UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MASSAGE THERAPY ASSOCIATION, Plaintiff, v. U.S. DEPARTMENT OF EDUCATION and MIGUEL CARDONA, Defendants.	Case Number: 1:24-cv-01670-RJL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Page

I. STATEMENT OF FACTS 2

A. AMTA Advocates for Massage Therapy Institutions in the United States. 2

B. Statutory and Regulatory Background 2

1. Congress Enacts the Higher Education Act of 1965 to Provide Financial Aid for Students in Institutions of Higher Education. 3

2. The Department Promulgates a Rule in 1994 to Offer Latitude to Institutions While Protecting Students and Taxpayers. 5

3. The Department Expands the 150 Percent Rule in 2020 by Consensus. 7

4. The Department Eliminates the 150 Percent Rule in 2023 Without Sufficient Notice, Industry Participation, or Time for Comment. 9

5. The Department Acknowledges the Difficulties Educational Institutions Will Face in Complying with the Final Rule But Pushes the Final Rule's Implementation Forward. 13

C. Institutions Challenge the Final Rule in Two Lawsuits. 14

1. The Two Lawsuits. 14

2. The Texas Court Enjoins the Final Rule. 14

D. The Final Rule Endangers Massage Therapy Education. 15

1. Loss of Pell Grants 16

2. Suspension of Enrollments 17

3. Undermining Industry Standards and Licensure Examination Results 18

II. ARGUMENT AND CITATION OF AUTHORITY 19

A. Summary Judgment Standard 19

B. Plaintiff Has Standing and Its Case is Ripe for Resolution. 20

C. The Final Rule Arbitrarily Departs from 30 Years of Practice. 21

D. Defendants' Reliance on Studies to Support the Final Rule is Misplaced. 28

1. Defendants' Studies Answered Irrelevant, Inapplicable Questions..... 28

2. Data Limitations Undermine Defendants' Reliance on the Studies. 31

E. The Department Makes Improper Assumptions and Ignores Problems With its "Other State" Exception. 33

1. Unjustified Assumptions Affecting All Three Scenarios 34

2. Invalid Assumptions Affecting the "MSA" Exception..... 36

F. Defendants Disregarded the Accreditation and Legislative Processes. 38

G. Defendants Respond Capriciously to the Loss of Pell Grant Access. 41

H. Defendants Irrationally Disregard an Obvious Alternative. 42

I. Defendants Disregarded Procedures Required by Law. 43

III. CONCLUSION.....45

Table of Authorities

Federal Cases

360 Degree Education, LLC v. U.S. Dep't of Educ., No. 4:24-cv-00508-P (N.D. Tex.) 14-15, 27-28, 40

Am. Ass'n of Cosmetology Schs. v. DeVos, 258 F. Supp. 3d 50 (D.D.C. 2017) 20, 35, 39, 41-42

Animal Legal Def. Fund, Inc. v. Perdue, 872 F.3d 602 (D.C. Cir. 2017) 33, 36, 41

Ardmore Consulting Grp., Inc. v. Contreras-Sweet, 118 F. Supp. 3d 388 (D.D.C. 2015) 19, 30

Ass'n of Private Sector Colleges & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012) 21, 39

Beverly Enters., Inc. v. Herman, 50 F. Supp. 2d 7 (D.D.C. 1999) 20-21

Casa De Maryland v. U.S. Department of Homeland Security, 924 F.3d 684 (4th Cir. 2019) 27, 43

Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024) 20-21, 23

Council of Parent Attorneys and Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28 (D.D.C. 2019) 25-26

Dep't of Homeland Sec. v. Regents of the Univ. of Calif., 591 U.S. 1 (2020) 21, 23

Desa Grp., Inc. v. U.S. Small Bus. Admin., 190 F. Supp. 3d 61 (D.D.C. 2016) 19

Dist. Hosp. Partners v. Burwell, 786 F.3d 46 (D.C. Cir. 2015) 32

Encino Motorcars, LLC v. Navarro, 579 U.S. 211 (2016) 21-23

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 25

Grocery Mfrs. Ass'n v. E.P.A., 693 F.3d 169 (D.C. Cir. 2012) 17

Hispanic Affairs Project v. Acosta, 901 F.3d 378 (D.C. Cir. 2018) 33-34, 36

Home Box Off., Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) 33, 41

Int'l Org. of Masters, Etc. v. NLRB, 61 F. 4th 169 (D.C. Cir. 2023) 24

Inv. Co. Inst. v. CFTC, 720 F.3d 370 (D.C. Cir. 2013) 34

Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561 (11th Cir. 1985) 31

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 20

MediNatura, Inc. v. FDA, 998 F.3d 931 (D.C. Cir. 2021).....22

Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016).....21, 39

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 33

NAACP v. Trump, 315 F. Supp. 3d 457 (D.D.C. 2018).....35, 43

Nat'l Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115 (D.C. Cir. 2013).....34

Nat'l Educ. Ass'n v. DeVos, 379 F. Supp. 3d 1001 (N.D. Cal. 2019) 44-45

National Lifeline Ass'n v. FCC, 941 F.3d 1102 (D.C. Cir. 2019) 24

Nissan Chem. Corp. v. FDA, No. 22-1598, 2024 WL 3724686 (D.D.C. Aug. 8, 2024) 22

Resolute Forest Prod., Inc. v. U.S. Dep't of Agric., 187 F. Supp. 3d 100 (D.D.C. 2016) 28, 30-31

Sherley v. Sibelius, 689 F.3d 776 (D.C. Cir. 2012).....32

Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702 (D.C. Cir. 2014) 24

St. Lawrence Seaway Pilots Ass'n, Inc. v. U.S. Coast Guard, 85 F. Supp. 3d 197 (D.D.C. 2015) 32

Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001) 34

U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) 21

Williams Gas Processing-Gulf Coast Co., L.P. v. FERC, 475 F.3d 319 (D.C. Cir. 2006) 35

Federal Statutes and Rules of Court

Pub. L. 89-329 (Nov. 8, 1965) 3, 42

5 U.S.C. § 702.....20

5 U.S.C. § 706.....19, 45

20 U.S.C. §§ 1001.....4

20 U.S.C. § 1002.....4

20 U.S.C. § 1070.....3

20 U.S.C. § 1088 ..... 4, 16

20 U.S.C. § 1098a 7-8, 43-44

Fed. R. Civ. P. 56(c) 19

Federal Regulations and Federal Register Entries

34 C.F.R. 668.8 ..... 4, 13, 16

34 C.F.R. § 668.13 19

34 C.F.R. § 668.14 ..... 1, 6, 9, 14, 33, 35, 39

34 C.F.R. § 602.22 ..... 17, 38

34 C.F.R. § 668.414 7

59 Fed. Reg. 9,526 (Feb. 28, 1994) 5, 25, 39

59 Fed. Reg. 22,348 (Apr. 29, 1994) 6

79 Fed. Reg. 64,890 (Oct. 31, 2014) 7

84 Fed. Reg. 31,392 (July 1, 2019) 7

85 Fed. Reg. 18,638 (Apr. 2, 2020) 8

85 Fed. Reg. 54,742 (Sept. 2, 2020) 7-8, 25, 36

86 Fed. Reg. 28,299 (May 26, 2021) 9

86 Fed. Reg. 69,607 (Dec. 8, 2021) 9, 44

88 Fed. Reg. 32,300 (May 19, 2023) 11-12, 23, 37

88 Fed. Reg. 74,568 (Oct. 31, 2023) 1-3, 11-17, 20-21, 23-43, 45

State Laws and Regulations

Va. Code § 54.1-3029 37

17 D.C. Mun. Regs. § 7502.2 1

COMAR § 10.65.01.07 38

Abbreviations and Acronyms Used

AMTA	American Massage Therapy Association
APA	Administrative Procedure Act
COMTA	Commission on Massage Therapy Accreditation
DACA	Deferred Action for Childhood Arrivals program
DOL	U.S. Department of Labor
EA	Electronic Announcement GEN-24-07 (Apr. 9, 2024)
FLSA	Fair Labor Standards Act of 1938
FSA	Federal Student Aid
FSMTB	Federation of State Massage Therapy Boards
GE	Gainful Employment
HEA	Higher Education Act of 1965
IMpact	Interstate Massage Compact
MBLEx	Massage & Bodywork Licensing Examination
MSA	Metropolitan Statistical Area
NPRM	Notice of Proposed Rulemaking, 88 Fed. Reg. 32,300 (May 19, 2023)
PI	AMTA's Motion for Preliminary Injunction
PPA	Program Participation Agreement

For 30 years, institutions of higher education that offer "gainful employment" programs, such as massage therapy and cosmetology, have maintained their eligibility to participate in Title IV federal student aid ("FSA") programs by relying on a regulation from the U.S. Department of Education ("the Department") widely known as the 150 Percent Rule. That rule permits these "gainful employment" programs, which train students for certain recognized professions, to last up to 150 percent of the minimum number of clock hours required for a student to become licensed in that profession in the state in which his or her school is located. *See* 34 C.F.R. § 668.14(b)(26). For example, in the District of Columbia, where one must study a minimum of 500 clock hours to become a licensed massage therapist,[1] schools may offer a massage therapy program that is up to 750 hours in duration and still be eligible to participate in FSA programs. The flexibility of the 150 Percent Rule has allowed institutions to design curricula that best meet their students' needs and position graduates to be competitive in the marketplace. All that changed on October 31, 2023, when the Department and its Secretary, Miguel Cardona (collectively, "Defendants") published a rule at 88 Fed. Reg. 74,568 ("Final Rule") that will eliminate this flexibility and cap these programs at no more than 100 percent of the minimum clock hours in a school's state.

The plaintiff, the American Massage Therapy Association ("AMTA"), brings this action under the Administrative Procedure Act ("APA") and Declaratory Judgment Act seeking declaratory and injunctive relief arising out of the promulgation—without good reason or observance of required procedure—of the Final Rule because it is an arbitrary, capricious, unexplained, and unsupported change from longstanding Department policy upon which many institutions, including hundreds of massage therapy schools, have relied for 30 years.

Defendants hastily included the Final Rule in a package of significant changes to their

[1] *See* 17 D.C. Mun. Regs. § 7502.2.

regulations arising under the Higher Education Act ("HEA") without adequate notice, proper negotiated rulemaking, supportive research, or reasonable justification. Aside from upsetting a decades-old regulatory balance, if the Final Rule takes effect, it will deprive many of AMTA's member schools of the ability to participate in one or more types of FSA programs. Other member schools will have to significantly cut the length of their massage therapy programs, which, in turn, will cause significant drops in revenue, school closures, and loss of learning opportunities for students, most of whom are female or demographically and economically diverse—all this in spite of Congress's express intention in the HEA to encourage vocational training. The Court should set aside Defendants' arbitrary regulation.

I. STATEMENT OF FACTS

A. AMTA Advocates for Massage Therapy Institutions in the United States.

AMTA is a non-profit professional association whose mission is "[t]o serve AMTA member schools while advancing the art, science, and practice of massage therapy." Declaration of Jeffrey Flom dated June 7, 2024 ("June 7 Flom Decl."), ECF No. 3-2, ¶ 4. To this end, AMTA supports professional competency by advocating for standards in massage therapy education that benefit practitioners and the public alike. *Id.* ¶ 5. AMTA conducts and supports research into massage therapy education nationwide, and it surveys its members about accreditation, curriculum, duration of school programs, and clock hour requirements (a measure of program length). *Id.*

AMTA has more than 600 massage school members nationwide. *Id.* ¶ 5. These schools represent a majority of U.S. massage therapy educational institutions, a substantial number of which will suffer catastrophic harm if the Final Rule takes effect. *Id.* ¶¶ 5, 8, 21–35.

B. Statutory and Regulatory Background

The HEA is designed to "mak[e] available the benefits of postsecondary education to

eligible students" through a series of grants, loans, and other programs. 20 U.S.C. § 1070(a). For decades, the Department's regulations governing program length have been consistent with that purpose. The Final Rule, however, unjustifiably and irrationally departs from Congress's purpose and the Department's longstanding practice.

1. Congress Enacts the Higher Education Act of 1965 to Provide Financial Aid for Students in Institutions of Higher Education.

In 1965, Congress enacted the HEA to "strengthen the educational resources of [the nation's] colleges and universities and to provide financial assistance for students in postsecondary and higher education." Pub. L. 89-329, Nov. 8, 1965, 79 Stat. 1219. Central to the HEA is Title IV, which authorizes various FSA programs that provide financial assistance to students to pursue postsecondary education at eligible institutions of higher education. *See* 20 U.S.C. §§ 1070–1099d. One such Title IV program, the federal Pell Grant program, "is the single largest source of federal grant aid supporting undergraduate students." Cassandria Dortch, Cong. Rsch. Serv., R45418, Federal Pell Grant Program of Higher Education Act: Primer , Nov. 6, 2024. "Pell Grants are need-based aid that is intended to be the foundation for all need-based federal student aid awarded to undergraduates. Unlike loans, students do not repay Pell Grants." *Id.* For relatively low-tuition programs like massage therapy, Pell Grants are a vital resource. The maximum Pell Grant for 2024-25 is $7,395.[2] Thus, for a hypothetical massage therapy course that costs $10,000, a Pell Grant alone would defray, debt-free to the student, nearly 75% of the cost.

Any institution that wants to receive FSA funds pursuant to a Title IV program, including Pell Grants and direct loans under the William D. Ford Direct Loan Program, must meet several statutory and regulatory eligibility criteria, including the statutory definition of an "institution of

[2] Don't Miss Out on Federal Pell Grants, Office of Federal Student Aid, (last visited Oct. 7, 2024), https://studentaid.gov/articles/dont-miss-out-on-pell-grants.

higher education." 20 U.S.C. § 1002. For purposes of Title IV, an institution of higher education can include a "proprietary institution of higher education," which the HEA defines as any school that is neither a public nor a nonprofit institution and which "provides an eligible program of training to prepare students for gainful employment in a recognized occupation," among other requirements. 20 U.S.C. §§ 1001(a), 1002(a)(1)(A) & (b). A vocational school may also qualify as an "institution of higher education" if it prepares students for "gainful employment." 20 U.S.C. § 1002(a)(1)(B). Since all academic programs at proprietary institutions and vocational institutions must meet the "gainful employment" requirement to be Title IV-eligible, programs at proprietary and vocational schools are often called "GE Programs."[3]

Department regulations impose additional Title IV requirements in parts 600 and 668 of Title 34 of the Code of Federal Regulations. Relevant to this action, a program offered by a proprietary institution of higher education or vocational institution qualifies under Title IV if, among other things, it "require[s] a minimum of 15 weeks of instruction," it is "at least 600 clock hours, 16 semester hours, or 24 quarter hours" long, and it "provide[s] undergraduate training that prepares a student for gainful employment in a recognized occupation[.]" 34 C.F.R. § 668.8(d)(1).

The eligibility requirements under the Pell Grant and direct loan programs differ in some material respects. One critical difference relates to program length. Pell Grants are only available for GE Programs that entail at least "600 clock hours of instruction, 16 semester hours, or 24 quarter hours," offered over 15 or more weeks. 20 U.S.C. § 1088(b)(1)(A). In contrast, direct loans under the Ford Direct Loan Program are available if a GE Program lasts between 300 and 600 clock hours of instruction over 10 or more weeks (among other requirements). *Id.* §

[3] Programs at not-for-profit and public colleges that are at least one year long and lead to a certificate or other non-degree credential are also GE Programs. *See* 34 C.F.R. § 668.8(c)(3).

1088(b)(2). Certain GE Programs, including many massage therapy programs offered by AMTA member schools, are measured in "clock hours,"[4] as opposed to traditional units for measuring the length of an academic course (e.g., credit, semester, or quarter hours). *See* ECF No. 3-2, ¶ 8.

2. The Department Promulgates a Rule in 1994 to Offer Latitude to Institutions While Protecting Students and Taxpayers.

On February 28, 1994, the Department issued a Notice of Proposed Rulemaking, declaring that the "Federal government's management of its responsibilities to determine eligibility and to certify institutions to participate in Title IV, HEA programs has not always been adequate to prevent abusive practices at institutions that participate in those programs." 59 Fed. Reg. 9,526 (Feb. 28, 1994). Specific to GE Programs, the Department claimed that many schools were offering excessively long programs that required students to incur unnecessary debt. As an example, the Department identified an institution that sought approval of a 600-hour program when the state in which the institution was located required only 40 hours of training for entry-level positions for which the program provided training. *Id*. at 9,547–48. To address this concern while still seeking to fulfill the HEA's purpose of making federal aid widely available to postsecondary students, the Department proposed (and later issued) regulations that it concluded would "help curb abuse of the programs by preventing institutions from providing unnecessary training to students in order to receive additional Title IV, HEA program funds." *Id*. at 9,532–33.

The Department's February 1994 proposal provided that, to be Title IV-eligible, any institution offering a GE Program must agree in its Program Participation Agreement ("PPA")[5] to

[4] Clock hours are the total number of actual hours per week a student spends attending class or other instructional activities that count toward completing a program of study. *See* U.S. Dep't of Homeland Sec., The Difference Between Clock Hours and Credit Hours, March 2, 2016, https://studyinthestates.dhs.gov/2016/03/difference-between-clock-hours-and-credit-hours (last visited Nov. 25, 2024).

[5] Institutions of higher education must execute a PPA to participate in Title IV federal student aid

demonstrate a reasonable relationship between the quantity of training provided in the program and entry-level requirements for employment. *Id*. at 9,548. A "reasonable relationship" would exist "if the number of clock hours in the program d[id] not exceed by more than 50 percent any State requirement for the minimum number of clock hours necessary to train the student in the occupation for which the program prepares the student." *Id*. In effect, the Department was capping the number of clock hours that a school could require (and charge for) in a clock hour-based GE Program while still remaining eligible to receive Title IV FSA funds.

On April 29, 1994, the Department published a final version of its proposed rule. It stated:

> If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will—
>
> (i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has established such a requirement or as established by any Federal agency; and
>
> (ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

59 Fed. Reg. 22,348, 22,427 (Apr. 29, 1994). The rule was codified at 34 C.F.R. § 668.14(b)(26).

This was the origin of the 150 Percent Rule. The new rule ensured that institutions offering clock hour-based GE Programs that lasted up to 150 percent of the state's required minimum clock hours could still accept students who intended to use Pell Grants and other Title IV FSA funds to pay for their education. This built-in flexibility is consistent with the Department's stated purpose for promulgating the 150 Percent Rule: "[A]llow[ing] enough latitude for institutions to provide

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programs. The PPA is an agreement between the institution and the Department that certifies that the institution complies with all applicable Title IV provisions. *See* 34 C.F.R. § 668.14.

quality programs and furnish[ing] a sufficient safeguard against the abuses of course stretching." *Id*. at 22,366. It is noteworthy that, when the 150 Percent Rule was finalized in 1994, the Department disagreed with commenters who argued that "the standard . . . was too lenient and that the program length should not exceed the minimum State standard." *Id*.

3. The Department Expands the 150 Percent Rule in 2020 by Consensus.

The substance of the 150 Percent Rule remained unchanged for nearly three decades.[6] Then, in 2020, the Department changed the 150 Percent Rule to offer even *more* flexibility to institutions of higher education in light of the Department's recognition that "individuals often move from one State to another or live, work, and learn in different States at the same time." 85 Fed. Reg. 54,742, 54,776 (Sept. 2, 2020). In accordance with its finding, the Department amended the 150 Percent Rule to better account for the acknowledged mobility of students. *Id*. at 54,743.

Unlike ordinary APA rulemaking, Title IV regulations must undergo "negotiated rulemaking," in which the Department solicits input from "individuals and representatives of the groups involved in student financial assistance programs." 20 U.S.C. § 1098a. Proper negotiated rulemaking will facilitate input from the various interested sectors, including "students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies." *Id*. Some of these stakeholders naturally have diverging interests. Legal assistance organizations representing students may disagree with collection agencies, for example. However, if these groups can reach consensus during negotiated

[6] Effective July 1, 2015, the Department made immaterial changes to the rule and added a minor requirement that each institution provide a certification required under 34 C.F.R. § 668.414. *See* 79 Fed. Reg. 64,890, 65,007 (Oct. 31, 2014). None of this is at issue. 34 C.F.R. § 668.414 was removed and reserved effective July 1, 2020. *See* 84 Fed. Reg. 31,392, 31,453 (July 1, 2019).

rulemaking on what a regulation should say, then the Department is obligated to present that consensus as a proposed rule. 20 U.S.C. § 1098a(b)(2).

The 2020 amendment to the 150 Percent Rule is an example of consensus rulemaking; all interested parties agreed to it. Under the 2020 consensus version of the regulation, an institution offering a GE Program could still demonstrate a "reasonable relationship" between program length and entry-level job requirements by showing that its program length did not exceed 150 percent of its own state's minimum required hours (as had always been the case). *Id*. at 54,816. But as modified, the institution could also demonstrate reasonableness by showing that its GE Program length did not exceed 100 percent of the minimum hours required by an *adjacent* state. *Id*.

The Department rejected public commentary arguing that the amended 2020 version failed to prevent institutions from over-stretching their programs, finding that the amended language struck "a reasonable balance between supporting students who must qualify for State licensure and preventing abuse." *Id*. at 54,776. When proposing the 2020 rule to the public, the Department explained that it "did not want schools to inflate the number of hours in a program beyond those that a student needs to complete in order to get a good job in their field[.]" 85 Fed. Reg. 18,638, 18,664 (Apr. 2, 2020). On the other hand, the Department recognized that keeping the "150 percent threshold" would "afford those pursuing career and technical education the same opportunities to develop advanced competencies in order to qualify for higher paying and more secure jobs." *Id*. The Department reasoned that a lower course length threshold for GE Programs would result in disparate treatment where "Title IV funds can be used by a student who wishes to pursue a graduate degree simply because they are interested in a topic, but cannot be used by a student in a [GE] program who wants to complete coursework to develop advanced skills and competencies that *go beyond basic licensure requirements*." *Id*. (emphasis added).

4. The Department Eliminates the 150 Percent Rule in 2023 Without Sufficient Notice, Industry Participation, or Time for Comment.

On May 26, 2021, the Department announced its intention to form negotiated rulemaking committees to prepare proposed regulations governing FSA programs. *See* 86 Fed. Reg. 28,299 (May 26, 2021). The Department's announcement listed 14 specific "topics for regulation." Modifying the 150 Percent Rule or any aspect of 34 C.F.R. § 668.14 was *not* among them. *Id*. at 28,299–300. The Department also held public hearings on its "rulemaking agenda" on June 21, 23, and 24, 2021.[7] *See* AR-00003, AR-00053, AR-00120, AR-00186; 86 Fed. Reg. 69,607 (Dec. 8, 2021). At no time did the Department propose making changes to the 150 Percent Rule.

After the public hearings, and as the next stage in the negotiated rulemaking process, the Department announced on December 8, 2021 that it would form an "Institutional and Programmatic Eligibility Committee" ("Committee") to address seven topics—none of which referred to the 150 Percent Rule or changes to 34 C.F.R. § 668.14.[8] 86 Fed. Reg. 69,607–08.

Although the Department averred that the Committee "w[ould] include representatives of organizations or groups with interests that are significantly affected by the subject matter of the proposed regulations," *id*. at 69,607, the Department did not include a person with experience in clock hour-based GE Programs, massage therapy programs, or beauty and wellness programs on the Committee. South College's Chief Operating Officer, Bradley Adams, and Aviation Institute of Maintenance's Vice President of Administration, Michael Lanouette, represented proprietary

[7] The public hearing transcripts are found in AR-00003, AR-00053, AR-00120.

[8] These topics included: "(1) 90/10 under 34 CFR 668.28; (2) Ability to benefit under 34 CFR 668.156; (3) Certification procedures for participation in title IV, HEA programs under 34 CFR 668.13; (4) Change of ownership and change in control of institutions of higher education under 34 CFR 600.31; (5) Financial responsibility for participating institutions of higher education under 34 CFR 668.15 and 34 CFR part 668, subpart L, such as events that indicate heightened financial risk; (6) Gainful employment (formerly located in 34 CFR part 668, subpart Q); and (7) Standards of administrative capability under 34 CFR 668.16."

institutions.[9] Neither South College nor the Aviation Institute of Maintenance offers a massage therapy, cosmetology, or other wellness or beauty industry program.[10]

The Committee met in January, February, and March 2022. It was not until prior to the Committee's first meeting on January 21, 2022—after its membership was established, and after the public had its opportunity to comment on rulemaking topics—that the Department, out of nowhere, sought "feedback from the [C]ommittee on the appropriate maximum length of aid eligibility" for a gainful employment program.[11] Over the course of several negotiated rulemaking sessions, the negotiators considered several changes, but did not reach consensus on whether, or how, the 150 Percent Rule should be modified.[12] Defendants, however, were undeterred.

On May 19, 2023—approximately three decades after the 150 Percent Rule was originally adopted and just three years after it was reaffirmed and amended by consensus—Defendants published a Notice of Proposed Rulemaking proposing to abandon the 150 Percent Rule altogether. The initial proposal would have limited the number of hours in a GE Program to the greater of:

> (A) The required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by any Federal agency or the institution's accrediting agency; or
>
> (B) Another State's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, if certain criteria is [sic] met.

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[9] *See* ECF 3-9; AR-00189.

[10] *See* Aviation Inst. of Maintenance, https://aviationmaintenance.edu/ (last visited Oct. 10, 2024); Programs and Degrees, South Univ., https://www.south.edu/about/ (last visited Oct. 10, 2024).

[11] ECF 3-10 at 11; AR-00208; AR-00203.

[12] The transcripts for the Committee's January 18 through March 18, 2022 meetings are available at: AR-00463, AR-00500, AR-00527, AR-00553, AR-00667, AR-00864, AR-00884, AR-00905, AR-00925, AR-00946, AR-00985, AR-01165, AR-01227, AR-01247, AR-01268, AR-01291.

88 Fed. Reg. 32,300, 32,492 (May 19, 2023) ("NPRM"). Under the proposal in the NPRM, an institution could have relied on paragraph (B) only if "the institution document[ed], with substantiation by a certified public accountant who prepares the institution's compliance audit report" that, in the most recently completed award year, a majority of the program's students either lived in the other state, went to work in the other state, or certified at the time of their enrollment that they intend to live in a different state within the same metropolitan statistical area. *Id*.

