a), and 501(b) and Interpretation 501-1, the above-mentioned statements were misleading insofar as they had the likelihood or tendency to deceive reasonable students and prospective students about the current status, nature, and extent of CSL’s accreditation. The misrepresentation became even more pronounced in July 2016 when the Committee again notified CSL of its noncompliance and also found that the noncompliance was “substantial” and “persistent.” Although the school appealed the July 2016 determination as to the findings of the “substantial” and “persistent” nature of the noncompliance, the school did not appeal the finding of noncompliance itself. Nonetheless, the school did not amend, update, or otherwise correct its continuing and misleading representation on its website.

Second, CSL promoted, and continues to promote, on its website to students and prospective students (under the heading “Practical Preparation is Critical”) that it “created” a “rigorous curriculum ... to ensure that [CSL] students are equipped with practical skills that will allow them to thrive in a professional setting.” See Enclosure 1. This statement appears directly beneath the section of the webpage in which CSL promotes its “full compliance” with ABA standards, which includes Standard 301(a), which provides that law schools should maintain a “rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” In this context, CSL’s promotion of its “rigorous curriculum” is misleading insofar as: (1) as described above, the ABA has specifically and repeatedly concluded that CSL has not maintained a “rigorous” program of legal education, that its failures in this regard are “substantial” and “persistent,” and that CSL’s plans to come into compliance with that standard have not proven effective or reliable; and (2) the positioning of CSL’s description of its curriculum as “rigorous” directly beneath the discussion of compliance with the ABA standards (which use the word “rigorous” to describe what is expected of a compliant program) has the likelihood or tendency to leave students and prospective students with the false impression that CSL was compliant with that very requirement by the ABA.

Each of these misleading statements constitutes a substantial misrepresentation because students and prospective students could reasonably be expected to rely on each of these statements to their detriment. 34 C.F.R. § 668.71(b). Indeed, CSL argued to the ABA that if students and prospective students were aware of the ABA’s findings of noncompliance, that would have a “profound impact on admissions” because: (1) knowledge of the ABA’s findings would make

⁹ See <http://www.charlottelaw.edu/our-mission.html> (last visited Dec. 16, 2016) (attached hereto as Enclosure 1) (emphasis added).

applicants “much less likely to enroll;”¹⁰ and (2) such a disclosure would “effectively tell applicants to beware of attending the Charlotte School of Law.”¹¹ In addition, CSL argued to the ABA that public disclosure of its noncompliance would “have an adverse impact on [CSL’s] ability to retain high-performing students,” because it would “inevitably create anxiety on the part of high-performing students and make their transfer more likely.” *Id.* Thus, under CSL’s own arguments, the truth about its noncompliance would have impacted the decisions made by prospective students and current students to either enroll or continue their studies at CSL.

CSL’s assertion that knowledge of noncompliance would be material to student admissions and retention decisions was not conjecture. Indeed, in the Third Committee Decision, the Committee ordered CSL to disclose to its admitted students and the public, via its webpage, a statement disclosing the ABA’s noncompliance findings and required remedial actions. As part of its appeal of this requirement, CSL commissioned (and provided to the ABA) a market study that tested the impact of disclosure on CSL applicants. The study analyzed the views of individuals with LSAT scores above 142 who had applied to one or more of the InfiLaw schools. These individuals were asked to assess the impact on the likelihood of their respective enrollment at a particular law school if acceptance materials from that school included a statement that the school failed to meet accreditation standards dealing with admissions, educational programs, and bar passage. The study concluded that approximately 3 in 4 applicants (or 74%) stated that they would be “much less likely to enroll” after reading such a statement – establishing that reasonable students were highly likely to rely on the disclosure of information regarding the accreditation failures that CSL sought to keep from public view.

Finally, the Department finds that CSL substantially misrepresented the bar passage rates of CSL graduates in an interview you had with the Charlotte Business Journal published on November 30, 2016.¹² In that interview, you stated that “[i]f you look at bar pass rates between 2009 and 2013, we were consistently *at or above* the state bar average pass rate. That is an incredible feat for a new school.” (emphasis added). However, bar passage data published on CSL’s website shows that, out of the nine sittings of the North Carolina bar exam (between July 2009 and July 2013), CSL’s first-time bar passage rate was actually *below* the state average *five times* (with a maximum differential of -13.33%) and above the state average only four times (with a maximum differential of 7.4%).¹³ Thus, your statement was false and/or misleading, particularly when you were making representations as a law school president responding to questions about an accreditor’s finding of the school’s substantial and persistent failures to prepare students for admission to the bar. Substantial misrepresentations about the success that CSL graduates have on bar examinations constitute substantial misrepresentations about both the “appropriateness of [CSL’s] courses and programs to the employment objects that [CSL] states

¹⁰ Letter from J. Conison & C. Ogene to G. Murphy, Chair, Council of the ABA Section of Legal Education & Admissions to the Bar (Oct. 4, 2016).

¹¹ Letter from J. Conison to G. Murphy (Aug. 22, 2016) (enclosing Appeal) & Appeal at 11.

¹² Jennifer Thomas, *Charlotte School of Law president talks probation, considers nonprofit status*, CHARLOTTE BUS. J., Nov. 30, 2016 available at 2016 WLNR 36711693 (Nov. 30, 2016).

¹³ Bar passage data published at: <http://www.charlottelaw.edu/gainful-employment-aba-required-disclosures.html>.

its programs are designed to meet,” 34 C.F.R. § 668.72(g), and the schools’ success in training its students to meet “requirements that are generally needed to be employed in the fields for which the training is provided,” 34 C.F.R. § 668.74(f). You either knew or reasonably should have known that this interview was to be made public and could be viewed by current or prospective students.¹⁴ Because a reasonable student or prospective student would have understood your comments to be misleading in its representation of CSL graduates’ prior success on the bar examination, these statements constituted substantial misrepresentations in violation of 34 C.F.R. § 668.71.

* * * *

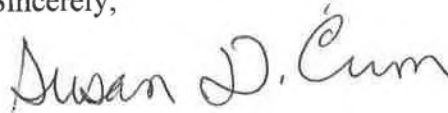
The denial of recertification will be effective on December 31, 2016. Should CSL have factual evidence to dispute the Department’s findings and demonstrate their inaccuracy, CSL may submit that evidence via overnight mail to me at the following address:

Administrative Actions and Appeals Service Group
U.S. Department of Education
Federal Student Aid/Enforcement
830 First Street, NE (UCP-3, Room 84F2)
Washington, DC 20002-8019

If any such material is received by **January 3, 2017**, the Department will review it and notify CSL whether the recertification denial will be modified, rescinded, or left in place. If the recertification denial remains in effect following the Department’s review of such submission, or if CSL opts not to make such a submission, the Multi-Regional School Participation Division will contact CSL concerning the proper procedures for closing out CSL’s Title IV program accounts.

In the event that CSL submits an application to participate in the Title IV, HEA programs in the future, that application must address the deficiencies noted in this letter. If you have any questions about this letter, you may contact Mitch Cary of my staff at (303) 844-3145.

Sincerely,



Susan D. Crim
Director
Administrative Actions and Appeals Service Group

Enclosure

cc: Rick Inatome (InfiLaw), via rinatome@infilaw.com
Jonathon Glass (Cooley LLP), via jglass@cooley.com

¹⁴ Notably, the question immediately preceding the question that elicited your statement about bar passage rates was: “What’s the message to current students?”

Barry A. Currier, Managing Director, Accreditation and Legal Education, ABA Section of Legal Education and Admissions to the Bar, via barry.currier@americanbar.org

Dr. Tim Gallimore, Associate VP for Academic Planning and State Authorization, The University of North Carolina – General Administration, via tagallimore@northcarolina.edu

Department of Defense, via osd.pentagon.ousd-p-r.mbx.vol-edu-compliance@mail.mil

Department of Veteran Affairs, via INCOMING.VBAVACO@va.gov

Consumer Financial Protection Bureau, via CFPB_ENF_Students@cfpb.gov



910 Raleigh Rd.
Chapel Hill, NC 27514

Constituent Universities

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State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

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Central University

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State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

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at Charlotte

University of
North Carolina
at Greensboro

University of
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at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

January 24, 2017

Mr. Jay Conison, Dean
Charlotte School of Law
201 South College Street
Suite 400
Charlotte, NC 28244
Email: jconison@charlottelaw.edu

Tim Gallimore, Ph.D.
**Associate Vice President for Academic
Planning and State Authorization**

Office: (919) 843-4538
Email: tagallimore@northcarolina.edu

Required Documentation of Compliance with Licensure Standards

Dear Dean Conison:

Pursuant to North Carolina General Statutes Section 116-15 and the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*, any institution that acquires licensure shall be subject at any time to review by the University of North Carolina Board of Governors to determine whether the institution continues to meet the standards for licensure.

Our discussion on January 20, 2017, along with the communications that my office has had with the U.S. Department of Education concerning its recent adverse action against the Charlotte School of Law, and a submission to the North Carolina Post-Secondary Education Complaints have raised questions about the School's compliance with the license standards.

Therefore, I am requesting that the Charlotte School of Law provide to the Licensure Division at the University of North Carolina-General Administration the documentation/information listed below to demonstrate its continued compliance with the license standards.

The documentation/information must be submitted for review no later than January 31, 2017.

Please be advised that based on staff recommendation, "Any institution holding a license to conduct post-secondary degree activity in North Carolina that is found by the Board of Governors not to satisfy these licensure requirements shall have its license to conduct post-secondary degree activity revoked by the Board."

I am available to answer any questions that you may have concerning this compliance review.

Sincerely,

Tim Gallimore

Charlotte School of Law -- Required Documentation

Current organizational chart showing any controlling entities and their relationship to the Charlotte School of Law (CSL)

List of current governing board members and their contact information

Policies and articulation agreements for transferring academic credit and copies of the policies and agreements as publicized in recruitment materials and in the institution's catalog

Description of curriculum approval procedures

Description of course approval methods

Description of course evaluation procedures

Copies of contractual agreements with other libraries

Copies of lease agreements for facilities not owned by the institution

Faculty qualifications, size, and stability (complete faculty matrix form)

Definition/description of faculty responsibilities

Description of faculty role in governance and decision-making of the School

Description of official action/procedure by which faculty is appointed

Procedure for annual evaluation of faculty

Published policies on academic freedom

Evidence/examples of ongoing professional development for faculty

Resumes showing the qualifications of all senior administrators/officers of CSL

Copy of policy and description of practices for verifying and issuing program completion credentials

Copy of policies for determining amount of credit awarded for each course

Copy of record-keeping procedures

Evidence that student attendance, progress, and performance standards are enforced

Copy of admissions policy and copies of recruitment, advertisement, and marketing materials describing that policy

Copies of policies and procedures regarding financial aid administration and distribution

Graduation and job placement rates (2014-2017) and explanation of how rates were calculated

Job placement records for students who graduated in 2014-2017 and copies of recruitment, advertising, and marketing materials mentioning CSL job placement record

Description of job placement assistance provided by CSL and copies of recruitment, advertising, and marketing materials containing that description

Description of health care services provided by CSL

Copies of counseling and guidance policies

Report of student satisfaction with all student services and education quality

Copy of annual Compliance Report

Policies and compliance record concerning the Americans with Disabilities Act

Copy of Clery Act Reporting (2014-2017)

Copy Title IX Reporting (2014-2017)

List of any significant correspondence with regulatory agencies and officials

Statement about any record of non-compliance/violations of health and safety laws/ordinances

Evidence of financial stability (current financial statement, detailed description of any material changes contained in the audit report, financial development plan)

Tuition guaranty bond – based on all current student charges & fees as well as enrollment

Signed statement/description of how the bond amount was calculated

Statement from an Independent CPA attesting to accuracy of tuition bond

Evidence of Adequate Casualty and Liability Insurance

Detailed disclosure of binding legal relationship with any parent or subsidiary corporation or institution

Plan for short-term financial management

Evidence of adequate casualty and liability insurance

Copies of policy and process for monitoring conflicts of interest

Policy describing and distinguishing administration and policy-making functions of the governing board, academic administration, and faculty

Description of the role of the governing board, academic administration, faculty, and students in determining policy and resolving issues

Institutional Effectiveness Plan

Current catalog and all required disclosures to students and the public

Copies of financial policies and procedures governing business practices

Advertising, marketing, recruiting and promotional materials

Bar examination pass rate and other indicators of student/graduates' success

Statement about ongoing and pending litigation

Description of all adverse regulatory and accreditation actions for last 3 years

Statements about any record of unprofessional conduct by School personnel

Copy of student complaint process

Record/log of student complaints for last 3 years and summary of resolution

Copies of cancellation and refund policies

Statements about any record of unprofessional conduct by vendors and contractors

Copies of policies and procedures for determining credit hours awarded in courses and programs and three examples of the application of these policies and procedures in courses and programs



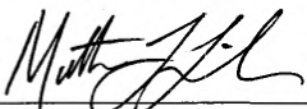
State of North Carolina
Department of Justice
INVESTIGATIVE DEMAND

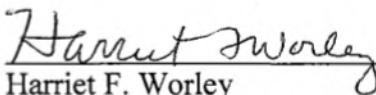
TO: Charlotte School of Law
 c/o Johnny M. Loper
 Counsel for Charlotte School of Law
 Womble Carlyle Sandridge & Rice, LLP
Via electronic mail to jloper@wcsr.com

TAKE NOTICE: YOU ARE REQUIRED to produce for inspection and copying the records set forth in the attached document production request and tender such documents to the undersigned on **March 20, 2017**, at 10:00 a.m. at the Office of the Attorney General, Consumer Protection Division, 114 W. Edenton Street, Raleigh, North Carolina, or at such other time and place to which the parties may agree. In the alternative, copies of the requested documents and answers to the questions may be delivered to the undersigned on or before the foregoing date.

Issued this 10th day of March, 2017, under my hand and seal pursuant to the authority vested in me by Section 75-10 of the General Statutes of North Carolina.

JOSH STEIN
 Attorney General of North Carolina

By: 
 Matthew L. Liles
 Assistant Attorney General


 Harriet F. Worley
 Special Deputy Attorney General
 North Carolina Department of Justice

INVESTIGATIVE DEMAND FOR PRODUCTION OF DOCUMENTS

I. DEFINITIONS

As used in this investigative demand, the following definitions shall apply:

1. "Communication(s)" means every disclosure, transfer, exchange, or transmission of information, whether oral, written, or electronic, and whether face to face, by telecommunications, computer, U.S. Mail, corporate internal mail, telecopier, telephone, text, email, facsimile machine, or otherwise.

2. "Document," unless otherwise specified, means written, computerized, programmed, recorded or graphic materials, information or data of every kind and description, including but not limited to: letters, correspondence, telegrams, facsimiles, voice mail, e-mail, memoranda, reports, studies, summaries, analyses, bulletins, circulars, advertisements, instructions, books, records, notes, records and notes of telephone or personal conversations and conferences, minutes, worksheets, contracts, charts, graphs, photographs, film, audiotape and videotape recordings, and all other data compilations or information resources from which information can be obtained or translated into reasonably usable form. "Document" includes the original of any document in whatever medium it may exist and all copies that differ in any way from the original, including the addition of any notations, underlining, markings, or electronically imbedded comments or codes. "Document" also includes information stored in, or accessible through, computer diskettes and hard drives or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations.

3. "You," "your," and "CSL" means Charlotte School of Law, LLC, and, unless otherwise noted, all of its officers, board members, members, employees, agents, representatives, parent companies, subsidiaries, predecessors, successors, assigns, and all persons acting on its behalf. Without limiting the foregoing, "you," "your," and "CSL" include any persons who were employees of other entities who were acting for the benefit of or on behalf of an educational institution or business holding itself out as "Charlotte School of Law."

II. INSTRUCTIONS

1. This Civil Investigative Demand requests production of all described documents in your possession, custody or control without regard to the person or persons by whom or for whom the documents were prepared. Unless otherwise stated, these Requests seek documents from January 1, 2014 to the present.
2. This request includes documents in possession of your employees, agents, representatives, and attorneys, unless privileged. If any document or information is withheld under claim of privilege, identify the document and state the basis for the privilege, and provide a detailed privilege log that contains at least the following information for each document or information that you have withheld:
 - a. The name of each author, writer, sender, creator, or initiator of such document;

- b. The name of each recipient, addressee, or party for whom such document was intended or to whom the document was sent;
 - c. The date of such document, or an estimate thereof if no date appears on the document;
 - d. The general subject matter of the document; and
 - e. The claimed grounds for withholding the document, including, but not limited to, the nature of any claimed privilege and grounds in support thereof.
3. These document requests impose a continuing duty to produce promptly any responsive information or item that is not objected to, which comes into your knowledge, possession, custody or control after your initial production of responses to the requests.
4. In each instance in which a document is produced in response to a request, produce the current edition, along with all earlier editions or predecessor documents serving the same function, even though the title of earlier documents may differ from current versions.
5. The following procedures shall apply to the production of documents and information in response to this Civil Investigative Demand:
 - a. The recipient of this Civil Investigative Demand shall label each responsive document (i.e., Response to Request No. 1, Response to Request No. 2, and so forth), group all documents responsive to a particular request together, and place a label on each group of documents which identifies the corresponding Request;
 - b. All attachments to responsive documents or information shall be produced with, and attached to, the responsive documents (or digitally in corresponding order);
 - c. Each responsive document or information shall be produced in its entirety and no portion of any document or information shall be edited, cut, masked, redacted or otherwise altered, unless for applicable privilege which shall be logged according to the procedures set forth above; and
 - d. The recipient of this Civil Investigative Demand shall provide a key to all abbreviations used in the documents or information and shall attach the key to the corresponding documents or information.
6. Documents or information that may be responsive to more than one numbered request in these Requests need not be submitted more than once. However, for each such document or information, the recipient of this Civil Investigative Demand shall identify all of the numbered requests to which the document or information is responsive. If any responsive document or information has been previously supplied to the North Carolina Attorney General's Office, you shall identify the document(s) or information previously provided and the date(s) of submission.
7. You shall consecutively number each page of all documents or information produced with your response and indicate the total number of pages produced with your response. This page numbering must be separate from and must not alter any original page numbering on the responsive documents or information.
8. Your responses to these requests for production should include all relevant electronically stored information in your possession, custody, or control.

