April 28, 2022

The Honorable Miguel A. Cardona
Secretary of the U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Application for Borrower Defense on Behalf of Borrowers that Attended Schools Operated by Education Corporation of America

Dear Mr. Secretary:

We write to request that the U.S. Department of Education (Department) grant full borrower defense relief for students who attended schools operated by Education Corporation of America (ECA) from June 2016 through its abrupt closure in December 2018.

During that time period, ECA repeatedly misled current and prospective students about its accreditation status and overall wellbeing in order to induce students to enroll and take out loans. Further, as a result of its closure, ECA breached its contract with students to provide them with promised educational services, including heavily-promoted continuous career services.

Enclosed, please find our group application on behalf of ECA student borrowers. As detailed therein, the evidence submitted in conjunction with this group application supports the undersigned State Attorneys Generals' requested relief under Federal Borrower Defense regulations. We respectfully request a written response to the enclosed group application with a clear indication of whether the Department approves or denies our request for student loan discharge and refunds, and the basis for that decision.

Thank you for your consideration.

Sincerely,

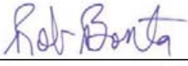
ATTORNEY GENERAL FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO

ATTORNEY GENERAL FOR THE STATE OF MARYLAND

BRIAN E. FROSH

ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA



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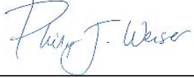

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ATTORNEY GENERAL FOR THE STATE OF ALABAMA

STEVE MARSHALL

To: Miguel A. Cardona
Secretary of the U.S. Department of Education

Cc: Colleen Nevin
Director of the Borrower Defense Unit, U.S. Department of Education

From: The Attorneys General of Pennsylvania, Maryland, California, Colorado, Virginia and Alabama.

Date: April 28, 2022

RE: Application for Borrower Defense on Behalf of Borrowers that Attended Schools Operated by Education Corporation of America

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TABLE OF CONTENTS

I. SUMMARY 1

II. BACKGROUND 2

III. ECA MISREPRESENTED AND OMITTED MATERIAL INFORMATION AND BROKE ITS PROMISES TO ELIGIBLE BORROWERS 4

A. ECA Misled Students about its Unstable and Uncertain Accreditation 4

B. ECA Touted and Promised Post-Graduate Career Services to Eligible Borrowers Up Until its Closure 19

C. Due to its Closure, ECA Breached its Contract to Provide Instruction, Post-Graduate Career Services, and Other Related Services to Eligible Borrowers 22

IV. BORROWER DEFENSE REGULATIONS SUPPORT FULL RELIEF FOR ELIGIBLE BORROWERS 23

A. The Department Should Apply State Law to Loans Taken Out by Eligible Borrowers Prior to July 1, 2017 25

B. The Department Should Apply the Standard in the 2016 Rule for Loans Issued On or After July 1, 2017 25

C. Full Borrower Defense Relief Should Be Provided to Eligible Borrowers 26

V. CONCLUSION AND REQUESTS FOR RELIEF 30

ATTACHMENT A: STATE LAW ANALYSIS 31

Violations of Pennsylvania Law 32

Violations of Maryland Law 36

Violations of California Law 38

Violations of Colorado Law 40

Violations of Virginia Law 43

Violations of Alabama Law 45

I. SUMMARY

The Attorneys General of Pennsylvania, Maryland, California, Colorado, Virginia and Alabama ("States") respectfully submit this Application for borrower defense on behalf of student borrowers ("Eligible Borrowers")[1] that attended schools operated by Education Corporation of America ("ECA"). The Application is occasioned by ECA's misconduct occurring from June 2016 through its abrupt closure in December 2018, and seeks full loan discharge for the States' Eligible Borrowers as well as the recovery of amounts paid on their federal student loans.

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As detailed below, ECA's communications with current and prospective students during the relevant time period consistently misrepresented and/or omitted material facts related to its accreditation status, financial position, quality of education, and the likelihood and impact of its possible loss of accreditation, all of which were false, misleading, and designed to induce students to enroll at its schools. Yet, without access to ECA's internal documents related to its financial position and accreditation efforts, and without a pre-existing understanding of the effect that the loss of an accreditor's federal recognition has upon a school's eligibility for federal student aid, current and prospective students were simply left to reasonably rely on ECA's false narrative, all to their detriment. Accordingly, as a result of ECA's substantial misrepresentations and material omissions, students were deprived of both an opportunity to understand that their educational future was in jeopardy as well as a meaningful opportunity to consider transferring to a different university or otherwise taking corrective action.

As further detailed below, separate and apart from its substantial misrepresentations and material omissions, ECA promised career services that would be both "continuous" and "available to all eligible graduates" even after its graduates received their first job placement. As a result of its closure, however, ECA breached its contractual obligation to provide these services when it closed. Moreover, while ECA could have avoided or mitigated its breach of promise to its students by contracting with a third party to provide career counseling or otherwise leaving in place some sort of infrastructure to assist its graduates, there is no evidence ECA took any such steps. Instead, ECA simply abandoned this promise to its students when it closed.

Finally, until ECA shut down in December 2018, ECA's enrollment agreements, catalogs, websites, and other materials implied unequivocally that it would be possible for enrolling students to complete a full term of study and eventually earn a degree once necessary qualifications were met. Again, ECA breached these obligations by simply shutting its doors without warning.

For the reasons just stated and more fully set forth below, the States respectfully submit that a preponderance of the evidence establishes a borrower defense for Eligible Borrowers from our respective states during the relevant time period.

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[1] For purposes of this Application, Parent PLUS borrowers are included in the definition of "Eligible Borrowers."

II. BACKGROUND

1. ECA is a Delaware corporation founded in 1999, with a principal place of business in Birmingham, Alabama.

2. As pertinent to this Application, from June 2016 until its closure in December 2018, ECA operated for-profit schools throughout the United States under the names Virginia College, Brightwood, Brightwood Career Institute, Golf Academy of America and Ecotech Institute, all of which were accredited by the Accrediting Council for Independent Colleges and Schools ("ACICS").

3. In 2016, the nationwide enrollment of these schools was approximately 20,000 students.[2]

4. In Pennsylvania, ECA operated Brightwood Career Institute campuses at the following locations: Broomall, Harrisburg, Philadelphia, Philadelphia Mills and Pittsburgh.

5. In Maryland, ECA operated Brightwood campuses in Baltimore, Beltsville and Towson.

6. In California, ECA operated a Golf Academy of America campus in San Diego and Brightwood campuses at the following locations: Bakersfield, Chula Vista, Fresno, Modesto, North Hollywood, Palm Springs, Riverside, Sacramento, San Diego and Vista.

7. In Colorado, ECA operated one Ecotech campus in Aurora.

8. In Virginia, ECA operated a Virginia College campus in Richmond.

9. In Alabama, which is where ECA was headquartered, ECA operated Virginia College campuses in Birmingham, Huntsville, Mobile and Montgomery.

10. On June 23, 2016, the National Advisory Committee on Institutional Quality and Integrity ("NACIQI") voted to withdraw its recognition of ACICS due to ACICS's lax oversight of its accredited schools.[3]

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[2] *See Complaint for Declaratory and Injunctive Relief and Appointment of Receiver* filed on Oct. 16, 2018 in the United States District Court for the Northern District of Alabama at Case No. 2:18-cv-01698-AKK, Doc. No. 1, ¶4.

[3] NACIQI Meeting Transcript, https://sites.ed.gov/naciqi/files/2016/08/naciqi-transcripts-062316-508.pdf (June 23, 2016).

11. The NACIQI vote was followed by a U.S. Department of Education ("Department") decision to terminate ACICS's recognition as a national accreditor on September 22, 2016.[4]

12. ACICS then sought reversal of the termination decision from Acting Secretary of Education John B. King, Jr., but, on December 12, 2016, the Secretary adopted the decision and withdrew and terminated ACICS's recognition.[5]

13. Accreditation is of vital importance to for-profit schools such as ECA because, without an accreditor in place, these schools do not qualify for participation in Title IV federal student aid programs that serve as the primary source of their revenue.[6]

14. In ECA's case, Title IV funds accounted for approximately 84 percent of its total revenue in the 2017-2018 award year.[7]

15. A school's loss of accreditation can adversely impact students who are seeking licensure/certifications that require students to have attended an accredited institution.[8]

16. As a result of the Department's termination of ACICS's recognition, all ACICS accredited schools, including ECA's schools, were deemed by the Department to be provisionally certified to participate in Title IV while they sought a new accreditor.[9] This meant ECA had to comply with certain additional conditions designed to protect student and taxpayer dollars, or risk the loss of its federal financial aid eligibility.[10]

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[4] *See In the Matter of: Accrediting Council for Independent Colleges and Schools*, Docket No. 16-44-O, 2016 WL 8202964, at *1 (E.D.O.H.A. Dec. 12, 2016), https://www2.ed.gov/documents/acics/final-acics-decision.pdf.

[5] *Id.* at *10.

[6] 20 U.S.C. § 1099c(h)(2)-(3)).

[7] *See generally* Federal Student Aid, *Proprietary School 90/10 Revenue Percentages*, https://studentaid.gov/data-center/school/proprietary (providing breakdowns by school and year).

[8] *See, e.g.*, *Public Disclosure: Illinois Institute of Art and Art Institute of Colorado From "Accredited" to "Candidate,"* Higher Learning Commission (last updated Aug. 24, 2018), https://www hlcommission.org/download/_PublicDisclosureNotices/PDN%20Art%20Inst%20Update%20%20b%208.2018.pdf.

[9] Department, *Summary of Selected Requirements for Institutions Accredited by ACICS* at 1, https://www2.ed.gov/documents/acics/ppa-provisions.pdf ("[A]lthough ACICS is no longer a federally recognized accrediting agency, the Department will continue the participation of schools accredited by ACICS in the federal student aid programs through provisional certification.").

[10] *Id.* at 3.

17. Throughout this same 2016 through 2018 time period, ECA was experiencing financial difficulties as evidenced by the fact the Department had placed its schools on Heightened Cash Management I from 2014 until November 2018 when the Department placed ECA on Heightened Cash Management 2.[11]

18. Between the June 23, 2016 NACIQI decision and its ultimate closure in December 2018, ECA misrepresented and omitted material information related to its accreditation status, financial position, and quality of education, which were false, misleading, and designed to induce students to enroll.

19. ECA minimized the impact of ACICS's derecognition and, at critical moments from at least September 22, 2016 until its closure in December 2018, overstated its schools' path toward accreditation under a new national accreditor, the Accrediting Council for Continuing Education & Training ("ACCET").

20. ECA's closure in December 2018 breached its contract with students related to the availability of continuous career counseling and the school's ability to provide the education it had promised.

21. By virtue of the aforementioned conduct, and as more fully detailed below, the States request full relief for Eligible Borrowers in their respective states who enrolled at any ECA campus from June 2016 through December 2018.

III. ECA MISREPRESENTED AND OMITTED MATERIAL INFORMATION AND BROKE ITS PROMISES TO ELIGIBLE BORROWERS

A. ECA Misled Students about its Unstable and Uncertain Accreditation

22. ECA's messaging in the wake of the Department's September 22, 2016 decision was to downplay its significance and not to disclose the consequences of ACICS's derecognition. A September 30, 2016 email from the President of the Brightwood Career Institute-Philadelphia Market Street location to his staff highlighting the need for the message to be "simple" and noting ACICS "is fully recognized and has license to operate throughout this process until the Secretary of Education decides (if he does) to remove their accreditation."[12]

23. Additional talking points and questions and answers for existing students dated November 1, 2016, stated ECA would be applying to ACCET for accreditation in

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[11] *See* Letter from Senator John F. Kennedy, Esq., Court-Appointed Receiver, Receivership of ECA et al., to Senator Warren, Honorable Cummings, and Honorable Bonarnici (Feb. 7, 2019) (on file with authors); *see also* Federal Student Aid, *Heightened Cash Monitoring*, https://studentaid.gov/data-center/school/hcm.

[12] Email from Johnny Arellano, Campus President, Brightwood Career Institute in Philadelphia, to Ian Manners, Thomas Driscoll, and Sherri Moore (Sept. 30, 2016, 14:42 EST) (on file with authors, emphasis added).

January 2017 for its Brightwood Schools and in May 2017 for its Virginia College schools. The talking points included the following Q and A:

Why does it matter whether <School> is accredited?

- Accreditation is important because it indicates whether a school meets certain standards for providing a quality education. Accreditors have a responsibility under federal law to make sure colleges earn their accreditation by meeting specific requirements for curricula, instructor quality, facilities, job placement, and in many more areas.

- <School> has consistently met those standards and earned accreditation from ACICS, and our quality has not changed. Additionally, the DOE requires that schools be accredited in order to receive federal financial aid.

- The DOE has provided an explanation of accreditation and what changes in accreditation mean to students on its blog, which you can read here.

…

What if <School> cannot get accreditation from ACCET?
We have a full understanding of ACCET requirements and are taking all necessary actions to meet those standards. ACCET accreditation requirements are very similar to ACICS's, and we are fully confident that we will become accredited.