The proposed modifications to the 150 Percent Rule were buried in over 200 pages of complex and new proposed regulations that affected broader sections of the higher education industry. *See generally id*. at 32,300–32,511. To make matters worse, the Department provided only 30 days for the public to submit comments to its lengthy proposals. *See id*. at 32,300.

Notwithstanding the Defendants' needlessly truncated deadline, commenters, including AMTA, identified numerous legal and practical flaws of the proposed gutting of the 150 Percent Rule, including (1) the lack of representation of beauty and wellness industries or small, proprietary schools on the Committee; (2) the Department's failure to account for the time it will take accrediting agencies and states to approve changes to the lengths of GE Programs; (3) limiting post-graduation student mobility and diminishing the quality of education; (4) undermining the Interstate Massage Therapy Compact, which adopts a 625-hour training minimum based on the massage therapy industry average; and (5) the nationwide shortage of massage therapists in a growing industry. *See* 88 Fed. Reg. 74,568, 74,572, 74,639–42 (Oct. 31, 2023) (noting commenters' concerns about Committee make-up); AR-07012, AR-02046, AR-03593, AR-03606, AR-04043, AR-04675, AR-04774, AR-06483, AR-07007, AR-05442, AR-05570, AR-08698, AR-05680, AR-06265, AR-06295, AR-06311.

The government was dismissive of these (and other) significant flaws. On October 31,

2023, Defendants published the Final Rule, adopting a regulation that is even more draconian than what Defendants proposed in the NPRM, with an effective date of July 1, 2024. *Id*. at 74,696–97. The Final Rule states:

> If an educational program offered by the institution on or after July 1, 2024, is required to prepare a student for gainful employment in a recognized occupation, the institution must—
>
> (i) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student; and
>
> (ii) Demonstrate a reasonable relationship between the length of the program and the entry level requirements for the recognized occupation for which the program prepares the student by limiting the number of hours in the program to the greater of—
>
> (A) The required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement or as established by any Federal agency; or
>
> (B) Another State's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, if the institution documents, with substantiation by a certified public accountant who prepares the institution's compliance audit report as required under § 668.23 that—
>
> (1) A majority of students resided in that State while enrolled in the program during the most recently completed award year;
>
> (2) A majority of students who completed the program in the most recently completed award year were employed in that State; or
>
> (3) The other State is part of the same metropolitan statistical area as the institution's home State and a majority of students, upon enrollment in the program during the most recently completed award year, stated in writing that they intended to work in that other State; and
>
> (iii) Notwithstanding paragraph (a)(26)(ii) of this section, the program length limitation does not apply for occupations where the State entry level requirements include the completion of an associate or higher-level degree; or where the program is delivered entirely through distance education or correspondence courses[.]

Id. at 74,696–97. The only significant change—which also operates against AMTA members—is that minimum training hours required for accreditation could no longer be used as the maximum

length of a GE Program. *See* 88 Fed. Reg. at 74,637. Only the state minimum matters. *Id*.

5. The Department Acknowledges the Difficulties Educational Institutions Will Face in Complying with the Final Rule But Pushes the Final Rule's Implementation Forward.

Not long after issuing it, the Department acknowledged that the Final Rule had a serious problem. On April 9, 2024, in Electronic Announcement GEN-24-07 ("EA"), Defendants admitted that "institutions face unique challenges outside their control that may affect their ability to comply" with 34 C.F.R. 668.8(b)(26). *See* Exhibit 1, U.S. Dep't of Educ., Updates on New Regulatory Provisions Related to Certification Procedures and Ability-to-Benefit (GE-24-03), Apr. 9, 2024, https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2024-04-09/updates-new-regulatory-provisions-related-certification-procedures-and-ability-benefit. These challenges—which commenters raised in no uncertain terms during the comment period—include institutions' inability to obtain approvals from states and accrediting agencies for changes in program length in time to comply with the Final Rule. *Id*.; *see also* 88 Fed. Reg. at 74,641. The Department offered a non-committal statement that it would "seriously consider such challenges, in particular prior to January 1, 2025, when determining whether to seek enforcement of these provisions." *See* Exhibit 1. Additionally, the Department announced that "an institution can raise as a defense to an enforcement action that it faced challenges in meeting compliance due to reasons that are unique, time-specific, and outside the control of the institution." *Id*. The Department speculated that it "believes" that most of those concerns and challenges affecting compliance with the 150 Percent Rule will have been resolved or sufficiently mitigated by January 1, 2025, though it cited no evidence in support of that belief.

Despite finally acknowledging a major problem with the Final Rule that commenters foretold, the Department did *not* change the date on which the Final Rule was to take effect or provide a mechanism for affirmative relief on which institutions can confidently rely to avoid

losing out on the 150 Percent Rule's 30-year-old, mission-critical benefits. The Department merely granted unto itself "enforcement discretion," leaving schools in limbo as to how (and if) that discretion would be exercised.

C. Institutions Challenge the Final Rule in Two Lawsuits.

1. The Two Lawsuits.

On May 31, 2024, a career college and a coalition of other interested plaintiffs filed a lawsuit in the United States District Court for the Northern District of Texas against Defendants under the APA to set aside the changes in 34 C.F.R. § 668.14(b)(26)(ii)(A), which limit a Title IV GE Program's clock hours to the state minimum. *See 360 Degree Education, LLC v. U.S. Dep't of Educ.*, 4:24-cv-00508-P ("*Cortiva*"), ECF No. 1. The same day, the *Cortiva* plaintiffs filed a Motion for Temporary Restraining Order, Injunction and Stay, seeking to enjoin the changes made to 34 C.F.R. § 668.14(b)(26)(ii)(A). *Id*., ECF No. 5.

One week later, on June 7, 2024, AMTA filed the instant lawsuit and a Motion for Preliminary Injunction seeking to enjoin implementation of the Final Rule. *See* ECF Nos. 1, 3.

2. The Texas Court Enjoins the Final Rule.

On June 21, 2024, the *Cortiva* court granted the plaintiffs' motion for a preliminary injunction, ordering that enforcement and implementation of 34 C.F.R. § 668.14(b)(26)(ii)(A), as amended in the Final Rule (referred to by that court as the "the Bare Minimum Rule"), be enjoined pending resolution of that lawsuit. *See Cortiva*, ECF No. 30. Prompted by a motion from the government, the court confirmed on July 1, 2024 that the injunction applies nationwide. *See Cortiva*, ECF No. 39. The Department did not appeal the injunction and issued guidance on July 3, 2024, informing institutions that they "must continue to comply with the maximum program length regulations that were in effect prior to July 1, 2024." *See* Exhibit 2, U.S. Dep't of Educ., Temporary Injunction on Program Length Regulations (GEN-24-83), July 3, 2024,

https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2024-07-03/temporary-injunction-program-length-regulations.

In the meantime, on June 27, 2024, the parties in the instant case appeared for a hearing on AMTA's Motion for Preliminary Injunction ("PI"). Because the nationwide injunction in *Cortiva* mooted AMTA's PI motion, AMTA withdrew its PI motion without prejudice and the parties agreed to cross-move for summary judgment. ECF Nos. 18, 19.

A month later, the Department filed a motion to dismiss in *Cortiva* for (alleged) lack of standing, and alternatively sought a transfer of *Cortiva* to this Court. *See Cortiva*, ECF Nos. 42, 43. The government argued that the institution at the center of *Cortiva* is ineligible to participate in Title IV, FSA programs, and thus, will not be affected by the Final Rule. *Id*. Rather than rule on the institution's Title IV eligibility itself, the *Cortiva* court instead directed the government to initiate administrative proceedings to determine the institution's eligibility, and it administratively closed *Cortiva*. *Cortiva*, ECF No. 57. However, the court kept the injunction in place. *Id*.

D. The Final Rule Endangers Massage Therapy Education.

AMTA's membership includes more than 600 schools offering massage therapy programs across the United States. *See* ECF No. No. 3-2, ¶ 5. Many, if not most, of these member schools face one or more inevitable hardships if the Final Rule takes effect. These hardships include loss of eligibility to participate in critical FSA programs; compelled, indefinite shut-downs of enrollments in massage therapy programs; disruptions to established industry-wide compacts; reputational harm; and outright cessation of business operations. Compounding the problem is the irreversible collateral damage that the Final Rule will cause for students of those schools—the very individuals the Final Rule is purportedly intended to help.

1. Loss of Pell Grants

The overwhelming majority of students at AMTA member schools are women, and many come from a diverse racial or ethnic background. *Id.* ¶ 6. A similarly high number of students at AMTA member schools come from disadvantaged backgrounds and rely heavily on Pell Grants to finance their educations. *Id.*; *see also* AR-05960, AR-08074, AR-08094, AR-10644. Given the demographics of their student bodies, massage therapy schools structure their curricula to fit within the federal Pell Grant program, to support these underserved students, and to offer them training in a practical, marketable trade. *See, e.g.,* AR-08513 ("I take advantage of the 150% rule to ensure our enrollees can access Title IV student loans and Pell Grants."). However, under the HEA, students may not use Pell Grants to pay for GE Programs such as massage therapy unless the program is at least 600 clock hours long. *See* 20 U.S.C. § 1088(b).[13]

Twelve states currently have a minimum clock hour requirement for massage therapy that is below 600 hours.[14] *See* Exhibit 3, Declaration of Jeffrey Flom dated November 26, 2024, ("Flom Decl.") ¶ 6. In those 12 states, the Final Rule—by capping GE Programs at the minimum number of hours required by an institution's state—will effectively ban massage therapy schools from the Pell Grant program, and will likewise limit or foreclose massage therapy education for students who otherwise would have attended those schools. The result will be a significant reduction to member schools' enrollment and operating revenues and lost opportunities for students.

[13] The Final Rule also has the effect of conditioning participation in the federal direct loan programs on criteria that many AMTA member schools need not satisfy under the current regulatory regime. *See* 34 C.F.R. § 668.8(d)(3), (e). To the extent the government challenges standing, AMTA will further explain how the Final Rule harms institutions that participate in the direct loan program, irrespective of whether they also participate in the Pell Grant program.

[14] When this case was filed, an estimated 22 states had minimum hours requirements below 600.

2. Suspension of Enrollments

If it takes effect, the Final Rule will put AMTA member schools in a damned-if-you-do, damned-if-you-don't scenario. Because state authorities and accreditors need time to approve changes to programs, institutions will be forced to either violate their accreditation by enrolling new students in shortened programs without approval from their accreditors (which itself jeopardizes the school's participation in FSA programs, *see* 34 C.F.R. § 602.22(a)), or pause their massage therapy programs while their accreditors and other state authorities review and approve the reduced-hour curricula (which will jeopardize schools' ability to stay in business). *See* ECF No. 3-2, ¶¶ 32, 34; ECF No. 3-3, ¶ 13, ECF No. 3-7 ¶¶ 13–16, ECF No. 3-6, ¶¶ 18–20, ECF No. 3-5, ¶ 18.[15] Between those two options, the only way to comply with the letter of the law is to temporarily and indefinitely suspend new enrollments while state agencies and accreditors review each institution's revised program curriculum. To the extent schools can weather that storm and stay in business, they will never recover the tuition that they would have been paid had they been able to enroll students and teach massage therapy programs continuously.

The result will be, at best, significant financial losses to nearly one-third of AMTA member schools, and, at worst, program losses that threaten the existence of many institutions that have labored for decades to provide high-quality massage therapy education. *See* Flom Decl., ¶ 7; ECF No. 3-2, ¶¶ 20–35; ECF No. 3-3, ¶¶ 14–15, ECF No. 3-7, ¶¶ 13–17, 20, ECF No. 3-6, ¶¶ 14, 18, 20, ECF No. 3-5, ¶¶ 15–16. Sixty-five percent of massage therapy schools nationwide are small or family businesses. *See* ECF No. 3-2, ¶¶ 5, 10; *see also* AR-03055, AR-08594, AR-08984.

[15] Most, if not all, of the facts in these declarations were before Defendants in sum and substance during the rulemaking process. However, even if they were not in the administrative record, AMTA may rely on them to establish its standing. *See Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 174 (D.C. Cir. 2012).

These devastating financial losses will force many AMTA member schools to terminate faculty and staff members who rely on their positions to support their families and pay for living expenses. *See, e.g.* ECF No. 3-5, ¶ 19.

3. Undermining Industry Standards and Licensure Examination Results

The average massage therapy school program lasts approximately 625 hours, which is consistent with the minimum hours requirement of the Interstate Massage Compact ("IMpact") developed by the Federation of State Massage Therapy Boards ("FSMTB"). *See* AR-07012, AR-08984. The FSMTB formed IMpact to set a nationwide standard that allows massage therapy students to transfer their licenses seamlessly from state to state. AR-08989. Commenters informed Defendants that the FSMTB considers many state minimum requirements for massage therapy education to be insufficient to protect public safety. *See* AR-05612.

Overriding the massage therapy industry's training and testing standard would have detrimental effects on AMTA members. Massage therapy schools obviously have a reputational interest in producing graduates who will perform massage therapy services safely (and the public has an interest in safe massage therapy). Stripping massage therapy programs down to a length that the FSMTB has deemed unsafe (in some states) puts those interests at risk.

Furthermore, the majority of states require that an applicant for a massage therapy license pass the Massage & Bodywork Licensing Examination ("MBLEx"), which the FSMTB administers. ECF No. 3-2, ¶ 16. In 2022-23, the nationwide pass rate for the MBLEx was 72%. *Id.*, *see also* Flom Decl., ¶ 12, Ex. B. However, statistics show that training beyond state minimums can increase a student's odds of achieving a passing score on the MBLEx. The optimal training time is between 600 and 650 hours. *See* ECF No. 3-2, ¶ 16. Eighty-one percent of MBLEx applicants who receive between 600–650 hours of education pass the MBLEx on the first try,

significantly above the national average. *Id*.

Licensure examination passage rates also bear upon a school's eligibility to participate in Title IV programs. For example, if an accreditor requires institutions to track licensure examination passage rates, the Department's regulations allow the Department to consider those passage rates when determining whether to certify an institution for participation in Title IV programs. *See* 34 C.F.R. § 668.13(e)(3). The Commission on Massage Therapy Accreditation ("COMTA") is one such accreditor. *See* ECF No. 3-2, ¶ 18; *see also* Exhibit 4, COMTA Accreditation Standards at 12 ("To maintain and/or improve program effectiveness, institutions or programs monitor and report . . . exam pass rates on an annual basis.").

In sum, schools are harmed if they cannot provide students the optimal amount of training to practice safely, meet industry standards, and pass the MBLEx.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Summary Judgment Standard

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). APA cases present only questions of law "limited to determining whether the agency acted arbitrarily or capriciously,' or in violation of another standard set out in section 10(e) of the APA . . . ." *Desa Grp., Inc. v. U.S. Small Bus. Admin*., 190 F. Supp. 3d 61, 68 (D.D.C. 2016) (internal citations omitted).

"Under the APA, a reviewing court must set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). This standard requires the agency to 'examine the relevant [evidence]' and 'articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Ardmore Consulting Grp., Inc. v. Contreras-Sweet,* 118 F. Supp. 3d 388, 393 (D.D.C. 2015). Applying these standards to the instant case, the Court should award AMTA summary

judgment and set aside the Final Rule.

B. Plaintiff Has Standing and Its Case is Ripe for Resolution.

To have standing under 5 U.S.C. § 702, a litigant must show that it is injured in fact by the agency action. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys*., 144 S. Ct. 2440, 2449 (2024). AMTA, an organization whose membership includes nearly 600 massage therapy schools, is an "object of the challenged regulation" and a paradigmatic "person[ ] injured by agency action." *Id.; Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Though AMTA is not itself a school, "'[a]ssociational standing,' . . . allows an organization to sue on behalf of its members to protect their interests." *Am. Ass'n of Cosmetology Schs. v. DeVos*, 258 F. Supp. 3d 50, 66–67 (D.D.C. 2017) (*"AACS"*). An organization has associational standing if it shows "that (1) 'its members would otherwise have standing to sue in their own right,' (2) 'the interests it seeks to protect are germane to the organization's purpose,' and (3) 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Id.*

The Declarations of AMTA CEO Jeffrey Flom dated June 7, 2024 and November 26, 2024 make clear that many of AMTA's member schools will be adversely affected by the Final Rule. Thus, the harms are not unique to one individual member. In addition, the declarations from various schools submitted in support of AMTA's PI further detail the deleterious effects of the Final Rule, many of them fatal. For all these reasons, AMTA has standing to bring this case.

Plaintiff's claims are ripe. Ripeness turns on "(1) whether the disputed claims raise purely legal questions and would, therefore, be presumptively suitable for judicial review; (2) whether the court or the agency would benefit from postponing review until the policy in question has sufficiently 'crystallized' by taking on a more definite form; and (3) whether the agency's action is sufficiently final." *Beverly Enters., Inc. v. Herman*, 50 F. Supp. 2d 7, 13 (D.D.C. 1999) (citing *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149-151 (1967), abrogated on other grounds by *Califano*

v. Sanders, 430 U.S. 99 (1977)). Here, all questions are legal—did Defendants act arbitrarily in violation of the APA or in violation of the HEA?—and Defendants' *final* regulations obviously constitute *final* agency action. *Beverly Enters.*, 50 F. Supp. 2d at 13. Given that the case involves only legal questions, more facts will not aid in the Court's analysis. *Id.*

C. The Final Rule Arbitrarily Departs from 30 Years of Practice.

The Final Rule is arbitrary and capricious because it reflects an unjustified departure from decades of past agency practice. "An agency's departure from past practice can . . ., if unexplained, render regulations arbitrary and capricious." *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). An agency that is changing an existing rule must "adequately explai[n] the reasons for a reversal of policy . . . ." *Id.* Furthermore, "the Supreme Court has held that 'the APA requires an agency to provide more substantial justification when . . . its prior policy has engendered serious reliance interests that must be taken into account.'" *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 708 (D.C. Cir. 2016) (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015)). "In such cases, in order to offer a satisfactory explanation for its action, . . . the agency must give a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 719 (D.C. Cir. 2016). Specifically, where an agency is "not writing on a blank slate, . . . it [is] required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 33 (2020). The failure to consider these matters makes a rule "arbitrary and capricious in violation of the APA." *Id.*

The Supreme Court explained in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016):

> When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position

> and show that there are good reasons for the new policy. In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. It follows that an [u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.

Id. at 2125-26 (quotation marks and citations omitted) (alteration in original).

Encino Motorcars involved a determination by the Department of Labor ("DOL") in 1978 that the Fair Labor Standards Act ("FLSA") exempted service advisors at car dealerships from the FLSA's overtime pay requirements. DOL suddenly changed its position in 2011 with a new regulation that would not exempt service advisors from overtime. The automobile industry challenged DOL's 2011 rule, arguing that its dealerships had come to rely on DOL's 1978 interpretation. The Supreme Court sided with the industry, holding:

> In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

Encino Motorcars, 579 U.S. at 218. The D.C. Circuit has since described the agency's obligation as "a substantial explanatory burden" when departing from a longstanding rule that has engendered significant industry reliance. *MediNatura, Inc. v. FDA*, 998 F.3d 931, 942 (D.C. Cir. 2021) (quoting and following *Encino*); *see also Nissan Chem. Corp. v. FDA*, No. 22-1598, 2024 WL 3724686, at *6 (D.D.C. Aug. 8, 2024) (quoting and adopting *Encino*).

Institutions of higher education, students, and states have all relied on the 150 Percent Rule for the past 30 years in at least the following ways: (1) institutions developed comprehensive curricula meeting current industry standards and prepared students for licensure examination and work in the field with the understanding that their students would be able to apply for Pell Grants

to pay for their educations;[16] (2) institutions used the 150 Percent Rule to maintain eligibility to receive Title IV FSA funds;[17] (3) at least one state relied on the 150 Percent Rule to set minimum clock hour requirements for licensing that fall below the 600-clock hour threshold for participation in the Pell Grant program; [18] and (4) institutions rely on FSA dollars to fund their operations and stay in business.[19]

Unfortunately, Defendants have caused *Encino Motorcars* all over again. Defendants finalized the Final Rule without accounting for or weighing any of the abovementioned reliance interests, even after receiving myriad comments from students, teachers, small business owners, AMTA, its member schools, and accrediting agencies that detailed the negative impacts of the Defendants' proposed changes to the 150 Percent Rule. *See, e.g.*, AR-03626, AR-05612, AR-07015, AR-08513, AR-08914, AR-10654. Despite acknowledging that the 150 Percent Rule "has existed in some form, with only slight variation in its effect, since 1994," 88 Fed. Reg. at 74,638, and further admitting that "institutions rely on the 150 percent rule to qualify their programs for title IV, HEA participation," 88 Fed. Reg. at 74,640, at no point did Defendants actually "assess whether there were reliance interests, determine whether they were significant, [or] weigh any such interests against competing policy concerns." *Dep't of Homeland Sec.*, 591 U.S. at 33; *see generally* 88 Fed. Reg. 32,300–32,511; *see also* 88 Fed. Reg. 74,568.

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[16] *See, e.g.,* AR-08622-25, AR-10229; AR-03967, AR-08812.

[17] *Id.*

[18] For example, Florida's state legislature relied on the 150 Percent Rule when it set the minimum number of training hours for massage therapists to 500. *See* AR-08624 ("[O]n the forefront of every [Florida] legislator's mind was, 'will this reduction in hours cause potential students to lose Title IV financial aid?'").

[19] Recall that the 150 Percent Rule not only allows institutions to offer (and collect tuition for) massage therapy courses that are up to 150 percent of the state minimum length, but also is critical for many schools to meet the minimum program length requirements simply to participate in certain FSA programs altogether. *Id.*, *see also* 88 Fed. Reg. at 74,640; AR-08624.

The Court should look for a substantive, *Encino*-mandated "reasoned explanation" in the Final Rule that weighs schools' decades-long reliance on the current 150 Percent Rule against the "competing policy concerns" in the Final Rule. When it does, it will not find that explanation anywhere. The Final Rule therefore is arbitrary and capricious. *See Int'l Org. of Masters, Etc. v. NLRB*, 61 F. 4th 169, 180 (D.C. Cir. 2023) (Board's rule arbitrary and capricious because it was adopted "with no regard for the parties' reliance interests. The Board did not consider the sweeping impact of its new rule or explain why existing case law does not govern"); *National Lifeline Ass'n v. FCC*, 941 F.3d 1102, 1115 (D.C. Cir. 2019) (tribal telecommunications rule invalid because FCC "d[id] not take into account the reliance interests of both the non-facilities-based providers that had crafted business models and invested significant resources into providing Lifeline service, and the two-thirds of subscribers relying on non-facilities-based providers for their telecommunications service").

Even if Defendants had no "substantial explanatory burden" to explain why the reliance interests of AMTA's member schools should yield to the government's new-found policies, the meager justifications that Defendants use to support the Final Rule are nevertheless fatally speculative. For example, Defendants guess that "Programs that are unnecessarily long *may* interfere with a student's ability to persist and complete a course of study," "unnecessary expenditures *may* then lead to further negative financial impacts," and the 150 Percent Rule "*could* be used simply to increase program length and take in more Federal aid," 88 Fed. Reg. at 74,639, 74,642 (emphases added). But Defendants' mere conjecture is insufficient as a matter of law to overturn any regulation, let alone a 30-year-old policy. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) ("Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference . . . deference to such . . . judgment[s] must be

based on some logic and evidence, not sheer speculation.") (alteration in original). If, as Defendants claim, course-stretching is truly a problem the Department has been combating for "decades," *id*. at 74,640, one would reasonably expect the Department to offer more than speculation about the supposed harms that the 150 Percent Rule causes. Yet, they do not. Defendants' lack of concrete evidence reflects arbitrary decision-making.

Moreover, the concerns Defendants cite in support of the Final Rule—safeguarding taxpayer dollars, overuse of Pell Grant eligibility, higher student debt, and "overly long programs"—are concerns that have been around for decades, and are in fact concerns that the Department considered when it promulgated the 150 Percent Rule in 1994 and when it amended the rule by consensus in 2020. *See, e.g.*, 59 Fed. Reg. at 9,548 and 22,366 (citing excessive program length and concerns about course stretching and excessive student debt in 1994); 85 Fed. Reg. at 54,776 (considering and rejecting comments claiming that rule did not go far enough to prevent institutions from artificially lengthening their programs). Defendants have not explained how the facts and circumstances *today* are materially different from the facts and circumstances in 1994 and 2020, or how today's circumstances justify terminating the 150 Percent Rule in light of the heavy reliance interests of schools, industry associations, states, and students over the past 30 years. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (An agency "must" provide a detailed justification when "its prior policy has engendered serious reliance interests that must be taken into account. . . . It would be arbitrary and capricious to ignore such matters.").

These failures mirror arbitrary and capricious actions invalidated in other cases. For example, in *Council of Parent Attorneys and Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28 (D.D.C. 2019) ("*CPAA*"), this Court set aside the Department's 2018 postponement of regulations it had adopted in 2016. When postponing the 2016 regulations, the Department cited concerns that the

regulations "could incentivize [local education agencies] to use racial quotas to avoid findings of significant disproportionality" under the Individuals with Disabilities Education Act. The problem with the Department's reasoning, this Court found, was that the Department based its decision on a purported concern (use of quotas) that it had already "thoroughly discussed and dealt with years before 2018." *Id*. at 49. In other words, the potential use of quotas "was not new information to the government, which was aware of this risk when drafting the 2016 Regulations . . . ." *Id*. at 51.

Far from explaining how circumstances had changed or why its prior reasoning was erroneous, the Department simply "did not address the 2016 Regulations' safeguards to deter the use of racial quotas or responded to them in an inadequate or cursory manner," this Court found. *Id*. at 50. This Court also determined that the Department overlooked the reliance interests of states and local education agencies who had incurred costs to comply with the 2016 regulations, rejecting the Department's contention that they were "sunk investments" and further found that the Department did not "account for the costs to children, their parents, and society." *Id*. at 54. Moreover, the *CPAA* Court observed that the Department's explanation for its decision was replete with conjectural harms—i.e., that its 2016 regulations "may" or "could" incentivize quotas—and thus "amount[ed] to the type of speculation the Supreme Court and the D.C. Circuit have rejected." *Id*. at 48, 50-51.