9. The following procedures shall apply to the production of electronic Documents.
- A. Documents should be produced in Bates labeled single-page TIF format with associated searchable text files including extracted and OCR where applicable, together with Concordance load files (DAT and OPT). The DAT file should include the following fields: BegBates; EndBates; BegAttach; EndAttach; Request Number; Custodian; Subject; From; To; CC; BCC ; Date Sent; Time Sent; Date Received; Time Received; Original File Name; Title; Author; Date Created; Date Last Modified; Document Extension; File Size; Folder; NativeFile. Reference the appendix at the end of this document for technical descriptions of each required field.
 - B. Spreadsheet, database, audio, and video files should be produced in native format with a Bates labeled single-page slipsheet image with the message "This Document has been Produced Natively." Full image conversion for these file types is not required. If responsive data exists in non-portable databases (such as SQL, Oracle or other proprietary software), export in Comma Separated Value (CSV) text file format. If a list must be compiled to respond to a particular request because that information does not exist in the normal course of business, produce as an Excel Spreadsheet in your response to this CID.
 - C. Microsoft PowerPoint files should be converted to images to show "Slides and Notes" and to unhide hidden slides. Microsoft Word files should reveal hidden text, display Track Changes, and show comments. Responsive Documents produced in electronic format must be produced in a format that accurately captures each version and draft of the document, including handwritten notes and signatures.
 - D. The North Carolina Department of Justice may request that certain Documents be produced in native format, indicating on a document-by-document basis that the Documents are difficult to read in the produced format or contain embedded information that is potentially relevant. As such, your duty to preserve the original Documents in native format continues beyond the production of the Documents.
 - E. You shall submit electronically stored data on a generally supported storage medium. Currently supported storage media include the following: CD-readable disks formatted to ISO 9660 specifications; DVD-ROMs; USB mass storage; or delivery via secure FTP.
10. If you are unable to fully answer any particular interrogatory or request for documents, supply all of whatever information is actually available. Designate such incomplete information as incomplete and accompany the information with an explanation that includes the reasons for the incomplete answer; a description of any and all of your efforts to obtain the information; and the source from which the Office of the Attorney General may obtain information to complete your response. If books, records, or other sources that provide accurate answers are not available, provide your best estimates and describe how you derived the estimates, including the sources or bases of such estimates. Designate estimated data as such by marking it with the "est." notation. If there is no reasonable way for you to make an estimate, provide an explanation.

11. If particular documents responsive to this Civil Investigative Demand no longer exist for reasons other than the ordinary course of business but you have reason to believe they have been in existence, describe the documents, state the circumstances under which such documents were lost or destroyed, and identify persons having knowledge of the content of the documents.
12. In order for your response to this Demand to be complete, submit with your response the attached certification form, as executed by the official supervising your compliance with this Demand.

III. INFORMATION REQUESTED TO BE PRODUCED

Produce the following documents:

1. All documents, following the decision by the Accreditation Committee of the Council of the ABA Section of Legal Education and Admissions to the Bar ("ABA Accreditation Committee") to place CSL on probationary status and/or following the U.S. Department of Education's ("USDOE") decision in December 2016 to terminate CSL's participation in Title IV programs, which discussed or explained CSL's plans for continued operations or which communicated CSL's plans for continued operations to CSL students;
2. All documents describing what CSL termed "alternative financing" for CSL students, including but not limited to options referenced in the letter of January 13, 2017;
3. All documents CSL sent to current or potential CSL students, from December 19, 2016, to present, concerning the availability of Title IV funds or how their student debt may be affected by the continued operations of CSL after the loss of Title IV funds;
4. All documents explaining any plan by CSL, as referenced in CSL's January 19, 2017, statement, to credit CSL students for federal funds and what will happen to these credits if CSL's Title IV eligibility is not reinstated;
5. All promotional materials intended to be reviewed by prospective CSL students and made available by CSL to students at any time from January 1, 2016 to the present;
6. A roster of students, identified by class, currently enrolled at CSL for the 2017 Spring Semester, including identification of those who are in a position to receive a degree after successful completion of course work at the end of the 2017 Spring Semester;
7. A roster of students, identified by class, enrolled at CSL for the 2016 Fall Semester, including current e-mail addresses and any other contact information in the possession of CSL for those students;
8. A copy of CSL's course offering schedules for the 2016 Fall Semester and 2017 Spring Semester, including the names and contact information for the professors teaching those classes and the number of students enrolled in each class;
9. Copies of all complaints, whether received in written or electronic form and including any notes from telephone conversations, that CSL has received since January 1, 2016, to the present from current and past CSL students;
10. Copies of any responses by CSL to those complaints identified in Request Number 10;
11. Copies of all documents reflecting the current application process for students applying

for admission to CSL in the summer or fall of 2017;

12. All documents related to the program under which CSL financially assisted students who deferred taking the bar examination after graduation ("Deferral Program"), including but not limited to:
 - a. the total amount of financial assistance provided to students who participated in the Deferral Program;
 - b. the total number of students who received financial assistance under the Deferral Program;
 - c. the total number of students who participated in the Deferral Program and ultimately took a bar exam; and
 - d. the total number of students who participated in the Deferral Program and ultimately passed a bar exam;
13. All documents CSL gathered or created in connection with the American Bar Association's ("ABA") review of CSL's accreditation and its subsequent decision to place CSL on probation, including any documents CSL has provided to the ABA in response to the ABA's decision;
14. All documents CSL gathered or created in connection with the USDOE's decision to withdraw student funding for students attending CSL including all documents CSL has provided to USDOE while appealing its decision to withdraw funding;
15. Copies of all market studies CSL conducted, or had conducted on its behalf, concerning the impact of potential disclosures on CSL applicants, including, but not limited to, the market study discussed on page 12 of the December 19, 2016, letter USDOE sent to CSL;
16. All records of the interview Mr. Ogene had with the *Charlotte Business Journal* on or about November 30, 2016; and
17. To the extent not provided in response to Request No. 14, provide a copy of the following documents:
 - (a) The September 15, 2014, Inspection Report provided to the ABA;
 - (b) The January 2015 decision of the ABA Accreditation Committee;
 - (c) The February 3, 2016, decision the ABA Accreditation Committee issued;
 - (d) The May 2016 report CSL submitted to the ABA;
 - (e) All records of the testimony of CSL at the June 23, 2016, ABA hearing;
 - (f) The ABA Accreditation Committee's decision issued in the summer of 2016;
 - (g) All documents CSL submitted to the ABA Accreditation Committee in August and October 2016; and
 - (h) All records relating to CSL's October 2016 hearing before the ABA Accreditation Committee.

CERTIFICATION

I, _____, having made the foregoing responses to requests for production of documents, certify under penalty of perjury under the laws of the State of North Carolina, that I am authorized to sign legal documents on respondent's behalf and know the responses herein to be true, correct and complete.

Signature:

Title or Position:

Date:

City and State:

APPENDIX

Field Name	Description
BegBates	First Bates number of the document
EndBates	Last Bates number of the document
BegAttach	BegBates number of the parent document in an attachment range
EndAttach	EndBates number of the last document in an attachment range
Custodian	Individual who possessed the document in the normal course of business or the shared repository from which the document was collected
Request Number	Request number(s) to which the document is responsive. Where multiple numbers apply, separate with a semi-colon
Subject	Subject line of the email
From	Sender of the email
To	Recipient(s) of the email
CC	Carbon copy recipient(s) of the email
BCC	Blind carbon copy recipient(s) of the email
DateSent	Date on which the email was sent
TimeSent	Time the email was sent
DateRcvd	Date on which the email was received
TimeRcvd	Time the email was received
FileName	File name of the original non-email file
Title	Title metadata of non-email file
Author	Author metadata of non-email file
DateCreated	Date on which the non-email file was created
DateLastMod	Date on which the non-email file was last modified
DocExt	File extension of the non-email file
FileSize	Size of the file in bytes
Folder	For e-docs, the full path of source files. For emails/attachments, the folder path contained within a mail store
NativeFile	Hyperlink to natively produced documents

Dates should appear in MM/DD/YYYY format.



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

JOSH STEIN
ATTORNEY GENERAL

REPLY TO: MATT LILES
Assistant Attorney General
mliles@ncdoj.gov

March 10, 2017

Mr. Chidi Ogene
President, Charlotte School of Law
201 S. College Street, Suite 400
Charlotte, NC 28244

Jay Conison, Esq.
Dean, Charlotte School of Law

Re: Civil Investigative Demand to Charlotte School of Law

Dear Mr. Ogene and Dean Conison:

We are writing concerning (1) the recent actions by the U.S. Department of Education ("USDOE") and the American Bar Association ("ABA") against Charlotte School of Law ("CSL"); and (2) in light of those actions, your decision to begin classes for the Spring Semester of 2017 after you released a substantial number of the school's faculty. We have questions about CSL's future viability and how, in turn, that affects the CSL students, many of whom have incurred substantial student debt while attending CSL. We also are concerned that CSL's statements to students have not fully apprised them of all material facts, including most recently students' options going forward and how they might best minimize that substantial debt. For these reasons, in the attached civil investigative demand, we request information concerning CSL's statements to students, CSL's interactions with the ABA and USDOE, CSL's plans for its ongoing and continued operation, and how CSL's students will be protected.

We are aware that USDOE's recent action revoked CSL's ability to receive Title IV funding. Likewise, we are aware that in the fall of 2016, the ABA put CSL on probationary status for noncompliance with the ABA's accreditation standards. The cumulative result of these actions is that CSL students cannot currently use federal funds to pay for their education at CSL. Additionally, if the ABA decides to revoke CSL's accreditation, students are in jeopardy of not graduating from an accredited law school and, therefore, being unable to take a bar examination in certain states. These actions are obviously significant for students and for CSL's continued operation.

Many students' ability to attend CSL is predicated upon access to Title IV funds. Therefore, the loss of these funds prevented students from enrolling for the spring semester. At the close of the fall semester, students were faced with the decision to continue to attend a school where they could not use federal student loans and were not given clear directives on whether the school would even reopen for the spring semester as reports abounded about the school's impending closure. Hundreds of students made the decision not to enroll at CSL for the spring semester without any guidance from the school as to the effect failure to reenroll might have on their ability to discharge their debt if the school did close. Despite numerous reports that CSL planned to close, you issued a statement on January 19th indicating that you planned to contest the revocation and to begin the spring semester four days later.

While reopening the school for the spring semester protected CSL's financial interests by reducing its liability for closed school discharges in the event of closure, our office is concerned that your continued operation potentially endangers students' eligibility for a closed school discharge, absent extraordinary action by the USDOE. See 34 C.F.R. § 685.214(c)(1)(i)(B) (providing a closed school discharge only to students who attended a school within 120 days of the date of closure). Consequently, your failure to challenge the USDOE's final agency decision to revoke Title IV funding, combined with your decision to reopen for the spring semester have left students with no clarity on how to proceed. We understand the majority of CSL students did not return for the spring semester due to the uncertainty of CSL's future. Therefore, by continuing to operate, CSL endangers these students' eligibility for a closed school discharge – should you eventually close – because they would not have attended the school within 120 days of the closure.

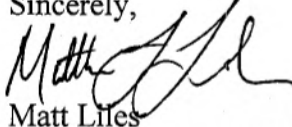
Failure to Communicate with Students

One of the most troubling aspects of this situation is that throughout the process students have felt uninformed. Students have contacted the Consumer Protection Division looking for information both on CSL's status and their options. Though your statement on January 19th confirmed that CSL would open on January 23rd and that students would be given some sort of credit for their federal loans, it otherwise provided very little detail on CSL's future.

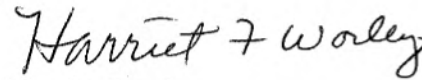
The details matter here. We have not seen any public statements where you have informed students about their rights should CSL close, how those rights are affected by their decisions to attend this semester, or the actual viability of CSL's plans to remain open despite the loss of Title IV funding and the termination of the majority of its faculty. Students who have spent tens of thousands of dollars to attend your school should not be kept in the dark about such important details and to do so is fundamentally unfair to them.

Due to the urgency of this matter, we ask that you respond to the attached civil investigative demand by March 20, 2017. If you have any questions, we are happy to discuss this matter with you at your convenience.

Sincerely,



Matt Liles
Assistant Attorney General
Consumer Protection Division



Harriet Worley
Special Deputy Attorney General
Consumer Protection Division

cc: Dr. Tim Gallimore Associate VP for Academic Planning and State Authorization,
UNC General Administration
Barry A. Currier, Managing Director, Accreditation and Legal Education, ABA Section
of Legal Education and Admissions to the Bar
Dan Zibel, Deputy Assistant General Counsel for Postsecondary Education, U.S.
Department of Education

Attachment



**STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE**

JOSH STEIN
ATTORNEY GENERAL

REPLY TO: MATT LILES
Assistant Attorney General
mliles@ncdoj.gov

March 10, 2017

Dr. Tim Gallimore
Associate VP for Academic Planning and State Authorization
UNC General Administration
910 Raleigh Rd.
P.O. Box 2688
Chapel Hill, NC 27514

Re: Charlotte School of Law – Continued Licensure Under N.C. Gen. Stat. § 116-15

Dear Dr. Gallimore:

We write to share our serious concerns, based on recent findings of the American Bar Association (“ABA”) and the U.S. Department of Education (“USDOE”), about the ability of Charlotte School of Law (“CSL”) to fulfill its commitments and provide students with an adequate education consistent with CSL’s stated objectives. Our office is taking steps to obtain more information. However, we believe these concerns merit review by the Board of Governors as it fulfills its responsibility under N.C. Gen. Stat. § 116-15 to determine whether CSL should continue to be licensed to conduct post-secondary degree activity in the State of North Carolina.

These issues are not only important, but also urgent. It appears that many CSL students left CSL after the 2016 fall semester. As described further below, when a school closes a federal program provides automatic forgiveness of student debt to any student who has not graduated and was enrolled within 120 days of the school’s closure. In early April 2017, this deadline would pass for students who recently left CSL.

As you know, in November 2016, CSL’s accreditor – the American Bar Association (“ABA”) – put CSL on probationary status and required remedial actions, following a years-long investigation and appeals process. The ABA concluded that CSL was not in compliance with three ABA accreditation standards:

- The ABA found that CSL did not comply with Standard 301(a), which requires a rigorous legal education that prepares graduates to pass the bar examination and participate in the legal profession.
- The ABA found that CSL did not comply with Standard 501(a), which requires sound admission policies and practices consistent with the ABA standards, CSL’s mission, and the objectives of CSL’s program.

Post Office Box 629 | Raleigh, North Carolina 27602-0629

Telephone 919.716.6000 | Facsimile 919.716.6767

ED-19-1146, 19-1148, 19-1149-A-000525

ED 19-02226-F 0231

- The ABA found that CSL did not comply with Standard 501(b), which is violated by admitting applicants who do not appear capable of satisfactorily completing the course of study and gaining admission to the bar.

Then, in December 2016, the USDOE revoked CSL's ability to receive Title IV funds. In its December 19, 2016 letter to CSL, USDOE found that CSL "made substantial misrepresentations regarding the nature of its academic program" in violation of federal regulations. USDOE wrote that its "review established that CSL substantially misrepresented to students and prospective students the 'nature and extent' of CSL's accreditation and the 'appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet.'"

These statements by the law school's accreditation authority and by the USDOE are troubling. In the meantime, despite the ABA's probation sanction and USDOE's action on Title IV funds, CSL has remained open, albeit with a greatly reduced faculty and student body.

With their school at risk of closure, CSL students are left in an untenable position. Students still attending CSL cannot use federal loan money – their primary means of finance – to pay their tuition. The school has decided to stay open but has offered few details on how it plans to do so long term. Students who try to leave have found that few schools will honor their credits. Students who stay are attending a school that has fired half of its employees, thus diminishing the quality of their legal education. Students who graduate from CSL have on average \$161,000 in debt for a degree that has suffered considerable reputational damage. Finally, as explained further below, students who left CSL after the fall semester may lose their right to loan forgiveness if CSL does not close before early April 2017.

Since the ABA and USDOE's actions, our office has received numerous student inquiries about CSL's future. We previously shared with you the four official complaints we received. We have received two additional complaints since we sent you the other complaints, and those are included with this letter. We have also reviewed several civil lawsuits filed by former CSL students, which allege that CSL actively concealed its substandard educational program and bad student outcomes.

Based on student complaints and our past experience with failing schools, we highlight a few areas of particular concern for CSL students that we ask you to consider before making your recommendation to the Board of Governors:

Students Report a Lack of Transparency from CSL

Since November, students have had very real questions about CSL's future. The students report the school has not been forthcoming with information during that time. For example, students reported not having class schedules just days before the school's first day of spring classes. Similarly, CSL in a January 19, 2017 message announced students would be given credits for their previous federal aid dollars, but it did not offer students any details about how that would work. CSL has repeatedly left students in the dark about important matters that affect their future and the thousands of dollars in personal debt they have amassed while students at CSL.

The Timing of Any Closure Will Affect Students' Rights to Discharge Their Student Debt

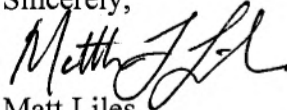
When a school closes, any student who has not graduated and was in attendance within 120 days of closure has the right to discharge their federal student loan debt. *See* 34 C.F.R. § 685.214 (known as "closed school discharge") and 34 C.F.R. § 685.214(c)(1)(i)(B) (discharge limited to students who attended within 120 days of closure). The U.S. Secretary of Education may, in her sole discretion, extend the discharge period for an additional 120 days on the basis of "exceptional circumstances." *Id.* This discharge could be a significant benefit for CSL students who already owe considerable federal student loan debt. CSL's future has been in question since November 2016, causing the majority of CSL students to leave already. Therefore, the longer CSL's future is uncertain, the more likely it becomes that some students will lose their right to a closed school discharge. For this reason, the timing of any closure of CSL is of crucial importance to hundreds of students.

Future Educational Quality at CSL is in Doubt

Given that CSL has fired a significant portion of its faculty and staff, we are worried that a stripped-down version of CSL will not be able to deliver the level of education it originally advertised to students. The ABA and USDOE found that CSL offered a substandard legal education and poor student outcomes. These findings are echoed by the class action filings and consumer complaints. CSL is rumored to have proposed a teach-out¹ plan whereby remaining CSL students would receive instruction through CSL's sister school, Florida Coastal Law School. While this plan would obviously protect CSL's monetary interests, it may not best serve students. Florida Coastal has not been authorized to operate in North Carolina, and the quality of the education it provides has likewise been seriously questioned. Continued substandard instruction will compound, not remedy, the injury here.

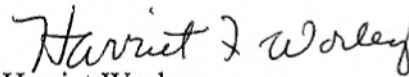
As explained above, this matter requires prompt and decisive action to protect North Carolina students. If you have any questions about these comments, please contact us.

Sincerely,



Matt Liles

Assistant Attorney General



Harriet Worley

Special Deputy Attorney General

cc: Barry A. Currier, Managing Director, Accreditation and Legal Education, ABA
Dan Zibel, Deputy Assistant General Counsel for Postsecondary Education, USDOE
Chidi Ogene, President & Jay Conison, Dean, Charlotte School of Law

Attachments

¹ Any teach-out plan should clearly advise students that accepting a teach-out will make them ineligible for a closed school discharge. 34 C.F.R. § 685.214(c)(1)(i)(C)(teach out students ineligible for closed school discharge).



