NACUBO

> BEST PRACTICES

FOR STUDENT FINANCIAL RESPONSIBILITY AGREEMENTS

ADVISORY REPORT 21-02

flywire

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About NACUBO

NACUBO is a membership organization representing more than 1,800 colleges and universities across the country and around the world. NACUBO specifically represents chief business and financial officers through advocacy efforts, community services, and professional development activities. The association's mission is to advance the economic viability, business practices, and support for higher education institutions in fulfillment of their missions. For additional information, please visit www.nacubo.org.

This report is generously supported by Flywire.

May 2021 Updates

NACUBO seeks to keep its member institutions current on developments that impact higher education. This updated document outlining various best practices related to student financial responsibility agreements addresses some developments since our prior version was released.

THE ASSESSMENT OF COLLECTION FEES

A case captioned *Bernal v. NRA Group, LLC* highlights a split among federal circuits regarding the assessment and recovery of contingent-based collection fees.[1] The varying positions of courts that have addressed this issue creates a patchwork of compliance dependent, in part, on the location of the institution and/or student relative to contractually requiring a student to pay some or all of the school's fees resulting from debt collection. This advisory report has been updated to address the issue. The *Bernal* ruling, issued by a jurisdiction whose history tends to reflect a more consumer-friendly approach, found the following contractual language allowed for a reasonable percentage-based fee:

> *If your account is in arrears for more than 30 days (after you miss two payments) and … The Minimum Term has expired, then your account will be permanently cancelled and you will be billed for any amounts that are due and owing plus **any costs** (including reasonable attorney's fees) incurred by us in attempting to collect amounts due or otherwise enforcing this agreement.*[2]

In reaching this result, the court addressed an Eighth Circuit decision, *Kojetein v. C.U. Recovery, Inc.,*[3] and an Eleventh Circuit decision, *Bradley v. Franklin Collection Service, Inc.,*[4] that both came to a different conclusion.[5] The *Bernal* court found the language of each of the agreements at issue in the *Kojetein* and *Bradley* cases to be materially indistinguishable to that included in *Bernal*; however, according to *Bernal*, these other courts made a "questionable" assumption that the language of each only allowed for "actual costs," and "actual costs" do not include collection fees. Ultimately, *Bernal* ruled the fee charged fell within the broad language allowing for "any costs" of collection. The *Bernal* court's interpretation of "any costs" was a victory for the agency defendant, and the collection fee was held to be compliant with the Fair Debt Collection Practices Act (FDCPA).

An earlier version of this advisory report used language that was influenced by the *Bradley* opinion cited above. That case dealt with an agreement that "required the plaintiff to pay 'all costs of collection.'"[6] The agreement did not include any provision regarding a percentage-based fee and, as a result, the court held the agreement did not permit such a fee. Later, *Annunziato v. Collecto, Inc.* raised the profile of consumer claims against schools and agencies who assess/collect fees.[7] In this class-action litigation, the agency attempted, on behalf of a school, to recover a nonfederal account with an added collection fee, but the school could not produce a student agreement executed by the class representative. Additionally, the court disagreed that the language in the unsigned student agreement supported a

[1] 930 F.3d 891 (7th Cir. 2019)
[2] *Id.* at 892 (emphasis added)
[3] 212 F.3d 1318 (8th Cir. 2000)
[4] 739 F.3d 606 (11th Cir. 2014)
[5] *Bernal* at 894
[6] *Bradley* at 609
[7] 207 F.Supp.3d 249 (E.D.N.Y. 2016)

percentage-based collection fee wherein the school was "made whole."[8] This case illustrates the perils of not having evidence a student has expressly agreed to the terms of a financial responsibility agreement. The case also calls into question how schools calculate collection fees and the attempt, on nonfederal debts/accounts, to have the student pay an amount allowing the school to recover its entire balance and pay its collection agency for a successful collection effort.