Could this affect my financial aid?
There is no immediate risk for you or your financial aid. If ACICS loses its appeal, you will have at least 18 months to continue receiving financial aid and complete your program. We anticipate that we will be accredited by ACCET within 18 months.

How long will the whole process take?
Based on where we currently are in the process, we are hopeful that Brightwood schools will be accredited by December, 2017 and Virginia College, Golf Academy of America and Ecotech Institute schools will be accredited by April, 2018, however, the process could take up to 18 months after filing the application.

What should I do now?
Please continue to focus on your studies and complete your program. We will keep you informed of any developments related

> to our accreditation status with ACCET, ACICS, and how they might affect you.[13]

24. Missing from these talking points is any mention of the impact of ACICS's derecognition on ECA students' degrees, especially students who intended to sit for licensure or certifications. Instead, the school focuses on access to Title IV funds, which continued during ECA's provisional certification period.

25. During this time period, it is believed that ECA schools failed to mention any accreditation issues, simply stating:

> **Accreditation**
>
> Accredited by the Accrediting Council for Independent Colleges and Schools (ACICS) to award Associate of Specialized Business degrees, Associate of Specialized Technology degrees, and diplomas.[14]

26. Further, the website for Virginia College included the following accreditation disclosure:

> Virginia College is accredited by the Accrediting Council for Independent Colleges and Schools (ACICS) to award certificates, diplomas, associate's, bachelor's, and master's degrees. [¶] The Accrediting Council for Independent Colleges and Schools is listed as a nationally recognized accrediting agency by the United States Department of Education and is recognized by the Council for Higher Education Accreditation (CHEA). [15]

27. After the Secretary's December 12, 2016 termination decision, and in an effort to continue to reassure its students, ECA sent emails to its students across all brands that included the following (the below is the Virginia College version):

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[13] Email from Johnny Arellano, Campus President, Brightwood Career Institute in Philadelphia, to Carmen Agosto-Cruz, Bonnie McBride, Sherri Moore, Jennifer Meech, Susan Doherty, Peter Sullivan, Ian Manners, Nina Nolan and Thomas Driscoll (Nov. 2, 2016, 11:52 EST) (forwarding an email from Chris Lacek to all presidents of ECA schools) (on file with authors, formatting in original).

[14] *See, e.g.*, Brightwood Career Institute, Harrisburg, 2016 - 2017 Catalog 5 (Oct. 26, 2016) (on file with authors, formatting in original).

[15] Virginia College, Accreditation (Aug. 17, 2016, 2:01:27 EST), https://web.archive.org/web/20160817150127/https://www.vc.edu/about/accreditation/ (on file with authors, formatting in original).

<u>While the case is in process, we will remain an accredited school and students who qualify remain eligible for Title IV financial aid.</u>

Accreditation is very important to us and we are taking this matter very seriously. Our primary concern is you, our students. Our mission is to provide a meaningful and valued career education that you can take into the marketplace to secure a job that allows you to provide for yourself and your family. Maintaining accreditation from a recognized accrediting body is critical to that mission.

Since ACICS's hearing in June, we have been anticipating the possibility that this decision would be handed down and began exploring our options to seek accreditation elsewhere. To ensure that we continue operating with accreditation from a DOE-recognized accreditor, Virginia College has been engaged in the process of seeking accreditation from the Accrediting Council for Continuing Education and Training, ACCET. There are many steps in the process and we are working quickly to progress through them.

We have completed the Accreditation and Evaluation Workshop and are making preparations to file a formal application. We will continue to work through the process as quickly as possible. In the meantime, please be assured that Virginia College remains an accredited institution and students who qualify remain eligible for Title IV financial aid.

Overall, please be assured that our focus is on you, our students and continuing to provide you with leading career-focused education and job placement services to get you the career you deserve. We expect to remain an accredited institution and continue to be eligible for federal financial aid. We will keep you updated on any significant updates. If you have any questions, please see me.

Sincerely,
<Name>
Campus President[16]

[16] Email and attachment from Susan Lynch, Campus President, Brightwood Career Institute in Harrisburg, Pennsylvania, to Jenny Piper, Pat Mozurkevich, Sarah Brooker, Jamie Earley, Jennifer Riordan, Douglas Miller, Michael Nelson, James Williams, Tracy Batug, Brenda Townsend, Christine Seibert, Troy Winemiller, Wendy Forbes, Amy Skillman, Debbie Yocum, Christopher Brown, Penny Sorensen, Gina Abromitis, Michael Madden, and David Gang (Dec. 14, 2016, 9:10 EST) (on file with authors, emphasis in original).

28. Additionally, despite the Secretary's decision, ECA's catalogs omitted any mention of the accreditation concerns. For example:

> **Accreditation**
>
> Ecotech Institute is accredited by the Accrediting Council for Independent Colleges and Schools (ACICS) to award associate's degrees. ACICS is listed as a nationally recognized accrediting agency by the United States Department of Education and is recognized by the Council for Higher Education[17]

29. The aforementioned disclosure is almost identical to internet disclosures made *prior* to ECA encountering any accreditation issues as the result of ACICS's derecognition.[18]

30. ECA also made the following disclosure to prospective students across all brands from February 2017 until mid-April 2017:

> On December 12, 2016, the U.S. Department of Education withdrew recognition for the Accrediting Council for Independent Colleges and Schools (ACICS) as a national accrediting agency.
>
> ACICS has taken legal action in federal court, the outcome of which is pending and may take several months to resolve. Until the case is resolved, ACICS is not a recognized accreditor by the Department of Education.
>
> In the meantime, because we are an institution in good standing, the Department of Education offered Virginia College the ability to continue to participate in the federal student aid programs so long as the College takes timely action to pursue new accreditation. We are doing that.
>
> We have until June 12, 2018 to find a new accreditor and have been exploring options. Although we cannot guarantee we will be accepted by a new accrediting agency, we are working hard to

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[17] This disclosure appeared at page 6 of the 2017-2018 Ecotech campus catalog published January 31, 2017. Similar accreditation disclosures appeared in 2016-2017 Virginia College catalogs for the Birmingham, Montgomery and Huntsville campuses in Alabama, copies of which are on file with the authors. Similarly, page 5 of the 2016-2017 catalog for the Pittsburgh Brightwood campus, which was published on January 30, 2017, stated only: "Accredited by the Accrediting Council for Independent Colleges and Schools (ACICS) to award Associate of Specialized Business degrees. Associate of Specialized Technology degrees, and diplomas."

[18] Virginia College, Accreditation and Approvals (Dec. 8, 2015, 02:38:46 EST), https://web.archive.org/web/20151208023846/http://www.vc.edu:80/about/accreditation/ (on file with authors).

> achieve new accreditation by a recognized accreditor by the June 2018 deadline.
>
> Again, our students can continue to utilize financial aid through at least June 12, 2018.[19]

31. ECA filed almost all of its initial applications with ACCET from February 28, 2017, through March 6, 2017.[20]

32. Even though the effort to obtain ACCET approval was in its infancy, the above prospective student disclosure was substantially modified in April 2017 to a more "enrollment friendly" version indicating that ECA was "on schedule to be accepted" by ACCET. Specifically, the new language stated:

> We want you to know that we are in the process of transitioning to a new accreditor, ACCET.
>
> Our current accreditor ACICS lost its recognition on December 12, 2016, and it is pursuing legal action in federal court to attempt to overturn that decision.
>
> **The U.S. Department of Education has recognized us as an institution in good standing and has stated that we remain provisionally accredited by the Department of Education**.
>
> We have until June 12, 2018, to be accepted by a new accreditor and applications have been submitted to ACCET to support that transition. While we cannot guarantee we will be accepted by the June, 2018 deadline, our applications are in process and we currently are on schedule to be accepted.[21]

33. ECA's representation to students that it was "on schedule" with regard to its accreditation became ingrained in other ECA materials while it also downplayed

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[19] Email and attachment from Steve McClearn, EVP, Chief Marketing Officer & President Online, Education Corporation of America, to John Schuman, Abrinar Guerra, Adam Merkle, Alex Poyuzina and others (April 13, 2017, 17:34 EST) (on file with authors).

[20] Email from Shari Mecca, Case Manager, U.S. Department of Education, to Martina Fernandez-Rosario, Area Case Director, U.S. Department of Education (Dec. 22, 2021, 13:15 EST) (on file with authors).

[21] Email and attachment from David Bryant, Education Corporation of America, to Todd Harlow, Darrell Lashley, Wayne Hampton, Justin Papariella, Greta North, Daniel Watkins, Thomas Driscoll, Mark Garner, William Schott, Shawn Taylor, Nicholaus Buzzard, Deanna Slusher, Leslie Scott, Ellishequea Hardekopf, Jeffrey Odum, Jeffrey Witter, Lori Glasser, Seth Mazzei, and Thomas Parol (April 13, 2017, 3:21 EST) (remarking disclosure is "much more enrollment friendly") (on file with authors, emphasis in original).

the potential impact its accreditation status could have on the availability of financial aid for its students. For example, the representation appears in an Accreditation Q & A Tip Sheet dated April 26, 2017, which stated:

> **Why is accreditation important?**
>
> Accreditation serves the interests of companies, agencies, and the public through the establishment of standards, policies, and procedures in conjunction with an objective third-party professional evaluation designed to identify and inspire sound education and training practices. Being accredited means that the degree, diploma, or certificate you earn is recognized as meeting or exceeding the high standards established in the industry. Our programs give you the skills necessary to be successful in your field of study.
>
> **What happens to my financial aid after June 2018?**
>
> We have until June 12, 2018, to be accepted by a new accreditor and applications have been submitted to ACCET to support that transition. While we cannot guarantee we will be accepted by the June, 2018 deadline, our applications are in process and we currently are on schedule to complete the process. If we are successful, there will be no interruption in your ability to receive financial aid.[22]

34. By at least July 6, 2017, ECA was asking new students to execute an "Accreditation Disclosure," which stated as follows and also included the "on schedule" language:

> **Accreditation Disclosure**
>
> We want you to know that we are in the process of transitioning to a new accreditor, ACCET.
>
> Our current accreditor ACICS lost its recognition on December 12, 2016, and it is pursuing legal action in federal court to attempt to overturn that decision.
>
> **The U.S. Department of Education has recognized us as an institution in good standing and has stated that we remain provisionally accredited by the Department of Education.**

---

[22] Email and attachment from David Bryant, Education Corporation of America, to Wayne Hampton, Darrell Lashley, Justin Papariella, Greta North, Daniel Watkins, Thomas Driscoll, Mark Garner, William Scott, Todd Harlow, Shawn Taylor, Leslie Scott, Ellishequea Hardekopf, Deanna Slusher, Lori Glaser, Seth Mazzei, Jeffrey Witter, Jeffrey Odum, and Thomas Parol (April 26, 2017, 17:02 EST) (on file with authors, emphasis in original).

> We have until June 12, 2018, to be accepted by a new accreditor and applications have been submitted to ACCET to support that transition. While we cannot guarantee we will be accepted by the June, 2018 deadline, our applications are in process and we currently are on schedule to be accepted.
>
> ______________________ ____________
> STUDENT'S SIGNATURE DATE[23]

35. ECA also represented that it was on schedule to be accredited in its Brightwood school catalogs:

> Brightwood College is in the process of transitioning to a new accreditor, the Accrediting Council for Continuing Education and Training (ACCET). The College's current accreditor, ACICS, lost its recognition on December 12, 2016, and it is pursuing legal action in federal court to attempt to overturn that decision. The U.S. Department of Education has recognized Brightwood College as an institution in good standing and has stated that the College remains provisionally accredited by the Department of Education. The College has until June 12, 2018, to be accepted by a new accreditor and applications have been submitted to ACCET to support that transition. While Brightwood College cannot guarantee it will be accepted by the June, 2018 deadline, the College's applications are in process and is currently on schedule to be accepted.[24]

36. The path to obtaining accreditation through ACCET was by no means as straightforward as represented. In a May 26, 2017 email, one Brightwood campus president informed staff that they were not meeting ACCET Completion or Attendance requirements.[25]

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[23] Email and attachment from prospective Brightwood College student to Amy Jo DiGiovanni (July 10, 2017, 9:47 EST) (on file with authors). Email and attachment from Amy Jo DiGiovanni, Premier Admissions Representative, Brightwood College, Beltsville, Maryland, to another prospective Brightwood College (Jan. 29, 2018, 17:19 EST) (on file with authors). Email and attachment from Mike Miller, SVP-Admissions, Education Corporation of America, to "All Director of Admissions" and "All Presidents" (Nov. 2, 2017, 11:20 EST) (on file with authors).

[24] The "on schedule" disclosure appeared in: the Brightwood Baltimore catalogs dated November 21, 2017, December 6, 2017, February 20, 2018, July 13, 2018, September 17, 2018 and November 6, 2018 (which was **after** ECA withdrew its Brightwood ACCET applications on October 23, 2018, as noted *infra*); the Brightwood Broomall, Pennsylvania catalog dated September 21, 2017; and the Brightwood Clovis, Salida, and Chula Vista, California catalogs dated January 12, 2018.

