Docket No. 17-15111

In the

United States Court of Appeals

For the

Ninth Circuit

UNITED STATES OF AMERICA, EX REL. SCOTT ROSE, MARY AQUINO, MITCHELL NELSON and LUCY STEARNS,

Plaintiffs-Appellees,

v.

STEPHENS INSTITUTE, dba Academy of Art University,

Defendant-Appellant.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 4:09-cv-05966-PJH · Honorable Phyllis J. Hamilton

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INTRODUCTION

Relators' brief begins by misstating the core legal requirement at issue. That initial misleading sentence distills Relators' theme: The incentive compensation ban ("ICB") "prohibits schools from receiving federal student aid" if they pay any admissions recruiters based on their success enrolling students. Appellees' Answering Brief (AAB) at 1. But that is not what the ICB says and it is not how the Department of Education consistently enforced the ICB for over twenty years.

The ICB restricts the types of compensation schools may pay to admissions recruiters. 20 U.S.C. § 1094(a)(20). It does not bar a school's receipt of federal student aid funds ("Title IV funds") and institutions do not certify compliance with the ICB when they request Title IV funds. Although the Department *may* limit, suspend, or terminate an institution's participation in Title IV programs for violating the ICB, Relators provide no evidence that the Department regularly does so. Even the Department admits that it has never prohibited a school from receiving Title IV funds because it violated the ICB. (ER at 73, 96, 137-39). That admission would be shocking if the ICB said what Relators assert. But Relators describe the rule they need to win their case, not the ICB as it is.

In the same fashion Relators contort witness testimony and circumstantial evidence to paint AAU as something it is not. Relators repeat (without record support) the banal allegation that AAU's admissions department operated in a "boiler room" atmosphere (AAB at 7). Relators, for example, assert that AAU organized recruiters

into "hunt groups," as if recruiters preyed on prospective students (*Id.*), but a "hunt group" is a method for distributing incoming telephone calls to the admissions department to the first available recruiter. The witness testimony they cite makes that clear (SER 741-42), as would a two-minute Google search.

From the very outset, this has been a lawyer-driven case to get money (lots of it). *See* Further Excerpts of Record ("FER") at 40-44, 327-36, 357-61 (chronicling Relators' efforts to avoid dismissal by copying whole paragraphs from the *Hendow* complaint into their complaint and sworn interrogatories). The *qui tam* bar knows that ICB claims have been an easy pass through to discovery and that every ICB claim that has survived summary judgment has ended in settlement.[1] The litigation costs and potential downside compel settlement. (Chamber's Amicus at 8-9).

It is no surprise then that Relators' core theory that AAU "reverse-engineered" employee performance reviews ("EPRs") to hide ICB violations has been superimposed by counsel. The witness testimony describes an iterative performance review process; AAU managers describe going through multiple draft EPRs and proposed salary increases before making final recommendations. Relators' entire argument consists of ignoring earlier EPR drafts and asserting that later EPR drafts, which followed initial draft salary increases, are proof that AAU made the salary adjustment first and reverse engineered the EPR to match. (*See* FER at 369)

[1] To AAU's knowledge this is true with one exception that settled after trial while on appeal.

(demonstrating Relators' cherry-picking). But every witness familiar with the emails Relators misrepresent to fit this chronology has explained (and will explain) that is not at all what happened. (FER at 55-58, 70-90, 136-41, 162-64, 166-74).

Putting all of that aside though and taking as settled the district court's view that a reasonable jury could find AAU violated the ICB, Relators cannot show that AAU made impliedly false claims that were material to the government's payment decision under *Universal Health Servs. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016).

It is undisputed that the Department of Justice deposed AAU managers and walked through the same emails and same chronology on which Relators base their "reverse-engineered" theory. (FER at 68-90). It is undisputed the Department of Education reviewed the compensation plan Relators assert is facially violative of the ICB. (ER at 309-12, 340-42, 348-50). And it is undisputed that the government took no action against AAU of any kind. (ER at 407-08).

On these facts, Relators have not satisfied *Escobar*'s demanding materiality standard, as the Seventh Circuit found when confronted with similar facts and allegations of ICB violations. *United States v. Sanford Brown*, 840 F.3d 445 (7th Cir. 2016).

I. The FCA's Falsity Element After *Escobar*.

This Court made clear first in *U.S. ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017) and later in *U.S. ex rel. Campie v. Gilead Sciences*, 862 F.3d 890 (9th Cir. 2017) that an implied certification claim must satisfy *Escobar*'s two conditions, or else fail as a matter of law. *See U.S. ex rel. Mateski v. Raytheon Co.*, No. 06-cv-03614, 2017 U.S. Dist. LEXIS 122685 (C.D. Cal. Aug. 3, 2017) (*Campie* issued a "clear-cut statement of law supporting [its] prior conclusion" in *Kelly*). Here, because AAU's specific representations about student eligibility were "literally true" when made, as the Government concedes, Relators' implied certification claims fail under *Escobar*. *See, e.g., U.S. v. Lang*, No. 16-cv-305, 2017 U.S. Dist. LEXIS 60893, *9 (E.D.N.C. April 21, 2017) ("FCA liability unavailable without evidence that actual claim submitted . . . contained false or inaccurate statements." (citing *Kelly*, 846 F.3d at 333).

a. The *Kelly* Court held that relator's claim failed as a matter of law "because [] the claims for payment made no 'specific representations'"[2] and nothing about the claims "was made misleading"[3] by the alleged deficiencies.

Relators and amici dismiss *Kelly*'s clear application of *Escobar*'s two conditions. AAU anticipated and refuted this argument in its opening brief. Contrary to Relators' assertions, the only fair reading of *Kelly* is that an implied certification claim must meet *Escobar*'s two conditions. *See* John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM

[2] *U.S. ex rel. Kelly v. Serco*, No. 14-56769, ECF Doc. No. 34 (28(j) letter).

[3] *U.S. ex rel. Campie v. Gilead Sciences, Inc.*, No. 15-16380, ECF Doc. No. 61 (28(j) letter).

ACTIONS § 2.04[A] at 2-260.1 ("Boese") (citing the *Kelly* Court as one of "[m]any courts [that] have articulated *Escobar*'s two-part test . . . as the threshold for a valid [implied] false certification theory"). As the only court that has addressed Relators' and amici's argument recently concluded: "The only way to reconcile *Kelly* and *Ebeid* is to conclude either that *Kelly* implicitly recognized that *Escobar* abrogated *Ebeid*, or that *Ebeid* never actually posited a lower standard than *Kelly*—neither of which helps [Relators]." *Mateski*, 2017 U.S. Dist. LEXIS 122685, *12 (C.D. Cal. Aug. 3, 2017).

Relators also incorrectly assert that the *Kelly* and *Campie* Courts were not on notice of *Escobar*'s two-conditions holding. But the *Kelly* defendant notified the Court in a Rule 28(j)-letter that the Supreme Court held that an implied certification claim is valid where two conditions are satisfied and informed the Court that the claims at issue "did not make any 'specific representations.'" Similarly, the *Campie* defendant filed a Rule 28(j)-letter asserting that the relator had failed to show specific representations made misleading by the defendant's alleged omission and cited *Kelly* for support.

Even if that were not the case, the discussion of *Escobar*'s two conditions in *Kelly* and *Campie* still would not constitute dicta. "The distinction between a holding and a dictum doesn't depend on whether the point was argued by counsel and deliberately considered by the court . . . but instead on whether the solution of the particular point was more or less necessary to determining the issues involved in the case." Bryan Garner, et al., THE LAW OF JUDICIAL PRECEDENT at 51 (2016). Understood as such, it

is the decision Relators and amici point to that shows the classic hallmarks of dicta. *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017).

Unlike *Kelly* and *Campie*, where the discussion of *Escobar*'s two conditions is at the center of the Court's analysis, the discussion in *Triple Canopy* that Relators and amici cite is analytically unnecessary to the court's decision. Indeed, *Triple Canopy* held that the relator satisfied an implied certification claim under *Escobar*—the defendant submitted invoices for guards who were required to meet marksmanship requirements but omitted that it had "falsified the [marksmanship] scorecards on several occasions," which the court found to fall within the rule that half-truths can be actionable misrepresentations. *Id.* at 178. The court then offered in a footnote that it would have reached the same result regardless under its broader pre-*Escobar* view of the implied certification theory. *Id.* at 178 n.3.

The arguments Relators and amici raise have already been rejected. After AAU filed its opening brief, the Government asked the *Mateski* Court to reconsider its prior decision applying *Kelly*, raising the same arguments Relators and amici advance here. 2017 U.S. Dist. LEXIS 122685 at *11.

The *Mateski* Court declined:

> [A]s the Court previously noted—and as the Government even seems to agree—the most reasonable reading of *Kelly* is that an FCA claim under an implied false certification theory cannot survive if the relator does not identify any specific representations in the claims for payment. Further, *Kelly* cited *Escobar* for this proposition, an authority superior to (and later in time than) *Ebeid*. The only way to reconcile *Kelly*

> and *Ebeid* is to conclude either that *Kelly* implicitly recognized that *Escobar* abrogated *Ebeid*, or that *Ebeid* never actually posited a lower standard than *Kelly*—neither of which helps Mateski or the Government.

Id. at *11-12 (cleaned up).

In short, the *Mateski* Court faithfully read *Kelly*'s clear statement that *Escobar* established the minimum showing to state an implied false certification claim. *Id.* at *12, n. 4.

Relators and amici also dramatically undercount the number of courts that have held *Escobar*'s two conditions must be satisfied. Recall that Relators argued that only seven courts nationwide had considered the issue.[4] In one recent opinion, however, a judge in the Southern District of New York noted that it was joining the "majority" of district courts in the Second Circuit and then cited five prior decisions in that circuit alone reading *Escobar* to require its two conditions in all implied certification claims. *U.S. ex rel. Forcier v. Computer Science Corp.*, No. 12-cv-1750, 2017 U.S. Dist. LEXIS 128140, *31 (S.D.N.Y. Aug. 10, 2017).[5]

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[4] *See* Jason McElroy, et al., *Implied False Certification Liability Under the False Claims Act After Escobar*, 30 J. Tax'n F. Inst. 51, n.36 (Fall 2016) (writing just months after *Escobar* and identifying eight "courts [that] have followed this directive from *Escobar* already").

[5] At least four other district courts have reached the same conclusion about *Escobar*'s two conditions since AAU filed its opening brief. *U.S. ex rel. Payton v. Pediatrics Servs. of America*, No. CV416-102, 2017 U.S. Dist. LEXIS 144289, *31 (S.D. Ga. Sept. 6, 2017); *U.S. ex rel. Dickson v. Bristol-Meyers Squibb*, No. 13-cv-1039, 2017 U.S. Dist. LEXIS 98810, *17-18 (D.N.J. June 27, 2017); *U.S. ex rel. Lisitza v. Par Pharmaceutical Co.*, No. 06-cv-06131, 2017 U.S. Dist. LEXIS 131246, *27 (N.D. Ill. Aug. 17, 2017); *Lang*, 2017 U.S. Dist. LEXIS 60893 at *9.

Finally, the Government's additional arguments for rejecting *Escobar*'s two conditions conflate theories of FCA liability. First, the Government looks to the FCA's adoption in response to contractors delivering defective goods during the Civil War and asserts that no one thought it mattered whether contractors made specific representations about those goods. (Gov't at 15). That's because defective goods cases have always been understood as involving factually false claims, not legally false claims. *See, e.g.*, *Bishop v. Wells Fargo & Co.*, 823 F.3d 35, 43 (2d Cir. 2016) ("Consistent with its origin, the archetypal FCA claim involves a factually false request for payment from the government, as when a contractor delivers a box of sawdust to the military but bills for a shipment of guns."); Michael Holt and Gregory Klass, IMPLIED CERTIFICATION UNDER THE FALSE CLAIMS ACT, 41 Pub. Cont. L.J. 1, 15-16 (2011).

Second, citing the Seventh Circuit's decision in *Main*, the Government asserts that *Escobar*'s two conditions should not apply to programs "involv[ing] sequential" steps (first, program entry; then, submission of claims). The Government never explains this bright-line rule. And because *Main* concerned fraud-in-the-inducement, the Court's analysis worked in the opposite direction from what the Government suggests. *Main* held that fraudulent entry into the Title IV programs would render the downstream claims false. *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir.

2005). It did not hold that violations after entry into a program participation agreement ("PPA") made subsequent claims impliedly false.

In fact, in *Sanford-Brown*, the Seventh Circuit affirmed entry of summary judgment on the relator's claim that the defendant university submitted impliedly false claims because it was not in compliance with the ICB. 840 F.3d 445 (7th Cir. 2016). Like *Kelly*, *Sanford-Brown* held that the relator's claim failed as a matter of law because *Escobar*'s two conditions had not been met. *Id.* at 447; *see* Boese at 2-260.1 (describing *Kelly* and *Sanford-Brown* as articulating *Escobar*'s two conditions as the basis for an implied certification claim).

b. AAU's specific representations about eligible students would not have misled the Department, even if AAU violated the ICB, because the Department did not consider "a recruited student ineligible to receive student aid funds for attendance at [an] institution" that violated the ICB.[6]

AAU submitted forms certifying that specific students were eligible to receive Title IV funds. The Department's student eligibility requirements include that a student be admitted or enrolled in an eligible program at an eligible institution. After arguing below that AAU's certifications were misleading because ICB noncompliance rendered AAU an ineligible institution, Relators and the Government now effectively concede

[6] ER at 104-05 (Department memorandum setting "[e]nforcement policy for violations of the [ICB] by institutions participating in student aid programs").

that argument was meritless.[7] For the first time on appeal, Relators contend the certifications are misleading because AAU would not have been an eligible program if it violated the ICB.

Relators' core argument remains a legal question. Referencing 34 C.F.R. § 668.8, Relators contend that an eligible program is (1) provided by a participating institution (2) that satisfies certain requirements in that section. Relators' argument only concerns the first factor. The argument goes something like this: (1) to participate in Title IV programs (i.e., to be a participating institution) AAU had to enter a PPA; (2) the PPA conditions AAU's "initial and continued" participation in Title IV programs on numerous requirements, including the ICB; (3) AAU later violated the ICB and (4) AAU is therefore ineligible to participate in Title IV programs as a matter of law. (AAB at 38-41).

