August 2, 2018

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Docket ID ED-2018-OPE-0027

To Whom It May Concern:

This preliminary comment is submitted in reference to the above rulemaking Docket ID, pertaining to the Notice of Proposed Rulemaking (NPRM) published on July 31, 2018 by the Office of Postsecondary Education, Department of Education, 83 Fed. Reg. 37242.

As published, the NPRM contains an inaccuracy or misstatement that renders discussion of the proposed rule, including the Regulatory Impact and Net Budgetary Impact Analyses, invalid. Unless corrected, this flaw will hinder the public’s ability to comment on this proposed regulation. The Department has indicated that this regulation will have a significant economic impact. Because of the high stakes, I am submitting this comment today, two days after the NPRM was posted, to provide the Department with notice of its error so that it may correct the NPRM as soon as possible.

In sum, the Department proposes to limit the circumstances in which a borrower may seek loan cancellation based on school misconduct to “defensive,” post-default administrative collection proceedings. In the NPRM, the Department asserts that such a limitation would be consistent with the 1995 borrower defense regulation, which remains operative in light of the Department’s delay of the 2016 regulation. Specifically, the Department claims that it reinterpreted the 1995 rule in 2015; and further that, prior to 2015, the Department would not consider borrower defense assertions from borrowers whose loans had not defaulted and who were not currently experiencing enumerated forms of collection, such as wage garnishment, debt collection litigation, or Treasury offset.

This is not accurate. In fact, the Department accepted such “affirmative” borrower defense claims well before 2015. To the extent the NPRM asserts that two webpages published in 2015 constitute a “reinterpretation” of the currently-effective regulation, this is inaccurate. Attached documentation demonstrates:
• In October 1998, the Department applied the borrower defense regulation affirmatively to reduce the loan obligations of borrowers who were owed money by a closed school.

• In October 2000, the Department’s Office of General Counsel recommended discharge of the loans of two Direct Loan borrowers who had affirmatively asserted a defense to repayment based on the misconduct of their school under state law.

• In February 2001, the Department’s Office of General Counsel recommended discharge of the loans of 25 Direct Loan borrowers who had affirmatively asserted a defense to repayment based on the misconduct of their school under state law.

• In February 2003, the Department’s Office of General Counsel recommended discharge of the loans of 58 Direct Loan borrowers who had affirmatively asserted a defense to repayment based on the misconduct of their school under state law.

• In March 2015, members of the Department’s Office of General Counsel compiled summaries of the above instances, and others, involving assertions of borrower defense claims outside of enumerated collection contexts.

These documents show that, in 2015, the Department affirmed, rather than changed, its long-standing interpretation that the governing regulation allows borrowers to affirmatively seek loan cancellation based on school misconduct at any time, whether in repayment, forbearance, or default. The undersigned is not aware that any contrary interpretation was ever in effect at any point since the regulation was promulgated in 1994.

The inaccuracy or misstatement appears throughout the NPRM as published in the Federal Register (emphasis added):

• 37243: “Through these proposed regulations, the Department is considering whether to reaffirm the Department’s original interpretation of the statute, which persisted for 20 years and provided borrowers an opportunity to raise defenses to the repayment of Direct Loans only in response to collection actions by the Department, or to continue with the Department’s 2015 interpretation, which allowed borrowers to raise defenses to repayment in affirmative claims. The Department adopted that interpretation in response to advocacy efforts on behalf of student borrowers who had attended institutions owned by Corinthian Colleges, Inc., but without negotiated rulemaking.”

• 37243: “This new interpretation to allow affirmative claims was codified in the Department’s 2016 final regulations. The 2015 reinterpretation....”

• 37244: “And these proposed regulations would not eliminate the opportunity for Corinthian or other students with loans first disbursed prior to July 1, 2019, to seek debt relief under the 2015 interpretation of the regulation.”

• 37251: “Though the regulation has been in effect since 1995, it was rarely used prior to 2015, when the Department received applications from borrowers for loan relief in response to the Department’s announcement (see www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges and
https://studentaid.ed.gov/sa/about/announcements/corinthian) that it would consider affirmative borrower defense claims.

- 37251: “The Department is considering whether to allow only defensive claims or to continue the approach taken in its 2015 interpretation that allowed it to accept both defensive and affirmative claims. One regulatory alternative, specified in the proposed amendatory language, continues to provide a remedy to borrowers in a collections proceeding, as has been the case since the borrower defense to repayment regulation was promulgated in 1994, by permitting borrowers to assert defense to repayment during a proceeding by the Department to collect on a Direct Loan including, but not limited to, tax refund offset proceedings under 34 CFR 30.33, wage garnishment proceedings under section 488A of the HEA, salary offset proceedings for Federal employees under 34 CFR part 31, and consumer reporting proceedings under 31 U.S.C. 3711(f).”
- 37252: “Under the current regulations, since 2015, the Department has accepted affirmative claims, i.e., those not in collection proceedings.”
- 37253: “From 1994 to 2015, the Department’s regulation—as per earlier negotiated rulemaking—provided defense to repayment loan discharge opportunities only to borrowers who were in a collections proceedings. As a matter of practice, starting in 2015 and later codified in the 2016 regulations, the Department has (primarily in response to the closure of Corinthian Colleges, Inc.) accepted borrower defenses to repayment requests asserted affirmatively outside of the collection proceedings specifically listed in the existing regulation.”
- 37253: “We are now considering that for loans first disbursed on or after July 1, 2019, the Department return to the pre-2015 interpretation such that borrowers may only submit applications in connection with one of the specific collection proceedings listed in current § 685.206(c).”
- 37254: “The Department processed a small number of defense to repayment claims from borrowers in a collections proceeding under the existing regulation from 1994 through 2015.”
- 37254: “In those [2016] regulations, the Department took the approach it had adopted in 2015 to allow affirmative defense to repayment claims….”
- 37285: “Since 2015, the Department has considered both affirmative and defensive claims….”
- 37285: “The proposed regulations revert back to the plain meaning of the regulation, as it had been implemented prior to 2015, such that only those borrowers in a collection proceeding would have a mechanism by which they could exercise defenses to repayment.”
- 37288: “Borrowers may be disadvantaged by receiving fewer opportunities to discharge loans if the Department returns to the pre-2015 practice of accepting defense to repayment claims only from borrowers in a collections proceeding.”
• 37296: “The Department altered this approach in 2015 by allowing borrowers to file affirmative borrower defense claims, meaning claims while loans are in repayment or forbearance, and the 2016 regulations continued that approach.”

This inaccuracy or misstatement is incorporated into the Department’s analysis of the proposed regulation “relative to the existing regulatory baseline under a cost-benefit approach.” 83 Fed. Reg. 37285. The NPRM correctly identifies the (final, but delayed) 2016 regulations as the baseline for the impact analysis. 83 Fed. Reg. 37287. As required by OMB circular A-4, the Department analyzes three options: its preferred option; a more stringent option that achieves additional benefits (and presumably costs more) beyond those realized by the preferred option; and a less stringent option that costs less (and presumably generates fewer benefits) than the preferred option.

The Department identifies as its less stringent option “rescind[ing] the 2016 regulations on borrower defenses and go[ing] back to the 1995 regulations,” under which “the Department would accept only defensive borrower defense claims to repayment applications or attestations and adjudicate them, applying a State law standard.” 83 Fed. Reg. 37288.

Accurately stated, the 1995 regulations are the same as, not “less stringent” than, the baseline (2016 rule) with respect to the Department’s acceptance of affirmative claims. Likewise, the Department’s preferred alternative of limiting consideration of borrower defenses to repayment to post-default collection proceedings—something that the Department “expects” will produce a “marked reduction” in administrative burden, 83 Fed. Reg. 37296—would be a change not only from the 2016 regulation, but from the 1995 regulation as well. It would be an entirely new scenario. These inaccuracies undermine the compliance of this NPRM with Executive Orders 12866 and 13563 and inhibit the interested public’s ability to comment meaningfully on these economically significant regulations.

Further, the inaccuracy with respect to the acceptance of “affirmative” borrower defense claims impacts much more than the cost-benefit analysis. It undermines Department’s rationale that the availability of affirmative claims invites “frivolous” claims. 83 Fed. Reg. 37254. The Department has over two decades of experience under a regulation that allows for affirmative claims, and no evidence of such abuse.

For the foregoing reasons, I respectfully request that the Department withdraw the NPRM and resubmit its proposed regulation with an accurately stated baseline and budget impact scenarios, and allow the public additional time to comment on the proposed regulation.
Sincerely,

/s

Eileen Connor

Director of Litigation,
Project on Predatory Student Lending
Legal Services Center of Harvard Law School
(617) 390-2528
econnor@law.harvard.edu

cc:  Alex Hunt, Branch Chief, Information Policy, OMB
     Sharon Mar, Senior Advisor to the Deputy Administrator, OMB
     Elizabeth McFadden, Deputy General Counsel, U.S. Department of Education
Here’s a revised and consolidated recap of our experience:

Our joint recollections of ED experience with assertion of state law-based claims against schools as defenses to repayment of Direct Loans pursuant to 34 CFR 685.206(c) is as follows:

1999 – 2003: International Business College:
- Unpaid refunds: In 1998, when IBC closed, the HEA did not include a provision making failure to pay a refund grounds for partial discharge of a student loan, a provision now found in 20 USC 1087(c)(1). OIG documented dozens of instances in which the school owed, but failed to pay, refunds. Since refunds were owed by the school under the terms of the enrollment contract, failure to pay the refund was a breach of contract. As noted in the IBC memo we issued in 2003, ED “credited the unpaid refunds owed by IBC as a partial defense to repayment.” This was an application of the DL regulation to unpaid refunds.
- Misrepresentations: In 2003, a group of borrowers who had sued IBC for misrepresentation and obtained a judgment against the school presented that claim as a defense to repayment of their Direct Loans. (b)(5)

2003 - University of Michigan – single DL borrower claimed chiefly that school committed educational malpractice (tort), committed fraud by misrepresenting its intentions with respect to meeting his academic goal. Our discovery led to rejection of the claims as not cognizable under state law (educational malpractice) and factually unsupported.