[25] Email from Johnny Arellano, Campus President, Brightwood Career Institute in Philadelphia, to David Callsen, Irene Howard, Toria Pierce, Tonique Reid, Larry Black, Angelo Outlaw, Desiree Vigo, Exie Mayes, and Jack Dixon (May 26, 2017, 16:51 EST) (on file with authors) (mistakenly identifying ACCET as its "new accreditor" and stating

37. It was not until August 2017 that ACCET publicly reported to the Department and state education regulators that a number of ECA's Virginia College and Brightwood schools, as well as its Golf Academy of America and Ecotech schools, would be considered for an initial grant of accreditation at ACCET's December 2017 meeting.[26] In fact, ACCET had not even commenced campus site visits by August 2017, noting that the main campuses would be visited in the December 2017 review cycle with the branch campuses to be visited in the April 2018 cycle.[27]

38. After completion of the main campus visits, it is believed ACCET identified significant deficiencies at multiple main campuses. For example, on December 20, 2017, ACCET informed ECA that it would defer its determination regarding ECA's Pittsburgh Brightwood Career Institute campus until ACCET's April 2018 meeting in order to resolve a number of concerns, including issues related to financial procedures, supervision of instruction, admissions/enrollment, attendance, certification and licensing, completion, and job placement. [28]

39. As a result of the deficiencies across a number of campuses, ACCET did not grant any of the ECA main campuses initial accreditation in December 2017.[29] Following its December 2017 meeting, ACCET stated that it would consider a grant of initial accreditation to certain ECA schools at ACCET's April 2018 meeting and noted that the branch campuses would be visited in ACCETs April 2018 cycle.[30]

"By not meeting these ACCET Outcomes, every single employee at this campus can be at risk of losing their job if we lose any additional programs.")

[26] Memorandum from ACCET to the U.S. Department of Education, et al., *Solicitation of Commentary - Institutions under Consideration for ACCET Accreditation at the December 2017 and April 2018 Commission Meetings* (Aug. 31, 2017) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/institutions_considered_aug17.pdf.

[27] *Id.*

[28] *See, e.g.*, Letter from William V. Larkin, Executive Director, ACCET, to John Carreon, SVP, Regulatory Affairs and Associate General Counsel, Brightwood Career Institute, Pittsburgh, Re: Initial Accreditation Deferred; Interim Report Required (Dec. 20, 2017) (noting the need to resolve issues involving Financial Procedures, Supervision of Instruction, Admissions/Enrollment, Attendance, Certification and Licensing, and Completion and Job Placement) (on file with authors). Similar letters were sent to multiple ECA locations, including Brightwood- Philadelphia, Brightwood- Harrisburg, and Brightwood- Broomall, which are on file with the authors.

[29] Memorandum from ACCET on Final Actions, Show Cause Directives, Programmatic Probations, and Adverse Actions Taken by the ACCET Commission at the December 2017 Meeting (Dec. 22, 2017) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/final_actions_dec17.pdf.

[30] Memorandum from ACCET to the U.S. Department of Education et al., *Solicitation of Commentary-Institutions under Consideration for ACCET Accreditation at the April and August 2018 Commission Meetings* (Dec. 22, 2017) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/institutions_considered_dec17.pdf. (noting "in most instances the main campuses were visited in the December 2017 review cycle").

40. At its April 2018 meeting, ACCET denied ECA's Virginia College, Golf Academy of America, and Ecotech schools initial accreditation subject to appeal.[31] In a May 1, 2018 letter to ECA outlining the reasons for its denial of accreditation, ACCET stated:

> It is further noted that some of the weaknesses cited in the team reports were adequately addressed in the institution's team report responses and interim report, received March 2, 2018. However, upon review of the record, the Commission determined that of the 232 weaknesses identified across the institution's 33 campuses and the corporate office, approximately 20% were satisfactorily addressed, leaving 80% of the weaknesses originally cited substantially unresolved, spanning 23 of the 33 Standards for Accreditation. Further, 31 of 33 campuses failed to meet the required completion and job placement benchmarks as detailed in Standard IX: D – Completion and Job Placement. The Commission determined that the institution did not adequately demonstrated compliance with respect to all ACCET standards plus applicable policies, and procedures. The following findings do not encompass all areas for which the institution was non-compliant, but rather represent the standards and issues most pertinent to the denial of accreditation.
>
> Since denial of initial accreditation is an adverse action by the Accrediting Commission, the institution may appeal the decision.[32]

41. To the best of the States' knowledge, this initial rejection was not communicated to students despite ECA's prior representations that its application for accreditation with ACCET was on schedule.

42. On May 1, 2018, ACCET sent letters to the schools it had deferred back in December 2017 informing them it had yet again voted to defer further action and requesting additional information, including information related to student

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[31] Memorandum from ACCET on Final Actions, Show Cause Directives, Programmatic Probations, and Adverse Actions Taken by the ACCET Commission at the April 2018 Meeting (May 4, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/final_actions_apr18.pdf. The appeal was subsequently denied in August 2018. *See* Letter from William V. Larkin, Ed.D., Executive Director, ACCET, to John Carreon, SVP, Regulatory Affairs and Associate General Counsel, Virginia College, LLC (August 31, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/adverse/1539.pdf; *see also* Memorandum from ACCET on Final Actions, Show Cause Directives, Programmatic Probations, and Adverse Actions Taken by the ACCET Commission at the August 2018 Meeting (Aug. 30, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/final_actions_aug18.pdf.

[32] Letter from William V. Larkin, Ed. D., Executive Director, ACCET, to John Carreon, SVP, Regulatory Affairs and Associate General Counsel, Virginia College, LLC (May 1, 2018) (on file with authors).

outcomes.[33] Overall, ACCET did not grant accreditation to the Brightwood schools but instead reported that all of the Brightwood schools would now be considered for a grant of initial accreditation at its August 2018 meeting.[34]

43. Then, in June 2018, upon a request from the Brightwood schools, ACCET granted a deferral of their initial accreditation application until the December 2018 meeting.[35] Thus, the accreditation process for all of the Brightwood schools was still pending almost two years from the original NACIQI determination and would continue to be in flux through June 12, 2018, the date by which ECA had initially represented it needed to find a new accreditor.

44. In August 2018, ECA's appeal to ACCET related to the Virginia College, Golf Academy of America, and Ecotech schools was denied.[36] Further, interim reports were requested for 21 Brightwood locations.[37]

45. On October 23, 2018, Stu Reed, President and CEO of ECA, wrote to ACCET and withdrew the pending Brightwood applications stating:

> I am writing to you on behalf of the 29 Brightwood Colleges and Brightwood Career Institutes (collectively, "Brightwood") the ultimate owner of which is Education Corporation of America ("ECA"). The 29 Brightwood campuses are on deferral to the

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[33] *See, e.g.*, Letters from William V. Larkin, Executive Director, ACCET, to John Carreon, SVP, Regulatory Affairs and Associate General Counsel, Brightwood Career Institute, Re: Initial Accreditation Deferred; Interim Report Required for Brightwood- Pittsburgh, Brightwood- Philadelphia Mills, Brightwood- Harrisburg, and Brightwood-Broomall (May 1, 2018) (on file with authors).

[34] Memorandum from ACCET to the U.S. Department of Education et al., *Solicitation of Commentary – Institutions under Consideration for ACCET Accreditation at the June, August, and December 2018 Commission Meetings* (May 4, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/institutions_considered_apr18.pdf; *see also* ACCET, Deferral Extensions Granted (June 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/extensions_jun18.pdf.

[35] ACCET, Deferral Extensions Granted (June 2018), *supra* note 34.

[36] *See* Memorandum from ACCET on Final Actions, Show Cause Directives, Programmatic Probations, and Adverse Actions Taken by the ACCET Commission at the August 2018 Meeting (Aug. 30, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/final_actions_aug18.pdf; *see also* Letter from William V. Larkin, Ed.D., Executive Director, ACCET, to John Carreon, SVP, Regulatory Affairs and Associate General Counsel, Virginia College, LLC (August 31, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/adverse/1539.pdf.

[37] Letter from William V. Larkin, Ed.D., Executive Director, ACCET, to John Carreon, SVP, Regulatory Affairs and Associate General Counsel, Education Corporation of America (Aug. 31, 2018) (on file with authors); *accord* Memorandum from ACCET to the U.S. Department of Education et al., *Solicitation of Commentary – Institutions under Consideration for ACCET Accreditation at the December 2018 and April 2019 Commission Meetings* (Aug. 31, 2018) *available at* https://s3.amazonaws.com/docs.accet.org/downloads/reports/institutions_considered_aug18.pdf.

> December 2018 ACCET Commission meeting. The purpose of this letter is to withdraw the Brightwood applications for accreditation by the ACCET Accrediting Commission.[38]

46. Again, it appears there was no notice to students of the appeal denial involving the Virginia College, Golf Academy of America, and Ecotech schools or the subsequent withdrawal of the Brightwood application.

47. Despite its precarious accreditation status as evidenced by the deferrals and ECA's ultimate withdrawal of the Brightwood applications, ECA outrageously published multiple Brightwood catalogs that simply defaulted to the above general disclosure identifying ACICS as a "nationally recognized accrediting agency."[39]

48. Separate from ECA's efforts to gain accreditation from ACCET, ACICS continued to act as its provisional accreditor during the pendency of the ACCET applications. In April and May of 2018, as the result of ACCET's denial of accreditation, ACICS required ECA's Virginia College, Golf Academy of America, and Ecotech schools to show cause why its current grant of accreditation should not be withdrawn while at the same time issuing institutional show cause directives and warnings related to student achievement to certain Brightwood locations.[40]

49. Near that same time period, ACCET issued talking points to active and enrolled students regarding ACICS's show cause that indicated ECA calculated placement

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[38] Letter from Stu Reed, President and CEO, Education Corporation of America to William V. Larkin, Ed.D., Executive Director, ACCET, Re: Withdrawal of Brightwood applications for accreditation (Oct. 23, 2018) (on file with authors).

[39] This "nationally recognized accrediting agency" disclosure appeared in the following catalogs: the 2018-19 Brightwood Towson Maryland campus catalog (Oct. 29, 2018); the 2018-19 Beltsville Maryland campus catalog (Oct. 3, 2018 and Nov. 6, 2018); the 2017-18 Franklin Mills Pennsylvania campus catalog (Aug. 31, 2018); the 2017-18 Broomall Pennsylvania campus catalog (Aug. 24, 2018); the 2017-18 Pittsburgh Pennsylvania campus catalog (Aug. 9, 2018); the 2017-18 and 2018-19 Vista California campus catalogs (Sept. 21, 2018 and Nov. 21, 2018); the 2017-18 and 2018-19 San Diego campus catalogs (Aug. 30, 2018 and Nov. 21, 2018); the 2017-18 and 2018-19 Riverside campus catalogs (Aug. 31, 2018 and Nov. 16, 2018); the 2017-18 and 2018-19 Modesto campus catalogs (Aug. 13, 2018 and Nov. 19, 2018); the 2017-18 and 2018-19 Los Angles campus catalogs (Aug. 28, 2018 and Nov. 19, 2018); the 2017-18 and 2018-19 Chula Vista campus catalogs (Aug. 31, 2018 and Nov. 6, 2018); the 2018-19 Carlsbad California Golf Academy of America (Oct. 29, 2018); and the 2017-18 Ecotech Institute campus catalog (Oct. 29, 2018).

[40] *See* Revised Letter from Michelle Edwards, President and CEO, ACICS, to Gregory Gossett, Campus President, Virginia College, Re: Institutional Show-Cause Directive-Adverse Action by another Agency RE: Virginia College, Birmingham, Alabama 1 (May 15, 2018) *available at* https://www2.ed.gov/documents/acics/capacity-report/agency-reponse-part6.pdf ("The institution's accreditation is also in jeopardy of being withdrawn having reported a 37% placement at the main campus."); *see also* Memorandum from ACICS to the U.S. Department of Education et al., *Final Actions, Show-cause Directives, Compliance Warnings, Programmatic Withdrawals of Approval, and Adverse Actions Taken by the ACICS Council at the April 2018 Meeting* (May 11, 2018) *available at* https://static1.squarespace.com/static/5ce58a38738b880001909396/t/5d8259c58541c55a854003fa/1568823749377/Summary+of+April+2018+Council+Actions.pdf.

rates in a manner inconsistent with ACICS standards – essentially admitting to the existence of two sets of placement rates.[41]

50. While ACICS recognized some progress was made, in September the show cause directive was continued to ACICS's December 2018 meeting and ECA was required to provide specific information from multiple campuses related to the institutional deficiencies ACCET had identified, as well an institutional teach-out plan for ECA's Virginia College, Golf Academy of America and Ecotech schools to "ensure that students will receive an appropriate outcome in the event of institutional closure . . . ."[42]

51. Subsequently, after ECA filed a lawsuit against the Department on October 16, 2018 seeking the appointment of a receiver and other declaratory relief, ACICS directed ECA to show cause, in person at its December 2018 meeting, why the accreditation of *all* of its institutions should not be withdrawn and requesting teach-out plans for its ECA's existing Brightwood locations.[43]

52. Following receipt of the ACICS show cause directive, ECA downplayed its significance. Specifically, on November 7, 2018, a Regional Vice President of Operations wrote to ECA campus administrators:

> Team,
>
> Some of you have received the attached notification but I don't think it's gone to every campus. ACICS has placed us on show cause for financial concerns. There will be a call and directives coming out shortly. A few important things:
>
> - Corporate will take care of most of the items in the letter, but we will be asking CPs to compile a list of competitors for the required teach-out plan (ACICS requires this in case a teach-out/transfer becomes necessary).