PO Box 2688
Chapel Hill, NC 27515-2688

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

Thomas C. Shanahan
Senior Vice President and General Counsel

Phone: 919-962-4588

Fax: 919-962-0477

Email: tcshanahan@northcarolina.edu

March 23, 2017

Matt Liles, Assistant Attorney General
Harriet F. Worley, Special Deputy Attorney General
North Carolina Department of Justice
Consumer Protection Division
Post Office Box 629
Raleigh, North Carolina 27699-0629

Dear Mr. Liles and Ms. Worley:

This responds to your letter dated March 10, 2017, regarding the Charlotte School of Law ("CSL"). Thank you for forwarding your correspondence with CSL, as well as the Investigative Demand issued by your office to CSL's counsel, and the student complaints received by your office regarding CSL.

As you know, the Licensure Unit at UNC General Administration has already initiated a review of CSL's license and compliance with the Board of Governors' requirements for licensure of non-public post-secondary institutions. This review is ongoing, and has been underway for some time. As part of the University's review process, we have requested records from CSL relating to its program, which CSL has provided to the University. Following review of the CSL records and responses to the University's inquiries, the President will make a recommendation to the Board of Governors concerning the disposition of CSL's license, which could include revocation of the license to operate in North Carolina. Under Section IX of the Rules and Standards for Licensing Non-Public Institutions, CSL must be notified in writing in advance of the recommendation that the President intends to make to the Board of Governors. CSL then has ten days from the receipt of the notification to request an interview to respond to the President's recommendation. A recommendation to revoke CSL's license, if any, would not go before the Board of Governors until after that interview, if requested.

We understand that you agree with our assessment that the authority of the Board of Governors is limited to granting, reviewing, and revoking licenses to institutions of higher education, and that the Board of Governors lacks any statutory authority to compel any institution to close. Pursuant to G.S. § 116-15(j), enforcement authority for noncompliance with the licensure statute lies with the Attorney General. The Board of Governors "shall call to the attention of the Attorney General, for any action as he may deem appropriate, any institution failing to comply with the requirements of this section." License revocation by the Board of Governors does not, per se, close an institution. We agree that the concerns involving CSL require prompt attention, and the University has responded by initiating a prompt and thorough licensure review as described in this correspondence.

March 23, 2017

Page 2 of 2

The University stands ready to provide any information or assistance the Attorney General's office may require as it conducts its own investigation of CSL.

Sincerely,



Thomas C. Shanahan

cc: Margaret Spellings, President, University of North Carolina General Administration
Kimberly van Noort, Vice President for Academic Programs & Instructional Strategy, University of
North Carolina General Administration
Daniel A. Zibel, U.S. Department of Education (via email)
Daniel Harrison, U.S. Department of Education (via email)

Charlotte School of Law
North Carolina Post-Secondary Activity
Licensure Review



1355 Greenwood Cliff, Suite 400

Charlotte, NC 28204

Office: (704) 831-5202

Email: mjuby@firsttryon.com

Executive Summary

On behalf of the Board of Governors of the University of North Carolina (the “Board”), the University of North Carolina General Administration (“UNCGA”) has asked First Tryon Advisors (“First Tryon”) to conduct a comprehensive review of the financial health and business model of the Charlotte School of Law (“CSL”) in support of the Board’s review of CSL’s license to conduct post-secondary degree activity in North Carolina (the “Review”).

Specifically, First Tryon has been asked to evaluate all financial information submitted by CSL in connection with the Review for compliance with the finance-related standards set forth in N.C. Gen. Stat. § 116-15 (the “Act”) and the Board’s Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina (the “Rules and Standards”).

Under Standard 10 of the Rules and Standards, CSL must demonstrate to the Board’s satisfaction that CSL is “*financially sound and capable of fulfilling its commitments to students.*” The Rules and Standards further state that CSL must show that it possesses and maintains “*adequate financial resources to sustain its mission and purpose.*” CSL’s stated mission is “*to provide a student-centered education, that produces practice-ready lawyers and that serves underserved communities.*”

Set forth below are summaries of the finance-related criteria established under the Rules and Standards, which serve as a guide for evaluating CSL’s compliance with the Act and Standard 10 of the Rules and Standards.

Overview of the Finance-Related Guidelines under Standard 10

Stability

CSL must demonstrate to the Board’s satisfaction that CSL’s financial resources are characterized by stability that indicates the institution can maintain operational continuity for an “extended period,” which, in CSL’s case, means at least three years.

Adequacy

CSL must demonstrate adequate financial support, which is determined, in part, based on an analysis of various ratios, as well as CSL’s financial policies, procedures and practices.

Plan for Financial Development

CSL must demonstrate to the Board’s satisfaction that CSL maintains a “coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution.”

Financial Records and Audit Report

The institution’s recent financial history must demonstrate financial stability. CSL must submit financial statements, the most recent audit report, a description of any material changes in the audit report and a detailed disclosure of legal and binding relationships with any parent or subsidiary corporation or institution.

Other Criteria

CSL must also demonstrate to the Board’s satisfaction that it maintains (1) adequate insurance to protect its financial interests and (2) a tuition guaranty bond at least equal to the maximum amount of unearned tuition held at any time during the most recent fiscal year.

Overview of Certain Regulatory Matters

The American Bar Association (“ABA”) placed CSL on probation on November 14, 2016, citing CSL’s failure to comply with the ABA’s accreditation standards and directing CSL to take specific remedial actions. On December 19, 2016, the Department of Education (“DOE”) informed CSL that its application for continued participation in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended (“Title IV”), had been denied.

1. Liquidity Concerns

Put Option and Collateralized Obligations

CSL is wholly-owned by InfiLaw Corporation (“InfiLaw”), which is wholly-owned by InfiLaw Holding, LLC.

In 2011, InfiLaw entered into a Preferred Unit Purchase Agreement (“PUP Agreement”) and a five-year Credit Agreement with Ares Capital Corporation. InfiLaw has pledged all its assets, including those of CSL, to secure its obligations under the Credit Agreement, which is cross-defaulted with the PUP Agreement.

Preferred dividends are due under the PUP Agreement quarterly and are currently paid out at a preferred dividend rate of 15%. In December of 2016, the PUP Agreement was amended to defer payments due with respect to the preferred shares until February 1, 2018. Under the PUP Agreement, the holders of InfiLaw’s Series A and Series A-1 preferred units may put their shares back to InfiLaw on July 31, 2018 (180 days after the February 1, 2018 maturity date) or earlier, based on certain trigger events, at a purchase price equal to 100% of the par amount of such shares plus accrued dividends and paid-in-kind distributions. As of December 31, 2016, InfiLaw owed \$8.49 million in preferred dividends on \$132 million in Series A preferred units. Unless InfiLaw renegotiates the PUP Agreement or obtains alternative financing, Note 5 to CSL’s most recent audit (the “FY2016 Audit”) states that InfiLaw will be unable to provide the more than \$140 million in cash required to cover the put option, if exercised.

InfiLaw has consistently violated the terms of the PUP Agreement and Credit Agreement, forcing it to rely on waivers from its investors and the payment-in-kind or deferral of its payment obligations under the agreements. Given InfiLaw’s current financial condition, it is unlikely InfiLaw will be able to obtain alternative financing on reasonable terms prior to the put date, and no assurance has been given that InfiLaw’s investors will continue to forbear from exercising its remedies under the agreements in response to InfiLaw’s ongoing noncompliance.

Cash Pooling Arrangement

CSL participates in a pooled cash arrangement that is managed by InfiLaw. Approximately \$10.5 million in CSL’s cash is held by InfiLaw under the arrangement, which is reflected as an account receivable on CSL’s balance sheet. First Tryon has not reviewed the pooling agreement, but InfiLaw’s liquidity and solvency concerns may negatively affect CSL’s ability to convert the receivable into cash when needed to meet CSL’s operational requirements.

Taken together, these liquidity concerns cast doubt on CSL’s ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, as required by Standard 10.

2. Statistics and Trends

Enrollment

Enrollment is a key leading indicator of financial health and operational stability. CSL’s enrollment has deteriorated significantly in recent years, from a high of 1,410 FTE in Fall 2013 to 712 FTE in Fall 2016. Mid-April 2017 data suggests that this downward trend has accelerated, with Spring 2017 enrollment estimated at 220 students. Approximately half of CSL’s remaining students are expected to graduate at the end of the current semester. The following factors have contributed to CSL’s enrollment declines:

- National law school enrollment has dropped by 30% over the past five years to 42-year lows
- CSL’s bar passage rates and job placement statistics have weakened in recent years, raising concerns over the value of CSL’s degree programs
- The ABA’s decision to place CSL on probation
- DOE’s denial of CSL’s application for continued participation in Title IV funding programs, which significantly increased the cost of attendance for many prospective students

CSL’s Reliable Plan for Compliance with Standards 301 and 501 (the “Reliable Plan”), which it submitted to the ABA on December 29, 2016, included enrollment targets and projections that were developed before DOE informed CSL that it was ineligible to continue its participation in Title IV programs. CSL notes on page 5 of the Reliable Plan that, “As of the

date of submission of this Reliable Plan, [CSL] does not have sufficient information to determine the extent to which [CSL] will have to modify [its] projections” in light of its ineligibility. In each of the last three fiscal years, Title IV funding has accounted for at least 88% of CSL’s annual institutional revenues (as calculated in accordance with Title IV regulations).

CSL also concedes in the Reliable Plan that changes to its enrollment strategies, as proposed to meet ABA standards, “will result in a significant decline in revenue” in the short-term, and that its current ABA-imposed probation “presents a challenge for both attracting applicants and yielding matriculants.”

The uncertainty surrounding CSL’s Title IV eligibility, its historical dependence on Title IV funding and its status with the ABA, together with CSL’s inability to forecast the impact of those factors on its enrollment, calls into question (1) the existence of a “coordinated, comprehensive, flexible financial plan” for its long-range management and (2) CSL’s ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

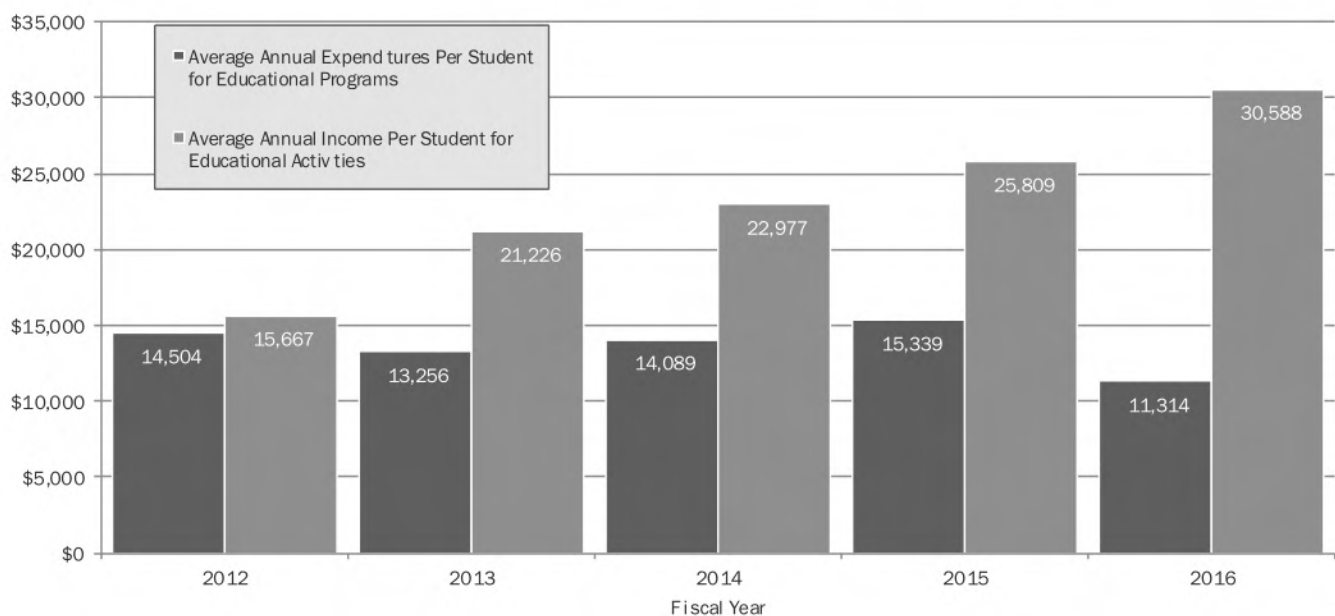
Financial Adequacy

Under the guidelines set forth in the Rules and Standards, the adequacy of an institution’s financial support is based, in part, on the following three metrics:

- Average annual expenditures per student for educational programs
- Average annual income per student for educational programs
- Ratio of net profit to debt service costs (debt service coverage ratio)¹

The chart below tracks the per student metrics, which First Tryon has calculated using financial data from the end of CSL’s last five fiscal years and the average of FTE enrollment from the Fall semesters immediately before and after the end of each fiscal year.

Charlotte School of Law – Standard 10 – Financial Adequacy Metrics (FY2012 through FY2016)



CSL’s educational expenditures per student have remained relatively flat since 2012, though they dipped more than 25% in 2016. Over the same period, CSL’s educational income per student has risen steadily, nearly doubling since FY2012.

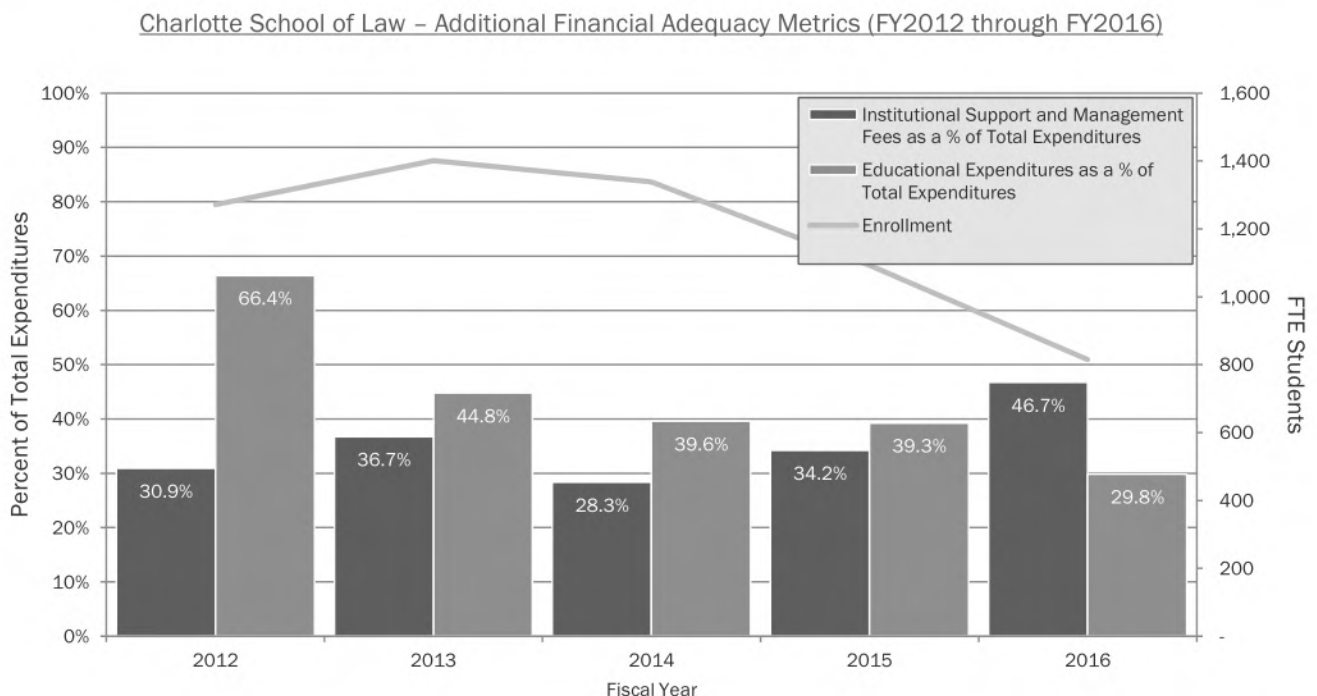
¹ First Tryon has not calculated CSL’s debt service coverage ratio because CSL has no direct debt outstanding. CSL’s assets have been pledged, however, to secure InfiLaw’s outstanding debt under the Credit Agreement, and a portion of InfiLaw’s annual interest expense is allocated to CSL. As of July 31, 2016, there was approximately \$10.3 million outstanding under the Credit Agreement, and InfiLaw charged CSL \$350,000 in allocated interest expenses for the fiscal year ended July 31, 2016.

In a stable or rising enrollment environment, this data might indicate that CSL has realized efficiencies that allow it to deliver both a quality educational product and significant value to its investors. In the context of a declining enrollment environment, however, the data suggest that CSL's cost management initiatives may be designed to maintain profitability at the expense of CSL's core educational programming.

To address CSL's recent enrollment volatility and the interpretive challenges that volatility presents for per capita-based ratios, First Tryon has calculated the two ratios described below to provide additional perspective on CSL's financial commitment to adequately support its educational mission:

- Institutional support and management fees as a percentage of CSL's total expenditures
- Educational expenditures as a percentage of CSL's total expenditures

The chart below plots these two metrics as of the end of CSL's last five fiscal years against CSL's average enrollment, using the same enrollment calculation as in the first chart:



Educational expenditures as a percentage of total expenditures has fallen in each of the past four years, while institutional support and management fees have risen from 30.9% of total expenditures in FY2012 to nearly half of total expenditures in FY2016.

Given CSL's declining enrollment, the data reflected in the charts above raise concerns regarding the adequacy, as evaluated under Standard 10, of CSL's financial support for its mission to provide a "student-centered education."

3. Going Concern Disclosures

The Financial Accounting Standards Board has issued Accounting Standards Update No. 2014-15 ("FASB ASU 2014-15") to provide guidance on determining when and how reporting entities must disclose going-concern uncertainties in their financial statements. The guidance requires, among other things, that the reporting entity provide certain disclosures if there is "substantial doubt about the entity's ability to continue as a going concern."

The audit report in the FY2016 Audit states that it was prepared under the assumption that CSL "will continue as a going concern" but that CSL's ineligibility under DOE's Title IV programs "raises substantial doubt about [CSL's] ability to continue as a going concern" (emphasis added). The audit report also states that no adjustments were made to CSL's

financial statements to account for the uncertainty surrounding CSL's Title IV eligibility. The FY2016 Audit also describes CSL's obligations under FASB ASU 2014-15 and states that the disclosures under Note 11 of the FY2016 Audit address management's "assessment of going concern considerations for the year-end July 31, 2017."

Note 11 describes CSL's ongoing negotiations with DOE regarding its Title IV eligibility and the possibility of restoring Title IV funding under a mutually-acceptable plan of action. Note 11 also states that management cannot predict the outcome of the negotiations with DOE, nor can it forecast the likelihood of CSL's continued participation in the Title IV programs. Note 11 states that without the successful implementation of a plan of action and the reinstatement of Title IV funding, there is substantial doubt about CSL's ability to continue as a going concern, and CSL may be forced to cease operations.