To address the issues raised by developing case law, this advisory report makes some adjustments to the proposed language related to the assessment of collection fees. It is critically important to note that any fee incidental to the principal obligation of the debt has to be expressly authorized by the agreement creating the debt, allowed by applicable law, and reasonable as defined in the relevant jurisdiction. Also, schools and universities are responsible for determining what amount is due and owing to the school. When any student account is placed for collection, the placing institution should be certain the amounts included in the debt are accurate, legally appropriate, and due and owing when placed with an agency.

COMMUNICATION

Additionally, under "Contact," we removed language limiting the method of revocation a student may use to cease calls via an automatic telephone dialing system since there is no such limiting language in the Telephone Consumer Protection Act (TCPA).[9] Also, schools should honor when a student "opts out" of receiving information via any updated channel of communication (i.e., text messaging).

SEVERABILITY

A sample severability clause has been provided as guidance for the institution's use to provide protection should a court determine a portion of the agreement is illegal, unenforceable, or ineffective. Rather than the entire agreement being rescinded, just the provision(s) deemed to be illegal, unenforceable, or ineffective would be severed from the agreement. The remainder of the agreement would remain intact.

ARBITRATION/MEDIATION

The Arbitration/Mediation section was modified as a result of new regulations that went into effect in July 2020 that allow for the inclusion of arbitration and/or class waiver provisions so long as certain disclosures are made to the student. It is important to closely monitor this issue, as it could be altered by the changing political climates. Also, whether or not to utilize a provision mandating any alternative dispute resolution should be made by an institution's attorney.

[8] *Id.* at 253

[9] 47 U.S.C. § 227, *et seq*

Introduction

Colleges and universities increasingly ask students to affirm their understanding of their financial obligation to the institution by signing a student financial responsibility agreement prior to registering for classes. A student financial responsibility agreement provides relevant information about official institutional policies to students and contractually binds them to those policies. It is intended to properly disclose and set the contractual parameters between the creditor and consumer for the duration of the contractual relationship and to outline the relevant remedies available if there is a material breach of the terms. Additionally, the agreement assists the institution and its collection agency partners when complying with laws and regulations such as the following:

- FDCPA
- TCPA
- Title IV of the Higher Education Act
- Internal Revenue Code (IRC)

NACUBO recommends use of a comprehensive student financial responsibility agreement as a student service best practice, to clearly outline the creditor/consumer relationship, to protect the school, and to comprehensively disclose student obligations. In the current electronic and online/remote environment, it is imperative to provide an efficient process for electronically signing and maintaining these agreements. Over the years, NACUBO's Student Financial Services Council has prepared a template of priority and optional subjects and text to assist schools in developing or strengthening their agreement language. This report was reviewed by Chad Echols of The Echols Firm LLC, whose practice focuses on the rights and legal responsibilities of creditors and collection agencies.

Members are encouraged to consider requiring students to sign an agreement prior to registering for classes and even periodically thereafter. The institution will need to determine how often students are asked to reaffirm the agreement, taking into account state law, characteristics of the student population, and coordination with other processes. Current practices vary widely. Some institutions choose to require students to affirm their agreement each time they register for a class; others ask students to sign an agreement each term or each year; and still others only require a one-time agreement that is clearly worded to cover the student's entire enrollment. No matter how an institution handles this issue, the legal goal remains a clear contract that binds the student to the most current policies of the institution and covers all the amounts that become due and owing during a student's tenure with the institution.

NACUBO recommends utilizing an electronic agreement located within the school's online registration system behind the student authentication portal. We further recommend an "opt-in" format that utilizes check boxes next to each topic for which the student's agreement is required. For some topics, specific "opt-out" instructions must be provided to meet regulatory requirements and protect the institution from potential future disputes. Where appropriate, opt-out instructions should clearly delineate to the student the consequences of opting out. Additionally, it is important for the school to accurately implement the terms of the institution's agreement. For example, if a student properly opts out of a term, then the school needs to accurately capture the opt-out information and ensure the student's interaction with the school reflects the ramifications or implications of opting out. Also, we recommend an institutional review to ensure the language of an agreement accurately matches the actions of that school. For example, if there is a late fee outlined in the agreement, it is important that

the school's pattern and practice are to accurately assess the amount in the agreement unless the agreement is amended in a legally enforceable manner.