The similarities are obvious. In the Final Rule, Defendants ignore the reliance interests of schools, states, and students. Borrowing the words of the *CPAA* decision, Defendants premise the elimination of the 150 Percent Rule on an alleged issue (course-stretching) that is "not new . . . to the government" and that the Department "discussed and dealt with years before [2023]." *Id*. at 51. Finally, Defendants justify the Final Rule with mere guesswork about the supposed harms of the 150 Percent Rule. *CPAA* is on all fours.

Likewise, in *Casa De Maryland v. U.S. Department of Homeland Security*, 924 F.3d 684 (4th Cir. 2019), the court reviewed the government's rescission of the Deferred Action for Childhood Arrivals program ("DACA"), established in 2012. Under DACA, "certain noncitizens who came to the United States as children could receive deferred action–a decision forbearing their removal from the country." *Id*. at 690. Hundreds of thousands of individuals structured their lives on the availability of deferred action. *Id*. at 690, 705. But in 2017, the Acting Secretary of Homeland Security rescinded DACA based on the view that it was unlawful. *Id*. at 690–91. The Fourth Circuit ruled that the agency's "decision to rescind DACA was arbitrary and capricious," largely because the agency failed to "address the 'facts and circumstances that underlay or were engendered by the prior policy.'" *Id*. at 704. In fact, the Fourth Circuit found that the memorandum directing rescission of DACA "ma[de] no mention" of the reliance interests of DACA beneficiaries or the reasons why the government's interests suddenly trumped them, and that court ruled against Homeland Security. *Id*. at 705. So too here.

Applying these concepts, one court has already found the Final Rule is likely arbitrary and capricious. Just as AMTA asserts here, in *Cortiva*, the plaintiffs argued that the "Department failed to explain its 'regulatory changes to the longstanding 150% Rule, which has been in place for 30 years." *Cortiva*, 2024 WL 3092459, at *4 (June 21, 2024). The *Cortiva* court agreed and preliminarily enjoined the Final Rule because Defendants, *inter alia*, failed to "show that there are good reasons for [these] new polic[ies]." *Cortiva*, 2024 WL 3092459, at *4 (June 21, 2024) ("The record similarly reflects a dearth of justification for the Department's pivot on the 150% Rule."). That court's decision should hold considerable weight in this case because it relies on the same standards that govern this case and turns on a straightforward answer to a simple question: *Did Defendants include a rational explanation for their departure from 30 years of precedent in the*

Final Rule? Having reviewed the same Final Rule and similar arguments from the government as those made here, the *Cortiva* court found the answer to be "No."

D. Defendants' Reliance on Studies to Support the Final Rule is Misplaced.

Defendants cite research that they claim identifies no "correlation between higher training hour requirements and higher wages in massage therapy or cosmetology." ECF No. 12 at 18. The Court should not credit that argument. In addition to having data gaps that undermine Defendants' conclusions, the studies cited in the Final Rule do not actually say anything about whether educating students for more hours than a state requires confers an economic benefit on the students.

1. Defendants' Studies Answered Irrelevant, Inapplicable Questions.

If an agency relies on statistics and research to support a regulation, those statistics and research must be "reasonably reli[able] . . . to measure what they purport." *Resolute Forest Prod., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016). Here, Defendants argue that the research they cite in the Final Rule shows that "training beyond State licensure requirements would not financially benefit students." ECF No. 12 at 19. The research says no such thing.

One study—*Occupational Licensing and Student Outcomes* ("Acevedo Study")—purportedly measured whether a massage therapist's income is impacted by the number of hours required under state law to obtain a license. *See* AR-11173. That measurement, however, sheds no light on whether education *beyond* the state minimum leads to better outcomes. In order to support the government's proposition, the study would have to have compared (a) the earnings of students whose programs lasted only as long as a given state's minimum hours against (b) the earnings of students whose programs lasted longer than the same state's minimum. But, it did not.

To illustrate, Tennessee is a 650-hour state, and Connecticut is a 750-hour state. Defendants claim that "most students seek or obtain employment close to where they live or attend

school." 88 Fed. Reg. at 74,639. Taking Defendants at their word[20], comparing incomes of students who are assumed to have studied for 650 hours at Tennessee schools against those who are assumed to have studied for 750 hours at Connecticut schools—exactly what the Acevedo Study did—only shows whether massage therapists in Tennessee make more or less money than massage therapists in Connecticut. That does not inform whether education beyond a state's minimum is financially beneficial. To be relevant, Defendants' study needed to analyze (for example) whether a student in a 650-hour program *in Tennessee* makes more, less, or the same as a student in a 750-hour program *in Tennessee*. Defendants cannot stretch the Acevedo Study this far, and they have no other data that speak to that question.

Another study—*Examination of Cosmetology Licensing Issues* ("Simpson Study")—is unsupportive for a similar reason. In that paper, the authors compared the wages of cosmetologists in states with higher training requirements (e.g., 1,500 hours) versus those in states with lower training requirements (e.g., 1,000 hours). *See* AR-11376, AR-11384-85. Like in the Acevedo Study, these comparisons did not differentiate between schools whose programs last only the state minimum length and schools whose programs last longer than the state minimum. *Id*. The Simpson Study simply lumped all cosmetology schools in a state together (North Carolina, for example—a 1,500-hour state), assumed those schools all offered programs 1,500 hours long, and then compared the wages of cosmetologists in North Carolina against earnings of cosmetologists in other states (similarly aggregated) with different clock hour minimums. *Id*. However, by

[20] Accepting Defendants' characterizations of any of the studies cited in the Final Rule is a risky proposition. In fact, the study cited for this proposition warns, "[A]ssuming that graduates remain in-state or that in-state retention rates are similar across colleges is erroneous," and further warns that "flows of graduates across state or metro-area boundaries are far from uniform, as some areas tend to be strong net-importers of recent college graduates, where others are net-exporters of college-educated workers." AR-11295.

aggregating all programs in a given state together, the Simpson Study necessarily suppressed any differences in outcomes between schools that teach beyond the minimum and those that do not.

Defendants rely on a third study—*Quick College Credentials* ("Cellini Study")—to support their claim that "[p]rograms with lower training requirements . . . tend to result in lower earnings for graduates," such that spending an "additional few hundred or thousand dollars" to complete a program longer than the state minimum could result in a negative investment. 88 Fed. Reg. at 74,639.[21] True or not—the Cellini Study does not actually compare short programs with longer programs, and in fact lumps all programs between 300 and 599 hours together—Defendants draw no "rational connection" between the purported facts in the Cellini Study and their choice to eliminate the 150 Percent Rule. *Ardmore,* 118 F. Supp. 3d at 393. The Cellini Study did nothing to evaluate the relationship between hours spent in the classroom and wages earned after graduation. It did, however, conclude that "short-term programs fare well on debt-to-earnings measures . . . due to low borrowing." Exhibit 5 at 2. Defendants seem to have ignored that part.

In *Resolute,* this Court found that the Department of Agriculture's actions were arbitrary and capricious where, in crafting a key provision of an order, the agency relied on a report that did not actually have the information the Department claimed it had. *See* 187 F. Supp. 3d at 124. This case presents a similar scenario. Even if the Court takes everything in Defendants' studies as true—and it shouldn't for the reasons explained in the next section—all Defendants have shown is that differences in state training minimums do not impact the wages of massage therapists in their respective states. That is a far cry from showing whether, within a given state, students who attend schools that teach more than the bare minimum fare better than those who do not. Defendants acted arbitrarily—and were, in fact, simply wrong—in concluding that these studies

[21] Defendants failed to include this study in the administrative record. It is attached as Exhibit 5.

justify jettisoning the 150 Percent Rule.

2. Data Limitations Undermine Defendants' Reliance on the Studies.

Reliance on studies is also arbitrary and capricious when the studies have critical limitations that compromise the conclusions the government wants to make. *See*, *e.g.*, *Resolute Forest Prod.,* 187 F. Supp. 3d at 123 ("[W]here an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon, its decision is arbitrary and capricious and should be overturned.") (emphasis in original); *see also Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1564 (11th Cir. 1985) (overturning final rule because agency relied on data derived from a study whose author acknowledged that the study had serious limitations). The relevant studies Defendants rely upon have those limitations, but Defendants relied on them with abandon anyway.

The Acevedo Study took an "average wage" for all individuals in a given occupation, did not control for the location and type (*i.e.*, part-time v. full-time) of employment, and did not distinguish between different ages and experience levels. *See* AR-11174. The full-time/part-time distinction is especially critical: commenters explained that in the massage therapy industry, earnings may be cut in half for therapists who choose to (or must) work part-time, and that any study of their earnings must account for the "many" massage therapists who pursue a part-time schedule. *See, e.g.,* AR-02783; AR-04096; AR-04615; AR-04774; AR-05680; AR-05960; AR-07012; AR-08984. In addition, wage discrepancies between entry-level and more experienced workers are significant, since therapists do not reach their full earnings potential until they have worked for a number of years in their industries. *See* AR-06484.

In the Simpson Study, the authors acknowledged, "[T]here are two primary limitations to these data: (1) the data reported incorporate reported hourly wage information, which excludes data on tips–a significant source of income for those in the service industry; and (2) wage estimates

are for wage and salary workers only, which excludes self-employed persons." *See* AR-11376. While these limitations may have minimal effects in other industries, in the massage therapy industry, they are of enormous importance. Commenters advised Defendants that tips make up a significant portion of therapists' income. *See, e.g.,* AR-03557, AR-03619, AR-03648, AR-03653, AR-03817, AR-04475, AR-04576. Commenters also advised that self-employment is common, if not predominant, in the massage therapy industry. *See, e.g.,* AR-03619, AR-04784, AR-06977. Defendants' explanation in support of the Final Rule gives no indication that they accounted for the amount of part-time work in the massage therapy industry, the effects on income from tips (reported or unreported), the frequency of self-employment, or the differences in earnings for more experienced therapists vis-à-vis junior therapists. Defendants will argue, as they have already, that they need not obtain perfect data, only the best available data. *See* ECF No. 12 at 19. While true, the government cannot deliberately decide to rely on *inaccurate* data. *Dist. Hosp. Partners v. Burwell*, 786 F.3d 46, 56 (D.C. Cir. 2015). Yet, that is exactly what Defendants do in the Final Rule. Defendants conclude that more training does not equal higher wages, even though the wage data in their studies—by the authors' own admissions, and as confirmed by commenters—is marred by incompleteness and underestimation. That is arbitrary. *See*, *e.g.*, *St. Lawrence Seaway Pilots Ass'n, Inc. v. U.S. Coast Guard*, 85 F. Supp. 3d 197, 206 (D.D.C. 2015) (final rule setting pilotage rates was arbitrary and capricious where Coast Guard "provided no rational justification for its decision to continue using data *the sources of which* affirmatively stated was inaccurate").

Not only does this mean Defendants' reliance on these studies was arbitrary and capricious, but it also establishes that Defendants acted arbitrarily and capriciously by failing to respond to the issues raised in comments. "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Sherley v. Sibelius*, 689 F.3d 776, 784 (D.C.

Cir. 2012); *see also Home Box Off., Inc. v. FCC,* 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("An agency also violates the APA if it fails to respond to 'significant points' and consider 'all relevant factors' raised by the public comments."). Given that the studies themselves identified part-time work, age, tips, and self-employment as important factors, Defendants cannot reasonably deny that these issues are "relevant factors" that it should have addressed in its responses to comments.

E. The Department Makes Improper Assumptions and Ignores Problems With its "Other State" Exception.

The Final Rule is arbitrary and capricious because the Department failed to justify key assumptions related to the "other state" exception proposed in 34 C.F.R. § 668.14(b)(26)(ii)(B), and also failed to grapple with the problems associated with that exception. "Agencies always bear the 'affirmative burden' of 'examin[ing] a key assumption' when 'promulgating and explaining a non-arbitrary, non-capricious rule.'" *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (quoting *Okla. Dep't of Env'tl Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014)). "That means that an agency 'must justify [a key] assumption' underlying its regulation 'even if no one objects during the comment period.'" *Id*. Likewise, "[a]gency action is arbitrary and capricious 'if the agency … entirely failed to consider an important aspect of the problem[.]'" *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

The Final Rule states that an institution may offer a program based on *another state's* minimum hours requirement only if the institution can show that: (1) a majority of the program's students lived in the other state during the most recent award year; (2) a majority of the program's students who completed the program in the prior award year were employed in the other state; or (3) the institution is located in a metropolitan statistical area ("MSA") shared by two or more states *and* a majority of students, at the time of enrollment in the program during the most recently

completed award year, stated in writing their intention to work in the other state. *See* 88 Fed. Reg. at 74,696–97. These carve-outs—put in place ostensibly to account for massage therapists who may want to practice in a different state than where they attended school, practice in multiple states, or relocate, *see* 88 Fed. Reg. at 74,639—are practically unusable and premised on arbitrary, unsupported, and incorrect assumptions.

1. Unjustified Assumptions Affecting All Three Scenarios

Defendants fail to explain why the "other state" exception is only available to schools if a "majority" of students live in, work in, or intend to work in a specific neighboring state. "An agency may not pluck a number out of thin air when it promulgates rules in which percentage terms play a critical role." *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1153 (D.C. Cir. 2013); *see also Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377 (D.C. Cir. 2013); *Time Warner Ent. Co., L.P. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001). Why did Defendants select 50-percent-plus-one as the triggering percentage? Why not 33 percent? Or 25 percent? Or 75 percent? And, what about institutions whose students can work in a variety of other states, like in multi-state MSAs (including D.C., Virginia, and Maryland)? Do those students count as working in just one neighboring state? Must institutions also survey students who choose to change fields and work in a different profession after graduation—or not to work at all?

"Pluck[ing] a number out of thin air" is exactly what Defendants have done. The Final Rule contains no discussion of why "a majority" is a rational choice, especially given all of the complicating factors identified above. Though a "majority" may initially strike a reader as a straightforward benchmark, the APA demands more. Defendants still have the "affirmative burden" to explain their assumption that a "majority" is the proper threshold. *Hispanic Affairs*, 901 F.3d at 389. To be sure, Defendants' counsel asserts that a "majority" threshold is "a perfectly reasonable regulatory design," ECF No. 12 at 21, but the post-hoc, *ipse dixit* rationalizations of

counsel are not a viable stand-in for an actual explanation from the agency itself. *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *NAACP v. Trump*, 315 F. Supp. 3d 457, 465-66 (D.D.C. 2018) (subsequent history omitted). That explanation is missing from the Final Rule.

The Department also unreasonably assumes that institutions will have access to the data necessary to establish eligibility for the exception. For the most part, the data necessary to establish these exceptions will come from self-reporting by current or former students. The Department assumes without explanation that institutions will actually be able to obtain sufficient responses from enough students to justify adoption of another state's clock hour requirements. In order to show that a "majority" of students are working in another state, for example, the Department assumes that institutions can gather enough information to prove that an absolute majority of all prior-year graduates worked in a different state. Any institution with a thin majority of students practicing, living, or intending to practice in an adjacent state will have to achieve nearly a 100 percent response rate to prove it is entitled to avail itself of one of Defendants' three exemptions in proposed § 668.14(b)(26)(ii)(B). However, regulations that assume schools can effectively use an alternative process that requires responses from up to 100 percent of students are arbitrary and capricious, as this Court has held before in a case against the Department. *See AACS*, 258 F. Supp. 3d at 74–75 (invalidating rule on the bases that it was capricious to assume that a 100 percent response rate was (1) feasible or (2) statistically significant).

Moreover, all three scenarios provided for in the Final Rule "in which institutions could use another State's program length" suffer from an assumption that graduates will stay put in one state for their entire careers. This assumption is contradicted by the Department's finding in 2020 that "individuals often move from one State to another or live, work, and learn in different States

at the same time." 85 Fed. Reg. at 54,776. In the Final Rule, Defendants do not even acknowledge the Department's findings in 2020, let alone explain why they are incorrect. Furthermore, the lone study Defendants cite on graduate mobility ("Conzelmann Study") suggests that at least one-third of massage therapy graduates will move to another state to practice within eight years of graduation. *See* 88 Fed. Reg. at 74,639, n.33. Although the Conzelmann Study did not measure relocation rates for those who had graduated more than eight years prior, it is obvious that graduates can move to another state after being out of school for more than eight years, which further exacerbates the issue of graduate mobility. After all, massage therapy training—like any degree—is a lifelong asset. Defendants have not put forward any data justifying their sweeping assumption that most massage therapists live near home for their entire careers. This "important aspect of the problem" is entirely unanswered and entirely unaddressed. *Animal Legal Def. Fund*, 872 F.3d at 611.

2. Invalid Assumptions Affecting the "MSA" Exception

Under the Final Rule, one of the scenarios in which an institution may adopt another state's minimum is if "the institution is located in a MSA shared by two or more states and a majority of students, at the time of enrollment . . . stated in writing their intention to work in the other state" ("(B)(3) Exception"). In addition to the flaws identified above, the (B)(3) Exception has two additional infirmities.

The first is simple. Defendants assume, with no stated rationalization, that students will not change their minds about the state in which they want to work, like they might do when they get their first job offer. Besides being an obvious possibility that any regulator should realize, this is the sort of key assumption" that Defendants needed to deal with "even if no one object[ed] during the comment period." *Hispanic Affairs* 901 F.3d at 389. It is common sense that job offers, economic conditions, personal relationships, family needs, individual preferences, or a host of

other factors can push students to decide, while enrolled in school, to go to work in a different state than where they had initially planned. If enough students—potentially as few as one—change their minds about where they intend to work, then the math behind the (B)(3) exception no longer adds up. Schools that initially invoked the (B)(3) exception will get to continue using another state's minimum (even though a majority of students no longer intend to work in the other state). The inverse is worse: under the Final Rule, schools that were barred from relying on the (B)(3) exception have no way of invoking it midstream, leaving students unable to complete the training they need to work in another state.

The second is geographical. For schools located in an area with a high concentration of states (e.g., the northeastern United States, the D.C. metropolitan area), it is exceptionally challenging for any institution to show that a majority of students go to *one* nearby state for work. Virginia is one such example. Virginia requires massage therapy applicants to complete a program consisting of at least 500 clock hours. *See* Va. Code § 54.1-3029. It is one of four jurisdictions in the DC metropolitan area, along with Maryland, the District of Columbia, and West Virginia.[22] Virginia also borders North Carolina, Kentucky, and Tennessee, and is close to Delaware and Pennsylvania. Students attending any of the AMTA member schools in Northern Virginia could work in any of those jurisdictions post-graduation. Or, to borrow Defendants' words, all of those states are "close to where they live or attend school." 88 Fed. Reg. at 74,639. However, the

[22] Although the NPRM suggested borrowing the Office of Management and Budget's list of MSAs, the Final Rule dropped references to the OMB, making it unclear what the term "MSA" means. Assuming the OMB's definition applies, MSAs cover multiple states, particularly in the Northeast. For example, Philadelphia's MSA includes Pennsylvania, New Jersey, Delaware, and Maryland. Washington, D.C.'s MSA includes the District of Columbia, Virginia, Maryland, and West Virginia. And MSAs can change periodically, further complicating any efforts by an institution to determine what its curriculum will be and what state's hours minimum will apply. *See* OMB Bulletin No. 23-01 (July 21, 2023), available at https://www.whitehouse.gov/wp-content/uploads/2023/07/OMB-Bulletin-23-01.pdf.

training requirements differ among those jurisdictions. To illustrate, nearby Maryland requires 750 hours of massage therapy education. *See* COMAR § 10.65.01.07.

The (B)(3) Exception requires a school to prove that an absolute majority of all its students intend to work in *one* state within the same MSA. But if the students at a Northern Virginia school intend to spread out in roughly equal proportions among three or four states in this MSA, the Northern Virginia school will never be able to show that a "majority" of its students work, live, or intend to work in any given state outside Virginia—and therefore will never be able to qualify for the "other state" exception to the Final Rule. If any students intend to work in any of the other five states close to Virginia, it becomes even more difficult for the Northern Virginia school to avail itself of the (B)(3) Exception. In practice, AMTA member schools located in areas with a high concentration of states have no way to take advantage of the (B)(3) Exception. Defendants' failure to grapple with these problems resulted in arbitrary and capricious decision-making.

F. Defendants Disregarded the Accreditation and Legislative Processes.

Defendants issued the Final Rule on October 31, 2023 with an effective date of July 1, 2024. *See* 88 Fed. Reg. at 74,568. Defendants' actions gave schools, states, and accreditors only eight months to rework curricula and seek accreditor/regulatory approval. In so doing, Defendants assumed, with no justification, that the Final Rule gave schools sufficient time to present shortened programs to accreditors *and* sufficient time for accreditors to review and approve them. Defendants failed to justify that assumption even though they admitted that the Final Rule would force institutions that offer GE Programs to request modifications to their accreditations and to seek new approvals from state authorities. *See* 88 Fed. Reg. at 74,641.

Under the Department's regulations, such a program modification must be approved by an accreditor before it can be offered to students. *See* 34 C.F.R. § 602.22(a). As the preamble to the Final Rule admits, commenters raised "concern[s] about accrediting agencies and State agencies

approving changes in program length and the time needed for these actions." 88 Fed. Reg. at 74,641. The commenters suggested a "gradual transition period to bring all GE programs into compliance." *Id*. The Defendants' entire response was:

> The Department does not think an extended legacy eligibility period is appropriate given our concern about the effects of excessive debt on students. As already noted, we will apply this provision to new program enrollees following the effective date of these regulations, so that no currently enrolled student would be negatively affected.

Id. This terse rejoinder illustrates the Department's failure to "grapple with th[is] issue in any meaningful way." *AACS*, 258 F. Supp. 3d at 73. The Department claims that its concerns about excessive student debt trump institutions' concerns about delays in re-accreditation. But the Department offers no explanation why its concerns are more valid than the institutions' concerns. Alleged "excessive debt" has *always* been a concern of the Department, *see* 59 Fed. Reg. at 9,548, yet Defendants do not explain why "excessive debt" is suddenly so problematic that it must jeopardize the accreditations that schools across the country rely on to keep their doors open and remain eligible for Title IV participation. *See Ass'n of Private Sector Colleges & Univs.,* 681 F.3d at 441; *Mingo Logan Coal Co.*, 829 F.3d at 719.

The Court need not speculate whether this assumption is material, whether the Department was unjustified in making it, or whether it will cause harm to regulated institutions, because Defendants conceded all three points in the EA. Just five-and-one-half months after it issued the Final Rule, the Department backpedaled in the EA and admitted that "there may be circumstances outside of an institution's control that may prevent compliance with the new requirements under § 668.14(b)(26) . . . by July 1, 2024," including "[t]he inability to obtain approvals from States and/or accrediting agencies for changes in program length in order to comply" with the Final Rule. In short, the Department's failure to justify its assumption not only shows that the Final Rule is arbitrary and capricious, but also demonstrates that the Department was, in fact, flat wrong to reject

commenters' concerns about a rule that threatens the existence of massage therapy institutions.[23]

Relatedly, the Department made unfounded assumptions about the realities of enacting state legislation. Commenters informed Defendants that eliminating the 150 Percent Rule would lower license exam passage rates, disrupt the IMpact interstate course-length compact, and frustrate the efforts of state legislatures (like Florida) that based their training hours requirements on the 150 Percent Rule. *See* 88 Fed. Reg. at 74,641-42. In response, Defendants told commenters, in effect, to "Take it up with your states." *Id.*[24] Inherent in Defendants' flippant responses is an assumption that state legislatures would quickly act to change their laws to increase the minimum hours for massage therapy programs at the urging of massage therapy schools.

Defendants offer no support to back up their assumptions. The Final Rule contains no evidence, much less convincing evidence, that any given state legislature can or will promptly consider changes to its laws before the Final Rule takes effect. It can take years for a legislature to enact a new law. *See, e.g.,* Lauren Rygg, *School Shooting Simulations: At What Point Does Preparation Become More Harmful than Helpful*, 35 Child. Legal Rights J. 215, 223 (2015)

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[23] The *Cortiva* injunction does not cure the Department's problematic assumption that accreditors will have sufficient time to accredit modified programs before the Final Rule takes effect. That injunction can end at any time, after which the Final Rule would take effect without regard for whether accreditors have reviewed and approved shortened massage therapy programs. Furthermore, some schools may have paused efforts to shorten their programs in reasonable reliance on the *Cortiva* court's finding that the Final Rule is likely arbitrary and capricious. Such schools would not even have requests to accreditors and state authorities pending and would stand no chance of receiving authorization to offer shortened programs if the *Cortiva* injunction ends.

[24] Defendants' responses are: "This rule does not prohibit any State from amending its own State laws. States can and do regularly amend their laws, on an ongoing basis, and this final rule would not interfere with their ability to do so."; "If the commenters believe that graduates cannot pass the State licensing exam following completion of a program that complies with State training requirements, we suggest they discuss with the State whether the hours required are appropriate."; "[A] institution in a State that increases or decreases its minimum hours for certain professions can adjust the lengths of corresponding training programs accordingly. Thus, if the States in this compact adjust the minimum hours for certain licenses, then the programs can adjust too.

(referring to passing legislation "within two years" as "a relatively short timeline"); Megan Rowan, *When Words Hurt More than "Sticks and Stones": Why New York State Needs Cyberbullying Legislation*, 22 Alb. L. J. Sci. & Tech. 645, 649 (2012) (discussing statute "passed after spending nine years in the Assembly and Senate."). Four states only hold legislative sessions every two years.[25] Defendants cannot fulfill their obligation to deal with "important aspect[s] of the problem" by palming schools off onto state legislatures, particularly when Defendants fail to explain any basis for assuming that those legislatures will pick up the mantle before the schools begin hemorrhaging money, losing students, or going out of business altogether. *Animal Legal Def. Fund*, 872 F.3d at 611; *see also AACS*, 258 F. Supp. 3d at 73; *Home Box Off.*, 567 F.2d at 35–36.