Despite what they say, Relators' argument is a legal question about AAU's status under the Higher Education Act ("HEA") and the Department's regulations. To

[7] Relators assert that this Court need not consider "whether the district court correctly concluded there remains a triable issue of fact" as to this element. (AAB at 35-36). Relators, however, obscure the district court's finding. At Relators' urging, the district court held: "If AAU was not in compliance with the ICB, failure to disclose this fact would render the loan forms misleading because AAU would not have been an 'eligible' institution." (ER at 9). Although Relators and the Government introduced the eligible institution argument below, both now admit it was "mistaken." (AAB at 37; U.S. at 19 ("[T]he [district] court's focus on whether violations of the ICB automatically render a school ineligible for Title IV funds . . . was misplaced."). Because Relators abandon the district court's finding, this Court should not take seriously their invitation to avoid addressing this issue here.

support their conclusion that AAU lost program eligibility upon violating the ICB, Relators lean heavily on *Hendow*'s discussion of the "initial and continued" participation language. But *Hendow* concerned a university's entry into a PPA, not its subsequent compliance. *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006) (alleging that school made false promises "in order to become eligible to receive Title IV funds").

To be sure, *Hendow* said that the defendant university would not have gotten paid but-for its initial promise to comply with the ICB. But the "initial and continued" participation language here simply recognizes the Department's authority to terminate AAU's eligibility for post-entry violations of the ICB. It does not mean, as Relators and amici suggest, that schools automatically lose Title IV participation upon violating the ICB.

34 C.F.R. § 668.11 captures this point: "(a) This subpart establishes standards that an institution must meet in order to participate in any Title IV, HEA program. (b) Noncompliance with these standards by an institution already participating in any Title IV, HEA program . . . may subject the institution . . . to proceedings under subpart G," including "[t]he limitation, suspension, or termination of the participation of the institution in a Title IV, HEA program."

AAU does not dispute the Department's authority to terminate Title IV participation for ICB violations. But until the Department does so, an institution remains eligible to receive Title IV funds. *See Sanford-Brown*, 788 F.3d 696, 710 (7th Cir.

2015); *U.S. ex rel. Brooks v. Stevens-Henager College*, 174 F. Supp. 3d 1297, 1310-11 (D. Utah 2016). The Department is clear: "[a]n institution's participation in a Title IV, HEA program ends on the date that . . . [t]he institution's participation is terminated." 34 C.F.R. § 668.26.

Termination proceeding are prospective only. Under its regulations, the Department cannot terminate an institution's participation and apply the decision retroactively to invalidate prior claims. The Department provides schools with core due process protections by requiring written notification before instituting termination proceedings. And the "effective date of [any] . . . termination" must be "at least 20 days *after*" the termination notice has been mailed to the institution. 34 C.F.R. § 668.86(b)(ii) (emphasis added). In other words, claims submitted before the "effective date" of any termination proceeding remain valid claims, even though the institution submitted those claims at the same time it engaged in the action that led the Department to take adverse action.

The Government responds that, even if AAU's certifications are "literally true" in this sense, the failure to disclose noncompliance with the ICB still renders the claims misleading. (Gov't at 20). The implicit assumption seems to be that AAU's violation of "a condition for participation" might cause the Department to take adverse action terminating AAU's eligibility. But this argument fails, as it causes *Escobar*'s two conditions to collapse back into the broad implied certification theory the Supreme Court confronted but declined to adopt. *See Escobar*, 136 S.Ct. at 1998 (noting that

liability attached under the First Circuit's view because every claim for payment implied compliance with "relevant program requirements").

That argument also disregards the context it claims renders the certification of student eligibility false. For all the talk about context in the opposition briefs, none mentions that the Department issued a written policy addressing the eligibility of students attending ICB noncompliant institutions and followed that policy at all relevant times. That policy unequivocally states that ICB violations "do[] not render a recruited student ineligible to receive student aid funds for [use] at the institution" that violated the ICB.[8] (ER at 104). It is plainly not the case that AAU's literally-true certifications were, somehow, misleading in context.

Finally, Relators and amici fundamentally misconstrue *Escobar*'s discussion of misleading half-truths. The Supreme Court did not find "literally true" statements impliedly false in *Escobar*. Such reasoning would eliminate the FCA's core requirement that a defendant must submit a false claim. *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) ("[L]ack of a false claim [is a fatal defect]."). That is not what *Escobar* held. Instead, the Supreme Court addressed claims that were true only so far as they went but were rendered false by the defendant's omission of critical qualifying information. *See Par Pharmaceutical Co.*, No. 06-cv-06131, 2017 U.S. Dist. LEXIS 131246,

[8] To the extent this presents a factual question, the district court already found that the Department followed the written policy during the relevant period. (ER at 7).

*27 (N.D. Ill. Aug. 17, 2017) (rejecting argument "that a facially accurate [claim] . . . is nevertheless false or fraudulent" under *Escobar*).

In *Escobar*, the defendant billed Medicare seeking reimbursement for specific medical services performed by staff with specific job titles that required specific licenses. The defendant's staff, however, lacked the required licenses, and the reimbursement claims, which included payment codes for those job titles and medical services, were misleading on their face. Far from being "literally true," the reimbursement claims made specific representations about the services provided but failed to disclose "critical qualifying information" that made the claims false—like the fact the practitioner who diagnosed the relators' daughter was not "licensed as a psychologist" or the practitioner who "prescribed medicine . . . and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision." *Escobar*, 136 S.Ct. at 1997.

AAU did not omit "critical qualifying information" by failing to disclose alleged noncompliance with the ICB. *Escobar*, 136 S.Ct. at 2000. Even if AAU violated the ICB, as Relators allege, the students on whose behalf AAU submitted claims still would have been eligible under the Department's regulations and longstanding practice. Anyone at the Department would have understood AAU's certifications of student eligibility against that backdrop and would *not* have read the student certifications as a broad certification of compliance with the PPA. Rather, as the Government concedes, the certifications AAU submitted to the Department were "literally true."

II. The FCA's Materiality Element After *Escobar*.

a. When the *Hendow* Court found the ICB material, the Supreme Court had not yet determined how the FCA should be applied in the context of heavily regulated programs with thousands of pages of statutes, regulations, and other guidance.[9]

Escobar established a heightened materiality standard that looks to the likely or actual effect of a misrepresentation on the government's payment decision. In doing so, the Supreme Court placed the government's behavior at the forefront of the materiality analysis. Because the *Hendow* Court's materiality analysis did not consider evidence of the Department's response to ICB violations, it is "clearly irreconcilable" with *Escobar*'s demanding materiality standard. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003). And because Relators offer no evidence that ICB noncompliance was likely to affect the Department's payment decision, their materiality analysis also falls short. Consistent with *Escobar,* and in line with other courts of appeal, this Court should hold that no reasonable jury could find ICB compliance material when the Department reviewed AAU's compensation plan with knowledge of Relators' allegations and took no administrative action.

[9] Malcolm J. Harkins, III, THE UBIQUITOUS FALSE CLAIMS ACT: THE INCONGRUOUS RELATIONSHIP BETWEEN A CIVIL WAR ERA FRAUD STATUTE AND THE MODERN ADMINISTRATIVE STATE, 1 St. Louis U.J. Health L. & Pol'y 131, 157 (2007) (criticizing the *Hendow* Court's failure to even acknowledge "that the DOE was aware of the [university's] noncompliance and, nevertheless, continued paying").

i. *Escobar* adopted a heightened materiality standard that "is almost entirely *unlike* FCA materiality as it has been applied to date."[10]

Although Relators and amici assert that "*Escobar* did not change the law of materiality" but merely looked to common law antecedents, federal courts have understood *Escobar* as establishing a heightened materiality standard. *See, e.g.*, *U.S. ex rel. Pestratos v. Genentech Inc.*, 855 F.3d 481, 492-93 (3rd Cir. 2017) ("join[ing] the many other federal courts that have recognized the heightened materiality standard after [*Escobar*]"). That "demanding" materiality standard is "almost entirely *unlike* FCA materiality as it has been applied to date. Krause, REFLECTIONS ON CERTIFICATION, INTERPRETATION, AND THE QUEST FOR FRAUD THAT "COUNTS" UNDER THE FALSE CLAIMS ACT at 29 (emphasis in original). "Far from being viewed universally as a high bar, [the FCA's] 'natural tendency to influence' language ha[d] long been viewed" as a low threshold before *Escobar*. *Id.* And despite Relators saying that "little has changed, post-*Escobar* decisions indicate that courts are taking the new materiality standard seriously, and that instead of perfunctory analysis under the 'natural tendency' definition, the courts are applying a rigorous materiality analysis." Boese, § 2.04[A] at 2-259.

[10] Joan H. Krause, REFLECTIONS ON CERTIFICATION, INTERPRETATION, AND THE QUEST FOR FRAUD THAT "COUNTS" UNDER THE FALSE CLAIMS ACT, U. Ill. L. Rev. (forthcoming 2017) at draft page 29 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836645).

ii. "Nowhere in *Hendow* does the Court acknowledge that the DOE was aware of the noncompliance and, nevertheless, continued paying" claims.[11]

This Court's materiality analysis in *Hendow* "clearly falls short of [*Escobar*'s] demanding materiality [standard]." Boese, § 2.03[G] at 2-211.

Relators' brief does little to challenge that the *Hendow* Court considered the text of the ICB dispositive evidence of materiality. It admits that *Hendow* found the ICB material as a matter of law because the statute, regulation, and PPA require compliance as a condition of participation. (AAB at 23, 46).

Instead Relators argue that courts can look to the text alone as dispositive evidence of materiality even under *Escobar*. (AAB at 45). The Supreme Court, however, confronted and rejected that same "view of materiality" as articulated by the First Circuit. *Escobar*, 136 S.Ct. at 2004. Like the *Hendow* Court, the First Circuit held the "regulations themselves 'constitute[d] dispositive evidence of materiality'" because they were conditions of payment. *Id.* at 1998.

Relators argue what distinguishes this case from *Escobar* is that the ICB is "triple conditioned." (AAB at 45). Relators fail to explain, however, why this should have legal significance generally or in the specific Title IV context. 20 U.S.C. § 1094 identifies requirements that must be in PPAs, so looking to the ICB's inclusion in the PPA as some added indicia of materiality makes little sense. And 34 C.F.R. § 668.14 simply

[11] Harkins, THE UBIQUITOUS FALSE CLAIMS ACT, 1 St. Louis U.J. Health L. & Pol'y at 157.

repeats (nearly verbatim) each provision in 20 U.S.C. § 1094—which is neither unusual as far as regulations go, nor further proof that ICB compliance is material to the Department's payment decision.

In fact, the one court Relators cite for support based its materiality finding, not on the mere statutory, regulatory, and PPA texts, but on its conclusion that the Department terminated the participation of otherwise eligible institutions who violated the record-keeping requirement at issue. *U.S. ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494, 505 (8th Cir. 2016).

In contrast, the *Hendow* Court dismissed evidence of the Department's ICB enforcement precisely because it found the ICB material solely based on the statute, regulation, and PPA provisions. Relators meekly contend that the *Hendow* Court "did not need to address such evidence." (AAB at 47). Yet they fail to explain how "summarily dismissing" what under *Escobar* is very strong evidence that the ICB is not material comports with the Supreme Court's materiality analysis. Harkins, THE UBIQUITOUS FALSE CLAIMS ACT, 1 St. Louis U.J. Health L. & Pol'y at 156.

Hendow's materiality analysis did not consider the Department's inaction. "[N]owhere in *Hendow* [did] [this] court acknowledge that the DOE was aware of the noncompliance and, nevertheless, continued paying [the university]." *Id.* *Hendow* does not mention that the Department investigated the allegations and "exercised its discretion to continue making payments to [the university]." *Id.* at 169. And though Relators contend settlement agreements can offer circumstantial proof of materiality,

Hendow ignored the agreement the Department reached, which "'did not require [the university] to repay any of the financial aid received by its students" or "change any of its [compensation] practices." *Id.* at 156. Finally, *Hendow* never "mentions that the DOE issued a written policy providing that" ICB violations should be treated as regulatory violations—not as fraud. *Id.* at 157. The *Hendow* Court's failure to consider that evidence is not compatible with *Escobar*.

iii. Relators cannot establish the evidence *Escobar* instructed courts to look to "when evaluating materiality" under the FCA.[12]

Neither Congress nor the Department identify compliance with the ICB as a condition of payment. Citing *Hendow*, Relators and amici dismiss this fact as a "distinction without a difference."[13] With respect, this Court's decision to conflate conditions of payment and participation in the Title IV context is not evidence of materiality under *Escobar*. The Supreme Court made clear that it is the government's decision to expressly identify compliance as a condition of payment that is relevant evidence.

The *Escobar* Court understood (as federal courts generally have) that the government's decision to label compliance with a requirement as a condition of

[12] *Escobar*, 136 S.Ct. at 2004.

[13] It is worth noting, again, that *Hendow* concerned false promises made in the PPA in order to gain entry into Title IV programs, not an implied certification theory based on subsequent noncompliance with conditions of participation.

payment is direct, relevant evidence of materiality. To be sure, the Court held that the label the government attaches is not dispositive and conditions of participation may be material to the government's payment decision. But *Escobar* did not eradicate the distinction between conditions of payment and conditions of participation.

That distinction developed "to prevent courts from using the FCA to enforce regulatory provisions that the regulatory agencies themselves have chosen not [to] enforce or to enforce more delicately." *Smith v. Caroline Med. Ctr.*, No. 11-cv-2756, 2017 U.S. Dist. LEXIS 122150, *36 (E.D. Pa. Aug. 2, 2017). Nothing in *Escobar* makes that concern less relevant; if anything, *Escobar*'s clarification of the evidence courts should look to when determining materiality strongly underscores that concern. *Escobar*, 136 S.Ct. at 2003; *U.S. ex rel. Johnson v. Golden Gate Nat'l Senior Care, L.L.C.*, 223 F. Supp. 3d 882, 910 (D. Minn. Dec. 9, 2016) (*Escobar*'s demanding materiality standard calls for "facts related to the Government's practices in paying or refusing to pay certain types of claims").

Under *Escobar*'s demanding materiality standard, when a regulatory agency routinely allows program participants to continue participating despite violations of conditions of participation and chooses not to seek retroactive recovery of prior payments, it is strong evidence that the agency does not consider the relevant requirement material to its *payment decision*. Here, the Department has never limited, suspended, or terminated any institution's participation in Title IV programs based on ICB noncompliance. And neither Relators nor amici identify any evidence that shows

the Department "normally seeks retroactive recovery of Title IV payments." *Brooks*, 174 F. Supp. 3d at 1309 (cleaned up).