The going concern disclosures in the FY2016 Audit, along with the FY2016 Audit's disclosures regarding InfiLaw's recent inability to remain in compliance with its covenants under the PUP and Credit Agreements, do not indicate a recent history of financial stability for CSL and its affiliates, nor do they support a finding that CSL has a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution" or the ability to maintain adequate financial resources to sustain its mission, purpose and operational continuity for the next three years, in each case as required by Standard 10.

4. Tuition Guaranty Bond

Standard 10 requires each institution to maintain a tuition guaranty bond in a principal amount not less than the greater of (1) \$10,000 and (2) the maximum amount of prepaid tuition held by the institution at any time during its most recent fiscal year. Under Standard 10, "prepaid tuition held" on any given date equals the difference, if positive, of (a) the amount of tuition and related required fees collected by the institution and (b) the amount of such tuition and fees actually earned by the institution on such date. For the purposes of calculating "prepaid tuition held," Standard 10 makes no distinction regarding the source of any such payments, stating only that collections include "the amount of cash received by an institution for a student's account as payment for the applicable tuition and related required fees."

As part of its annual report to the Board for the 2015-16 academic year, CSL included a letter to UNCGA describing a change in the methodology CSL unilaterally adopted in determining the required amount of its tuition guaranty bond. The change in methodology, which included only prepaid tuition received directly from students and excluded prepaid tuition received from the federal government on a student's behalf, reduced CSL's tuition guaranty bond requirement from \$13,284,363 for the 2014-2015 academic year to \$2,388,890 for the 2015-16 academic year. CSL used a similar methodology to calculate its tuition bond guaranty requirement for the current academic year.

UNCGA has informed CSL (along with a small number of other institutions who have used a similar approach in calculating its tuition bond requirement) that its methodology is not supported by the plain language of Standard 10 and that CSL's calculation of its "maximum amount of prepaid tuition held" must take into account any prepaid tuition received from the federal government.

To date, CSL has not provided the Board with information sufficient to establish the "maximum amount of prepaid tuition held ... at any time" during the fiscal year ended July 31, 2016 in the manner prescribed under Standard 10, nor has CSL provided a statement from an independent certified public accountant stating that the existing principal amount of its tuition guaranty bond is at least equal to such amount, as required by Standard 10.

5. Further Inquiry

As part of its review, First Tryon has not reviewed evidence that would support a finding that CSL maintains adequate insurance to protect its financial interests, as required by Standard 10

In addition, First Tryon is not aware of any materials submitted by CSL that would constitute a "coordinated, comprehensive, flexible financial plan (budget) for long-range management of the institution." The limited projections CSL has provided to date were developed, according to CSL, under the assumption that CSL would remain eligible for funding under Title IV, which is not currently the case. To the extent any such long-range plans have been developed to address CSL's lack of participation under Title IV funding programs, First Tryon would welcome the opportunity to review them in light of the guidelines promulgated under Standard 10.

Finally, First Tryon has not had the opportunity to review (1) the agreement pursuant to which CSL is obligated to pay InfiLaw for certain shared and management-related expenses, (2) any agreements relating to the PUP and Credit Agreements and (3) any pooled cash management agreements among CSL and its affiliates. We note that the guidelines for Standard 10 require CSL to provide “detailed disclosure of legal and binding relationships with any parent or subsidiary corporation or institution.” Absent our ability to review those documents, First Tryon has made certain assumptions regarding the content of those agreements and the impact those arrangements might have on CSL’s ability to meet the requirements set forth under Standard 10.

**Review of Charlotte School of Law for Compliance with
North Carolina Licensure Requirements**

May 8, 2017

**Paul Kurtz
Associate Dean & Professor Emeritus
University of Georgia School of Law, Athens, Georgia**

Program of Legal Education

“Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

(a) A law school shall maintain a rigorous program ... that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession....”

This language, taken from the 2016-17 ABA Standards and Rules of Procedure for Approval of Law Schools (hereinafter ABA Standards), serves two functions. First, it serves as the general principle describing the American Bar Association’s mandate to American law schools concerning the type of educational program which is pre-requisite to the grant and maintenance of accreditation by the ABA. The rest of the Standards in Chapter 3 are more specific in explaining the contents of a “rigorous program...that prepares...law students.....for admission to the bar and....effective, ethical and responsible participation as members of the legal profession....”

Standard 301, however, has a second, more specific, function as well. This is to stress the importance of the role of an accredited law school in preparing its graduates for passing the examination required for admission to the bar. Each state has its own examination, the passage of which serves as a gatekeeper to the legal profession. The requirements concerning the preparation for bar admission are made even more specific in Standard 316, one of the Standards alluded to in the prior paragraph.

This section of our report will outline the most important of the Program of Legal Education Standards in Chapter 3 of the ABA Standards and provide available data relevant to whether the Charlotte School of Law measures up to the Standards. It should be emphasized, however, that this review and report has been prepared solely on the basis of documents provided to this committee by the CSL at the request of the committee.¹ Likewise, it should be emphasized that, while this report is similar to a report filed with the ABA by a Site Visit team², it is neither as thorough nor as detailed as such a report.

“Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(a) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit

¹ The CSL generally has been prompt and thorough in its cooperation with our committee.

² The most recent onsite visit to the CSL by a joint ABA/AALS team was in the fall of 2014. The ABA is the American Bar Association, which the accrediting agency for American law schools. The AALS is the Association of American Law Schools, a membership organization, which is the leading professional group for American legal educators. This committee is in receipt of and has utilized the report made by the site team (hereinafter Site Committee Report), which was sent to the ABA Accreditation Committee. The committee has received and relied on the Decision of the ABA’s Accreditation Committee based on that site committee report (hereinafter Accreditation Committee Decision (2015)).

hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.³

- (b) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.**
- (c) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation...."**

The Accreditation Committee Decision (2015) (p. 3, Findings (7), (8) and (9)) specifically finds that the CSL is in compliance with the requirements of subsections (a), (b) and (c) of Standard 311. A review of the current Student Rights & Responsibilities Manual (SRRM) (August 2016) (hereinafter Student Handbook) confirms that the school remains in compliance with these subsections. See pp. 17-18, 21, 25, 38-39, and 51.

"Standard 303. Curriculum

- (a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:**
 - (1) one course of at least two credit hours in professional responsibility...;**
 - (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and**
 - (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:**
 - (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more ... professional skills....;**
 - (ii) develop the concepts underlying the professional skills being taught;**
 - (iii) provide multiple opportunities for performance; and**
 - (iv) provide opportunities for self-evaluation.**
- (b) A law school shall provide substantial opportunities to students for:**
 - (1) law clinics or field placement(s); and**
 - (2) student participation in pro bono legal services, including law-related public service activities."**

The Accreditation Committee Decision (2015) (pp. 4-8, Findings (14) through (24)) specifically found that all provisions of this Standard were being met at the time of the 2014

³ This is to be distinguished from time spent in credit-bearing activities such as Moot Court, Law Review, Externships, law-related courses in other parts of a university and other similar educational experiences. Most American law schools, including the CSL, award credits to such activities.

Site Visit. The Student Handbook confirms that the school remains in compliance with this Standard. Student Handbook, p. 51. Additionally, the CSL currently requires all students to perform 50 hours of “Access to Justice” work and 10 hours of community service work over the course of their legal education. *Id.* at p. 34.

Each year the ABA requires all accredited schools to complete and submit the ABA Annual Questionnaire⁴ in which the school reports on a range of matters, including admission, curriculum, graduation rates, bar passage rates, etc. The CSL submission for Fall, 2014, reported all 1,625 positions available in simulation courses were filled in the prior academic year. Additionally, 205 of the 256 clinical seats were filled and 215 field placements were made. The Fall, 2015 submission reported 2,481 positions available in simulation courses with 1,941 positions filled in the prior year. Additionally, 167 of the 253 available clinic course seats were filled and field placements for 351 students were made. The Fall, 2016 submission showed in the prior year 756 of the 935 seats filled in simulation courses, 190 of 196 of the clinic seats filled, and 237 field placements made. While a decline in overall enrollment apparently resulted in a contraction of the number of seats offered and filled, it is obvious that the school continues to be committed to experiential learning of all types and that its students are very interested in such coursework.⁵

While no ABA Standards require the teaching of particular courses outside Standard 303, it should be noted that the CSL has consistently required a fairly large number of courses. Unlike many schools which require only a set of first-year courses (and sometimes not all of the first year is devoted to required courses), the CSL had a total of 69 hours of required course work for those seeking the J.D. degree according to its 2014 submission, 63 according to its 2015 submission, and 62 in its 2016 submission. The required courses for students entering in the Fall of 2015 or later are a fairly traditional package of first year courses, plus Professional Responsibility, Practice in Context: Litigation **or** Practice in Context: Real Estate, North/South Carolina Distinctions **or** Multi-State Bar Exam Strategies, Constitutional Law, Criminal Procedure, Evidence, Business Associations, Secured Transactions, Decedent’s Estates, First Amendment and Sales. Student Handbook, pp. 33-4. Additionally, the courses in Federal

⁴ The CSL was asked by the Committee to provide the school’s responses to the 2014, 2015, and 2016 ABA questionnaires. Complete materials for 2015 and 2016 were provided, with substantially all of 2014 provided as well.

⁵ The CSL provided to the Committee a list of the courses and instructors being offered during the current academic year. This document is on file with Dean Kurtz. During the current semester, with enrollment significantly reduced from prior levels, the following clinics are being operated: Driver’s License Restoration Clinic, Criminal Litigation Drafting Clinic, Criminal Justice Clinic, and Wills Practitioner Clinic. Additionally, Advanced Externship, Civil Practice Externship, and Judicial Externship are being offered. During the fall semester 2016, the school offered its clinics in Homeless Prevention, Domestic Violence, Criminal Prosecution, Immigration, Human Rights Practice, Family Advocacy, Entrepreneurship, and Wills. Along with a number of externship courses, this reflects the school’s continuing commitment to experiential learning. The current required course work for all students entering in the fall of 2015 and later includes a requirement of at least five credit hours in “practice ready courses”, which include all the clinics, all the externship programs and simulation courses, where students engage in simulation of professional roles. Student Handbook, p. 34.

Income Tax, Administrative Law, Remedies, Family Law, Real Estate Finance (North Carolina), and Insurance Law (South Carolina) are “highly recommended.” *Id.* at p. 35.

There is a tradition of a rich upper-level elective curriculum and a history of small classes at CSL. During the current academic year, for example, courses are being offered in Undocumented Children and the Law, National Security Law, Consumer Bankruptcy, International Sales and Commercial Arbitration, E-Discovery, Media Law, Insurance Law, and Military Law. In 2014, according to the school’s ABA Questionnaire, 80% of upper-class courses had enrollments of 49 students or fewer. In 2015, small classes accounted for 87% of the upper-level course work, and in 2016 the parallel percentage was 90%.⁶ The average first year class ranged from 60 in the evening division in 2014 down to 43 in the 2016 submission which included both day and night divisions. While no precise comparative data is available to the committee, a first-year section of 60 or fewer students is smaller than the sections in many, if not, most American law schools. There are obvious educational benefits to a small class and most of the school’s classes are small.

“Standard 306. DISTANCE EDUCATION

- (a) A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.**
- (b) Credit for a distance education course shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.**
- (c) A law school shall have the technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education.**
- (d) A law school may award credit for distance education and may count that credit toward the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction required ... if:**
 - (1) there is opportunity for regular and substantive interaction between faculty member and student and among students;**
 - (2) there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and**

⁶ In the Questionnaire for 2014, there was a total of 222 upper division classes with 25 or fewer students. The parallel numbers for 2015 and 2016 were 167 and 140, respectively. The declining numbers are traceable to the declining total enrollment.

(3) the learning outcomes for the course are consistent with Standard 302.

(e) A law school shall not grant a student more than a total of 15 credit hours toward the J.D. degree ... under this Standard.

(f) A law school shall not enroll a student in courses ... under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(g) A law school shall establish an effective process for verifying the identity of students taking distance education courses and that also protects student privacy....”

The Accreditation Committee Decision (2015) (pp. 8-9; Finding (25)), in its analysis of the school’s compliance with Standard 306, found that

...online courses must first be approved by the Curriculum and Professional Readiness Team...even if the course is already offered as a traditional classroom course. The Law School uses an externally hosted, web-based platform (to deliver the course to students). It is presented in a comprehensive and secure online delivery format. The system presents a student from signing up for more than one online course at a time, thus assuring that a student will not take more than four credit hours in a semester. The Registrar’s office conducts a degree check every summer to assure that a student does not have more than 12 credit hours of online courses....Students must verify their identity when signing into an online course by using a secure user login and passcode. Final exams are administered as proctored examinations.

Currently, 15 online course credits may be applied toward satisfaction of the 90 credits required for graduation. Student Handbook, p. 37.⁷ Students in the J.D. program are not permitted to take online courses until they have completed 28 credit hours of “in person” coursework. Id. at p. 38.⁸

The CSL has had a robust online education program for a number of years. In its 2015 ABA Questionnaire, it reported 36 courses having been offered in the prior year online.⁹ Most of those courses were presented by iLaw Ventures, one of the leading providers of such coursework in American legal education. The school appears to have made good use of the online course platform to broaden the curriculum (offering such courses as White Collar Crime, International and Comparative Antitrust Law, and Small and Solo Firm Practice) as well as

⁷ While this is more than the 12 hours permitted at the time of the Site Visit, it is consistent with the provisions of Standard 306(e) above.

⁸ Standard 306(f) prohibits first-year coursework from being offered online.

⁹ The 2014 ABA Questionnaire reported 17 online courses in the prior year and the 2016 Questionnaire listed 28 online courses in 2015-16.

providing scheduling flexibility for those students taking more traditional courses (such as Evidence, Family Law, Personal Income Tax, Remedies, Decedents' Estates, and Corporate Taxation).

"Standard 308. ACADEMIC STANDARDS

- (a) A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance, good standing, academic integrity, graduation, and dismissal.**
- (b) A law school shall adopt, publish, and adhere to written due process policies with regard to taking any action that adversely affects the good standing or graduation of a student."**

The Accreditation Committee Decision (2015) described and implicitly approved the CSL policies concerning regular class attendance (p. 3, Finding (8)), academic good standing and dismissal (p. 10, Finding (30)), and graduation requirements (pp. 2, 3, 4, 5, 7, Findings (6), (9), (11), (16), and (22)). The current Student Handbook contains provisions on regular class attendance (pp. 21-22), good standing and dismissal (pp. 48-51), and graduation requirements (p. 51),¹⁰ all of which are consistent with Standard 308.

Inexplicably, the Accreditation Committee Decision (2015) made no mention explicit or implicit of the CSL's policies on "academic integrity" or "due process [regarding] any action that adversely affects the good standing or graduation of a student." Therefore, a careful review of the Student Honor Code in the Student Handbook (pp. 54-61) was undertaken for the purposes of this report. The Code thoroughly defines academic dishonesty (unfair advantage, plagiarism, unauthorized assistance and misrepresentation) and describes it as a violation of the Honor Code (pp. 54-55). Further, the Code defines and prohibits unprofessional and disrespectful conduct and gives examples of such conduct (pp. 55-56). The Code imposes an obligation on all students to "protect the integrity of the Honor Code" and gives examples of a violation of this obligation, including failure to report a violation by another student, knowingly making a false report of an Honor Code violation, falsifying or destroying evidence in an Honor Code proceeding, failing to appear in an Honor Code proceeding without reasonable excuse or good cause, breaching an obligation of confidentiality under the Code and failing to report to school officials any "federal, state, or local charges or offenses" occurring after admission to the school. (p. 56)

The Student Handbook, on pp. 57-61, outlines the procedures involved in dealing with claims of an Honor Code violation. Any member of the CSL community can report alleged violations to the law school administration. The Assistant Dean for Academic Affairs or the Director of Student Engagement then informally investigates the complaint, interviews

¹⁰ The CSL is one of the relatively few American law schools which require completion of 90 academic credits for the J.D. degree. Most schools require 88 or sometimes 86 credits.

witnesses, and examines relevant documents. Before any formal hearing is convened the student is provided with a written allegation of the offending behavior. A plea bargain, which includes acknowledgment of guilt and imposition of discipline, may be reached before the hearing.

The Academic Disciplinary Team is a standing committee of five or more faculty members, appointed by the Dean. A Hearing Panel is composed of both students and faculty. A faculty member from the Academic Disciplinary Team chairs the Hearing Panel.¹¹ Hearings shall be held in private. The accused student is entitled to know the names of the witnesses against him/her no less than 24 hours before the hearing.

The accused student may have a student advisor to provide counsel, who is not permitted to ask questions, introduce evidence, or otherwise represent the accused student. No mention is made of representation by an attorney. The accused student may ask questions of the witnesses. The formal rules of evidence are inapplicable, but “every effort will be made to obtain the most reliable evidence for consideration.” The Panel Chair’s evidentiary rulings may be overruled by majority vote of the Panel. The Panel may make further investigation of the allegations after the hearing is concluded.

The Panel will decide whether the allegations were “proved or not proved.” If not proved, the Chair will write a letter to the Dean noting the decision, along with the Panel’s findings of fact and conclusions, along with a recommended sanction. The sanctions range from an oral reprimand to expulsion from the institution, with many options between those two extremes. The Student Handbook provides a list of the permissible considerations for the Hearing Panel in recommending a sanction (p. 60). The Dean, after receiving the Panel’s findings and recommended sanction, will implement the sanction unless “for compelling reasons he or she wishes to modify” it. Written notice of the decision is to be provided to the student as quickly as practicable.

While the Accreditation Committee of the ABA did not determine the acceptability of these provisions, they would seem to satisfy Standard 308, both in the procedures provided and in the notice provided to CSL students by the material in the Student Handbook.

“Standard 309. ACADEMIC ADVISING AND SUPPORT

- (a) A law school shall provide academic advising for students that communicates effectively the school’s academic standards and graduation requirements, and that provides guidance on course selection.**

¹¹ The Handbook describes this person as a Facilitator, but it is clear that the function which is being served is that of Chair of the Hearing Panel.

(b) A law school shall provide academic support designed to afford students a reasonable opportunity to complete the program of legal education, graduate, and become members of the legal profession.”

Academic advising was found by the Accreditation Committee Decision (2015) to be “handled by the Associate Dean for Academic Services and Faculty Development, the Assistant Dean for Academic Services, the Registrar’s Office and the Student Success Department.” (p. 10, (Finding 32)). Additionally, faculty members are expected to hold regular office hours to consult with students and students are encouraged to identify a faculty mentor either formally (in a program operated by a student organization, such as the Black Law Students Association) or informally.

The CSL academic support program required by subsection (b) of Standard 309 was described by the Accreditation Committee as “comprehensive” and the Site Team Report found it evidenced a “strong commitment to an academic success oriented program rather than mere remedial assistance for students.” (p. 21). The Student Success Department is charged with providing direct support for full-time and part-time students on academic probation, students who are on “academic alert,”¹² those students admitted through the CSL conditional admission program (AAMPLE), and students referred to the Department by professors teaching in the first year program. Additionally, it provides assistance to the student body at large.