G. Defendants Respond Capriciously to the Loss of Pell Grant Access.

Defendants admit that, once the 150 Percent Rule disappears, AMTA member schools in states that require fewer than 600 clock hours for licensure will lose their eligibility to participate in the Pell Grant program. *See* 88 Fed. Reg. at 74,640. Defendants downplay the loss of Pell Grants by suggesting that such schools could still participate in direct loan programs authorized under Title IV, provided they meet other regulatory criteria. *Id.* But direct *loans*, unlike Pell *Grants*, must be repaid. Defendants assume, without acknowledgment (let alone justification), that low-income students who would otherwise qualify for Pell Grants will still decide to pursue massage therapy programs even if Pell Grants cannot be used to fund massage therapy education.

Moreover, despite their professed concern about increasing student debt, Defendants fail to explain why it is reasonable to force a student to take out a *loan* to replace the Pell *Grant* that he or she would have received but for the Final Rule. Taking out a loan has the untoward effect

[25] *See* Dates of 2024 State Legislative Sessions, BALLOTPEDIA, https://ballotpedia.org/Dates_of_2024_state_legislative_sessions (last visited Nov. 21, 2024).

of *increasing* that student's debt. This outcome conflicts with the legislative findings that impelled Congress to pass Title IV of the HEA. *See* 79 Stat. at 1232 (A purpose of Title IV is "to provide, through institutions of higher education, educational opportunity grants to . . . high school graduates of extreme financial need" who otherwise would not obtain the benefits of higher education).

H. Defendants Irrationally Disregard an Obvious Alternative.

"The arbitrary-and-capricious standard . . . also applies to an agency's consideration of regulatory alternatives." *AACS*, 258 F. Supp. 3d at 75 (citing *Pillai v. Civil Aeronautics Bd.*, 485 F.2d 1018, 1027 (D.C. Cir. 1973)). While an agency need not consider every conceivable alternative, it must "address obviously germane alternatives proposed by commenters during the notice-and-comment period." *Id*. (citing *Int'l Ladies' Garment Workers Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983)).

Under the Final Rule, if a GE Program's length is a minute longer than the state minimum, the GE Program cannot receive *any* Title IV FSA funds—zero dollars. One obvious alternative that Defendants claim to have considered was to fund students' participation in GE Programs up to the number of training hours required by the state in which the program is offered. In other words, if a massage therapy school in Maryland (a 750-hour state) sets its program length at 800 hours, Defendants could allow that student to use federal student aid to pay for the first 750 hours, leaving him or her responsible for funding only the last 50 hours.

While Defendants acknowledge this alternative in the preamble to the Final Rule, they give it short shrift. Specifically, without providing any support or legal authority, Defendants claim that the Department "did not have the legal authority to partially fund a program." 88 Fed. Reg. at 74,637. Defendants also offer a second reason for rejecting this alternative: that it would be "[in]appropriate given the potential harms to students who enroll in partially funded programs and

are unable to complete their programs due to a lack of title IV, HEA funds." *Id*.

Defendants fail to provide any support for their legal argument that they do not have "authority to partially fund a program." On that basis alone, the Final Rule is arbitrary and capricious. In *Casa De Maryland*, the Department of Homeland Security attempted to rescind DACA on the basis that it was "unlawful." 924 F.3d at 704. That action, however, was held to be arbitrary and capricious because "neither the Attorney General's September 4 letter nor the Department's Rescission Memo identif[ied] any statutory provision with which the DACA policy conflicts." *Id*. (citing *Encino Motorcars v. Navarro*, 579 U.S. 211, 224 (2016)). Defendants' bare claim that they "do[ ] not have the legal authority to partially fund a program" presents an identically arbitrary scenario, and no post-hoc explanation from counsel can fill the void. *NAACP*, 298 F. Supp. 3d at 237. Defendants also cite no evidence of actual harm to students from partial funding (particularly with respect to grants, which students do not have to repay).

I. Defendants Disregarded Procedures Required by Law.

The Final Rule must be set aside because the Department engaged in rulemaking without observance of the procedure required by law. Pursuant to 20 U.S.C. § 1098a(a), the Department must "obtain public involvement in the development of proposed regulations," including the "advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs . . . ." This information is to be obtained through "regional meetings and electronic exchanges of information," and it is to be "take[n] into account . . . in the development of proposed regulations . . . ." *Id*. Once the Department has done so, and "before publishing proposed regulations" in a Notice of Proposed Rulemaking, the Department must "prepare draft regulations implementing [Title IV programs] and . . . submit such regulations to a negotiated rulemaking process." 20 U.S.C. § 1098a(b)(1). The Department must form a committee consisting of "select individuals with demonstrated expertise or experience in the

relevant subjects under negotiation . . . ." *Id.*

Defendants had several opportunities to disclose their intention to undo the 150 Percent Rule in a manner that would meet the "public involvement" requirements of the HEA. *See supra* at I(B)(4). They forewent those opportunities. Defendants should have mentioned changes to the 150 Percent Rule when requesting input from the public on their "rulemaking agenda." They did not. *Id.* They should have discussed potential changes to the 150 Percent Rule when publishing a notice in the Federal Register of their intent to form a rulemaking committee and to seek nominations for committee members. They did not. *See* 86 Fed. Reg. at 69,607. In fact, Defendants never made their intention to eliminate the 150 Percent Rule clear until Department staffers distributed written materials just before the Committee's first meeting in January 2022, after members had already been chosen and topics (ostensibly) set. *See supra* at I(B)(4).

By concealing their intention to rescind the 150 Percent Rule until after the Committee was formed, Defendants violated section 1098a(a)(1). The public—including AMTA and its members—was entitled to be involved in the "development of proposed regulations" *before* the Committee was formed and *before* Defendants distributed draft regulations to eliminate the 150 Percent Rule. 20 U.S.C. § 1098a(a)(1), (b)(1). As a preliminary step, Defendants were obligated to "provide for a comprehensive discussion and exchange of information," 20 U.S.C. § 1098a(a)(2), but by withholding their proposal from the public's knowledge, they breached that statutory duty. Instead, Defendants foisted rescission of the 150 Percent Rule directly on the Committee, and only on the Committee, without first "obtaining public involvement."

The Department has been reversed for similar conduct in the past. *See Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001 (N.D. Cal. 2019) ("*NEA*"). In *NEA*, the Department delayed the effective date of a rule issued under the previous administration without first undergoing

negotiated rulemaking. *Id*. at 1028-30. Likening the negotiated rulemaking provisions of the HEA to other statutes that require "consultation," the court found that the Department violated the HEA by skipping negotiated rulemaking, even though it allowed for other public comment. *Id*. The court found it problematic that the Department acted contrary to the process "mandated by Congress" and unlawfully deprived itself of "timely substantive information" that may have affected its discretionary decision-making. *Id*. at 1030.

Here, the specific failure is different, but the effects are the same. Defendants skipped a process—facilitating "comprehensive discussion" with the public before sending draft rules to the Committee—that Congress mandates, and in so doing, missed out on timely, substantive information (including Committee member recommendations) that massage therapy stakeholders could have provided had Defendants not concealed their intention to erase the 150 Percent Rule. Defendants' actions subverted the regulatory process and should be set aside.

III. CONCLUSION

When, as here, an agency action violates the APA, a reviewing court "*shall* . . . hold unlawful and set aside" that action. 5 U.S.C. § 706(2) (emphasis added). Given the multiple substantive defects inherent in the Final Rule, as well as Defendants' procedural gamesmanship, the Court should enter judgment in Plaintiff's favor and set the Final Rule aside.

Dated: November 26, 2024

Respectfully Submitted,

/s/ Drew T. Dorner

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Attorneys for the American Massage Therapy Association

Exhibit 1

Federal Student Aid
An OFFICE of the U.S. DEPARTMENT of EDUCATION

Published on https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2024-04-09/updates-new-regulatory-provisions-related-certification-procedures-and-ability-benefit

POSTED DATE: April 09, 2024
AUTHOR: Federal Student Aid
ELECTRONIC ANNOUNCEMENT ID: GE-24-03
SUBJECT: Updates on New Regulatory Provisions Related to Certification Procedures and Ability-to-Benefit

Today, Federal Student Aid announces clarifications on how its enforcement discretion specifically relates to two provisions in the Certification Procedures regulations published on October 31, 2023, and scheduled to take effect on July 1, 2024. These provisions are related to the maximum program length for certain Gainful Employment (GE) programs and the need for postsecondary programs to obtain necessary state licensure or certification approvals. We also provide an update on timing for compliance with one provision related to ability-to-benefit.

Clarifying Enforcement Discretion for New Certification Procedures Requirements

The Department issued final regulations related to certification procedures for institutions participating in the *Title IV*, HEA programs to provide important protections for students to ensure that their programs do not result in unnecessary debt and can meet their educational goals (88 FR 74568). At the same time, the Department recognizes that, currently, some institutions face unique challenges outside of their control that may affect their ability to comply with the following provisions of the regulations by the date they become effective:

- 34 CFR 668.14(b)(26): New limits on program length for GE programs, reducing the maximum program length from 150% to 100% of the state's minimum educational requirements for licensure; and
- 34 CFR 668.14(b)(32): New requirements for programs to meet educational requirements for licensure or certification in all states where the institution has enrolled students through distance education and correspondence courses.

For example, institutions have expressed concern about their ability to seek and obtain approval from accrediting agencies and States to change the lengths of their GE programs in time to come into compliance with the regulations. Institutions have also expressed concern about their ability to determine the specific requirements for licensure in the States in which they operate and, in some cases, limit the States in which they operate in order to comply with requirements for programs to meet licensure and certification requirements in all States where an institution enrolls students. The Department has also heard concerns from State agencies about their ability to approve a substantial number of program changes in time for their institutions to be in compliance. Additionally, we are aware of challenges that institutions have experienced regarding access to and use of certain Department systems.

The Department understands that there may be circumstances outside of an institution's control that prevent compliance with these new requirements by July 1, 2024. However, the Department believes that most of those concerns and challenges will have been resolved or sufficiently mitigated by January 1, 2025. The Department has enforcement discretion with respect to an institution's compliance with certain Title IV, HEA requirements. Given the concerns received from institutions and States, particularly for the period between July 1, 2024 and January 1, 2025, we will consider exercising this discretion before taking action regarding the provisions in 34 CFR 668.14(b)(26) and 34 CFR 668.14(b)(32).

An institution can raise as a defense to an enforcement action that it faced challenges in meeting compliance due to reasons that are unique, time-specific, and outside the control of the institution. Some examples may include:

- The inability to obtain approvals from States and/or accrediting agencies for changes in program length in order to comply with requirements under 34 CFR 668.14(b)(26);
- The inability to obtain approvals for academic program changes to comply with the requirements related to licensure/certification under 34 CFR 668.14(b)(32);
- The inability to obtain sufficient clarity from State licensing and certification entities about licensure and certification requirements;
- The inability to access and use the Department's systems.

The Department will seriously consider such challenges, in particular prior to January 1, 2025, when determining whether to seek enforcement of these provisions. The Department retains the discretion to base its determination on the totality of the circumstances and the specific facts of each case.

In accordance with the Department's general practice, the Department encourages institutions to document, prior to July 1, 2024, the circumstances that prevent their compliance with any requirement by the regulations' effective date. The Department will review such documentation prior to taking any enforcement action related to these provisions.

Eligible Career Pathway Program Approvals Will Begin in 2025

The Department also maintains requirements for institutions with existing eligible career pathway programs to have at least one program approved by the Department in order to offer Federal student aid to students without a high school diploma or its recognized equivalent under 34 CFR 668.157(b). The Department plans to begin approving existing eligible career pathway programs as part of eligibility applications beginning on January 1, 2025.

Future Guidance on New Regulations

In the coming weeks, the Department intends to publish a series of resources related to the regulations. Those include:

- A Dear Colleague Letter summarizing the provisions in the regulations published October 31, 2023;
- A series of frequently asked questions about those provisions;
- A Dear Colleague Letter explaining the implementation of the program length limitation under 34 CFR 668.14(b)(26); and
- A Dear Colleague Letter explaining the implementation of ability to benefit State process regulations under 34 CFR 668.156 and requirements for eligible career pathway programs under 34 CFR 668.157.

We thank you for your continued efforts to implement these new requirements.

Exhibit 2

Federal Student Aid
An OFFICE of the U.S. DEPARTMENT of EDUCATION

Published on https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2024-07-03/temporary-injunction-program-length-regulations

POSTED DATE: July 03, 2024
AUTHOR: Federal Student Aid
ELECTRONIC ANNOUNCEMENT ID: GENERAL-24-83
SUBJECT: Temporary Injunction on Program Length Regulations

On October 31, 2023, the Department published a final rule in the Federal Register that included changes to regulations pertaining to financial responsibility, administrative capability, certification procedures, and ability to benefit (ATB). Those regulations are scheduled for implementation on July 1, 2024.

One of the provisions in those regulations would have reduced the maximum length of gainful employment (GE) programs to 100 percent of a state's minimum educational requirements for licensure in the occupation for which the programs prepare students, with certain limited exceptions, as provided under 34 CFR 668.14(b)(26).

On June 21, 2024, the United States District Court for the Northern District of Texas, in *360 Degrees Education, LLC, et al. v. U.S. Department of Education, et al.*, granted the plaintiff's motion for a preliminary injunction preventing the Department from enforcing the changes to 34 CFR 668.14(b)(26) pending a decision by the Court.

Therefore, until further notice institutions must continue to comply with the maximum program length regulations that were in effect prior to July 1, 2024. The existing regulations limit the maximum program length of GE programs to 150 percent of a state's minimum educational requirements for licensure, or 100 percent of the requirements of an adjacent state, whichever is greater.

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MASSAGE THERAPY ASSOCIATION, 500 Davis Street, Suite 900, Evanston, IL 60201 Plaintiff, v. **U.S. DEPARTMENT OF EDUCATION and MIGUEL CARDONA,** in his official capacity as Secretary, 400 Maryland Avenue, S.W. Washington, D.C. 20202 Defendants.	Case Number: 1:24-cv-01670-RJL

DECLARATION OF JEFF FLOM, CEO OF AMERICAN MASSAGE THERAPY ASSOCIATION, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Jeff Flom, declare as follows:

1. I am over the age of 18 years and I am competent to make this declaration. I have personal knowledge of the facts set forth herein, except for those facts stated on information and belief and, as to those facts, I am informed and believe them to be true. If called as a witness, I could and would testify as to the matters set forth below based upon my personal knowledge.

2. I am the CEO of the American Massage Therapy Association ("AMTA"), which is based in Evanston, Illinois. AMTA currently has more than 600 massage therapy schools as members ("AMTA member schools").

3. I submit this Declaration in Support of Plaintiff's Motion for Summary Judgment.

4. I previously submitted a Declaration in Support of Plaintiff's Motion for Preliminary Injunction dated June 7, 2024 (Dkt. 3-2), which I incorporate herein by reference. I submit this Declaration to provide the Court with additional information relevant to AMTA's summary judgment motion and to update the Court about recent developments since the filing of

AMTA's Complaint and Motion for Preliminary Injunction on June 7.

Massage Therapy Education and Regulation in the United States

5. When AMTA filed this case in June 2024, twenty states required a minimum of 500 hours of massage therapy education to be eligible to become licensed as a massage therapist. Since AMTA's filing, some states have enacted emergency regulations or legislation to increase the minimum number of hours for massage therapy licensure.

6. However, twelve states, including the District of Columbia, still have minimum requirements that are less than 600 hours.

7. At least 171 AMTA member schools – nearly one-third – are located in states where the minimum number of clock hours required for massage therapy licensing falls below the 600-hour requirement for receipt of federal Pell Grant funds. In total, there are approximately 415 massage therapy schools located in these states (including AMTA member schools and non-member schools). The breakdown is as follows:

State Minimum Clock Hours < 600		**State Minimum Clock Hours ≥ 600**	
Hours required = 500	Arkansas, District of Columbia, Florida, Georgia, Idaho, Maine, Montana, Oklahoma, South Dakota, Texas, and Virginia	Hours required = 600	Iowa, Illinois, Kentucky, New Jersey Pennsylvania, Utah, Wisconsin, and Ohio
		Hours required = 625	Alaska, Delaware, Indiana, Louisiana, Michigan, Missouri, Nevada, Oregon, Washington and West Virginia
		Hours required = 650	Alabama, Colorado, Massachusetts, New Mexico, North Carolina, Rhode Island and South Carolina
Hours required = 570	Hawaii	Hours required = 750	Connecticut, New Hampshire, North Dakota, and Maryland
		Hours required = 1,000	Nebraska and New York

8. Annexed hereto as **Exhibit A** is an updated map of the United States that contains the minimum number of clock hours for each state that has such a requirement to become licensed as a massage therapist.

9. Effective July 1, 2024, the Missouri Board of Therapeutic Massage ("the Board") enacted an emergency temporary regulation increasing the minimum hours for massage therapy licensure to 625, but the regulation expires on February 27, 2025. *See* 20 CSR 2197-2.010. The Board deemed the Final Rule to be "an immediate danger to the public health, safety, and/or welfare and a compelling governmental interest" requiring emergency action and found that, "If the rule is not amended … it will restrict federal financial aid to the entry level competence standard (minimum) which is the role of regulation (as opposed to allowing funding for a quality education program for lifelong learning) restricts access to education for already disadvantaged students and has the opposite effect of the purpose of federal financial aid funding. Students will be deprived of loans, schools will close, the massage therapist labor shortage will be exacerbated."

10. For schools in the states that have recently increased their minimum hours for massage therapy licensure, most of them are in the 625-hour range. For schools that previously relied on the 150 Percent Rule in a 500-hour state to offer a 750-hour program, these schools would still be forced to reduce their programs by more than 100 hours. This will result in worse outcomes such as reduced MBLEx licensure exam passage rates, reduced readiness for the workforce and lower revenue for the schools. All of these factors still threaten the viability of AMTA member schools.

11. If the Final Rule goes into effect, AMTA's member schools in the 12 states that require fewer than 600 hours for massage therapy licensure will no longer be eligible for participation in the Pell Grant program, which provides grant funding for students from disadvantaged backgrounds. Importantly, unlike student loans, students who are eligible for Pell Grants do not need to repay these grants. As the declarations from some of our member schools demonstrate (*see* Dkt. Nos. 3-3, 3-5, 3-6, 3-7), many Pell Grant recipients would not be able to afford massage therapy school without Pell Grant funding.

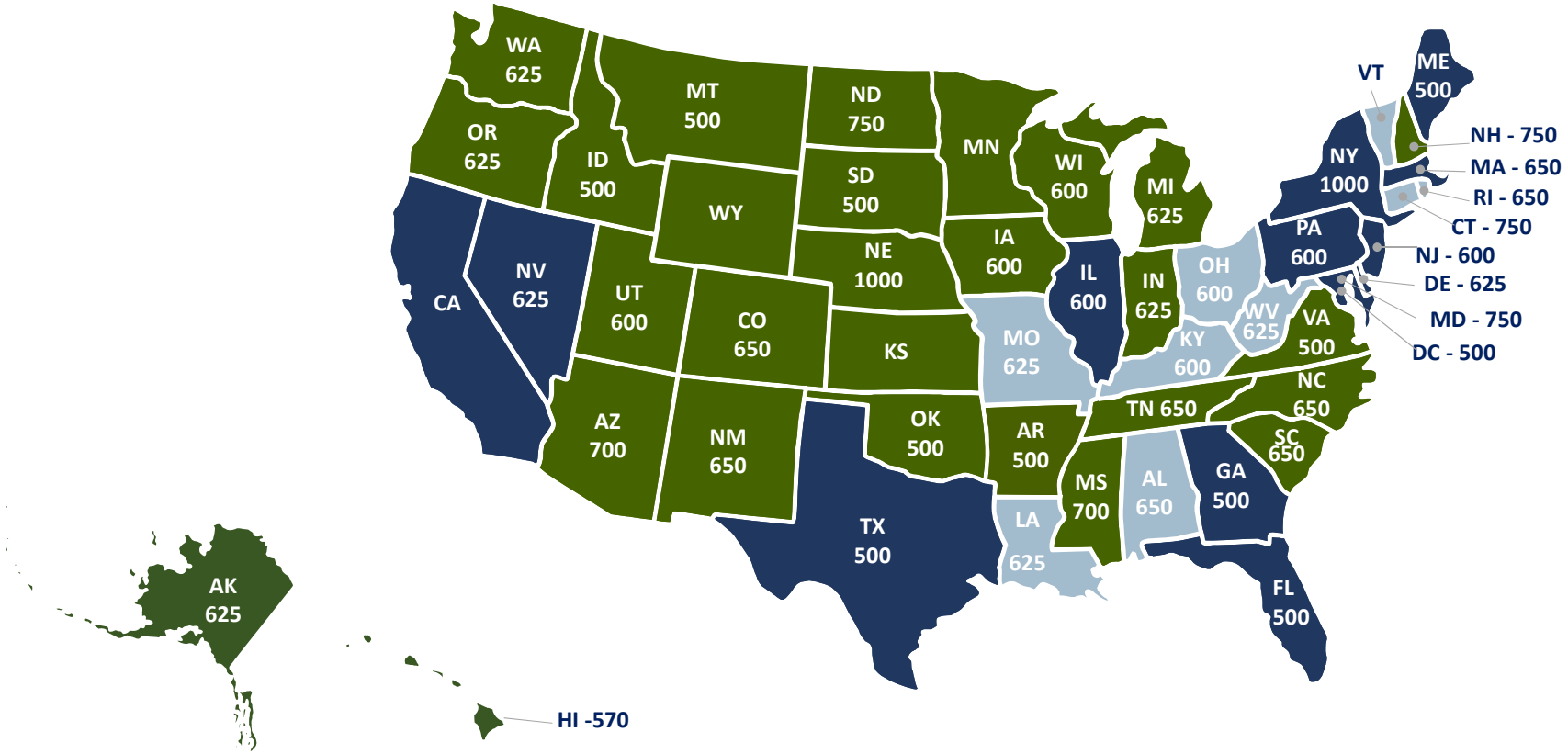
12. As set forth in my Declaration dated June 7, 2024 at paragraph 16, the majority of states require that an applicant for a massage therapy license pass the Massage & Bodywork Licensing Examination ("MBLEx"). In 2022-23, the nationwide pass rate for the MBLEx was 72%. *See* **Exhibit B**, p. 6.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26 day of November, 2024, in Chicago, IL.

Jeff Plom

Exhibit A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OR 625
CA
NV 625
ID 500
MT 500
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AZ 700
CO 650
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MO 625
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AL 650
OH 600
WV 625
GA 500
FL 500
SC 650
NC 650
VA 500
PA 600
NY 1000
VT
ME 500
NH - 750
MA - 650
RI - 650
CT - 750
NJ - 600
DE - 625
MD - 750
DC - 500
AK 625
HI -570

Exhibit B

FSMTB®
FEDERATION OF STATE
MASSAGE THERAPY BOARDS

Annual Report

October 2023

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

Message *from the* President

As state regulators and guardians of the public interest, we are entrusted with the responsibility to shape and uphold laws that impact a profession and the citizens we serve. In our pursuit of good governance, it is essential that we engage in open and honest communication, forging connections across our jurisdictions and transcending boundaries for the greater good.

Through robust communication, we enhance our ability to respond effectively to the challenges of our time. We can tackle the urgent issues of human trafficking, deregulation, and license portability with unwavering determination and unity. It is through communication that we can navigate the complexities of our regulatory landscape. Let us commit ourselves to actively seek out opportunities for dialogue, collaboration, and knowledge exchange.

Let us cultivate an atmosphere of trust and respect, where all voices are heard and valued. Together, we can build a future where the collective wisdom of our state regulators drives positive change.

Craig Knowles, LMT
President

2023 FSMTB Board of Directors

PRESIDENT
Craig Knowles
Chair, Georgia Board of Massage Therapy

VICE PRESIDENT
Sandy Anderson
Executive Director, Nevada Board of Massage Therapists

TREASURER
Keith Warren
Executive Director, Alabama Board of Massage Therapy

Robin Alexander
Indiana

Foad Araiinejad
Alabama Board of Massage Therapy

Mike Arismendez
Executive Director, Texas Department of Licensing and Regulation

Victoria Drago
Florida Board of Massage Therapy

EXECUTIVE DIRECTOR
Debra Persinger, PhD, CAE

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

Mission

The mission of FSMTB is to support its Member Boards in their work to ensure that the practice of massage therapy is provided to the public safely and competently.

Non-Profit

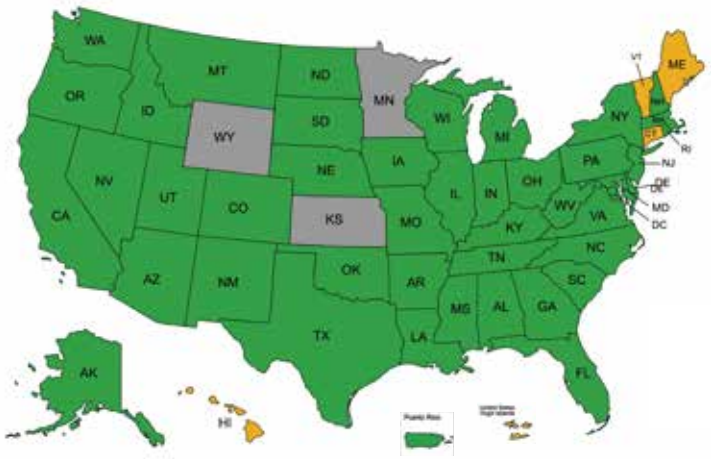
The FSMTB is a 501c3, non-profit organization. All revenue is used to enhance FSMTB programs and services and provide support to its Members in fulfilling their responsibility of protecting the public from unsafe practice.

Membership

The FSMTB members are state boards and agencies that regulate the profession of massage therapy and are charged with the mission of public protection.