2009 – MBTI: Federal district court action by Student borrowers who asserted claims against the school (then closed) in a suit against the school, ED, several guarantors, and lenders to challenge enforcement of their FFELP and (as to 15 of the borrowers) Direct Loans. ED and other defendant loan holders settled with reduction in amounts owed in return for reaffirmation of balance and share of potential recovery from school.

2011- Life University – single Direct Loan borrower claimed that chiropractic school violated state education law, committed fraud, and breached his contract with the school. The borrower had used FFELP loans to finance his education, then refinanced using a Direct Consolidation Loan. Consolidation Loans discharge all the borrower’s rights and obligations under the original loans, and the Direct Loan was not the loan used to finance the education. The defense was, we believe, rejected (draft denial letter attached).
From: Burton, Vanessa
Sent: Friday, March 20, 2015 10:10 AM
To: DiPaolo, John; Marinucci, Fred
Cc: Jenkins, Harold; Ament, Aaron; Siegel, Brian; Scaniffe, Dawn; Varnovitsky, Natasha
Subject: RE: recap of ED experience with state law claims as defenses to Direct Loans

From: DiPaolo, John
Sent: Friday, March 20, 2015 9:41 AM
To: Burton, Vanessa; Marinucci, Fred
Cc: Jenkins, Harold; Ament, Aaron; Siegel, Brian; Scaniffe, Dawn; Varnovitsky, Natasha
Thanks.
John

Privileged Deliberative Confidential

John K. DiPaolo
Deputy General Counsel
U.S. Department of Education
(w) 202-401-0342
(m) 202-603-9511

From: Burton, Vanessa
Sent: Friday, March 20, 2015 9:34 AM
To: DiPaolo, John; Marinucci, Fred
Cc: Jenkins, Harold; Ament, Aaron; Siegel, Brian; Scaniffe, Dawn; Varnovitsky, Natasha
Subject: RE: recap of ED experience with state law claims as defenses to Direct Loans

From: DiPaolo, John
Sent: Friday, March 20, 2015 5:17 AM
To: Marinucci, Fred
Cc: Jenkins, Harold; Ament, Aaron; Burton, Vanessa; Siegel, Brian; Scaniffe, Dawn; Varnovitsky, Natasha
Subject: RE: recap of ED experience with state law claims as defenses to Direct Loans

Thanks again.
John
From: Marinucci, Fred  
Sent: Thursday, March 19, 2015 5:39 PM  
To: DiPaolo, John  
Cc: Jenkins, Harold; Ament, Aaron; Burton, Vanessa; Siegel, Brian; Scaniffe, Dawn; Varnovitsky, Natasha  
Subject: recap of ED experience with state law claims as defenses to Direct Loans

Our joint recollections of ED experience with assertion of state law-based claims against schools as defenses to repayment of Direct Loans pursuant to 34 CFR 685.206(c) is as follows:

1999 – 2003: International Business College:
- Unpaid refunds: In 1998, when IBC closed, the HEA did not include a provision making failure to pay a refund grounds for partial discharge of a student loan, a provision now found in 20 USC 1087(c)(1). OIG documented dozens of instances in which the school owed, but failed to pay, refunds. Since refunds were owed by the school under the terms of the enrollment contract, failure to pay the refund was a breach of contract. As noted in the IBC memo we issued in 2003, ED “credited the unpaid refunds owed by IBC as a partial defense to repayment.” This was an application of the DL regulation to unpaid refunds.
- Misrepresentations: In 2003, a group of borrowers who had sued IBC for misrepresentation and obtained a judgment against the school presented that claim as a defense to repayment of their Direct Loans. As explained in the Feb. 10, 2003 memo, we advised FSA that the borrowers had proven their claims and that the claims should be recognized as defenses to repayment of their Direct Loans.

2009 – MBTI: Federal district court action by Student borrowers who asserted claims against the school (then closed) in a suit against the school, ED, several guarantors, and lenders to challenge enforcement of their FFELP and (as to 15 of the borrowers) Direct Loans. ED and other defendant loan holders settled with reduction in amounts owed in return for reaffirmation of balance and share of potential recovery from school.
Fred J. Marinucci
Deputy Asst. General Counsel
For Postsecondary Education
400 Maryland Ave. SW
Washington DC 20202
(202) 401-6287
MEMORANDUM

DATE: February 6, 2001

TO: Dan Hayward, Director, Student Channel Repayment, Student Financial Assistance

FROM: Vanessa Santos, General Attorney Division of Postsecondary Education

SUBJECT: Interstate Business College, ND Former Students' Defense to Repayment of their Direct Loans

INTRODUCTION: This memorandum is written in response to correspondence from attorney Dale Craft on behalf of his 25 clients who were former Interstate Business College ("IBC") students. He is requesting that we recognize his clients' defense to repayment of their Direct Loans pursuant to 34 C.F.R. §685.206(c). The 25 students include:

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1 Two of the 25 "students", Linda Barth and Vicki Bergman, are actually parents who obtained PLUS loans for their daughters, Christy Turso and Dawn Weaver respectively, to attend IBC. All references to "the students" will include these two parents.
These students are presenting the same defense to repayment of their Direct Loans as [name] and [name] did, which was addressed in my October 4, 2000 Memorandum. Attached as Exhibit A. As Ms. [name] and Ms. [name] did, these 25 students contend that IBC’s false representations, which induced them to enroll into IBC and obtain Direct Loans, constitute a defense sufficient to avoid repayment of their Direct Loans. Under the Direct Loan Regulations, a borrower can avoid repayment on the loan if he or she “asserts as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.” 34 C.F.R. §685.206(c). The Department will only recognize such claims as a defense against repayment if the school’s act or omission has a clear, direct relationship to receipt or distribution of the loan or to the school’s provision of educational services for which the loan was provided: 60 Fed. Reg. 37768 (Notice of Interpretation, July 21, 1995). Thus, these 25 students have to prove three elements in order for their claims to be recognized: (1) that IBC engaged in wrongful conduct and that such conduct gives rise to a legal cause of action under State law (in this case North Dakota law); (2) that IBC’s actions were directly related to the receipt or distribution of their Direct Loans; and (3) that they were damaged as a result of IBC’s actions.

In evaluating the students’ claim, I reviewed the following: (1) my October 4, 2000 memorandum and underlying documentation; (2) letters from Mr. Craft wherein he alleges that IBC induced the students into enrolling into their educational programs and obtain Direct Loans through material misrepresentations and, as a result of IBC’s wrongful conduct, the students should be relieved of their obligation to repay their Direct loans; (3) Stipulation agreements, which ended four different lawsuits brought by former students against IBC; (4) the North Dakota statutes and case law; and (5) Education’s relevant regulations and interpretation of those regulations.

After careful consideration of these documents and the specific facts of these students’ cases, all of the 25 students, except [name], have adequately established sufficient causes of action against IBC under North Dakota law for negligent misrepresentation. Further, these 24 students have established that IBC’s wrongful actions were directly related to their receipt of the Direct Loans and that they have been damaged as a result of IBC’s actions in amounts sufficient to offset the full amounts due on their Direct loans. Since [name] filed suit against IBC

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2 According to the records I received from the Direct Loan Program, [name] does not have any Direct Loans. Therefore, this Memo, and the decision herein, does not apply to her. If it is determined that she does have Direct Loans that are due and owing, given the fact that IBC admitted to engaging in negligent misrepresentation with regard to her enrollment, she should be relieved of her obligation to repay her Direct loans.
has not yet been reduced to a judgment or a Stipulation, I am unable to make a recommendation on her defense to repayment. If, at some point in the future, IBC stipulates or it is determined that IBC engaged in fraud or negligent misrepresentation, her claim will be reviewed at that time.

**DISCUSSION: Factual Background:** IBC closed on January 22, 1998. The owner of the school, Susan Jensen, later pled guilty to failing to return to the Department unearned financial aid for 278 students who either withdrew or stopped attending before they completed their educational program between February 16, 1996 and November 20, 1997. Ms. Jensen was sentenced to 18 months in prison and was ordered to pay $914,000.00 in restitution to Education. As a result of IBC's closure, Education gave those students who qualified a “Closed School Discharge” or a credit for the unpaid refunds owed by IBC as a partial defense to repayment. The following students received a credit for unpaid refunds: [redacted] ($278.75) and [redacted] ($1,200.24). The following students received a refund for their Direct Loans: [redacted] ($2,741.00), [redacted] ($3,472.00), and [redacted] ($4,017.00). We do not have any information about whether the remaining students were among the ones who received a credit or an unpaid refund, however their names do not appear on the Inspector General’s list of students who received a refund or credit balance. Regardless, all of the students are claiming that they should not have to pay the balance on their student loan accounts.

