

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

| | | |
|--|---|----------------------|
| CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 22-1732C |
| |) | |
| THE UNITED STATES, |) | (Senior Judge Smith) |
| |) | |
| Defendant. |) | |

DEFENDANT'S MOTION FOR JUDICIAL NOTICE

Defendant, the United States, respectfully requests that the Court take judicial notice of three facts. Counsel for plaintiff, Center for Excellence in Higher Education, Inc. (CEHE) has communicated to us in writing that “[w]e object to any request for judicial notice,” and CEHE’s counsel demanded written explanations of the purpose for the judicial notice beyond our previous statement that it was relevant to whether Court V of the complaint is a plausible claim. We provided two written explanations beyond the first, but CEHE has apparently not yet had an opportunity to fully consider its position.

Pursuant to Fed. R. Evid. 201, the United States requests that the Court take judicial notice of the following three facts that are relevant to CEHE’s Fifth Amendment taking claim concerning its financial guarantee (Count V of the complaint):

1. On December 8, 2023, the United States Department of Education (Education) issued to CEHE a Final Program Review Determination “to determine CEHE’s liability for discharges of Direct Loans resulting from CEHE’s closure on the dates specified in Section A.” A7 (Final Program Review Determination).¹

¹ “A” refers to the appendix to this motion.

2. Education determined that CEHE was liable to the United States in the amount of \$22,859,605 as a result of “approved Direct Loan closed school applications for 1352 students.” A8 (Final Program Review Determination).

3. On December 8, 2023, Education transmitted to CEHE a cover letter that included a notice describing rights to seek administrative review of the Final Program Review Determination issued to CEHE. A2-3 (cover letter).

As support for these three facts, we have placed in the appendix five documents (out of six total documents) transmitted together to CEHE on December 8, 2023: the cover letter, A1-3; the Final Program Review Determination, A4-11; Appendix B (Program Review Report, dated July 28, 2023), A12-17; Appendix C (CEHE’s response to the Program Review Report, dated August 25, 2023), A18-24; and “Instructions For FedWire Payments,” A25-26. In a separate motion, we will seek to file the sixth document transmitted to CEHE, Appendix A, under seal because it contains personal identification information for students.

We seek no ruling concerning the merits of Education’s administrative claim, but we respectfully request that the Court take judicial notice that Education has made an administrative claim (concerning the Direct Loan program -- one of several programs that CEHE participated in), and that Education has notified CEHE of administrative appeal rights in connection with Education’s administrative claim.

That Education has asserted an administrative claim for “discharges of Direct Loans resulting from CEHE’s closure” is relevant to this case because it supports our arguments that (1) the gravamen of CEHE’s claim for return of its financial guarantee is a challenge to various administrative actions (both past actions and anticipated actions), and (2) CEHE has failed to state a plausible claim for a Fifth Amendment taking of CEHE’s financial guarantee deposit.

On the face of Count V, CEHE challenged the statutory and regulatory authority for Education’s administrative actions. Complaint, at ¶ 243, November 23, 2022, ECF No. 1 (“When CEHE timely submitted its FYE 2020 audit submission, the Department had *no legitimate statutory, regulatory, or contractual basis to hold the escrow funds.*”) (italics added). Indeed, on the face of Count V, CEHE anticipated the administrative action recently taken by Education as one of the actions preliminary to a claim against CEHE’s financial guarantee:

the Department intends to use the escrow funds for what it considers to be the public benefit, *including funding former student’s closed-school discharges* under 34 C.F.R. § 685.206 and § 685.222 . . .

Complaint, at ¶ 245 (italics added); *see id.* at ¶ 150 (discussing “closed-school discharges” and citing 34 C.F.R. § 685.214). In short, Count V seeks to improperly bring CEHE’s challenges to Education’s administrative decisions to this Court. *See* Motion to Dismiss, at 24-27, March 24, 2023, ECF No. 12 (“CEHE’s APA Claims Must Be Dismissed”) (“gravamen of CEHE’s complaint is that Education made improper administrative decisions”).

Furthermore, Education’s recent administrative claim for “discharges of Direct Loans resulting from CEHE’s closure” supports our argument that CEHE has failed to identify a cognizable property interest in its financial guarantee deposit (a necessary element of a taking claim). *E.g.*, Reply, at 19-20, August 15, 2023, ECF No. 25 (the United States continues to have a lien interest in the financial guarantee deposit until CEHE’s liabilities for program activities have been determined). Education’s recent administrative claim demonstrates that CEHE’s liabilities have not yet been finally determined, and our competing property interest in the deposit remains.

For the reasons set forth above, we respectfully request that our motion for judicial notice be granted.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

s/ Elizabeth M. Hosford
ELIZABETH M. HOSFORD
Assistant Director

s/ James W. Poirier
JAMES W. POIRIER
Trial Attorney
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Civil Division
Department of Justice
PO Box 480
Ben Franklin Station
Washington, D.C. 20044
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December 11, 2023

Attorneys for Defendant

APPENDIX



December 8, 2023

Paul Gardner
Interim CEO/Chief Financial Officer
Center for Excellence in Higher Education, Inc.
4201 South 700 East, Suite 400
Salt Lake City, UT 84107-9923

Re: Final Program Review Determination
OPE IDs: 00367400, 00367410, 02110800, 03120300, 02594300
PRCN: 2023-4-11-300710, 2023-4-11-30709, 2023-4-11-30708

Dear Mr. Gardner:

The U.S. Department of Education's (Department's) Office of Federal Student Aid issued a program review report on July 28, 2023 covering institutions owned by the Center for Excellence in Higher Education's (CEHE's) administration of programs authorized by Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070 et seq. (Title IV, HEA programs), to determine the liability for discharges of Direct Loans resulting from the institutions' closures. CEHE's response was received on August 25, 2023. A copy of the program review report and related attachments and CEHE's response are attached. Any supporting documentation submitted with the response is being retained by the Department and is available for inspection by CEHE upon request. Additionally, this Final Program Review Determination (FPRD), related attachments, and any supporting documentation may be subject to release under the Freedom of Information Act (FOIA) and can be provided to other oversight entities after this FPRD is issued.