FSMTB Membership by State

- Not Regulated
- FSMTB Members
- Non-Members

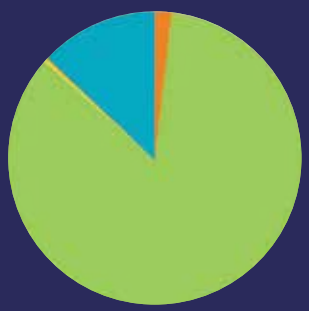


2023 Financials*

July 2022 - June 2023

** unaudited*

INCOME



INCOME	
Membership	115,700
Exam Services	5,436,400
Professional Services	21,335
Grants/Donations	5,000
Investments	827,100
TOTAL	***6,405,535***

EXPENSES

EXPENSES	
General Operating	2,306,350
Travel & Events	515,385
Professional Fees	496,900
Exam Services	1,451,370
TOTAL	***4,770,005***
Surplus	***1,635,530***

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

School *Outreach*

In addition to campus visits and virtual school events, FSMTB attended national school events, including the Associated Bodywork & Massage Professionals (ABMP) School Forum, American Massage Therapy Association (AMTA) School Summit, AMTA national convention, and Florida State Massage Therapy Association (FSMTA) Convention.

EVC

The Education Verification Center (EVC) supports more than **1,500 EVC users** representing over **1,000 state-approved massage therapy schools.**

Communications

FSMTB responds to over 5,000 phone calls and emails each month.

WEBSITE

The FSMTB website, fsmtb.org, remains the foremost resource for individuals seeking information about FSMTB and the MBLEx. During the past year, the website hosted over 504,000 page views.

SOCIAL MEDIA

FSMTB shares organizational news and regulatory information via its social media presence. Across all platforms, we had 7,000 followers, which was 20.4% lower than the previous year.

facebook.com/FSMTB

twitter.com/fsmtb

linkedin.com/fsmtb

youtube.com The FSMTB

instagram.com/thefsmtb

34,260 Calls

29,332 Emails

98,862
Home Web Page Visits

307,251
MBLEx Web Page Visits

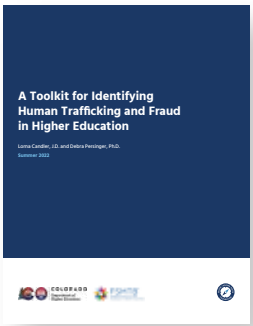
12,353
Member/Regulatory Boards Web Page Visits

2,333
Translated Content

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

Collaboration

HIGHER EDUCATION STATE AUTHORIZERS



The FSMTB received a grant from the Seldin/Haring-Smith Foundation to produce a Toolkit for Identifying Human Trafficking and Fraud in Higher Education. The resource, co-authored by our executive director, Dr. Debra with Lorna Candler of the Colorado Department of Higher Education, is a practical guide for state authorizers to identify and take action on human trafficking in higher education institutions. This guide continues to serve as a resource for education and training in the regulatory compliance and enforcement community.

GEORGIA HUMAN TRAFFICKING SUMMIT

FSMTB hosted an educational summit for local and state law enforcement agency personnel in Atlanta, Georgia.

THENETWORK

THE NETWORK

The Federation of State Massage Therapy Boards partnered with The Network, a counter-human trafficking organization, to coauthor an article examining massage licensing fraud in education.

MASSAGE THERAPY COALITION

President Craig Knowles and Executive Director Dr. Debra Persinger represented FSMTB at the annual meeting of the coalition of national massage therapy organizations.

FEDERAL LAW ENFORCEMENT

FSMTB provided an educational training session for federal law enforcement representatives regarding illicit massage.

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

MBLEx

The Massage & Bodywork Licensing Examination (MBLEx) is an entry level competence exam that is psychometrically fair, valid, reliable and legally defensible.

FSMTB continues to work with massage regulatory boards and law enforcement agencies who collaborate to protect the integrity of the exam and in turn, the licensure process.

STATES & TERRITORIES THAT USE MBLEX | NOT REGULATED | STATES THAT DO NOT USE ANY EXAM | STATES THAT DO NOT USE MBLEX

MBLEx TESTING ACCOMMODATIONS

The FSMTB complies with federal laws regarding the Americans with Disabilities Act and considers requests from qualified candidates with diagnosed disabilities to utilize testing accommodations when taking the MBLEx.

The nature of the disabilities for which the accommodations were provided included ADHD, learning disabilities, dyslexia, visual/hearing impairments, and mental health conditions. The costs for providing the testing accommodations are covered by FSMTB.

MBLEx Pass Rates*

17,400 MBLEx candidates tested
First-time pass rate **72%.**

**July 2022 - June 2023*

MBLEx Accommodations

FSMTB supported **307** MBLEx candidates with **579** testing accommodations

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

MBLEx CANDIDATE HANDBOOK

The most current edition of the Massage & Bodywork Licensing Examination Candidate Handbook was published in July 2023. It is available on our website at fsmtb.org.

The MBLEx Candidate Handbook is an important reference for applicants and educational institutions. It contains comprehensive details about eligibility criteria, application processes, fees, scheduling, FSMTB candidate support, study materials, and examination content. In addition, it encompasses all the policies pertaining to exam administration, irregularities, and ensuring examination confidentiality.

MBLEx PREP MATERIALS

The Federation is committed to empowering MBLEx candidates in their exam preparation by offering a comprehensive array of study tools. The Federation strives to provide resources that enable aspiring massage and bodywork professionals to approach the MBLEx confidently.

THE MBLEx CHECK ONLINE READINESS ASSESSMENT

The MBLEx Check Online Readiness Assessment is the practice test designed to simulate the actual MBLEx experience. The Federation is proud to offer the MBLEx Check in Spanish, catering to our colleagues in Puerto Rico and Spanish-speaking communities nationwide.

THE OFFICIAL MBLEx STUDY GUIDE

The Official MBLEx Study Guide includes a comprehensive breakdown of the examination's core content areas and invaluable tips to encourage a successful examination experience. Notably, this guide offers a 100-question practice examination and includes sample exam items, further enhancing the learning experience.

The Official MBLEx Study Guide is available in English and Spanish.

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

REACH

94% of users who took a REACH course were happy with the course content and

89% would recommend REACH courses to other users

REACH
REGULATORY EDUCATION AND COMPETENCE HUB

REGULATORY EDUCATION AND COMPETENCE HUB (REACH)

FSMTB offers online CE courses sponsored by state boards through the Regulatory Education and Competence Hub (REACH) at www.reach4ce.org.
Course completion information is recorded in the Massage Therapy Licensing Database (MTLD) for participating state boards to access.

CE REGISTRY

CE Registry is a registry of educators, providing massage and bodywork therapy continuing education, who meet and adhere to the national CE standards developed by the FSMTB regulatory community. The CE Registry accepts information from continuing education providers, including course completion information, and transfers that information into the national Massage Therapy Licensing Database (MTLD). CE Registry includes a Course Search capability that allows potential CE consumers (LMT's) to search for courses that meet their needs.

CE Registry is a solution that meets the needs of the regulatory community by:

1. *Verifying primary source documentation of completed CE in MTLD.*
2. *Supporting the authority of state regulatory boards to accept CE for license renewal.*
3. *Reducing the instances of CE fraud among licensees.*
4. *Protecting the licensees from predatory practices by CE providers.*
5. *Identifying and making transparent the providers who are not compliant with the Standards established by the FSMTB membership.*

CE Registry
CONTINUING EDUCATION REGISTRY

The following states accept CE Registry courses

Alabama
Alaska
Arkansas
Connecticut
Delaware
District of Columbia
Idaho
Indiana
Iowa
Kentucky
Maryland
Michigan
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
North Carolina
Oklahoma
Oregon
Rhode Island
South Carolina
South Dakota
Tennessee
Virginia
Washington
West Virginia
Wisconsin

CE Registry

383 courses registered to date
85% positive course feedback

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

GOVERNMENT RELATIONS

This year the Government Relations team was active, primarily providing support and education to members and their jurisdictions' legislators on the Interstate Massage Compact (IMpact).

SERVICE

Attended over **100** board meetings, spending over **300** hours being directly available to our members.

Attended **50** legislative and committee hearings and submitted testimony on **18** occasions to **12** states.

INTERSTATE MASSAGE COMPACT (IMPACT)

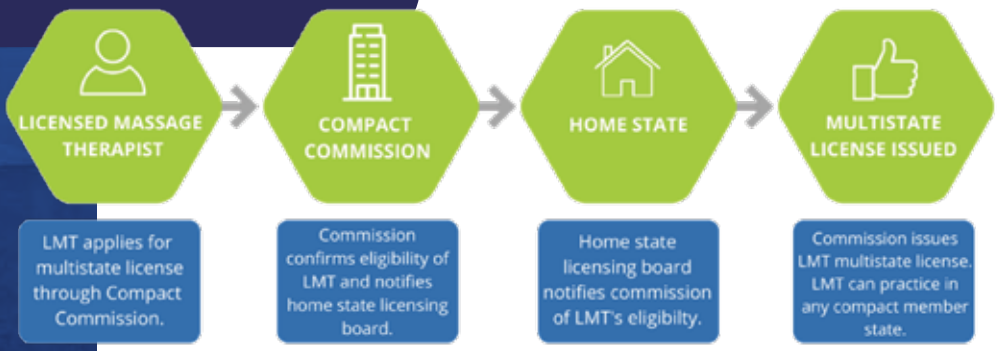
Massage therapy regulators, practitioners, and educators, in collaboration with FSMTB and the Council of State Governments (CSG), have developed the interstate massage therapy licensure compact, or IMpact.

IMpact enables licensed massage therapists to practice in all states that join the compact, rather than get an individual license in each state where they want to practice.

After seven (7) states adopt the legislation, IMpact is activated and the Compact Commission will begin accepting applications for the massage therapy multistate license.

IMpact

Nevada was the **FIRST** state to adopt IMpact.



BILLS

A total of **198** bills were tracked, **42** of which were enacted.

LEGISLATIVE TRACKING

The most common type of legislation tracked related to the Interstate Massage Compact, massage boards, human trafficking, establishment regulation, license application and discipline, and scope of practice related to reflexology.

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

VIRTUAL MEMBERSHIP EVENTS

The Virtual Membership Events support the mission of the FSMTB by facilitating communication among member boards and providing education and guidance on trending issues such as licensure mobility, uniform minimum competency standards and interagency collaboration. Topics addressed in 2023 included the Interstate Massage Compact, the value of the Massage & Bodywork Licensing Examination, how to educate massage clients on boundaries, and collaborating with state education entities.

These events present an opportunity for members to discuss issues across jurisdictions and learn from one another. They continue to receive positive feedback and attendees consistently encourage others to attend.

MASSAGE BOARD EXECUTIVE SUMMIT

The Massage Board Executive (MBE) Summit was held in Denver, Colorado on April 27-28, 2023. The 2023 Summit offered two tracks, one for Board Executives and one for Inspectors and Investigators.

The Summit focused on facilitating communication and sharing best practices across jurisdictions. Session content addressed how race, gender and policies contribute to the illicit massage industry; organized crime and protecting exam content; understanding trauma, secondary trauma, and burnout; regulatory trends; investigator training models; and massage establishment regulation. The feedback received from attendees was very positive.

LEGAL

The FSMTB initiated litigation in the United States District Court for the Southern District of Texas against Footy Rooty Development, Inc. D/B/A Footy Rooty Institute Houston, its officers, and other participating parties.

The litigation process, currently ongoing, was initiated by FSMTB, alleging copyright and trade secret infringement related to the intellectual property interests of the Massage & Bodywork Licensing Examination (MBLEx®).

MBE Summit

46 attendees representing
25 member jurisdictions.

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

VOLUNTEERS

We are grateful for our volunteers who juggle work schedules, family schedules, and everyday life obligations while still finding time to dedicate to volunteering for FSMTB.

We owe a special debt of gratitude to examination item writers for their unwavering service and dedication. Their diligent efforts and invaluable contributions significantly elevate the massage and bodywork profession for the benefit of all.

Contributions

6,237 volunteer hours contributed to FSMTB

$198,337 of volunteer time donated

thank you

(volunteer hour value = $31.80. Source: Independent Sector)

FSMTB
FEDERATION OF STATE MASSAGE THERAPY BOARDS

People

CONTINUING EDUCATION COURSE DEVELOPMENT
Katherine Brady, TX
Pattie Campbell, VA
Melissa Clark, OH
William Ensminger, PA
Ceena Lund, KS
Susan Salvo, LA
Elan Schacter, NC
Christina Valente, OH
Roberta Wolff, TX
Dr. Diane Young, FL

CE REGISTRY
Nicole Davis, NJ
William Ensminger, PA
Joseph Frazier, MA
Rosendo Galvez, IL
Barbara Lis, IN
Ceena Lund, KS
Dr. Tim Reischman, NC
Charlene Russell, MS
Elan Schacter, NC
Jan Shaw, SC
Bianca Smith, NV
Richard Ventura, MO

EXAMINATION DEVELOPMENT
Sarah Albanawi, VA
Karen Armstrong, MI
Su Bibik, MI
Ed Bolden-Greer, TN
Jeryd Bolden-Greer, TN
Katherine Brady, TX
Vickie Branch, NH
Laurie Craig, GA
Nicole Davis, NJ
Chimere Figaire-Correa, WA
Priscilla Fleming, NC
Sandy Fritz, MI
Rosendo Galvez, IL
Bethany Lowrie, PA
Ceena Lund, KS
Wendy McGinley, ND
Jodi Peck, AZ
Dr. Tim Reischman, NC
Charlene Russell, MS
Susan Salvo, LA
Elan Schacter, NC
Cherie Sohnen-Moe, AZ
Juntan (JT) Song, AZ
Tracy Sullivan, CT
Christina Valente, MO
Richard Ventura, MO
Charles Watson, KY
Roberta Wolff, TX

EXAMINATION ELIGIBILITY
Chair: Ed Bolden-Greer, TN
Chimere Figaire-Correa, WA
Karen Frazier, KY
Caroline Fox-Guerin, TX
Linda Lyter, WV
Sharon Oliver, MD
Charlene Russell, MS
Maile Tau'a-Roberts, UT
Heidi Williams, WA

FINANCE
Chair: Treasurer, Keith Warren, AL
Elisabeth Barnard, NV
Caroline Fox-Guerin, TX
Elizabeth Kirk, NC
Linda Lyter, WV

EXAMINATION POLICY
Chair: Caroline Fox-Guerin, TX
Elisabeth Barnard, NV
Ed Bolden-Greer, TN
Chimere Figaire-Correa, WA
Karen Frazier, KY
Linda Lyter, WV
Charlene Russell, MS

POLICY
Chair: Victoria Drago, FL
Chimere Figaire-Correa, WA
Charisma Townsend-Davila, WI
Kay Warren, NC

NOMINATING
Chair: Charlene Russell, MS
Carrie Anderson, ND
Karen Armstrong, MI
David Cox, MD

ESTABLISHMENT TASK FORCE
Chair: Adrienne Price, GA
Karen Armstrong, MI
Ed Bolden-Greer, TN
Mike James, AL
Rick McElroy, CA
Charlene Russell, MS
Jeff Van Laanen, OR

LICENSE RENEWAL
Chair: Jan Shaw, SC
Lori Cutchin, OK
Karen Frazier, KY
Elizabeth Kirk, NC
Sharon Oliver, MD
Bianca Smith, NV
Maile Tau'a-Roberts, UT
Charisma Townsend-Davila, WI

ANNUAL MEETING PRESENTERS
Robert Beiser, *Strategic Initiatives Director, Polaris*
Michael Fogel, *PsyD, ABPP, Founder, Redirect*
Doug Gilmer, *PhD, Resident Agent in Charge, Homeland Security Investigations*
Matthew Shafer, *Deputy Policy Director, National Center for Interstate Compacts, The Council of State Governments*
Chris Smith, *Trauma Touch Therapist, Director of Colorado School of Healing Arts*

MASSAGE BOARD EXECUTIVE SUMMIT PRESENTERS
Theresa Brown, *South Carolina Board of Massage/Bodywork Therapy*
Christine Brunner, *Nevada State Board of Massage Therapists*
Kathy Chen, *Senior Program Advisor, The Network*
Pam Hamilton, *MSW, LCSW, Hamilton Counseling & Consulting*
Elizabeth Kirk, *North Carolina Board of Massage and Bodywork Therapy*
Janelle Larson, *Iowa Board of Massage Therapy*
Mike Longmire, *North Carolina Board of Massage and Bodywork Therapy*
Rick McElroy, *California Massage Therapy Council*
Robert Ruark, *Oregon Board of Massage Therapists*
Harry Samit, *Director, Special Investigations, Pearson VUE*
Jason Shawver, *Enforcement Investigator, State Medical Board of Ohio*
Dennis Trammel, *Alabama Board of Massage Therapy*
Jeff Van Laanen, *Oregon Board of Massage Therapists*
Keith Warren, *Alabama Board of Massage Therapy*
Mary Winston, *Texas Department of Licensing and Regulation*

VIRTUAL MEMBER EVENTS PRESENTERS
Dale J. Atkinson, *Esq., The Atkinson Firm, General Counsel to the FSMTB*
Matt Shafer, *Deputy Policy Director, National Center for Interstate Compacts, The Council of State Governments*
Jessica Thomas, *Policy Associate, Council of State Governments*
Craig Knowles, *FSMTB President, Chair, Georgia Board of Massage Therapy*
Harry Samit, *Director, Special Investigations, Pearson VUE*
Sandy Anderson, *LMT, FSMTB Vice President and Executive Director, Nevada State Board of Massage Therapy*
Niki Munk, *PhD, LMT, researcher, Department of Health Sciences, Indiana University*
Mica Rosenow, *LMT, researcher, Department of Health Sciences, Indiana University*
Sylvia Rosa-Casanova, *Senior Associate for Private Postsecondary Education, SCHEV*
Sandra Freeman, *Director, State Council of Higher Education for Virginia*
Kimberly Hodge, *Compliance Officer, Tennessee Higher Education Commission*
Gloria Lindsay, *Executive Director, Missouri Board of Therapeutic Massage*

Exhibit 4

COMTA® COMMISSION ON MASSAGE THERAPY ACCREDITATION

Accreditation Standards

Effective January 1, 2015
Revised July 2017

REQUIRED BACKGROUND INFORMATION
Institutional Mission and Objectives

1. **Institutional Mission**

   STATEMENT OF PURPOSE: A mission statement outlines the purpose of an institution or program and provides clear direction for the ongoing development and operation of the institution or program. In developing and revising a mission statement, an institution or program should consider the needs of society, the profession, and the students for whom the program is intended. The institution's or program's success will be evaluated in relation to its mission. Therefore, the institution must have a mission statement that is published, well communicated, and implemented throughout the organization's programs and daily operations.

2. **Institutional Goals or Objectives**

   STATEMENT OF PURPOSE: In addition to a general mission statement, the institution has goals or objectives to measure its effectiveness. These goals or objectives are derived from the general mission statement and are stated in specific, measurable terms. They are then used to guide the development and evaluation of all educational programs and institutional services.

STANDARDS for <u>BOTH</u> PROGRAMMATIC and INSTITUTIONAL ACCREDITATION

I. Program Approvals

STATEMENT OF PURPOSE: Prior to accreditation, programs must receive state and/or any other applicable approvals to offer the certificate or degree. Standard I refers specifically to the approvals required for the massage/bodywork or esthetics programs. Any institutional approvals are considered in the Standard for Institutional Accreditation. Requirements vary based on the jurisdiction. In some states, programs must be approved by a state education agency and/or the specific professional licensing board. Institutions must demonstrate knowledge of and compliance with all applicable state regulations, as well as all applicable accreditation standards from COMTA or other institutional accrediting agencies.

A. The programs under consideration for COMTA accreditation have current approval(s) as required by law and regulation in their jurisdictions, including state education agencies, state private postsecondary regulators, or massage or esthetics licensing boards.

B. Individual programs are in compliance with all standards and policies of their institutional accrediting agency.

C. Changes to accredited programs must be reported to COMTA in accordance with applicable policies.

II. Curriculum and Instruction

A. Programmatic Educational Objectives

STATEMENT OF PURPOSE: Specific, measurable objectives for each certificate or degree program are derived from the institutional mission/goals. These programmatic educational objectives should be published and should guide the development of the curriculum, course content, course objectives, and evaluation methods. If there are multiple massage or esthetics certificates/degree programs, there should be separate educational objectives for each program that clearly delineate their different purposes.

1. Each program has clearly stated educational objectives that are published and consistent with the institution's mission.

2. Program objectives are stated in measurable terms so they may be used to evaluate program effectiveness and outcomes.

3. Program objectives are integrated consistently throughout the curriculum, instruction, and evaluation methods.

B. Curriculum Design

The curriculum is designed comprehensively, is organized systematically for effective learning, and prepares students for professional practice.

STATEMENT OF PURPOSE: The curriculum is the plan for student learning and is where the institutional mission and programmatic objectives are realized. COMTA's curriculum standard includes three main components: organization, length, and content. The curriculum can be organized in a variety of ways, depending on the school's mission and educational philosophy. If an integrated curriculum model is used, schools should assure that course learning objectives are appropriately delineated and assessed between subjects. If a modular curriculum delivery method is used, specific steps should be taken to ensure that the needs of both beginning and more advanced students are met.

1. Programs are organized for optimal student learning, including the following considerations:
   a. Programs are comprised of separate and discrete courses, which may be organized by content area, by term, or by a combination of content and term.
   b. Each course has clearly identified learning objectives.
   c. Programs are designed for systematic and sequential learning.
      (i) All course prerequisites are clearly identified and enforced to ensure concept mastery prior to a student advancing.

2. The program length complies with the following:
   a. The mission and objectives of the institution and program;

b. Professional licensing/credentialing requirements for the applicable jurisdictions and/or commonly accepted national standards in the field;
c. A minimum of 600 hours of classroom and clinic/fieldwork that are directly supervised by qualified faculty members; and
d. Standard academic measures of course length as defined by the applicable regulatory agency (i.e., clock hour definitions, clock hour to academic credit conversions, term length).
   (i) Schools seeking COMTA institutional accreditation use the COMTA Standard Academic Measurement Policy.
   (ii) For programmatic accreditation, in the absence of other regulatory policies, the COMTA policy applies.

3. The program's curriculum content is coherent and demonstrates that it has been designed with the following in mind:
   a. The mission and objectives of the institution and program, as well as the principles and values that are being emphasized by the program;
   b. Professional licensing and/or credentialing requirements for the jurisdictions in which the school operates, jurisdictions for which the school prepares graduates, and/or national professional standards;
   c. Historical foundations in the field;
   d. Recent developments in the field;
   e. Sound educational models and current learning theories; and
   f. COMTA Competencies (see next standard).

4. Curriculum Competencies

   STATEMENT OF PURPOSE: Curriculum competencies set standards of professional knowledge and abilities. Evaluating a program in terms of student competency places the emphasis on student learning, as opposed to how much time is devoted to each topic. As a specialized accrediting agency, COMTA has created a comprehensive list of content competencies that describe what graduates should know and be able to perform. Schools/programs must demonstrate how these competencies are being taught and assessed. The Commission's six general competency areas are as follows:
   1. *Plan and organize an effective massage and bodywork session or esthetic treatment.*
   2. *Perform massage therapy and bodywork or esthetic treatments for therapeutic benefit.*
   3. *Develop and implement a self-care strategy.*
   4. *Develop successful and ethical therapeutic relationships with clients.*
   5. *Develop a strategy for a successful practice, business, or employment situation.*
   6. *Identify strategies for professional development.*

   Programs should refer to COMTA Competency Charts for a complete list of the specific elements within each competency area.

   a. Massage/Bodywork Curriculum Competencies
   Programs meet the minimum competencies found in COMTA's Competency Chart, as demonstrated through teaching and student assessment.

   b. Esthetic Curriculum Competencies
   Programs meet the minimum competencies found in COMTA's Competency Chart, as demonstrated through teaching and student assessment.

C. Syllabi

Programs ensure documentation and consistent implementation of curriculum through the use of clear syllabi distributed to students at the beginning of each course. These syllabi comply with the COMTA Syllabi Checklist.

STATEMENT OF PURPOSE: The syllabus is the documentation and implementation tool for the course curriculum. It also serves as a written contract between school and student, serves as an archival record of student learning, and clarifies expectations to increase student success. Syllabi should be developed for each course and distributed at the beginning of each course, and followed consistently throughout the course. This does not require that all instructors use identical syllabi, as long as consistency in learning outcomes is maintained.

D. Methods of instruction and evaluation

STATEMENT OF PURPOSE: The written curriculum is realized by in-class instruction and evaluation. Quality instruction may be delivered in a variety of ways according to student need and instructor judgment. Instruction should encourage active participation by students and a direct focus on meeting diverse student needs. Sound adult learning theories should guide instructional choices and be evident in lesson plans and classroom observation. In addition, quality evaluation methods are essential for confidence in students' proficiency. Practical (hands-on) exams should be used routinely. These should be documented and employed consistently with predetermined rubrics or checklists.

1. Teaching methods are appropriate to course content, meet the needs of diverse learners, and are designed to encourage and enhance learner participation and involvement.
   a. The teacher to student ratio reasonably ensures effective teaching and learning in both lecture and lab courses. This ratio is clearly published.

2. Evaluation methods (such as written and practical tests, papers, assignments, classroom observation, etc.) are used appropriately to assess student knowledge and skills.
   a. Measurable performance standards are clearly outlined for students on syllabi.
   b. Students are assessed using both written and practical (hands-on) assessments based on a predetermined set of skills (i.e., checklists or rubrics for practical exams) that reflect the key educational objectives of the course.
   c. Faculty members use assessment methods and grading consistently in determining whether performance standards are met.
   d. Students receive timely and regular feedback on their performance during the course.

E. Clinic/Fieldwork

STATEMENT OF PURPOSE: The clinic/fieldwork experience is a vital component of student learning. Clinic/fieldwork should be considered an integral part of the instructional process, with appropriate learning objectives and evaluation tools. Clinics may be either permanent health centers in which students operate or temporary clinics in classrooms, as long as the program can substantiate that the experience models professional procedures and involves members of the general public. Off-site, supervised fieldwork may also be included, but hands-on practice in other classes may not be considered part of the clinic hours.

Programs include clinic/fieldwork instruction as an integrated part of the curriculum according to the following requirements:

1. The clinic/fieldwork component is a distinct course with its own course learning objectives and evaluation methods (as evidenced by a written syllabus).

2. Students practice on members of the general public.

3. Clinics are designed to model professional procedures.

4. Students are supervised and evaluated by qualified faculty members.

5. Clinic/fieldwork hours are appropriate to the length of the program and adhere to the following:
   a. Hours do not exceed 25 percent of the required hours of the program.
   b. A minimum number of hours/client sessions on the general public must be performed and documented. (See COMTA Clinic Guidelines.)