These seventeen students were part of a lawsuit against IBC along with 23 other former students (hereinafter “40 plaintiff lawsuit”). In January 2000, the parties settled the suit and stipulated, in a settlement agreement adopted by the plaintiffs and IBC through their attorney, to the following facts which established a pattern of negligent misrepresentation under North Dakota law:

1. that IBC misrepresented the number of graduates who had jobs “in their field” and that they applied that term loosely;
2. the Accrediting Counsel for Independent Colleges and Schools defines the term “in the field” as requiring “a direct use of the skills taught in the program.” Also, ACICS defines “related field” as employment as a position that requires “an indirect use of the skills taught in the program”;
3. that based on the representations by the enrollment counselor, the Plaintiffs signed an agreement enrolling in the Medical Administrative Assistant program (MAA) and incurring thousands of dollars in loan debt;
4. that the program was not accredited by any accrediting agency;
5. that the graduates of this program were ineligible to take the certification exam as a Medical Assistant until they had one year of full-time work experience in a position “in their field”;

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3 According to the Inspector General’s audit report, Ms. Bauer Hill did receive a $1,531.00 refund.
that graduation with a degree as an MAA, without being certified, gives candidates no greater chance of employment or pay grade, than would be available without the degree;

7. that it was critical that the training received at IBC enable plaintiffs to secure employment qualifying graduates for the exam;

8. that IBC's past employment placement was lower than stated during the enrollment interview;

9. that the enrollment counselor had no personal knowledge of the placement statistics or of the meaning of "in the field" as defined by the accrediting agencies nor did she intend to deceive the students with her misstatements;

10. that there was no evidence that Susan Jensen personally participated in the preparation of the enrollment materials or that she had any intent to deceive;

11. that the Plaintiffs should be awarded damages in the amount of three times their enrollment contract, pursuant to NDCC §15-20.4-094, lost wages, books and travel expenses and miscellaneous expenses;

12. that the lawsuit be dismissed.

The court entered the Stipulation and issued judgments in favor of the plaintiffs, thus, concluding the lawsuit. The facts in this suit were conclusively established by the stipulation agreement between the litigation parties and not by a court or jury. However, because IBC stipulated to engaging in negligent misrepresentation in this lawsuit and the court issued judgments against it as a result, IBC cannot argue in any future lawsuits that it did not engage in negligent misrepresentation (under the legal theory of collateral estoppel). Thus, IBC is bound by its admission of negligent misrepresentation in all future lawsuits.

Further, it should be noted that the damage amount set forth in the Stipulation is based solely on an agreement between the litigation parties and the provable facts of each plaintiff's case. In the Stipulation, IBC admitted to engaging in negligent misrepresentation. Yet, IBC agreed to give the Plaintiffs treble damages pursuant to NDCC15-20.4-09, which is a damage provision for defendants who engage in fraud. See Footnote 4. Fraud requires a finding of an intent to deceive. IBC did not admit to such intent and specifically included in the Stipulation that neither Susan Jensen nor the IBC recruitment staff intended to deceive the students. Perhaps during the negotiations, the plaintiffs would only agree to settle if they received treble damages or the amount of damages that they would have received had they prevailed on a fraud claim. Regardless, there is an inconsistency between IBC's stipulation to negligent misrepresentation and the amount of the damage awards, which would only be warranted if IBC had stipulated to

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4 North Dakota Century Code, section 15-20.4-09 states: Any person defrauded by any advertisement or circular issued by a postsecondary educational institution, or by any person who sells textbooks to the institution or to the pupils thereof, may recover from such institution or person three times the amount paid.

5 According to Mr. Craft, [redacted] and [redacted] did not have their claims reduced to judgment because of other pending claims in their individual cases against IBC. However, since IBC admitted to engaging in negligent misrepresentation and inducing these four students into enrolling into the MA program and because IBC agreed to pay them damages based on the Stipulation, these four students will be considered in the same category as their co-plaintiffs for purposes of this Memo.
engaging in fraud. Therefore, given the discrepancy, the damage figure from this lawsuit will not be used in our analysis of other student’s claims that were not part of this lawsuit.

2. These two students were Plaintiffs in a separate lawsuit against IBC for allegations of fraud with regard to IBC’s Computer Aided Drafting (CAD) program. On January 10, 2000 the parties signed a Stipulation for Entry of Judgement in which IBC admitted to engaging in actual fraud, as defined under North Dakota law. In the stipulation, the following facts were stipulated to:

1. That based on the representations by the enrollment counselor, Ms.____ and Mr.____ signed an agreement enrolling in the CAD program and incurred in excess of $15,428.00 each in debt;
2. That IBC agents and employees negligently made oral and/or written representations which were positive assertions, in a manner not warranted by the information of the person making it, of that which was not true though the person believed it to be true, for the purpose of inducing Ms.____ and Mr.____ into contracting with IBC for educational services;
3. That IBC agents represented that Ms.____ and Mr.____ would be placed in a curriculum designed specifically and exclusively for persons interested in becoming experts in CAD;
4. That IBC agents represented that the program was taught by experienced instructors who were themselves experts in CAD;
5. That IBC agents represented that Ms.____ and Mr.____ would be supplied with computers equipped with the most advanced CAD software;
6. That IBC agents represented that the school had a 90% success rate in placing CAD graduates in the field;
7. That IBC agents represented that the program was fully accredited;
8. That IBC’s CAD program had not been specifically and exclusively designed for persons interested in becoming experts in CAD, that the instructors were not experts in CAD, that the computers were not loaded with the most advanced CAD software, that IBC had not experienced a 90% success rate in placing CAD graduates in the field, and that the CAD program was not fully accredited;
9. That IBC’s affirmative misstatements induced Ms.____ and Mr.____ to enroll in their CAD program and as a direct and proximate result of their reliance on IBC’s fraudulent statements of material facts, they sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;
10. That Ms.____ and Mr.____ should each be awarded damages in the amount of three times their enrollment contracts, pursuant to NDCC §15-20.4-09, lost wages, books and travel expenses and miscellaneous expenses.

On June 14, 2000 the North Dakota court entered the Stipulation for Entry of Judgment in favor of Ms.____ and Mr.____ thus, concluding the lawsuit. As in the 40-plaintiff suit against IBC, the facts in this suit were conclusively established by the stipulation agreement between the litigation parties and not by a court or jury. Also, as in the 40-plaintiff lawsuit, it should be
noted that the damage amount set forth in the stipulation is based solely on an agreement between the litigation parties and the provable facts of Ms. Glines and Mr. Eagle's case.

(3) These two students were Plaintiffs in a separate lawsuit against IBC for allegations of fraud with regard to IBC's Computer Information Specialist (CIS) program. The parties signed a Stipulation for Entry of Judgement in which IBC admitted to engaging in actual fraud, as defined under North Dakota law. IBC admitted:

1. That it made "positive assertions, in a manner not warranted by the information of the person making it, of that which was not true through the person believed the representation to be true, for the purpose of inducing the Plaintiffs into contracting with IBC for educational services";
2. That IBC's staff made material misrepresentations that were not true; that the CIS program was specifically and exclusively designed for persons interested in becoming experts in CIS, that the instructors were experts in CIS, that the computers were loaded with the most advanced CIS software, that IBC had experienced a 90% success rate in placing CIS graduates in-the-field, and that the CIS program was fully accredited;
3. That IBC's affirmative misstatements induced Ms. ______ and Ms. ______ to enroll in the CIS program and as a direct and proximate result of their reliance on IBC's fraudulent statements of material facts, they sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;
4. That IBC would pay Plaintiffs money damages, which would include the amount of their enrollment contract, trebled, pursuant to NDCC §15-20.4-09, lost wages books and travel expenses and miscellaneous expenses.

The stipulation was reduced to a judgment on June 14, 2000 in favor of Ms. ______ and against IBC in the amount of $52,200.00, inclusive of costs and disbursements. Judgment was also entered in favor of Ms. ______ and against IBC in the amount of $52,200.00, inclusive of costs and disbursements. As in the 40-plaintiff suit against IBC, the facts in this suit were conclusively established by the stipulation agreement between the litigation parties and not by a court or jury. Also, as in the 40-plaintiff lawsuit, it should be noted that the damage amount set forth in the stipulation is based solely on an agreement between the litigation parties and the provable facts of Ms. ______ and Ms. ______ case.

(4) Ms. ______ was a Plaintiff in her own lawsuit against IBC for allegations of fraud with regard to IBC's Medical Transcriptionist (MT) program. She and a representative from IBC signed a Stipulation for Entry of Judgement in which IBC admitted to engaging in actual fraud, as defined under North Dakota law. IBC admitted:

1. That it made "positive assertions, in a manner not warranted by the information of the person making it, of that which was not true through the person believed the
representation to be true, for the purpose of inducing Plaintiff into contracting with IBC for educational services;

2. That IBC's staff had made material misrepresentations that were not true; that the MT program had been specifically and exclusively designed for persons interested in becoming experts in MT, that the instructors were experts in MT, that the computers were loaded with the most advanced MT software, that IBC had experienced a 90% success rate in placing MT graduates in-the-field, and that the MT program was fully accredited;

3. That IBC's affirmative misstatements induced Ms. ___ to enroll in the MT program and as a direct and proximate result of her reliance on IBC's fraudulent statements of material facts, she sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;

4. That IBC would pay Ms. ____ money damages, which would include the amount of her enrollment contract, trebled, pursuant to NDCC §15-20.4-09, lost wages, books and travel expenses and miscellaneous expenses.