Purpose:

Final determinations have been made concerning all of the outstanding findings of the program review report. The purpose of this letter is to: (1) identify liabilities resulting from the findings of this program review report, (2) provide instructions for payment of liabilities to the Department, (3) notify the institution of its right to appeal.

The total liabilities due from the institution from this program review are \$22,859,605.14.

This final program review determination contains detailed information about the liability determination for all findings.

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 2 of 3

Protection of Personally Identifiable Information (PII):

PII is any information about an individual which can be used to distinguish or trace an individual's identity (some examples are name, social security number, date and place of birth). The loss of PII can result in substantial harm, embarrassment, and inconvenience to individuals and may lead to identity theft or other fraudulent use of the information. To protect PII, the findings in the attached report **do not contain any student PII. Instead, Appendices A, and D1-31 are encrypted and password protected. The password will be forwarded separately.**

Appeal Procedures:

If CEHE elects to appeal to the Secretary of Education for a review of the financial liabilities established by this FPRD, the institution must file a written request for a hearing. Please note that institutions may appeal financial liabilities only. The Department must receive CEHE's request no later than 45 calendar days from the date CEHE receives this FPRD. **The Department requests that CEHE submit an original and four copies of its complete request for review.** The request must be sent to:

Attn: Susan Crim, Director
Administrative Actions and Appeals Service Group
U.S. Department of Education
Federal Student Aid/Partner Enforcement and Consumer Protection
830 First Street, NE UCP3, Room 92G4
Washington, DC 20002-8019

CEHE's's appeal request must:

- (1) indicate the findings, issues, and facts being disputed;
 - (2) state the institution's position, together with pertinent facts and reasons supporting its position; and
 - (3) include a copy of the FPRD received by the school.
- PLEASE INCLUDE ALL APPENDICES TO THE FPRD (you may exclude any appendices that relate only to findings that you are not appealing).

When it submits its request for appeal, the institution may also include an original and four copies of documentation it believes the Department should consider in support of the appeal.

If any appeal documents include personally identifiable information (PII), the PII must be redacted, except for the student's name and last four digits of his/her social security number (please see the enclosed document, "Protection of Personally Identifiable Information," for instructions on how to mail records containing PII).

If the institution's appeal is timely, the request for appeal will be transmitted to the Department's Office of Hearings and Appeals (OHA), for an administrative hearing in accordance with

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 3 of 3

20 U.S.C. § 1094(b)(2). The Hearing Official assigned to the case will issue an order scheduling the submission of briefs and supporting evidence in accordance with 34 C.F.R. § 668.114(c). The institution may therefore submit additional documentation supporting its appeal request at that time. Further, if the institution is appealing a projected liability amount, it may provide detailed liability information from a complete file review, either at the time it initially submits its appeal request or pursuant to the proceedings at OHA. The procedures followed with respect to CEHE's appeal are those provided at 34 C.F.R. Part 668, Subpart H. Interest on the appealed liabilities shall continue to accrue at the applicable value of funds rate, as established by the United States Department of Treasury, or if the liabilities are for refunds, at the interest rate set forth in the loan promissory note(s).

Record Retention:

Program records relating to the period covered by the program review must be retained until the later of: resolution of the loans, claims or expenditures questioned in the program review; or the end of the retention period otherwise applicable to the record under 34 C.F.R. §§ 668.24(e)(1), (e)(2), (e)(3).

If the institution has any questions regarding this letter, please contact Liz Brunton at liz.brunton@ed.gov. Questions relating to any appeal of the FPRD should be directed to the address noted in the Appeal Procedures section of this letter.

Sincerely,



Michelle Allred, Branch Chief
for
Michael Frola
Division Chief
Multi-Regional and Foreign Schools Participation Division

cc: Steven Gombos, Counsel sgombos@glpclaw.com

OPE IDs: 00367400, 00367410, 02110800, 03120300, 02594300

PRCNs: 2023-4-11-30710, 2023-4-11-30709, 2023-4-11-30708

Prepared by

U.S. Department of Education

Federal Student Aid

Multi-Regional and Foreign Schools School Participation Division

Center for Excellence in Higher Education

Final Program Review Determination

December 8, 2023

Multi-Regional and Foreign Schools School Participation Division

830 First Street, NE

Washington, DC 20202

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 2 of 8

Table of Contents

| | Page |
|---|------|
| A. Institutional Information..... | 3 |
| B. Scope of Review..... | 4 |
| C. Findings and Final Determinations | 4 |
| Finding 1: Potential Liability for Loans Discharged Due to Institution’s Closure..... | 4 |
| D. Summary of Liabilities | 7 |
| E. Payment Instructions | 7 |
| F. Appendices | |
| Appendix A: Direct Loan Closed School Loan Discharges | |
| Appendix B: Program Review Report | |
| Appendix C: Attorney Jacob C. Shorter’s Response to the Program Review Report (May 28, 2020) | |
| Appendix D: Fedwire Form | |

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 3 of 8

A. Institutional Information

Independence University - 00367400
1350 West 1890 South
West Haven UT 84401-1420

Independence University – 00367410
16835 Market Place Boulevard
Nampa ID 83687-5140

California College of San Diego - 02110800
700 Bay Marina Drive
National City CA 91950-7924

CollegeAmerica Denver - 02594300
1385 South Colorado Boulevard
Denver CO 80222-3380

CollegeAmerica Flagstaff - 03120300
399 South Malpais
Flagstaff AZ 86001-3936

Center for Excellence in Higher Education (CEHE) and the associated additional locations closed and lost eligibility as outlined below:

00367400 on 08/01/2021
00367410 on 03/01/2019
02110800 on 08/01/2021
02594300 on 08/01/2021
03120300 on 08/01/2021

Accrediting Agency For All Schools: Accrediting Commission of Career Schools and Colleges

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 4 of 8

B. Scope of Review

The U.S. Department of Education's (Department's) Office of Federal Student Aid (FSA), School Eligibility and Oversight Service Group (SEOSG) conducted an off-site program review of CEHE. The review was conducted by Liz Brunton and Breneé Johnson.