Ultimately, how schools build their agreement or choose which text to incorporate depends on campus leadership, the culture, the level of IT support, and the advice of the school's legal counsel. Any institution reviewing this material should have all provisions of a student financial responsibility agreement reviewed by an attorney in the institution's jurisdiction to make certain its chosen provisions and language are clear, accurate, and legally enforceable.

Institutions should carefully review the suggestions in this report. There are many considerations to properly implementing a student financial responsibility agreement. These include but are not limited to the following:

- **State Laws:** Ensure compliance with state laws relating to debt collection, late fees, convenience fees for certain payment methods, student paid collection fees, attorney's fees, and any other fee amount to be assessed for a current or defaulted student's account.
- **Truth in Lending Act (TILA):** Make sure the agreement falls within the exceptions for a private education loan and does not trigger a requirement that the institution follow TILA disclosures when implementing an agreement. The TILA requirements are beyond the scope of this advisory report, and an institution would need to seek specific counsel to ensure compliance.[10]
- **E-SIGN Act:** Make certain the process in which a student electronically executes an agreement complies with the federal E-SIGN Act and the state's Uniform Electronic Transactions Act (UETA). These laws govern the validity of electronic records and signatures. Forty-seven states and the District of Columbia have passed UETA. The other three states (Washington, New York, and Illinois) have state provisions governing the validity and use of electronic signatures. In the modern world of communication, it is almost imperative schools allow students to sign electronically in a manner consistent with the law, and the school should maintain the necessary electronic infrastructure to store, save, and produce these agreements. Consistent with the *Annunziato* opinion discussed above, unsigned agreements or agreements that cannot be produced as evidence are not useful or effective.

The following sample language provides a template for a college or university to use as a starting point in developing or reviewing its student financial responsibility agreement. It is not legal advice or intended to be adopted without review by an institution's legal counsel. NACUBO recommends that prior to implementation, schools submit any student financial responsibility agreement to its own legal counsel for review and approval to ensure it complies with all applicable federal, state, and local laws and institutional policy. We also recommend that readers of this document review all footnotes, as they contain not only regulatory and case citations, but important commentary on the various agreement clauses. Institutions should also ensure student financial services staff is prepared to respond to student inquiries regarding any new terms and conditions.

[10] See 12 CFR §§ 226.46-226.48

Priority Subjects and Text

PAYMENT OF FEES/PROMISE TO PAY

I understand when I register for any class at {Institution Name} or receive any service from {Institution Name}, I accept full responsibility to pay all tuition, fees, and other associated costs assessed as a result of my registration and/or receipt of services. I further understand and agree my registration and acceptance of these terms constitutes a contractual agreement (i.e., a financial obligation in the form of an educational loan as defined by the U.S. Bankruptcy Code at 11 U.S.C. §523(a)(8)) in which {Institution Name} is providing me educational services, deferring some or all of my payment obligation for those services, and I promise to pay for all assessed tuition, fees, and other associated costs by the published or assigned due date.)

I understand and agree if I drop or withdraw from some or all of the classes for which I register, I will be responsible for paying all or a portion of tuition and fees in accordance with the published tuition refund schedule at {Institution's tuition refund policy/schedule URL}. I have read the terms and conditions of the published tuition refund schedule and understand those terms are incorporated herein by reference. I further understand my failure to attend class or receive a bill does not absolve me of my financial responsibility as described above.