The stipulation was reduced to a judgment on June 14, 2000 in favor of Ms. ___ and against IBC in the amount of $23,175.00 inclusive of costs and disbursements. As in the other lawsuits against IBC, the facts in this suit were conclusively established by the stipulation agreement between the litigation parties and not by a court or jury. Also, as in the other lawsuits, it should be noted that the damage amount set forth in the stipulation is based solely on an agreement between the litigation parties and the provable facts of Ms. ___ case.

(5) Ms. ____ and Ms. __: According to correspondence from Mr. Craft and NSLDS, in 1996 these two women obtained PLUS loans for their daughters to attend IBC. Ms. ____ daughter is ___ and Ms. ____ daughter is ___. Both Ms. ___ and Ms. ____ were part of the 40-plaintiff suit against IBC. According to Mr. Craft, after obtaining the judgment in the 40-plaintiff lawsuit, he learned that these two women had PLUS loans for two of the plaintiffs in that suit. He argues that Ms. ____ and Ms. ____ claims arise out of the misrepresentations made to their daughters and thus, their obligations on the PLUS loans should be relieved. Ms. ____ obtained a PLUS loan for her daughter totaling $8,350.00 and Ms. ____ obtained a PLUS loan for her daughter totaling $4,500.00.

LEGAL ANALYSIS:

(1) IBC's Actions Violate the Applicable State Law: In evaluating a claim for a defense against repayment of a Direct loan, one must look to the law of the state where the alleged wrongful act or omission occurred. In this case, IBC's alleged wrongful actions occurred in North Dakota. Thus, we must evaluate these 24 students' claims under North Dakota law. Since IBC admitted in the Stipulations of four lawsuits referenced above, that it engaged either in negligent misrepresentation or actual fraud, the students in those lawsuits have satisfied the legal analysis necessary to determine that IBC's action violated North Dakota law. However, Ms.
(a) The students were damaged as a result of IBC's Negligent Misrepresentation:

The students in the 40-plaintiff lawsuit obtained Direct loans to pay for IBC's MA program. The stipulated facts from this lawsuit established that had these students completed the MA program, their degree or education from IBC would have no value given the fact that: (1) the program was unaccredited, (2) they would have been ineligible for a certificate, (3) they would have had to work for a full year in the medical assistant field to be able to sit for the certification exam, and (4) the job placement rate for IBC graduates was low, therefore employment was not guaranteed. Thus, the students were damaged because they incurred debts to pay tuition for an education that has no value.

Likewise, Ms. _____ and Mr. _____ obtained Direct Loans to pay for IBC's CAD program. The Stipulation of Judgment established that had they completed the CAD program, their degree or education from IBC would have no value given the fact that: (1) the program was unaccredited, (2) the program was not designed to make the students experts in CAD, the computer software was not the most advanced and the staff were not experts in CAD, and (3) the job placement rate for IBC graduates was low, therefore employment was not guaranteed. Thus, Ms. _____ and Mr. _____ were damaged because they incurred debts to pay tuition for an education that has no value.

Ms. _____ and Ms. _____ obtained Direct Loans to pay for IBC's CIS program. The Stipulation of Judgment established that had they completed the CIS program, their degree or education from IBC would have no value given the fact that: (1) the program was unaccredited, (2) the program was not designed to make the students experts in CIS, the computer software was not the most advanced and the staff were not experts in CIS, and (3) the job placement rate for IBC graduates was low, therefore employment was not guaranteed. Thus, Ms. _____ and Ms. _____ were damaged because they incurred debts to pay tuition for an education that has no value.

Similarly, Ms. _____ obtained Direct Loans to pay for IBC's MT program. The Stipulation of Judgment established that had she completed the MT program, her degree or education from IBC would have no value given the fact that: (1) the program was unaccredited, (2) the program was not designed to make the students experts in MT, the computer software was not the most advanced and the staff were not experts in MT, and (3) the job placement rate for IBC graduates was low, therefore employment was not guaranteed. Thus, Ms. _____ was damaged because she incurred debts to pay tuition for an education that has no value.

Ms. _____ and Ms. _____ both obtained PLUS loans for their daughters to be trained as Assistants. As explained in the first paragraph of this section, Ms. _____ and Ms. _____ degrees from IBC would have been worthless given the fact that: (1) the program was unaccredited, (2) they would have been ineligible for a certificate, (3) they would have had to work for a full year in the medical assistant field to be able to sit for the certification exam, and (4) the job placement rate for IBC graduates was low, therefore employment was not guaranteed. Thus, Ms. _____ and Ms. _____ were damaged in that they obtained PLUS loans to pay for their daughters' tuition for an education that has no value.
(b) **Amount of Damages**

Pursuant to the Stipulations filed in all four of the lawsuits against IBC, the damages owed to these students has been quantified as being three times their enrollment contract, plus lost wages, books, travel expenses and miscellaneous school expenses. However, as stated previously, the amount of the damages awarded in the lawsuits was governed by an agreement of the parties, not by the court or a jury. Thus, the damage awards and the formula used in these lawsuits will not be used as a measure of damages for students who were not parties to the suit.

To quantify Ms. ___ and Ms. ___ damages, we have to determine the amount of damages they could recover from IBC under state law. The recoverable damages from IBC must then be used to offset their loan obligations. Under North Dakota law, a person who has been misled by another is entitled to damages under a tort claim theory. Under this theory, a person is entitled to receive damages in an amount that will compensate her for all of her losses directly caused by the misrepresentation, whether the damages could have been anticipated or not, absent exceptional circumstances. NDCC §32-03-20. See also Delzer v. United Bank, 559 N.W.2d 531 (N.D. 1997)(case involved a contract to loan money to the Delzer’s to operate their ranch. The loan was to be paid out in two installments. The Delzers pledged all of their assets and ranch equipment as collateral, but the Bank never advanced the second installment of the loan. The Delzers lost all of their collateral and their ranch. During the trial, the evidence revealed that the Bank never intended to make the second installment to the Delzers. The court held that the Bank’s actions were deceitful and that the damage damages were foreseeable. The court awarded the Delzer’s a judgment for $1,076,000, twice the amount of their compensatory or actual damages).

Here, both Ms. ___ and Ms. ___ would be entitled to receive damages from IBC in an amount that would compensate them for all the losses directly caused by IBC’s negligent misrepresentations to their daughters. Given the fact that Ms. ___ and Ms. ___ education from IBC has virtually no value, the amount of their damages is at least the amount of tuition they paid to obtain that education. Presumably, the total amount of the PLUS loans was used to pay for a portion of Ms. ___ and Ms. ___ tuition at IBC. Thus, Ms. ___ damages equal the principal amount of the PLUS loan she obtained to pay for her daughter’s tuition minus any credit given, or $8,350.00. Likewise, Ms. ___ damages equal the principal amount of the PLUS Loans she obtained to pay for daughter’s tuition, or $4,521.25. These amounts are then used to offset the loan balances due and owing to Education on Ms. ___ and Ms. ___ student loan accounts, notwithstanding unpaid, accrued interest. Therefore, both Ms. ___ and Ms. ___ PLUS loan obligations are fully offset by the amount of their damages against IBC.

For the students in the lawsuits, there damage awards are also used to offset the loan balances due and owing to Education, notwithstanding unpaid, accrued interest. Thus, their loan obligations are fully offset by the amount of their damages against IBC.

**CONCLUSION:** Based on the foregoing, we believe that 24 students have adequately established that: (1) IBC engaged in negligent misrepresentation which is a valid cause of action under North Dakota state law, (2) IBC’s actions had a direct connection to their receipt of the
Direct loans, and (3) that they were damaged by IBC's misrepresentations in the amount of their Direct Loans. We believe that these students' claims should be recognized as a defense to collection of their Direct loans only. Further, we recommend that these students be relieved of their obligation to repay their Direct loans, provided, however, that the allegations that they have asserted against IBC are not later proven to be false. If it is proven that these students fabricated their assertions against IBC, their Direct Loan obligations should be immediately reinstated in the amount due and owing at the time relief was provided to them pursuant to the recommendation in this memorandum.

I have attached to this Memorandum a draft copy of a letter to Mr. Craft in response to his inquiries. I recommend that this letter or a similar one be sent to him with regard to his clients' loan obligations.

If you have any questions or concerns about the contents of this memo or its conclusion, please feel free to contact me at (202) 401-6007.