Relators' response confirms this point. Acknowledging that corrective action comprised the Department's only response in the disproportionate number of substantiated ICB violations, Relators contend that this evidence shows the Department "ensured . . . that schools came into compliance with the ICB." (AAB at 53). But under *Escobar*, "a finding that a requirement is a condition of participation undermines materiality when violating that requirement would lead the regulatory agency to initiate corrective measures *other* than denying payment." *Smith*, 2017 U.S. Dist. LEXIS 122150 at *37 (emphasis added).

The Department has broad discretion to enforce compliance with its regulations through enforcement mechanisms tied to Title IV funding. It can require noncompliant institutions to pay back Title IV funds. 34 C.F.R. § 668.96(b). It can temporarily withhold funds from an institution if it "determines that immediate action is necessary to prevent misuse of Federal funds." 34 C.F.R. § 668.83(c)(1)(ii). And in addition to terminating Title IV participation, the Department can temporarily suspend Title IV program participation or impose specific limits on an institution's participation such as limiting the amount of available Title IV funds. 34 C.F.R. §§ 668.85-86.

But the record before this Court confirms that the Department (1) did not deny payment to ICB noncompliant schools; (2) did not regularly seek retroactive recovery of Title IV funds from ICB noncompliant schools; and (3) never limited, suspended, or

terminated any institution's participation in Title IV programs because of ICB violations. The Department even "issued a written policy providing that . . . [ICB] violation[s] should be treated, not as fraud, but as a matter for administrative [enforcement]." Harkins, THE UBIQUITOUS FALSE CLAIMS ACT, 1 St. Louis U.J. Health L. & Pol'y at 157.

Amici's attempt to label this an "all-or-nothing approach" falls flat. (VES at 21). As noted above, although the Department can respond to ICB noncompliance with *numerous enforcement actions* tied to Title IV funding, it has not done so on a regular or routine basis. Far from looking only to termination proceedings, AAU's materiality analysis accounts for the Department's decision-making involving Title IV funds.

In short, Relators "[have] offered no evidence that the government's decision to pay [AAU] would likely or actually have been different had it known of [AAU's] alleged noncompliance with Title IV regulations." *Sanford-Brown*, 840 F.3d at 447. At most, Relators have shown that the Department required AAU to agree to comply with the ICB before participating in Title IV programs. The Seventh Circuit considered the same arguments about the ICB and concluded that the relator had shown no more than that "[the defendant's] supposed noncompliance and misrepresentations would have entitled the [Department] to decline payment," "[which] is not enough" under *Escobar*. *Id.* at 3.

iv. Relators "excuse the government's past enforcement"[14] even though *Escobar* puts government action "at the forefront of FCA liability determinations."[15]

Finally, Relators fail to address the Department's decision not to issue findings or take action against AAU after evaluating Relators' allegations in the context of materiality. Relators instead raise the issue in the context of falsity and argue that it is "absurd" to conclude from the Department's review of AAU that "AAU did not violate the law." (AAB at 55). That reframing of the issue elides the very strong evidence that the Department did not consider AAU's alleged ICB noncompliance material to its payment decision.

Amicus Taxpayers Against Fraud asserts that *Escobar* requires the government have actual knowledge of fraud, not just an awareness of fraud allegations, and approve the conduct. (TAF 16). But amicus cites pre-*Escobar* cases addressing the "government knowledge" defense developed under the FCA's scienter element. *Escobar*, however, addressed government action or inaction as key evidence of materiality and nowhere suggests the government must approve of the noncompliant conduct. *See, e.g.*, *Knudsen v. Sprint Communs. Co.*, 2016 U.S. Dist. LEXIS 118438, *45-46 (N.D. Cal. Sept. 1, 2016).

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[14] Doan Phan, Comment, REDEFINING LINCOLN'S LAW: HOW TO SHAPE THE THEORY OF IMPLIED CERTIFICATION POST-ESCOBAR, 13 J.L. Econ. & Pol'y 113 (2017) (writing critically of the district court's materiality analysis in the decision below)

[15] Boese, § 2.04[A] at 2-257 (Because *Escobar*'s materiality standard "'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation,'" "government knowledge, and government action or inaction, is at the forefront of FCA liability determinations").

The government more subtly suggests that the Department lacked knowledge of AAU's scorecard compensation plan because AAU "attempted to cover up its unlawful scheme after a government investigation was initiated." (Gov't at 24).[16] The government insinuates, rather than asserts, this conclusion because there is no evidence in this case that AAU failed to comply with the Department's investigation.

The facts of this case are not like *Campie* where the parties disputed "what the government knew and when." The following facts are not in dispute:

- Between 2009-2010, AAU compensated admissions recruiters using a "scorecard" that included both quantitative and qualitative factors;
- After Relators filed their qui tam action, the Department initiated a focused program review of AAU's compensation of admissions recruiters during the 2009-10 award year;
- The Department requested and received multiple copies of the "scorecard" used to determine admissions recruiters' salaries;
- The sample scorecards AAU provided to the Department are the same scorecard Relators contend is facially noncompliant with the ICB; and

[16] Although the district court found a triable issue regarding whether AAU managers hid the compensation practice from employees, there are strong reasons to doubt that finding and no reason for this Court to reach further. The district court did not find, and Relators have not shown, that AAU lied to or misled the government.

- The Department issued no findings and took no action against AAU at the close of its program review.

(ER at 340-42, 348-50, 407-08).

Numerous courts of appeals have found legal requirements immaterial to the government's payment under the same or similar circumstances. In *Sanford-Brown*, the Seventh Circuit rejected relator's claim that the ICB was material where the Department reviewed the defendant university and "concluded that neither administrative penalties nor termination was warranted." *Sanford-Brown*, 840 F.3d at 447. In *U.S. ex rel. McBride v. Halliburton Co.*, the D.C. Circuit affirmed summary judgment in part because "the [government] investigated [the relator's] allegations and did not disallow any charged costs." 848 F.3d 1027, 1029 (D.C. Cir. 2017). And in *Abbott v. BP Exploration & Prod.*, the Fifth Circuit affirmed summary judgment in part because the government "allow[ed] [the defendant] to continue [the challenged behavior] after a substantial investigation into Plaintiff's allegations." 851 F.3d 384, 387 (5th Cir. 2017).

b. Relators' theory subsumes the Department's ability to set policy and exposes colleges to massive FCA liability for actions the Department treats, not as fraud, but as garden-variety regulatory noncompliance.

The materiality analysis Relators propose "lacks a discerning limiting principle." *Sanford-Brown*, 788 F.3d at 711. Relators urge this Court to hold that the ICB is material (1) because it is a condition of "initial and continued" eligibility or (2) because it is "triple conditioned" and "central" to the HEA bargain. Under either holding, though,

any condition in the PPA that is "not met by [an] institution would have the potential to impose strict liability on it under the FCA" (*id.*)—irrespective of whether the Department routinely pays claims despite knowledge of noncompliance.

i. Relators ask this Court to adopt an absolutist approach to materiality that is incompatible with *Escobar*'s core holding.

Relators ask the Court to hold that "compliance with the ICB is material" because it is a condition of AAU's initial and continued eligibility to participate in Title IV programs. (AAB at 51). The same is true, however, for "all [HEA] statutory provisions," "all applicable regulatory provisions prescribed under [the HEA]," and all requirements in the PPA.[17] (ER at 293, 295) ("[E]xecution of this [PPA] . . . is a prerequisite to [AAU's] initial or continued participation in any Title IV, HEA

[17] Amicus Veterans Education Success (VES) attempts to differentiate the ICB by noting that it is included in the "'Selected Provisions' section of the [PPA]." (VES at 10). But amicus omits that the first paragraph of the "Selected Provisions" expressly requires AAU to comply with *all* HEA statutory provisions, *all* Department regulations, and *all* provisions of the PPA. ER at 295.

Amicus VES also attempts to distinguish the ICB by noting that institutions "must annually certify in writing that they are complying with the ICB, among other specific certifications of compliance required in the audit process." VES at 10-11. The assertions VES references differ by auditor, are not in the record, and AAU sharply disagrees with VES's view that the assertions are a basis for FCA liability.

For this brief, it is enough to note that Amicus fails to mention that by "among other specific certifications" it is referring, again, to every statute, regulation, and PPA provision. *See U.S. v. ITT Educ. Serv.*, 284 F. Supp. 2d 487, 491 (2003) (the management assertions "confirmed to [the auditor] that the school had, in the reporting period, complied with the requirements of Title IV") & 505 (assertions stated that "the institution had complied with the eligibility and participation compliance requirements of the Title IV programs"). The same is true for VES's argument that schools must hire an outside auditor to review compliance with the ICB. 34 C.F.R. § 668.23.

program" and "[b]y entering into this [PPA], [AAU] agrees" to comply with *all* applicable statutes, regulations, and PPA provisions)). Relators' proposed holding is not at all about the ICB's materiality to the Department's payment decision and is entirely dependent on the mere label the Department attached to all statutory, regulatory, and PPA provisions.

It should not be lost on this Court that Relators and amici assert this alone is sufficient to create a question of fact for a jury to resolve. (VES at 25). But *Escobar* expressly rejects Relators' expansive view of materiality and instructs courts that they must engage in a *demanding, fact-intensive* analysis at both the motion to dismiss and summary judgment stage. *Escobar*, 136 S.Ct. at 2004, n.6.

ii. Relators alternatively ask this Court to hold that the ICB is material as a matter of law because it is "triple conditioned" and "central" to the Department's regulatory efforts.

Relators' alternative proposed holding also comes up short. Although Relators and amici assert that a material misrepresentation is one that goes "to the very essence of the bargain," (Gov't. at 23) none provides any meaningful standard from which to conclude that the ICB is "central" to the bargain schools make with the Department. *See Brooks,* 174 F. Supp. 3d at 1310 (noting the government's and relators' failure to provide any meaningful standard to distinguish the ICB as an "integral regulation").

Relators contend the ICB is "central" to the HEA bargain because the ICB was enacted in response to concerns that schools were signing up unqualified students who were defaulting on their student loans. Relators neglect, however, that Congress enacted

the ICB as one of "more than 100 provisions" in the 1992 HEA amendments—all of which were designed in response to the same concerns. 138 Cong. Rec. H. 1736. And Relators make no effort to establish that Congress or the Department viewed the ICB as the "central" provision of the 1992 HEA Amendments—let alone the entire HEA bargain. Their argument simply assumes what it sets out to prove.

Even in the best case, trying to establish that the ICB goes to the "essence of the bargain" by reference to legislative history answers the wrong question. At most, the underlying legislative history "highlight[s] the importance" of strengthening Title IV programs and "note[s] Congress's decision to regulate" certain practices. *U.S. ex rel. Schimelpfenig v. Dr. Reddy's Labs*, No. 11-cv-4607, 2017 U.S. Dist. LEXIS 44064, *23 (E.D. Pa. Mar. 27, 2017). But the fact Congress found each of the 100-plus provisions of the 1992 HEA amendments "important enough to regulate speaks little to the intended consequences of noncompliance." *Id.* at *23 (citing *Wilkins*, 659 F.3d at 310 n. 17). And ultimately, under *Escobar*, "the relevant inquiry is whether the Government's payment decision was influenced by claimant's purported compliance with a particular requirement, not whether a given issue has been deemed worthy of regulation." *Id.* at *24.

But this is not the best case because Relators misleadingly quote the legislative history they purport to rely on. To be sure, Congress enacted the 1992 HEA Amendments in response to growing concern that schools were signing up unqualified students who were increasingly defaulting on their student loans. But nothing in the

legislative history supports Relators' claim that Congress viewed the ICB as "central" to its efforts to curb those concerns.

In the first place, the Senate Committee Report Relators purport to rely on only mentions commissioned admissions personnel twice and both times in simple descriptive terms to describe certain schools. Relators contend that the report identified "recruitment and admissions" as rife with abuse but fail to mention that the report identifies the specific troublesome practices—false advertising, illegal recruitment efforts, and falsifying ability-to-benefit testing. 138 Cong. Rec. H. 1736. Paying commissions to admissions personnel, which was legal at the time, was not among the specific abusive school practices detailed in the report.

Although the 1992 HEA Amendments include provisions directly regulating the specific practices detailed in the Congressional report, Relators make no mention of them. Yet comparing the other provisions Congress passed in the 1992 Amendments to the ICB undermines Relators' core argument that the ICB is material because it is "central" to the HEA bargain.

Consider, for example, the default rate provisions Congress enacted. Rather than merely prohibiting excessive default rates (as the ICB prohibits certain payments), Congress enacted provisions that strip institutions of eligibility by operation of law when their cohort default rates exceed (1) a certain benchmark for three years or (2) a higher benchmark in any individual year. 34 C.F.R. § 668.206(a). (The fact the Congress has enacted HEA provisions that expressly terminate Title IV eligibility should caution

this Court against Relators' unsupported argument that ICB violations automatically result in the loss of program eligibility.)

The Department's subsequent implementation of the default-rate requirements sharply contrasts with its enforcement of the ICB. When the Senate Government Committee issued its report about the Title IV programs in 1991, "about half of the approximate[ly] 2,200 proprietary schools" had high default rates that warranted remedial action. 102 S. Rpt. 58. And within ten years, the Department's default rate requirements had resulted in "more than 1100 schools" having lost eligibility to participate in Title IV programs. That year the Department reported the lowest ever national default rate. *See* Accountability For Results Works: College Loan Default Rates Continue To Decline, available at https://ifap.ed.gov/eannouncements/0919 DefaultRtsDecline.html (last verified May 29, 2017).

In contrast, the Department has never limited, suspended, or terminated any school's Title IV participation because of ICB noncompliance. And at all relevant points, the Department followed a written policy stating that ICB violations did not cause the government monetary loss, did not affect student eligibility, and should not be treated as fraud.

Relators' approach also overlooks the Department's own assessment of the core provisions adopted in the 1992 HEA Amendments. The Department had no trouble identifying the cause for the dramatic turnaround in the national default rate. In response to public comments during the negotiated rulemaking for the ICB Safe

Harbors, the Department tied its success in strengthening Title IV programs to four core requirements enacted in the 1992 HEA Amendments.

