



March 1, 2018

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Delivered via email to: [ThirdPartyComments@ed.gov](mailto:ThirdPartyComments@ed.gov)

*This comment is in response to the Federal Register Notice published on January 24, 2018, as updated on February 22, 2018, by the U.S. Department of Education (Department) Office of Postsecondary Education titled “Solicitation of Third-Party Comments Concerning the Performance of Accrediting Agencies.” The Century Foundation (TCF) is a nonprofit organization that works to advance students’ rights with respect to educational opportunity. As part of our mission, we advocate on behalf of enhancing student protections and file comments in rulemaking and federal regulatory proceedings to inform the public and policymakers on past practices of accreditors and institutions of higher education.*

The American Bar Association (ABA)<sup>1</sup> is charged, as a federally recognized accreditor, with a duty to safeguard the Department’s investment of taxpayer dollars to support legal education by ensuring that ABA-accredited programs meet certain standards of quality, competence and integrity.<sup>2</sup> ABA’s faithful performance of its accreditation functions, in compliance with the Title IV accreditation criteria set forth by Congress and in the Department’s regulations, is critical to ensuring that students using federal funds are provided an education with real value, and preventing the nation’s investment in higher education—including students’ own investment of time, effort, and money—from being diverted to low-quality, ineffective, or even fraudulent enterprises.

## **I. The Department Identified Compliance Issues Within ABA**

In September 2016, the Department was sufficiently concerned by ABA’s performance to issue a Staff Report identifying five discrete “compliance issues,” or areas where ABA failed to meet the legal criteria for federally recognized accrediting agencies. The compliance issues, detailed below, included three personnel issues and two quality control issues:

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<sup>1</sup> The ABA performs its accreditation duties through the Council of the Section of Legal Education and Admission to the Bar, the Standards Review Committee, and other staff, collectively referenced throughout this comment as “ABA.”

<sup>2</sup> U.S. Department of Education, Staff Report to the Senior Department official on Recognition Compliance Issues, at 3 (hereinafter “Staff Report”), Sept. 2016, <https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=6&mid=68>.

A. Administrative Capabilities, Qualified Personnel, and Composition of Decision-Making Bodies

1. ABA failed to evidence “adequate administrative staff” in compliance with 34 C.F.R. § 602.15(a)(1) because it failed to provide resumes to demonstrate the qualifications of twelve staff members.
2. ABA failed to evidence “competent and knowledgeable individuals qualified . . . to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and preaccrediting decisions” in compliance with § 602.15(a)(2)) because it failed to provide resumes for decision-makers who held key accrediting roles.
3. ABA failed to demonstrate adequate inclusion of “[a]cademic and administrative personnel on its evaluation, policy, and decision-making bodies” in compliance with § 602.15(a)(3) because the ABA’s Appeals Panel lacked sufficient input from academic or administrative representatives.

B. Accrediting Standards and Their Application

4. ABA failed to demonstrate adequate “accreditation and preaccreditation standards” in compliance with § 602.16(a)(1)(viii) because a change in ABA’s quality-control standards for “self-study” lacked clarity and also because ABA failed to evidence that the change had been approved as a new ABA standard.
5. ABA failed to demonstrate an “effective mechanism for evaluating . . . compliance with [ABA’s] standards before reaching a decision to accredit . . . [an] institution or program” in compliance with § 602.17(b) because a change in ABA’s quality-control process for “self-study” lacked clarity and also because ABA failed to evidence that the change had been approved as a new ABA standard.

While acknowledging that ABA was not in compliance with these five criteria, the Department nevertheless allowed ABA to continue to function as a federally-recognized accreditor, on the condition that ABA must “come into compliance” and demonstrate its renewed compliance with these five criteria.<sup>3</sup>

**II. ABA Reports on Efforts to Remedy Compliance Concerns**

The ABA’s 2017 Narrative and Exhibits (“2017 ABA Report”) obtained by The Century Foundation (TCF) through litigation demonstrate significant efforts by the ABA to come into compliance with the regulatory criteria described above.