The focus of this review was to determine CEHE's liability for discharges of Direct Loans resulting from CEHE's closure on the dates specified in Section A. The review consisted of an examination of CEHE's student records in the National Student Loan Data System (NSLDS) and information obtained from the Direct Loan servicers.

Disclaimer:

Often school liabilities continue to accrue following resolutions of any close-out audit or program review. For example, borrowers may in the future submit additional successful applications for closed school discharges of the Title IV, HEA loans taken out to permit students to attend CEHE schools. If that occurs, the Department will use an additional program review to recover those liabilities from CEHE at that time. Neither the Department's issuance of this letter, nor payment by CEHE of the liabilities identified, waives the Department's right to require payment of liabilities either existing now but unknown to the Department, or accruing in the future.

C. Findings

Finding 1. Liabilities for Loan Discharges Due to the Institution's Closure

Noncompliance:

Student borrowers, who had loans first disbursed prior to July 1, 2020, who were enrolled at the time of a school's closure or who withdrew from the school within the 120 days preceding the school's closure, and who were unable to complete their program because of the closure, are eligible to apply for Direct Loan discharges. See 34 C.F.R. § 685.214(c)(1). Students who received the proceeds of a loan, in whole or in part, after July 1, 2020, who were enrolled at the time of a school's closure or who withdrew from the school within the 180 days preceding the school's closure, and who were unable to complete their program because of the closure, are eligible to apply for Direct Loan discharges. See 34 C.F.R. § 685.214(c)(2). Students who complete their educational programs through a teach-out, or who use the credits gained at the closed school to complete an educational program at another school, are not eligible for the discharge. See 34 C.F.R. §§ 685.214(c)(i)(1),(2)(i)(C).

If a discharge is granted, the Department relieves the borrower of any obligation to repay the loan, and refunds to the borrower any amounts already repaid. 34 C.F.R. § 685.214(b).

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 5 of 8

Upon approval of the discharge, the borrower automatically assigns to the Department his/her rights under applicable law with respect to the loan or the enrollment agreements against the school, its principals, its affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party, up to the amount discharged. 34 C.F.R. § 685.214(e).

In approving the discharge applications, the Department reviews the information provided by the student in the application, and the enrollment information reported by the institution prior to, or when, it closed. Institutions are required to certify enrollment every two months, at a minimum, and update the roster one final time when closing. Enrollment Reporting Guide, Sections 1.4 and 5.2.2.1. The Department also reviews its records to confirm the information provided in the application regarding re-enrollment in another Title-IV eligible institution or other discharge factors.

The Department determined that CEHE ceased providing instruction and closed on the dates specified in Section A. Subsequently, the Department approved Direct Loan closed school discharge applications for 1352 students totaling \$22,859,605. The list of students who were awarded closed school discharges is included as Appendix A.

Directives from Program Review Report:

The Department issued a Program Review Report (Report) on July 28, 2023, setting forth the Department's authority to assess liabilities for loan discharges provided to students who could not complete their program of study due to the institution's closure. Appendix B. CEHE was provided an opportunity to provide evidence to establish that any of the students cited in the Report were not actually eligible for the loan discharges cited. CEHE was also notified that the Department would provide the liability total in the Final Program Review Determination (FPRD).

Analysis of Liability Determination

CEHE provided a response to the program review report on August 25, 2023. Appendix C. CEHE raised a number of arguments in this response. First, CEHE makes a general claim that the Department failed to provide sufficient information for the institution to provide a meaningful response. This claim is without merit. Consistent with its standard procedure, the Department provided a list of students who received closed school discharges as a result of CEHE's closures with the Report. With the names of the students, CEHE could review its student information to determine the enrollment status of the students at the time of the closures. In addition, CEHE entered into teachout agreements with other institutions and was keeping track of students taking advantage of the teachout opportunities. Despite being in possession of this information, CEHE made no attempt to provide student specific challenges to the students listed in the Report.

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 6 of 8

Although CEHE did not provide any student specific arguments, the Department did obtain copies of the discharge applications to ensure that the students listed in the Report were all eligible for the discharges given. The Department has determined that the discharges for approximately 24 students may not have been properly granted. These students have been removed from the discharge list in Appendix A, and the liabilities removed from the total listed below. The applications that support the liability being assessed are included in zip files as Appendices D 1-31.¹

CEHE maintains that the institution is not responsible for the closed school discharge liabilities because the Department forced it to close by not paying the pending Heightened Cash Monitoring 2 (HCM2) claim. This argument is also without merit. The Department placed CEHE on HCM2 on April 28, 2021, as a result of issues identified during a program review that was being conducted to assess the institution's compliance with Title IV program requirements. On July 26, 2021, the Department determined it could not release the funds requested by CEHE due to issues identified in the student file documentation that had been reviewed. Under the Department's procedures, an HCM2 package is rejected when the error rate in the sample files reviewed exceeds 10%. The error rate for the sample files reviewed for CEHE's HCM2 package exceeded that error rate. As with all rejected claims, CEHE was provided with the opportunity to resubmit the claim after fixing the identified errors. CEHE closed prior to resubmitting the HCM2 claim. There is nothing in the rejection letter which directs, or suggests, CEHE close its doors and cease providing educational programs. That decision rested solely with CEHE.

Once the institution closed, students attending the institution at the time of closure, and those that had withdrawn within specified time frames set forth above, were entitled to have their loans discharges. The Title IV statute clearly provides a directive for the Department to recoup the liabilities resulting from those discharges. The statutory provision specifically states that the Department "shall subsequently pursue any claim available to such borrower against the institution and its affiliates and principals.." 20 U.S.C. § 1087(c)(1). The statute also states that the borrower is deemed to have assigned the right to a loan refund up to the amount discharged against the institution. 20 U.S.C. § 1087(c)(2). As outlined above, the regulations in effect at the time CEHE closed contained similar language. It is the Department's responsibility to recoup the discharge liabilities and that is exactly what it is doing in issuing this FPRD.