Rejecting one commenters concern that the ICB Safe Harbors would "allow unscrupulous institutions to engage in the kinds of improper recruiting activities that took place during the 1980s and early 1990s," the Department was adamant. 67 Fed. Reg. 67048. "That result is no longer possible today." *Id.* The Department attributed its response to four aspects of the 1992 HEA amendments: (1) the default rate requirements, (2) the "strengthened ability-to-benefit [testing] provisions," (3) the added provisions requiring schools to refund Title IV funds to the Department, and (4) the provision allowing the Department to terminate a school's eligibility "if it misrepresents its programs to students." *Id.* The Department specifically noted that under the Department's default rate provisions "most of those unscrupulous institutions were terminated from participating in the Title IV, HEA programs because of their high cohort default rates." *Id.*

Finally, on its own terms, Relators' proposed holding creates enormous FCA liability that this Court should be keenly aware of before it acts. There are numerous requirements in the Title IV context that meet Relators' criteria. If this Court were to adopt Relators' holding, it would expose colleges and universities to expansive liability for numerous regulatory violations.

Consider one representative example of the many "triple conditioned" Title IV requirements: Like the ICB, every college and university that wishes to participate in

Title IV programs must promise to comply with the Jeanne Clery Act, which requires schools to annually disclose criminal offenses (including sexual offenses) that occur on campus. Congress has made clear that the Clery Act "is a very, very important statute" and the disclosures are a critical tool without which parents and prospective students "cannot make an evaluation as to where they want to [attend]." Campus Crime: Compliance and Enforcement Under the Clery Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 590 (2006).

Like the ICB, compliance with the Clery Act is required by statute (20 U.S.C. § 1092(f)), regulation (34 C.F.R. §§ 668.14(c)(2)(i) & 668.46), and the PPA (ER at 294 (2(b)) & 297 (26)(ii)(c)(2)). *See Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 760 (E.D. Tn. 2009) (violations more effectively addressed under Department's "regulatory framework" "because a university's failure to comply with the mandates of the Clery Act may result in it not receiving federal funding for its student financial assistance programs").

Colleges and universities have strong incentives to underreport criminal offenses committed on their campuses, as the growing coverage of on-campus sexual offenses makes clear. The Department accordingly reviews "compliance with Clery Act requirements as a part of each and every program review [it] conduct[s]." 109 S. Hrg. 590 (2006). And since the Clery Act's enactment, the Department has substantiated violations at some of the most prestigious universities, including Yale University, which failed to report four separate forcible sexual offenses. The $165,000 fine the

Department issued Yale alone far exceeds the two fines the Department has issued for ICB violations, combined. *See* https://studentaid.ed.gov/sa/sites/default/files/1250_001.pdf.

Under Relators' materiality analysis Yale's violations of the Clery Act would expose the university to massive FCA liability even though the Department (1) does not treat Clery Act violations as fraud, (2) does not normally seek retroactive recovery of Title IV funds, and (3) has never limited, suspended, or terminated participation in Title IV programs for Clery Act noncompliance. This Court should reject that expansive view of liability and refuse to consider such regulatory violations as fraud.

Although Relators try to analogize PPA violations (here the ICB) to *Escobar*'s "guns that don't shoot," the two simply do not measure up. (AAB at 50). Participation in Title IV programs is not like contracting to provide firearms to the government. A court is not at risk of substituting its judgment for that of the government when it concludes that purchased guns "must actually shoot." *Escobar*, 136 S.Ct. at 2001. But the policies the HEA advances are varied and at times competing.

"[I]n the Title IV context, imposition of FCA liability for regulatory violations may jeopardize broad access to education . . . [and] courts are [simply] ill-equipped to determine the proper balance between enhancing access to education by allowing schools to retain eligibility for Title IV funding and adequately enforcing the requirements of program participation." *Brooks*, 174 F. Supp. 3d at 1311. This Court should respect the Department's judgment (expressed in writing and through the

Department's past practice) that ICB violations do not affect student eligibility for Title IV funds and should not be treated as fraud.

CONCLUSION

For these reasons, this Court should reverse the district court's order denying AAU's motion for reconsideration, vacate the district court's order denying in part AAU's motion for summary judgment, and order the district court to enter judgment in favor of AAU.

Dated: September 20, 2017

Respectfully submitted,

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Signature of Attorney or Unrepresented Litigant /s/ Steven M. Gombos

Date 9/20/2017

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

Table of Contents to Addendum

The following relevant regulations supplement the regulations and statutes contained in Appellant's opening brief:

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Document:34 CFR 668.8

34 CFR 668.8

This document is current through the September 13, 2017 issue of the Federal Register with the exception of the amendment appearing at 82 FR 43088, September 13, 2017. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through September 8, 2017.

Code of Federal Regulations TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS SUBPART A -- GENERAL

§ 668.8 Eligible program.

(a) General. An eligible program is an educational program that --

(1) Is provided by a participating institution; and

(2) Satisfies the other relevant requirements contained in this section.

(b) Definitions. For purposes of this section --

(1) The Secretary considers the "equivalent of an associate degree" to be --

(i) An associate degree; or

(ii) The successful completion of at least a two-year program that is acceptable for full credit toward a bachelor's degree and qualifies a student for admission into the third year of a bachelor's degree program;

(2) A week is a consecutive seven-day period; and

(3)

(i) The Secretary considers that an institution provides one week of instructional time in an academic program during any week the institution provides at least one day of regularly scheduled instruction or examinations, or, after the last scheduled day of classes for a term or a payment period, at least one day of study for final examinations.

(ii) Instructional time does not include any vacation periods, homework, or periods of orientation or counseling.

(c) Institution of higher education. An eligible program provided by an institution of higher education must --

(1) Lead to an associate, bachelor's, professional, or graduate degree;

(2) Be at least a two-academic-year program that is acceptable for full credit toward a bachelor's degree; or

(3) Be at least a one-academic-year training program that leads to a certificate, or other nondegree recognized credential, and prepares students for gainful employment in a recognized occupation.

(d) Proprietary institution of higher education and postsecondary vocational institution. An eligible program provided by a proprietary institution of higher education or postsecondary vocational institution --

(1)

(i) Must require a minimum of 15 weeks of instruction, beginning on the first day of classes and ending on the last day of classes or examinations;

(ii) Must be at least 600 clock hours, 16 semester or trimester hours, or 24 quarter hours;

(iii) Must provide undergraduate training that prepares a student for gainful employment in a recognized occupation; and

(iv) May admit as regular students persons who have not completed the equivalent of an associate degree;

(2) Must --

(i) Require a minimum of 10 weeks of instruction, beginning on the first day of classes and ending on the last day of classes or examinations;

(ii) Be at least 300 clock hours, 8 semester or trimester hours, or 12 quarter hours;

(iii) Provide training that prepares a student for gainful employment in a recognized occupation as provided under subpart Q of this part; and

(iv)

(A) Be a graduate or professional program; or

(B) Admit as regular students only persons who have completed the equivalent of an associate degree;

(3) For purposes of the FFEL and Direct Loan programs only, must --

(i) Require a minimum of 10 weeks of instruction, beginning on the first day of classes and ending on the last day of classes or examinations;

(ii) Be at least 300 clock hours but less than 600 clock hours;

(iii) Provide undergraduate training that prepares a student for gainful employment in a recognized occupation as provided under subpart Q of this part;

(iv) Admit as regular students some persons who have not completed the equivalent of an associate degree; and

(v) Satisfy the requirements of paragraph (e) of this section; or

(4) For purposes of a proprietary institution of higher education only, is a program leading to a baccalaureate degree in liberal arts, as defined in 34 CFR 600.5(e), that--

(i) Is provided by an institution that is accredited by a recognized regional accrediting agency or association, and has continuously held such accreditation since October 1, 2007, or earlier; and

(ii) The institution has provided continuously since January 1, 2009.

(e) Qualitative factors. (1) An educational program that satisfies the requirements of paragraphs (d)(3)(i) through (iv) of this section qualifies as an eligible program only if --

(i) The program has a substantiated completion rate of at least 70 percent, as calculated under paragraph (f) of this section;

(ii) The program has a substantiated placement rate of at least 70 percent, as calculated under paragraph (g) of this section;

(iii) The number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares students, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(iv) The program has been in existence for at least one year. The Secretary considers an educational program to have been in existence for at least one year only if an institution has been legally authorized to provide, and has continuously provided, the program during the 12 months (except for normal vacation periods and, at the discretion of the Secretary, periods when the institution closes due to a natural disaster that directly affects the institution or the institution's students) preceding the date on which the institution applied for eligibility for that program.

(2) An institution shall substantiate the calculation of its completion and placement rates by having the certified public accountant who prepares its audit report required under § 668.23 report on the institution's calculation based on performing an attestation engagement in accordance with the Statements on Standards for Attestation Engagements of the American Institute of Certified Public Accountants (AICPA).

(f) Calculation of completion rate. An institution shall calculate its completion rate for an educational program for any award year as follows:

(1) Determine the number of regular students who were enrolled in the program during the award year.

(2) Subtract from the number of students determined under paragraph (f)(1) of this section, the number of regular students who, during that award year, withdrew from, dropped out of, or were expelled from the program and were entitled to and actually received, in a timely manner a refund of 100 percent of their tuition and fees.

(3) Subtract from the total obtained under paragraph (f)(2) of this section the number of students who were enrolled in the program at the end of that award year.

(4) Determine the number of regular students who, during that award year, received within 150 percent of the published length of the educational program the degree, certificate, or other recognized educational credential awarded for successfully completing the program.

(5) Divide the number determined under paragraph (f)(4) of this section by the total obtained under paragraph (f)(3) of this section.

(g) Calculation of placement rate. (1) An institution shall calculate its placement rate for an educational program for any award year as follows:

(i) Determine the number of students who, during the award year, received the degree, certificate, or other recognized educational credential awarded for successfully completing the program.

(ii) Of the total obtained under paragraph (g)(1)(i) of this section, determine the number of students who, within 180 days of the day they received their degree, certificate, or other

recognized educational credential, obtained gainful employment in the recognized occupation for which they were trained or in a related comparable recognized occupation and, on the date of this calculation, are employed, or have been employed, for at least 13 weeks following receipt of the credential from the institution.

(iii) Divide the number of students determined under paragraph (g)(1)(ii) of this section by the total obtained under paragraph (g)(1)(i) of this section.

(2) An institution shall document that each student described in paragraph (g)(1)(ii) of this section obtained gainful employment in the recognized occupation for which he or she was trained or in a related comparable recognized occupation. Examples of satisfactory documentation of a student's gainful employment include, but are not limited to --

(i) A written statement from the student's employer;

(ii) Signed copies of State or Federal income tax forms; and

(iii) Written evidence of payments of Social Security taxes.

(h) Eligibility for Federal Pell Grant, ACG, National SMART Grant, TEACH Grant, and FSEOG Programs. In addition to satisfying other relevant provisions of the section --

(1) An educational program qualifies as an eligible program for purposes of the Federal Pell Grant Program only if the educational program is an undergraduate program or a postbaccalaureate teacher certificate or licensing program as described in 34 CFR 690.6(c);

(2) An educational program qualifies as an eligible program for purposes of the ACG, National SMART Grant, and FSEOG programs only if the educational program is an undergraduate program; and

(3) An educational program qualifies as an eligible program for purposes of the TEACH Grant program if it satisfies the requirements of the definition of TEACH Grant-eligible program in 34 CFR 686.2(d).

(i) Flight training. In addition to satisfying other relevant provisions of this section, for a program of flight training to be an eligible program, it must have a current valid certification from the Federal Aviation Administration.

(j) English as a second language (ESL). (1) In addition to satisfying the relevant provisions of this section, an educational program that consists solely of instruction in ESL qualifies as an eligible program if --

(i) The institution admits to the program only students who the institution determines need the ESL instruction to use already existing knowledge, training, or skills; and

(ii) The program leads to a degree, certificate, or other recognized educational credential.

(2) An institution shall document its determination that ESL instruction is necessary to enable each student enrolled in its ESL program to use already existing knowledge, training, or skills with regard to the students that it admits to its ESL program under paragraph (j)(1)(i) of this section.

(3) An ESL program that qualifies as an eligible program under this paragraph is eligible for purposes of the Federal Pell Grant Program only.

(k) Undergraduate educational program in credit hours. If an institution offers an undergraduate educational program in credit hours, the institution must use the formula contained in paragraph (l) of this section to determine whether that program satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for purposes of the title IV, HEA programs, unless--

(1) The program is at least two academic years in length and provides an associate degree, a bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or

(2) Each course within the program is acceptable for full credit toward that institution's associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary provided that--

(i) The institution's degree requires at least two academic years of study; and

(ii) The institution demonstrates that students enroll in, and graduate from, the degree program.

(l) Formula. (1) Except as provided in paragraph (l)(2) of this section, for purposes of determining whether a program described in paragraph (k) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and determining the number of credit hours in that educational program with regard to the title IV, HEA programs--

(i) A semester hour must include at least 37.5 clock hours of instruction;

(ii) A trimester hour must include at least 37.5 clock hours of instruction; and

(iii) A quarter hour must include at least 25 clock hours of instruction.

(2) The institution's conversions to establish a minimum number of clock hours of instruction per credit may be less than those specified in paragraph (l)(1) of this section if the institution's designated accrediting agency, or recognized State agency for the approval of public postsecondary vocational institutions for participation in the title IV, HEA programs, has not identified any deficiencies with the institution's policies and procedures, or their

implementation, for determining the credit hours that the institution awards for programs and courses, in accordance with 34 CFR 602.24(f) or, if applicable, 34 CFR 603.24(c), so long as--

(i) The institution's student work outside of class combined with the clock hours of instruction meet or exceed the numeric requirements in paragraph (l)(1) of this section; and

(ii)

(A) A semester hour must include at least 30 clock hours of instruction;

(B) A trimester hour must include at least 30 clock hours of instruction; and

(C) A quarter hour must include at least 20 hours of instruction.

(m) An otherwise eligible program that is offered in whole or in part through telecommunications is eligible for title IV, HEA program purposes if the program is offered by an institution, other than a foreign institution, that has been evaluated and is accredited for its effective delivery of distance education programs by an accrediting agency or association that --

(1) Is recognized by the Secretary under subpart 2 of part H of the HEA; and

(2) Has accreditation of distance education within the scope of its recognition.

(n) For Title IV, HEA program purposes, eligible program includes a direct assessment program approved by the Secretary under § 668.10 and a comprehensive transition and postsecondary program approved by the Secretary under § 668.232.

Document:34 CFR 668.11

34 CFR 668.11

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Code of Federal Regulations TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS SUBPART B -- STANDARDS FOR PARTICIPATION IN TITLE IV, HEA PROGRAMS

§ 668.11 Scope.

(a) This subpart establishes standards that an institution must meet in order to participate in any Title IV, HEA program.