DELINQUENT ACCOUNT/COLLECTION

Financial Hold: I understand and agree if I fail to pay my student account bill or any monies due and owing {Institution Name} by the scheduled due date, {Institution Name} will place a financial hold on my student account, preventing me from registering for future classes, obtaining transcripts, or receiving my diploma.[11]

Late Payment Charge: I understand and agree if I fail to pay my student account bill or any monies due and owing {Institution Name} by the scheduled due date, {Institution Name} will assess late payment and/or finance charges at the rate of {Institution $ or % amount} per month on the past-due portion of my student account until my past-due account is paid in full.[12]

Collection Agency Fees: I understand and accept if I fail to pay my student account bill or any monies due and owing {Institution Name} by the scheduled due date, and fail to make acceptable payment arrangements to bring my account current, {Institution Name} may refer my account to a collection agency. I further understand if {Institution Name} refers my student account balance to a third party for collection, whether an attorney or collection agency, I will be responsible for any costs (including but not limited to collection fees) associated with attempting to collect the monies due and owing. I understand a collection fee will be assessed and will be due and owing in full at the time of the referral to the third party. The collection fee will be calculated at the maximum amount permitted by applicable law but not to exceed {XX percent} of the amount outstanding. For purposes of this provision, the third party may be a debt collection company or an attorney. If a lawsuit is filed to recover an outstanding balance, I shall also be responsible for any costs associated with the lawsuit such as court costs or other

[11] Note: California and Washington now have state statutes addressing the process of withholding transcripts. Any financial hold provision should take those state statutes into consideration.

[12] Note: Schools looking to implement this provision should make certain any and all amounts comport with applicable law.

applicable costs. Finally, I understand that my delinquent account may be reported to one or more of the national credit bureaus.[13]

COMMUNICATION

Method of Communication: I understand and agree {Institution Name} uses email as an official method of communication with me and that, therefore, I am responsible for reading the emails I receive from {Institution Name} on a timely basis.

Contact: I authorize {Institution Name} and its agents and contractors to contact me at my current and any future cellphone number(s), email address(es), or wireless device(s) regarding my delinquent student account(s)/loan(s), any other debt I owe to {Institution Name}, or to receive general information from {Institution Name}. I authorize {Institution Name} and its agents and contractors to use automated telephone dialing equipment, artificial or prerecorded voice or text messages, and personal calls and emails in their efforts to contact me. Furthermore, I understand that I may withdraw my consent to call or text my cellphone using automated telephone dialing equipment by submitting a clear revocation request to {Institutional Office or Position} or to the applicable contractor or agent contacting me on behalf of {Institution Name}.[14]

Updating Contact Information: I understand and agree that I am responsible for keeping {Institution Name} records up to date with my current mailing addresses, email addresses, and phone numbers by following the procedure at {Institution Website for Updating Student Address/Email Address/Phone Number}. The linked procedure is incorporated herein by reference. Upon leaving {Institution Name} for any reason, it is my responsibility to provide {Institution Name} with updated contact information for purposes of continued communication regarding any amounts that remain due and owing to {Institution Name}.

ENTIRE AGREEMENT

This agreement supersedes all prior understandings, representations, negotiations, and correspondence between the student and {Institution Name}, constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified or affected by any course of dealing or course of performance. This agreement may be modified by {Institution Name} if the modification is signed by me. Any modification is specifically limited to those policies and/or terms addressed in the modification.

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[13] As noted above, there is a split of authority regarding the assessment and collection of percentage-based collection fees. NACUBO recommends each institution consult with its own attorney to discuss issues involving the language outlined above, the choice of law provision in the student financial responsibility agreement, how remote learning may impact the choice of law provision included in the agreement, etc. The accuracy and legal enforceability of this provision is critical if a school intends for a student to pay any portion of the fees associated with a third-party collection attempt. The provision will not allow fees in states that prohibit the assessment of collection fees. The bracketed items may be adjusted to fit the specific laws that apply to the jurisdiction in which the provision shall be enforced.

[14] Schools should have robust revocation policies and abide by those policies. If a student revokes consent for a specific channel of communication, the school should honor that revocation, note the student's file, and advise any future collection agency the student has revoked consent to be contacted by certain communication channels.

SEVERABILITY CLAUSE

If any provision, term, or clause of this Agreement is declared illegal, unenforceable, or ineffective in a legal forum with competent jurisdiction to do so, this Agreement shall be deemed severable, and all other provisions, terms, and clauses of the Agreement will remain valid and binding on the Parties.