In December, 2016,¹³ the CSL submitted a “Reliable Plan for Compliance with Standards 301 and 501” (hereinafter Reliable Plan or Plan). It described the current structure of academic support at the school as follows:

[a] stand-alone academic skills development courses;¹⁴ [b] academic skills development laboratory components (“Labs”) to doctrinal courses;¹⁵ [c] first-year and upper-level

¹² Such students are those not on probation, but close to it.

¹³ The plan was prepared in response to an Accreditation Committee letter of November 14, 2016 which, in addition to placing the CSL on probation, directed the school to submit “a written reliable plan for bringing the Law School into compliance with Standards 301(a) [and two Standards dealing with the Admissions program].” It should be noted that the letter cites Standard 301, the general introductory Standard in Chapter 3 of the ABA Standards and **not** Standard 316, *infra*, which deals specifically with bar passage. The ABA has not specifically found the CSL to be in non-compliance with Standard 316.

¹⁴ Two such courses are mentioned in the Reliable Plan: Lawyering Fundamentals (a voluntary one-week course begun in 2016 before the start of the first semester for students with a 145 LSAT score or lower, which is designed to “demystify the case method, to begin to develop the skills necessary to achieve academic success”; a critical part of this course was daily assessments, which provided students with continuous feedback on their level of readiness for law school); Legal Methods (required for second-semester 1L students who are on academic probation or alert focusing on issue spotting, critical reading, time management, rule synthesis, analysis and outlining; Criminal Law is deferred for a term for those students taking this course) (pp. 14-15). The plan also mentions five courses designed specifically for bar preparation (pp. 20-23).

¹⁵ These labs (begun in fall semester, 2016) are team-taught by a doctrinal professor and an Academic Success professor. They are designed to allow for “individualized attention and feedback” and “allow students to practice the concepts they are learning.”

workshops, one-on-one counseling, and other support mechanisms delivered by the academic success faculty. (p. 14)¹⁶

“Standard 316. BAR PASSAGE

- (a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:**
 - (1) That for students who graduated from the law school within the five most recently completed calendar years:**
 - (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or**
 - (ii) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.**

In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

- (2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.**

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

(b) A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2).

[Subsection (c) is omitted].”

¹⁶ The Plan goes on to describe the current staffing of the Academic Success department as follows: “four full-time faculty (including the Director), one half-time faculty member (who was formerly head of the Academic Success team) and approximately one-half of the time of one of the Librarians. There are also six Academic Success teaching assistants.”

Standard 316 is very complex and, in at least one respect, misleading. The reason for its inclusion in the ABA Standards Chapter on the Program of Legal Education, however, seems fairly clear. The ABA, not to mention potential students and the public, intuit a link between success on a bar examination and the quality of the program of legal education at the school which produced the bar applicant.

Three methods of satisfying the Standard are presented in subsection (a). Two of these methods, which measure ultimate bar passage, are outlined in subsection (a)(1), under which compliance is achieved if either:

75% of the students who have graduated from the law school in the prior 5 calendar years have passed a bar examination; or

In at least three of those 5 years, 75% of that class have passed a bar examination.¹⁷

The last portion of subsection (a)(1), however, makes clear that the 75% required pass rate in both of the above provisions is illusory. This is because the ABA requires the school to account for the bar exam performance of only 70% of the members of any class. Thus, theoretically, if a particular graduating class had 100 students all of whom took a bar examination and the school only had the results for 70 of them, Standard 316(a)(1) would be satisfied if merely 53 students eventually had passed a bar. This would be 75% of the “class” of 70 graduates for whom the school had bar results.¹⁸

Subsection (a)(2) provides the third alternative method of satisfying Standard 316. This subsection focuses on the performance of graduates on their first attempt to pass a bar exam. It requires that in at least “three....of the five most recently completed calendar years, the school’s first-time bar passage rate...is no more than 15 points below the average first-time bar passage rate [in the jurisdictions reported by the school].”¹⁹ Just as in the prior subsection, only 70% of the school’s graduates who took the exam in a particular calendar year need be accounted for.

¹⁷ In light of the second method of satisfying the Standard, one might wonder what purpose is served by the first one. Apparently, it was designed to deal with the possibility that an overwhelming number of the graduates of two years might have passed a bar, but in the other three years, the school came up just short of the required 75% pass rate.

¹⁸ A conversation with the Deputy Managing Director of the ABA Section on Legal Education and Admission to the Bar indicates that a revision to Standard 316 is under consideration. It would require schools to account for more than 70% of their graduates’ performance on the bar examination. It should be noted that in our mobile society a law school’s graduates may take a bar exam in any one of 50 states and staying in touch with them and getting bar exam performance information from them is not always easy.

¹⁹ Note that this third method of satisfying the Standard is based on the performance of a school’s graduates taking a bar exam for the first time in a particular year, regardless of when they might have graduated. The first two methods of satisfying the Standard use a graduating class as the measuring stick, not a calendar year. Because some graduates may wait one or more years before attempting to pass a bar exam, bar pass rates focusing on the year in which the exam is taken may vary drastically from bar pass rates focused on the graduation year.

A school which is found to have failed to satisfy any of the three methods of compliance is given two years to become compliant. It may seek to extend the two-year period remedial by offering one or more of 8 types of evidence delineated in subsection (c).²⁰

Compliance with Standard 316 by CSL

In its report on the 2014 Site Visit, the ABA Accreditation Committee Decision (2015) (pp. 21-22, Finding (64)) focused solely on data showing compliance with subsection (c)'s provisions. Its charts, (covering 2009-2014)²¹ showed that in 5 of the 6 years the CSL first-time pass rate was lower than the North Carolina statewide first-time pass rate. In order, the deficit (in percentages) were 7.77 (2009), 1 (2011), 11.74 (2012), 8.88 (2013), and 11.7 (2014). The only year in which the CSL alumni bettered the statewide average was in 2010 (+6.6). It should be noted that under subsection (c), all 6 years (not merely the three required by the Standard) were compliant because the school was within the 15% deficit permitted by the subsection.

In the Accreditation Committee's Decision, the Committee requested additional information from the CSL²² in order for it to make a determination as to the school's compliance with several Standards, including Standard 301(a)'s requirement that a school's "rigorous program of legal education prepares its students, upon graduation, for admission to the bar." The Accreditation Committee referenced Finding (64) (dealing with bar passage rates) detailed above. As noted earlier, the Accreditation Committee did not find the law school in violation of Standard 316.²³

The CSL Response to the Accreditation Committee's Decision of 2015 was filed in December of that year and included a description of the school's efforts specifically designed to insure bar examination success (see pp. 17-24 of Response of CSL to Decision of the ABA Accreditation Committee, December 2, 2015). It also described a new program established in November, 2015 described as a "bar outcome improvement project." This project included incorporating learning science methodologies into core courses in the school's curriculum, including such features as increased testing, review of first-year and other core knowledge in advanced courses, and a review of the entire curriculum. It also involved a culture change at the school "in respect of grit and professionalism," building a more effective mentoring system,

²⁰ Illustrative types of such evidence are: a trend in the performance of the school's graduates whether upward or downward, demonstrated likelihood that students from the law school to other schools will pass a bar examination, and temporary circumstances beyond the law school's control (such as natural disaster or a significant increase in the standard for passing the relevant bar examination(s)), which are being addressed by the law school.

²¹ Six years were covered rather than the usual five apparently because final 2014 data came out after the Site Visit report was submitted to the Accreditation Committee.

²² The Committee asked the school for a response by December 1, 2015.

²³ There has never been a finding by the Accreditation Committee of a violation by the CSL of a violation of Standard 316.

optimization of academic attrition and more attention to financial literacy and planning for students.

The Accreditation Committee subsequently issued a decision responding to the CSL December, 2015 presentation.²⁴ This decision, in Finding (12) (p. 4, Accreditation Committee Decision, January, 2016) stated:

The first-time bar passage differential has been worsening over the past few years, and the Law School has been taking measures to address the issue. The 2013 calendar year had a differential rate between the relevant state averages and the Law School average of -8.7 points.; 2014 was -12.2 points; and 2015 was -18.4 points. Given the [declining performance of entering classes on the Law School Admissions Test] the bar passage rates might continue to be 15 points or more below [the relevant state averages].²⁵

The Accreditation Committee concluded, on the basis of Finding (12) and other findings dealing with bar preparation, curriculum, including the writing requirements, etc., that the CSL had not demonstrated compliance with Standard 301's mandate of a "rigorous program of legal education that prepares its students...for admission to the bar...." The Committee then asked the school to provide, by May 1, 2016, a report demonstrating compliance with Standard 301. The CSL filed the requested report in May and appeared at a hearing before the Accreditation Committee in June, 2016.

The Accreditation Committee's decision was issued in July, 2016. The Committee, after making findings concerning Admissions, Programming for Admitted Students, Mentoring and Related Opportunities, the Writing Program, Academic Support, the Faculty, Attrition, Bar Preparation During Law School, and Post-Graduation Bar Preparation, made findings regarding bar passage. It noted that the results of the February, 2016 bar exams in North Carolina showed CSL students 16.4% below the state first-time taker pass rate and the South Carolina results in February, 2016 showed CSL students 10.8% below the state first-time taker pass rate.

The Committee then made findings regarding the ultimate bar pass rate performance, under Standard 316 (a)(ii). Its conclusion (Finding (44)) was that the school "is in compliance for 2011, 2012, and 2013 with respect to ultimate bar passage. It may be in compliance for 2014, the 17% missing or never passed could affect that compliance. It is not in compliance for 2015 at this point, with 43% either missing or never passed the bar." While the Accreditation Committee did not point this out, it should be noted that Standard 316(a)(ii) requires satisfaction of the 75% bar pass rate in three of the immediately prior five years and as of the writing of the July, 2016 decision, the school was in compliance with that rule. The Committee

²⁴ The Committee, in its decision, also considered "the history of decisions made by the Committee with respect to the Law School since its last regular site evaluation visit." (p. 1, Accreditation Committee Decision, January, 2016).

²⁵ Indeed, data obtained by this committee in an email from North Carolina Assistant Attorney General Matt Liles indicates that the first-time bar passage differential for CSL students for the February, 2016 test was -16.4%, and the parallel number for the July, 2016 test was -20.70%, and for February, 2017 was -19.44%.

did not, and, in light of the data and the language of Standard 316, could not find the school in violation of that Standard.

After finding the CSL not in compliance with Standard 301, the Accreditation Committee concluded its decision of July, 2016 with a list of 5 remedial actions, including the submission of a “reliable plan” for “bringing the Law School into compliance with Standard() 301(a)....” Accreditation Committee Decision of July, 2016 (p. 12). The law school was also required to inform all admitted students of the required remedial actions. Similarly, the Managing Director of the Section of Legal Education and Admissions to the Bar was directed to make public the decision of the Committee and the remedial actions which were ordered.

The school appealed the Accreditation Committee’s decision to the Council of the ABA Section on Legal Education and Admissions to the Bar. The school’s basic claim was that the Accreditation Committee’s sanction requiring the publication of the required remedial actions to both admitted students and to the public was overly harsh and counterproductive. The appeal was heard in October, 2016 and the Council’s resolution of it was issued on November 14, 2016. It affirmed the Findings made by the Accreditation Committee, as well as its conclusions, including a finding of non-compliance with Standards 301(a), 501(a) and 501(b). The Council, however, added an additional sanction. Because of what it concluded were “substantial and persistent” violations of these Standards, the Council placed the school on probation for two years and required the school to publicize this fact to all of its students and to place a notice of the probation on its website.²⁶

In December, 2016, the CSL submitted to the Accreditation Committee, pursuant to the sanctions issued in the fall by the Committee and affirmed by the Council, a 38-page “reliable plan” for remedying its violations of the ABA Standards. After recounting prior efforts to strengthen bar preparation and enhance the profile of the students being admitted, the document identified five goals of the “reliable plan”:

- (1) Rapidly increasing entering class academic indicators, particularly the LSAT profile, to levels that will yield strong and sustainable bar outcomes and graduation rates. The indicators also will be comparable to those of earlier entering classes in the School before bar passage rates began to decline.
- (2) Implementing a restructured curriculum, which builds on our experience with curriculum, academic support, and writing; and which, with our substantial improvements to academic support and pedagogy, form an integrated program of core J.D. education and academic support. The entire academic experience is designed to deliver robust legal knowledge and competencies, long-term retention, and preparation for success on the bar examination and beyond.

²⁶ This notice does currently appear on the law school’s website, but it should be noted that it is not on the front page of the site.

- (3) Implementing, and continuously assessing and improving, a comprehensive approach to focused bar preparation, involving courses in the J.D. curriculum, counseling and services, and post-graduation programs for both first-time bar takers and repeaters.
- (4) Managing academic attrition so as to continue to provide opportunity for students, while at the same time ensuring compliance with ABA Standards and minimizing the debt of unsuccessful law students.
- (5) Further developing our relationship with the University of New Haven, a comprehensive non-profit university with which we are already working on recruiting high academic caliber students to the School of Law and on prospective joint degree and certificate programs to provide marketable competencies in growing areas of legal services and elsewhere in the economy.

Charlotte School of Law, Reliable Plan for Compliance with Standards 301 and 501 (pp. 2-3 (December, 2016).

While the Plan articulates five different goals, upon careful inspection it is clear that all five of these strategic initiatives are focused on the same ultimate goal---improvement of the performance of the school's graduates on the bar examination. This is not a criticism of the plan. To the contrary, the school has wisely acknowledged that the most important task ahead is significantly raising the bar pass rate.

The part of the Reliable Plan most relevant to the Program of Legal Education is the reshaping of the first-year curriculum to return to a more traditional set of two-semester courses in the traditional first-year subjects which are tested on the Multi-State Bar exam and often on state-specific portions of the bar exam as well. This restructuring is described as follows by the school:

The School of Law has developed a restructured curriculum that will be implemented for the class entering in fall 2017. Some details will be further developed in early 2017, but the key features that make it an improvement over the current curriculum have been approved by the faculty....

The current curriculum, implemented in fall 2013, changed the first-year structure from two-semester doctrinal courses to one-semester courses with reduced credits for the courses. Central features of the new, restructured curriculum are: (a) a return to a first-year program framework in which the core doctrinal courses are taught over two semesters, with (b) increased credits for each such course. Thus, Contracts, Property, Civil Procedure, and Torts will be two-semester courses, with six total credits for each

course, rather than the one semester and four credits in the current curriculum. Evidence, Constitutional Law, and Professional Responsibility (all second-year courses) will each add a credit hour over the current levels, with Evidence increasing to four credits, Constitutional Law to six credits, and Professional Responsibility to three credits.

Another central feature is to tightly integrate into both the doctrinal courses and the curriculum as a whole the academic support programs the School has implemented.... Thus, in light of positive experience with the Labs, over an hour of extra class time per week in the first-year doctrinal courses (Contracts, Property, Civil Procedure, and Torts) will be allocated to Lab activities, such as creating and answering hypotheticals, writing, and improving one's legal analysis based on self-editing and feedback. Academic Success faculty will co-teach with a member of the doctrinal faculty one of the Lab components in one of the first-semester first-year doctrinal classes. This collaboration will allow the success of the current format of integrated first-semester Labs to continue into the new curriculum. In the second year, Criminal Procedure and Evidence will also meet for over an hour of Lab work per week.

In addition, required two-credit courses, such as Sales and Secured Transactions, which meet once a week under the current curriculum, will meet twice a week with an additional hour of class time. The additional hour and the more frequent class meetings will allow reinforcement of the material taught to students.

Because of the data showing the positive impact of Lawyering Fundamentals, we will now require the course for all incoming students, effective in fall 2017. The first week of the student's first semester will be allocated to the course. The course will be required, but will not have any credit hours assigned.

In addition, in the second semester of their first year, students will spend the first week in Lawyering Fundamentals II....The course will expressly integrate the first-year curriculum to both remind students of content from the prior semester, and demonstrate how concepts from various classes are related.

Id. at pp. 17-18 (footnotes omitted).

The return to a more traditional first-year curriculum which provides all-year instruction in the core courses such as Property, Contracts, Civil Procedure and Torts would seem to be solid step forward toward improving bar exam passage rates. Under such an approach students will spend twice as much time focusing on these subjects which are tested on the Multi-State Bar Exam, as well as many state-law portions of the bar examination. The addition of a Lab component in which the student actively engages the subject matter by responding to hypotheticals, creating hypotheticals and rewriting answers seems likely to provide students with a deeper knowledge of the material and, thus, more confidence in approaching the bar

exam. The two-semester courses will also provide more time to teach extra material in these subject matter areas and give the student more time to reflect on material covered in class.

While doing a better and more thorough job of covering the substance of the “bar courses” would be very helpful, a more fundamental goal of this plan is the improvement of the quality of student being enrolled. The first stated goal of the “reliable plan” is to “[r]apidly increas[e] entering class academic indicators, particularly the LSAT profile.” This is a most worthy goal, but the Plan itself, other than including charts showing gradually increasing LSAT scores for the entering classes over the next several years to a level “comparable to those of earlier entering classes...before bar passage rates began to decline,” offers no clear explanation of exactly how this goal will be achieved.²⁷ There are brief mentions of smaller class sizes and “generous scholarships to admitted students that are highly competitive, based on market analysis,” *Id.* at pp. 12, 13,²⁸ but there are not very many details offered on how the LSAT scores of applicants will be raised very quickly in order to meet the projections of future entering classes.²⁹

The asserted relationship between the Plan’s goals of 1) improving bar preparation during law school and after graduation, 2) effectively “managing academic attrition,”³⁰ and 3) attracting highly qualified University of New Haven students to the CSL and the improvement of bar passage rates can be examined by a reading of the Plan (pp. 14-38). It would seem that these three parts of the Plan are of distinctly secondary importance to the school as compared to improving the quality of students admitted and revamping the curriculum.

²⁷ The plan itself seems to acknowledge the difficulty of achieving this goal in light of the school’s current probationary status with the ABA and the Department of Education’s termination of Title IV eligibility for student loans. See Note 2 of the Reliable Plan, at p. 5 (acknowledging that in light of the situation “as of the date of submission of this Reliable Plan, the School does not have sufficient information to determine the extent it will have to modify those projections [of ‘Expected Matriculant Characteristics 2017-18’]”). Getting better-qualified students to enroll in the school while it is on probation and the ability to secure loans is at best uncertain would be a challenge to say the least.

²⁸ Because of the financial implications to the school of reducing class size and increasing scholarship totals, this topic is only touched on at this point and will be more thoroughly canvassed in the portion of this report devoted to finances.