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<sup>3</sup> U.S. Department of Education, Staff Report, Sept. 2016, <https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=6&mid=68>.

A. ABA Largely Satisfies the Department’s Concerns Regarding Administrative Capabilities, Qualified Personnel, and Composition of Decision-Making Bodies

The 2017 ABA Report makes significant progress in addressing the Department’s concerns regarding administrative capabilities and personnel, as detailed in the chart below. The ABA Report includes rosters and resumes for nearly all personnel in the staff, decision-making, and appellate roles about which the Department expressed concern.

However, some concerns remain:

- Redactions in the resumes and biographical materials contained in ABA Exhibits 4, 8, and 17 present challenges to public comment on the qualifications of various personnel;
- ABA Exhibit 2 reveals that a staff employee, Barry Arthur Currier, Managing Director, Legal Education and Accreditation, served from 2004 to 2010 in various leadership roles at a non-ABA approved online law school affiliated with Kaplan Legal Education. During this period, a Senate investigation of Kaplan revealed problematic practices, including regarding Kaplan’s provision of online programs.<sup>4</sup> Subsequent law enforcement action suggests that Kaplan misrepresented to students the opportunities that would be available to graduates of another non-approved professional program.<sup>5</sup> This context raises significant concerns regarding Mr. Currier’s qualification to hold a leadership role among ABA’s legal accreditation staff, especially in light of ABA’s accreditation of various law schools that have similarly been accused of making unlawful misrepresentations to students.<sup>6</sup>

B. Questions Remain Regarding ABA’s Accrediting Standards and Their Application

The Department’s September 2016 Staff Report described limited concerns regarding ABA’s substantive accrediting standards and regarding ABA’s process for overseeing law schools’ compliance with “self study” processes. ABA’s Report to the Department regarding its self study process reflects a change in ABA’s formal policy and demonstrates ABA’s efforts to implement these changes.

However, it is unclear whether these conceptual changes to the design of ABA’s self study process will be sufficient to address underlying causes for concern regarding the strength of ABA’s substantive

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<sup>4</sup> U.S. Senate Committee on Health, Education, Labor and Pensions, “For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success,” July 30, 2012, 592 et seq., <https://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf>. For Kaplan-specific material only, see [https://www.help.senate.gov/imo/media/for\\_profit\\_report/PartII/Kaplan.pdf](https://www.help.senate.gov/imo/media/for_profit_report/PartII/Kaplan.pdf).

<sup>5</sup> Charles Huckabee, “Kaplan Suspends a Dental-Assistant Program in North Carolina and Reimburses Students,” The Chronicle of Higher Education, Feb. 1, 2012, <https://www.chronicle.com/blogs/ticker/kaplan-suspends-a-dental-assistant-program-in-north-carolina-and-reimburses-students/40153>.

<sup>6</sup> Yan Cao and Tariq Habash, “College Complaints Unmasked,” The Century Foundation, November 8, 2017, <https://tcf.org/content/report/college-complaints-unmasked/>.

accrediting standards and the effectiveness of its procedures—including self study processes—in ensuring compliance with ABA standards and rooting out non-compliant law schools.

In the guidance relating to ABA Standard 204, which describes the revised self study requirements for ABA-accredited institutions, the ABA acknowledges an important new component of the self study: beginning in 2016-2017, law schools must “[c]onduct an ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods and use those evaluations to monitor and improve the curriculum [Standard 315]. Interpretation 315-1 elaborates on the methods that schools may use to measure student achievement of learning outcomes.” ABA Exhibit 24. Upon examination however, it is not clear that the ABA has yet demonstrated sufficiently aggressive implementation of the standard.