(b) Noncompliance with these standards by an institution already participating in any Title IV, HEA program or with applicable standards in this subpart by a third-party servicer that contracts with the institution may subject the institution or servicer, or both, to proceedings under subpart G of this part. These proceedings may lead to any of the following actions:

(1) An emergency action.

(2) The imposition of a fine.

(3) The limitation, suspension, or termination of the participation of the institution in a Title IV, HEA program.

(4) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA

program.

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34 CFR 668.23

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Code of Federal Regulations TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS SUBPART B -- STANDARDS FOR PARTICIPATION IN TITLE IV, HEA PROGRAMS

§ 668.23 Compliance audits and audited financial statements.

(a) General.

(1) Independent auditor. For purposes of this section, the term "independent auditor" refers to an independent certified public accountant or a government auditor. To conduct an audit under this section, a government auditor must meet the Government Auditing Standards qualification and independence standards, including standards related to organizational independence.

(2) Institutions. An institution that participates in any title IV, HEA program must at least annually have an independent auditor conduct a compliance audit of its administration of that program and an audit of the institution's general purpose financial statements.

(3) Third-party servicers. Except as provided under this part or 34 CFR part 682, with regard to complying with the provisions under this section a third-party servicer must follow the procedures contained in the audit guides developed by and available from the Department of Education's Office of Inspector General. A third-party servicer is defined under § 668.2 and 34 CFR 682.200.

(4) Submission deadline. Except as provided by the Single Audit Act, Chapter 75 of title 31, United States Code, an institution must submit annually to the Secretary its compliance audit and its audited financial statements no later than six months after the last day of the institution's fiscal year.

(5) Audit submission requirements. In general, the Secretary considers the compliance audit and audited financial statement submission requirements of this section to be satisfied by an audit conducted in accordance with the Office of Management and Budget Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, or the audit guides developed by and available from the Department of Education's Inspector General, whichever is applicable to the entity, and provided that the Federal student aid functions performed by that entity are covered in the submission. (Both OMB circulars are available by calling OMB's Publication Office at (202) 395-7332, or they can be obtained in electronic form on the OMB Home Page (http://www.whitehouse.gov).

(b) Compliance audits for institutions.

(1) An institution's compliance audit must cover, on a fiscal year basis, all title IV, HEA program transactions, and must cover all of those transactions that have occurred since the period covered by the institution's last compliance audit.

(2) The compliance audit required under this section must be conducted in accordance with --

(i) The general standards and the standards for compliance audits contained in the U.S. General Accounting Office's (GAO's) Government Auditing Standards. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402); and

(ii) Procedures for audits contained in audit guides developed by, and available from, the Department of Education's Office of Inspector General.

(3) The Secretary may require an institution to provide a copy of its compliance audit report to guaranty agencies or eligible lenders under the FFEL programs, State agencies, the Secretary of Veterans Affairs, or nationally recognized accrediting agencies.

(c) Compliance audits for third-party servicers. (1) A third-party servicer that administers title IV, HEA programs for institutions does not have to have a compliance audit performed if --

(i) The servicer contracts with only one institution; and

(ii) The audit of that institution's administration of the title IV, HEA programs involves every aspect of the servicer's administration of that program for that institution.

(2) A third-party servicer that contracts with more than one participating institution may submit a compliance audit report that covers the servicer's administration of the title IV, HEA programs for all institutions with which the servicer contracts.

(3) A third-party servicer must submit annually to the Secretary its compliance audit no later than six months after the last day of the servicer's fiscal year.

(4) The Secretary may require a third-party servicer to provide a copy of its compliance audit report to guaranty agencies or eligible lenders under the FFEL programs, State agencies, the Secretary of Veterans Affairs, or nationally recognized accrediting agencies.

(d) Audited financial statements.

(1) General. To enable the Secretary to make a determination of financial responsibility, an institution must, to the extent requested by the Secretary, submit to the Secretary a set of financial statements for its latest complete fiscal year, as well as any other documentation the Secretary deems necessary to make that determination. Financial statements submitted to the Secretary must be prepared on an accrual basis in accordance with generally accepted accounting principles, and audited by an independent auditor in accordance with generally accepted government auditing standards issued by the Comptroller General of the United States, and other guidance contained in the Office of Management and Budget Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations; or in audit guides developed by, and available from, the Department of Education's Office of Inspector General, whichever is applicable. As part of these financial statements, the institution must include a detailed description of related entities based on the definition of a related entity as set forth in the Statement of Financial Accounting Standards (SFAS) 57. The disclosure requirements under this provision extend beyond those of SFAS 57 to include all related parties and a level of detail that would enable to Secretary to readily identify the related party. Such information may include, but is not limited to, the name, location and a description of the related entity including the nature and amount of any transactions between the related party and the institution, financial or otherwise, regardless of when they occurred.

(2) Submission of additional financial statements. To the extent requested by the Secretary in determining whether an institution is financially responsible, the Secretary may also require the submission of audited consolidated financial statements, audited full consolidating financial statements, audited combined financial statements or the audited financial statements of one or more related parties that have the ability, either individually or collectively, to significantly influence or control the institution, as determined by the Secretary.

(3) Disclosure of Title IV, HEA program revenue. A proprietary institution must disclose in a footnote to its financial statement audit the percentage of its revenues derived from the Title IV, HEA program funds that the institution received during the fiscal year covered by that audit. The

revenue percentage must be calculated in accordance with § 668.28. The institution must also report in the footnote the dollar amount of the numerator and denominator of its 90/10 ratio as well as the individual revenue amounts identified in section 2 of appendix C to subpart B of part 668.

(4) Audited financial statements for third-party servicers. A third-party servicer that enters into a contract with a lender or guaranty agency to administer any aspect of the lender's or guaranty agency's programs, as provided under 34 CFR part 682, must submit annually an audited financial statement. This financial statement must be prepared on an accrual basis in accordance with generally accepted accounting principles, and audited by an independent auditor in accordance with generally accepted government auditing standards and other guidance contained in audit guides issued by the Department of Education's Office of Inspector General.

(e) Access to records. (1) An institution or a third-party servicer that has a compliance or financial statement audit conducted under this section must --

(i) Give the Secretary and the Inspector General access to records or other documents necessary to review that audit, including the right to obtain copies of those records or documents; and

(ii) Require an individual or firm conducting the audit to give the Secretary and the Inspector General access to records, audit work papers, or other documents necessary to review that audit, including the right to obtain copies of those records, work papers, or documents.

(2) An institution must give the Secretary and the Inspector General access to records or other documents necessary to review a third-party servicer's compliance or financial statement audit, including the right to obtain copies of those records or documents.

(f) Determination of liabilities.

(1) Based on the audit finding and the institution's or third-party servicer's response, the Secretary determines the amount of liability, if any, owed by the institution or servicer and instructs the institution or servicer as to the manner of repayment.

(2) If the Secretary determines that a third-party servicer owes a liability for its administration of an institution's title IV, HEA programs, the servicer must notify each institution under whose contract the servicer owes a liability of that determination. The servicer must also notify every institution that contracts with the servicer for the same service that the Secretary determined that a liability was owed.

(g) Repayments. (1) An institution or third-party servicer that must repay funds under the procedures in this section shall repay those funds at the direction of the Secretary within 45 days of the date of the Secretary's notification, unless --

(i) The institution or servicer files an appeal under the procedures established in subpart H of this part; or

(ii) The Secretary permits a longer repayment period.

(2) Notwithstanding paragraphs (f) and (g)(1) of this section --

(i) If an institution or third-party servicer has posted surety or has provided a third-party guarantee and the Secretary questions expenditures or compliance with applicable requirements and identifies liabilities, then the Secretary may determine that deferring recourse to the surety or guarantee is not appropriate because --

(A) The need to provide relief to students or borrowers affected by the act or omission giving rise to the liability outweighs the importance of deferring collection action until completion of available appeal proceedings; or

(B) The terms of the surety or guarantee do not provide complete assurance that recourse to that protection will be fully available through the completion of available appeal proceedings; or

(ii) The Secretary may use administrative offset pursuant to 34 CFR part 30 to collect the funds owed under the procedures of this section.

(3) If, under the proceedings in subpart H, liabilities asserted in the Secretary's notification, under paragraph (e)(1) of this section, to the institution or third-party servicer are upheld, the institution or third-party servicer must repay those funds at the direction of the Secretary within 30 days of the final decision under subpart H of this part unless --

(i) The Secretary permits a longer repayment period; or

(ii) The Secretary determines that earlier collection action is appropriate pursuant to paragraph (g)(2) of this section.

(4) An institution is held responsible for any liability owed by the institution's third-party servicer for a violation incurred in servicing any aspect of that institution's participation in the title IV, HEA programs and remains responsible for that amount until that amount is repaid in full.

(h) [Effective July 1, 2011.] Audit submission requirements for foreign institutions. (1) Audited financial statements. (i) The Secretary waives for that fiscal year the submission of audited financial statements if the institution is a foreign public or nonprofit institution that received less than $ 500,000 in U.S. title IV program funds during its most recently completed fiscal year, unless that foreign public or nonprofit institution is in its initial provisional period of participation, and received title IV program funds during that fiscal year, in which case the institution must submit, in English,

audited financial statements prepared in accordance with generally accepted accounting principles of the institution's home country.

(ii) [Effective July 1, 2011.] Except as provided in paragraph (h)(1)(iii) of this section, a foreign institution that received $ 500,000 or more in U.S. title IV program funds during its most recently completed fiscal year must submit, in English, for each most recently completed fiscal year in which it received title IV program funds, audited financial statements prepared in accordance with generally accepted accounting principles of the institution's home country along with corresponding audited financial statements that meet the requirements of paragraph (d) of this section.

(iii) [Effective July 1, 2011.] In lieu of making the submission required by paragraph (h)(1)(ii) of this section, a public or private nonprofit institution that received--

(A) [Effective July 1, 2011.] $ 500,000 or more in U.S. title IV program funds, but less than $ 3,000,000 in U.S. title IV program funds during its most recently completed fiscal year, may submit for that year, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country, and is not required to submit the corresponding audited financial statements that meet the requirements of paragraph (d) of this section;

(B) [Effective July 1, 2011.] At least $ 3,000,000, but less than $ 10,000,000 in U.S. title IV, program funds during its most recently completed fiscal year, must submit in English, for each most recently completed fiscal year, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country along with corresponding audited financial statements that meet the requirements of paragraph (d) of this section, except that an institution that continues to receive at least $ 3,000,000 but less than $ 10,000,000, in U.S. title IV funds during its most recently completed fiscal year may omit the audited financial statements that meet the requirements of paragraph (d) of this section for up to two consecutive years following the submission of audited financial statements that meet the requirements of paragraph (d) of this section.

(2) [Effective July 1, 2011.] Compliance audits. A foreign institution's compliance audit must cover, on a fiscal year basis, all title IV, HEA program transactions, and must cover all of those transactions that have occurred since the period covered by the institution's last compliance audit. A compliance audit that is due under this paragraph must be submitted no later than six months after the last day of the institution's fiscal year, and must meet the following requirements:

(i) [Effective July 1, 2011.] If the foreign institution received $ 500,000 or more in U.S. dollars in title IV, HEA program funds during its most recently completed fiscal year, it must submit a standard compliance audit for that prior fiscal year that is

performed in accordance with audit guides developed by, and available from, the Department of Education's Office of Inspector General, together with an alternative compliance audit or audits prepared in accordance with paragraph (h)(2)(ii) of this section for any preceding fiscal year or years in which the foreign institution received less than $ 500,000 in U.S. dollars in title IV, HEA program funds and for which a compliance audit has not already been submitted;

(ii) [Effective July 1, 2011.] If the foreign institution received less than $ 500,000 U.S. in title IV, HEA program funds for its most recently completed fiscal year, it must submit an alternative compliance audit for that prior fiscal year that is performed in accordance with audit guides developed by, and available from, the Department of Education's Office of Inspector General, except as noted in paragraph (h)(2)(iii) of this section.

(iii) [Effective July 1, 2011.] If so notified by the Secretary, a foreign institution may submit an alternative compliance audit performed in accordance with audit guides developed by, and available from, the Department of Education's Office of Inspector General, that covers a period not to exceed three of the institution's consecutive fiscal years if such audit is submitted either no later than six months after the last day of the most recent fiscal year, or contemporaneously with a standard compliance audit timely submitted under paragraph (h)(2)(i) or (h)(3)(ii) of this section for the most recently completed fiscal year, and if the following conditions are met:

(A) [Effective July 1, 2011.] The institution received less than $ 500,000 in title IV, HEA program funds for its most recently completed fiscal year.

(B) [Effective July 1, 2011.] The institution has timely submitted acceptable compliance audits for two consecutive fiscal years, and following such submission, has no history of late submission since then.

(C) [Effective July 1, 2011.] The institution is fully certified.

(3)

(i) [Effective July 1, 2011.] Exceptions. Notwithstanding the provisions of paragraphs (h)(1)(i) and (h)(1)(iii) of this section, the Secretary may issue a letter to a foreign institution that identifies problems with its financial condition or financial reporting and requires the submission of audited financial statements in the manner specified by the Secretary.

(ii) [Effective July 1, 2011.] Notwithstanding the provisions of paragraphs (h)(2)(ii) and (h)(2)(iii) of this section, the Secretary may issue to a foreign institution a letter that identifies problems with its administrative capability or compliance reporting that

may require the compliance audit to be performed at a higher level of engagement, and may require the compliance audit to be submitted annually.

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34 CFR 668.26

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Code of Federal Regulations TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS SUBPART B -- STANDARDS FOR PARTICIPATION IN TITLE IV, HEA PROGRAMS

§ 668.26 End of an institution's participation in the Title IV, HEA programs.

(a) An institution's participation in a Title IV, HEA program ends on the date that --

(1) The institution closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution or the institution's students;

(2) The institution loses its institutional eligibility under 34 CFR part 600;

(3) The institution's participation is terminated under the proceedings in subpart G of this part;

(4) The institution's period of participation, as specified under § 668.13, expires, or the institution's provisional certification is revoked under § 668.13;

(5) The institution's program participation agreement is terminated or expires under § 668.14;

(6) The institution's participation ends under subpart M of this part; or

(7) The Secretary receives a notice from the appropriate State postsecondary review entity designated under 34 CFR part 667 that the institution's participation should be withdrawn.