CEHE also suggest that the Department interfered with the teachout agreements it entered into with other institutions and this interference resulted in less students transferring to the teachout institutions than otherwise would have. CEHE maintains that as a result, the closed school discharge liabilities are larger than they would have been absent the alleged interference. CEHE's claim is baseless. As CEHE is aware, students are not required to accept a teachout to complete their programs even if one is offered by the closing institution. When an institution closes, the Department takes steps to ensure that students are provided all of their options, including the option of a loan discharge. Consistent with its practice, those steps were taken

¹ These Appendices are being provided electronically in secured zip files.

Center for Excellence in Higher Education
 OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
 Page 7 of 8

when CEHE closed. These steps do not constitute interference with the teachout process, and do not provide a basis for a reduction in the loan discharge liabilities.

The three remaining arguments raised by CEHE are outside the scope of this program review process. CEHE contends that by issuing the program review report the Department is attempting to circumvent the lawsuit filed by the institution in the Court of Federal Claims, that the borrower defense claims against College America Colorado are improper, and that the Department is attempting to collect funds to assist with the administration's loan forgiveness. This program review was initiated to recoup the liabilities resulting from the loan discharges granted to students who could not complete their programs of study due to CEHE's closures. The only issues relevant here are whether the students cited were properly granted discharges and whether CEHE is responsible for the repayment of the liabilities resulting from those discharges. The remaining arguments raised by CEHE have no bearing on those issues, and therefore, will not be addressed in this determination.

CEHE has failed to provide any evidence establishing that the discharges for the students cited were improper. Consequently, CEHE is liable for the \$22,859,605 in loans discharged for students who were unable to complete their programs of study due to the institution's closure.

D. Summary of Liabilities

| Description of Liability | Payable to | Amount |
|---|-------------------|---------------|
| Total Amount of Closed School Loan Discharges | Department | \$22,859,605 |
| | | |
| Net Due | | \$22,859,605 |

E. Payment Instructions

CEHE owes the Department \$22,859,605.

As a result of this final determination, the Department has created a receivable for this liability. The liability must be paid using an electronic transfer of funds through the Treasury Financial Communications System, which is known as Fedwire. CEHE must make this transfer within 45 days of the date of this letter. A copy of the Fedwire form and instructions is included as Enclosure E.

If payment is not received within the 45-day period, interest will begin to accrue on the amounts owed to the Department, at the current value of funds rate in effect as established by the Department of the Treasury, from the date of this notice until the date of receipt of payment. In addition, if this debt is not paid within 90 days, penalties of 6% per year will accrue from the date of this notice until the date of receipt of payment. If an appeal is not filed or payment is not

Center for Excellence in Higher Education
OPEID – 00367400, 00367410, 02110800, 3120300, 02594300
Page 8 of 8

made by the end of the 45-day appeal period, the Department will refer the debt to Centralized Receivables Service (CRS) for servicing and collection. Continued failure to pay the liability after notification from CRS may result in costs exceeding 32% on the amount due. If the liability is appealed, interest will continue to accrue while the appeal is pending.

If the institution has any questions regarding payment of this debt or wishes to request a payment plan within the 45-day appeal period, those inquiries should be sent by email to OCFOAccountsReceivable@ed.gov. Once the debt is referred to CRS, you will receive notification and any further inquiries should be directed to that entity at 855-549-2683. Interest charges and other conditions may apply to any payment plan.

If within 45 days of the date of this letter, CEHE has neither made payment in accordance with these instructions nor entered into an arrangement to repay the liability under terms satisfactory to the Department, the Department intends to collect the amount due and payable by administrative offset against payments due CEHE from the Federal Government. CEHE may object to the collection by offset only by challenging the existence or amount of the debt as described in the appeal section of the cover letter. No separate appeal opportunity will be provided. If a timely appeal is filed, the Department will defer offset until completion of the appeal, unless the Department determines that offset is necessary as provided at 34 C.F.R. § 30.28. This debt may also be referred to the Department of the Treasury for further action as authorized by the Debt Collection Improvement Act of 1996.

In addition, the failure to pay this debt will constitute a past performance issue for any related entity or individual seeking participation in the Title IV programs.

F. Appendices

Appendix A: Direct Loan Closed School Loan Discharges
Appendix B: Program Review Report
Appendix C: August 25, 2023 School Response
Appendix D 1-31: Student Discharge Applications
Appendix E: Fedwire Form



July 28, 2023

Paul Gardner
Interim CEO/Chief Financial Officer
Center for Excellence in Higher Education, Inc
4021 South 700 East, Suite 400
Salt Lake City, UT 84107-9923

Sent via email to
paul.gardner@independence.edu

RE: Program Review Report

OPE IDs: 00367400, 00367410, 02110800, 03120300, 02594300

PRCN: 2023-4-11-30710, 2023-4-11-30709, 2023-4-11-30708

Mr. Gardner:

The U.S. Department of Education's (Department) Office of Federal Student Aid (FSA), School Eligibility and Oversight Service Group (SEOSG), conducted an off-site program review of the institutions owned by the Center for Excellence in Higher Education, Inc. (CEHE) (OPE IDs noted above). The review was conducted by Liz Brunton and Breneé Johnson. This review was limited to determining the liability for discharges of Direct Loans resulting from the institutions' closures. Please review the attached program review report and Appendix. Should the school wish to respond to the report, that response must be sent by email directly to Liz Brunton within 30 calendar days of receipt of this letter.

Please note that any Personally Identifiable Information (PII) must be encrypted to protect the identity of the student. PII is any information about an individual which can be used to distinguish or trace an individual's identity (some examples are name, social security number, date and place of birth). The loss of PII can result in substantial harm, embarrassment, and inconvenience to individuals and may lead to identity theft or other fraudulent use of the information. To protect PII, the finding in the attached report does not contain any student PII. The students relevant to the report are listed in Appendix A.

