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Is That Student Eligible? Attorney Workshop on High School Validity and Career Pathway Programs

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Presentation Topics

- ▶ Background
 1. Secondary Education in the United States
 2. Student Eligibility Rule
 3. Development of Program Integrity Rules
 4. New Safe Harbor
- ▶ Enforcement Actions: Invalid High School Diplomas
- ▶ Compliance Strategies
- ▶ Eligible Career Pathway Programs
- ▶ False Certification Discharges

This presentation does not constitute legal advice and is for informational purposes only. You should consult with legal counsel before making any decisions regarding topics covered in this presentation.

Opening Note: Secondary Education in the United States

- ▶ Secondary education is primarily a state and local responsibility.
 - 1. Federal law prohibits ED from exercising “any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution.”

See 20 U.S.C. § 1232a.
 - 1. Further, ED does not formally recognize or oversee secondary-level accrediting agencies.
- ▶ Yet there is great variability in state-level oversight of private secondary schools. Many states do not license or approve private secondary schools.
- ▶ The natural result: confusion as to which private high schools are legitimate.

Title IV Student Eligibility Rule

- ▶ To receive federal student aid funds, a student must be qualified to study at the postsecondary level.
- ▶ Qualifications:
 1. High school diploma
 2. Recognized equivalent of a high school diploma (i.e., GED)
 3. Homeschool
 4. Ability-to-benefit and currently enrolled in an eligible career pathway program

See 34 C.F.R. § 668.32(e); 2018-2019 FSA Handbook 1-8.

A Note Regarding the ATB Transition to Career Pathways

- ▶ Gradual tightening of ATB rules over a 20-year period
- ▶ Elimination of ATB
- ▶ Limited ATB restoration via career pathway programs

2000s: Regulatory Void

- ▶ Prior to July 1, 2011, ED's rules neither defined "high school diploma" nor included provisions regarding the evaluation of validity of diplomas.
- ▶ Other agencies found evidence of invalid diplomas being used to gain access to federal student aid and urged ED to develop rules and guidance.

2011: New High School Evaluation Requirement

- ▶ Postsecondary institutions must develop and apply procedures to evaluate the validity of a student's high school diploma if the institution or ED has reason to believe that the diploma is not valid or was not obtained from an entity that provides secondary school education.
- ▶ Noncompliance with this evaluation requirement is an indicator of lack of administrative capability.
- ▶ Became effective July 1, 2011.

See 34 C.F.R. § 668.16(p); 2018-2019 FSA Handbook 1-9.

2011-2019: New Evaluation Requirement...Continued Lack of ED Guidance

- ▶ ED provided a short statement in the Federal Register regarding its notion of a diploma mill:
 1. “[T]he concept of a diploma mill, i.e., an entity that offers a credential, typically for a fee, and requires little or no academic work on the part of the purchaser of the credential. We believe that students with a credential from a diploma mill would not have a sufficient educational foundation for success at the postsecondary level and should not receive Title IV, HEA aid.”

See 75 Fed. Reg. 66889 (Oct. 29, 2010).
- ▶ Otherwise, ED has not issued guidance on invalid high schools or published blacklists – although ED has now announced a safe harbor (next slide).

July 23, 2019:

ED Announces a Safe Harbor

- ▶ A postsecondary school will be in compliance if it:
 1. Receives documentation from the secondary school that confirms the validity of the student's diploma, and
 2. Confirms with, or receives documentation from, the relevant department or agency in the state in which the secondary school is located that the secondary school is recognized as a provider of secondary school education.

- ▶ Open questions:
 1. Was this safe harbor needed?
 2. What is the meaning of "recognized"?
 3. What are your options in states (such as California) that may not "recognize" private secondary schools?

2011-2019: Increased ED Enforcement Despite Lack of Guidance

▶ Major Actions

1. Career college in Seminole Co., FL: \$1,137,921 liability
 - High school at issue: Columbus Academy
2. Career college in Miami, FL: \$1,952,919 liability
 - High school at issue: Atlantic Southeastern Academy
3. National beauty school chain: Denial of recertification
 - Issue: ED argued that a secondary program as administered by this postsecondary school was invalid.

2011-2019: Increased ED Enforcement (Cont'd)

- ▶ Student ineligibility has become a common program review finding.
- ▶ FPRDs issued in 2016-2018 include:
 1. **Cosmetology school in Georgia: \$30,000+ liability**
 - High schools at issue: Belford High School; Continental Academy; Cornerstone Christian Correspondence School
 2. **Four colleges in Texas: \$52,000+ aggregate liability**
 - High schools at issue: Lincoln Academy; Marque Learning Center; Southwest Academy; Parkview Home School; Jean Cooper Private School
 3. **Massage school in Florida: \$8,000+ liability**
 - High schools at issue: American Academy of Pinecrest; American Academy High School
 4. **HBCU in Alabama: \$81,000+ liability**
 - Issue: Files lacked proofs of graduation
 5. **Cosmetology school in California: \$22,000+ liability**
 - Issue: Certificates of Completion/Achievement; ATB after elimination