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Optional Subjects and Text

FINANCIAL AID

I understand aid described as "estimated" on my Financial Aid Award does not represent actual or guaranteed payment but is an estimate of the aid I may receive if I meet all requirements stipulated by that specific aid program.

I understand my Financial Aid Award is contingent upon my continued enrollment and attendance in each class upon which my financial aid eligibility was calculated. If I drop any class before completion, I understand my financial aid eligibility may decrease and some or all of the financial aid awarded to me may be revoked.

If some or all of my financial aid is revoked because I dropped or failed to attend class, I agree to repay all revoked aid disbursed to my account and resulted in a credit balance refunded to me.

I agree to allow financial aid I receive to pay any and all charges assessed to my account at {Institution Name} such as tuition, fees, campus housing and meal plans, student health insurance, parking permits, service fees, fines, bookstore charges, or any other amount in accordance with the terms of the aid.

Federal Aid: I understand any federal Title IV financial aid I receive, except for Federal Work-Study (FWS) wages, will first be applied to any outstanding balance on my account for tuition, fees, and room and board. Title IV financial aid includes aid from the Pell Grant, Supplemental Educational Opportunity Grant (SEOG), Direct Loan, PLUS Loan, Perkins Loan, and TEACH Grant programs. I authorize {Institution Name} to apply my Title IV financial aid to other charges assessed to my student account such as student health insurance, parking permits, bookstore charges, service fees and fines, and any other education-related charges. I further understand this authorization will remain in effect until I rescind it or the end of {Institution's Authorization Term}, and I may withdraw it at any time by following the instructions at {Institution's Authorization Website}.[15]

Prizes, Awards, Scholarships, Grants: I understand all prizes, awards, scholarships, and grants awarded to me by {Institution Name} will be credited to my student account and applied toward any outstanding balance. I further understand my receipt of a prize, award, scholarship, or grant is considered a financial resource according to federal Title IV financial aid regulations and may, therefore, reduce my eligibility for other federal and/or state financial aid (i.e., loans, grants, Federal Work Study), which if already disbursed to my student account, must be reversed and returned to the aid source.

METHOD OF BILLING

I understand {Institution Name} uses electronic billing (e-bill) as its official billing method; therefore, I am responsible for viewing and paying my student account e-bill by the scheduled due date. I further understand failure to review my e-bill does not constitute a valid reason for paying my bill after the due date. E-bill information is available at {Link to E-Bill Information}.

[15] Note: This authorization cannot be mandatory or coerced. The institution may also want an authorization from the student to use Title IV funds to pay other education-related charges from the prior year.

BILLING ERRORS

I understand administrative, clerical, or technical billing errors do not absolve me of my financial responsibility to pay the correct amount of tuition, fees, and other associated financial obligations assessed as a result of my registration at {Institution Name}.

RETURNED PAYMENTS/FAILED PAYMENT AGREEMENT

If a payment made to my student account is returned by the bank for any reason, I agree to repay the original amount of the payment plus a returned payment fee of ${Institution Fee Amount}. I understand multiple returned payments and/or failure to comply with the terms of any payment plan or agreement I sign with {Institution Name} may result in cancellation of my classes and/or suspension of my eligibility to register for future classes at {Institution Name}.[16]

WITHDRAWAL

If I decide to completely withdraw from {Institution Name}, I will follow the instructions at {Institution's Withdrawal Policy Website}, which I understand and agree are incorporated herein by reference.

PRIVACY RIGHTS & RESPONSIBILITIES

I understand {Institution Name} is bound by the Family Educational Rights and Privacy Act (FERPA), which prohibits {Institution Name} from releasing any information from my education record without my written permission. Therefore, I understand if I want {Institution Name} to share information from my education record with someone else, I must provide written permission by following the procedure outlined at {Link to Institution's FERPA Release Website}. I further understand I may revoke my permission at any time as instructed in the same procedure.