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[41] Email and attachment from John Carreon, SVP, Regulatory Affairs and Associate General Counsel, to Lorna Candler, Mary Kanaly, and Chris Gorrie (May 1, 2018, 11:48 EST) (on file with authors) ("Talking Points to Active and Enrolled Students").

[42] Letter from Michelle Edwards, President and CEO, ACICS, to Deana Southerland, Interim Campus President, Virginia College (Sept. 7, 2018) *available at* https://static1.squarespace.com/static/5ce58a38738b880001909396/t/5d5d55c54bdbf50001d11c29/1566397894196/00010582_VirginiaColl-SCC.pdf.

[43] Letter from Michelle Edwards, President and CEO, ACICS, to Stuart Reed, CEO, Education Corporation of America (Oct. 30, 2018) (on file with authors); *see also* Revised Letter from Michelle Edwards, President and CEO, ACICS, to Stuart Reed, CEO, Education Corporation of America (Nov. 12, 2018) *available at* https://static1.squarespace.com/static/5ce58a38738b880001909396/t/5d5d55f9cd337c00014942f3/1566397948924/00016224_ECA-VC_FinAdv-SC+%28Revised%29.pdf (incorrectly setting forth an original mailing date of October 31, 2018).

- We are required to notify all active and booked futures (no booked futures for sunset) of the show cause directive. I've attached the notice that will go out to students at 10PM CST Wednesday night via email.
- You will receive talking points tomorrow to address any student questions that arise from the notification.
- We are also required to post the show cause in the consumer information section of our websites. Marketing is taking care of this. At this point, we don't believe new students will have to sign a disclosure because the website is the notice to prospective students.

> I know it's a pain to have to deal with this on top of everything else. That said, many of you already had to send show cause student notices in May due to placement issues. The impact overall was minimal and there really weren't that many student questions or concerns. I'm confident we can handle this messaging without much impact to our students and the business. Stay tuned for the call tomorrow and let me know if you have questions in the meantime.[44]

53. ECA also circulated the following talking points to administrators related to the ACICS Show Cause:

ACICS Show Cause Talking Points

> In the event that a staff/faculty member or student asks about the ACICS Show Cause email or website notice, please use the following talking points.
>
> • Our accreditor, ACICS, recently placed the ECA campuses on show cause due to financial concerns.
>
> • This is a normal action for an accreditor to take when a company, like ECA, is restructuring. We expected this. ACICS wants our students to know that it is monitoring us during this restructure to ensure that both ECA and our students are successful.
>
> • It is important to understand that the restructuring includes significant investment dollars, that have already been provided, by existing investors to help the students and schools achieve

[44] Email from Jack Flinter, Academic Dean, Brightwood Career Institute in Pittsburgh, to Erin Naggy, Jim Yocolano, Kathy Osborne, Gwen Victum, Jennifer Kelly, Kristi Balaban, and Leah Walker-Owens (Nov. 7, 2018, 13:28 EST) (on file with authors).

> their goals. Our investors share our enthusiasm and have demonstrated confidence in our long-term success by providing the current funding.
>
> • At this time, there's no impact on student's eligibility for financial aid nor should there be any disruption to programs. We will keep you updated on our status with ACICS.[45]

54. Additionally, notices were sent to ECA students informing them of the show cause and stating at relevant part:

> At this time, there is no impact to your eligibility for federal student financial aid, nor should there be any disruption to your program. We are currently working to resolve the concerns and will keep you updated on our status.
>
> For more information about what this means, please visit our FAQ.[46]

55. On November 21, 2018, the Department, through Secretary of Education DeVos, reversed its prior decision of December 12, 2016, and granted ACICS continued recognition.[47] However, the ACICS reprieve did not save ECA; on December 4, 2018, ACICS withdrew ECA's accreditation.[48]

56. On December 5, 2018, ECA closed all of its campuses across the country. ECA's CEO and President, Stu Reed, sent an email to ECA's students confirming the decision to close down all campuses:

> Dear Students,

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[45] Email and attachment from Jack Flinter to Bradley Rollins, Brandy Britenbaugh, Cherie Koslow, Erin Naggy, Gwen Victum, Janet Begg, Jennifer Kelly, Jim Yocolano, John Bennett, Kathy Osborne, Kristi Balaban, LaRon Griffin, Lois Gould, Marie Pampena, Patricia Celani, Richard Payo, Suzy Chertik, William Curry, and William Trimmer (Nov. 8, 2018, 15:34 EST) (quoting from email attachment "ACICS Show Cause Talking Points Final 11-8-18.pdf") (on file with authors).

[46] *See, e.g.*, Letter from Senator John F. Kennedy, Esq., *supra* note 11, at 000076 (Brightwood Baltimore), 000078 (Ecotech), 000080 (Golf Academy of America), and 000082 (Virginia College).

[47] *In the Matter of: Accrediting Council for Independent Colleges and Schools*, Docket No. 16-44-O, Accrediting Agency Recognition Proceeding (Nov. 21, 2018), https://www2.ed.gov/about/offices/list/ope/final-agency-decision-acics-november-2018.pdf.

[48] Letter from Michelle Edwards, President and CEO, ACICS, to Stuart Reed, CEO, Education Corporation of America (Dec. 4, 2018) (on file with authors); Press Release, ACICS, *ACICS Withdraws Accreditation of All Institutions Owned by Virginia College LLC* (Dec. 6, 2018), https://www.acics.org/news/acics-withdraws-accreditation-of-all-institutions-owned-by-virginia-college-llc.

> In early fall, we undertook a path to dramatically restructure Education Corporation of America (parent company of your school) in an effort to best posture it for the future. This plan entailed the teach out of 26 of our campuses and then the commitment of capital from our investors additional funds from investors.
>
> However, recently, the Department of Education added requirements that made operating our schools more challenging. In addition, last night ACICS suspended our schools' accreditation with intent to withdraw. The uncertainty of these requirements resulted in an inability to acquire additional capital to operate our schools.
>
> It is with extreme regret that this series of recent circumstances has forced us to discontinue the operations of our schools. Your campus will close this month. Please contact your Dean or Program Director for the specific closure date of your campus.
>
> You will receive credit for all courses that you completed and passed by the closure date. Information on how to request your transcript will be posted at www.ecacolleges.com within the next few weeks. If you do not graduate this month, we encourage you to continue your career training by requesting your transcript and contacting local schools to determine transferability.
>
> This is clearly not the outcome we envisioned for you or our schools, and it with the utmost regret that we inform you of this direction.
>
> Stu Reed,
> President & CEO[49]

B. ECA Touted and Promised Post-Graduate Career Services to Eligible Borrowers Up Until its Closure

57. Across all of its brands, ECA touted its ability to provide its students with the skills needed in order to have a successful career.[50]

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[49] Letter from Senator John F. Kennedy, Esq., *supra* note 11, at 000070-71.

[50] Virginia College, Why Choose Virginia College (July 17, 2015, 18:27:53 EST), https://web.archive.org/web/20150717182753/http://www.vc.edu/about-virginia-college/why-choose.cfm; Virginia College, Why Choose Virginia College (Apr. 6, 2016, 06:12:14 EST), https://web.archive.org/web/20160406061214/https://www.vc.edu/about/why-virginia-college/; Virginia College, Why Choose Virginia College (July 10, 2017, 14:03:15 EST), https://web.archive.org/web/20170710140315/https://www.vc.edu/about/; Brightwood Career Institute, Main Page (Feb. 3, 2016, 14:38:49 EST), https://web.archive.org/web/20160203143849/https://www.brightwoodcareer.edu/;

58. Hand in hand with its career focus, one of ECA's primary selling points to prospective students was that it would provide lifetime career counseling services through all of its schools. For example, in its online advertising, ECA stressed career placement assistance, stating:

> Once you have the degree, do you know how to begin your new career? Maybe you're looking for a new profession, or just want to move ahead in the one that you already have. At Virginia College, our Career Services associates stand ready to assist you in obtaining or enhancing your career wherever you are...helping you with job placement services well beyond graduation! To find out more, complete the Request for More Information or call and talk with an Enrollment Specialist at the Virginia College campus nearest you.[51]

59. Additionally, ECA's catalogs stated:

> The Institution offers career development services to all eligible graduates. An eligible graduate is any student who has successfully completed all graduation requirements as stated in the Graduation Requirements section of this catalog. Many students desire to obtain employment on their own. The Institution supports and encourages this effort and will provide techniques on seeking and securing employment. Students are responsible for informing the Institution of their employment information.
>
> The Institution's Career Development Department will assist students in their job search. Career development services include assistance with resume writing, interviewing, identifying job openings, and other job search activities. It should be understood that career development services offered by the Institution are not an obligation or guarantee of employment. If a student repeatedly fails to attend Career Development coaching sessions and/or repeatedly fails to attend job interviews arranged by the Career Development Department, the service may no longer be available to that student.

Brightwood Career Institute, Career Services (May 31, 2016, 08:32:21 EST), https://web.archive.org/web/20160531083221/https://www.brightwoodcareer.edu/career-services/.

[51] Brightwood Career Institute, Career Services (May 31, 2016, 08:32:21 EST), https://web.archive.org/web/20160531083221/https://www.brightwoodcareer.edu/career-services/; Virginia College, About Us (July 10, 2017, 14:03:15 EST), https://web.archive.org/web/20170710140315/https://www.vc.edu/about/.

> Although average wage information based on data received from employers and graduates may be available to prospective students, no employee of the Institution can guarantee that a graduate will earn any specific amount. Each student's program of study, academic performance, employer needs and location, current economic conditions, and other factors may affect wage levels and career prospects.
>
> Continuous career development services are available to all eligible graduates. Graduates who require additional assistance after their initial employment should contact the Institution to provide updated resume information and are encouraged to use the resources available in the Career Development Department.[52]

60. ECA further made clear that its promise to provide students with career development services was a contractual commitment it made to them. Here, documents reviewed by the States demonstrate that ECA's practice was to enter into enrollment agreements, which ECA identified as "contracts," that contained a number of standard contractual provisions governing the relationship between the school and the student.[53] An integration clause was included within those contracts, which stated the contract *and* the relevant student catalog constituted the entire agreement between the parties.[54] The Enrollment Agreements themselves further reiterate that ECA promised to provide placement assistance to students upon graduation.[55]

61. Even during a planned closure of certain ECA campuses announced in September 2018,[56] ECA made promises to continue to provide career services to all impacted students.[57] Unfortunately, after its abrupt closure, the promised placement services ceased being provided to *all* of ECA's students and graduates. As ECA made clear in a post-closure Q & A:

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[52] *See, e.g*., the 2017-18 Brightwood Franklin Mills Pennsylvania Catalog (Aug. 31, 2018), *supra* note 39, as well as multiple catalogs referenced within this application and on file with the authors.

[53] *See* Brightwood Career Institute Enrollment Agreement (signed June 4, 2018), Virginia College Enrollment Agreement (signed Aug. 29, 2017), and Ecotech Enrollment Agreement (signed Sept. 28, 2016).

[54] *See* Virginia College and Brightwood Enrollment Agreements, *supra* note 53, at par. 15; *see also* Ecotech Enrollment Agreement, *supra* note 53, at par. 16.

[55] *See* Virginia College, Brightwood, and Ecotech Enrollment Agreements, *supra* note 53, at par. 9.

[56] Andrew Kreighbaum, *For-Profit Chain Will Close Dozens of Campuses*, Inside Higher Ed (Sept. 12, 2018), https://www.insidehighered.com/news/2018/09/12/profit-chain-will-close-dozens-campuses.

[57] *See* Letter from Senator John F. Kennedy, Esq., *supra* note 11, at 000185-000204 (ECA's Communications Plan for Impacted Schools).