6. Clinics are operated in compliance with all applicable laws.

F. Externship (if applicable)
If clock hours or academic credit are awarded for an externship experience, it must meet the following standards:

> *STATEMENT OF PURPOSE: Externships involve experiential learning done away from the school. Schools may plan and coordinate these experiences to allow students to work with the general public while being supervised by a qualified professional who is not associated with the school. Externships are not a requirement for COMTA-accredited programs. However, if students are allowed to complete externships (as either a requirement or an elective), the experience must meet the COMTA definition of externship (see Definition of Terms and the following standards.*

1. The externship is a distinct course with its own course learning objectives and evaluation methods (as evidenced by a written syllabus).

2. Externship hours are appropriate to the length of the program and adhere to the following:
   a. Hours are over and above the minimum 600 hours required for accreditation.
   b. Hours do not exceed 20 percent of total program hours.

3. There is a written agreement signed by the program faculty and externship site personnel that clearly defines the obligations of the onsite supervisors, the faculty coordinator, and the student.

4. Student performance is supervised by an onsite supervisor who is legally qualified to do so.

5. Student performance is evaluated by a qualified faculty coordinator (employee of the school), and students are provided with planned opportunities to discuss the experience and their performance with the faculty coordinator.

G. Learning/Library Resources
Students have reasonable access to library and learning resources, including electronic resources, which support the program objectives.

STATEMENT OF PURPOSE: It is essential that postsecondary institutions have a library and/or learning resource center. The library should be more than just a physical location and should contain learning resources that are incorporated into the curriculum, support the research competency, and serve as reference materials for practical work in the clinic.

1. Learning resources are accessible to all students during and beyond classroom hours and may be provided via hard copy and/or virtually.

2. Learning resources are integrated into the curriculum and instruction, and students and faculty are trained on their use.

3. Students are guaranteed access to library and learning resources if the library is off site.

III. Program Administration and Faculty

STATEMENT OF PURPOSE: The individuals involved in a program's execution are key to its success. Therefore, the program should be properly managed by a qualified individual with time and resources dedicated for administration beyond teaching obligations. Further, faculty members should have the educational background, field experience, and proper credentials to competently teach their assigned courses. In addition to expertise in professional technique, schools must ensure that instructors are qualified in teaching skills, and/or receive proper training and ongoing development in this area.

A. Program Administration
Programs are adequately managed by qualified individuals who maintain currency in the field.

1. There is at least one full-time employee of the institution designated as program director (or equivalent title) with responsibility for the supervision, management, and administration of the program.
   a. If the program director is also a faculty member, non-instructional time is scheduled to effectively fulfill administrative and compliance duties.

2. Individuals with specific responsibilities for curriculum design, curriculum assessment, instructional supervision, and instructional evaluation have appropriate education or experience to perform their functions effectively.

3. The employee designated with primary responsibility for the program maintains current awareness of the field through professional development specific to the program.

4. Methods are in place to ensure the integrity of the program during changes in administrative staff.

5. For programmatic accreditation, there is a realistic program budget demonstrating adequate resources and institutional support of the program.

B. Faculty Qualifications
All instructors are academically and professionally qualified, based upon the following:

1. Instructors are qualified and/or trained in instructional methods and classroom management.

2. Instructors of theory and technique have a minimum of two (2) years of practical experience and are able to demonstrate the appropriate knowledge or expertise as required by the course learning objectives.

3. Instructors of anatomy physiology, and pathology have advanced proficiency in these sciences which is broader and more advanced than the material being taught. (See Faculty Qualifications, Development and Evaluation Guidelines.)

4. Instructors of theory and technique hold a current professional license, certification or other credential as required by applicable laws.
   a. This requirement is waived for nonresidents of the jurisdiction if the credential is not available to nonresidents, or if the nonresident instructor provides no more than 20 hours of instruction over the length of the program.
   b. If there are no professional licensing requirements, instructors of theory and technique must be eligible to sit for an appropriate licensing/certification exam or provide evidence of equivalent training or experience in lieu of eligibility.

5. Current evidence of instructor qualifications is maintained in faculty files.

C. Faculty Supervision

1. The institution or program uses standards of instructional performance and professionalism to guide hiring, periodic reviews of performance, and professional development of its faculty.

2. New instructors receive adequate orientation and training on job expectations.

3. Faculty members routinely participate in ongoing professional development in both technical knowledge and instructional skills.

   a. Documentation of such training is maintained by the institution.

4. All instructors receive written evaluations on a regular and routine basis from their supervisor. These evaluations follow COMTA's Faculty Qualifications, Development and Evaluation Guidelines.

5. Methods are in place to ensure the quality of instruction through reasonable continuity of the faculty.

IV. Instructional Facilities and Professional Environment

STATEMENT OF PURPOSE: A professional environment includes adequate and well-maintained facilities, equipment, and supplies. Teaching and modeling the standards of practice also create a professional and optimal learning environment. Programs should

have in place clear codes of conduct for professional behavior, including appropriate boundaries and draping, as well as sexual harassment policies and professional liability insurance.

A. Instructional facilities (classrooms and clinic/laboratory spaces) support professionalism, are adequate to meet the program objectives and student needs, and are in compliance with all applicable laws.
   1. There is adequate access to sanitation (e.g., restrooms, sinks, hand sanitizer) to support "standard precautions." (See Definition of Terms.)

B. Programs use industry-current instructional equipment and materials that are adequate and maintained to meet the program objectives and student needs.

C. To support professionalism in the school environment:

   1. There is a published student code of conduct that models professional industry standards (including hygiene and draping) and is implemented in classroom activities.

   2. The institution or program has a published policy and procedure for preventing sexual harassment and handling complaints in the learning environment that is compliant with all applicable laws. The published policy includes a definition of "sexual harassment" and clear procedures for addressing complaints.

   3. Adequate professional liability insurance is maintained for the institution, faculty, and all students.

V. **Program Admissions**

STATEMENT OF PURPOSE: This standard refers only to those admissions processes and procedures that are specific to the massage/bodywork or esthetics program. Admission requirements, policies, and procedures may be set by the institution to be the same for all programs, or they may be program-specific. All such admission policies and procedures should comply with federal requirements, be consistent with the mission and program objectives, and ensure that only those students who can reasonably be expected to benefit are admitted. The criteria by which students are selected for admission should be consistently applied and documented in student files. Additional standards regarding advertising and recruiting are included in the Standards for Institutional Accreditation.

A. Admissions Policies and Procedures
Institutions or programs have published admissions requirements and procedures that are adhered to consistently.

   1. Admissions policies and procedures are consistent with the institutional mission and program objectives.

   2. The admissions requirements are designed to ensure that programs only admit those students who can reasonably be expected to benefit from the instruction. The requirements include but are not limited to the following:
      a. Applicants must possess evidence of high school graduation or a recognized equivalency (See Definition of Terms).

b. If applicants do not possess evidence of high school graduation or the equivalent, they must demonstrate their ability to benefit from the training by passing an approved exam.
c. Applicants without high school graduation or equivalent must be beyond the compulsory age of attendance as defined by state law.

3. All admissions decisions are based on clearly published admissions criteria.
   a. The institution or program maintains admission documentation in student files as evidence confirming an applicant's eligibility.
   b. Institutions or programs maintain documentation of the reasons for the denial of admission to any applicant.

B. Program Advertisement, Recruitment and Disclosures

1. Programs are accurately represented in all the institution's marketing and promotional materials, as well as in all verbal representations.

2. Disclosures

   a. Costs
   Total program costs are clearly disclosed for prospective students.
   (i) Total program costs are available in program information even if the institution itself does not publish total cost.

   b. Accreditation status
   Institutions and programs accurately represent their accreditation status.
   (i) No institution or program may use the term "accredited" unless it indicates by what agency or organization it is accredited.
   (ii) Institutions having branch locations clearly identify the accreditation status of each of the branch locations.
   (iii) Institutions or programs accredited by COMTA must name "COMTA" or "Commission on Massage Therapy Accreditation" when referring to its accreditation. This language may be used with or without the COMTA logo.
   (iv) The COMTA logo may only be used in the form provided by COMTA.

   c. Licensing requirements
   Institutions or programs must publish in the catalog or student handbook current licensing requirements, including:
   (i) A brief description of regulations in the state of training, as well as contact information in the state of training, with a statement that requirements in other states may differ;
   (ii) Reference to a reputable resource that lists the names, addresses, and licensing requirements for all the appropriate regulatory agencies in all states that regulate the practice of massage therapy and bodywork and/or esthetics/skin care (e.g., AMTA, ABMP, or similar resource that is updated regularly with information for ALL states);
   (iii) The understanding that local municipal ordinances may apply in the absence of state law;
   (iv) A written disclosure of any circumstance that would adversely impact an applicant's ability to gain a license and/or employment in the field after graduation (e.g., criminal record, failure to pass exams, failure to gain other credentialing requirements).

d. Salary and Employment Expectations
   (i) If institutions or program provide information about salary or employment opportunities to prospective students, either in written or verbal form, such information must be accurate and identify the source and date.

VI. Student Experience and Support

STATEMENT OF PURPOSE: Open communication channels, responsive complaint procedures, and adequate support services are part of a student-centered culture. Institutions and/or programs should take measures to ensure student needs are addressed and student feedback is honored. These services may be provided at the institutional or programmatic level, but they should consider the specific needs of the massage/bodywork or esthetics student.

A. Student Communication and Feedback
The institution and/or program representatives are proactive in initiating and responding to communications with students, both formally and informally.

1. Effective mechanisms exist for consistent and systematic communication between students, administration, and faculty.

2. Student feedback/evaluation is solicited and responded to on a regular basis.
   a. Institutions and/or programs use written anonymous student evaluations as part of gathering input (e.g. routine class evaluations, student feedback on programmatic effectiveness).
   b. There is a system in place for the analysis of such evaluations.
   c. Institutions and/or programs take appropriate action based on feedback as necessary.

B. Complaint Procedure
The institution and/or program provides a written complaint policy to all students upon admission that describes the procedure to be followed, an objective third party school official to whom the complaint should be addressed, a specific and reasonable time frame for response, and the contact information for all applicable regulatory agencies.

1. The institution or program maintains written records of all formal student complaints and their resolution.

2. COMTA-accredited institutions and programs include the COMTA complaint policy and procedures for situations when the school procedure has been exhausted without resolution.

C. Placement Services

1. Graduate placement assistance consistent with the mission and objectives is provided as needed to ensure employment outcomes adequate to meet COMTA benchmarks. The extent and nature of placement services are clearly published for students.

2. The institution or program keeps verifiable records of each graduate's initial employment on file for five years. Any statement regarding the percentage of graduate employment (i.e., annual employment rates of graduates) must be based upon these verifiable records.

D. For programmatic accreditation only: Students have access to all student services provided to other students within the institution, as well as to program-specific student services.

1. The institution or program maintains academic advising and support that meets the specific needs of massage/bodywork or esthetics students, including program-specific advising, tutoring, and/or placement services (e.g. tutoring is provided in hands-on technique, not just general education courses; placement services are specific to the field).

VII. Student Performance and Transcripts

STATEMENT OF PURPOSE: Institutions and programs should monitor and maintain records of students' progress throughout the program. Students should be informed of expected performance standards and receive regular reports of their progress in the program. Further, due to the essential role transcripts play in industry licensing requirements, transcript authenticity is critical and should be protected. Additional standards regarding student records are included in the Standards for Institutional Accreditation.

A. Attendance, Grading Policies, and Procedures

1. Attendance policies comply with all applicable laws and/or accreditation regulations.

2. Faculty and staff consistently enforce institution or program attendance, academic performance, and grading policies.

3. Students regularly receive progress and/or attendance reports throughout the program.

4. Students are informed when attendance or academic performance standards are not being met

B. Transcript Verification and Authentication
Institutions and programs develop, publish, and consistently follow policies for student transcripts that conform to all applicable laws and regulations.

1. Transcripts are released only in response to student or graduate request.

2. Institutions use appropriate measures to ensure transcript authenticity (e.g., watermark paper, embossed seal).

3. All transcript information is accurate and verifiable via other student records.

4. Transcripts are maintained securely, backed up regularly, and kept on file by the school indefinitely.

VIII. Program Effectiveness

STATEMENT OF PURPOSE: Accrediting agencies are required to assess institutions and programs based on success in achieving their stated objectives and continual efforts to improve educational quality. Program objectives then serve as a guide and a measure

for program effectiveness. Therefore, program administration should engage in ongoing self-assessment. Programs should collect and analyze feedback from a variety of sources, including students, graduates, employers and other interested parties. A Program Advisory Committee should be created to assist in formalizing this process. A Program Advisory Committee increases the perspective and broadens the input for review, so it is essential that it include members who are not directly affiliated with the school. The collection of feedback from all parties should then be analyzed and used in reviewing and/or revising all aspects of the program. The curriculum itself should be regularly reviewed and revised as needed to ensure that it is current and effective in meeting its stated objectives.

A. Evaluation of Programmatic Objectives

The program has methods in place to measure its success in meeting its educational objectives.

B. Program Advisory Committee

To provide an objective analysis of effectiveness, the program maintains an active Program Advisory Committee that meets the following guidelines:

1. Includes diverse representation with a minimum of five members, at least 40 percent of whom are not directly affiliated with the institution.
   a. Affiliated members may include staff, faculty, board members, students, graduates, and/or educators from other programs within the institution.
   b. Unaffiliated members may include employers, respected practitioners, members of the public, regulators, and/or educators from other schools.

2. A minimum of one synchronous meeting is held per year, with additional interaction occurring regularly (e.g., emails, phone calls, meetings).

3. The institution or program must maintain detailed notes and evidence that the administration has considered the Program Advisory Committee comments.

C. Student Outcomes

To maintain and/or improve program effectiveness, institutions or programs monitor and report completion, placement, and licensure exam pass rates on an annual basis.

1. There is a process in place to ensure accuracy of the report which complies with COMTA Student Outcomes Tracking Policy.

2. Verifiable records of all completion and placement data for graduates are maintained by the institution.

3. Programs meet minimum benchmarks for completion and placement rates as established by the Commission, stipulated in the Student Outcomes Tracking Policy.

D. Data Analysis

Programs have a process for collecting and analyzing data about the quality and effectiveness of educational programs and curriculum content. These data must include:

1. Student outcomes

2. Student evaluations and complaints

3. Graduate feedback

4. Employer feedback

5. Faculty feedback

6. Program Advisory Committee feedback

7. Industry trends, recent developments in the field and outside organizations (e.g., regulatory agencies and professional associations).

E. Program/Curriculum Review and Revision

1. Programs formally consider the results of assessment data collection and analysis in planning and implementing change in the educational programs.

2. The curriculum is regularly reviewed and revised as necessary.

3. This revision process is documented.

IX. Degree Programs

STATEMENT OF PURPOSE: In addition to complying with all other applicable standards, programs that offer degrees have additional responsibilities to ensure appropriate academic rigor and compliance with all applicable laws. The type of degree offered may be determined by the state, and institutional standards often govern the structure. Degrees are intended to develop practitioners for an academic path. Accordingly, the inclusion of general education courses supports a broader educational experience that should be reflected in the degree program objectives.

A. Standards Applicable to All Degree Programs

1. For academic purposes, degree programs are measured in credit hours according to the conversion outlined in the COMTA Standard Academic Measurement Policy.

2. Students admitted to degree programs have earned a high school diploma or recognized equivalency certificate before starting class, and proof of high school diploma or its equivalent is on file at the time of enrollment.

3. Transfer of credit may be applied toward the degree.
   a. A minimum of 25 percent of the required curriculum must be completed at the school awarding the degree.
   b. A maximum of 30 semester credits or the equivalent of the general education requirement may be provided by another degree-granting institution.

4. The institution may award appropriate credit to students in attendance at the time the institution becomes degree granting.

   a. Former students must meet all equivalent course work and degree requirements and complete a minimum of 15 semester credits or the equivalent in the new degree program.

5. Faculty teaching in degree programs meet minimum requirements.
   a. Instructors for technical courses have a minimum of three (3) years of practical work experience or equivalent training in the field being taught.
   b. Instructors for general education courses shall hold, at a minimum, a baccalaureate degree, with appropriate education in the specific courses being taught.

6. The institution maintains a library/resource center.
   a. The library/resource center is supervised by a staff member who demonstrates competence to provide oversight and management.
   b. The library/resource center includes holdings appropriate to the courses of study, standard works of reference, relevant current periodicals, and relevant reference materials in sufficient titles and numbers to adequately serve the students.
   c. Study space appropriate for the number of students served is provided.
   d. Appropriate assistance is available to the students from qualified staff personnel.

B. Occupational Associate Degree Standards
   1. Occupational Associate degrees are a minimum of 60 semester credits or 90 quarter credits.

   2. A minimum of 45 semester credits or 67.5 quarter credits are included in the occupational area for which the degree is offered.

   3. A minimum of six semester credits or nine quarter credits in applied/related education courses are also included.

   4. General education courses may be offered as desired, in which case the faculty requirements apply.

   5. The title of the degree program, the name of the degree, the credential issued, and all advertising, promotional materials and literature make clear that the degree is occupational.

C. Academic Associate Degree Standards
   1. Academic Associate degree programs are a minimum of two academic years.

   2. A minimum of 24 semester credits or 36 quarter credits are general education courses.

   3. A minimum of 30 semester credits or 45 quarter credits are in the technical field for which the degree is awarded.

   4. Full-time and adjunct faculty maintain teaching loads and schedules that allow time for student advising, adequate preparation, and continuing professional growth.

   5. A person with appropriate education or library work experience supervises the library.

X. Distance Education

STATEMENT OF PURPOSE: Distance education (both fully online and hybrid courses) utilizes technology to create enriching virtual classroom experiences. Distance education must meet the criteria of supporting regular and substantive interaction between the students and the instructor. (Independent study or correspondence courses do not meet

that criterion.) The Commission acknowledges that there are some competencies within a massage/bodywork or esthetics program that may be taught through distance education. These competencies typically do not involve hands-on work or require instant oversight or feedback. Programs using distance education must demonstrate continued compliance with these and other applicable standards. (See COMTA's Distance Education Guidelines for additional information.)

A. Basic Approvals
   1. Courses that utilize distance education are reviewed and approved by COMTA before being offered (not for initial applicants).

   2. Hours awarded for distance education constitute no more than 49 percent of the program clock hours or credits (whichever is less). This includes any general education hours that may be included in a degree program.

   3. Institutions and programs must be approved to offer distance education for both in-state and out-of-state students where applicable.

B. Curriculum and Instruction
   1. Course content does not require on-site, hands-on, or immediate monitoring of student work.
      a. If any COMTA Competencies are taught or assessed via distance education, methods appropriate to the language of the Competency are used.

   2. Hours or credits awarded for distance education courses are comparable to those offered for similar amount of content in classroom courses.

   3. Distance education courses are designed to provide regular, meaningful, effective, and timely interaction between students and faculty.

   4. The program maintains control over the curriculum within the distance education courses and can make revisions as needed. The program must be able to adjust course delivery as needed to meet student needs.

   5. Faculty teaching distance education courses are experienced and/or trained in distance education methods.

C. Security and Assessment
   1. Distance education course information for students and faculty is private and secure via log-in username and password.

   2. Distance education courses are designed to provide effective assessment of student learning.

   3. Programs and distance education course faculty employ methods to assure student identity and academic integrity in coursework, including assessments.

      a. Such methods may include, as appropriate, a secure log-in and password, proctored examinations, or other technologies and/or practices that are effective in verifying each student's identity.

D. Student Support (For Institutional Accreditation Only)

1. Admissions and marketing materials inform prospective students of courses only offered via the distance education format.

2. Students are oriented to the process of distance education teaching and learning, and/or are assessed to determine preparedness for success in distance learning environments.

3. Student support services are available for students while taking online courses.

4. Courses that utilize distance education formats must meet ADA standards.

E. Distance Education Infrastructure and Support (For Institutional Accreditation Only)

1. Distance education courses use a learning management system (LMS) or similar platform to facilitate interaction and accountability that is appropriate to the scale of the distance education program.

2. The institution has personnel capable of supporting the distance education hardware/software onsite infrastructure or interface with outside hosts

3. The institution ensures effective and timely support for hardware and software needs of faculty and students.

4. The institution ensures sufficient bandwidth to provide distance education courses.

5. Distance education course content and activity are backed up daily.

STANDARDS for <u>INSTITUTIONAL</u> ACCREDITATION ONLY

XI. Institutional Management and Administration

STATEMENT OF PURPOSE: Management's primary role is to oversee the development, implementation, and evaluation of an effective institution and/or program. This includes upholding and promoting quality education, as well as maintaining government and accreditation compliance on an ongoing basis. An institution's management and administrative staff should be competent, with well-defined policies and procedures that promote consistency, communication, and regular review and planning.

A. Government Compliance

1. The institution is licensed as required by local, state, or federal law to offer educational services in all current locations.

2. The institution maintains compliance with all applicable laws, regulations, and accreditation standards.

3. Any expansion in programs by institutions already COMTA-accredited must be approved by COMTA prior to their being offered to students, including but not limited to, additional certifications or degrees, new programs, substantive changes, or distance education formats.

B. Management, Policies, and Procedures

1. Institutions have qualified and adequately staffed management in place.

2. The institution develops, publishes, and follows internal policies and procedures to ensure consistent operation.

3. Mechanisms exist for regular and effective communication between and among management and other staff.

4. Institutional management engages in regular review and planning.
   a. The institution has a process for measuring success in meeting its mission and objectives.
   b. Planning is in alignment with the mission and objectives of the institution.
   c. A strategic plan includes both short-term and long-term goals that are linked to specific resources (e.g., timelines, finances, personnel, facilities).

C. Human Resources
Management uses human resource strategies to ensure effective staff performance.

1. Management recruits and hires staff with appropriate training and experience.

2. Management and staff are fully aware of their job descriptions and are provided adequate orientation, supervision, ongoing training, and routine evaluation to ensure proficiency in their positions.

3. Management has in place reasonable measures to ensure the continuity of staff knowledge regarding school policies, regulation, and accreditation standards.

D. Employment Policies

1. Non-discrimination
   The institution practices are non-discriminatory with respect to race, gender, religion, nationality, age, disability, sexual orientation or other status protected by law.

2. Sexual harassment
   The institution develops, publishes and strictly adheres to a sexual harassment policy that is in compliance with federal and state government requirements and includes a definition of sexual harassment.

3. Grievance Policy
   Management develops, publishes, and adheres to a grievance procedure for all employees.

   a. Records of staff and faculty grievances are maintained and are available for inspection by the accrediting agency.

E. Institutional Facilities
   Non-instructional facilities (administrative facilities and "common areas") support the continuation of the school and programs, are adequate to meet the mission and objectives, and are in compliance with all applicable laws, building codes and health and safety regulations.

1. Non-instructional facilities (e.g., lobbies, offices, restrooms, lounges, and campus grounds) are safe, accessible, clean, well lit, suitably furnished, and adequate to meet the purpose of the area.

2. If the institution provides student housing, the facilities meet fire, safety, and sanitation standards as required by the applicable regulatory authorities.

XII. Institutional Financial Practices

STATEMENT OF PURPOSE: Institutions should be financially sound, show adequate financial planning and management, and be in compliance with all regulatory agency requirements. Verification of financial stability requires annual independently audited, reviewed, or compiled financial reports that follow Generally Accepted Accounting Principles (GAAP) and COMTA's Financial Reporting Guidelines. An independent Compilation with Disclosures will also be considered for schools generating less than $400,000 in gross revenue. In addition, fairness and consistency are required with regard to tuition and refund policies.

A. Financial Stability
   Institutions are adequately financed, and finances are administered competently and legally to ensure long-term stability.

1. A responsible financial management system ensures the continuance of the institution.
   a. Financial books and bank accounts are separate from any other finances not connected to the institution.
   b. Written policies and procedures exist to assure the safety, accountability, and effective use of financial resources.

2. The institution demonstrates a commitment to the financial resources for the education of all currently enrolled students in a program consistent with the standards.
   a. Financial reports provide clear evidence of financial stability and sound fiscal practices (e.g., budget, tuition bond, letter of credit, audited, reviewed or compiled statements, history of income and reserves, current ratio of assets and liabilities).
   b. Financial statements are prepared in accordance with generally acceptable accounting principles, the COMTA Financial Reporting Guidelines, and all applicable federal, state, and local requirements.

3. Institutions carry adequate general liability insurance for all properties to address extraordinary events that could disrupt business operations (e.g., fire, water, theft, or tampering).

B. Student Finance and Tuition Policies
Tuition policies are reasonable, clear and uniformly applied.

1. All program costs, including extra costs, are clearly published and fully disclosed to prospective students.

2. Tuition and fees are charged consistently for students admitted under similar circumstances e.g., employee discounts, early payments or registration, special cohorts).

3. The tuition and refund policies are published, easy to understand, applied equitably, and comply with the COMTA Cancellation and Refund Policy.

4. Written records are maintained for all student transactions, and there is a process for ensuring accuracy of records.

5. Institutions participating in state or federal student tuition assistance programs (non-Title IV) comply with all applicable laws and regulations of the sponsoring agency.

6. Institutions that offer scholarships publish the terms, including the basis for selection, deadline dates for applications, the number of scholarships to be awarded, and any other applicable terms and conditions.

XIII. Advertising, Recruiting, and Enrollment Practices

STATEMENT OF PURPOSE: Institutions must use ethical recruitment and enrollment practices and ensure that all recruitment and enrollment practices comply with applicable regulations. "Recruiting practices" include all activities designed to attract students and lead to student enrollment. These include but are not limited to advertising, public outreach and promotion, correspondence with prospective students, and completing enrollment documents. "Recruiting personnel" refers to anyone whose primary responsibility is recruiting, contacting, or responding to prospective students. These staff positions may have different titles at different institutions, but all must comply with the following standards. All activities should provide prospective students with complete and accurate information about the institution so that students can make informed enrollment decisions.

A. Advertising

1. All advertising and promotional materials (including the institution's website) are clear, factually accurate and current, and avoid leaving any false or unsupported impressions of the institution or program, including location name, educational programs, services, policies, and accreditation status.