(b) If an institution's participation in a Title IV, HEA program ends, the institution shall --

(1) Immediately notify the Secretary of that fact;

(2) Submit to the Secretary within 45 days after the date that the participation ends --

(i) All financial, performance, and other reports required by appropriate Title IV, HEA program regulations; and

(ii) A letter of engagement for an independent audit of all funds that the institution received under that program, the report of which shall be submitted to the Secretary within 45 days after the date of the engagement letter;

(3) Inform the Secretary of the arrangements that the institution has made for the proper retention and storage for a minimum of three years of all records concerning the administration of that program;

(4) If the institution's participation in the Federal Perkins Loan Program ended, inform the Secretary of how the institution will provide for the collection of any outstanding loans made under that program;

(5) If the institution's participation in the LEAP Program ended --

(i) Inform immediately the State in which the institution is located of that fact; and

(ii) Notwithstanding paragraphs (c) through (e) of this section, follow the instructions of that State concerning the end of that participation;

(6) If the institution's participation in all the Title IV, HEA programs ended, inform the Secretary of how the institution will provide for the collection of any outstanding loans made under the National Defense/Direct Student Loan programs; and

(7) Continue to comply with the requirements of § 668.22 for the treatment of title IV, HEA program funds when a student withdraws.

(c) If an institution closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution or the institution's students, the institution shall --

(1) Return to the Secretary, or otherwise dispose of under instructions from the Secretary, any unexpended funds that the institution has received under the Title IV, HEA programs for attendance at the institution, less the institution's administrative allowance, if applicable; and

(2) Return to the appropriate lenders any Federal Stafford Loan program proceeds that the institution has received but not delivered to, or credited to the accounts of, students attending the institution.

(d)

(1) An institution may use funds that it has received under the Federal Pell Grant, ACG, National SMART Grant, or TEACH Grant Program or a campus-based program or request additional funds from the Secretary, under conditions specified by the Secretary, if the institution does not possess sufficient funds, to satisfy any unpaid commitment made to a student under that Title IV, HEA program only if --

(i) The institution's participation in that Title IV, HEA program ends during a payment period;

(ii) The institution continues to provide, from the date that the participation ends until the scheduled completion date of that payment period, educational programs to otherwise eligible students enrolled in the formerly eligible programs of the institution;

(iii) The commitment was made prior to the end of the participation; and

(iv) The commitment was made for attendance during that payment period or a previously completed payment period.

(2) An institution may credit to a student's account or deliver to the student the proceeds of a disbursement of a Federal Family Education Loan Programs loan to satisfy any unpaid commitment made to the student under the Federal Family Education Loan Programs only if --

(i) The institution's participation in that Title IV, HEA program ends during a period of enrollment;

(ii) The institution continues to provide, from the date that the participation ends until the scheduled completion date of that period of enrollment, educational programs to otherwise eligible students enrolled in the formerly eligible programs of the institution;

(iii) The loan was made for attendance during that period of enrollment.

(iv) The proceeds of the first disbursement of the loan were delivered to the student or credited to the student's account prior to the end of the participation.

(3) An institution may use funds that it has received under the Direct Loan Program or request additional funds from the Secretary, under conditions specified by the Secretary, if the institution does not possess sufficient funds, to credit to a student's account or disburse to the student the proceeds of a Direct Loan Program loan only if --

(i) The institution's participation in the Direct Loan Program ends during a period of enrollment;

(ii) The institution continues to provide, from the date that the participation ends until the scheduled completion date of that period of enrollment, educational programs to otherwise eligible students enrolled in the formerly eligible programs of the institution;

(iii) The loan was made for attendance during that period of enrollment; and

(iv) The proceeds of the first disbursement of the loan were delivered to the student or credited to the student's account prior to the end of the participation.

(e) For the purposes of this section --

(1) A commitment under the Federal Pell Grant, ACG, National SMART Grant, and TEACH Grant programs occurs when a student is enrolled and attending the institution and has submitted a valid Student Aid Report to the institution or when an institution has received a valid institutional student information report; and

(2) A commitment under the campus-based programs occurs when a student is enrolled and attending the institution and has received a notice from the institution of the amount that he or she can expect to receive and how and when that amount will be paid.

(Approved by the Office of Management and Budget under control number 1840-0537)

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Code of Federal Regulations TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS SUBPART D -- INSTITUTIONAL AND FINANCIAL ASSISTANCE INFORMATION FOR STUDENTS

§ 668.46 Institutional security policies and crime statistics.

(a) Definitions. Additional definitions that apply to this section:

Business day. Monday through Friday, excluding any day when the institution is closed.

Campus. (i) Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

(ii) Any building or property that is within or reasonably contiguous to the area identified in paragraph (i) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).

Campus security authority. (i) A campus police department or a campus security department of an institution.

(ii) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department under paragraph (i) of this definition, such as an individual who is responsible for monitoring entrance into institutional property.

(iii) Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.

(iv) An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. If such an official is a pastoral or professional counselor as defined below, the official is not considered a campus security authority when acting as a pastoral or professional counselor.

Clery geography. (i) For the purposes of collecting statistics on the crimes listed in paragraph (c) of this section for submission to the Department and inclusion in an institution's annual security report, Clery geography includes--

(A) Buildings and property that are part of the institution's campus;

(B) The institution's noncampus buildings and property; and

(C) Public property within or immediately adjacent to and accessible from the campus.

(ii) For the purposes of maintaining the crime log required in paragraph (f) of this section, Clery geography includes, in addition to the locations in paragraph (i) of this definition, areas within the patrol jurisdiction of the campus police or the campus security department.

Dating violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

(i) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(ii) For the purposes of this definition--

(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(B) Dating violence does not include acts covered under the definition of domestic violence.

(iii) For the purposes of complying with the requirements of this section and § 668.41, any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

Domestic violence. (i) A felony or misdemeanor crime of violence committed--

(A) By a current or former spouse or intimate partner of the victim;

(B) By a person with whom the victim shares a child in common;

(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;

(D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or

(E) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

(ii) For the purposes of complying with the requirements of this section and § 668.41, any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

Federal Bureau of Investigation's (FBI) Uniform Crime Reporting (UCR) program. A nationwide, cooperative statistical effort in which city, university and college, county, State, Tribal, and federal law enforcement agencies voluntarily report data on crimes brought to their attention. The UCR program also serves as the basis for the definitions of crimes in Appendix A to this subpart and the requirements for classifying crimes in this subpart.

Hate crime. A crime reported to local police agencies or to a campus security authority that manifests evidence that the victim was intentionally selected because of the perpetrator's bias against the victim. For the purposes of this section, the categories of bias include the victim's actual or perceived race, religion, gender, gender identity, sexual orientation, ethnicity, national origin, and disability.

Hierarchy Rule. A requirement in the FBI's UCR program that, for purposes of reporting crimes in that system, when more than one criminal offense was committed during a single incident, only the most serious offense be counted.

Noncampus building or property. (i) Any building or property owned or controlled by a student organization that is officially recognized by the institution; or

(ii) Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.

Pastoral counselor. A person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor.

Professional counselor. A person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of the counselor's license or certification.

Programs to prevent dating violence, domestic violence, sexual assault, and stalking. (i) Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking that--

(A) Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and

(B) Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.

(ii) Programs to prevent dating violence, domestic violence, sexual assault, and stalking include both primary prevention and awareness programs directed at incoming students and new employees and ongoing prevention and awareness campaigns directed at students and employees, as defined in paragraph (j)(2) of this section.

Public property. All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.

Referred for campus disciplinary action. The referral of any person to any campus official who initiates a disciplinary action of which a record is kept and which may result in the imposition of a sanction.

Sexual assault. An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program and included in Appendix A of this subpart.

Stalking. (i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to--

(A) Fear for the person's safety or the safety of others; or

(B) Suffer substantial emotional distress.

(ii) For the purposes of this definition--

(A) Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(B) Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

(C) Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

(iii) For the purposes of complying with the requirements of this section and section 668.41, any incident meeting this definition is considered a crime for the purposes of Clery Act reporting.

Test. Regularly scheduled drills, exercises, and appropriate follow-through activities, designed for assessment and evaluation of emergency plans and capabilities.

(b) Annual security report. An institution must prepare an annual security report reflecting its current policies that contains, at a minimum, the following information:

(1) The crime statistics described in paragraph (c) of this section.

(2) A statement of policies regarding procedures for students and others to report criminal actions or other emergencies occurring on campus. This statement must include the institution's policies concerning its response to these reports, including--

(i) Policies for making timely warning reports to members of the campus community, as required by paragraph (e) of this section, regarding the occurrence of crimes described in paragraph (c)(1) of this section;

(ii) Policies for preparing the annual disclosure of crime statistics;

(iii) A list of the titles of each person or organization to whom students and employees should report the criminal offenses described in paragraph (c)(1) of this section for the purposes of making timely warning reports and the annual statistical disclosure; and

(iv) Policies or procedures for victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics.

(3) A statement of policies concerning security of and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.

(4) A statement of policies concerning campus law enforcement that--

(i) Addresses the enforcement authority and jurisdiction of security personnel;

(ii) Addresses the working relationship of campus security personnel with State and local police agencies, including--

(A) Whether those security personnel have the authority to make arrests; and

(B) Any agreements, such as written memoranda of understanding between the institution and such agencies, for the investigation of alleged criminal offenses.

(iii) Encourages accurate and prompt reporting of all crimes to the campus police and the appropriate police agencies, when the victim of a crime elects to, or is unable to, make such a report; and

(iv) Describes procedures, if any, that encourage pastoral counselors and professional counselors, if and when they deem it appropriate, to inform the persons they are counseling of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics.

(5) A description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others.

(6) A description of programs designed to inform students and employees about the prevention of crimes.

(7) A statement of policy concerning the monitoring and recording through local police agencies of criminal activity by students at noncampus locations of student organizations officially recognized by the institution, including student organizations with noncampus housing facilities.

(8) A statement of policy regarding the possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws.

(9) A statement of policy regarding the possession, use, and sale of illegal drugs and enforcement of Federal and State drug laws.

(10) A description of any drug or alcohol-abuse education programs, as required under section 120(a) through (d) of the HEA, otherwise known as the Drug-Free Schools and Communities Act of 1989. For the purpose of meeting this requirement, an institution may cross-reference the materials the institution uses to comply with section 120(a) through (d) of the HEA.

(11) A statement of policy regarding the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking, as defined in paragraph (a) of this section, and of procedures that the institution will follow when one of these crimes is reported. The statement must include--

(i) A description of the institution's educational programs and campaigns to promote the awareness of dating violence, domestic violence, sexual assault, and stalking, as required by paragraph (j) of this section;

(ii) Procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred, including written information about--

(A) The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order;

(B) How and to whom the alleged offense should be reported;

(C) Options about the involvement of law enforcement and campus authorities, including notification of the victim's option to--

(1) Notify proper law enforcement authorities, including on-campus and local police;

(2) Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and

(3) Decline to notify such authorities; and

(D) Where applicable, the rights of victims and the institution's responsibilities for orders of protection, "no-contact" orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court or by the institution;

(iii) Information about how the institution will protect the confidentiality of victims and other necessary parties, including how the institution will--

(A) Complete publicly available recordkeeping, including Clery Act reporting and disclosures, without the inclusion of personally identifying information about the victim, as defined in section 40002(a)(20) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)(20)); and

(B) Maintain as confidential any accommodations or protective measures provided to the victim, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the accommodations or protective measures;

(iv) A statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both within the institution and in the community;

(v) A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation,

and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement;

(vi) An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required by paragraph (k) of this section; and

(vii) A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section.

(12) A statement advising the campus community where law enforcement agency information provided by a State under section 121 of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16921), concerning registered sex offenders may be obtained, such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address.

(13) A statement of policy regarding emergency response and evacuation procedures, as required by paragraph (g) of this section.

(14) A statement of policy regarding missing student notification procedures, as required by paragraph (h) of this section.

(c) Crime statistics --(1) Crimes that must be reported and disclosed. An institution must report to the Department and disclose in its annual security report statistics for the three most recent calendar years concerning the number of each of the following crimes that occurred on or within its Clery geography and that are reported to local police agencies or to a campus security authority:

(i) Primary crimes, including--

(A) Criminal homicide:

(1) Murder and nonnegligent manslaughter; and

(2) Negligent manslaughter.

(B) Sex offenses:

(1) Rape;

(2) Fondling;

(3) Incest; and

(4) Statutory rape.

(C) Robbery.

(D) Aggravated assault.

(E) Burglary.

(F) Motor vehicle theft.

(G) Arson.

(ii) Arrests and referrals for disciplinary actions, including--

(A) Arrests for liquor law violations, drug law violations, and illegal weapons possession.

(B) Persons not included in paragraph (c)(1)(ii)(A) of this section who were referred for campus disciplinary action for liquor law violations, drug law violations, and illegal weapons possession.

(iii) Hate crimes, including--

(A) The number of each type of crime in paragraph (c)(1)(i) of this section that are determined to be hate crimes; and

(B) The number of the following crimes that are determined to be hate crimes:

(1) Larceny-theft.

(2) Simple assault.

(3) Intimidation.

(4) Destruction/damage/vandalism of property.

(iv) Dating violence, domestic violence, and stalking as defined in paragraph (a) of this section.

(2) All reported crimes must be recorded.

(i) An institution must include in its crime statistics all crimes listed in paragraph (c)(1) of this section occurring on or within its Clery geography that are reported to a campus security authority for purposes of Clery Act reporting. Clery Act reporting does not require initiating an investigation or disclosing personally identifying information about the victim, as defined in section 40002(a)(20) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)(20)).

(ii) An institution may not withhold, or subsequently remove, a reported crime from its crime statistics based on a decision by a court, coroner, jury, prosecutor, or other similar noncampus official.

(iii) An institution may withhold, or subsequently remove, a reported crime from its crime statistics in the rare situation where sworn or commissioned law enforcement personnel have fully investigated the reported crime and, based on the results of this full investigation and evidence, have made a formal determination that the crime report is false or baseless and therefore "unfounded." Only sworn or commissioned law enforcement personnel may "unfound" a crime report for purposes of reporting under this section. The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with the prosecution, and the failure to make an arrest do not "unfound" a crime report.

(A) An institution must report to the Department and disclose in its annual security report statistics the total number of crime reports listed in paragraph (c)(1) of this section that were "unfounded" and subsequently withheld from its crime statistics pursuant to paragraph (c)(2)(iii) of this section during each of the three most recent calendar years.

(B) [Reserved]

(3) Crimes must be recorded by calendar year.

(i) An institution must record a crime statistic for the calendar year in which the crime was reported to local police agencies or to a campus security authority.

(ii) When recording crimes of stalking by calendar year, an institution must follow the requirements in paragraph (c)(6) of this section.