INTERNAL REVENUE SERVICE (IRS) FORM 1098-T

I agree to provide my Social Security number (SSN) or taxpayer identification number (TIN) to {Institution Name} upon request as required by IRS regulations for Form 1098-T reporting purposes. If I fail to provide my SSN or TIN to {Institution Name}, I agree to pay any and all IRS fines assessed as a result of my missing SSN/TIN.

I consent to receive my annual IRS Form 1098-T, Tuition Statement, electronically from {Institution Name}. I understand if I do not consent to receive my Form 1098-T electronically, a paper copy will be provided. I understand I can withdraw this consent or request a paper copy by following the instructions at {Institution's IRS Form 1098-T Reporting Website}.

STUDENT AGE

I understand and agree if I am younger than the applicable age of majority when I execute this agreement, the educational services provided by {Institution Name} are a necessity, and I am contractually obligated pursuant to the "doctrine of necessaries."

[16] Note: Make sure any amount assessed for nonsufficient funds (NSF) payments comports with applicable law.

Other Considerations

Institutions may also want to consider including paragraphs addressing the following:

- **Governing Law:** The reference to state law should not be a default provision. This provision should be considered carefully depending on whether the institution is located in a consumer-friendly or creditor-friendly state. Other considerations to take into account include remote learning: Where are a majority of the students actually taking classes in a remote environment? Are the majority of these students based in a jurisdiction that is more or less consumer friendly than the state in which the institution is located? Does the law of the state in which the institution provides the agreement allow for garnishment of wages? Not all states allow for garnishment of wages (Texas, Pennsylvania, North Carolina, and South Carolina do not have a private right to wage garnishment).
- **Arbitration or Mediation:** There has been a shift from the Obama-era regulations regarding arbitration provisions and class action waiver provisions. Effective July 1, 2020, a clause may be added requiring the use of arbitration, so long as specific disclosure language is made available (as outlined below) or mediation rather than civil litigation in the case of disputes. Alternative dispute resolution can be extremely helpful in avoiding class action liability and limiting the public nature of civil litigation. While specific provisions regarding this issue should be developed by the institution's counsel, below is information outlining several of the requirements of this disclose language.
    - **34 CFR 668.41(h)** specifically allows for an institution's use of pre-dispute arbitration agreements and/or class action waivers as a condition for enrollment for students receiving title IV federal student aid so long as a written (electronic) plain language disclosure is provided and available to enrolled students, prospective students, and the public. The disclosure must be included in 12-point font on the institutions' admissions information webpage and in the admissions section of the institution's catalog and must include the following statement: "The school cannot require the borrower to participate in arbitration or any internal dispute resolution process offered by the institution prior to filing a borrower defense to repayment application with the Department pursuant to § 685.206(e); the school cannot, in any way, require students to limit, relinquish, or waive their ability to pursue filing a borrower defense claim, pursuant to § 685.206(e) at any time; and any arbitration, required by a pre-dispute arbitration agreement, tolls the limitations period for filing a borrower defense to repayment application pursuant to § 685.206(e)(6)(ii)."
- **Additional Title IV Authorizations:** Students may also authorize a school to hold Title IV funds in their student account rather than pay out a credit balance, to apply Federal Work-Study wages to outstanding charges on the student account, or to pay other education-related charges from prior years. Some institutions may want to include these authorizations as part of this agreement.

Background Information

The following useful resources provide an introduction to some of the relevant legal requirements that may influence the development of financial responsibility agreement for colleges and universities.

TELEPHONE CONSUMER PROTECTION ACT (TCPA)

- Federal Communications Commission (FCC): Stop Unwanted Robocalls and Texts

DEPARTMENT OF EDUCATION RULES ON STUDENT AUTHORIZATIONS

- 34 CFR 668.155: Notices and authorizations
- Federal Student Aid Handbook, Volume 4, Chapter 2

IRS GUIDANCE ON PROVIDING 1098-TS ELECTRONICALLY

- 26 CFR 1.6050S-2: Information reporting for payments and reimbursements or refunds of qualified tuition and related expenses