2011-2019: FTC Actions Against Diploma Mills

- ▶ **FTC v. Diversified Educational Resources LLC and Steinbock Holdings LLC**
 - 1. High schools at issue: Jefferson High School Online; Enterprise High School Online

- ▶ **FTC v. Capitol Network Distance Learning Programs LLC**
 - 1. High schools at issue: Capitol High School; Stafford High School; Franklin High School; Lincoln High School; County High School; Metro High School; Liberty High School; Heritage High School

- ▶ **FTC v. Stepping Stonez Development LLC**
 - 1. High schools at issue: Aberdeen Academy; Mayflower High School Academy; Columbia Northern High School; Dalloway High School; West Madison Falls High School; Aspen Heights High School Academy; Heritage Western High School; Glacier Online High School Academy

Compliance Strategies: The Basic Requirements

- ▶ To demonstrate administrative capability, your school must:
 1. Develop and follow procedures to evaluate the validity of a student's high school completion if the institution or ED has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.
 2. Develop and apply an adequate system to identify and resolve discrepancies in the information that the institution receives from different sources with respect to a student's application for financial aid.

See 34 C.F.R. § 668.16.

Compliance Strategies: Understanding Different Types of Invalidity

- ▶ Your school's policy regarding high school evaluation should distinguish between invalid high schools and invalid high school diploma documents.
 1. Invalid high schools are not acceptable because they do not provide a sufficient educational foundation for success at the postsecondary level.
 2. Invalid high school diploma documents are not acceptable because they have been fabricated or manipulated.

Compliance Strategies: Catching Invalid Documents

- ▶ Consider tasking an employee who has no contact with students to be a reviewer for invalid (i.e., fraudulent) documents.
- ▶ The reviewer should check for:
 1. Different fonts
 2. Uneven text
 3. Changes in background color
 4. Incongruous names, dates, etc.
 5. Off-center items
- ▶ If your school's investigation reveals credible information pointing to fraud, you may need to report the issue to ED's Office of Inspector General.

Compliance Strategies: Reviewing High Schools for Validity

- ▶ If your college (or ED) has reason to believe that the high school is not valid, you may need to perform an in-depth review of that entity.

- ▶ Issues to consider for in-depth review:
 1. Does the school award diplomas in a short period of time?
 2. How much does it cost to study at the school?
 3. Are costs determined by diploma, by time spent, by unit, or some other measure?
 4. Does the school award credit for life or work experience, with little or no documented support or measurement of competencies?
 5. Does the school require attendance, either online or in person?

Compliance Strategies: Reviewing High Schools for Validity

- ▶ Issues to consider for in-depth review (Continued)
 6. Is instruction provided or does the school offer only self-study?
 7. How is learning assessed (homework, exams, etc.)?
 8. Are exams proctored and, if so, by whom?
 9. Does the school accept transfer credits and, if so, what standards does it apply?
 10. Has the school allowed you, the college, to review the secondary curriculum, syllabi, catalogs, etc.?
 11. How long does the school retain student work product?

Compliance Strategies: Exercise Caution in Relying on Accreditation

- ▶ **FTC:** DEAC and AdvancED are widely-recognized accrediting bodies for secondary schools.

- ▶ **ED:** “[D]iplomas from unaccredited high schools can be valid and qualify students to receive FSA funds, as well as to meet college admission standards.”
 1. The implication is that accredited secondary schools exceed minimum standards and are acceptable.
 2. But beware:
 - Accreditation mills exist.
 - Some secondary schools assert accreditation ... by themselves!
 - No assurance from ED that accreditation is dispositive.

Compliance Strategies: State-Specific Considerations

- ▶ ED guidance: “[O]ne resource that a school may consider to determine if a high school diploma is valid is the department of education in the state in which the high school is located, if that department has jurisdiction over the high school.”
- ▶ But many states do not approve or license (i.e., ‘have jurisdiction over’) private secondary schools!
- ▶ Make sure your school is familiar with non-diplomas issued by public schools in your state.
 - 1. California examples
 - Likely valid for Title IV: Certificate of proficiency (passed CHSPE).
 - Likely not valid for Title IV: Certificates of achievement/completion to students with IEPs who were unable to meet state/local graduation requirements.

Compliance Strategies: Hard Calls

- ▶ Will your policy involve multiple layers of review?
 1. Pro: More likely to catch errors and/or individual malfeasance
 2. Con: Slower; complexity can encourage improper “shortcuts”
- ▶ Will your policy have a strict, bright-line rule that all schools must be state licensed and/or accredited by a reputable agency?
 1. Pro: Spend less time reviewing individual schools
 2. Con: Difficulty in determining if a school is licensed and/or accredited
- ▶ What rules will your school impose to restrict employee referrals of students to specific schools and/or GED training providers?