²⁹ The school’s ABA Annual Questionnaire filed in the fall of 2016 shows the 25th percentile of the entering class to be 141, the 50th percentile as 144 and 75th percentile as 148. According to the projections in the “Reliable Plan” these numbers will be 145-46/149/151-152, respectively, for the class entering in August, 2018. Reliable Plan, p. 6. This is an extremely ambitious goal for a two-year period, particularly in the current environment of the school in particular and legal education in general. The only change to the admissions methodology identified in the Plan is to require those students with LSAT scores of 142 or 143 to have an interview with two individuals, at least one of whom will be a member of the Faculty Admissions Team. The goal of the interview will be to determine “whether the candidate is qualified for admission despite the lower LSAT.” Reliable Plan, p. 10. This would seem to be at cross-purposes with the goal of raising the LSAT credentials of the entering class.

³⁰ As explained in the Plan, this strategy is designed, at least in part, to “minimiz[e] the debt of unsuccessful law students.” Plan, p. 3. What this means is a stricter grading curve which will result in the academic exclusion of more students and a winnowing of likely unsuccessful candidates for the bar examination upon graduation. The stricter grading curve has already been implemented. Plan, p. 32 (reporting a strengthening of the grade curve in the fall of 2015).

Because of the very ambitious nature of the Reliable Plan and the lack of details demonstrating that its goals can be met, the licensing authorities of the school need to be very wary of anything other than a temporary or probationary renewing of the school's license.

Faculty

"Standard 401. QUALIFICATIONS

A law school shall have a faculty whose qualifications and experience enable the law school to operate in compliance with the Standards and carry out its program of legal education. The faculty shall possess a high degree of competence, as demonstrated by academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship."

The most recent systematic review of the CSL faculty was conducted in the fall of 2014 during the ABA/AALS Site Inspection. The Site Committee reported to the Accreditation Committee that:

[t]he faculty is highly qualified. Nine faculty members hold LL.M. degrees, 14 hold various other masters degrees, and three hold P.D. degrees. Combined the full-time faculty [of 25 tenured and tenure-track individuals and 49 others not on the tenure track] has 429 years of teaching experience. Fourteen members of the faculty have between 10 and 35 years of experience.

Site Report, p.24.

Because of the recent drastic decline of enrollment³¹, it is not surprising that the current faculty is a good deal smaller than the one reported in the 2014 site visit. It is, however, a qualified teaching corps. Upon request of the committee, the President of the Charlotte School of Law submitted to the committee the resumes of 25 individuals represented to be currently on the full-time faculty of the school. One of those individuals did not appear in the Profile Section of CSL's 2016 ABA Annual Questionnaire.³² Another is the Director of the Law Library

³¹ The ABA/AALS Site Team, during its Fall, 2014 visit reported a total of 1,410 students (1,141 full-time, 269 part-time). One year later, the school's ABA Questionnaire data for October 1, 2015 indicate a total of 918 students (658 full-time and 260 part-time), while the total on October 1, 2016 was 638 (490 full-time and 148 part-time). Thus, total enrollment dropped from 2014 to 2016 from 1,410 to 638, a decrease of well more than 50%. No figures were obtained concerning the enrollment during the current semester, but the ABA's sanction of probation, issued late in fall 2016, apparently caused a further shrinkage of the student body. See Stancill and Marusak, NC Attorney General Tells DeVos He is Investigating Charlotte School of Law (<http://www.charlotteobserver.com/news/local/article147548644.html#storylink=cpy>) (reporting only 220 students currently enrolled).

³² She is, however, identified on the CSL website as an Academic Success Lecturer. No further information about her is provided. She is listed on the class schedule for the Spring, 2017 semester teaching a 1-credit distant

and clearly does not teach full-time. Of the 23 remaining individuals in the group of resumes submitted by the CSL President, 10 were designated as tenure or tenure-track in the Profile Section of CSL's 2016 ABA Annual Questionnaire and 13 were listed as "other."³³

The J.D. degrees of these 23 full-time faculty are all from accredited U.S. law schools, including Georgetown, University of Texas, Emory University, the University of North Carolina, Stanford, Wake Forest, Hastings and Northwestern. A number of the faculty earned membership as students in the Order of the Coif, the leading American honor society within legal education whose membership is limited to the top 10% of a graduating class. Collectively, the 23 faculty members have 212 years of legal practice experience and 218 years of law school teaching experience. They have earned a total of 8 advanced degrees in addition to the J.D., which is the terminal degree in American legal education. In response to a request by the committee, the CSL submitted a list of a total of 31 books, articles, book chapters and other pieces authored by these individuals in the last three years.

Judging the teaching effectiveness of the faculty is a difficult task, given that this report is based on a desk review of documents. However, the ABA/AALS Site Inspection Team in 2014 was extremely complimentary of the classroom teaching it observed.

The site team observed parts of approximately three dozen classes taught by full-time faculty and adjunct faculty during the visit. On a scale of one to ten, the team rated the teaching as a whole between eight and ten, with more nines and tens on average. The team observed that the faculty generally engaged the students from the start of the class time and that a good mix of teaching techniques was employed (e.g., lecture, discussion, Socratic method, and small group work). Most of the classes visited were found to be intellectually stimulating or rigorous. The team is of the opinion that the faculty members were prepared for class. Faculty members consistently made use of technology, such as PowerPoint, in the classroom and visual aids and white boards were used to highlight key information. Students were responsive and actively participating in conversation both voluntarily and when called upon.

Site Visit Report (p. 29); *see also* Accreditation Committee Decision (2015), pp. 23-24 (Finding 43).

In light of the fact that all 23 members of the full-time faculty presently at the school were also teaching at CSL at the time of the site visit, it is pretty clear that the quality of teaching continues to satisfy Standard 401.

learning course on MPT (Multistate Performance Test) Fundamentals. The MPT is a portion of many bar examinations.

³³ This generally refers to clinicians or those teachers who are on either long- or short-term contracts. It is pretty clear that the CSL full-time faculty, using the approach adopted by the ABA, is actually larger than 23. *See* fn. 34, *infra*.

“Standard 403. INSTRUCTIONAL ROLE OF FACULTY

(a) The full-time faculty shall teach substantially all of the first one-third of each student’s coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.”

The Site Visit Report affirmed that the “(f)ull-time faculty members teach the major portion of the Law School Curriculum, including substantially all of the first one-third of the curriculum. No adjunct faculty members teach first-year required courses.”
Site Visit Report, p. 14.

A review of the class schedule for the current academic year indicates that the entire first-year curriculum is being taught by full-time faculty members³⁴ It also makes clear that the majority of the credit hours offered by the law school are being taught by full-time faculty members.

(b) A law school shall ensure effective teaching by all persons providing instruction to its students.”

See the discussion under Standard 401, *supra*.

“Standard 404. RESPONSIBILITIES OF FULL-TIME FACULTY

(a) A law school shall adopt, publish, and adhere to written policies with respect to full-time faculty members’ responsibilities. The policies shall require that the full-time faculty, as a collective body, fulfill these core responsibilities:

- (1) Teaching, preparing for classes, being available for student consultation about those classes, assessing student performance in those classes, and remaining current in the subjects being taught;**
- (2) Participating in academic advising, creating an atmosphere in which students and faculty may voice opinions and exchange ideas, and assessing student learning at the law school;**
- (3) Engaging in scholarship, as defined by the law school;**

³⁴ It should be noted that all the teachers of Legal Process (the traditional first-year course in legal research and writing) are full-time faculty and designated as such in the Profiles section of the ABA Annual Questionnaire. Because we have not been given resumes for most of these teachers, they were not included in the tally of full-time faculty reported in the discussion above under Standard 401.

(4) Service to the law school and university community, including participation in the governance of the law school, curriculum development, and other institutional responsibilities described in the Standards;

(5) Service to the profession, including working with judges and practicing lawyers to improve the profession; and

(6) Service to the public, including participation in pro bono activities.

(b) The law school shall periodically evaluate the extent to which the faculty discharges its core responsibilities under the law school's policies and the contributions of each full-time faculty member to meeting the core responsibilities of the faculty."

The CSL has an extensive and carefully drafted Faculty Handbook (hereinafter Handbook), which was last revised in the summer of 2014, presumably in preparation for the school's ABA/AALS inspection of the institution in the fall of that year. On pp. 66-73 of the Handbook, the faculty's basic obligations are outlined. Teaching is described as a faculty member's "primary responsibility" and, in this role, the professor is "accountable for student learning by developing, assessing and contributing to student learning outcomes." The section on teaching goes into great detail in defining and describing course content expertise, teaching effectiveness and student learning.

The expectations in regard to scholarship, which are focused on tenured and tenure track faculty (Handbook, pp. 68-69), are also outlined very clearly, with quantifiable production required for promotion in rank and tenure also described. Concerning the evaluation of scholarship in the context of promotion, tenure and salary consideration:

Each piece ... should be evaluated according to at least one of the following six criteria: aligns with the mission of serving the underserved; aligns with the mission of student-centered outcomes; aligns with the mission of creating practice ready lawyers; improves teaching and learning pedagogy and theory; contributes to faculty member's subject-matter expertise and provides corollary benefit to their larger faculties.

Handbook, p. 69.

A lengthy section describes the type of service, both inside and outside the school, required of all faculty, including service on faculty committees, assistance with co-curricular activities, service as a mentor for colleagues, participation in professional organizations, service as a scholarship reviewer, engagement in pro bono legal services and consulting, and service as a media expert or interviewee. Handbook, pp. 71-72.

Importantly, the mentoring of students is a requirement for all faculty members. The Handbook, p. 88, requires at least six hours per week of office hours for each full-time faculty member. “Social interaction and regular office hours may facilitate mentoring, but, by themselves, do not satisfy the mentoring requirement.” Handbook, p. 72. All faculty members are expected to carry an “equitable load” of student academic advisees “as determined by the Dean’s office.” *Id.*

A number of the standard types of faculty committees exist at CSL (e.g., Admissions, Curriculum, Information Technology, Faculty Appointments, etc.) but, in an effort to stress the goal of cooperative work by such groups they are labelled “teams” not “committees.” Handbook, p. 30. In addition to the standard types of committees usually found in law schools, the CSL has an Adjunct Faculty team to review the work of adjuncts and assist in their recruitment and training, a Culture team to “promote understanding of culture among faculty by serving as role models and sources of knowledge,” and an Academic Discipline team to serve as the hearing panel in assertions of student academic dishonesty and plagiarism. Handbook, p. 32.

In addition to the reviews of faculty performance in the promotion and tenure process, the Handbook describes an annual formal evaluation by the Dean of each faculty member. *See generally* Handbook, pp. 51-53. Student evaluations are completed and provided to the faculty member. Each faculty member is required to annually submit to the Dean an Individual Plan of Performance and Professional Development and the Dean shall review and respond to each faculty member’s IPPD. *Id.* at p. 52. After the grant of tenure (the tenure process is described at Handbook, pp. 57-61), each faculty member is evaluated in an “extensive review” by the Dean and the Faculty Evaluation Team every four years. A faculty member found not to be meeting the “same performance standards that govern an application for tenure,” is given one year to achieve compliance or otherwise face “loss of tenure and termination of the employment relationship” one year after the initial year. Handbook, p. 62.

The CSL has created three separate tracks for faculty members. Handbook, pp. 43-44. 1) Traditional tenure track faculty receive one-year contracts until tenure is attained, teach 12-14 credit hours annually, and produce scholarship consistent with the school’s expectations as expressed in the Handbook. 2) Those faculty on the teaching track begin with one or two one-year contracts, followed by a three-year contract and then successive five-year terms. They teach either 15-18 credit hours annually, or 12-14 hours with additional “extraordinary service as defined by the School.” No scholarship is required of such faculty. 3) The alternative track has a contract sequence identical to the teaching track and teaching responsibilities of 12-14 credit hours annually, no expectations of scholarship or extraordinary service and a “lower pay scale than the other two tracks.”

In discussing the faculty, the Accreditation Report was complimentary about its diversity and the policies producing that diversity, the faculty’s role in the formation and development of the school’s goals and policies, its monitoring the curriculum, and the inclusive nature of the school’s policies regarding membership on faculty committees, attendance, and voting

privileges at faculty meetings. Accreditation Report (2015), pp. 12-13, 15 (Findings (36), (37), (39), (40), (46). *See also* Site Committee Report, pp. 24-33.

“Standard 405. PROFESSIONAL ENVIRONMENT

....

- (b) A law school shall have an established and announced policy with respect to academic freedom and tenure....**
- (c) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members....**
- (d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction..., and (2) safeguard academic freedom.”**

The CSL definition of and protection of Academic Freedom appears at p. 77 of the Faculty Handbook:

Each member of the faculty is entitled to full freedom in research and in the publication of the results of that research, subject to the acceptable performance of her/his other academic duties....

Each member of the faculty is entitled to freedom in the classroom in discussing his/her subject, but he/she should be careful not to introduce in his/her teaching controversial matter which has no relation to his/her subject.

The Accreditation Committee Decision (2015) specifically referenced and implicitly approved the school’s academic freedom protection. (p. 15, Finding (48)).

The CSL philosophy and purpose regarding tenure is as follows (Handbook, p. 58):

The School recognizes the value of tenure as promoting favorable conditions for the exercise of academic freedom and for the orderly development of the School as a community of teachers and scholars.

In tenure reviews, decisions made by the School are of extreme importance in the institution’s pursuit of academic excellence.

Achievement of tenure should never be regarded as a routine or automatic award. It must, rather, reflect and affirm professional competence and performance measured against national standards at comparable institutions. Tenure is dependent not only on demonstrating a record of excellence necessary for promotion, but on indications of a certain promise of continuing high productivity in a tenured capacity.

The School's decision to grant tenure is subject to the determination by the School that the faculty member's services will continue to be needed and that the institution's financial resources are sufficient to meet a long-time commitment. It is also required that the tenured faculty member's level of performance will be maintained or improved.

Unlike faculty handbooks at other schools, there is no explicit explanation in the Handbook of the nature of the protections of tenure at the CSL. However, the Accreditation Committee Decision (2015) specifically referenced and implicitly approved the school's definition of tenure. (p. 15, Finding (48)).

Subsections (c) and (d) of Standard 405 specifically require job security for those teachers of clinical subjects and legal writing, respectively. This has led many law schools to provide separate protections for each of these groups of teachers. The CSL has what the ABA Accreditation Committee called a "unified" faculty in which the distinctions between faculty members are based solely on the track they are on (tenure track, teacher track and alternative track), rather than on the subjects they teach. Thus a "clinical teacher" could be on the tenure track, the teacher track or the alternative track. Similarly, a "legal writing" teacher could be on any one of those tracks.³⁵

A member of one of the latter two groups on any of the three tracks would not only have substantially similar job security as a full-time teacher of Torts or Constitutional Law on one of those tracks, but would actually have exactly the same job security. While not explicitly analyzing why the CSL does not have separate provisions for clinicians and legal writing instructors, the Accreditation Committee in Findings (49), (50), and (51) made clear that there were no status issues extant regarding those two groups of faculty members. The only outstanding issue for the "clinical, externship and pro bono" faculty at that time was the issue of what constituted a full load. Accreditation Committee Decision (2015), p. 16 (Finding (51)). It is not clear whether that issue has since been resolved and, if so, how.

³⁵ At the time of the Accreditation Committee Decision, six of the clinicians were on the teaching track and the seventh was a visiting professor. Accreditation Committee Decision (2015) (p. 16 (Finding 49)). Of the legal writing faculty (the course is actually titled Legal Process at CSL), six were on the teaching track and five were on the alterative track). Id. at (Finding (51)).

Admissions

“Standard 501. ADMISSIONS

- (a) A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.
- (b) A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.

Interpretation 501-1

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program.”

Since January, 2015, the ABA, the accrediting agency for American legal education, has dealt with the admissions policies and practices of the Charlotte School of Law on four occasions. These four occasions will be treated and described in order.

1. ABA Accreditation Committee Decision, January 2015

This document was a review of the joint ABA/AALS Site Visit performed in the fall of 2014. It was prepared by the Committee after reviewing the Site Visit team’s written report. A number of findings³⁶ by the Committee focused in whole or in part on the school’s admissions policies and practices. In the Committee’s Conclusions, it asked the school to provide “additional information [for the Committee] to make a determination as to the Law School’s compliance with...Standards...501(a), 501(b) and Interpretation 501-1...” That is, the Committee determined that it was not yet in a position to determine whether the school was in compliance with the primary ABA Admissions Standard and its primary interpretation. The Committee asked for the information by December 1, 2015.

2. ABA Accreditation Committee Decision, January 2016

This decision, issued after the school had submitted the information requested by the Committee, made four Findings devoted to compliance with Standard 501 and Interpretation 501-1.³⁷ One finding focused on the LSAT profiles of the entering classes of 2012 through 2015. A second focused on a program begun in early 2015 to improve an existing conditional

³⁶ See especially Findings (55), (57), (58), (61), (62), (63), and (65).

³⁷ These were Findings (8), (9), (10), and (11).

admission program.³⁸ A third finding focused on attrition rates and the school's explanation of why the academic profile of the entering class of 2014 had declined, particularly with regard to the LSAT 25th percentile score.³⁹ The fourth finding noted a recent change in the Admissions process involving clarification of decision criteria and improvement of coordination between the Admissions committee and the Admissions Office and the Dean's Office.

After reviewing the information submitted by the law school, the Committee concluded that the school was "not in compliance with...Standard 501(a), 501(b) and Interpretation 501-1." It asked the school to provide, by May 1, 2016, "information to demonstrate that is in compliance" with these provisions, in essence repeating its request of January, 2015. The Committee also summoned the President and the Dean of the Charlotte School of Law to appear before the Committee in June, 2016 at its regular meeting at a hearing to assist it in the determination of "whether to impose sanctions in connection with the Law School's non-compliance with the Standards."

3. ABA Accreditation Committee Decision, June 2016

After the submission of the school's requested information and the hearing before the Accreditation Committee, a decision was rendered in June, 2016. The Committee made seven Findings directly related to the Admissions program.⁴⁰ These findings detailed, among other items, the current Admissions methodology, the conditional admissions program, the LSAT and GPA profiles of recent admitted classes, the school's size, and an additional question being added to the school's application designed to assess the applicant's "grit," defined in terms of "perseverance, motivation, and commitment." The final Finding on Admissions stated, in its entirety:

It was not clear to the Committee how these admissions practices demonstrate that applicants with low academic and admission test credentials appear capable of completing the Law School's program of legal education and being admitted to the bar.

In its conclusions, the Accreditation Committee reiterated its prior conclusion that the school was not in compliance with Standard 501(a) and 501(b) and Interpretation 501-1. It also concluded that the noncompliance had been "substantial and ... persistent." It mandated a number of remedial actions be taken by the school, including the preparation by the school of a

³⁸ New entry requirements were added, the amount of academic support was reduced in order to insure that the student's performance in the program reflected "student motivation and ability," and "qualitative factors" were added in the decision to admit students to the conditional admissions program. The Committee found that after the changes, fewer students were granted admission to the law school.