13. Will ECA offer any placement services?

Unfortunately, all schools are permanently closing and will not have any employees who can assist with placement services.[58]

C. Due to its Closure, ECA Breached its Contract to Provide Instruction, Post-Graduate Career Services, and Other Related Services to Eligible Borrowers

62. "It is held generally in the United States that the 'basic legal relation between a student and a private university or college is contractual in nature . . . .'"[59] Indeed, there seems to be almost "no dissent" from this proposition.[60] There also seems to be no dissent that the contractual relationship between student and private university or college is not narrowly constrained to one express agreement between the parties; rather, the catalogs, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract, too.[61]

63. As set forth above, ECA's practice was to enter into enrollment agreement "contracts" that contained a number of standard contractual provisions governing the relationship between the school and the student, including a promise that ECA would provide its students with instruction in a chosen course of study, post graduate career services, and a number of related services. Yet, by the plain terms of its written contract with students, ECA's abrupt closure and subsequent failure to provide promised services to its students resulted in a clear breach of contract.[62]

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[58] Letter from Senator John F. Kennedy, Esq., *supra* note 11, at 000104-000105.

[59] *Zumbrun v. University of Southern California*, 101 Cal.Rptr. 499, 504 (Cal. Ct. App. 1972) (collecting cases from numerous states).

[60] *Wickstrom v. North Idaho College*, 725 P.2d 155, 157 (Idaho 1986) (quoting *Peretti v. Montana*, 464 F.Supp. 784, 786 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir.1981)).

[61] *See, e.g.*, *Botts v. Johns Hopkins Univ.*, 2021 WL 1561520, at *11 and *15 (D. Md. Apr. 21, 2021) (collecting decisions and holding that the "terms of [a university's] contract [with the students] are contained in the brochures, course offering bulletins, and other official statements, policies and publications of a university"); *see also Figueroa v. Point Park Univ.*, 2021 WL 3549327 (W.D. Pa. Aug. 11, 2021), *cert. denied*, 2021 WL 4975196 (W.D. Pa. Oct. 26, 2021) (surveying case law regarding contracts between schools and students, declining to limit its determination of contractual terms to the existence of an express written contract, and recognizing that a contract between students and a university may be implied in fact from other materials including websites, promotional materials, circulars, admission papers, and publications as well as students' resultant reasonable expectations, the surrounding context, and the parties' course of conduct). *Botts* goes on to identify numerous decisions from other courts that found adequate support the existence of implied contracts from various university materials, including promotional materials. *Botts*, 2021 WL 1561520, at *15.

[62] The example Virginia College and Brightwood Enrollment Agreements at footnote 53, *supra*, also contained two apparently contrary provisions dealing with discontinued services. Paragraph 2(f) of those agreements states, "[d]issatisfaction with, or non receipt of, the educational services being offered by the College does not excuse the Student, as a borrower, from repayment of any loan made to the Student, as a borrower, for enrollment at the College,

64. The fact that ECA failed to continue providing these opportunities and services means that it breached its contract as to each student enrolled at the time of its closure.[63]

65. Any defense based on necessity or some exigent circumstances will not avail ECA either, as ECA had ample opportunity to notify its students and take courses of action to attempt to remedy its breach of contract, but did not do so.[64]

IV. BORROWER DEFENSE REGULATIONS SUPPORT FULL RELIEF FOR ELIGIBLE BORROWERS

66. The Higher Education Act directs the Secretary to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment" of a federal student loan.[65]

67. Eligible Borrowers who obtained federal loans prior to July 1, 2017, are entitled to relief under 34 C.F.R. § 685.206(c)(1), which states that "any act or omission of the school attended by the student . . . that would give rise to a cause of action against the school under applicable State law" constitutes a borrower defense and includes a defense to repayment of amounts owed and/or a claim to recover amounts previously collected.

68. In addition, ECA's conduct serves as a sufficient basis to support a borrower defense to repayment for affected students under the standard in 34 C.F.R. § 685.222, which applies to loans issued on or after July 1, 2017, up to ECA's closure. Under that standard, borrowers are also eligible for discharge and/or recovery of amounts previously collected where a preponderance of the evidence shows that the school breached its contract with the student or made a substantial

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including federally guaranteed and career loans provided by or through the College." Paragraph 11(2) states, "[i]f an institution cancels a program subsequent to a student's enrollment, the institution must refund all monies paid by the student." Regardless, it is the position of the submitting states that any provision purporting to require payment, but not provide services, would result in an unenforceable contract of adhesion. *See, e.g.*, *Figueroa*, 2021 WL 3549327, at *8 n.19.

[63] *Accord Craig v. Forest Institute of Professional Psychology*, 713 So.2d 967, 973 (Ala. 1997) (observing college does not necessarily fulfill all of its contractual obligations to students merely by providing them with instruction for which they have paid tuition on a semester-by-semester basis).

[64] *See Ford v. Rensselaer Polytech. Inst.*, 2020 WL 7389155, at *7 (N.D. N.Y. Dec. 16, 2020) ("It does not matter whether defendant's decisions were prudent or necessary. What matters at this moment is that plaintiffs have plausibly alleged that defendant specifically promised in its circulars a bevy of in-person academic programs that it did not provide."); *see also Doe v. Bradley Univ.*, 2020 WL 7634159, at *2 (C.D. Ill. Dec. 22, 2020) (collecting cases reaching similar conclusions).

[65] 20 U.S.C. § 1087e(h).

misrepresentation that the borrower reasonably relied on to the borrower's detriment.[66]

69. Upon consideration of common facts and claims, the Secretary has the authority to determine whether a group has a borrower defense and therefore qualifies for loan discharge.[67] The Secretary can identify a group eligible for discharge from any source.[68]

70. The States are authorized to bring this group application on behalf of all Eligible Borrowers in their respective states, and the Department is required to consider it.[69] Given the mandates of the States to enforce their respective state consumer protection laws and to obtain relief on behalf of consumers,[70] the States seek borrower defense relief on behalf of Eligible Borrowers harmed by ECA.[71]

71. Applying the aforementioned regulations, Eligible Borrowers who enrolled at ECA from at least June 2016 through December 2018 are entitled to relief.[72] All Eligible

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[66] *See* 34 C.F.R. § 685.222(a)(2), 34 C.F.R. § 685.222(c) and 34 C.F.R. § 685.222(d)(1).

[67] *See* 34 C.F.R. § 685.222(f).

[68] 34 C.F.R. § 685.222(f)(1)(i). The States believe that the Department can identify ECA borrowers eligible for borrower defense to repayment loan forgiveness using loan disbursement and enrollment information in the National Student Loan Data System, as well as enrollment information reported by ECA during the relevant period. We also believe that loan information reported by the borrower's loan servicer may be used to determine if loans were disbursed during the period the borrower enrolled at ECA.

[69] *See Vara v. DeVos*, 2020 WL 3489679, at *26 and *28 (D. Mass. June 25, 2020), *appeal dismissed sub nom. Vara v. Cardona*, 2021 WL 4057798 (1st Cir. July 21, 2021) (in rejecting the claim that a group discharge process did not exist for loans taken out prior to 2017, the court found "overwhelming record evidence, which demonstrates that the agency repeatedly exercised its discretion to initiate group discharge processes upon receipt of group applications."); *see also Williams v. DeVos*, 2018 WL 5281741, at *12 (D. Mass. Oct. 24, 2018) ("In short, the Court finds that Attorney General Healey's DTR submission was sufficient to require the Secretary to determine the validity of the plaintiffs' borrower defense.").

[70] *See, e.g.*, Ala. Code § 8-19-1, *et seq.*; Cal. Bus. & Prof. Code § 17200, *et seq.*; C.R.S. § 6-1-103 and 110; Md. Code Ann., Com. Law § 13-201, §13-204; 73 P.S. §§ 201-4 and 201-4.1; 9 V.S.A. § 2458; Va. Code Ann. §§ 2.2-517 and 59.1-203.

[71] In *Vara*, the court rejected the Department's argument that the Massachusetts Attorney General's group application on behalf of Corinthian borrowers was defective because it lacked signed attestation forms from students consenting to the Attorney General's representation. The court noted: "This argument fundamentally misunderstands [] the scope of the AGO's authority and its capacious role in protecting the public interest." *Vara*, 2018 WL 5281741, at *28.

[72] Based on information provided to the States from the office of Federal Student Aid ("FSA"), for the enrollment period from 2015 through ECA's closure, there are currently approximately 4,600 Maryland Brightwood borrowers, 12,900 California Brightwood borrowers, and 7,200 Pennsylvania Brightwood borrowers. Additionally, because all of ECA's Virginia College Schools (including Ecotech and Golf Academy of America) reported through its Birmingham, Alabama campus, FSA information indicates that for the same period of time there are approximately: 9,430 Virginia College borrowers residing in Alabama; 1,650 Virginia College borrowers residing in Virginia; 410

Borrowers should be granted full loan discharges and refunds of amounts already paid.[73]

A. The Department Should Apply State Law to Loans Taken Out by Eligible Borrowers Prior to July 1, 2017

72. As detailed above, ECA made false and misleading representations to Eligible Borrowers, through both material omissions and affirmative statements, related to its accreditation status, financial position, quality of education, and failed to provide promised educational and career counseling services to its students and graduates to their detriment.

73. For the misrepresentations and omissions that occurred prior to July 1, 2017, the applicable borrower defense regulation states that the borrower may assert as a borrower defense against repayment, "any act or omission of the school attended by the student . . . that would give rise to a cause of action against the school under applicable State law."[74]

74. For the reasons set forth above, Eligible Borrowers who enrolled at ECA during this time frame have valid claims under their state consumer protection laws and are therefore eligible for borrower defense. Consumer protection laws for each of the signatory states are summarized in Attachment A.

B. The Department Should Apply the Standard in the 2016 Rule for Loans Issued On or After July 1, 2017

75. On November 1, 2016, the Department published a revised borrower defense rule applicable to student loans issued on or after July 1, 2017, and before July 1, 2020.[75] Under this revised rule, a borrower defense "refers to an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided...."[76]

Virginia College borrowers residing in Colorado; 250 Virginia College borrowers residing in California; 130 Virginia College borrowers residing in Pennsylvania; and 110 Virginia College borrowers residing in Maryland.

[73] *See Vara*, 2020 WL 3489679, at *32-33 (holding that, under the pre-2017 borrower defense rule, Secretary's authority to grant full loan discharge is based on state law and not left to Secretary's discretion).

[74] 34 C.F.R. § 685.206(c)(1).

[75] 34 C.F.R. § 685.222. Although this rule belatedly went into effect as a result of the Department's delay notices that the U.S. District Court for the District of Columbia found in violation of the Administrative Procedure Act in September 2018, the plain language of the rule's applicability to loans issued on or after July 1, 2017 remains unchanged.

[76] 34 C.F.R. § 685.222(a)(5).

76. Under the revised rule, a borrower has a borrower defense upon a breach of contract by the school.[77] Additionally, a borrower has a borrower defense under this section if the school made a substantial misrepresentation that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan.[78]

77. Under Section 668 subpart F, a "substantial misrepresentation" is defined as "[a]ny misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment."[79] "Misrepresentation" is defined as "[a]ny false, erroneous or misleading statement" made by an institution or the institution's representative and includes "… any statement that omits information in such a way as to make the statement false, erroneous, or misleading."[80] A "misleading statement" includes any statement that has the "likelihood or tendency to mislead under the circumstances."[81]

78. Again, as detailed in Section III, above, Eligible Borrowers who enrolled at ECA from July 1, 2017, until its closure were subject to substantial misrepresentations as defined under the applicable Borrower Defense regulations and were the victims of systematic breaches of their contracts due to ECA's abrupt closure.

C. Full Borrower Defense Relief Should Be Provided to Eligible Borrowers

79. The representations, omissions, and breaches of contract described above are based upon the enrollment agreements, catalogs, and other communications that were used pervasively across ECA's campuses over a span of approximately two and a half years. Given the widespread dissemination of ECA's extensive misrepresentations, all Eligible Borrowers should be granted full loan discharges and refunds of amounts already paid.[82]

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[77] 34 C.F.R. § 685.222(c) ("***Breach of contract by the school.*** The borrower has a borrower defense under this section if the school the borrower received the Direct Loan to attend failed to perform its obligations under the terms of a contract with the student. A borrower may assert a defense to repayment of amounts owed to the Secretary under this paragraph at any time after the breach by the school of its contract with the student. A borrower may assert a right to recover amounts previously collected by the Secretary under this paragraph not later than six years after the breach by the school of its contract with the student.").

[78] 34 C.F.R. § 685.222(d).

[79] 34 C.F.R. § 668.71(c).

[80] *Id.*

[81] *Id.*

[82] *See* 34 C.F.R. § 685.212(k) and § 685.206(c).