Compliance Strategies: Helpful Resources

- ▶ Names of diploma mills
 1. ED and FTC enforcement actions
 2. Career Education Review (July 2010)
- ▶ FTC FAQ regarding high school diploma scams
 1. <https://www.consumer.ftc.gov/articles/0539-high-school-diploma-scams>
- ▶ ED report titled “State Regulation of Private Schools”
 1. <https://www2.ed.gov/admins/comm/choice/regprivschl/index.html>

Eligible Career Pathway Programs

- ▶ Congress recently reinstated federal financial aid eligibility for adults without a high school diploma who have the “ability to benefit” (“ATB”) from postsecondary training in eligible career pathway programs (“ECPPs”).
- ▶ ED-OIG is now scrutinizing ED’s oversight of ECPPs and determining whether schools are complying with the law when deploying ECPPs.
See ED-OIG FY 2019 Annual Plan.
- ▶ But what is an ECPP? As shown on the next slide, it’s complicated.

Eligible Career Pathway Programs

- ▶ An ECPP is one that combines rigorous and high-quality education, training, and other services that meet seven distinct requirements:
 1. First: Aligns with the skill needs of industries in the economy of the state or regional economy;
 2. Second: Prepares an individual to be successful in any of a full range of secondary or postsecondary education options, including registered apprenticeships;
 3. Third: Includes counseling to support an individual in achieving the individual's education and career goals;
 4. Fourth: Includes, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;
 5. Fifth: Organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;
 6. Sixth: Enables an individual to attain a high school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and
 7. Seventh: Helps an individual enter or advance within a specific occupation or occupational cluster.

See Consolidated Appropriations Act of 2016 (Public Law 114-113)

Eligible Career Pathway Programs

- ▶ The onus is on an institution to ensure its programs qualify as ECPPs.
- ▶ A Title IV institution must document that the program meets each requirement listed on the prior slide.

See 2018-2019 FSA Handbook 1-12 through 13.

- ▶ ED has stated it will not be developing a career pathway program approval process, but will review the eligibility of these programs through program reviews and audits.

See Dear Colleague Letter GEN-16-09, Questions and Answers.

- ▶ ED's program review teams are likely to review ECPPs more closely now that ED-OIG has identified it as a priority area.

Recent Developments: False Certification Discharge

- ▶ Borrower will not qualify for a discharge if:
 1. Borrower was unable to provide an official transcript or official copy of a diploma, and
 2. Borrower submitted to the school a written attestation, under penalty of perjury, that the borrower had a high school diploma.

See 34 C.F.R. 685.215 (promulgated at 84 Fed. Reg. 49931 (Sept. 23, 2019))

- ▶ This new rule applies to loans disbursed on or after July 1, 2020.

Stanley A. Freeman



Stanley A. Freeman joined Powers Pyles Sutter & Verville in 1994. He is the former president of the firm and founder of the firm's education practice.

Stanley counsels postsecondary educational institutions from all sectors of higher education regarding strategic issues pertaining to participation in the federal student financial assistance programs, accreditation, licensure, and related regulatory concerns. He was selected by his peers for inclusion in the 2009 - 2016 editions of The Best Lawyers in America in the specialty of Education Law.

Stanley has been actively involved in representing educational institutions for more than 20 years. In his practice, he counsels individual educational institutions, corporate investors in higher education, associations of schools and colleges, and allied educational companies on administrative, transactional, regulatory and litigation matters. He has represented numerous schools before the U.S. Department of Education and before other federal agencies, state educational oversight agencies, and accreditors on compliance matters, financial responsibility concerns, legislative issues, and investigative matters. He has also litigated cases in the state and federal courts. He spends much of his time advising clients concerning regulatory and compliance matters arising under the Higher Education Act of 1965, including program reviews, audits, substantive changes, changes in ownership and control, and other oversight matters.

Stanley has authored numerous articles on federal student financial aid issues for higher education publications and frequently speaks to gatherings of college officials and student aid administrators.

Stanley graduated with distinction from the Honors College of the University of Michigan in 1978 and earned his law degree from the Georgetown University Law Center in 1982. He is admitted to practice law in the District of Columbia, Maryland and Virginia. Stanley is a lifelong resident of the Washington area, and he and his wife Cecilia have five children.

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As a Principal in Powers' Education Group, Nick guides clients through the postsecondary triad so that the institutions can focus on fulfilling their missions.

Nick represents postsecondary schools in audit and program review proceedings before the United States Department of Education and its administrative tribunal, the Office of Hearings and Appeals. He also has experience responding to adverse actions taken by accrediting and state licensing agencies. Nick seeks to preserve important institutional relationships with regulatory agencies while advancing the school's viewpoint.

Nick helps postsecondary institutions remain current in a rapidly evolving environment by monitoring legislative, regulatory, judicial, interpretive, and other developments on a variety of education issues. With this background, he assists schools with institutional policymaking, transactional matters, responding to subpoenas, and conducting internal investigations.

Nick is knowledgeable about the higher education industry and the realities facing schools. He has worked with many types of institutions since joining Powers as an Associate in September 2010. During law school, Nick gained experience by working at Powers as a summer associate and a law clerk.

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