Exhibits/Attachments

cc: Rosa Wright, Direct Loan Program
    Adam Evans, AWG Branch Chief
    Debra Wiley, OSFA Ombudsman
    Naomi Randolph, Closed Schools
February 6, 2001

Dale J. Craft, Esq.
1111 Westrac Drive, Suite 108
P.O. Box 29
Fargo, North Dakota 58107-0029

Re: Defense to Repayment of Direct Loan Debt on behalf of:

Dear Mr. Craft:

I am in receipt of your requests, on behalf of your 25 clients, to recognize their defense to repayment of their Direct loans, pursuant to 34 C.F.R. §685.206(c). In conjunction with our legal counsel, the officials in the Direct Loan program have reviewed the specific facts of your clients’ cases, the materials you have provided, and the current law in North Dakota. After careful consideration of each student’s specific situation, we have determined that all 25 of your clients, except, have adequately established a sufficient cause of action against IBC for negligent misrepresentation under North Dakota law. As a result, they will be relieved of their obligations to repay their Direct Loans provided, however, that it is not later proven that their allegations against IBC were false. If, at some point in the future, it is proven that their allegations against IBC were untrue, their Direct Loan obligation will be reinstated retroactive from the date they were relieved of that obligation. At this time, we are unable to make a determination about Ms. ___ claim given the posture of her suit against IBC. If her suit against IBC is resolved in her favor, we will be reconsider her defense to repayment and make a final determination.

A copy of this letter will be forwarded to the appropriate official at the Direct Loan office to credit your clients’ accounts. If you have any further questions or comments, please feel free to contact me, toll free, at (202) 205-2672.

Sincerely,
Dan Hayward
Director, Student Channel Repayment
Student Financial Assistance
MEMORANDUM

DATE: February 20, 2001

TO: Dan Hayward, Director, Student Channel Repayment, Student Financial Assistance

FROM: Vanessa Santos, General Attorney Division of Postsecondary Education

SUBJECT: Interstate Business College Defense to Repayment of her Direct Loans

INTRODUCTION: This memorandum is a follow-up to my memorandum dated February 6, 2000 with regard to attorney Dale Craft’s 25 clients’ defenses to repayment of their Direct Loans pursuant to 34 C.F.R. §685.206(c). In my February 6th memo, I indicated that I did not have enough information on the student, [REDACTED], to evaluate her claim. However, on February 12, 2000 I received a copy of a Stipulation for Entry of Judgment resolving Ms. [REDACTED] suit against IBC. After reviewing the stipulation, I have determined that Ms. [REDACTED] has adequately established that IBC violated North Dakota law for fraud, that IBC’s wrongful actions were directly related to her receipt of the Direct Loans and that she has been damaged as a result of IBC’s actions in amounts sufficient to offset the full amount due on her Direct loans. I hereby incorporate by reference the Factual Background and Legal Analysis Sections of my February 6th Memorandum and find that Ms. [REDACTED] claim should be recognized as a defense to repayment of her Direct Loan.

DISCUSSION: Ms. [REDACTED] was a Plaintiff in a separate lawsuit against IBC for personal injuries resulting from IBC’s fraudulent conduct with regard to it’s Business Management Program (BMP). On February 12, 2001 the parties signed a Stipulation for Entry of Judgement in which IBC admitted to engaging in fraud, as defined under North Dakota law. In the stipulation, the following facts were stipulated to:

1. That based on the representations by IBC staff, Ms. [REDACTED] signed an agreement enrolling in the BMP and incurred in excess of $15,428.00 in student loan debt;
2. That IBC agents and employees negligently made oral and/or written representations which were positive assertions, in a manner not warranted by the
information of the person making it, of that which was not true though the person believed it to be true, for the purpose of inducing Ms. [REDACTED] into contracting with IBC for educational services;

3. That IBC agents represented that Ms. [REDACTED] would be placed in a curriculum designed specifically and exclusively for persons interested in becoming experts in Business Management;

4. That IBC agents represented that the program was taught by experienced instructors who were themselves experts in Business Management;

5. That IBC agents represented that Ms. [REDACTED] would be supplied with computers equipped with the most advanced computerized accounting and business management software;

6. That IBC agents represented that the school had a 90% success rate in placing BMP graduates in-the-field;

7. That IBC agents represented that the program was fully accredited;

8. That IBC’s BMP program had not been specifically and exclusively designed for persons interested in becoming experts in business management, that the instructors were not experts in business management, that the computers were not loaded with the most advanced computerized accounting and business management software, that IBC had not experienced a 90% success rate in placing BMP graduates in-the-field, and that the BMP was not fully accredited;

9. That IBC’s affirmative misstatements induced Ms. [REDACTED] to enroll in its program and as a direct and proximate result of her reliance on IBC’s fraudulent statements of material facts, she sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;

10. That Ms. [REDACTED] should be awarded damages in the amount of three times her enrollment contract, pursuant to NDCC §15-20.4-09, lost wages, books and travel expenses and miscellaneous expenses.

As in the other cases discussed in my previous memorandum, the facts in this suit were conclusively established by the stipulation agreement between the litigation parties and not by a court or jury. Also, the damage amount set forth in the stipulation is based solely on an agreement between the litigation parties and the provable facts of Ms. [REDACTED] case.

LEGAL ANALYSIS:

(1) IBC’s Actions Violate the Applicable State Law: Since IBC admitted in the Stipulations that it engaged fraud, Ms. [REDACTED] has satisfied the legal analysis necessary to determine that IBC’s action violated North Dakota law.

(2) Ms. [REDACTED] Relied on IBC’s Misrepresentations to Obtain the Direct Loans: IBC admitted in the Stipulation that Ms. [REDACTED] relied upon the IBC staff’s “positive assertions of fact” about the Business Management program and based on these assertions was induced into
enrolling in the program and incurring student loan debt. Thus, pursuant to IBC's admissions and the Stipulation, Ms. has proven that IBC's wrongful conduct was directly related to her enrollment in IBC and her receipt of the Direct Loans.

(3) **Damage**

(a) **Ms. was damaged as a result of IBC's Fraud**

Ms. obtained Direct loans to pay for IBC's Business Management program. The stipulated facts from this lawsuit established that if she had completed the BMF program, her degree or education from IBC would have no value given the fact that: (1) the program was unaccredited, (2) the program was not designed to make the students experts in business management, the computer programs were not the most advanced and the staff were not experts in business management, and (3) the job placement rate for IBC graduates was low, therefore employment was not guaranteed. Thus, she was damaged because she incurred a debt to pay tuition for an education that has no value.

(b) **Amount of Damages**

Pursuant to the Stipulation, the damages owed to Ms. have been quantified as being three times her enrollment contract, plus lost wages, books, travel expenses and miscellaneous school expenses. Thus, the damage awards should be used to offset Ms.' loan balance that is due and owing to Education, notwithstanding unpaid, accrued interest. Thus, her loan obligation is fully offset by the amount of her damages against IBC.

**CONCLUSION:** Based on the foregoing, I believe that Ms. has adequately established that: (1) IBC engaged in negligent misrepresentation which is a valid cause of action under North Dakota state law, (2) IBC's actions had a direct connection to her receipt of the Direct loans, and (3) that she was damaged by IBC's misrepresentations in the amount of her Direct Loans. I believe that Ms.' claim should be recognized as a defense to repayment of her Direct loans only. Further, we recommend that Ms. be relieved of her obligation to repay her Direct loans, provided, however, that the allegations that she has asserted against IBC are not later proven to be false. If it is proven that she fabricated her assertions against IBC, her Direct Loan obligation should be immediately reinstated in the amount due and owing at the time relief was provided to her pursuant to the recommendation in this memorandum.

I have attached to this Memorandum a draft copy of a letter to Mr. Craft. I recommend that this letter or a similar one be sent to him with regard to his clients' loan obligations. If you have any questions or concerns about the contents of this memo or its conclusion, please feel free to contact me at (202) 401-6007.

Exhibits/Attachments
Interstate Business College Memo

In Re: [Redacted]

February 20, 2001

Page 4 of 4

cc: Rosa Wright, Direct Loan Program
    Adam Evans, AWG Branch Chief
    Debra Wiley, OSFA Ombudsman
    Naomi Randolph, Closed Schools
UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE OMBUDSMAN
OFFICE OF STUDENT FINANCIAL ASSISTANCE

February 20, 2001

Dale J. Craft, Esq.
1111 Westrac Drive, Suite 108
P.O. Box 29
Fargo, North Dakota 58107-0029

Re: Defense to Repayment of Direct Loan Debt
Student Name: [Redacted]

Dear Mr. Craft:

I am in receipt of your request, on behalf of your client [Redacted], to recognize her defense to repayment of her Direct loans, pursuant to 34 C.F.R. §685.206(c). In conjunction with our legal counsel, the officials in the Direct Loan Program have reviewed the specific facts of Ms. [Redacted] case, the materials you have provided, and the current law in North Dakota. After careful consideration of her specific situation, we have determined that Ms. [Redacted] has adequately established a sufficient cause of action against IBC for fraud under North Dakota law. As a result, she will be relieved of her obligation to repay her Direct Loans provided, however, that it is not later proven that her allegations against IBC were false. If, at some point in the future, it is proven that her allegations against IBC were untrue, her Direct Loan obligation will be reinstated retroactive from the date she was relieved of that obligation.

A copy of this letter will be forwarded to the appropriate official at the Direct Loan office to credit your clients' accounts. If you have any further questions or comments, please feel free to contact me, toll free, at (202) 205-2672.

Sincerely,

Dan Hayward
Director, Student Channel Repayment
Student Financial Assistance

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-2110
enrolling in the program and incurring student loan debt. Thus, pursuant to IBC's admissions and
the Stipulation, Ms.________ has proven that IBC's wrongful conduct was directly related to
her enrollment in IBC and her receipt of the Direct Loans.