80. "[S]ince its promulgation, the borrower defense regulation has encompassed the right to assert a defense to repayment at any time during repayment of a loan, including before a borrower is in default."[83] Under the borrower defense regulation, the Department will order discharge of the student borrower's outstanding obligations, in whole or in part, at any time if a borrower defense application is approved.[84] The Department will also order the return of "payments made by the borrower or otherwise recovered on the loan that exceed the amount owed on that portion of the loan not discharged" if the claim is asserted not later than: (a) "the limitation period under applicable [state] law to the claim on which relief was granted" for loans first disbursed prior to July 1, 2017;[85] or (b) for loans first disbursed on or after July 1, 2017, six years "after the borrower discovers, or reasonably could have discovered, the information constituting the substantial misrepresentation"[86] or, where a breach of contract has occurred, not later than six years after the breach by the school of its contract with the student.[87]

81. Critically, the borrower defense regulation's referenced limitation periods only apply to borrower claims for the *recovery* of amounts already paid on student loans. For loans first disbursed on or after July 1, 2017, the Department has expressly recognized:

> [T]he six-year statute … of limitations is only applicable to students' claims for amounts already paid on student loans. *A borrower may assert a defense to repayment at any time.* This rule comports with the FTC Holder Rule … and general State law principles, as well as general principles relating to the defense of recoupment. *See, e.g.*, *Bull v. United States*, 295 U.S. 247, 262 (1935) ("Recoupment is in the nature of a defense arising out of some feature of a transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.")[88]

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[83] *Vara*, 2020 WL 3489679, at *17.

[84] 34 C.F.R. § 685.212(k)(1)(i).

[85] 34 C.F.R. § 685.206(c)(3)(ii) and § 685.212(k)(1)(ii)(A).

[86] 34 C.F.R. § 685.222(d)(1); 34 C.F.R. § 685.212(k)(1)(ii)(B).

[87] 34 C.F.R. § 685.222(c); 34 C.F.R. § 685.212(k)(1)(ii)(B).

[88] *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926-01, 75959 (Nov. 1, 2016) (emphasis added); *see also* 34 C.F.R. § 685.222(c) ("A borrower may assert a defense to repayment of amounts owed to the Secretary under this paragraph at any time after the breach by the school of its contract with the student."); *see also* 34 C.F.R. § 685.222(d)(1) ("A borrower may assert, at any time, a defense to repayment under this paragraph (d) of amounts owed to the Secretary.").

82. Likewise, for loans first disbursed prior to July 1, 2017 and subject to state limitation periods, as the Department recognized in the above passage, it is a general principle of state law that statutes of limitations do not apply to defenses that merely seek to reduce the monetary amount of an asserted claim, as opposed to affirmatively seeking the recovery of past loan payments.[89]

83. Thus, as a baseline, regardless of when a borrower's loan disbursement first occurred, the States respectfully submit to the Department that Eligible Borrowers may assert a defense to repayment of outstanding student loan obligations at any time.

84. The States also respectfully submit that, in this particular instance, any applicable statute of limitations to borrower claims for the recovery of amounts already paid has either not lapsed[90] or would be tolled by the discovery rule and/or the fraudulent concealment doctrine as developed in each state.[91]

85. Consistent with the Department's application of the discovery rule for loans first disbursed on or after July 1, 2017,[92] generally, state laws recognize that a statute of limitations is tolled so long as the injured party neither knows nor reasonably should know of his or her injury and its cause.[93] The fraudulent concealment doctrine further provides that a defendant may not invoke a statute of limitations defense if,

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[89] *See, e.g.*, *Household Consumer Disc. Co. v. Vespaziani* 415 A.2d 689, 694 (Pa. 1980) (quoting *Pennsylvania R. Co. v. Miller*, 124 F.2d 160, 162 (5th Cir. 1941)) ("The doctrine of recoupment was derived from the civil law, and was adopted as a part of the common law. Under it a defendant is entitled to claim, by way of deduction, all just allowances or demands, accruing to him in respect of the same transaction that forms the ground of the action. This is not a set-off . . . in the strict sense, because it is not in the nature of a cross demand, but rather it lessens or defeats any recovery by the plaintiff. It goes to the existence of plaintiff's claim, and is limited to the amount thereof. . . . [¶] Recoupment goes to the foundation of the plaintiff's claim; it is available as a defense, although as an affirmative cause of action it may be barred by limitation. The defense of recoupment, which arises out of the same transaction as plaintiff's claim, survives as long as the cause of action upon the claim exists. It is a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced.").

[90] 34 C.F.R. § 685.222(c) and (d)(1) (establishing minimum statute of limitation of six years for loans first disbursed on or after July 1, 2017, and before July 1, 2020).

[91] *See* Attachment A (State law analysis).

[92] 34 C.F.R. § 685.222(d)(1) ("A borrower may assert a claim under this paragraph (d) to recover funds previously collected by the Secretary not later than six years *after the borrower discovers, or reasonably could have discovered*, the information constituting the substantial misrepresentation.") (emphasis added).

[93] *See generally* Attachment A (State law analysis); *see, e.g.*, *Fine v. Checcio*, 870 A.2d 850, 859 (Pa. 2005) ("When the discovery rule applies, … the statute is tolled, and does not begin to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been caused by another party's conduct.").

through fraud or concealment, he caused the injured party to relax his vigilance or deviate from his right of inquiry into the facts.[94]

86. Based on the aforesaid common principles, regardless of when loan disbursement occurred, Eligible Borrowers in this instance would not have been aware of the misleading nature of the school's marketing that was used to induce them to enroll. Without access to ECA's internal documents related to its financial position and accreditation efforts, and without a pre-existing understanding of the effect that the loss of an accreditor's federal recognition has upon a school's eligibility for federal student aid, current and prospective students—often with just a high school education at the time of enrollment—were simply left to reasonably rely on ECA's false narrative, all to their detriment. Indeed, ECA's lawsuit seeking the appointment of a receiver articulates "numerous regulatory and macroeconomic factors" for its distressed condition that would not at all have been evident to its students.[95]

87. Accordingly, in addition to statute of limitations not being applicable to students' defensive claims generally, the States respectfully submit that, in this particular instance, a students' misrepresentation claims would also survive any limitations defense under state interpretations of the discovery rule and/or the fraudulent concealment doctrine.[96]

88. Moreover, Eligible Borrowers' breach of contract claims would not be time barred in any instance, as the applicable limitations period under 34 C.F.R. § 685.222(c) is six years, and the breach here occurred when ECA closed in December 2018.

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[94] *See generally* Attachment A (State law analysis); *see, e.g.*, *Drelles v. Manufacturers Life Ins. Co.*, 881 A.2d 822, 832 (Pa. Super. Ct. 2005) (quoting *Fine*, 870 A.2d at 859) ("In addition to the discovery rule, the doctrine of fraudulent concealment also tolls the running of a statute of limitations. [] The doctrine is based on estoppel and provides that a defendant may not invoke the statute of limitations if, through fraud or concealment, he caused the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. [] The doctrine does not require 'intent to deceive,' but only 'unintentional deception.'").

[95] *See* Revised Letter from Michelle Edwards to Stuart Reed, *supra* note 43, *available at* https://static1.squarespace.com/static/5ce58a38738b880001909396/t/5d5d55f9cd337c00014942f3/1566397948924/00016224_ECA-VC_FinAdv-SC+%28Revised%29.pdf (attaching ECA's *Complaint for Declaratory and Injunctive Relief and Appointment of Receiver* filed on Oct. 16, 2018 in the United States District Court for the Northern District of Alabama at Case No. 2:18-cv-01698-AKK). Paragraph 14 of the *Complaint for Declaratory and Injunctive Relief and Appointment of Receiver* disingenuously states that ECA informed students of "dire" consequences in the event ECA was unable to obtain alternative accreditation. In fact, as detailed in Section III above, they repeatedly failed to adequately inform students of the significance of their accreditation troubles.

[96] *See* Attachment A (State law analysis).

V. CONCLUSION AND REQUESTS FOR RELIEF

89. For the reasons set forth above, all Eligible Borrowers described herein are entitled to full relief under the borrower defense regulations.

90. Accordingly, the States urge the Secretary to grant full loan discharges and refunds of amounts already paid by Eligible Borrowers.

91. The States further urge the Secretary to reopen any borrower defense applications submitted by individuals or groups of Eligible Borrowers prior to the Department receiving the information referenced within this Application and reconsider all denied applications and partial relief applications with the new information provided by the States.[97]

92. Finally, we respectfully request a written response to this Application with a clear indication of whether and why the Secretary approves or denies the relief requested.

[97] *See* 34 C.F.R. § 685.222(e)(5), (g)(4).

ATTACHMENT A:

STATE LAW ANALYSIS

Violations of Pennsylvania Law

ECA's conduct as set forth in this Application for Borrower Defense on Behalf of ECA Students ("Application") violates the Pennsylvania *Unfair Trade Practices and Consumer Protection Law*, 73 P.S. § 201-1, *et seq*. ("UTPCPL"). Section 201-3 of the UTPCPL declares as unlawful "unfair methods of competition and unfair or deceptive acts or practices."[98] Section 201-2(4) lists twenty-one (21) instances of such conduct, including the following:

> (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> . . .
>
> (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another; [and]
>
> . . .
>
> (xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.[99]

In its seminal decision interpreting the UTPCPL, the Pennsylvania Supreme Court pronounced that the statute is to be construed liberally to affect its object of preventing unfair or deceptive acts or practices and protecting the public.[100] Pennsylvania courts have also consistently held that "[n]either the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way."[101] Further, the applicable standard of proof for demonstrating a violation of the UTPCPL is a preponderance of the evidence, as the language and purpose of the UTPCPL support this standard.[102]

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[98] 73 P.S. § 201-3.

[99] 73 P.S. § 201-2(4)(v), (vii), and (xxi).

[100] *Commonwealth, by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 815-817 (Pa. 1974) (stating that the UTPCPL attempts to place on more equal terms seller and consumer and is predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace).

[101] *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1023 (Pa. 2018) (quoting *Commonwealth ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. Ct. 2007)).

[102] *Com. v. Hush-Tone Indus., Inc.*, 1971 WL 13030 (Pa. Commw. Ct. 1971); *Boehm v. Riversource Life Ins. Co.*, 117 A.3d 308 (Pa. Super. Ct. 2015).

In addition to ensuring the fairness of market transactions, the UTPCPL was designed to promote full disclosure of information to consumers.[103] Consistent with this expansive treatment, the Commonwealth Court of Pennsylvania has held that a failure to disclose material facts may constitute a violation of the UTPCPL.[104]

Sections 201-4, 201-4.1 and 201-8 of the UTPCPL permit the Pennsylvania Attorney General's Office to commence proceedings to restrain violations of the UTPCPL, seek restitution on behalf of consumers and seek civil penalties of up to $1,000.00 per violation or $3,000.00 per violation if the victim is age 60 or older.[105]

Of particular note, Section 201-4.1 of the UTPCPL states, "Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section [201-4]…, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which <u>*may*</u> have been acquired by means of any violation of this act, under terms and conditions to be established by the court."[106] Use of the word "may" indicates the legislature did not intend for the Commonwealth to prove reliance as to each consumer who is awarded restitution.[107]

Section 201-9.2 provides a private cause of action for violations of the UTPCPL for any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use of a method, act or practice declared unlawful.[108]

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[103] *Gabriel v. O'Hara*, 534 A.2d 488, 491 n.6 (Pa. Super. Ct. 1987).

[104] *Commonwealth by Zimmerman v. Bell Tel. Co. of Pennsylvania,* 551 A.2d 602, 604 (Pa. Commw. Ct. 1988).

[105] 73 P.S. §§ 201-4, 201-4.1 and 201-8. The UTPCPL does not set forth an applicable statute of limitations. Therefore, the Commonwealth's ability to initiate an action under the UTPCPL is not subject to a statute of limitations under the doctrine of *nullum tempus occurrit regi* ("time does not run against the king") which is well-established in Pennsylvania. *See, e.g.*, *Com., Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 102 (Pa. 1981) ("This Court has always adhered to the 'old and well known rule that statutes which in general terms divest pre-existing rights or privileges do not bind the sovereign without express words to that effect.'") (citations and footnote omitted); *Commonwealth v. Musser Forests, Inc.*, 146 A.2d 714, 720 (Pa. 1959) (citing *Bagley v. Wallace*, 1827 WL 2701, at *6 (Pa. 1827)) ("It has long since been established that the statute of limitations does not run against a sovereign in a civil proceeding.").

[106] 73 P.S. § 201-4.1 (emphasis added).

[107] The Pennsylvania Superior Court has likewise drawn a distinction between the proof required in UTPCPL cases brought by the Commonwealth and those initiated by private citizens pursuant to Section 201-9.2. *See, e.g.*, *Weinberg v. Sun Co.*, 777 A.2d 442 (Pa. 2001).

[108] 73 P.S. § 201-9.2(a). The private cause of action under the UTPCPL is governed by a six-year statute of limitations. *Lesoon v. Metro. Life Ins. Co.*, 898 A.2d 620, 627 (Pa. Super. Ct. 2006). Nevertheless, if the injured party is reasonably unaware of its right to sue, the statute of limitations can be tolled by the discovery rule and the doctrine of fraudulent concealment. *See Drelles v. Manufacturers Life Ins. Co.*, 881 A.2d 822, 832 n.6 (Pa. Super. Ct. 2005) (involving a private action based on violations of the UTPCPL).