³⁹ As explained by the school, it "may have set the criteria for the admission to the J.D. program from the [conditional admission program] too low" and "used an assessment, which [it] believed might serve as an alternative to [the conditional admission program] for certain lower-indicator students." The law school relatively quickly determined that the alternative assessment "did not serve students and the Law School well" and was abandoned.

⁴⁰ These are Findings (5) through (11).

“written reliable plan” stating it intended to become compliant with, among others, Standard 501(a) and (b), along with Interpretation 501-1. It also directed the appointment of a fact finder by the Managing Director of the Section of Legal Education and Admissions to the Bar.⁴¹

4. Decision of the Council of the ABA Section on Legal Education and Admission to the Bar, October 2016

Proceeding under Rule 23 of the ABA Rules of Procedure for Approval of Law Schools, the Charlotte School of Law appealed the Accreditation Committee’s June, 2016 decision to the Council of the Section. A hearing was held on October 21, 2016, at which the President and the Dean of the law school appeared. The Council affirmed the Findings of Fact and Conclusions of the Accreditation Committee and affirmed all of the sanctions imposed by the Committee. Additionally, it placed the school on probation, effective November 14, 2016. There is no explanation, either in the Council’s decision or in the ABA’s Rules of Procedure for Approval of Law Schools, of the contours of probation. The Council, of course, may withdraw “approval” (accreditation) of a law school because of non-compliance with a Standard.⁴²

⁴¹ The fact finder is directed to monitor the admissions data and methodology, the rigor of the school’s program of legal education, and report on a number of matters, including the bar results, admission policies and any plan beyond the “reliable plan” referenced in the text. Other sanctions included the requirement that the school inform all admitted students of the remedial actions ordered by the ABA and a requirement that the mandate of remedial actions be posted on the school’s website. The school has also been ordered to, within 30 days of the assignment of grades each semester, provide each of its students information about the North Carolina and South Carolina bar results for the prior six semesters including the pass rates by the quartile of the applicant. The school must also inform each student within 30 days of assignment of grades of his or her placement in the quartiles of his or her class.

⁴² See ABA Rules of Procedure for Approval of Law Schools, Rule 16 (b) (8).

Constituent Universities

Appalachian
State University

East Carolina
University

Elizabeth City
State University

Fayetteville State
University

North Carolina
Agricultural and
Technical State
University

North Carolina
Central University

North Carolina
State University
at Raleigh

University of
North Carolina
at Asheville

University of
North Carolina
at Chapel Hill

University of
North Carolina
at Charlotte

University of
North Carolina
at Greensboro

University of
North Carolina
at Pembroke

University of
North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School

North Carolina
School of Science
and Mathematics

An Equal Opportunity/
Affirmative Action Employer

**University of North Carolina
Board of Governors**
(919) 962-1000
www.northcarolina.edu

Committee on Educational Planning, Policies, and Programs

RE: Charlotte School of Law – License Restrictions

DECISION

Pursuant to N.C.G.S. § 116-15, the Board of Governors is responsible for the licensure of nonpublic post-secondary degree granting institutions in North Carolina. UNC General Administration (UNC-GA) has the authority to perform compliance reviews to ensure that licensed institutions continue to meet the statutory and regulatory standards for licensure, as set forth in the *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-Secondary Degree Activity in North Carolina*. If an institution is not in compliance, the Board of Governors may, on the President's recommendation, revoke the institution's license, or may place conditions on the license until the institution coming into compliance.

The Committee on Educational Planning, Policies, and Programs has been delegated the authority and responsibility for considering recommendations from the President concerning licensure matters, and acting on behalf of the Board of Governors.

The Committee convened on June 21, 2017, to consider recommended findings and license conditions presented by President Margaret Spellings concerning the Charlotte School of Law, which has been licensed to conduct post-secondary degree activity in North Carolina since 2005. The recommendations are set forth in the attached document.

The Committee observes that the American Bar Association (ABA) has placed Charlotte School of Law (CSL) on probation for two years, beginning November 14, 2016, based on its finding that CSL is in substantial and persistent noncompliance with ABA accreditation standards 301 and 501. In response, CSL has asked the ABA to approve: (a) a plan to teach-out any remaining CSL students in anticipation of possible closure of the school; and (b) a remedial plan (which is referred to by the ABA as a "Reliable Plan") in anticipation of CSL's continued operation as an accredited law school. The U.S. Department of Education has suspended CSL's continued participation in Title IV programs. CSL has petitioned the Department of Education for reinstatement in Title IV programs, and CSL's request remains under consideration. CSL is currently under investigation by the North Carolina Department of Justice, Consumer Protection Division,

based on the division's concerns about CSL's future viability, the effects of CSL's viability on CSL students, and the Consumer Protection Division's concerns about keeping students fully informed about CSL's status.

Based on its review and consideration of the matter concerning the Charlotte School of Law, the Committee, on behalf of the Board of Governors, hereby adopts the President's recommendations, and imposes the following conditions and limitations on the Charlotte School of Law's license following limitations on CSL's license, pending further action and review of CSL's compliance with the Board of Governors Rules and Standards:

1. CSL shall not admit any new or additional students to CSL until such time as this condition may be removed by further action of the Board of Governors.
2. No later than August 1, 2017, and subject to item 3, below, CSL shall present to the Licensure Unit such evidence as the Licensure Unit may deem necessary to show that CSL has remedied any deficiencies and has come into full compliance with the licensure standards for which the Board has found it to be out of compliance.
3. CSL shall immediately obtain, maintain, and provide proof to the Licensure Unit of a tuition guaranty bond in an amount at least equivalent to the amount of prepaid tuition to be paid by the maximum number of students who may participate in the teach-out CSL has proposed for the ABA's consideration. The bond shall otherwise comply with Standard 10 of the Rules and Standards.
4. CSL may continue to conduct post-secondary degree activity in North Carolina at this time and on a limited basis while it develops and seeks ABA approval of an appropriate teach-out plan that fully protects the interests of CSL students who may wish to complete their CSL degree programs, and/or approval for continued operation as an accredited law school, subject to the following requirements:
 - a. CSL's plan for teaching out its remaining students and/or remedial plan for continued operation as an accredited law school, must be approved by the American Bar Association (ABA) no later than August 10, 2017; and
 - b. The Department of Education (DOE) must determine no later than August 10, 2017, that any CSL student who remains enrolled may participate in Title IV federal loan programs.
5. CSL shall keep the Licensure Unit fully informed of the progress and the status of:
 - a. The investigation of CSL by the Consumer Protection Division of the North Carolina Department of Justice;
 - b. The ABA's consideration of CSL's request to approve its teach-out plan and remedial plan; and
 - c. The Department of Education's consideration of CSL's request for reinstatement for participation in Title IV programs.

6. CSL shall promptly distribute this determination of the Board of Governors and the attached document, to:
 - a. All CSL students, including currently enrolled students, and students who have the status of "leave of absence" or "withdrawn";
 - b. The ABA;
 - c. The Department of Education; and
 - d. The North Carolina Department of Justice, Consumer Protection Division.
7. Nothing herein shall limit the Licensure Unit from conducting additional review, or the Board of Governors from taking further action, on any matter relating to CSL's operations and licensure, including without limitation such further review, recommendations, and actions as the Licensure Unit or the President may deem to be appropriate due to changes in CSL's circumstances, the development of new information, and the actions of the ABA, the Department of Education, or the North Carolina Department of Justice.
8. CSL has indicated that it believes it has the ability to remain open and become financially stable. CSL also expects that, upon the occurrence of certain financial restructuring events that it expects to consummate in the immediate future, CSL will be recertified by the U.S. Department of Education to participate in the federal Title IV student loan program. Provided that all conditions and requirements in items 1 through 6 are met, and subject to item 7, the Licensure Unit at UNC General Administration shall expeditiously review and present for the President's consideration possible actions that the Board may take to adjust or remove limitations on CSL's license.
9. Unless the Board of Governors takes further action, CSL's license shall expire on the earlier of:
 - a. The failure to meet the conditions set forth in items 1 through 4(a) and (b), above; or
 - b. May 30, 2019.

Anna Spangler Nelson

Anna S. Nelson

Chair, Committee on Educational Planning, Policy, and Programs

June 21, 2017
Date

Matt Liles

Assistant Attorney General

Consumer Protection Division

919.716.0141

mliles@ncdoj.gov

114 W. Edenton St., Raleigh, NC 27603

ncdoj.gov

Please note messages to or from this address may be public records.



From: Steven.Menashi@ed.gov
Sent: Tuesday, August 15, 2017 4:35 PM
To: Rosenfelt, Phil
Subject: Fwd: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program

Begin forwarded message:

From: "Brinton, Jedediah" <Jedediah.Brinton@ed.gov>
Date: August 15, 2017 at 4:27:14 PM EDT
To: "Menashi, Steven" <Steven.Menashi@ed.gov>
Subject: FW: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program

Steve,

Roseann provided the summary below, and forwarded the related email chain below as well. This fits with our prior conversation, so I will proceed as we discussed.

Best,
Jed

From: Eshbach, Roseann
Sent: Tuesday, August 15, 2017 4:18 PM
To: Brinton, Jedediah
Cc: Harris, Lisa (OGC); Ellis, Kathryn
Subject: FW: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program
Sensitivity: Confidential

Hi Jed.

Lisa called to tell me that you and she spoke about undocumented immigrants and whether they are eligible for services from the core programs under WIOA. As Lisa explained, I am the program attorney for the Vocational Rehabilitation (VR) program and I am in DEE.

(b)(5)

(b)(5)

I hope this information, including the string below, is helpful with the issue before you at this time. If I can help you in any way with this matter or any other, please call me. I work from home (b)(6)

(b)(6). But I am always reachable by email or phone. Thanks. –

Roseann (b)(6)

From: Eshbach, Roseann

Sent: Monday, June 19, 2017 4:04 PM

To: Menashi, Steven; Rosenfelt, Phil

Cc: Ellis, Kathryn; Kole, Adina

Subject: RE: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program

Sensitivity: Confidential

(b)(5)

(b)(5)

Thank you for your time. Based on your email below, I will advise RSA that they can proceed with the stock response, as tweaked slightly in the email string below. Is that OK? --Roseann

From: Menashi, Steven

Sent: Monday, June 19, 2017 12:56 PM

To: Rosenfelt, Phil

Cc: Ellis, Kathryn; Eshbach, Roseann; Kole, Adina

Subject: RE: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program

Sensitivity: Confidential

(b)(5)

From: Rosenfelt, Phil

Sent: Saturday, June 17, 2017 5:17 PM

To: Menashi, Steven

Cc: Ellis, Kathryn; Eshbach, Roseann; Kole, Adina

Subject: Informal Congressional Inquiry Regarding Serving Undocumented Immigrants in Vocational Rehabilitation Program

Importance: High

Sensitivity: Confidential

Steven: We wanted to share this issue with you and see if you are comfortable with our proposed response, or whether we should raise this within ED, and possibly involve DOJ and others.

(b)(5)

Basic information about the program including links to the program statute and regulations is at the following web address:

<https://www2.ed.gov/programs/rsabvrs/index.html>

(b)(5)

(b)(5)

Recently, WY VR program officials have raised the following question, and there is also the request from Oklahoma below --

Good morning, our Legislature...want to know our position on working with individuals that are not citizens of the United States. I know an individual does not have to live in Wyoming to be able to receive counseling and services. We ask individuals that report that they are not American citizens if they have a green card, an Employment Authorization Document (EAD) or in some case a student Visa.

Is there something more we should be doing? Can we legally provide services to illegal aliens? I don't think so, but want to be sure.

(b)(5)

Phil

From: Anthony, Edward
Sent: Thursday, June 08, 2017 4:34 PM
To: Dobak, Carol; Eshbach, Roseann
Subject: FW: Rehabilitation Services

We should discuss after you both have had a chance to look at the request.

*Edward Anthony, Ph.D.
Deputy Commissioner
Rehabilitation Services Administration
Office of Special Education and Rehabilitative Services
202-245-7256 (Phone)
202-245-7592 (Fax)
Edward.Anthony@ed.gov (email)*

From: Dixon, Doris
Sent: Thursday, June 08, 2017 4:30 PM
To: Anthony, Edward
Subject: FW: Rehabilitation Services

Ed – do you know what this person is referring to? If you do, will you have someone provide the info being requested/

Thanks. Doris

From: Stanley, Taylor
Sent: Thursday, June 08, 2017 3:58 PM
To: Dixon, Doris
Subject: Rehabilitation Services

Hi Doris,

I wanted to flag this for you again.

Taylor M. Stanley
Office of Legislation and Congressional Affairs (OLCA)
U.S. Department of Education
(202)453-7033

From: Marlin, Jacob [<mailto:Jacob.Marlin@mail.house.gov>]
Sent: Tuesday, June 06, 2017 4:29 PM
To: OLCA Inquiries
Subject: Rehabilitation Services

Good Afternoon,
We recently had a person contact our office with questions concerning the Oklahoma Department of Vocational Rehab that I believe falls under the federal rules and guidelines of the Dept. of Education Rehabilitation Services. They would like to receive a copy of the federal regulation stating that the state agency must provide services to illegal immigrants. Is this something that your office could provide? Any help that you can give me in answering this inquiry would be appreciated. Feel free to contact me if there are any further questions. Have a great day.

Jake Marlin, Veterans Caseworker
CONGRESSMAN MARKWAYNE MULLIN
3109 Azalea Park Drive | Muskogee, OK 74401
p 918-687-2533 | f 918-686-0128

Menashi, Steven

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Jake Marlin, Veterans Caseworker
CONGRESSMAN MARKWAYNE MULLIN
3109 Azalea Park Drive | Muskogee, OK 74401
p 918-687-2533 | f 918-686-0128

From: Menashi, Steven
Sent: Wednesday, January 24, 2018 12:59 PM
To: Bailey, Nathan; Hill, Elizabeth
Subject: FW: Another article (press clips)

From: Bader, Hans
Sent: Wednesday, January 24, 2018 12:57 PM
To: Menashi, Steven; Sherman, Brandon; Jackson, Candice; Bull, Brittany
Cc: Eitel, Robert; Talbert, Kent; Venable, Joshua; Brogan, Frank; Brinton, Jed; Henderson, Chelsea; Riemer, Jeffrey (Justin); Botel, Jason
Subject: Another article (press clips)

In addition to the other press clippings, US News just posted an interesting article about school discipline. It argues that the Obama administration's demands regarding student discipline made schools less safe and reduced academic achievement:

<https://www.usnews.com/opinion/knowledge-bank/articles/2018-01-24/suspension-bans-do-real-academic-damage>

By [Max Eden](#), Contributor | Jan. 24, 2018

Suspension Bans Hurt Kids

When the Los Angeles school board voted in 2013 to ban suspensions for "willful defiance," board member Richard Vladovic [said](#) he supported it as an experiment, but would be "the first to stop it" if it hurt student learning. Well, the results are in: the experiment has failed. The ban has done substantial academic damage. If the board is actually willing to do what it asks of students, to learn, it will repeal the ban.

A first-of-its-kind [study](#) by a Boston University doctoral candidate demonstrates direct, causal harm from the ban – harm that's the greatest in schools that had to lower suspensions by the most. Until recently, academic studies basically said: "Schools with more suspensions are weaker academically than schools with fewer suspensions." From there, activists have assumed that lowering suspensions must therefore increase academic achievement.

This study gives the lie to that wishful logic. It compares academic growth in Los Angeles Unified School District middle schools before and after the ban. In schools that didn't have any suspensions for willful defiance before, academic growth improved slightly.

But in schools that had 1-10 suspensions, academic growth dropped by 18 percent of a standard deviation – essentially a fifth of a year of learning. And in schools that had more than 10 suspensions before the ban, academic growth plummeted by 30 percent, an effect equivalent to telling kids: "Don't bother coming back to school after spring break."

The alarming findings hold when comparing LA schools to schools across the state. There wasn't much difference in schools that didn't have suspensions. But in schools that did, growth in LA plummeted and remained stable in schools where suspensions were not banned.

Two years later, Oakland implemented a similar ban. The results there look even worse. In the first year of implementation, academic growth in Oakland lagged 44 percent of a standard deviation behind the state, an effect equivalent to telling kids: "Don't bother coming back to school after winter break."

Perhaps even worse than the academic damage: when suspensions are banned, kids end up feeling less safe in school. As a fellow at the NYC-based Manhattan Institute, I published a [report](#) last year showing that according to student responses on school climate surveys, schools in the Big Apple were getting more violent. I examined student answers to the exact same questions the year before the discipline shift and the year after, setting a 5 percent difference as a threshold for determining whether matters had changed. According to students, violence increased at 443 middle and high schools and decreased at 144.

New York's reform just gave teachers extra hoops to jump through before issuing a suspension. LA banned suspensions altogether, and the results were far, far worse. Applying the same standard, 214 middle and high schools became less safe and only seven improved.

After student surveys showed safety tanking, New York City changed its questions and answers to make future comparisons impossible. Los Angeles did the same thing. They might try to argue that, sure, safety was at historic lows in 2015 and 2016, but it rebounded by 2017. That's because they changed the answer prompts to that question.

Los Angeles and New York City are hardly exceptional. Reforms to lower suspensions have harmed kids in [Syracuse](#), [St. Paul](#), [Virginia Beach](#), [Philadelphia](#), [Baton Rouge](#) – the list goes on and on. Hundreds of school districts serving millions of students overhauled their school discipline policies. They did not do so voluntarily. The Department of Education issued a dictate threatening school districts with a federal investigation if Washington didn't like the district's discipline numbers. When these investigations occurred, districts were forced to overhaul their discipline policies and disaster swiftly followed. LAUSD did not ban suspensions entirely of its own accord; it was under an [order](#) to change from the Department of Education.

It should surprise no one that suspension bans hurt kids. After all, they're predicated on the notion that teachers shouldn't be trusted, that teachers are to blame for society's problems, that teachers engage in mass "[racial discrimination](#)," according to the former secretary of education.

That's absurd, and it's dangerous. Nobody knows how to manage their classrooms better than teachers. Certainly not career bureaucrats or professional activists. If the Los Angeles school board is willing to accept evidence and do what's best for kids, it will repeal the ban and start trusting its teachers again.

Tags: [education](#), [education policy](#), [K-12 education](#)

From: Ackerson, Jeanne

Sent: Wednesday, January 24, 2018 10:13 AM

Subject: 2018-01-24 Clips

The text of each of the articles is included in the attached pdf.

[Betsy DeVos Taps Former Bush Administration Lawyer as Top Adviser](#)

ED Week – Alyson Klein

Kent Talbert, who served in the U.S. Department of Education under President George W. Bush, has been tapped as a senior policy adviser to Secretary of Education Betsy DeVos.

[Two students dead, 12 other people wounded in Kentucky high school shooting](#)

Washington Post – Moriah Balingit and Sarah Larimer

A 15-year-old boy armed with a handgun allegedly walked into a rural high school in Kentucky and opened fire on his classmates early Tuesday, authorities said, killing two students and wounding a dozen sother people before being stopped by a sheriff's deputy.