(3) Damages:

(a) Ms._________ was damaged as a result of IBC's Fraud

Ms._________ obtained Direct loans to pay for IBC's Business Management program. The
stipulated facts from this lawsuit established that if she had completed the BMP program, her
degree or education from IBC would have no value given the fact that: (1) the program was
unaccredited, (2) the program was not designed to make the students experts in business
management, the computer programs were not the most advanced and the staff were not experts
in business management, and (3) the job placement rate for IBC graduates was low, therefore
employment was not guaranteed. Thus, she was damaged because she incurred a debt to pay
tuition for an education that has no value.

(b) Amount of Damages

Pursuant to the Stipulation, the damages owed to Ms._________ has been quantified as being
three times her enrollment contract, plus lost wages, books, travel expenses and miscellaneous
school expenses. Thus, the damage awards should be used to offset Ms._________ loan
balance that is due and owing to Education, notwithstanding unpaid, accrued interest. Thus, her
loan obligation is fully offset by the amount of her damages against IBC.

CONCLUSION: Based on the foregoing, I believe that Ms._________ has adequately
established that: (1) IBC engaged in negligent misrepresentation which is a valid cause of action
under North Dakota state law, (2) IBC's actions had a direct connection to her receipt of the
Direct loans, and (3) that she was damaged by IBC's misrepresentations in the amount of her
Direct Loans. I believe that Ms._________ claim should be recognized as a defense to
repayment of her Direct loans only. Further, we recommend that Ms._________ be relieved of
her obligation to repay her Direct loans, provided, however, that the allegations that she has
asserted against IBC are not later proven to be false. If it is proven that she fabricated her
assertions against IBC, her Direct Loan obligation should be immediately reinstated in the
amount due and owing at the time relief was provided to her pursuant to the recommendation in
this memorandum.

I have attached to this Memorandum a draft copy of a letter to Mr. Craft. I recommend that this
letter or a similar one be sent to him with regard to his clients' loan obligations. If you have any
questions or concerns about the contents of this memo or its conclusion, please feel free to
contact me at (202) 401-6007.

Exhibits/Attachments
MEMORANDUM

TO: Dan Hayward
Student Channel Repayment
Federal Student Aid

FROM: Vanessa A. Santos
Division of Postsecondary Education

DATE: February 11, 2003

SUBJECT: Interstate Business College, ND Former Students' Defense to Repayment of their Direct Loans

INTRODUCTION:

This memorandum addresses correspondence dated February 20, 2002 from attorney Dale Craft on behalf of his clients, former Interstate Business College ("IBC") students. He requests that we recognize his clients' claims as a complete defense to repayment of their Direct Loans pursuant to 34 C.F.R. §685.206(c). Like Craft’s other clients,1 the 58 borrowers listed in Attachment A to this memorandum contend that IBC's false representations induced them to enroll into IBC and obtain Direct Loans and constitute fraud under North Dakota law, which permits them to avoid repayment of their Direct Loans under 34 C.F.R. §685.206(c).

Direct Loan regulations provide that a borrower may avoid repayment on a Direct loan to the extent that he or she "asserts as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. §685.206(c). The Department will only recognize such claims as a defense against repayment if the school’s act or omission has a clear, direct relationship to receipt or disbursement of the loan or to the school’s provision of educational services for which the loan was provided. 60 Fed. Reg. 37768 (Notice of Interpretation, July 21, 1995). Thus, in order to establish a defense to repayment, these 58 students must prove three elements: (1) that IBC engaged in wrongful conduct that gives rise to a legal cause of action under State law (in this case North Dakota law); (2) that IBC’s actions were directly related to the receipt or distribution of their Direct Loans or the provision of educational services paid for with those loans; and (3) that they were in fact injured as a result of IBC’s actions, and that those injuries

1 Mr. Craft’s previous clients (see my February 2001 memo) as well as (see my October 4, 2000 Memorandum)

2 Eleven of the 58 are actually parents who obtained PLUS loans for their children. All references to “the students” will include these parents.
can be measured as a specific damage amount. If the borrowers prove all three elements, the amount of that damage is the amount recognized as a defense to repayment.

In evaluating the borrowers’ claims, I reviewed the following: (1) my October 4, 2000 and February 2001 memoranda and underlying documentation; (2) letter from Mr. Craft dated February 20, 2002; (3) the Complaint and Default Judgment from the lawsuit brought by these 58 students against IBC, Holzer et al. v. Red River Educational Services, Inc., Civil Case No. 09-02-C-476, District Court, County of Cass, State of North Dakota; (4) the North Dakota statutes and case law; (5) Education’s relevant regulations and interpretation of those regulations; and (6) IBC’s prior stipulations of fraud in previous lawsuits.

After careful consideration of these documents and the specific facts of these students’ cases, I conclude that all 58 borrowers have adequately established each prong of the three-part test and should be relieved of the full amount of their Direct Loan obligations.

DISCUSSION:

**Factual Background:** As stated in my previous Memos, IBC closed on January 22, 1998. The owner of the school, [REDACTED], later pled guilty to failing to return to the Department unearned financial aid for 278 students who either withdrew or stopped attending before they completed their educational program between February 16, 1996 and November 20, 1997. Ms. Jensen was sentenced to 18 months in prison and was ordered to pay $914,000.00 in restitution to Education. As a result of IBC’s closure, Education gave those students who qualified a “Closed School Discharge” or a credit for the unpaid refunds owed by IBC as a partial defense to repayment. Of the 58 students involved here, eight received a credit for unpaid refunds.3

We do not have any information about whether the remaining students were among the ones who received a credit for an unpaid refund; however their names do not appear on the Inspector General’s list of students who were owed a refund or had a credit balance. Regardless, all 58 students now claim that they should not have to pay any remaining balance on their Direct student loan accounts.

**Programs in which claimants were enrolled:** The 58 students involved in the instant case were enrolled in one of the following 9 programs:

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<th>SSN</th>
<th>Amount</th>
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<tr>
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1. Medical Administrative Assistant Program (MAAP): (30)¹
2. Business Management Program (BMP): (9)²
3. Computer Information Specialist Program (CISP) (1)³
4. Computer Travel Business Management Program: (8)⁴
5. Computer Accounting Program: (3)⁵
6. Dental Assistance Program: (1)⁶
7. Administrative Legal Assistant Program: (4)⁷
8. Computer Programming Program: (2)⁸

Mr. Craft's Prior Litigation with IBC: Mr. Craft has represented numerous IBC students and/or graduates in their suits against IBC for fraud.¹² IBC stipulated to fraudulent conduct with regard to five of its academic programs: the MAAP, BMP, CISP, the Computer Aided Drafting Program (CADP), and the Medical Transcription Program (MTP). The specific acts which IBC stipulated to committing differ somewhat from case to case, but generally include misrepresentations regarding its placement success, the accreditation status of the program, and whether completion of the IBC program qualified or otherwise equipped the student to gain and

¹² In a telephone call on January 21, 2003, Mr. Craft indicated that he did not have any other clients seeking relief from the Department due to IBC’s misconduct. He stated that he had retired from the practice of law and that his partner, Gene Doeling, was doing corporate work and was not interested in taking any more of these IBC cases.
Interstate Business College Memo  
February 11, 2003  
Page 4 of 8

retain employment in the field. The five cases and the specific stipulations are described in detail in Attachment B.

LEGAL ANALYSIS:

1. Are the Actions Allegedly Taken by IBC Those for Which Applicable State Law Permits a Party to Sue a School for Damages?

The first step in evaluating a claim against a school for a defense against repayment of a Direct loan is determining whether the grievance raised by the borrower describes an injury for which State law would permit the borrower to sue the school for a financial recovery. To do so, one must look to the law of the state where the alleged wrongful act or omission occurred. In the instant case, IBC’s alleged wrongful actions occurred in North Dakota. Thus, we must evaluate these 58 students’ claims under North Dakota law, in conjunction with IBC’s previous admissions of fraud with regard to the MAAP, BMP, CISP, CADP and MTP.

Under the North Dakota Code, §9-03-08, actual fraud “consists of any of the following acts committed by a party to a contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into a contract:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true;
3. The suppression of that which is true by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or
5. Any other act fitted to deceive.”

Under paragraph 2 of this section, North Dakota courts have recognized a statutory claim for relief based on negligent misrepresentation when the misrepresentation is given to induce a person into a contract. See Bourgeois v. MDU, 466 N.W.2d 813 (N.D. 1991). The 58 borrowers claim that IBC made misrepresentations of various kinds, and withheld the truth of other facts, which induced them to enroll in IBC and borrow Direct Loans to finance that enrollment. The grievance would appear to be one that North Dakota law recognizes as a valid basis for a suit for damages.

2. Were IBC’s Alleged Actions Directly Related to the Students’ Receipt of the Direct Loans or the Provision of Educational Services Financed by those Loans?