In 2016, the Department became aware of several ABA-accredited law schools which were failing to adequately prepare their students for licensure and gainful employment as attorneys.<sup>7</sup> In the instance of the Charlotte School of Law (CSL) the Department took the extraordinary step of finding that the ABA-accredited law school lacked administrative capacity to participate in Title IV programs. Although ABA was aware of noncompliant practices at CSL as early as a March 2014 site visit, ABA nevertheless continuously enabled CSL to enroll new students and draw down Title IV funding for another three and a half years without notifying current or prospective students before finally announcing in October 2016 that it would put the school on probation in November 2016.<sup>8</sup>

After the Department found ABA out of compliance with the regulatory criteria for recognized accreditors, ABA has taken steps against other low performing law schools. By one account, ABA has found 23 programs noncompliant with ABA standards since 2016.<sup>9</sup> In March 2017, the ABA released a Notice of Probation and Specific Remedial Action against Arizona Summit Law School,<sup>10</sup> a for-profit law school which, like Charlotte School of Law, is operated by Infilaw Holdings, LLC.<sup>11</sup> In October 2017, the ABA issued a letter finding that the Florida Coastal School of Law—a third Infilaw-operated for-profit law school—was “not in compliance” with three ABA standards.<sup>12</sup> Furthermore, in November 2017, the

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<sup>7</sup> U.S. Department of Education, “Denial of Recertification Application to Participate in the Federal Student Financial Assistance Programs – Charlotte School of Law,” Dec. 19, 2016, <https://studentaid.ed.gov/sa/sites/default/files/csl-recert-denial.pdf>.

<sup>8</sup> ABA, Council Decision, Notice of Probation and Specific Remedial Action, Charlotte School of Law, Oct. 2016, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/PublicNoticeAnnouncements/2016\\_november\\_charlotte\\_probation\\_public\\_notice.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/PublicNoticeAnnouncements/2016_november_charlotte_probation_public_notice.authcheckdam.pdf)

<sup>9</sup> Andrew Kreighbaum, Calls for Tougher Oversight of For-Profit Law School, Inside Higher Education, Nov. 15, 2017, <https://www.insidehighered.com/news/2017/11/15/accreditors-scrutiny-florida-law-school-renews-concerns-over-oversight>.

<sup>10</sup> ABA Probation Notice, Arizona Summit Law School, March 2017, <https://www.azsummitlaw.edu/aba-probation-notice.html>.

<sup>11</sup> Infilaw Holdings, LLC, in turn, is managed under the control of Sterling Capital Partners, L.P. <https://studentaid.ed.gov/sa/sites/default/files/csl-recert-denial.pdf>.

<sup>12</sup> ABA Letter Acknowledging Noncompliance from Florida Coastal School of Law, October 12, 2017, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/PublicNoticeAnnouncements/2017\\_october\\_florida\\_coastal\\_school\\_of\\_law.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/PublicNoticeAnnouncements/2017_october_florida_coastal_school_of_law.authcheckdam.pdf).

ABA ruled that Western Michigan Cooley Law School was noncompliant with ABA standards.<sup>13</sup> These actions by the ABA are promising signals of increased attention to compliance. However, ABA ignored early warning signs at each of these institutions, and ABA’s continued accreditation of these institutions suggests that these actions may be too little, too late.

Examples of early warning signs against the above ABA-accredited institutions include:

- **Low bar passage rates:** In 2015, Cooley Law School had a 51 percent bar passage rate and Arizona Summit had a 52 percent bar passage rate. Arizona Summit’s passage rate further dropped to 42% the following year.<sup>14</sup>
- **High volume of student complaints:** TCF’s analysis of nearly 100,000 “borrower defense claims”—applications for loan relief from students who maintain that they have been defrauded or misled by federally approved colleges and universities—revealed 522 complaints from Infilaw students.<sup>15</sup> This places Infilaw among the ten educational enterprises that garnered the highest volume of student complaints and places ABA in the unsavory company of derecognized accreditor ACICS as an agency responsible for accrediting highly deceptive institutions.
- **High debt-to-earnings ratios:** Two schools—Charleston School of Law and Florida Coastal School of Law—received “failing” designations from the Department of Education based on graduate earnings that were insufficient to cover a typical graduate’s loan debts under either of the Department’s two formulas for evaluating loan burdens.<sup>16</sup> Under the more restrictive formula, five out of six reporting law schools—all of which are ABA-accredited—graduated students with debt burdens that far outstripped their earning potential.<sup>17</sup>