Please refer to the above Program Review Control Number (PRCN) in all correspondence relating to this report. If you have any questions concerning this report, please contact Liz Brunton at (202) 987-0288 or Liz.Brunton@ed.gov.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Allred".

Michelle Allred, Branch Chief
Multi-Regional and Foreign Schools Participation Division

Federal Student Aid

An OFFICE of the U.S. DEPARTMENT of EDUCATION

School Participation Division – Multi-Regional and Foreign Schools

830 First Street, NE, Washington, DC 20202

StudentAid.gov

A12

Enclosures:

Program Review Report and Appendix
Protection of Personally Identifiable Information

CC: Steven Gombos, Counsel sgombos@glpclaw.com

OPE IDs: 00367400, 00367410, 02110800, 03120300, 02594300

PRCNs: 2023-4-11-30710, 2023-4-11-30709, 2023-4-11-30708

Prepared by

U.S. Department of Education

Federal Student Aid

Multi-Regional and Foreign Schools School Participation Division

Center for Excellence in Higher Education

Program Review Report

July 28, 2023

Multi-Regional and Foreign Schools School Participation Division

830 First Street, NE

Washington, DC 20202

A. Institutional Information

Independence University - 00367400
1350 West 1890 South
West Haven UT 84401-1420

Independence University – 00367410
16835 Market Place Boulevard
Nampa ID 83687-5140

California College of San Diego - 02110800
700 Bay Marina Drive
National City CA 91950-7924

CollegeAmerica Denver - 02594300
1385 South Colorado Boulevard
Denver CO 80222-3380

CollegeAmerica Flagstaff - 03120300
399 South Malpais
Flagstaff AZ 86001-3936

Center for Excellence in Higher Education (CEHE) and the associated additional locations closed and lost eligibility as outlined below:

00367400 on 08/01/2021
00367410 on 03/01/2019
02110800 on 08/01/2021
02594300 on 08/01/2021
03120300 on 08/01/2021

Accrediting Agency For All Schools: Accrediting Commission of Career Schools and Colleges

B. Scope of Review

The U.S. Department of Education's (Department's) Office of Federal Student Aid (FSA), School Eligibility and Oversight Service Group (SEOSG) conducted an off-site program review of CEHE. The review was conducted by Liz Brunton and Breneé Johnson.

The focus of this review was to determine CEHE's liability for discharges of Direct Loans resulting from CEHE's closure on the dates specified in Section A. The review consisted of an examination of CEHE's student records in the National Student Loan Data System (NSLDS) and information obtained from the Direct Loan servicers.

Disclaimer:

Often school liabilities continue to accrue following resolutions of any close-out audit or program review. For example, borrowers may in the future submit additional successful applications for closed school discharges of the Title IV, HEA loans taken out to permit students to attend CEHE schools. If that occurs, the Department will use an additional program review to recover those liabilities from CEHE at that time. Neither the Department's issuance of this letter, nor payment by CEHE of the liabilities identified, waives the Department's right to require payment of liabilities either existing now but unknown to the Department, or accruing in the future.

This report reflects initial findings. These findings are not final. The Department will issue its final findings in a subsequent Final Program Review Determination (FPRD) letter.

C. Findings

Finding 1. Liabilities for Loan Discharges Due to the Institution's Closure

Noncompliance:

Student borrowers, who had loans first disbursed prior to July 1, 2020, who were enrolled at the time of a school's closure or who withdrew from the school within the 120 days preceding the school's closure, and who were unable to complete their program because of the closure, are eligible to apply for Direct Loan discharges. See 34 C.F.R. § 685.214(c)(1). Students who received the proceeds of a loan, in whole or in part, after July 1, 2020, who were enrolled at the time of a school's closure or who withdrew from the school within the 180 days preceding the school's closure, and who were unable to complete their program because of the closure, are eligible to apply for Direct Loan discharges. See 34 C.F.R. § 685.214(c)(2). Students who complete their educational programs through a teach-out, or who use the credits gained at the closed school to complete an educational program at another school, are not eligible for the discharge. See 34 C.F.R. §§ 685.214(c)(i)(1),(2)(i)(C).

If a discharge is granted, the Department relieves the borrower of any obligation to repay the loan, and refunds to the borrower any amounts already repaid. 34 C.F.R. § 685.214(b).

Upon approval of the discharge, the borrower automatically assigns to the Department his/her rights under applicable law with respect to the loan or the enrollment agreements against the school, its principals, its affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party, up to the amount discharged. 34 C.F.R. § 685.214(e).

In approving the discharge applications, the Department reviews the information provided by the student in the application, and the enrollment information reported by the institution prior to, or when, it closed. Institutions are required to certify enrollment every two months, at a minimum, and update the roster one final time when closing. Enrollment Reporting Guide, Sections 1.4 and 5.2.2.1. The Department also reviews its records to confirm the information provided in the application regarding re-enrollment in another Title-IV eligible institution or other discharge factors.

The Department determined that CEHE ceased providing instruction and closed on the dates specified in Section A. Subsequently, the Department approved Direct Loan closed school discharge applications for 1374 students totaling \$23,308,970. The list of students who were awarded closed school discharges is included as Appendix A. CEHE will be required to repay this amount to the Department.

Required Actions:

CEHE must acknowledge receipt of this Program Review Report (PRR) via e-mail to Liz.Brunton@ed.gov.

In response to this report, CEHE may submit written evidence to establish that one or more of the students cited in the report were not eligible for the discharges granted. CEHE's response and evidence must be submitted by email to the above address. Since the evidence may contain personally identifiable information, it must be e-mailed as an encrypted and password protected file. The password needed to open the encrypted files must be sent in a separate e-mail.

The Department will provide payment instructions for any determined liability in the Final Program Review Determination.

D. Appendices

Appendix A List of Closed School Discharges

The Student List for Closed School Loan Discharges contains personally identifiable information and will be emailed to CEHE as an encrypted WinZip file using advance encryption standard, 256-bit, upon confirmation of the appropriate email address. The Department will send the password needed to open the encrypted WinZip file in a separate email.