(4) Hate crimes must be recorded by category of bias. For each hate crime recorded under paragraph (c)(1)(iii) of this section, an institution must identify the category of bias that motivated the crime. For the purposes of this paragraph, the categories of bias include the victim's actual or perceived--

(i) Race;

(ii) Gender;

(iii) Gender identity;

(iv) Religion;

(v) Sexual orientation;

(vi) Ethnicity;

(vii) National origin; and

(viii) Disability.

(5) Crimes must be recorded by location. (i) An institution must specify whether each of the crimes recorded under paragraph (c)(1) of this section occurred--

(A) On campus;

(B) In or on a noncampus building or property; or

(C) On public property.

(ii) An institution must identify, of the crimes that occurred on campus, the number that took place in dormitories or other residential facilities for students on campus.

(iii) When recording stalking by location, an institution must follow the requirements in paragraph (c)(6) of this section.

(6) Recording reports of stalking.

(i) When recording reports of stalking that include activities in more than one calendar year, an institution must record a crime statistic for each and every year in which the course of conduct is reported to a local police agency or to a campus security authority.

(ii) An institution must record each report of stalking as occurring at only the first location within the institution's Clery geography in which:

(A) A perpetrator engaged in the stalking course of conduct; or

(B) A victim first became aware of the stalking.

(7) Identification of the victim or the accused. The statistics required under paragraph (c) of this section do not include the identification of the victim or the person accused of committing the crime.

(8) Pastoral and professional counselor. An institution is not required to report statistics under paragraph (c) of this section for crimes reported to a pastoral or professional counselor.

(9) Using the FBI's UCR program and the Hierarchy Rule.

(i) An institution must compile the crime statistics for murder and nonnegligent manslaughter, negligent manslaughter, rape, robbery, aggravated assault, burglary, motor vehicle theft, arson, liquor law violations, drug law violations, and illegal weapons possession using the definitions of those crimes from the "Summary Reporting System

(SRS) User Manual" from the FBI's UCR Program, as provided in Appendix A to this subpart.

(ii) An institution must compile the crime statistics for fondling, incest, and statutory rape using the definitions of those crimes from the "National Incident-Based Reporting System (NIBRS) User Manual" from the FBI's UCR Program, as provided in Appendix A to this subpart.

(iii) An institution must compile the crime statistics for the hate crimes of larceny-theft, simple assault, intimidation, and destruction/damage/vandalism of property using the definitions provided in the "Hate Crime Data Collection Guidelines and Training Manual" from the FBI's UCR Program, as provided in Appendix A to this subpart.

(iv) An institution must compile the crime statistics for dating violence, domestic violence, and stalking using the definitions provided in paragraph (a) of this section.

(v) In counting crimes when more than one offense was committed during a single incident, an institution must conform to the requirements of the Hierarchy Rule in the "Summary Reporting System (SRS) User Manual.

(vi) If arson is committed, an institution must always record the arson in its statistics, regardless of whether or not it occurs in the same incident as another crime.

(vii) If rape, fondling, incest, or statutory rape occurs in the same incident as a murder, an institution must record both the sex offense and the murder in its statistics.

(10) Use of a map. In complying with the statistical reporting requirements under this paragraph (c) of this section, an institution may provide a map to current and prospective students and employees that depicts its campus, noncampus buildings or property, and public property areas if the map accurately depicts its campus, noncampus buildings or property, and public property areas.

(11) Statistics from police agencies.

(i) In complying with the statistical reporting requirements under paragraph (c) of this section, an institution must make a reasonable, good-faith effort to obtain statistics for crimes that occurred on or within the institution's Clery geography and may rely on the information supplied by a local or State police agency.

(ii) If the institution makes such a reasonable, good-faith effort, it is not responsible for the failure of the local or State police agency to supply the required statistics.

(d) Separate campus. An institution must comply with the requirements of this section for each separate campus.

(e) Timely warning and emergency notification. (1) An institution must, in a manner that is timely and that withholds as confidential the names and other identifying information of victims, as defined in section 40002(a)(20) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)(20)), and that will aid in the prevention of similar crimes, report to the campus community on crimes that are--

(i) Described in paragraph (c)(1) of this section;

(ii) Reported to campus security authorities as identified under the institution's statement of current campus policies pursuant to paragraph (b)(2) of this section or local police agencies; and

(iii) Considered by the institution to represent a threat to students and employees.

(2) An institution is not required to provide a timely warning with respect to crimes reported to a pastoral or professional counselor.

(3) If there is an immediate threat to the health or safety of students or employees occurring on campus, as described in paragraph (g)(1) of this section, an institution must follow its emergency notification procedures. An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed.

(f) Crime log. (1) An institution that maintains a campus police or a campus security department must maintain a written, easily understood daily crime log that records, by the date the crime was reported, any crime that occurred within its Clery geography, as described in paragraph (ii) of the definition of Clery geography in paragraph (a) of this section, and that is reported to the campus police or the campus security department. This log must include--

(i) The nature, date, time, and general location of each crime; and

(ii) The disposition of the complaint, if known.

(2) The institution must make an entry or an addition to an entry to the log within two business days, as defined under paragraph (a) of this section, of the report of the information to the campus police or the campus security department, unless that disclosure is prohibited by law or would jeopardize the confidentiality of the victim.

(3)

(i) An institution may withhold information required under paragraphs (f)(1) and (2) of this section if there is clear and convincing evidence that the release of the information would--

(A) Jeopardize an ongoing criminal investigation or the safety of an individual;

(B) Cause a suspect to flee or evade detection; or

(C) Result in the destruction of evidence.

(ii) The institution must disclose any information withheld under paragraph (f)(3)(i) of this section once the adverse effect described in that paragraph is no longer likely to occur.

(4) An institution may withhold under paragraph (f)(2) and (3) of this section only that information that would cause the adverse effects described in those paragraphs.

(5) The institution must make the crime log for the most recent 60-day period open to public inspection during normal business hours. The institution must make any portion of the log older than 60 days available within two business days of a request for public inspection.

(g) Emergency response and evacuation procedures. An institution must include a statement of policy regarding its emergency response and evacuation procedures in the annual security report. This statement must include--

(1) The procedures the institution will use to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus;

(2) A description of the process the institution will use to--

(i) Confirm that there is a significant emergency or dangerous situation as described in paragraph (g)(1) of this section;

(ii) Determine the appropriate segment or segments of the campus community to receive a notification;

(iii) Determine the content of the notification; and

(iv) Initiate the notification system.

(3) A statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency;

(4) A list of the titles of the person or persons or organization or organizations responsible for carrying out the actions described in paragraph (g)(2) of this section;

(5) The institution's procedures for disseminating emergency information to the larger community; and

(6) The institution's procedures to test the emergency response and evacuation procedures on at least an annual basis, including--

(i) Tests that may be announced or unannounced;

(ii) Publicizing its emergency response and evacuation procedures in conjunction with at least one test per calendar year; and

(iii) Documenting, for each test, a description of the exercise, the date, time, and whether it was announced or unannounced.

(h) Missing student notification policies and procedures. (1) An institution that provides any on-campus student housing facility must include a statement of policy regarding missing student notification procedures for students who reside in on-campus student housing facilities in its annual security report. This statement must--

(i) Indicate a list of titles of the persons or organizations to which students, employees, or other individuals should report that a student has been missing for 24 hours;

(ii) Require that any missing student report must be referred immediately to the institution's police or campus security department, or, in the absence of an institutional police or campus security department, to the local law enforcement agency that has jurisdiction in the area;

(iii) Contain an option for each student to identify a contact person or persons whom the institution shall notify within 24 hours of the determination that the student is missing, if the student has been determined missing by the institutional police or campus security department, or the local law enforcement agency;

(iv) Advise students that their contact information will be registered confidentially, that this information will be accessible only to authorized campus officials, and that it may not be disclosed, except to law enforcement personnel in furtherance of a missing person investigation;

(v) Advise students that if they are under 18 years of age and not emancipated, the institution must notify a custodial parent or guardian within 24 hours of the determination that the student is missing, in addition to notifying any additional contact person designated by the student; and

(vi) Advise students that the institution will notify the local law enforcement agency within 24 hours of the determination that the student is missing, unless the local law enforcement agency was the entity that made the determination that the student is missing.

(2) The procedures that the institution must follow when a student who resides in an on-campus student housing facility is determined to have been missing for 24 hours include--

(i) If the student has designated a contact person, notifying that contact person within 24 hours that the student is missing;

(ii) If the student is under 18 years of age and is not emancipated, notifying the student's custodial parent or guardian and any other designated contact person within 24 hours that the student is missing; and

(iii) Regardless of whether the student has identified a contact person, is above the age of 18, or is an emancipated minor, informing the local law enforcement agency that has jurisdiction in the area within 24 hours that the student is missing.

(i) [Reserved]

(j) Programs to prevent dating violence, domestic violence, sexual assault, and stalking. As required by paragraph (b)(11) of this section, an institution must include in its annual security report a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking.

(1) The statement must include--

(i) A description of the institution's primary prevention and awareness programs for all incoming students and new employees, which must include--

(A) A statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking, as those terms are defined in paragraph (a) of this section;

(B) The definition of "dating violence," "domestic violence," "sexual assault," and "stalking" in the applicable jurisdiction;

(C) The definition of "consent," in reference to sexual activity, in the applicable jurisdiction;

(D) A description of safe and positive options for bystander intervention;

(E) Information on risk reduction; and

(F) The information described in paragraphs (b)(11) and (k)(2) of this section; and

(ii) A description of the institution's ongoing prevention and awareness campaigns for students and employees, including information described in paragraph (j)(1)(i)(A) through (F) of this section.

(2) For the purposes of this paragraph (j)--

(i) Awareness programs means community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.

(ii) Bystander intervention means safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking. Bystander intervention includes recognizing situations of potential harm, understanding institutional structures and cultural conditions that facilitate violence, overcoming barriers to intervening, identifying safe and effective intervention options, and taking action to intervene.

(iii) Ongoing prevention and awareness campaigns means programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking, using a range of strategies with audiences throughout the institution and including information described in paragraph (j)(1)(i)(A) through (F) of this section.

(iv) Primary prevention programs means programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.

(v) Risk reduction means options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.

(3) An institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking must include, at a minimum, the information described in paragraph (j)(1) of this section.

(k) Procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking. As required by paragraph (b)(11)(vi) of this section, an institution must include in its annual security report a clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as defined in paragraph (a) of this section, and that--

(1)

(i) Describes each type of disciplinary proceeding used by the institution; the steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding; how to file a disciplinary complaint; and how the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault, or stalking;

(ii) Describes the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking;

(iii) Lists all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking; and

(iv) Describes the range of protective measures that the institution may offer to the victim following an allegation of dating violence, domestic violence, sexual assault, or stalking;

(2) Provides that the proceedings will--

(i) Include a prompt, fair, and impartial process from the initial investigation to the final result;

(ii) Be conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;

(iii) Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice;

(iv) Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties; and

(v) Require simultaneous notification, in writing, to both the accuser and the accused, of--

(A) The result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking;

(B) The institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available;

(C) Any change to the result; and

(D) When such results become final.

(3) For the purposes of this paragraph (k)--

(i) A prompt, fair, and impartial proceeding includes a proceeding that is--

(A) Completed within reasonably prompt timeframes designated by an institution's policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay;

(B) Conducted in a manner that--

(1) Is consistent with the institution's policies and transparent to the accuser and accused;

(2) Includes timely notice of meetings at which the accuser or accused, or both, may be present; and

(3) Provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and

(C) Conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.

(ii) Advisor means any individual who provides the accuser or accused support, guidance, or advice.

(iii) Proceeding means all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, factfinding investigations, formal or informal meetings, and hearings. Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.

(iv) Result means any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution. The result must include any sanctions imposed by the institution. Notwithstanding section 444 of the General Education Provisions Act (20 U.S.C. 1232g), commonly referred to as the Family Educational Rights and Privacy Act (FERPA), the result must also include the rationale for the result and the sanctions.

(l) Compliance with paragraph (k) of this section does not constitute a violation of FERPA.

(m) Prohibition on retaliation. An institution, or an officer, employee, or agent of an institution, may not retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision in this section.

Document:34 CFR 668.83

34 CFR 668.83

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Code of Federal Regulations TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS SUBPART G -- FINE, LIMITATION, SUSPENSION AND TERMINATION PROCEEDINGS

§ 668.83 Emergency action.

(a) Under an emergency action, the Secretary may --

(1) Withhold Title IV, HEA program funds from a participating institution or its students, or from a third-party servicer, as applicable;

(2)

(i) Withdraw the authority of the institution or servicer, as applicable, to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds; or

(ii) Withdraw the authority of the institution or servicer, as applicable, to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds except in accordance with a particular procedure; and

(3)

(i) Withdraw the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program; or

(ii) Withdraw the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program except in accordance with a particular procedure.

(b)

(1) An initiating official begins an emergency action against an institution or third-party servicer by sending the institution or servicer a notice by registered mail, return receipt requested. In an emergency action against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The official also may transmit the notice by other, more expeditious means if practical.

(2) The emergency action takes effect on the date the initiating official mails the notice to the institution or servicer, as applicable.

(3) The notice states the grounds on which the emergency action is based, the consequences of the emergency action, and that the institution or servicer, as applicable, may request an opportunity to show cause why the emergency action is unwarranted.