The expansive judicial interpretation of the UTPCPL applies not only to actions initiated by the Commonwealth, but also to the aforementioned private right of action.[109] Further, when applying Section 201-2(4)(xxi), commonly referred to as the "catchall provision" of the UTPCPL, the test for establishing deceptive conduct is merely whether the conduct has the "tendency or capacity to deceive."[110] As recently articulated in *Gregg*, under Section 201-9.2 of the UTPCPL, the legislature established a statutory claim for anyone who demonstrates that: (1) they purchased or leased "goods or services primarily for a personal, family, or household purpose"; (2) they suffered an "ascertainable loss of money or property"; (3) the loss occurred "as a result of the use or employment by a vendor of a method, act, or practice declared unlawful by" the UTPCPL; and (4) the consumer justifiably relied upon the unfair or deceptive business practice when making the purchasing decision.[111]

Gregg went on to hold that deceptive conduct during a consumer transaction that creates a likelihood of confusion or misunderstanding and upon which consumers rely to their detriment does not depend upon the actor's state of mind and therefore, consistent with the requirement to liberally construe the UTPCPL, commercial vendors have a duty to comply, without regard to their intent.[112] In essence, the Court observed, without a state of mind requirement, a violation of the catchall provision "may be characterized as a strict liability offense."[113]

In light of the breadth and purpose of the UTPCPL as outlined above, ECA's practices clearly violated Pennsylvania's preeminent consumer protection statute and relief is warranted. Specifically, ECA's consistent practices of, (a) failing to adequately disclose its true accreditation status, (b) failing to adequately disclose the impact of the loss of accreditation and (c) making direct misrepresentations related to ECA's progress in obtaining a new accreditor would all violate, at a minimum, the UTPCPL's "catchall" provision at Section 201-2(4)(xxi) (engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding) as well as Sections 201-2(4)(v) (misrepresentations involving characteristics and benefits) and 201-2(4)(vii) (misrepresentations involving quality of goods or services).[114]

Finally, Pennsylvania Courts have long recognized that, because the Federal Trade Commission Act (FTC Act)[115] has language very similar to the UTPCPL, they will look to

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[109] *Gregg v. Ameriprise Fin., Inc.*, 245 A.3d 637, 649 (Pa. 2021) (citing *Monumental Properties*, 329 A.2d at 817) (recognizing the need to construe the UTPCPL liberally in a private action commenced by insureds involving alleged misrepresentations by a sales person).

[110] *Id*. at 641; *see also Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010 (Pa. 2018).

[111] *Gregg*, 245 A.3d at 645-46.

[112] *Id*. at 649-50.

[113] *Id*. at 650.

[114] 73 P.S. § 201-4(v), (vii), and (xxi).

[115] 15 U.S.C. §§ 41, *et seq*.

decisions under the FTC Act for guidance and interpretation of the UTPCPL.[116] As a result, it is the Commonwealth's position that ECA's systematic breaches of their contracts with students, whether express or implied, would also constitute a violation of the UTPCPL.[117]

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[116] *Monumental Properties, Inc.*, 329 A.2d at 817-818.

[117] *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988) (finding systematic breaches of consumer contracts unfair under the FTC Act); *see also In re Clark*, 96 B.R. 569 (Bankr. E.D. Pa. 1989) (determining systematic breach of warranty of habitability violates UTPCPL, including Section 201-2(4)(xiv) which provides that "failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made" is an unfair or deceptive act or practice); *In re Andrews*, 78 B.R. 78 (Bankr. E.D. Pa 1987) (holding mortgagee's imposition of late charges contrary to terms of underlying mortgage contract sufficient to establish cause of action under UTPCPL).

Violations of Maryland Law

The Maryland Consumer Protection Act ("MCPA") prohibits unfair, deceptive, and abusive trade practices in the sale or offer of sale of consumer goods and services.[118] Consumer goods and services, for purposes of the MCPA, are those "which are primarily for personal, household, family, or agricultural purposes" and specifically includes the offer for sale of course credit or other educational services.[119] The Consumer Protection Division of the Office of the Attorney General of Maryland ("CPD") is authorized to enforce this statute[120] and is directed by the Maryland General Assembly to "take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland."[121] The MCPA also provides a private right of action for any person to recover for injury or loss sustained as the result of a practice prohibited by MCPA.[122] Regardless of the party bringing the action, the MCPA is "construed and applied liberally to promote its purpose."[123]

The MCPA provides a non-exclusive list of unfair, deceptive or abusive trade practices,[124] which include false or misleading oral or written statements or other representations that have the capacity, tendency, or effect of deceiving or misleading consumers and the failure to state a material fact if the failure deceives or tends to deceive.[125] The question of "whether a statement is misleading under the MCPA "is judged from the point of view of the unsophisticated consumer."[126] The provisions of the MCPA referenced above do not require any showing that the person charged with a violation knew that the representation was false or that the person had any intent to deceive consumers.[127]

The CPD is authorized to bring an enforcement action for a practice that violates the MCPA, without any finding that a consumer in fact has been misled, deceived, or damaged as a

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[118] Md. Code Ann., Com. Law § 13–101, *et seq.*

[119] Md. Code Ann., Com. Law § 13-101(d); § 13-303(3).

[120] Md. Code Ann., Com. Law § 13-201; § 13-204

[121] Md. Code Ann., Com. Law § 13-102(b)(3).

[122] Md. Code Ann., Com. Law § 13-408.

[123] Md. Code Ann., Com. Law § 13-105.

[124] Md. Code Ann., Com. Law § 13-301. *Golt v. Phillips*, 308 Md. 1, 8 (1986) (noting nonexclusivity).

[125] Md. Code Ann., Com. Law § 13–301(1), (3).

[126] *Golt v. Phillips*, 308 Md. 1, 517 A.2d 328 (1986); *Luskin's, Inc. v. Consumer Prot. Div.,* 353 Md. 335, 356–57 (1999).

[127] *Golt*, 308 Md. at 10-11. ("In other words, [Md. Code Ann., Com. Law] § 13-301(1), (2), and (3) does not require scienter…the subsections require only a false or deceptive statement that has the capacity to mislead…").

result of that practice, and without any consumer testimony.[128] The CPD also does not need to show that consumers actually relied upon on a misrepresentation or omission in order to prove a violation of the MCPA.[129]

ECA engaged in unfair or deceptive trade practices in violation of Maryland law when, among other things, it made representations capable of misleading consumers and failed to state material facts that deceived or tended to deceive Maryland consumers as to whether its accreditation was obtained from a federally recognized agency and the availability of permanent career counseling for graduates.

This group application asserts a defense to repayment for borrowers affected by ECA's misrepresentations, based upon state law violations that could be brought pursuant to the CPD's law enforcement authority under the MCPA or asserted by individual consumers under the private right of action in the MCPA. In either case, the statute of limitations does not bar a defense to repayment that is asserted at any time while the loan is in repayment. *See Vara* at *17 (stating "since its promulgation, the borrower defense regulation has encompassed the right to assert a defense to repayment at any time during repayment of a loan, including before a borrower is in default").[130]

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[128] Md. Code Ann., Com. Law § 13-302 ("Any practice prohibited by this title is a violation of this title, whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice"); *Consumer Prot. Div. v. Consumer Publ'g Co., Inc.*, 304 Md. 731, 770-71 (1986) (holding that the Consumer Protection Division can determine that an advertisement is deceptive in the absence of any supporting testimony from a consumer or an expert); *Consumer Prot. Div. v. Morgan*, 38 Md. 125, 162-63 (2005) ("Consumer testimony is not required to prove a statutory violation….").

[129] *Morgan*, 38 Md. at 162; Md. Code Ann., Com. Law § 13-302.

[130] Limitations is inapplicable to a borrower's assertion of a defense to repayment. However, with respect to affirmative actions brought for violations of the MCPA, Maryland's statute of limitations does not apply when the CPD brings a public enforcement action under the MCPA using its administrative authority. *Maryland Security Commissioner v. U.S. Securities Corporation*, 122 Md. App. 574 (1998). For consumers bringing an action for a violation of the MCPA, the cause of action would not accrue until the plaintiff "knew or reasonably should have known about the wrong." *Poffenberger v. Risser*, 290 Md. 631, 636, 431 A.2d 677 (1981).

Violations of California Law

California's Unfair Competition Law (UCL) prohibits "unfair competition," defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[131] "[T]he unfair competition law's scope is broad."[132] It prohibits three general types of business acts or practices: (1) unlawful acts or practices, meaning violations of other federal, state, or local laws are "independently actionable" under the UCL; (2) unfair acts or practices, "even if not specifically proscribed by some other law"; and (3) fraudulent acts or practices, including deceptive or misleading advertising that is likely to deceive members of the public.[133]

The UCL may be enforced by certain public prosecutors, including the California Attorney General, and also includes a private right of action, allowing claims by "a[ny] person who has suffered injury in fact and has lost money or property as a result of such unfair competition."[134] Remedies under the UCL are equitable, and for private litigants include restitution and injunctive relief. [135] The court may grant restitution in the form of an order to "restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."[136] Public prosecutors may seek the same equitable remedies as private claimants, however, imposition of civil penalties of up to a $2,500 "for each violation" of the UCL is mandatory in actions brought by a public prosecutor.[137] Critically, the UCL does not have an intent requirement. The plaintiff "need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct. The UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice."[138]

"Fraudulent" business acts or practices under the UCL (including but not limited to false advertising), does not require that the plaintiff plead or prove the elements of common-law fraud.[139] "Allegations of actual deception, reasonable reliance, and damage are unnecessary [under

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[131] Cal. Bus. & Prof. Code §§ 17200 through 17210.

[132] *Cel-Tech Commc'ns, v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999).

[133] *Id.* at 540; *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal. 2002).

[134] Cal. Bus. & Prof. Code § 17204.

[135] Cal. Bus. & Prof. Code § 17203.

[136] Cal. Bus. & Prof. Code § 17203.

[137] Cal. Bus. & Prof. Code § 17206(b).

[138] *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 717 (Cal. 2000).

[139] *Comm. on Children's Television v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983).

the UCL]."[140] The plaintiff need only show that "a reasonable consumer"[141] is "likely to be deceived" by the defendant's statements, representations, or advertising.[142] The standard is whether the defendant's conduct is likely to deceive an "ordinary consumer acting reasonably under the circumstances," unless the act or practice is "targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer . . . ."[143]

Here, ECA engaged in unlawful, unfair, or fraudulent business act or practice in violation of California's UCL when, among other things, it made material representations capable of misleading consumers and failed to state material facts that deceived or tended to deceive California consumers as to whether ECA's accreditation was obtained from a federally recognized agency and the availability of permanent career counseling for graduates. Remedies under the UCL would require a full refund of all monies paid by the misled student to ECA because restitution orders under the UCL are designed to "restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."[144]

This group application asserts a defense to repayment for borrowers affected by ECA's misrepresentations and omissions, based upon state-law violations that could be brought pursuant to the California Attorney General's law-enforcement authority under the UCL or asserted by individual consumers under the private right of action in the UCL. In either case, the statute of limitations does not bar a defense to repayment that is asserted at any time while the loan is in repayment.[145] Further, the UCL's four-year statute of limitations is inapplicable because common-law accrual rules, such as the discovery rule, equitable tolling, fraudulent concealment, and the continuing violation doctrine, apply to UCL claims.[146] As this group application details, California's ECA students would have been unaware of the misleading nature of the school's marketing that induced them to enroll, and accordingly, any UCL claim that aggrieved students would be tolled.

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[140] *Id.*

[141] *McKell v. Wash. Mut., Inc.*, 49 Cal. Rptr. 3d 227, 239 (Cal. Ct. App. 2006); *Lavie v. Proctor & Gamble Co.*, 129 Cal. Rptr. 2d 486, 492 (Cal. Ct. App. 2003).

[142] *Comm. on Children's Television*, *supra*, 673 P.2d at 668.

[143] *Lavie, supra*, 129 Cal. Rptr. 2d at 498-99.

[144] *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 947 (Cal. 2003).

[145] *See Vara*, 2020 WL 3489679 at *17 (stating "since its promulgation, the borrower defense regulation has encompassed the right to assert a defense to repayment at any time during repayment of a loan, including before a borrower is in default").

[146] *Aryeh v. Canon Bus. Solutions*, 292 P.3d 871, 873 (Cal. 2013).

Violations of Colorado Law

In addition to the Attorney General's enforcement powers under the Colorado Consumer Protection Act (C.R.S. § 6-1-103) ("CCPA"), the Colorado legislature granted a private right of action to individual consumers to recover damages for violation of the act.[147] Here, both the Colorado Attorney General and individual students have cognizable claims for relief against ECA.

To prevail in a civil enforcement action under the CCPA, a party must establish by a preponderance of the evidence that: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) the practice significantly impacted the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury.[148] The Colorado Attorney General need only establish the first three elements, while the remaining two—that the plaintiff suffered injury in fact to a legally protected interest and that the conduct caused the plaintiff's injury—do not apply to an enforcement action seeking equitable relief, including restitution and disgorgement, or civil penalties.[149]

ECA engaged in unfair or deceptive trade practices in violation of the Colorado Consumer Protection Act over the course of its educational operations:

> Claim I: ECA either knowingly or recklessly made a false representation as to the source, sponsorship, approval, or certification of goods, services, or property. C.R.S. § 6-1-105(1)(b);
>
> Claim II: ECA failed to disclose material information concerning goods or services, which information was known at the time of an advertisement or sale when such failure to disclose such information was intended to induce the consumer to enter into a transaction. C.R.S. § 6-1-105(1)(u).