Steven M. Gombos



703-934-9831 Direct
sgombos@glpclaw.com

GOMBOS | LEYTON PC
ATTORNEYS

11350 Random Hills Road | Suite 400 | Fairfax, Virginia 22030
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August 25, 2023

By email only (Liz.Brunton@ed.gov)

Liz Brunton
Multi-Regional and Foreign School
Participation Division
U.S. Department of Education
830 First Street, NE
Washington, DC 20202

**Re: OPE IDs: 00367400, 00367410, 02110800, 03120300, 02594300
PRCN: 2023-4-11-30710, 2023-4-11-30709, 2023-4-11-30708**

We are responding to your July 28, 2023 Program Review Report (“Program Review”) seeking to hold CEHE liable for approximately \$23 million in closed school loan discharges. The Department has not provided sufficient information supporting the liabilities, denying us the opportunity to meaningfully respond. Moreover, it was the Department’s own unlawful conduct that precipitated the closure of CEHE’s colleges. As the Department knows, CEHE’s pending lawsuit in the Court of Federal Claims seeks to hold the Department accountable for those acts. The timing and substance make clear the Program Review is intended to interfere with CEHE’s lawsuit and evade discovery that would show the Department’s bad-faith efforts to precipitously close CEHE.

A. The Department weaponized the HCM2 process to force CEHE’s precipitous closure.

The Department—not CEHE—is responsible for the closed school liabilities cited in the Program Review. Because the Department illegally cut off Title IV funding, in effect it forced CEHE to close. As required by its PPAs and the Department’s regulations, CEHE developed a plan for an orderly teach-out and identified other schools that agreed to act as teach-out partners for most of CEHE’s students. CEHE was authorized and expected under the PPA to continue allowing students to access Title IV funding to ensure that they had the opportunity to complete their programs.

The Department breached the PPA by weaponizing the HCM2 process to prevent CEHE from meeting its Title IV obligations. While HCM2 established the procedure for CEHE’s reimbursement, it did not change the Department’s obligation to timely fund students’ eligible Title IV expenditures. While on HCM2 status, CEHE disbursed approximately \$43 million of its own money to fund those expenditures in good faith reliance that the Department would honor its obligations. The Department failed to live up to its end of the bargain and intentionally

Liz Brunton, U.S. Department of Education
August 25, 2023
Page 2

delayed processing—with the intent of later denying—CEHE’s claims for reimbursement, knowing that the likely and foreseeable consequence would be CEHE’s precipitous closure.

Indeed, the Department knows that even minor delays can have catastrophic effects on an institution’s operations, and it instructs institutions on HCM2 that its normal reimbursement claim processing time is 30 days. Yet in CEHE’s case, the Department took that long before permitting CEHE to even submit its initial claims. From the beginning, CEHE encountered technical difficulties with the Department’s online submission portal that prevented submission. We are not aware of any other school that encountered such issues. In fact, one of CEHE’s colleges was able to submit a much smaller claim around the same time without any difficulty. The Department could have quickly mitigated the delay caused by these issues by allowing CEHE to submit its claims through an alternative method, but it refused to do so until a month later. As CEHE’s financial situation became critical, the Department continued its delay tactics by making weekly burdensome and unnecessary documentation requests. CEHE promptly responded to each request, but the Department refused to explain the purpose of the iterative requests, further evidencing its intent to delay and hinder.

CEHE informed the Department in late July 2021 that it could not stay open to effectuate its teach-out plan unless the Department released at least a portion of the funds it owed to CEHE. But the Department’s only response was a July 26, 2021 letter informing CEHE that it was denying all reimbursement requests. At that time, the Department was sitting on nearly \$30 million in HCM2 reimbursement requests. It also held over \$20 million of **CEHE’s funds** in escrow pursuant to an **expired escrow agreement**. One of the stated purposes of the escrow agreement was to make sure the Department had funds on hand to ensure that CEHE’s students had teach-out opportunities. Yet the Department did not release any funds to CEHE, causing CEHE to close on August 1, 2021. CEHE’s nearly 10,000 students lost the ability to continue their programs and 1,000 employees had to be laid off.

CEHE and its committed teach-out partners nonetheless continued to seek Department approval of teach-out agreements that would allow CEHE’s online students to complete their programs at no additional cost. To achieve its political and ideological goals, the Department intentionally withheld that approval by, for example, suggesting that it intended to treat the agreements as a full change in ownership, which would require a prohibitively burdensome application and approval process. That was illogical because the only assets transferred in the deals were the curricula for some of CEHE’s programs and some laptops. At the same time, Department officials—including Federal Student Aid’s COO, Richard Cordray—engaged in a public relations campaign to convince CEHE students not to continue their programs at other schools and instead apply for closed-school discharges.

The Department has consistently cited the harm students and taxpayers face when a precipitous closure prevents students from completing their programs. It has required schools (including CEHE) to meet oppressive financial security requirements for the purported purpose of minimizing that harm. Yet here, the Department’s actions were directly calculated to **maximize** that harm. Taxpayer loss from discharged loans would have been almost entirely avoidable had the Department cooperated with CEHE as it sought to teach out its remaining



Liz Brunton, U.S. Department of Education
August 25, 2023
Page 3

students. But the Department *wanted* to discharge the loans in the service of the Biden administration's debt forgiveness pledge, turning its back on CEHE's students, its employees, and the American taxpayer.

B. The Program Review is a transparent effort to circumvent CEHE's lawsuit in the Court of Federal Claims.

The Department's overzealous efforts to close CEHE breached its agreement to reimburse CEHE for properly disbursed Title IV expenditures, prompting CEHE to file its lawsuit in the Court of Federal Claims. In addition, the Department breached its duties of good faith and fair dealing by interfering with CEHE's reasonable expectations under the PPA. Simply put, the Department caused CEHE's closure in bad faith and it—not CEHE—bears responsibility for the resulting loan discharges.

The decision in CEHE's lawsuit will likely be dispositive of the closed school discharge liabilities the Department seeks to impose. Thus, the appropriate course of action is to resolve that case before determining whether CEHE owes any closed school liabilities. Indeed, we are confident that CEHE will prevail in its lawsuit, precluding such liabilities.