The second step is determining whether the cause of action against the school is one related to the receipt of the loan or the provision of services paid for with the loan. The stipulations in the prior lawsuits help resolve this question. In the lawsuits referenced above, IBC admitted that the students who were plaintiffs in those cases had relied on the IBC staff’s misrepresentations regarding the MAAP, BMP, CISP, CADP, and MTP and based on these assertions were induced into enrolling in the programs and incurring student loan debt. IBC admitted that its ‘agents and employees negligently made oral and/or written representations which were positive assertions
... for the purpose of inducing the plaintiff[s] into contracting with IBC for educational services." IBC further admits that the "affirmative misstatements ... induced the plaintiff[s] to enroll in IBC's program and as a result [the plaintiffs] were damaged." Thus, by virtue of IBC's previous admission of fraud, the students in the instant case who were enrolled in the MAAP, BMP, CISP, CADP, and MTP have proven that IBC's actions were directly related to the receipt or distribution of their Direct Loans. With regard to the students in this case who were enrolled in IBC's other programs, in the default judgment the court found that IBC's false assertions of material facts as to the various programs induced the students to enroll into contracts with IBC and to obtain loans. See §C-D of Judgment. Based on the default judgment and IBC's prior admissions, I believe it is reasonable to conclude that these 18 students have shown that IBC's actions were directly related to the receipt or disbursement of their Direct Loans and the provision of services paid for with those loans.

(3) Damages:

(a) Did the borrowers prove that they were injured as a result of IBC's Negligent Misrepresentations?

The third step in analyzing whether a school-related grievance is in fact a defense to repayment of specific borrowers' Direct Loans is a two-part test of the facts: have the borrowers proven that the offending conduct of the school actually occurred, and if so, how much injury have they proven? To determine whether the claimed misconduct actually occurred in this instance, one looks to the stipulated facts from previous lawsuits against IBC, which established that students in the MAAP, BMP, CISP, CADP, or MTP who completed or would have completed their academic programs gained little or no value from their degree of education from IBC because: (1) the programs were not accredited, (2) they would have had to work for a full year in the medical assistant field to be able to sit for the certification exam (MAAP), (3) the program was not designed to make the students experts in the CISP, CADP, or MTP; (4) the computer software was not the most advanced and the staff were not experts in their fields, and (5) the job placement rate for IBC graduates was significantly lower than 90% pronounced, therefore employment was not guaranteed. Here, because IBC previously stipulated to committing fraud with regard to the MAAP, BMP, CISP, CADP, and MTP, that stipulation prevents IBC from disputing in any future lawsuit whether it engaged in such fraud with regard to these programs. Of the 58 students involved in this particular case, 40 of them obtained loans for the MAAP, BMP and CISP. Given IBC's previous admission of fraud with respect to these programs, the 40 students in the MAAP, BMP, and CISP have proven that IBC actually engaged in the wrongful conduct they allege, as well as that such conduct gives rise to a legal cause of action under North Dakota law.

The remaining 18 students who were enrolled in the Computer Travel Business Management Program, Computer Accounting Program, (Executive) Administrative Legal Assistant Program, Dental Assistance Program, and Computer Programming programs, do not have the benefit of IBC's prior admission of fraud. Thus, we must evaluate whether the claimed misconduct

13 IBC is considered to be "collaterally estopped" from disputing in any other lawsuit - even one involving different plaintiffs - those facts established against IBC in a prior lawsuit involving the school.
actually occurred using other available evidence. These borrowers did obtain a default judgment against IBC in *Holzer v. Red River Educational Services, Inc.* On December 26, 2001 Mr. Craft's firm issued a Summons on The Red River Educational Services, Inc., IBC to answer the complaint filed by his clients. The summons was served on January 8, 2002 to Susan Jensen at 3518 Serene Way in Lynnwood, Washington. In the complaint, the students alleged that IBC made affirmative misstatements to induce them to enroll in IBC's programs and that, as a result, they were damaged. IBC failed to answer. On February 13, 2002, a default judgment was entered in favor of the students due to IBC's failure to answer the complaint. The Judgment included a detailed description of IBC's fraudulent actions as to each student and the treble damage amount that each student was entitled to, which totaled $1,847,850.00 plus costs of $155.00.

A default judgment is a judgment entered against a party who has failed to defend against a claim that has been brought by another party. Blacks Law Dictionary, 6th ed. Under North Dakota law, once a complaint is filed and a summons is issued on a defendant, the defendant has 20 days in which to answer the complaint. If the defendant fails to answer the complaint within the stated time frame, the plaintiff may file a motion with the court to enter judgment in its favor due to the defendant's failure to file a timely answer. If the plaintiff shows that the summons and complaint were properly served on the defendant to satisfy due process and the defendant is not on active military duty, the court will enter a default judgment.

The courts have inherent power to dismiss an action or enter a default judgment to ensure the orderly administration of justice and the integrity of their orders. *Phoceans Sous-Marine v. U.S. Phoamarin, Inc.,* 682 F.2d 802 (9th Cir. 1982) (citing *Landis v. North American Co.,* 299 U.S. 248, 81 L.Ed. 153, 57 S. Ct. 163 (1936); *Fendler v. Westgate-California Corp.,* 527 F.2d 1168, 1170 (9th Cir. 1975); *O'Brien v. Sinatra,* 315 F.2d 637, 641 (9th Cir. 1963). A default judgment is awarded not because the court is necessarily satisfied that the claim has substantive merit (although it may scrutinize the claim before awarding judgment) but because the party in default failed to offer any defense. Restatement 2d of Judgments, §3.

A default judgment binds the defendant like any other judgment. However, because a default judgment is not the result of actual opposition by the defendant, it lacks the credibility of, for example, those judgments in the other four cases against IBC (see Attachment B), which were based on stipulations agreed to the defendant (IBC) in the course of active defense of those cases. In this instance, although the court had the opportunity to scrutinize the students' claims prior to entering default judgment, there is no way to determine whether the court in fact scrutinized the complaint, or simply relied on IBC's failure to answer. Particularly where a default judgment is entered after a school has closed and under circumstances in which the

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14 Under North Dakota law "when a defendant fails to answer or appear within the time prescribed, the court upon proof of default by affidavit may render judgment against defendant. If action is upon written instrument, same must be produced and filed. In other cases, proof must be submitted and court may in its discretion submit any question involved to a jury. If any appearance is entered by defendant, he must be given eight days notice of application for default judgment. If summons was served by publication plaintiff may be required to file satisfactory security to abide the order of the court relating to restitution of any property or money which may be collected in case defendant is thereafter permitted to defend and shall succeed in his defense." N.D.R., Civ. P., Rule 55 (2002).
principals of the school would have little economic motive to defend against the suit, a default judgment simply proves that the defendant — or those in control of the defendant — either lacked the resources to defend or saw no reason to defend. Accordingly, we see little in the default judgment itself that would be persuasive evidence that IBC committed the misconduct charged by these 18 borrowers.

However, we can also look to other evidence that has been provided to determine whether these 18 students have proven that their charges against IBC actually occurred. In four other cases that IBC actually defended, as stated previously, IBC admitted to engaging in fraud with regard to the MAAP, BMP, CISP, CADP, and MTP, that induced students to enroll on those programs and obtained student loans and caused them damage. It is reasonable to infer that if IBC was engaging in fraud and making material misstatements with regard to instructors' qualifications, quality of the equipment, graduate placement rate, and accreditation with respect to five other programs, that it did so with respect to its other programs as well. The complaint and default judgment entered against IBC in Holzer v. Red River cite the same kind of fraudulent misrepresentations and inducements with regard to each student, as those stipulated to in other cases with respect to the MAAP, BMP, CISP, CADP, and MTP. Thus, it is reasonable to infer, based on the scope of IBC's misconduct as proven from the stipulated judgments and the criminal investigation and prosecution, that IBC actually committed fraud and made the misrepresentations charged by these 18 students in their programs.

(b) Amount of Damages:

To quantify the students' damages, we have to determine the amount of damages they could recover from IBC under state law. The recoverable damages from IBC must then be used to offset their loan obligations. Under North Dakota law, a person who has been misled by another is entitled to damages under a tort claim theory. Under this theory, a person is entitled to receive damages in an amount that will compensate her for all of her losses directly caused by the misrepresentation, whether the damages could have been anticipated or not, absent exceptional circumstances. NDCC §32-03-20. See, e.g., Delzer v. United Bank, 559 N.W.2d 531 (N.D. 1997)(case involved a contract to loan money to the Delzers to operate their ranch. The loan was to be paid out in two installments. The Delzers pledged all of their assets and ranch equipment as collateral, but the Bank never advanced the second installment of the loan. The Delzers lost all of their collateral and their ranch. During the trial, the evidence revealed that the Bank never intended to make the second installment to the Delzers. The court held that the Bank's actions were deceitful and that the Delzer's damages were foreseeable. The court awarded the Delzer's a judgment for $1,076,000, twice the amount of their compensatory or actual damages). In the educational arena, North Dakota law permits a person defrauded by any advertisement or circular issued by a postsecondary educational institution to recover three times the amount of the actual damages. See N.D.C.C. §15-20,4-09.

15 In a letter dated September 4, 2002 I asked Mr. Craft to provide me with additional evidence of IBC's fraud with regard to these 18 students and the programs in which they were enrolled, beside the complaint and entry of judgment, but he has not been able to obtain any such evidence.
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Here, the students can demonstrate the amount of their damages by pointing to the amount they borrowed to attend IBC. Given that their education from IBC has virtually no value, the amount of their damages is at least the amount of tuition they paid to obtain that education times three pursuant to §15-20.4-09. Presumably, the total amount of the loans was used to pay for a portion of the tuition at IBC. Thus, the students' damage award should equal the principal amount of the loans they obtained to pay for the tuition minus any credit given, times three. This amount is then used to offset the loan balances due and owing to Education on the student loan accounts, including unpaid, accrued interest. Therefore, the students' loan obligations are fully offset by the amount of their damages against IBC.