2. All advertising and promotional materials (including the institution's website) comply with all applicable laws and regulations, including the COMTA Advertising and Recruiting Policy.

B. Recruiting Practices and Personnel
Institutions employ ethical and legal recruitment practices.

1. Institutions conform to all recruitment laws and regulations of the jurisdiction(s) in which they operate, including any applicable regulatory requirements for recruitment personnel.

2. Institutions have policies and procedures in place to ensure that ethical recruitment practices are followed and information provided to prospective students is accurate. These policies must also comply with the COMTA Advertising and Recruiting Policy.

3. An institution's recruitment efforts focus on attracting only students who are qualified and likely to complete and/or benefit from the education provided.

4. Institutions may not promise prospective students that program completion will guarantee employment, licensure, or certification.

5. Personnel are trained and qualified to engage in recruiting activities and may only use a title that accurately represents the individual's primary duties.

6. An institution does not provide a commission, bonus, or other financial incentive or payment to employees involved in the recruitment or admission of students, nor does it provide financial aid based directly or indirectly on the success in securing enrollment.

C. Catalog

1. A catalog and/or student handbook accurately portrays the institution and program, facilities, resources, and all policies and procedures and is readily available to all prospective students prior to signing an enrollment agreement.

2. A catalog and/or program student handbook contains (at minimum) all items in the COMTA Catalog Checklist.

3. The catalog and/or student handbook may be in either a printed or an electronic format, but all versions must be consistent and easily accessible to prospective and current students.

D. Enrollment Agreements
The institution ensures that the applicant is fully informed of the rights, responsibilities, and obligations of both the institution and the student under an enrollment agreement or other documentation before enrollment into the institution.

1. Enrollment agreements are completed with all students prior to enrollment and must include, at a minimum, all required items listed on the Enrollment Agreement Checklist.

2. No enrollment agreement is binding until it has been signed by the applicant and accepted and signed by the appropriate school official.

3. A copy of the enrollment agreement is signed by all appropriate parties and furnished to the student before any payment is made.

E. Non-discrimination
Admission requirements and procedures must comply with all local, state, and federal regulations.

1. Admissions policies may not discriminate on the basis of race, gender, religion, nationality, age, disability, sexual orientation, or other status protected by law.

2. Institutions or programs reasonably accommodate applicants with disabilities to the extent required by applicable law.

F. Transfer Credit
Institutions develop, publish, and consistently implement clear policies regarding transfer of credit into the institution.

1. The transfer credit policy specifies the educational criteria guiding the acceptance of transfer credits, specifies the maximum number of transfer credits that can be accepted toward completion of an accredited program, and outlines the procedure for determining whether transfer credit will be granted.

2. Records of transfer credit and any supporting documentation remain in the student's file.

XIV. Student Records and Student Services

STATEMENT OF PURPOSE: Institutions should monitor and maintain complete records of student progress throughout the program. This includes a clear definition of what constitutes satisfactory academic progress and provisions for ensuring student adherence to the institution's policy. There is a connection between student success and the support services provided. Therefore, institutions are expected to consider the students' academic and non-academic needs to encourage student success. The institution should provide a variety of student services in accordance with its mission and any applicable laws and regulations, and such services should reflect the highest ethical standards.

A. Student Record Management
For all currently enrolled students, institutions maintain educational records, which include all admissions, academic, and financial records.

STATEMENT OF PURPOSE: Institutions have a responsibility to maintain student records in compliance with all laws, including federal and state regulations (e.g., FERPA). Laws and standard practices for the content, confidentiality, security, and access of records should be followed consistently by all school personnel.

1. Educational records may be maintained electronically and/or in hard copy and both are accurate, organized, confidentially maintained, and secured from damage or loss (e.g., fire, water, theft, or tampering).

2. Institutions have and follow policies and procedures that comply with all applicable laws, including rights to access and confidentiality.

B. Satisfactory Academic Progress

STATEMENT OF PURPOSE: The institution should take measures to ensure students are making steady progress toward graduation through Satisfactory Academic Progress policies, including regular monitoring and assistance for students not succeeding. The school can determine its own requirements for the policy as long as the following criteria are met. NOTE: For schools participating in Title IV financial aid, there are more specifics that must be met within this policy. (See Title IV Compliance Standard.)

1. Institutions offering any COMTA-accredited program have a policy for determining what constitutes satisfactory academic progress throughout that program.

2. The school's Satisfactory Academic Progress (SAP) Policy includes consideration of the following:
   a. Quality of a student's academic work (i.e., grade percentage or grade point average).
   b. Quantity or amount of time a student has been in the program (i.e., maximum time frame in which students must complete program requirements).
   c. Clear increments of time when SAP will be assessed, not to exceed the program's midpoint or one year.
   d. The official actions to be taken as a result of failure to meet SAP (e.g., warning letter, academic assistance, probation, termination).
   e. An appeal process for those students who are terminated from the program and/or lose funding based on failure to meet SAP.

3. Student progress throughout the program is monitored and fairly applied to all students.

4. Those students failing to meet the policy should be duly informed and assisted prior to any adverse action.

5. Additional requirements apply for those institutions wishing to establish or maintain eligibility to administer federal student aid programs under Title IV of the Higher Education Act. (See Title IV Compliance Standard.)

C. Student Services

STATEMENT OF PURPOSE: The services that an institution provides its students have a direct impact on the students' academic success. Specifics of the services provided may be at the discretion of the institution, based on its size and the demographics of its students.

1. The institution provides adequate student services and resources to support its students in maintaining satisfactory progress, achieving educational outcomes, and making informed decisions concerning training and employment. These services include but are not limited to:
   a. Academic advising
   b. Tutoring or other academic support

c. Placement services
d. Non-academic support (e.g., counseling and/or referrals)
e. Any other services as required by law

2. Student services are delivered and/or are accessible at the main campus and all branch campuses.

3. Institutions reasonably accommodate students with disabilities to the extent required by applicable law and regulation.
   a. The institution has a process in place for determining and providing reasonable accommodations for students in accordance with law and regulation.

D. Student Code of Conduct

The institution has a published Student Code of Conduct/Academic Integrity Policy that includes clear expectations and disciplinary action for violations of the policy.

STATEMENT OF PURPOSE: The Student Code of Conduct should be specific to student behavior while enrolled in the institution (e.g., no cheating), and thus in addition to encouraging a professional code of conduct in the field.

XV. Title IV Compliance

Institutions participating in United States Title IV Financial Student Aid (FSA) programs comply with all applicable laws and regulations.

STATEMENT OF PURPOSE: Participating in Title IV is a responsibility beyond accreditation. Many accreditation standards are intended to help a school be proactive in maintaining compliance with Title IV requirements.

A. Administration

Institutions demonstrate the administrative capability to participate in these financial aid programs through satisfactory results of financial or compliance audits, program reviews, and other information provided.

B. Loan repayment

Institutions participating in federal loan programs have in place appropriate measures designed to encourage students to repay their loans, and the institutions maintain an official student loan default rate that is below the federal threshold.

C. Required Disclosures

1. Institutions clearly publish all disclosures required by federal regulation.

2. The catalog of the institution accurately describes the financial aid programs in which it participates and includes the requirements students must meet to maintain eligibility for continued participation in these programs.

3. The institution's cancellation and refund policy clearly stipulates procedures for the return of Title IV funds in compliance with federal regulations.

D. Clock Hour to Credit Conversion

Institutions participating in Title IV must comply with Title IV regulations regarding the calculation of aid. Institutions may use the COMTA clock hour-to-credit conversion for academic purposes. (See COMTA Standard Academic Measurement Policy if applicable.)

E. Satisfactory Academic Progress (SAP)
Those institutions wishing to establish or maintain eligibility to administer United States Title IV financial aid programs are required to use more specific criteria for their SAP policy. These institutions use the COMTA SAP Guidelines and Title IV regulations to develop their SAP requirements.

Exhibit 5

BROOKINGS

RESEARCH

Quick college credentials: Student outcomes and accountability policy for short-term programs

Stephanie Riegg Cellini and Kathryn J. Blanchard

July 22, 2021

Introduction

A small, though important, set of postsecondary programs have largely escaped the notice of policymakers and researchers: short-term vocational programs lasting between 300-599 clockhours. These short programs are not currently eligible for Pell Grants, but can access federal student loans under the Higher Education Act. We draw on information obtained through a Freedom of Information Act (FOIA) request from the Department of Education to generate counts of programs, basic statistics, and some measures of student outcomes for these short-term postsecondary programs participating in student loan programs. Our data include all short-term programs (lasting 300-599 clockhours over a minimum of 10 weeks) that applied to participate in federal student-loan programs between 2010 and 2019 under Section 481(b)(2) of the Higher Education Act of 1965 (20 U.S.C. 1088(b)(2)).

These programs are understudied in the literature and are not separately identifiable in most public government datasets. In this report, we document the size and scope of these programs, discuss current policies designed to ensure program quality, and explore the implications of alternative accountability policies that regulators might consider.

We find that, as of 2019, there are about 103 programs under 600 clockhours for which students can take out federal student loans, down from 730 such programs in 2010. Seventy percent of the programs participating are offered by for-profit institutions and nearly half are cosmetology programs. Despite reporting high completion and job-placement rates, we find that post-college earnings for students graduating from these programs are quite low—averaging about $24,000 per year, or $12 per hour for a full-time worker.

Current policies offer little in the way of accountability for these short-term programs. The main requirement for participation in loan programs is known as the 70-70 rule, requiring that programs have self-reported completion and job-placement rates of 70% each when they first apply. No standard definition or guidance for job-placement calculations exist, so institutions interpret the rule themselves and report their own figures. As we show below, all approved short-term loan programs report very high self-reported completion and job-placement rates—many well above 70%. We further show that job-placement rates are not correlated with post-completion student earnings.

> "Despite reporting high completion and job-placement rates, we find that post-college earnings for students graduating from [short-term] programs are quite low—averaging about $24,000 per year."

Due to the manipulability of job-placement rates in particular, the 70-70 rule may be inadequate to protect students and taxpayers from low-performing programs. In 2014, the Obama administration enacted the Gainful Employment (GE) rule that would have held these programs—and many others—accountable for debt-to-earnings rates of graduates. The rule was rescinded by the Trump administration before it was implemented, but data on earnings and debt were released. We examine these data and the implications of the GE rule had it been applied to these short-term programs. We find that, despite the very low earnings, short-term programs fare well on debt-to-earnings measures under the Gainful Employment rule due to low borrowing. On average, students in these programs borrow just $750. Only 5% of these short-term programs are in the GE warning "zone" and none of them fail debt-to-earnings thresholds.

Finally, we examine how these programs would fare on other potential accountability metrics—some of which have been proposed previously. In particular, we consider using the average earnings of young adults with no college education as a benchmark for post-completion earnings. When we apply our lowest benchmark of $25,000 (roughly the average for high school dropouts and about 200% of poverty in 2019), more than half of these short-term programs fail. Nearly all failing programs (96%) are in for-profit institutions—many of them in cosmetology and massage.

> "It is not clear that [short-term programs] warrant taxpayer support and student debt."

Our results have implications for regulatory policy surrounding access to loans for these very short vocational programs, and they can inform current proposals to expand access to Pell Grants for similar short-term programs. Although the short-term programs we study have relatively low debt and require only a short time investment, their earnings outcomes are concerning. It is not clear that they warrant taxpayer support and student debt. If these programs continue to participate in federal student-loan programs, we suggest that, at a minimum, policymakers consider adding a high school benchmark on top of GE metrics for any short-term program accessing federal student aid. We further suggest that access to short-term Pell Grants—if implemented—should be limited to public sector programs.

What We Know About Short-Term Programs Accessing Loans

Short-term programs under 600 clockhours are not eligible to participate in the Pell Grant program, but may access federal student loans if they submit an application and gain approval from the Department of Education. A key requirement for approval is the so-called 70-70 rule, requiring that programs have self-reported completion and job-placement rates of 70% each. No standard definition or guidance for job-placement calculations exist, so institutions must track their own graduates and interpret the rule themselves, subject to being verified by an auditor of their choice.

Under the Obama administration, GE regulations were proposed to hold these programs and others—including all for-profit programs and non-degree programs in

public and nonprofit institutions—accountable for student outcomes. Programs would lose access to federal student aid if they could not meet certain debt-to-earnings rates. Specifically, programs would fail with annual debt-to-earnings greater than 12% and discretionary debt-to-earnings greater than 30%. They would be in a warning "zone" in a range of 8-12% annual debt-to-earnings or 20-30% discretionary debt-to-earnings. The rule was rescinded by the Trump administration in 2019—before it was fully implemented.

To codify and strengthen accountability for these programs, efforts to reauthorize the Higher Education Act included reinstating GE as well as new proposals based on high school earnings benchmarks. For example, the College Affordability Act (H.R. 4674) put forward by House Democrats in 2019 proposed allowing Pell Grants to be used for short-term programs (lasting 8-15 weeks) in public and nonprofit institutions. It also redefined the rules determining eligibility for short-term programs in all sectors that currently access federal student loans.

In addition to meeting debt-to-earnings thresholds under the GE standards, the College Affordability Act proposed that programs between 300-599 clock hours would need to meet a high school earnings benchmark. Specifically, the proposal required programs to show that the higher of the mean or median earnings of graduates were higher than the national average or (if justified) a state or local average for students with just a high school diploma. Similarly, Pell Grant eligibility for short-term public and nonprofit programs in the College Affordability Act would need to meet "anticipated earnings" benchmarks agreed to by industry or sector partnerships, with the requirement that anticipated earnings be higher than local or national averages for individuals with only a high school diploma.

We examine all three levels of accountability here: the current 70-70 rule, GE regulations, and potential high school benchmarks that could be used to supplement the other metrics.

> "Students attending short-term programs tend to be disadvantaged and may be vulnerable to predatory practices, based on limited prior research."

Students attending short-term programs tend to be disadvantaged and may be vulnerable to predatory practices, based on the limited prior research on these programs. Ositelu, McCann, and Laitinen ↗ (2021) report on the many gaps in our understanding of short-term programs. They urge caution as policymakers consider expansions of short-term programs that could leave students of color, in particular, with high debt and little gain. Focusing on past policies surrounding short-term credentials, Whistle ↗ (2021) finds that the non-targeted and non-outcomes-based financing of these programs results in worse outcomes for low-income students and students of color. Ositelu ↗ (2021) draws on the Adult Training and Education Survey to study short-term programs lasting 15 weeks or less; she finds that half of working adults with a short-term credential were making poverty-level wages in 2016.

Analyzing Outcomes for Short-Term Programs Accessing Loans

Through a FOIA request, we obtained the Education Department's data on short-term programs accessing loans. The agency collects self-reported completion-rate and placement-rate data for these short-term programs when they apply for the first time or seek re-certification for access to loan programs.[1] This data also include basic information on the number of eligible programs, institutions, field of study, program length, and accreditation.

We have information on all programs between 300-599 clock hours lasting at least 10 weeks that applied to participate in federal student-loan programs or were recertified between 2010 and 2019. These programs are offered in 452 institutions and provide about 880 different programs over this period. We drop 27 programs in foreign institutions. Self-reported completion and placement rates under the 70-70 rule are provided for about 476 programs.

We supplement these data with data from the 2017 release of the GE program-level data to assess post-college earnings and how these programs would fare on GE debt-to-earnings metrics. The GE data contain debt-to-earnings rates, debt, and three-year mean and median earnings measures of graduates for programs that were operating between 2010 and 2012. Our FOIA data contain more than 700 short-term programs operating during this time frame, but only 73 report data under GE. The reasons for the

mismatch are unclear, but could be due to the small size of many of these programs, as GE does not report outcomes for programs with less than 30 graduates over three years.

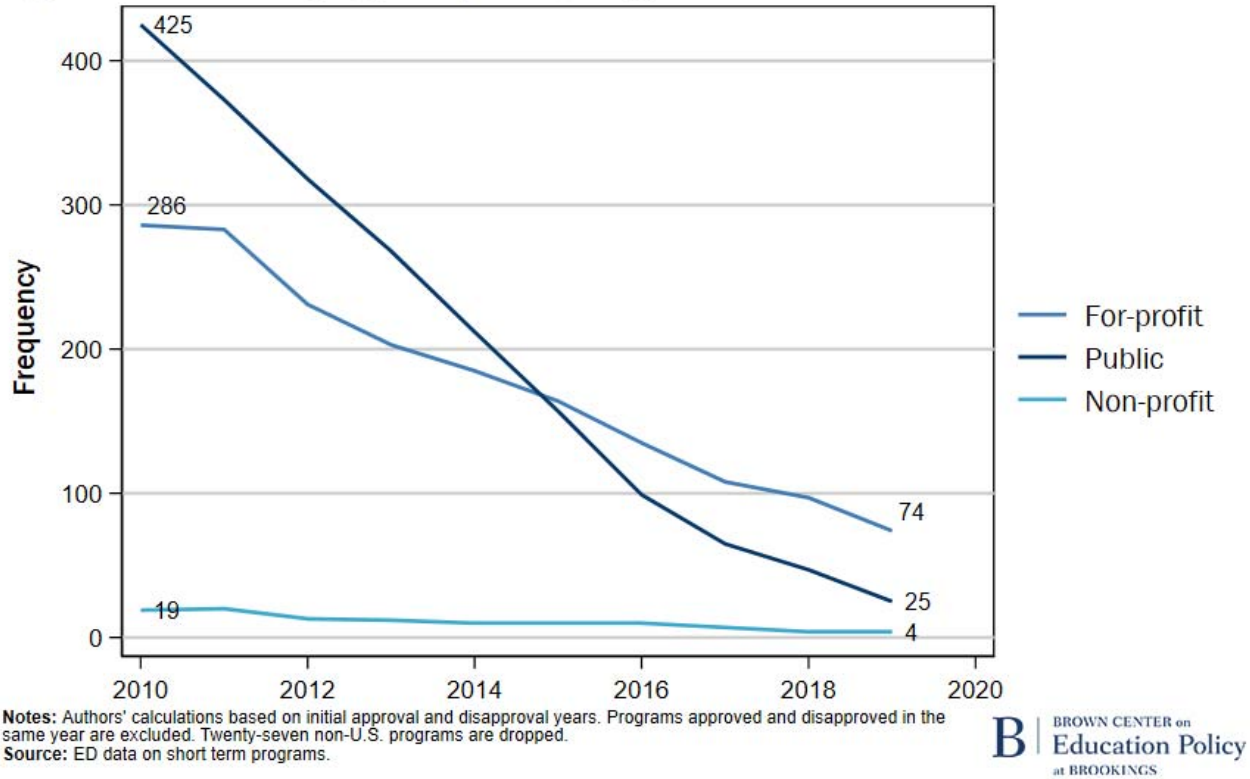
Finally, to explore additional proposed accountability metrics, we consider three earnings benchmarks that we classify simply as "low," "medium," and "high." Our most conservative low estimate is just $25,000. This baseline was previously used by the Department of Education in the first release of the College Scorecard in 2013-14 to calculate the percentage of students in each postsecondary institution that make more than a high school graduate. In explaining the use of this benchmark, the College Scorecard ↗ notes, "The $25,000 threshold was chosen since it approximately corresponds to the median wage of workers age 25 to 34 with a high-school degree only." The $25,000 figure is simple, straightforward, and serves as a lower-bound relative to other earnings benchmarks. Updating this statistic with 2019 earnings data, 25-34 year-olds with only a high school diploma only earned an average of $34,867, and, coincidentally, those in the same age range *who did not even complete high school* had median earnings ↗ of $25,536 in 2019. Accordingly, we refer to the low benchmark as approximating high school dropouts' earnings through the remainder of the report. Moreover, $25,000 roughly corresponds to 200% of the federal poverty line ↗ in 2019 for a single person living alone at $24,980. We propose $25,000 as a simple lower bound for this analysis and for policy, but our results would be similar using these alternate benchmarks.

To gain a more relevant representation of current earnings for young students who have completed a high school education, our medium estimate is based on average earnings of $32,787 annually. This reflects the Census Bureau's ↗ calculation of mean earnings of workers who graduated high school in the 18-24 age group who "usually worked 35 hours or more per week for 50 weeks or more during the preceding calendar year" in 2019. Finally, our high estimate is based on all year-round, full-time ↗ workers over the age of 18 with a high school diploma. Note that this estimate intentionally includes workers over the age of 25 and does not include those who are unemployed, making it an upper bound at $47,833 per year.

How Many Short-Term Programs Access Student Loans?

We begin with simple counts of programs lasting between 300-599 clockhours that applied to participate in federal student-loan programs. Figure 1 plots the total number of 300-599 clockhour programs participating in student loan programs each year by sector, regardless of approval date. Most evident is the steep decline in the total number of programs participating over time. In 2010, 730 programs participated. As of our latest complete year of data in 2019, there were just 103 programs participating. The number of public sector programs has plummeted most dramatically, dropping from 425 to 25.

Figure 1: Short-term programs participating in federal student loans



Notes: Authors' calculations based on initial approval and disapproval years. Programs approved and disapproved in the same year are excluded. Twenty-seven non-U.S. programs are dropped.
Source: ED data on short term programs.

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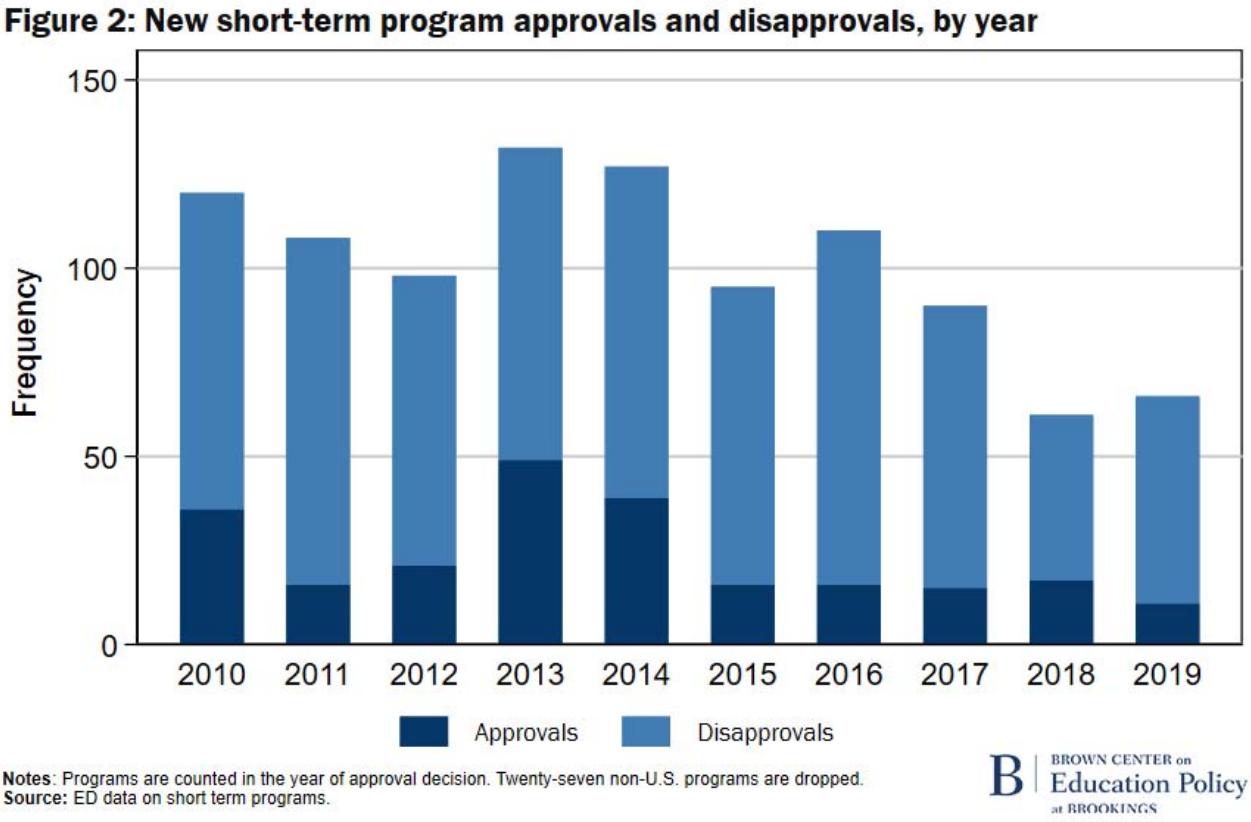
(https://www.brookings.edu/wp-content/uploads/2021/07/F1-Short-term-programs-participating-in-federal-student-loans.png)

More research is needed to understand the reasons behind the decline in Figure 1, but information on approvals and disapprovals is informative. Figure 2 reports patterns of overall applications, approvals, and disapprovals each year. The number of total applications and new approvals peaked in 2013 with about 48 new programs allowed to participate in federal loan programs that year. Less than half of new applicants are typically approved in any given year. Disapprovals were highest in 2011 and 2016 at

around 95 programs. The total number of applications has declined over the last four years, while the number of approvals has held steady, around 15 or so new programs added each year.



(https://www.brookings.edu/wp-content/uploads/2021/07/F2-New-short-term-program-approvals-and-disapprovals-by-year.png)

The Department of Education data also provide some insight into the reasons for disapproval. The largest category of disapprovals is for programs that "are not long enough" and presumably do not meet the minimum 300 clockhours or 10-week length. In most years, the second-most popular reason for disapproval is not meeting the 70-70 requirement. Interestingly, in 2015, one program was denied for the stated reason of "not leading to gainful employment," but the definition of this term was not clear and the GE rule was never officially implemented. It is not entirely clear as to why exceedingly short programs or those that do not meet the 70-70 requirements would apply.

What Types of Short-Term Programs are Accessing Loans?

Table 1 reports some descriptive statistics for the 103 short-term programs that are currently participating in federal student-loan programs (as of 2019). Seventy percent of these programs are in for-profit colleges. Less than a quarter of programs are in public institutions, and just 4% are in nonprofits. Cosmetology programs account for nearly half (46%) of all approved short-term programs, but since these are very short programs, they likely reflect programs in sub-fields such as nail technicians and aestheticians, rather than licensed cosmetologists. Welding, truck driving, phlebotomy (drawing blood), and culinary programs round out the top five fields, but each represents less than 8% of the total. Programs are fairly evenly distributed geographically, with Pennsylvania, Florida, and Texas topping the list.