The Department knows this and is seeking to remove the question from federal court to its tilted program review framework to prejudice CEHE. The Program Review offers scant explanation of the liabilities and attaches a conclusory list of students who allegedly submitted claims for closed school discharges. The report states only that the students filed claims and explains that the Department's normal process is to review its records to confirm the information provided in the application is correct. Notably, the letter does not state whether the Department actually followed its process here.

Moreover, the Department has made none of the work available to CEHE. The Department has not even provided the students' applications. CEHE thus cannot reasonably respond to the Department's conclusory findings. The Department's failure to provide sufficient information is particularly egregious because CEHE's administrative process to challenge the findings (Subpart H) shifts the burden on CEHE to disprove each submission. The information necessary to do that is solely in the Department's possession.

The Department's bad faith is demonstrated elsewhere. In seeking to dismiss CEHE's claims, the government is taking the position that the PPA **is not** a contract, while at the same time claiming that the PPA **is** a contract in pursuing claims against CEHE under the False Claims Act in the District of Utah. In fact, the Department has consistently relied on the contractual obligations of the PPA in taking actions against schools. In justifying its 2016 expansion of BDR liabilities, it reasoned that "the institution enters into a contract with the Department [i.e., the PPA] pursuant to which the institution acts as the Department's agent in the making of [student loans]." 81 FR 75926, 75931. More recently, the Department explained that it expanded that liability even further because "Congress [] authorized the Department to issue regulations to ensure that the schools **with which it contracts** to provide Title IV funds comply with program requirements." *Career Colleges & Schools of Texas v. U.S. Dep't. of Educ., et al.*, case no. 1:23-cv-00433 (W.D. Texas) (Doc. 56 at 12) (emphasis added). And the Department consistently



Liz Brunton, U.S. Department of Education
August 25, 2023
Page 4

asserts that it can impose closed school liabilities against schools based on the PPA's contractual requirement that institutions agree to "[a]ccept responsibility and financial liability stemming from [the institution's] failure to perform its functions under this Program Participation Agreement." 34 CFR 685.301(b)(8)(2020 version).¹

Put simply, the Department seeks to have it both ways. When seeking liabilities against CEHE, the PPA is a contract, and the Department seeks to hold CEHE liable under common-law contract principles. But now that CEHE is pursuing its contractual rights in the Court of Federal Claims under those same principles, the Department bafflingly claims there is no contract. Plainly, the Department's position in the Court of Federal Claims was not taken in good faith.

C. The Department's recent announcement that it has forgiven approximately \$130 million in student loans to CollegeAmerica's Colorado students further demonstrates the Department's bad faith.

We were shocked to read President Biden's and the Department's July 25 press releases, touting the administration's collusion with Colorado Attorney General Phil Weiser to forgive the debt of 7,400 students attending CollegeAmerica's Colorado campuses. The timing strongly suggests the administration intended to interfere in CEHE's pending litigation in the Colorado Court of Appeals. It is no coincidence that the Department and President Biden waited until now to act. It is entirely inappropriate for the Department—let alone the President of the United States—to coordinate with AG Weiser to influence the outcome of that case in furtherance of a purely political agenda.

Worse still, it is clear that the administration issued the decision without following its own fact-finding procedures and due process requirements. Critically, the Department was required to notify CEHE of the claim and provide 90 days for it to respond to the allegations. 34 CFR 685.404; *Id.* § 685.405. CEHE received no such opportunity.

The incredible speed at which the decision was reached makes it implausible that the Department meaningfully considered the merits. Indeed, the Department did not have authority to initiate a group claim until July 1, 2023. Yet by July 25—a mere three weeks later—the Department claims to have afforded sufficient process to warrant loan forgiveness for 7,400 students, totaling \$130 million.

Assume the Secretary took appropriate steps to identify and form the 7,400 member group on the first day the July 1, 2023 regulations became effective. The Secretary was then required to designate a Department official to administer and adjudicate the group claims. 34 CFR 685.602(d)(1); *Id.* 685.405(a). Next, the Secretary had to notify known members of the group and take "reasonable steps" to identify and notify unknown members. *Id.* § 685.402(d)(2)-(5). This step is important because students may disagree that they were misled or harmed by the practices at issue and thus would be unable to honestly say that they were entitled to loan forgiveness. After those steps, which could not possibly be completed in three weeks, the

¹ All of the PPAs for CEHE's colleges became effective before the more recent version of 685.301 became effective on July 1, 2020. Thus, CEHE never agreed to accept liability for loans discharged pursuant to the closed-school discharge and borrower defense to repayment regulations.



Liz Brunton, U.S. Department of Education
August 25, 2023
Page 5

Department official was required to consider the relevant evidence (including CEHE's response, for which CEHE received no opportunity) and make a recommendation to the Secretary. *Id.* § 685.406(b)(1). Clearly, the Department did not follow its procedures—including the critical requirement that CEHE be given an opportunity to respond.

Critically, there have been no findings that CEHE's practices actually deceived any students. To create that false impression, President Biden and the Department grossly mischaracterized CEHE's advertising practices. CEHE did not "prominently include[] in its admission and advertising materials that its graduates would earn high salaries" as the Department contends. That is false. In reality, the advertisements presented only national averages, largely sourced from the Bureau of Labor Statistics ("BLS"), and they were presented as such. CEHE included that data because during the time at issue, the Department expressly condoned the practice, promising "information provided by State and Federal governments **would not be the basis for a misrepresentation claim.**" 75 Fed. Reg. 66832, 66919 (Oct. 29, 2010) (emphasis added). In 2014, the Department further confirmed that it was reasonable to use BLS data for "consumer information purposes." 79 Fed. Reg. 64889, 64942 (Oct. 31, 2014). And, more recently, the Department recognized that "BLS data is helpful because a student is generally interested in earnings over the course of a career, and not just a few years after completion of the program." 84 Fed. Reg. 49788, 49810 (Sept. 23, 2019). CEHE, like numerous other institutions, relied on the Department's repeated acknowledgement that schools using BLS statistics were safe from misrepresentation claims. Yet now, President Biden suggests that CEHE violated misrepresentation regulations by using BLS statistics.