CONCLUSION:

Based on the foregoing, I conclude that all 58 students in Holzer v. Red River have adequately established that: (1) the students charged IBC with conduct that would constitute fraud under North Dakota state law; (2) IBC's actions as charged had a direct connection to their receipt of the Direct loans; and (3) IBC actually committed the conduct charged, and the borrowers were injured in an amount that at least equals the amount they borrowed on their Direct loans. These students' claims should be recognized as a defense to collection of their Direct loans only, pursuant to 34 C.F.R. 685.206(c).

These conclusions rest in large part on inferences drawn from other cases involving IBC but not these individuals. It is therefore possible that these individuals were not in fact injured by the conduct they charged, or even that the conduct did not occur as to them. In the unlikely event that evidence emerges later that these students fabricated their assertions against IBC, their Direct Loan obligations should be immediately reinstated in the amount due and owing at the time relief was provided to them pursuant to the recommendation in this memorandum.

I have attached to this Memorandum a draft copy of a letter to Mr. Craft in response to his inquiries. I recommend that this letter or a similar one be sent to him with regard to his clients' loan obligations.

If you have any questions or concerns about the contents of this memo or its conclusion, please feel free to contact me at (202) 401-6007.

Exhibits/Attachments

cc: Rosa Wright, Direct Loan Program (electronically)
Debra Wiley, OSFA Ombudsman (electronically)
Naomi Randolph, Closed Schools (electronically)
Attachment B

In a January 10, 2000 Stipulation\(^1\) IBC admitted to engaging in fraud with regard to the Medical Administrative Assistant (MAA) program. In that document, IBC admitted to the following:

1. that IBC misrepresented the number of graduates who had jobs “in their field” and that they applied that term loosely;
2. that the Accrediting Counsel for Independent Colleges and Schools defines the term “in the field” as requiring “a direct use of the skills taught in the program,” as well as that ACICS defines “related field” as employment as a position that requires “an indirect use of the skills taught in the program”;
3. that based on the representations by the enrollment counselor, the Plaintiffs signed an agreement enrolling in the MAA and incurring thousands of dollars in loan debt;
4. that the program was not accredited by any accrediting agency;
5. that the graduates of this program were ineligible to take the certification exam as a Medical Assistant until they had one year of full-time work experience in a position “in their field”;
6. that graduation with a degree as an MAA, without being certified, gives candidates no greater chance of employment or pay grade than would be available without the degree;
7. that it was critical that the training received at IBC enable plaintiffs to secure employment qualifying graduates for the exam;
8. that IBC’s past employment placement was lower than stated during the enrollment interview;
9. that the Plaintiffs should be awarded damages in the amount of three times their enrollment contract, pursuant to NDCC §15-20.4-09\(^2\), lost wages, books and travel expenses and miscellaneous expenses;
10. that the lawsuit be dismissed.

In a February 12, 2001 Stipulation in a second case\(^3\) IBC admitted to engaging in fraud with regard to the Business Management Program (BMP). In this stipulation, the following facts were stipulated to:

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\(^1\) *et al. v. Red River Educational Services, Inc., Interstate Business College, C. A. No. 97-02501* (District Court, County of Cass, North Dakota).

\(^2\) North Dakota Century Code, section 15-20.4-09 states: Any person defrauded by any advertisement or circular issued by a postsecondary educational institution, or by any person who sells textbooks to the institution or to the pupils thereof, may recover from such institution or person three times the amount paid.

\(^3\) *et al. v. Red River Educational Services, Inc., Interstate Business College, C. A. No. CV-00-000119*, (District Court, County of Cass, North Dakota).
1. That based on the representations by IBC staff, the borrower signed an agreement enrolling in the BMP and incurred in excess of $15,428.00 in student loan debt; the borrower was enrolled at IBC from August 1996 to April 1997;
2. That IBC agents and employees negligently made oral and/or written representations which were positive assertions, in a manner not warranted by the information of the person making it, of that which was not true though the person believed it to be true, for the purpose of inducing the student into contracting with IBC for educational services;
3. That IBC agents represented that the borrower would be placed in a curriculum designed specifically and exclusively for persons interested in becoming experts in Business Management;
4. That IBC agents represented that the program was taught by experienced instructors who were themselves experts in Business Management;
5. That IBC agents represented that the borrower would be supplied with computers equipped with the most advanced computerized accounting and business management software;
6. That IBC agents represented that the school had a 90% success rate in placing BMP graduates in-the-field;
7. That IBC agents represented that the program was fully accredited;
8. That IBC's BMP program had not been specifically and exclusively designed for persons interested in becoming experts in business management, that the instructors were not experts in business management, that the computers were not loaded with the most advanced computerized accounting and business management software, that IBC had not experienced a 90% success rate in placing BMP graduates in-the-field, and that the BMP was not fully accredited;
9. That IBC's affirmative misstatements induced the borrower to enroll in its program and as a direct and proximate result of her reliance on IBC's fraudulent statements of material facts, she sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;
10. That the borrower should be awarded damages in the amount of three times her enrollment contract, pursuant to NDCC §15-20.4-09, lost wages, books and travel expenses and miscellaneous expenses.

IBC made similar admissions of fraud in a stipulation filed in a third case; here IBC stipulated to committing fraud with regard to the CIS program, specifically—

1. That it made “positive assertions, in a manner not warranted by the information of the person making it, of that which was not true through the person believed the representation to be true, for the purpose of inducing the borrowers into contracting with IBC for educational services”;
2. That IBC’s staff made material misrepresentations that were not true; that the CIS program was specifically and exclusively designed for persons interested in becoming

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4 Red River Educational Services, Inc., Interstate Business College, C. A. No. CV-00-00118 (District Court, County of Cass, North Dakota).
experts in CIS, that the instructors were experts in CIS, that the computers were loaded with the most advanced CIS software, that IBC had experienced a 90% success rate in placing CIS graduates in-the-field, and that the CIS program was fully accredited;

3. That IBC's affirmative misstatements induced the borrowers to enroll in the CIS program and as a direct and proximate result of their reliance on IBC's fraudulent statements of material facts, they sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;

4. That IBC would pay the borrowers money damages, which would include the amount of their enrollment contract, trebled, pursuant to NDCC §15-20.4-09, lost wages books and travel expenses and miscellaneous expenses.

The stipulation was reduced to a judgment on June 14, 2000 in favor of the borrowers and against IBC.

In a January 2000 stipulation filed in a fourth case, IBC admitted to engaging in fraud with regard to the Computer Aided Drafting (CAD) program. IBC admitted to the following:

1. That based on the representations by the enrollment counselor, Engle and Glines signed agreements enrolling in the CAD program and incurred in excess of $15,428.00 in debt;

2. That IBC agents and employees negligently made oral and/or written representations which were positive assertions, in a manner not warranted by the information of the person making it, of that which was not true though the person believed it to be true, for the purpose of inducing Engle and Glines into contracting with IBC for educational services;

3. That IBC agents represented that the students would be placed in a curriculum designed specifically and exclusively for persons interested in becoming experts in CAD;

4. That IBC agents represented that the program was taught by experienced instructors who were themselves experts in CAD;

5. That IBC agents represented that the students would be supplied with computers equipped with the most advanced CAD software;

6. That IBC agents represented that the school had a 90% success rate in placing CAD graduates in-the-field;

7. That IBC agents represented that the program was fully accredited;

8. That IBC's CAD program had not been specifically and exclusively designed for persons interested in becoming experts in CAD, that the instructors were not experts in CAD, that the computers were not loaded with the most advanced CAD software, that IBC had not experienced a 90% success rate in placing CAD graduates in-the-field, and that the IBC CAD program was not fully accredited;

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v. Red River Educational Services, Inc., Interstate Business College, C. A. No CV-00-00120 (District Court, County of Cass, North Dakota.)
9. That IBC's affirmative misstatements induced Engle and Glines to enroll in their CAD program and as a direct and proximate result of their reliance on IBC's fraudulent statements of material facts, they sustained pecuniary injury in the form of loss or diminution of previous employment, loss of employment during school, failure to receive compensation in accordance with representations and costs and expenses of schooling;

10. That Engle and Glines should be awarded damages in the amount of three times their enrollment contract, pursuant to NDCC §15-20.4-09, lost wages, books and travel expenses and miscellaneous expenses.

On June 14, 2000 the North Dakota court entered the Stipulation for Entry of Judgment in favor of the plaintiffs, thus, concluding the lawsuit.

Lastly, in a fifth case,6 IBC signed another Stipulation, also on January 10, 2000, admitting to fraud with regard to the Medical Transcription Program (MT Program). In the Stipulation, IBC admitted to engaging in fraud that induced Ms. [Redacted] to enroll in IBC. Judgment was entered on June 14, 2000 on this Stipulation, which was very similar to the other Stipulations. Damages were awarded to Ms. Rubin in the amount of $23,175.00.

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6 [Redacted] v. Red River Educational Services, Inc. and Interstate Business College, C. A. No. 00-00117 (District Court, County of Cass, North Dakota).