Table 1: Short-Term Programs Participating in Loan Programs, 2019

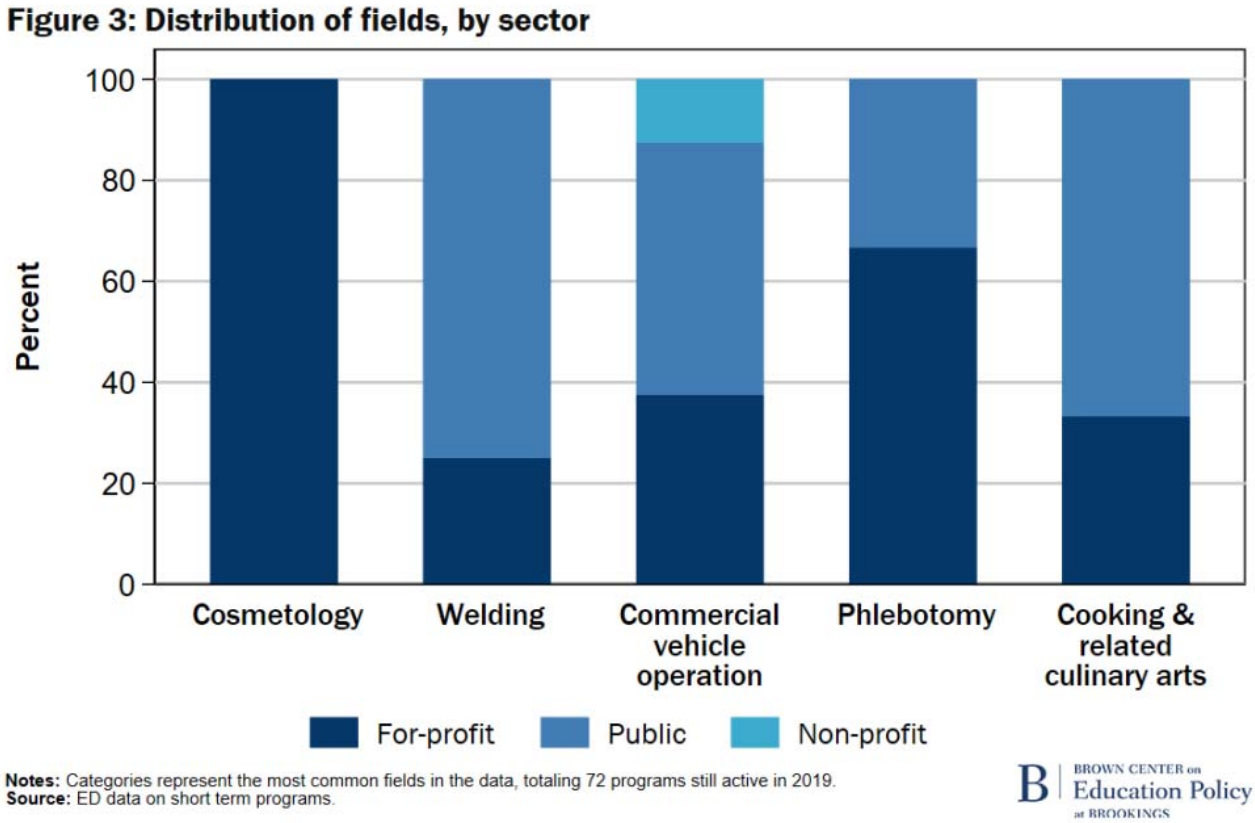
	Number
Total Number of Programs	103
Sectors	
For-profit	74
Public	25
Nonprofit	4
Top 5 Programs	
Cosmetology	47
Welding	8
Commercial Vehicle Operation	8
Phlebotomy	6
Cooking & Related Culinary Arts	3
Top 6 States	
Pennsylvania	16
Florida	15
Texas	11
New York	8
Ohio	7
New Jersey	7

Source: *Authors tabulations of Education Department data on short-term loan programs.*

Table 1: Short-Term Programs Participating in Loan Programs, 2019

Notes: *Top 5 programs lists the fields with the most programs participating in loan programs in 2019. Programs are grouped by the following 4-digit CIP codes: Cosmetology-1204, Welding-4805, Commercial Vehicle Operation-4902, Phlebotomy-5110, Cooking & Related Culinary Arts-1205. Top 6 states lists the states with the most short-term programs participating in loan programs in 2019. A total of 59 schools had at least one program approved for loans in 2019.*

Fields of study differ substantially across sectors. As shown in Figure 3, cosmetology programs take place entirely in for-profit institutions, while welding and culinary-arts programs are disproportionately offered by public institutions, although the numbers of programs are quite small. Nonetheless, these differences by field inform patterns by sector and suggest important differences in student demographics.



(https://www.brookings.edu/wp-content/uploads/2021/07/F3-Distribution-of-fields-by-sector.png)

Table 2 reports some additional metrics included in the Department of Education data. Notably, average clockhours are quite low, just 367, while the average number of weeks is 17. Most institutions have just one short-term program that accesses federal loans; the mean is 1.7 and the max is three. Many programs have been approved for several years—one as long as 33 years—but the average is about 9 years.

Table 2: Descriptive Statistics for Short-Term Programs, 2019

	Mean	*Min.*	*Max.*
Number of Programs Offered per Institution	1.2	1	3
Number of Years Program Approved	9	0	33
Clockhours	368	96	563
Number of Weeks	17	10	47
Self-Reported Completion Rate	93	70	100
Self-Reported Job Placement Rate	87	70	100
Total Programs		103	

Table 2: Descriptive Statistics for Short-Term Programs, 2019

Source: *Authors tabulations of Education Department data on short-term loan programs.*

Notes: *A program approved for zero years was approved to participate in loan programs in 2019. Self-reported completion and job-placement rates are averaged over all years a program reported them in Education Department data. One program had clockhours below 300, listing 96 hours and 36 weeks.*

How Do Short-Term Programs Perform on Outcomes-Based Accountability Measures?

The 70-70 rule

The most interesting information included in the Department of Education data are the self-reported outcome measures under the 70-70 rule. For these approved programs, in Table 2 we can see that all 103 meet the 70% threshold for completion and job placement with the minimum listed as 70 for each. However, the average self-reported completion rate is a high 93% and the self-reported job-placement rate is 87%.

The Gainful Employment rule

We next merge the data with the GE data released in 2017 to measure student earnings and assess how these institutions would fare if the GE rule had been implemented. As noted previously, only 73 short-term programs were successfully matched to the GE data. These are likely to be larger programs and potentially more-established programs than those that were unmatched—that is, they would be positively selected—so we consider our earnings analyses for these merged groups to be optimistic upper bounds of what we might expect if the full set of short-term programs were included. We also recommend that—if GE is reinstated—policymakers consider lowering the threshold number of students needed for inclusion for GE to be effective in holding these types of programs accountable for student outcomes.

Nonetheless, in Table 3 we report how our 73 matched programs fared on GE metrics. The average of the "highest of mean or median earnings" suggests that graduates of these programs have earnings of about $23,800 per year. The mean of the mean is only slightly lower at $23,500. Median annual loan payments are low, averaging $750 with a maximum of $2,782. These low debt measures keep debt-to-earnings annual rates quite low, with annual rates averaging 3.5% and topping out at 9.6% (for comparison, the threshold for failure is 12%). In contrast, discretionary debt-to-earnings rates are quite high, averaging 52% (the failure threshold based on discretionary earnings is 30%). We observe official GE program status—based on failing both the discretionary *and* annual metrics—in the lower panel: 95% of short-term programs pass and just 5% are in the warning "zone," with none failing.

Table 3: Gainful Employment Outcomes for Short-Term Programs

	Mean	*Min.*	*Max.*
Highest of Mean or Median Earnings	$23,830	$8,646	$80,672
Mean Earnings	$23,533	$8,646	$80,672
Median Earnings	$21,768	$3,846	$74,718
Annual Debt Payments	$750	$0	$2,782
Debt to Earnings Annual Rate	3.5%	0.0%	9.6%
Debt to Earnings Discretionary Income Rate	52.5%	0.0%	170.1%
Official GE Program Status			
Percent Passing		94.5%	
Percent in Warning "Zone"		5.5%	
Percent Failing		0	
Total Programs matched with GE Data		73	

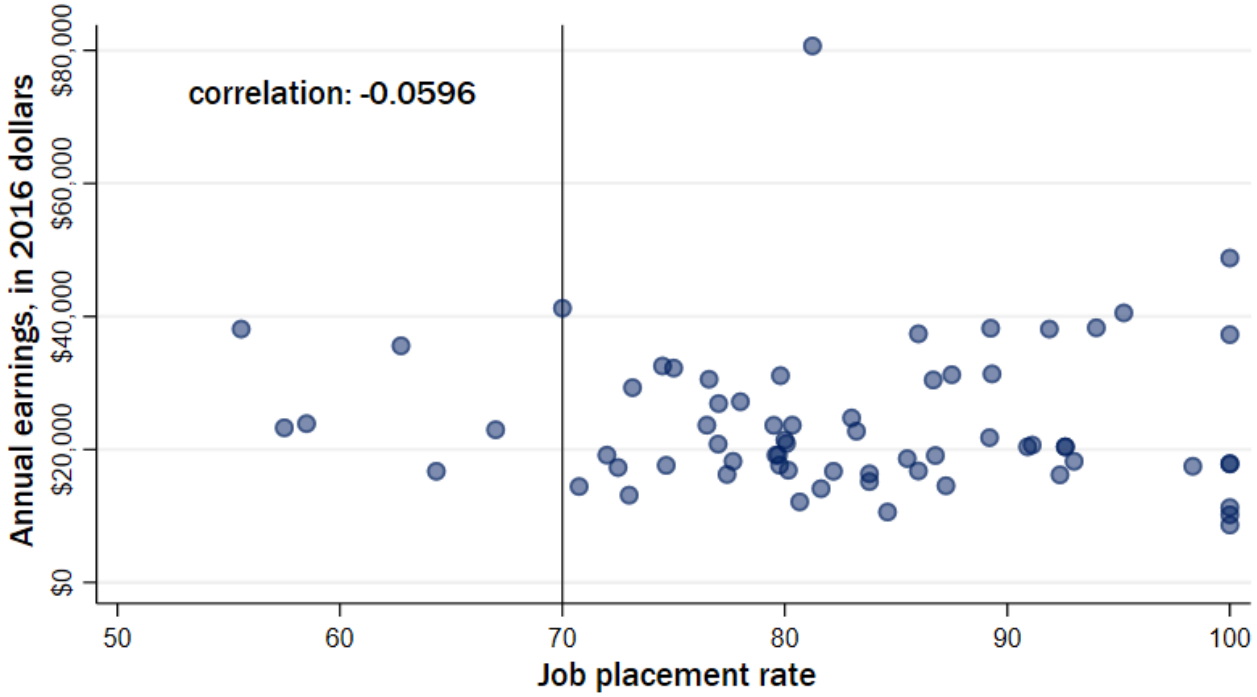
Source: *Education Department data on short-term loan programs merged with GE data.*

Notes: *Earnings and debt are in 2019$ (USD).*

One question arising in policy debates is the reliability of job-placement rates for accountability. Since there is no standard definition, institutions can interpret job placement loosely and, in the case of short-term programs, they self-report them. To better understand the relationship between more reliable earnings measures (based on Social Security Administration data) and job placement, we plot the two values for

the set of matched short-term programs in Figure 4. It is obvious from a glance that there is no correlation between the two measures. The calculated correlation coefficient is only -0.0596, with the opposite sign of what we would expect if both were indicative of quality. Thus, it is clear that job placement is a poor proxy for earnings outcomes among these programs. Moreover, Figure 4 shows that most short-term programs have very low earnings, with one obvious outlier around $80,000.

Figure 4: Reported job placement vs. earnings



Notes: Job placement rates are averaged from all years the program reported a rate to DoED. Annual earnings are the highest of the mean or median earnings reported in the 2017 GE data. Four of the 73 matched programs were missing placement rates for all years. We dropped two outliers: one with a zero average placement rate never participating in loans, and one with about a 20% placement rate that was approved to participate in loan programs for only six months in 2012. This leaves the 67 programs plotted in the figure. Of the 67 programs plotted, 61 were approved to participate in loans at least once from 2010-2012, the years for which we have outcomes in the GE data.

Source: ED data on short term loan programs merged with GE data.

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(https://www.brookings.edu/wp-content/uploads/2021/07/F4-Reported-job-placement-vs.-earnings.png)

A high school earnings benchmark

To assess a proposed third layer of accountability, we examine various high school earnings metrics. In contrast to debt-to-earnings, the application of a high school earnings metric to assess student outcomes for these programs yields disappointing—but perhaps not surprising—results; these are presented in the first column of Table 4.

Based on the lowest high school earnings benchmark ($25,000), 70% of the merged short-term programs fail this metric. That is, less than a third (30%) of the short-term programs yield higher earnings than a 25-34 year-old high school dropout. The medium metric of $32,787 based on high school graduates would yield failures of 84% of our sample. Using the highest metric of $47,833, only two programs of the 73 would pass, yielding a 97% failure rate.

Table 4: Comparing Earnings Metrics to Gainful Employment Status for Short-Term Programs

	Total failing benchmark (percent of total)	*Official GE Status*	
		Pass	*Warning "Zone"*
Low Earnings Benchmark ($25,000)	51 (69.9%)	47	4
Percent of GE Category Failing on Earnings	–	68.1%	100%
Med. Earnings Benchmark ($32,787)	61 (83.6%)	57	4
Percent of GE Category Failing on Earnings	–	82.6%	100%
High Earnings Benchmark ($47,833)	71 (97.3%)	67	4
Percent of GE Category Failing on Earnings	–	97.1%	100%
Total short-term programs	73 (100%)	69	4

Source: *Education Department data on short-term programs merged with GE data.*

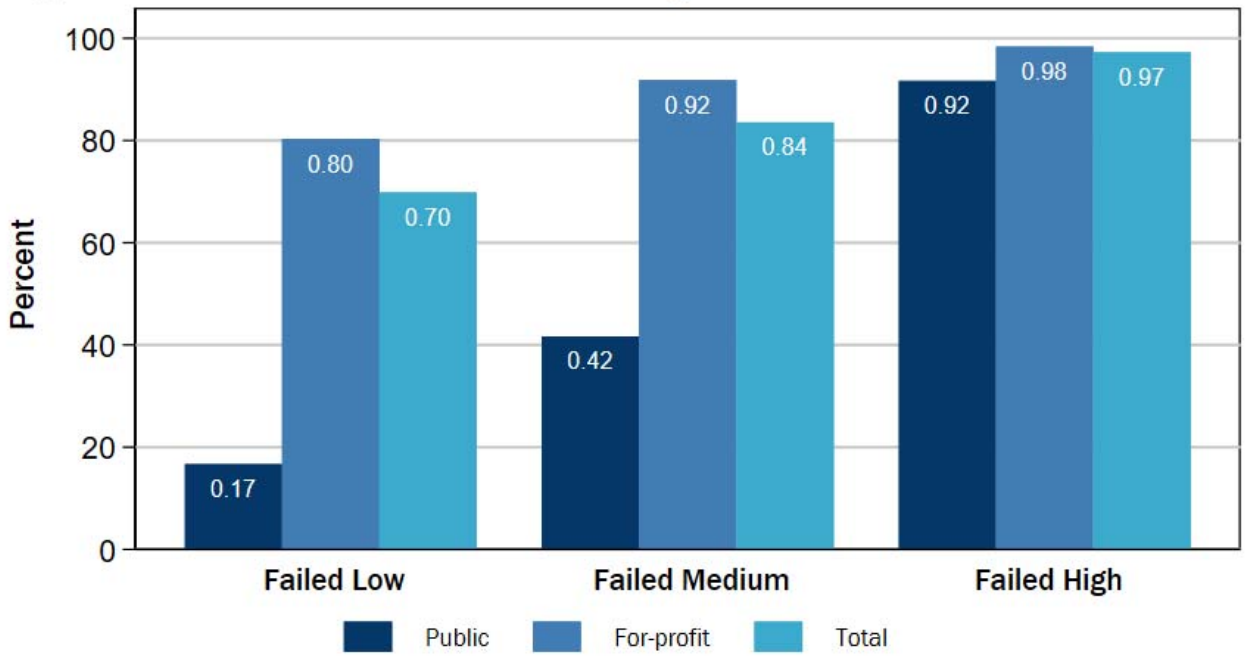
Notes: *Counts of programs that failed each high school earnings metric compared to the counts of programs in Pass or Warning "Zone" GE status. Percent of GE Category Failing calculates the percentage of programs that pass GE (or in the Warning "Zone") that fail each high school earnings benchmark. GE earnings data are adjusted from 2016$ to 2019$ (USD).*

The two right-most columns of Table 4 break out the programs that fail each earnings benchmark into passing/failing the debt-to-earning metrics under the GE rule to compare these different accountability approaches. Of the 51 programs that fail the lowest high school metric, 47 pass GE and 4 are in the warning "zone." Looking at it a different way in the second row, of those that pass GE, 68% would still fail our lowest high school earnings metric. If there is an expectation that postsecondary programs

receiving federal student aid should result in earnings greater than high school, even the lowest high school earnings metric—added to GE—could provide an additional measure of accountability.

Figure 5 presents failure rates by sector. Forty-nine for-profit programs (80%) fail the lowest high school metric, compared to just two public programs (17%). Calculated across all failing programs on our lowest earnings benchmark, 96% come from the for-profit sector. The difference in failure rate between sectors narrows with the medium and high earnings benchmarks, though for-profits fail at higher rates across all levels.

Figure 5: Sectoral failure rates across earnings benchmarks



Notes: Total depicts the programs at public and for-profit institutions in the merged data. No programs at non-profit institutions merged. **Failed low** shows the percentage of programs that failed the lowest high school earnings metric at $25,000, **medium** is $32,787, and **high** is $47,833. GE earnings data are adjusted from 2016 to 2019 dollars.
Source: ED data on short term programs merged with GE data.

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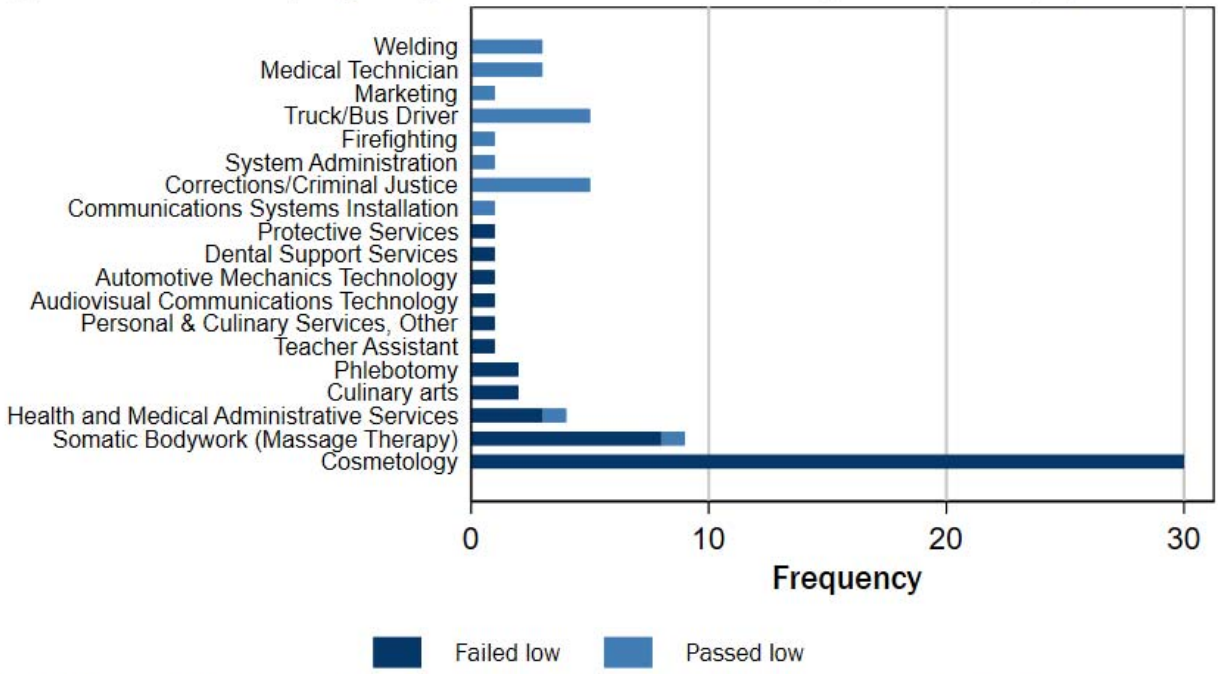
(https://www.brookings.edu/wp-content/uploads/2021/07/F5-Sectoral-failure-rates-across-earnings-benchmarks.png)

As noted above, fields of study are not evenly distributed across sectors. Figure 6 counts passing and failing programs (using the lowest earnings benchmark) by field of study. Cosmetology is the largest field of study in the data, and with all cosmetology

programs reporting less than $25,000, they make up nearly two-thirds of all failing programs. Massage therapy is next, with all but one program failing to meet the low earnings benchmarks, accounting for 17% of all failing programs. Among the four health administration programs in our data, three fail. All other fields with failures have just one program in the data, so we view these are merely suggestive. Fields with more than one program in which all programs pass the lowest high school benchmark include criminal justice, truck driving, medical technicians, and welding.

Figure 6: Short-term program performance on low earnings benchmark, by field



Notes: Failed low depicts the programs at public and for-profit institutions that failed the lowest earnings metric ($25000). This figure presents the counts of public and for-profit programs in the merged data. No programs at non-profit institutions merged.
Source: ED data on short term programs merged with GE data.

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(https://www.brookings.edu/wp-content/uploads/2021/07/F6-Short-term-program-performance-on-low-earnings-benchmark-by-field.png)

More research is needed to better understand these patterns, but it is possible that gender differences across fields could be contributing to these differential outcomes as passing fields appear more heavily male and failing fields are more heavily female. Disparities may also be related to employment trends and the way earnings are reported in different fields. For example, the main cosmetology trade association, the American Association of Cosmetology Schools, has been successful in its legal efforts to gain exceptions to earnings-based accountability rules due to the prevalence of

underreported tipped income in the field. Whether or not underreporting drives performance on these metrics is the subject of ongoing research.

Implications for Policy

In the last decade, about 880 short-term programs under 600 clockhours applied to participate in federal student-loan programs, and about 500 of these programs were approved in this period. Including approvals from earlier years, in 2010, about 730 short-term programs participated in federal student-loan programs, but this figure has declined over time. In 2019, the most recent year of our data, 103 programs participated. Seventy percent of these programs take place in for-profit institutions and 47% are cosmetology programs.

To gain eligibility, programs must meet the 70-70 criteria regarding completion and job-placement rates. Among approved programs, completion and job-placement averages are high, but can be misleading. In particular, job placement is not clearly defined in statute, allowing nearly any job to count as in-field. For example, a student who attended a cosmetology program may be considered placed "in-field" if they are working as a cashier at a salon.

> "[J]ob placement is not clearly defined in statute, allowing nearly any job to count as in-field. For example, a student who attended a cosmetology program may be considered placed 'in-field' if they are working as a cashier at a salon."

Earnings are more reliable metrics to assess quality in postsecondary programs. Not surprisingly, we find that earnings of graduates are not correlated with reported job-placement rates. The average earnings for these programs is about $24,000, or about $12 per hour for a full-time worker. Average debt is roughly $750.

In 2014, the Obama administration enacted the GE rule to add an additional layer of accountability for a number of different programs, including the short-term programs we investigate here. The rule was rescinded before it was fully implemented, but notably, very few of these short-term programs appear in the GE data, suggesting that

they fell below the reporting thresholds based on low number of graduates. Of the 73 programs we observe in the GE data, 95% pass the GE debt-to-earnings thresholds.

If these programs are to continue to access student loans, we support the creation of an additional earnings benchmark to be used in conjunction with GE for these short-term programs to ensure student protection. Such a measure could be based on a comparison of a program's earnings to a benchmark based on the average earnings of young people who graduate high school but do not attend college. Our data show that 70% of the short-term programs we study would fail even the lowest justifiable benchmark of just $25,000 per year based on the average earnings of high school dropouts. Virtually all (96%) of these failing programs are in for-profit institutions, at least in part due to the prevalence of (failing) cosmetology and massage programs in the sector. Programs in male-dominated fields, such as welding and truck driving, appear to perform better against these benchmarks. Higher benchmarks—such as our medium benchmark of $32,787 based on high school graduates' earnings—might be more easily justified for policy, as postsecondary institutions should, at least in theory, enroll high school graduates and generate more earnings for students than high school alone. Any such earnings thresholds could easily be adjusted to account for differences in wage levels in states or local areas and could flexibly adjust to changing labor market conditions. Research in progress examines these types of alternate thresholds for a broader set of programs.

> "Policymakers should consider changes to the 70-70 rule that strengthen accountability and avoid relying on an easily manipulated job-placement measure."

More research is needed to adjust for student selection in assessing outcomes and to explore the role of tipped income in earnings measures, but our descriptive analyses suggest that concerns about the value of these short-term programs for students is justified. Policymakers should consider changes to the 70-70 rule that strengthen accountability and avoid relying on an easily manipulated job-placement measure. Policymakers should also ensure that all short-term programs are subject to GE regulations, perhaps lowering the number of graduates for which exemptions apply.

In addition to GE, we support imposing a high school earnings benchmark or similar threshold earnings measure for short-term programs accessing student loans, as well as for any expansion of the Pell Grant program to short-term programs. In light of

these results and other research on sectoral differences in student outcomes ↗ in short-term programs, we further suggest that any access to short-term Pell Grants be limited to public sector programs.

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Footnotes

1. We requested information that the Department of Education collects when programs apply for the first time or are recertified using this form: https://eligcert.ed.gov/ows-

doc/eapp.pdf ↗. The short-term programs we consider are defined on p. 22 (Section E.26.i). Institutional recertification is based on program participation agreements that can last up to six years, but timing can vary and changes in ownership or governance also require recertification (Department of Education 2021 ↗).