Advocates have called on ABA to tie accreditation more closely to established indicia of student success—such as bar passage rates and graduates’ debt-to-earnings ratios—and for poor performance to trigger swift and meaningful penalties for non-compliant programs.<sup>18</sup> It remains to be seen whether ABA’s revised self study policies are sufficiently aggressive to combat noncompliant practices at problematic law schools.

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<sup>13</sup> Rick Seltzer, “Law Schools Under the Microscope”, January 16, 2018, <https://www.insidehighered.com/news/2018/01/16/aba-letters-accreditation-reflect-contracting-market-law-school>.

<sup>14</sup> In 2015, Cooley Law School had a 51 percent bar passage rate and Arizona Summit had a 52 percent bar passage rate. <http://www.abarequireddisclosures.org/>.

<sup>15</sup> <https://tcf.org/content/report/college-complaints-unmasked/>

<sup>16</sup> See Gainful Employment data file, available at <https://studentaid.ed.gov/sa/sites/default/files/GE-DMYR-2015-Final-Rates.xls>.

<sup>17</sup> These included Argosy University, Charlotte School of Law, and Arizona Summit Law School in addition to Florida Coastal and Charleston School of Law.

<sup>18</sup> Andrew Kreighbaum, Calls for Tougher Oversight of For-Profit Law School, Inside Higher Education, Nov. 15, 2017, <https://www.insidehighered.com/news/2017/11/15/accreditors-scrutiny-florida-law-school-renews-concerns-over-oversight>.

### **III. The ABA's Scope of Recognition**

The compliance report materials provided by the Department of Education for the American Bar Association lists the agency's current scope of recognition as including law degrees offered through distance education. This inclusion of distance education comes as an unexpected development.

The Senior Department Official's letter to the ABA from September 22, 2016, does not include distance education programs in the scope of recognition officially granted to the agency. The Department's 2016 Staff Report notes that the ABA initially requested that distance education programs be included in its scope of recognition on June 16, 2014, but that at the following full recognition review, the Department would "[expect] the agency to demonstrate its ability to evaluate distance education." As of 2016, the agency had not provided evidence of that review, according to the staff report.<sup>19</sup> We see no evidence in the compliance report that the ABA has demonstrated the capability, competency, and/or training of ABA staff and evaluators to include accreditation of distance education within the scope of their responsibilities. Furthermore, ABA has not demonstrated that its policies and standards have been reviewed and amended to address the Department's previously stated concerns with ABA accreditation of distance education.

This issue is particularly relevant now, as the agency has proposed to ease existing restrictions on distance education for its institutions.<sup>20</sup> Before expanding the scope of recognition, the Department should ensure that the ABA has the ability to provide the proper oversight for online programs, if it has not yet done so.

Thank you for the opportunity to comment on the compliance report.

Sincerely,

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<sup>19</sup> The staff report says that "In response to the draft analysis, the agency withdrew distance education from their scope of recognition." The Department required that the agency demonstrate formal training on distance education.

<sup>20</sup> Under a new proposal approved by the ABA council and due to be finalized as soon as May 2018, law students could earn as much as one-third of their law school credits through distance education courses, and first-year law students, who are currently not permitted to take distance education courses, could take up to 10 credits online. Lederman, Doug. "Law School Accreditor Proposes Easing Limits on Online Education." *Inside Higher Ed*. February 13, 2018: <https://www.insidehighered.com/quicktakes/2018/02/13/law-school-accreditor-proposes-easing-limits-online-education>.