That is not all that is wrong with the press release. CEHE never advertised "inflated and falsified job placement rates." CEHE's job placement rates were reported in accordance with ACCSC standards, as required. Over the years in question, ACCSC closely monitored CEHE's employment verification and report practices. The Colorado Attorney General's challenge to those practices rested entirely on the opinion of the State's paid-for "expert." This proffered expert opined that CollegeAmerica's verification documents failed to comply with ACCSC requirements. However, upon further examination, the purported expert admitted to having no prior experience interpreting or applying ACCSC Standards. The documentation reviewed by the so-called expert was the same documentation made available to ACCSC during numerous site visits and in other responses. While ACCSC's review of those documents may have periodically raised isolated questions about certain verification practices, as part of the iterative accreditation process, those issues were resolved by the institution in collaboration with ACCSC. Otherwise, ACCSC accepted CEHE's verification documents without raising any objections. Moreover, CEHE engaged independent auditors on multiple occasions to ensure CEHE's documentation accurately reflected the graduate employment outcomes it reported to the ACCSC. The auditors consistently vouched for the accuracy of the reports.

The Department also misrepresents CEHE's advertising of its private EduPlan loans. CEHE advertised that those loans made attending CEHE's colleges affordable, which they did for many students. The fact that some students did not meet their obligations of repaying those



Liz Brunton, U.S. Department of Education
August 25, 2023
Page 6

loans does not make that statement untrue. Indeed, the Colorado Supreme Court rejected the Colorado AG's predatory lending claims.

The press releases also falsely insinuated that CEHE misled thousands of students about the programs it offered. As AG Weiser is aware, those claims involved an inadvertent human error in specific college catalog listings, which impacted fewer than **ten** students—hardly a basis to forgive \$130 million in debt for 7,400 students.

More fundamentally, the Department's findings, as stated in the press release, appear to have no relationship to those 7,400 loans. By 2017, at the latest, CEHE had discontinued all of the practices discussed above. Thus, even if the conduct were sanctionable (it is not), extending discharges to students who could not have possibly relied on them is without basis.

In any event, given the Fifth Circuit's recent injunction prohibiting the Department from applying its BDR regulations (discussed below), we expect that the Department has ceased all BDR forgiveness actions. Please confirm that you have ceased all efforts to receive, process, consider, or award any group borrower defense to repayment claims related to students attending any CEHE-owned institution. We also demand that the Department provide us with the following:

1. Any written findings or analysis by the Department related to the decision to cancel the debt of student borrowers who were enrolled in and attended CollegeAmerica's Colorado campuses;
2. Any documents the Department relied upon or considered in arriving at that decision;
3. All applications for loan discharges submitted by student borrowers who enrolled in and attended a CollegeAmerica Colorado campus at any time;
4. All applications for loan discharges submitted by student borrowers who enrolled in and attended a CollegeAmerica Colorado campus and who are members of the class that was certified in the case *Theresa Sweet, et al. v. Miguel Cardona* (Case No. C 19-03674 WHA, Northern District of California);
5. All correspondence and documents exchanged between the Department and the office of the Colorado Attorney General relating to CollegeAmerica or Center for Excellence in Higher Education; and
6. If the Department had pending at any time prior to the entry of the Fifth Circuit's injunction any other group claims for loan discharges for students attending any CEHE-owned institutions, all documents reviewed or considered by the Department related to such group claims; and



Liz Brunton, U.S. Department of Education
August 25, 2023
Page 7

7. All written findings or analysis by the Department of Education related to such additional group claims.

We request the above-requested documents within 30 days of this letter. Please contact me as soon as possible to discuss delivery of the materials.

D. The Department's unauthorized efforts to force proprietary and career colleges to fund the administration's debt relief agenda.

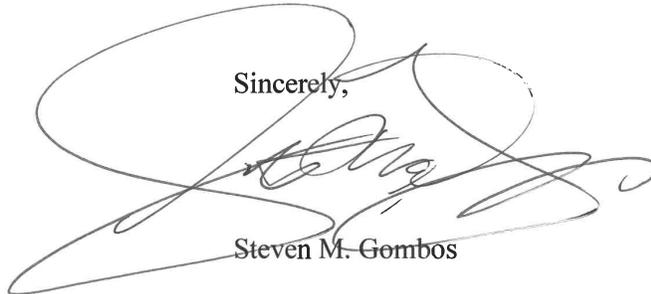
The Department's actions towards CEHE typify Biden administration's willingness to prioritize political pandering over legal compliance and due process. The Supreme Court denied efforts to interpret the HEROES act to grant debt forgiveness to all students, confirming that "the basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have reserved for itself." *Biden v. Nebraska*, 600 U.S. __ (2023) (cleaned up). Similarly, the Fifth Circuit recently enjoined the Department from implementing its new Borrower Defense to Repayment regulations, signaling that the Department's tactics have gone too far. And the Department misrepresented to the U.S. District Court for the Northern District of California in *Sweet, et al. v. Cardona* that it did not have the resources to process its backlog of pending BDR claims, and the only feasible way to provide relief to the students was to forgive the debt under its settlement authority. But once the court cautioned the Department that it could not pursue recoupment actions against schools, the Department reversed course and granted mass discharges in a matter of months.

E. Conclusion

The Department should dismiss or stay the instant Program Review pending the outcome of the pending litigation in the Court of Federal Claims. In addition, please confirm that the Department has ceased all discharge proceedings for CEHE students and will not proceed with any recoupment actions. Also, please confirm that the Department will promptly produce the documents and information requested in Section C, above. Finally, if the Department attempts to draw down any portion of CEHE's escrowed funds, we will seek all available legal remedies, including claims for conversion.

Please do not hesitate to contact me if you have any questions, or if you wish to discuss these matters further.

Sincerely,



Steven M. Gombos



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