The Colorado Supreme Court concluded that a false representation must either induce a party to act, refrain from acting, or have the capacity or tendency to attract consumers.[150] *In People ex rel. Dunbar v. Gym of America, Inc.*, the Colorado Supreme Court noted that deceptive trade

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[147] *Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998).

[148] *Hall*, 969 P.2d at 234; *Accord Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 155 (Colo. 2007); *Crowe v. Tull*, 126 P.3d 196, 200 (Colo. 2006).

[149] The Colorado legislature amended section 103 of the CCPA in 2019 such that an action brought under the CCPA by the Attorney General does not require proof that a deceptive trade practice has a significant public impact. *See*, C.R.S. §6-1-103; 2019 Colo. Legis. Serv. Ch. 268 (H.B. 19-1289) (West).

[150] *Rhino Linings USA Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003).

practices can induce parties to act on the basis of false or misleading information.[151] The *Rhino Linings* court further found that a misrepresentation is actionable when it is made "either with knowledge of its untruth, or recklessly and willfully made without regard to its consequences, and with an intent to mislead and deceive the plaintiff."[152]

As described in the attached application, ECA operated an Ecotech Institute campus in Aurora, Colorado, and a Brightwood College campus in Denver, Colorado. ECA's communications to students—both current and prospective—deceptively minimized the school's unstable accreditation status over the course of roughly two years (September 2016-December 2018). During that timeframe, ECA's accreditor, ACICS, was derecognized and the Department gave ECA 18 months to find a new accreditor; ECA then dragged its feet in applying to a new accreditor (ACCET), which ultimately rejected ECA's initial application in May 2018, while, at the same time, ACICS put ECA on show cause. Ultimately, ECA abruptly closed after ACICS withdrew its accreditation of the school in December 2018.

ECA, knowing that it was unable to meet accreditation standards and thus unlikely to be accredited in the near future, continued to string students along. ECA misrepresented to students that the school was "on schedule" to be accepted by ACCET and that the transition would not disrupt students' ability to access federal student aid. ECA's knowing misrepresentations and material omissions concerning the likelihood of obtaining accreditation constitute deceptive trade practices in violation of Colorado law, C.R.S. § 6-1-105(1)(b) and (u).

Per the Colorado Jury Instructions, the finder of fact may consider the following factors among others in gauging public impact in a CCPA claim brought by a private plaintiff: 1. The number of consumers directly affected by the challenged trade practice(s); 2. The relative sophistication of the consumers directly affected by the challenged trade practice(s); 3. The bargaining power of the consumers directly affected by the challenged trade practice(s); 4. Evidence that the challenged trade practices have previously impacted other consumers; (and) 5. Evidence that the challenged trade practices have significant potential to impact other consumers in the future.[153]

ECA made its misrepresentations to thousands of students over the course of two years. Students who, after enrolling, had significantly less bargaining power than ECA.

Eligibility for a refund of borrower payments is restricted to the limitations period under that state law upon which a claim for relief is made, according to 34 C.R.F. 685.212(k)(1)(ii)(A). The Colorado Consumer Protection Act describes a limitation period of "three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered

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[151] *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 667 (Colo. 1972).

[152] *Rhino Linings*, 62 P.3d at 146, *citing Parks v. Bucy*, 21 P. 638, 639 (1922).

[153] Colo. Pattern Jury Instr. Civ. 29:4 (June 2020).

or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." C.R.S. §6-1-115. Colorado courts have held that "'[t]he critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought.'"[154] Most ECA students would have no knowledge of the "facts essential to the cause of action" until now, and only because of the State's group borrower defense application, which is based on documents subpoenaed and otherwise requested by the States. Students would not have had access to such ECA internal information.

[154] *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 854 (Colo.App.2007) (*quoting Winkler v. Rocky Mountain Conference*, 923 P.2d 152, 159 (Colo.App.1995)).

Violations of Virginia Law

In addition to the Virginia Attorney General's enforcement powers under the Virginia Consumer Protection Act ("VCPA"), the Virginia General Assembly granted a private right of action to individual consumers to recover damages for violations of the VCPA.[155]

Here, both the Virginia Attorney General and individual students have cognizable claims against ECA through its "Virginia College," the sole ECA school in operation in the Commonwealth of Virginia. Pursuant to Virginia Code § 59.1-200, to prevail in a civil enforcement action under the VCPA, the Virginia Attorney General and private litigants must prove the statutory requirements: (1) that ECA is or was a "supplier[;]" (2) that ECA engaged in "consumer transaction[s]" with Virginians; and (3) that ECA committed one or more "unlawful" "acts or practices[,]" e.g., made one of the enumerated misrepresentations listed in § 59.1-200 in connection with a "consumer transaction[.]"[156]

As a supplier engaged in consumer transactions with Virginians, ECA violated the VCPA, without limitation, as follows:

Claim I: As further described in § III(A) of this group application, ECA misrepresented that its "goods or services [had] certain . . . characteristics . . . or benefits" in violation of § 59.1-200(A)(5) of the VCPA by misleading students to believe that its schools had no significant accreditation issues and that they were currently accredited and/or would be easily transitioning to a new accreditor.

Claim II: As further described in § III(A) of this group application, ECA misrepresented that its "goods or services [were] of a particular standard [or] quality . . . ." in violation of § 59.1-200(A)(6) of the VCPA by misleading students to believe that its schools had no significant accreditation issues and that they were currently accredited and/or would be easily transitioning to a new accreditor.

Claim III: As further described in § III(A) of this group application, ECA misrepresented that its "goods or services [had] certain . . . characteristics . . . or benefits" in violation of § 59.1-200(A)(5) of the VCPA by failing to disclose that its schools had significant accreditation issues.[157]

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[155] Va. Code Ann. § 59.1-204.

[156] Va. Code Ann. §§ 59.1-198 and 59.1-200. *See also Ballagh v. Fauber Enters.*, 290 Va. 120 (2015); and *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489 (2014).

[157] Basing its decision on *common law* fraud elements, the Virginia Supreme Court held that violations of the VCPA founded upon the "nondisclosure of a material fact" require "evidence of a knowing and deliberate decision not to disclose the fact." *Lambert v. Downtown Garage*, 262 Va. 707, 714 (2001). A decade later, the Virginia Supreme Court ruled that the VCPA should not be construed "as merely declarative of the common law." *Owens*, 288 Va. at 497. *Owens* suggests that the *Lambert* "knowing and deliberate" element is no longer required to prove "a" violation of the VCPA predicated on a nondisclosure. It is required to prove a "willful" violation of the VCPA. Indeed, violations of the VCPA founded upon nondisclosures, like other violations, should result in either (1) actual damages or (2) treble damages for *willful* violations. *Id.*; Va. Code Ann. § 59.1-204(A). Regardless of any uncertainty in the

Claim IV: As further described in § III(A) of this group application, ECA misrepresented that its "goods or services [were] of a particular standard [or] quality . . . ." in violation of § 59.1-200(A)(6) of the VCPA by failing to disclose that its schools had significant accreditation issues.

Claim V: As further described in § III(B) of this group application, ECA misrepresented that its "goods or services [had] certain . . . characteristics . . . or benefits" in violation of § 59.1-200(A)(5) of the VCPA by misleading students to believe that it would provide continuous career counseling.

Claim VI: As further described in § III(B) of this group application, ECA misrepresented that its "goods or services [were] of a particular standard [or] quality . . . ." in violation of § 59.1-200(A)(6) of the VCPA by misleading students to believe that it would provide continuous career counseling.

VCPA actions brought by the Virginia Attorney General are not subject to statutes of limitations.[158] However, an "individual action" under the VCPA must be "commenced within two years after *accrual*."[159] The time of "accrual" means the time when "such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered[.]"[160] Due diligence is measured by "an examination of the facts and circumstances unique to each case[,]" but, as this group application details in § IV(C), Virginia's ECA students would have been unaware of the misleading nature of the school's marketing that was used to induce them to enroll.

Finally, individual consumers are required to prove reliance to recover damages under the VCPA.[161] But the Virginia Attorney General has no such requirement.[162] Nor does the VCPA require the Virginia Attorney General to allege or to prove particular, individualized misrepresentations when seeking relief for a class of affected consumers.[163]

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law applicable to VCPA violations predicated on nondisclosures, § III(A) of this group application makes clear that Virginia College knowingly and deliberately failed to disclose material information about its accreditation status.

[158] Va. Code Ann. § 8.01-231.

[159] Va. Code Ann. § 59.1-204.1 (emphasis added).

[160] Va. Code Ann. § 8.01-249.

[161] *Owens*, 288 Va. at 497 (noting that Virginia Code § 59.1-204(A) provides, in pertinent part, that "[a]ny person who suffers loss as a result of a violation of this chapter shall be entitled to initiate an action to recover damages or $500, whichever is greater").

[162] Va. Code Ann. § 59.1-205 (court may make such additional orders "as are necessary to restore to any identifiable person any money or property . . . which may have been acquired from such person by means of an act or practice declared unlawful in § 59.1-200").

[163] *Id.*

Violations of Alabama Law

Alabama's Deceptive Trade Practices Acts (DTPA), *Section 8-19-1 Ala. Code (1975) et seq.* is a broadly worded statute that protects Alabama consumers from a large panoply of possible tortious conduct committed against Alabama consumers by any business or corporate entity or individual. The State of Alabama Attorney General is given specific authority to enforce this law on behalf of Alabama citizens and in addition it permits individual consumers to pursue private causes of action for any of the violations set forth therein. Although the Alabama DTPA specifically prohibits many different harms to consumers, e.g., "bait and switch" advertising, misrepresenting the quality or grade of goods, turning back automobile odometers, warranty misrepresentations, etc., the Alabama DTPA is primarily concerned with a general prohibition of consumer torts; namely the prevention and prosecution of "unconscionable, false, misleading, or deceptive act[s] or practices."

Herein ECA, through Virginia College and other related entities, committed a number of violations of the Alabama DTPA, and it committed such against every Alabama consumer who attended one of the said educational entities operating under the auspices of ECA in campuses located in Birmingham, Huntsville, Mobile, and Montgomery, Alabama. Specifically, ECA is in violation of the following provisions of Alabama's DTPA: *Section 8-19-5 (2) Ala. Code (1975)*: "Causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services"; *Section 8-19-5 (3) Ala. Code (1975)*: "Causing confusion or misunderstanding as to the affiliation, connection , or association with, or certification by another…"; *Section 8-19-5 (7) Ala. Code (1975)*: "Representing that good or services are of a particular standard, quality, or grade…"; *Section 8-19-5 (9) Ala. Code (1975)*: "Advertising goods or services with intent not to sell them as advertised"; *Section 8-19-5 (25) Ala. Code (1975)*: "Engaging in a scheme or artifice to defraud by telephone communication"; and *Section 8-19-5 (27) Ala. Code (1975)*: "Engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce."

The penalties for violations of the Alabama DTPA are both injunctive and monetary, civil and criminal. The fines permitted are up to $2,000.00 per violation. *Section 8-19-11 Ala. Code (1975)*. The Alabama Attorney General alleges all violations committed as detailed above, with the exception of the one alleging telephone conversations to defraud, were committed on a continuing daily basis, thus making ECA subject to a potential fine of $2,000.00 per violation per day, or $10,000 per day. Should the violation of the Alabama DTPA be determined and adjudged continuous and willful, the individual committing said violations may be sentenced to up to one year in jail. In addition to these DTPA violations, the State may also add counts to its complaint alleging fraud and/or suppression thus allowing the State to seek punitive damages having no cap, provided said damages are constitutionally consistent with the provisions of *BMW of North America v. Gore, 517 U.S. 559 (1986)* and *Green Oil Co. v. Hornsby, 539 So.2d 218 (1986)*. Moreover, even after the State of Alabama Attorney General has prosecuted a DTPA violation, any Alabama consumer is permitted to bring a private cause of action for fraud, misrepresentation, or suppression regardless of whether the State alleged the same causes of action through additional counts to its original DTPA complaint. The consumer likewise has the ability to sue for punitive damages in addition to their compensatory damages.

While Alabama's DTPA has a statute of limitation of one year, it is extended for actions wherein the matter complained of was discovered outside the statute of limitations, provided such "was discover[ed] or reasonably should have [been] discovered…" *Section 8-19-14 Ala. Code (1975).* Furthermore, the State's civil remedies, including "…fraud, misrepresentation, deceit, suppression…" are available to the State on the rare occasions wherein the statute of limitations for Alabama DTPA violations have expired. *Section 8-19-15 Ala. Code (1975).* It is the position of the Alabama Attorney General that the frauds committed in this case are within Alabama's statute of limitations.