[School Shooting in Kentucky Is Nation's 11th of Year. It's Jan. 23.](#)

New York Times – Alan Blinder and Daniel Victor

Gunfire ringing out in American schools used to be rare, and shocking. Now it seems to happen all the time.

Will Spending on Things Like Schools Match the Pentagon's Budget?

ED Week – Andrew Ujifusa

Whenever lawmakers reach a final 2018 budget deal, whether that's before Feb. 8 or after, we'll finally figure out how much funding there will be for the U.S. Department of Education. We'll also get an answer (sort of) to a long-standing fight in Washington: the fate of caps on defense and non-defense discretionary spending, including education.

Why The News About Graduation Rates May Actually Be Good News

U.S. News & World Report – Lauren Camera

Multiple states have found issues with their reported graduation rates for recent years.

Despite promises, Trump administration has had little impact on public education in California

ED Source – Louis Freedberg

A year into the his presidency, neither Donald Trump nor his secretary of education Betsy DeVos has inflicted anything like the damage on K-12 education that many public school advocates feared based on his campaign pledges and public pronouncements.

New York Denied ESSA Waiver to Test Students With Disabilities Off Grade Level

ED Week – Christina Samuels

New York's education plan required by the Every Student Succeeds Act passed federal muster with the U.S. Department of Education, but the state was not granted a waiver that would have allowed it to use tests for students with disabilities that do not match their grade level.

Outlook for Higher Ed in 2018 Is Bleak, Ratings Agency Says

Chronicle of Higher Education – Adam Harris

Higher education will face many of the same challenges in 2018 that it has in previous years, but additional state and federal pressures suggest a bleak outlook for the sector this year, according to the ratings agency Standard and Poor's.

STEM Students Want Universities to Address Racial Issues

Hechinger Report – Stuart Miller

STEM universities aren't doing enough to make students feel welcome and close racial gaps, students and experts say.

Trump to Schumer: 'If there is no wall, there is no DACA'

Politico (Subscription) – Louis Nelson

President Donald Trump reiterated late Tuesday night that funding for his promised wall along the U.S.-Mexico border remains a requirement for any deal to shield undocumented immigrants brought here as children from deportation, a declaration that came hours after Senate Minority Leader Chuck Schumer said he would take wall funding off the table in upcoming negotiations.

Trump sets his Cabinet free to shape an agenda

Politico (Subscription) – Nancy Cook

Agency heads have been given extreme leeway to pursue their policy goals, moving fast on changes as the White House seeks compromises with the Hill.

COLUMN: No more teaching to the test

Indiana Daily Student – Maddy Klein

Opinion - After becoming largely the subject of the federal government's discretion, ESSA is a sign that education policy is moving back where it should be: in the hands of the states. Friday, Education Secretary Betsy DeVos approved Indiana's plan for implementation of the Every Student Succeeds Act.

Public Service Loan Forgiveness Must Go

RealClear Education – Alex Caro

Commentary - Congress is set to kill off loan forgiveness for those working in public service.

Menashi, Steven

From: Menashi, Steven
Sent: Thursday, January 25, 2018 12:03 PM
To: Bull, Brittany
Subject: FW: USCCR and OCR responses
Attachments: USCCR discipline 1.24.18 OCR FL edits.docx

From: Lopez, Francisco (Frank) (OGC)
Sent: Thursday, January 25, 2018 12:00 PM
To: Menashi, Steven; Bader, Hans; Rosenfelt, Phil; Ellis, Kathryn
Subject: USCCR and OCR responses

I am attaching my initial edits to the OCR responses to interrogatories and document requests. Send the documents in separate emails due to size restrictions.

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Frank Lopez
Deputy Assistant General Counsel
Division of Educational Equity
Office of the General Counsel
(202) 401-6278 (direct)

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Steven.Menashi@ed.gov

From: Steven.Menashi@ed.gov
Sent: Monday, February 5, 2018 5:09 PM
To: Shaheen, Patrick
Subject: Fwd: Responses to USCCR
Attachments: OSERS Response to Civil Rights Commission Interrogatories 02-05-18 clean.docx; ATT00001.htm; OCR Response to Civil Rights Commission Interrogatories 020518 clean.docx; ATT00002.htm

I also need two copies of each of these.

Begin forwarded message:

From: "Lopez, Francisco (Frank) (OGC)" <Frank.Lopez@ed.gov>
Date: February 5, 2018 at 5:01:58 PM EST
To: "Menashi, Steven" <Steven.Menashi@ed.gov>, "Bader, Hans" <Hans.Bader@ed.gov>, "Ellis, Kathryn" <Kathryn.Ellis@ed.gov>, "Rosenfelt, Phil" <Phil.Rosenfelt@ed.gov>
Subject: Responses to USCCR

Here are the clean versions. I did not reattach the documents. Let me know if you need them again.

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From: "Lopez, Francisco (Frank) (OGC)" <Frank.Lopez@ed.gov>
Date: February 5, 2018 at 5:01:58 PM EST
To: "Menashi, Steven" <Steven.Menashi@ed.gov>, "Bader, Hans" <Hans.Bader@ed.gov>, "Ellis, Kathryn" <Kathryn.Ellis@ed.gov>, "Rosenfelt, Phil" <Phil.Rosenfelt@ed.gov>
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Menashi, Steven

From: Menashi, Steven
Sent: Thursday, February 8, 2018 3:09 PM
To: Bailey, Nathan; Hill, Elizabeth
Subject: FW: Responses to USCCR
Attachments: OSERS Response to Civil Rights Commission Interrogatories 02-05-18 clean.docx; OCR Response to Civil Rights Commission Interrogatories 020618 clean.docx

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Menashi, Steven

From: Menashi, Steven
Sent: Wednesday, February 21, 2018 11:12 AM
To: Brinton, Jed
Subject: FW: POLITICO's Morning Education: AP exam results show progress, but gaps still remain — DeVos weighs changes to student loan bankruptcy discharges — Fault lines form again on for-profit college accreditor

From: Siegelbaum, Jill
Sent: Wednesday, February 21, 2018 11:04 AM
To: Menashi, Steven; McFadden, Elizabeth
Cc: Daggett, Elizabeth; Bounds, Herman
Subject: FW: POLITICO's Morning Education: AP exam results show progress, but gaps still remain — DeVos weighs changes to student loan bankruptcy discharges — Fault lines form again on for-profit college accreditor

FYI

From: Mangold, Donna
Sent: Wednesday, February 21, 2018 11:02 AM
To: Siegelbaum, Jill
Subject: POLITICO's Morning Education: AP exam results show progress, but gaps still remain — DeVos weighs changes to student loan bankruptcy discharges — Fault lines form again on for-profit college accreditor

As expected — TCF is posting the docs. & Politico wondering whether comment period will extend beyond 3/1

From: Morning Education [<mailto:morningeducation@politico.com>]
Sent: Wednesday, February 21, 2018 10:07 AM
To: Mangold, Donna
Subject: POLITICO's Morning Education: AP exam results show progress, but gaps still remain — DeVos weighs changes to student loan bankruptcy discharges — Fault lines form again on for-profit college accreditor

By Michael Stratford | 02/21/2018 10:00 AM EDT

With help from Caitlin Emma and Mel Leonor

AP EXAM RESULTS SHOW PROGRESS, BUT GAPS STILL REMAIN: More students than ever are taking Advanced Placement exams and earning passing scores on the tests, according to results released by the College Board today. More than 1.17 million students last year took an Advanced Placement exam, compared to 1.14 million the previous year. And about 711,518 public high school graduates scored a 3 or higher on at least one test, compared to 423,067 in 2007.

- But gaps remain: White students made up 55.6 percent of all students who scored a 3 or higher, compared to nearly 22.9 percent of Hispanic/Latino students and just 4.3 percent of African American students who scored a 3 or higher. A score of 3 or higher is considered a passing score and one that colleges and universities may accept as credit. The College Board notes that students who score a 3 or higher often go on to earn better grades

in college and are more likely to graduate in four years. [Check out the results.](#)

- **Massachusetts leads the nation for the second year in a row** when it comes to the percentage of students taking AP courses and earning passing scores. About a third of Massachusetts public school graduates from the class of 2017 took an AP test and scored a 3 or higher on at least one exam. The College Board also continues to stress that its AP Computer Science Principles class is exploding and reaching more girls, more rural students and more African American and Hispanic/Latino students.

GOOD WEDNESDAY MORNING AND WELCOME TO MORNING EDUCATION. Drop me a line with your tips and feedback: mstratford@politico.com or [@mstratford](https://twitter.com/mstratford). Share event listings: educalendar@politicopro.com. And follow us on Twitter: [@Morning_Edu](https://twitter.com/Morning_Edu) and [@POLITICOPro](https://twitter.com/POLITICOPro).

FLORIDA'S HIGHER EDUCATION BUDGET BATTLE: A budget battle is brewing in the Florida Legislature over higher education funding, with the state Senate and House staking out opposing positions. POLITICO Florida Pro's explainer details the rival proposals - and how the outcome could impact Florida's public colleges and universities. [Download now.](#)

DEVOS WEIGHS POSSIBLE CHANGES TO STUDENT LOAN BANKRUPTCY DISCHARGES: The Trump administration is considering changes to how the Education Department evaluates the claims of federal student loan borrowers seeking to cancel their debts in bankruptcy. Department officials [announced](#) on Tuesday that they will seek public comments on the factors the agency uses to make decisions on whether to challenge bankruptcy claims made by student loan borrowers. Read [more](#).

- **The background: Federal law allows borrowers to discharge student loans in bankruptcy only if they can show that the debt presents an "undue hardship."** Neither Congress nor the Education Department has defined "undue hardship," and it's instead been up to the courts to develop the legal standards for what qualifies. But the Education Department, which owns or guarantees the vast majority of outstanding student loans, makes its own determination about whether a borrower has met the standard and then decides when to fight a borrower in bankruptcy court.

- **It's not yet clear what direction the Trump administration plans to take** in revising guidance for how the Education Department (or private holders of federal student loans) approach bankruptcy cases. Department officials wrote in the notice that they want to make sure that they "appropriately" carry out the congressional requirements for bankruptcy "while also ensuring that borrowers for whom repayment of their student loans would be an undue hardship are not inadvertently discouraged from filing an adversary proceeding in their bankruptcy case."

- **But the issue could potentially emerge as an area of rare agreement between Education Secretary Betsy DeVos and some congressional Democrats,** who have previously called for changes to how the Education Department evaluates claims made by student loan borrowers during bankruptcy proceedings. The Obama administration [issued](#) guidance on the issue in 2015, but it was weaker than what many congressional Democrats and consumer advocates had [sought](#) at the time.

- **What's next:** The Trump administration plans to accept public feedback on the issue for the next 90 days.

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POLITICAL FAULT LINES FORM AGAIN ON FOR-PROFIT COLLEGE ACCREDITOR: As public comments pour into the Education Department over the Accrediting Council for Independent Colleges

and Universities, it's clear that the politics surrounding the for-profit college accreditor remain largely the same as they did when the Obama administration gave it the death penalty in 2016. Senate Democrats and a coalition of 20 Democratic state attorneys general are urging the Trump administration to deny a bid by ACICS to have its federal recognition reinstated. The Obama administration terminated the accreditor over accusations that it approved too many troubled institutions like the now-defunct Corinthian Colleges and ITT Tech campuses.

- Democratic Sens. Elizabeth Warren, Patty Murray, Dick Durbin, Sherrod Brown and Richard Blumenthal last week urged the Education Department's accreditation advisory panel to reject ACICS's request to be reinstated. "We remain concerned that ACICS will again indiscriminately accredit colleges at the expense and harm of students and taxpayers," their letter says.

- A group of attorneys general from 19 states and the District of Columbia on Friday also sought to block ACICS's comeback. They wrote in a letter, which was led by Massachusetts Attorney General Maura Healey, that they believe the accreditor is "ineligible" to have its federal recognition reinstated, an argument that hints at possible litigation if the Trump administration ultimately decides to revive ACICS.

- For-profit colleges, meanwhile, are asking the Trump administration to restore the accreditor's status, citing improvements that they say the organization has made. Steve Gunderson, president and CEO of Career Education Colleges and Universities, acknowledged that ACICS lacked "effective oversight and enforcement of its accredited institutions" in 2016 when the Obama administration made its decision. But Gunderson called on the Education Department to now look at "significant reform efforts undertaken by new leadership" at the accreditor "over the last year." He urged the department to undertake a "fair, transparent, and non-ideological evaluation of ACICS's application" for reinstatement.

- A lawsuit by a progressive think tank could potentially throw a wrench into the Trump administration's plan to make a recommendation on ACICS by this spring. The Education Department on Friday, responding to a federal judge's order, formally extended the deadline for public comments on ACICS to March 1. The department can't make a recommendation on the accreditor until it reviews public feedback on the issue.

- The Education Department has begun to provide The Century Foundation, the progressive think tank, with the hundreds of pages of documents it requested related to ACICS's bid to be reinstated. Read the first batch of documents, requested under the Freedom of Information Act, here.

- What to watch next: Attorneys for the Education Department said in a letter on Friday to the judge in the case that they anticipated that they would be able to provide all of the documents by March 1 and avoid any need to further litigate the FOIA case. What's not yet clear, though, is whether the judge will require the department to further extend the public comment period to give The Century Foundation and others time to review the documents before providing feedback. The group previously asked for 21 days from the time it receives all of the documents it requested. That's expected to be an issue when the court holds a hearing on a preliminary injunction in the case on March 1.

STATE GROUPS LAUNCH INNOVATION COALITION: A number of state education groups representing public officials have banded together under the "States Leading Campaign" to showcase the "innovative" and "bold" work states are pursuing through their plans under the Every Student Succeeds Act. Through a weekly newsletter, social media and events, the campaign will counter complaints from education policy groups that plans are mostly "uncreative, unambitious, unclear, or unfinished."

- The campaign is backed by the Council of Chief State School Officers, Education Commission of the

States, the National Association of State Boards of Education and the National Conference of State Legislatures.

- **"From high-quality preschool to workforce preparation, states are taking the lead** to put the policies and practice in place that will create a more equitable education system for all students," said CCSSO Interim Executive Director Carissa Miller. "We are proud to partner on the States Leading Campaign to showcase the progress underway in states today and share best practices among state leaders to ensure we continue to move education forward for all kids in this country."

TRUMP MOVES TO BAN 'BUMP STOCKS,' TOUTS SCHOOL SAFETY AS 'TOP PRIORITY':

President Donald Trump on Tuesday directed the Justice Department to craft regulations to ban "bump stocks," the accessory used to simulate fully automatic fire in last year's deadly Las Vegas attack, as his administration responded to growing pressure to act following the fatal school shooting in Florida last week. Trump also said on Tuesday that he will "be holding a number of discussions with students, local leaders, and law enforcement to develop concrete steps that we can take to secure our schools, safeguard our students, and protect our communities." Trump's schedule for today includes one such event, a "listening session" with high school students and teachers.

- **"School safety is a top priority for my administration,"** Trump said, adding that the issue would be part of his conversation with governors next week. Trump said they'll be discussing "implementing commonsense security measures and addressing mental health issues, including better coordination between federal and state law enforcement to take swift action when there are warning signs."

- **Trump's actions on Tuesday, after almost a week of relative silence on guns following the deadly school shooting, are designed to avoid angering his pro-gun base,** report POLITICO's Eliana Johnson and Rachel Bade. "It wasn't by accident that both of the president's moves - authorizing a crackdown on 'bump stocks' and signaling support for a stronger background check system - are backed by the NRA," they write. "But they would allow Trump, who spent much of the last weekend at Mar-a-Lago watching cable news coverage of the aftermath of the shooting, to say he's taking action." Read more.

DEVOS FAMILY DIVIDED IN MICHIGAN GOVERNOR'S RACE: Dick DeVos Jr., the husband of Education Secretary Betsy DeVos, last month contributed to Michigan Attorney General Bill Schuette's gubernatorial campaign, The Detroit News reported on Tuesday. DeVos, who previously ran unsuccessfully to be the state's governor, gave the maximum \$6,800 contribution to Schuette along with his father, Amway co-founder Rich DeVos, the newspaper reported. Other members of the DeVos family are backing Schuette's opponent, Lt. Gov. Brian Calley, according to the report. Schuette has long been an ally of Betsy DeVos, backing her confirmation as secretary of Education last year. And both Dick and Betsy DeVos previously donated to his campaign to be attorney general.

- **Betsy DeVos said during her confirmation hearing last year that she "will not be involved in or engaged in political contributions, and my husband will not either."** A family spokesman has previously told The Detroit News that the pledge applied only to federal races and that Dick DeVos Jr. was "open" to contributing to state races.

DATAPoint GRAPHIC - 'RIGHT-TO-WORK' LAWS EXPLAINED: Since their sweeping electoral victories in 2010, Republican state legislators in six states have successfully passed "right-to-work" laws - policies that limit the ability of labor unions to charge non-members fees in exchange for negotiating contracts on their behalf. Conservatives argue these laws preserve employees' rights by allowing them to work without supporting a union, and that states with right-to-work laws are more attractive to businesses and investors.

Critics say these laws cripple unions' ability to function and encourage free-riding by non-members. An upcoming Supreme Court case, *Janus v. American Federation of State, County, and Municipal Employees*, could effectively bring "right-to-work" policies to all government employees nationwide. View the full Datapoint graphic [here](#). Want to add [DataPoint](#) to your Pro account? [Learn more](#).

MOVERS AND SHAKERS

- New Jersey Gov. Phil Murphy appointed **Zakiya Smith Ellis**, strategy director at the Lumina Foundation and a former education adviser to President Barack Obama, as the state's next secretary of higher education. Read [more](#).

REPORT ROLL CALL

- A [new study](#) released by the RAND Corporation finds that most teachers don't have a clear understanding of which reading instruction approaches are most aligned to their state academic standards.

- The Center for American Progress is out with a [new brief](#) on the state of civics education and finds that no state currently provides a "sufficient and comprehensive" civic education.

- American Enterprise Institute Visiting Scholar Mark Schneider (who is also Trump's [nominee](#) to lead the Institute of Education Science) and Burning Glass Technologies CEO Matthew Sigelman are out with a new report called "Saving the Liberal Arts: Making the Bachelor's Degree a Better Path to Labor Market Success." Read it [here](#).

SYLLABUS

- The urgent plea of an undocumented college trustee: [The Chronicle of Higher Education](#).

- New Jersey leads blue-state defiance of GOP tax law SALT deduction: [POLITICO New Jersey](#).

- Florida Gov. Rick Scott seeks more money for school safety, mental health after Parkland shooting: [POLITICO Florida](#).

- D.C. public schools leader resigns after skirting school assignment rules for daughter: [The Washington Post](#).

- Why is the Manhattan District Attorney looking at Newsweek's ties to a Christian university? [Newsweek](#).

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