(c)

(1) An initiating official takes emergency action against an institution or third-party servicer only if that official --

(i) Receives information, determined by the official to be reliable, that the institution or servicer, as applicable, is violating any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA;

(ii) Determines that immediate action is necessary to prevent misuse of Title IV, HEA program funds; and

(iii) Determines that the likelihood of loss from that misuse outweighs the importance of awaiting completion of any proceeding that may be initiated to limit, suspend, or terminate, as applicable --

(A) The participation of the institution in one or more Title IV, HEA programs; or

(B) The eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

(2) Examples of violations of a Title IV, HEA program requirement that cause misuse and the likely loss of Title IV, HEA program funds include --

(i) Causing the commitment, disbursement, or delivery by any party of Title IV, HEA program funds in an amount that exceeds --

(A) The amount for which students are eligible; or

(B) The amount of principal, interest, or special allowance payments that would have been payable to the holder of a Federal Stafford or Federal PLUS loan if a refund allocable to that loan had been made in the amount and at the time required;

(ii) Using, offering to make available, or causing the use or availability of Title IV, HEA program funds for educational services if --

(A) The institution, servicer, or agents of the institution or servicer have made a substantial misrepresentation as described in §§ 668.72, 668.73, or 668.74 related to those services;

(B) The institution lacks the administrative or financial ability to provide those services in full; or

(C) The institution, or servicer, as applicable, lacks the administrative or financial ability to make all required payments under § 668.22; and

(iii) Engaging in fraud involving the administration of a Title IV, HEA program. Examples of fraud include --

(A) Falsification of any document received from a student or pertaining to a student's eligibility for assistance under a Title IV, HEA program;

(B) Falsification, including false certifications, of any document submitted by the institution or servicer to the Secretary;

(C) Falsification, including false certifications, of any document used for or pertaining to --

(1) The legal authority of an institution to provide postsecondary education in the State in which the institution is located; or

(2) The accreditation or preaccreditation of an institution or any of the institution's educational programs or locations;

(D) Falsification, including false certifications, of any document submitted to a guaranty agency under the Federal Stafford Loan or Federal PLUS programs or an independent auditor;

(E) Falsification of any document submitted to a third-party servicer by an institution or to an institution by a third-party servicer pertaining to the institution's participation in a Title IV, HEA program; and

(F) Falsification, including false certifications, of any document pertaining to the performance of any loan collection activity, including activity that is not required by the HEA or applicable program regulations.

(3) If the Secretary begins an emergency action against a third-party servicer, the Secretary may also begin an emergency action against any institution under whose contract a third-party servicer commits the violation.

(d)

(1) Except as provided in paragraph (d)(2) of this section, after an emergency action becomes effective, an institution or third-party servicer, as applicable, may not --

(i) Make or increase awards or make other commitments of aid to a student under the applicable Title IV, HEA program;

(ii) Disburse either program funds, institutional funds, or other funds as assistance to a student under that Title IV, HEA program;

(iii) In the case of an emergency action pertaining to participation in the Federal Stafford Loan or Federal PLUS programs --

(A) Certify an application for a loan under that program;

(B) Deliver loan proceeds to a student under that program; or

(C) Retain the proceeds of a loan made under that program that are received after the emergency action takes effect; or

(iv) In the case of an emergency action against a third-party servicer, administer any aspect of any institution's participation in any Title IV, HEA program.

(2) If the initiating official withdraws, by an emergency action, the authority of the institution or servicer to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds, or the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program, except in accordance with a particular procedure specified in the notice of emergency action, the institution or servicer, as applicable, may not take any action described in paragraph (d)(1) of this section except in accordance with the procedure specified in the notice.

(e)

(1) Upon request by the institution or servicer, as applicable, the Secretary provides the institution or servicer, as soon as practicable, with an opportunity to show cause that the emergency action is unwarranted or should be modified.

(2) An opportunity to show cause consists of an opportunity to present evidence and argument to a show-cause official. The initiating official does not act as the show-cause official for any emergency action that the initiating official has begun. The show-cause official is authorized to grant relief from the emergency action. The institution or servicer may make its presentation in writing or, upon its request, at an informal meeting with the show-cause official.

(3) The show-cause official may limit the time and manner in which argument and evidence may be presented in order to avoid unnecessary delay or the presentation of immaterial, irrelevant, or repetitious matter.

(4) The institution or servicer, as applicable, has the burden of persuading the show-cause official that the emergency action imposed by the notice is unwarranted or should be modified because --

(i) The grounds stated in the notice did not, or no longer, exist;

(ii) The grounds stated in the notice will not cause loss or misuse of Title IV, HEA program funds; or

(iii) The institution or servicer, as applicable, will use procedures that will reliably eliminate the risk of loss from the misuse described in the notice.

(5) The show-cause official continues, modifies, or revokes the emergency action promptly after consideration of any argument and evidence presented by the institution or servicer, as applicable, and the initiating official.

(6) The show-cause official notifies the institution or servicer, as applicable, of that official's determination promptly after the completion of the show-cause meeting or, if no meeting is requested, after the official receives all the material submitted by the institution in opposition to the emergency action. In the case of a notice to a third-party servicer, the official also notifies each institution that contracts with the servicer of that determination. The show-cause official may explain that determination by adopting or modifying the statement of reasons provided in the notice of emergency action.

(f)

(1) An emergency action does not extend more than 30 days after initiated unless the Secretary initiates a limitation, suspension, or termination proceeding under this part or under 34 CFR part 600 against the institution or servicer, as applicable, within that 30-day period, in which case the

emergency action continues until a final decision is issued in that proceeding, as provided in § 668.91(c), as applicable.

(2) Until a final decision is issued by the Secretary in a proceeding described in paragraph (f)(1) of this section, any action affecting the emergency action is at the sole discretion of the initiating official, or, if a show- cause proceeding is conducted, the show-cause official.

(3) If an emergency action extends beyond 180 days by virtue of paragraph (f)(1) of this section, the institution or servicer, as applicable, may then submit written material to the show-cause official to demonstrate that because of facts occurring after the later of the notice by the initiating official or the show-cause meeting, continuation of the emergency action is unwarranted and the emergency action should be modified or ended. The show-cause official considers any written material submitted and issues a determination that continues, modifies, or revokes the emergency action.

(g) The expiration of an emergency action, or its modification or revocation by the show-cause official, does not bar subsequent emergency action on a ground other than one specifically identified in the notice imposing the prior emergency action. Separate grounds may include violation of an agreement or limitation imposed or resulting from the prior emergency action.

Document:34 CFR 668.85

34 CFR 668.85

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§ 668.85 Suspension proceedings.

(a) Scope and consequences. (1) The Secretary may suspend an institution's participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the institution or servicer --

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA; or

(ii) Substantially misrepresents the nature of --

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a suspension proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(3) The suspension may not exceed 60 days unless --

(i) The institution or servicer and the Secretary agree to an extension if the institution or servicer, as applicable, has not requested a hearing; or

(ii) The designated department official begins a limitation or termination proceeding under § 668.86.

(b) Procedures. (1) A designated department official begins a suspension proceeding by sending a notice to an institution or third-party servicer by certified mail, return receipt requested. In the case of a suspension proceeding against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The designated department official may also transmit the notice by other, more expeditious means if practical. The notice --

(i) Informs the institution or servicer of the intent of the Secretary to suspend the institution's participation or the servicer's eligibility, as applicable, cites the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(ii) Specifies the proposed effective date of the suspension, which is at least 20 days after the date of mailing of the notice of intent;

(iii) Informs the institution or servicer that the suspension will not be effective on the date specified in the notice, except as provided in § 668.91(b)(2), if the designated department official receives from the institution or servicer, as applicable, by that date a request for a hearing or written material indicating why the suspension should not take place; and

(iv) In the case of a suspension proceeding against a third-party servicer, informs each institution that contracts with the servicer of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing, but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer that --

(i) The proposed suspension is dismissed; or

(ii) The suspension is effective as of a specified date.

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official transmits the request for hearing and response to the Office of Hearings and Appeals, which sets the date and the place. The date is at least 15 days after the designated department official receives the request. The suspension does not take place until the requested hearing is held.

(4) A hearing official conducts a hearing in accordance with § 668.89.

(c) Expedited proceedings. With the approval of the hearing official and the consent of the designated department official and the institution or servicer, as applicable, any time period specified in this section may be shortened.

Document:34 CFR 668.86

34 CFR 668.86

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§ 668.86 Limitation or termination proceedings.

(a) Scope and consequences. (1) The Secretary may limit or terminate an institution's participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the institution or servicer --

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA; or

(ii) Substantially misrepresents the nature of --

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a limitation or termination proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(3) The consequences of the limitation or termination of the institution's participation or the servicer's eligibility are described in §§ 668.94 and 668.95, respectively.

(b) Procedures. (1) A designated department official begins a limitation or termination proceeding by sending an institution or third-party servicer a notice by certified mail, return receipt requested. In the case of a limitation or termination proceeding against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The designated department official may also transmit the notice by other, more expeditious means if practical. This notice --

(i) Informs the institution or servicer of the intent of the Secretary to limit or terminate the institution's participation or servicer's eligibility, as applicable, cites the consequences of that action, and identifies the alleged violations that constitute the basis for the action, and, in the case of a limitation proceeding, states the limits to be imposed;

(ii) Specifies the proposed effective date of the limitation or termination, which is at least 20 days after the date of mailing of the notice of intent;

(iii) Informs the institution or servicer that the limitation or termination will not be effective on the date specified in the notice if the designated department official receives from the institution or servicer, as applicable, by that date a request for a hearing or written material indicating why the limitation or termination should not take place; and

(iv) In the case of a limitation or termination proceeding against a third-party servicer, informs each institution that contracts with the servicer of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer that --

(i) The proposed action is dismissed;

(ii) Limitations are effective as of a specified date; or

(iii) The termination is effective as of a specified date.

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official transmits the request for hearing and response to the Office of Hearings and Appeals, which sets the date and place. The date is at least 15 days after the designated department official receives the request. The limitation or termination does not take place until after the requested hearing is held.

(4) A hearing official conducts a hearing in accordance with § 668.89.

(c) Expedited proceeding. With the approval of the hearing official and the consent of the designated department official and the institution or servicer, as applicable, any time schedule specified in this section may be shortened.

Document:34 CFR 668.96

34 CFR 668.96

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§ 668.96 Reimbursements, refunds and offsets.

(a) In an action to fine an institution or servicer, or to limit, suspend, or terminate the participation of an institution or the eligibility of a servicer, the designated department official, hearing official, or Secretary may require an institution or third-party servicer to take reasonable and appropriate corrective action to remedy the institution's or servicer's violation, as applicable, of any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA.

(b) The corrective action under paragraph (a) of this section may include payment of any funds to the Secretary, or to designated recipients, that the institution or servicer, as applicable, improperly received, withheld, disbursed, or caused to be disbursed. Corrective action may, for example, relate to --

(1) With respect to the Federal Stafford Loan, Federal PLUS, and Federal SLS programs --

(i) Ineligible interest benefits, special allowances, or other claims paid by the Secretary; and

(ii) Discounts, premiums, or excess interest paid in violation of 34 CFR part 682; and

(2) With respect to all Title IV, HEA programs --

(i) Refunds or returns of title IV, HEA program funds required under program regulations when a student withdraws.

(ii) Any grants, work-study assistance, or loans made in violation of program regulations.

(c) If any final decision in any action under this subpart requires an institution or third-party servicer to reimburse or make any other payment to the Secretary, the Secretary may offset these claims against any benefits or claims due to the institution or servicer.

(d) If an institution's violation in paragraph (a) of this section results from an administrative, accounting, or recordkeeping error, and that error was not part of a pattern of error, and there is no evidence of fraud or misconduct related to the error, the Secretary permits the institution to correct or cure the error. If the institution corrects or cures the error, the Secretary does not limit, suspend, terminate, or fine the institution for that error.

Document:34 CFR 668.206

34 CFR 668.206

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§ 668.206 Consequences of cohort default rates on your ability to participate in Title IV, HEA programs.

(a) End of participation.

(1) Except as provided in paragraph (e) of this section, you lose your eligibility to participate in the FFEL and Direct Loan programs 30 days after you receive our notice that your most recent cohort default rate for fiscal year 2011 or later is greater than 40 percent.

(2) Except as provided in paragraphs (d) and (e) of this section, you lose your eligibility to participate in the FFEL, Direct Loan, and Federal Pell Grant programs 30 days after you receive our notice that your three most recent cohort default rates are each 30 percent or greater.

(b) Length of period of ineligibility. Your loss of eligibility under this section continues--

(1) For the remainder of the fiscal year in which we notify you that you are subject to a loss of eligibility; and

(2) For the next 2 fiscal years.

(c) Using a cohort default rate more than once. The use of a cohort default rate as a basis for a loss of eligibility under this section does not preclude its use as a basis for--

(1) Any concurrent or subsequent loss of eligibility under this section; or

(2) Any other action by us.

(d) Continuing participation in Pell. If you are subject to a loss of eligibility under paragraph (a)(2) of this section, based on three cohort default rates of 30 percent or greater, you may continue to participate in the Federal Pell Grant Program if we determine that you--

(1) Were ineligible to participate in the FFEL and Direct Loan programs before October 7, 1998, and your eligibility was not reinstated;

(2) Requested in writing, before October 7, 1998, to withdraw your participation in the FFEL and Direct Loan programs, and you were not later reinstated; or

(3) Have not certified an FFELP loan or originated a Direct Loan Program loan on or after July 7, 1998.

(e) Requests for adjustments and appeals.

(1) A loss of eligibility under this section does not take effect while your request for adjustment or appeal, as listed in § 668.208(a), is pending, provided your request for adjustment or appeal is complete, timely, accurate, and in the required format.

(2) Eligibility continued under paragraph (e)(1) of this section ends if we determine that none of the requests for adjustments and appeals you have submitted qualify you for continued eligibility under § 668.208. Loss of eligibility takes effect on the date that you receive notice of our determination on your last pending request for adjustment or appeal.

(3) You do not lose eligibility under this section if we determine that your request for adjustment or appeal meets all requirements of this subpart and qualifies you for continued eligibility under § 668.208.

(4) To avoid liabilities you might otherwise incur under paragraph (f) of this section, you may choose to suspend your participation in the FFEL and Direct Loan programs during the adjustment or appeal process.

(f) Liabilities during the adjustment or appeal process. If you continued to participate in the FFEL or Direct Loan Program under paragraph (e)(1) of this section, and we determine that none of your requests for adjustments or appeals qualify you for continued eligibility--

(1) For any FFEL or Direct Loan Program loan that you certified and delivered or originated and disbursed more than 30 days after you received the notice of your cohort default rate, we

estimate the amount of interest, special allowance, reinsurance, and any related or similar payments we make or are obligated to make on those loans;

(2) We exclude from this estimate any amount attributable to funds that you delivered or disbursed more than 45 days after you submitted your completed appeal to us;

(3) We notify you of the estimated amount; and

(4) Within 45 days after you receive our notice of the estimated amount, you must pay us that amount, unless--

(i) You file an appeal under the procedures established in subpart H of this part (for the purposes of subpart H of this part, our notice of the estimate is considered to be a final program review determination); or

(ii) We permit a longer repayment period.

(g) Regaining eligibility. If you lose your eligibility to participate in a program under this section, you may not participate in that program until--

(1) The period described in paragraph (b) of this section has ended;

(2) You pay any amount owed to us under this section or are meeting that obligation under an agreement acceptable to us;

(3) You submit a new application for participation in the program;

(4) We determine that you meet all of the participation requirements in effect at the time of your application; and

(5) You and we enter into a new program participation agreement.

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin Largent