



# Advisory Report 2018-1

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## Best Practices for Financial Responsibility Agreements with Students

**2018 Update:** Because of various court decisions and changes to case law, this advisory report has been updated to address the ability of a college or university to pass on the cost of third-party collection fees to a student who is in default on his/her obligation to the institution.

The previous version of this advisory report used language that was influenced by the *Bradley v. Franklin Collection Services, Inc.* case [739 F.3d 606 (11<sup>th</sup> Cir. 2014)]. Later, *Annunziato v. Collecto, Inc.* [207 F.Supp.3d 249 (E.D.N.Y. 2016)] raised the profile of consumer claims against schools and agencies who assess/collect fees. In this class action litigation, the agency was attempting to recover a non-federal collection fee for a school, but the school could not produce a student agreement executed by the class representative. Additionally, the court disagreed that the language in the unsigned student agreement supported a percentage-based collection fee wherein the school was “made whole.”

To address those concerns, this advisory report now suggests using language similar to that in the *Robertson v. Enhanced Recovery Company, LLC* [2017 WL 5951584 (D.N.J. Nov 30, 2017)] case. Here, the court articulated that “the contract states only that the collection fee is meant ‘to cover collection-related costs’; it does not limit the collection fee to the exact cost [the collector] incurs in collecting the underlying debt.”

The “Collection Agency Fees” subsection under the “Delinquent Account/Collection” heading has been updated to reflect these developments.

Additionally, under “Method of Communication,” we have clarified that the provision where a student may revoke his/her consent should be limited to contact via an automatic telephone dialing system, rather than withdrawing consent generally.

Finally, the “Collection Agency Fees” section has been updated to allow schools to pass to students the costs, such as court costs, associated with a lawsuit, if filed to recover an outstanding balance.

Colleges and universities increasingly ask students to affirm their understanding of their financial obligation to the institution by signing a financial responsibility agreement prior to registering for classes. A financial responsibility agreement provides relevant information about official institutional policies to students and contractually binds them to those policies. It is intended to potentially protect student debts from bankruptcy discharge and set parameters for internal and external collection efforts to ensure compliance with laws and regulations such as:

- Fair Debt Collection Practices Act (FDCPA)
- Telephone Consumer Protection Act (TCPA)
- Title IV of the Higher Education Act
- Internal Revenue Code

NACUBO recommends use of a comprehensive financial responsibility agreement as a student service best practice, protecting the school, maximizing collections, and providing an efficient process to obtain cost-saving electronic agreements. NACUBO's Student Financial Services Council has prepared a template of priority and optional subjects and text to assist schools in developing or strengthening their agreement. This report was reviewed by Chad Echols, of The Echols Firm LLC, whose practice focuses on the rights and legal responsibilities of creditors and collection agencies.

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

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

Ultimately, how schools build their agreement or choose which text to incorporate depends on campus leadership, culture, level of IT support, and the advice of the school's legal counsel.

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

- **State Laws.** Ensure compliance with state laws relating to debt collections, late fees, convenience fees for certain payment methods, collection agency fees, attorney's fees, and the like.
- **Truth in Lending Act (TILA).** Make sure the student agreement falls within the exceptions for a private education loan and does not trigger a requirement that the institution follow TILA when implementing an agreement. The TILA requirements are beyond the scope of this advisory report and an institution would need to seek specific counsel to ensure compliance. See 12 CFR §§ 226.46-226.48.
- **E-SIGN Act.** Make certain the process in which a student electronically executes an agreement complies with the federal E-SIGN Act and the state's Uniform Electronic Transactions Act (UETA). These laws govern the validity of electronic records and signatures. Forty-seven states and the District of Columbia have passed UETA. The other three states (Washington, New York, and Illinois) have state provisions governing the validity and use of electronic signatures.

The following sample language provides a template for a college or university to use as a starting point in developing or reviewing its financial responsibility agreement. It is not legal advice or intended to be adopted without review by an institution's legal counsel. NACUBO recommends that prior to implementation, schools submit any student agreement to legal counsel for review and approval to ensure it complies with all applicable federal, state, and local laws, and institutional policy. Institutions should also ensure student financial services staff is prepared to respond to student inquiries regarding any new terms and conditions.

*Note: This sample language is also available in a [Microsoft Word document](#) to make it easier for NACUBO members to utilize in framing their own agreements.*

## Priority Subjects and Text

### PAYMENT OF FEES/PROMISE TO PAY

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

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

### DELINQUENT ACCOUNT/COLLECTION

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

**Late Payment Charge:** I understand and agree that if I fail to pay my student account bill or any monies due and owing {Institution Name} by the scheduled due date, {Institution Name} will assess late payment and/or finance charges at the rate of {Institution \$ or % amount} per month on the past due portion of my student account until my past due account is paid in full. *Note: Schools looking to implement this provision should make certain any and all amounts comport with applicable law.*

**Collection Agency Fees:** I understand and accept that if I fail to pay my student account bill or any monies due and owing {Institution Name} by the scheduled due date, and fail to make acceptable payment arrangements to bring my account current, {Institution Name} may refer my delinquent account to a collection agency. I further understand that if {Institution Name} refers my student account balance to a third party for collection, a collection fee will be assessed and will be due in full at the time of the referral to the third party. The collection fee will be calculated at the maximum amount permitted by applicable law, but not to exceed {XX percent} of the amount outstanding. For purposes of this provision, the third party may be a debt collection company or an attorney. If a lawsuit is filed to recover an outstanding balance, I shall also be responsible for any costs associated with the lawsuit such as court costs or other applicable costs. Finally, I understand that my delinquent account may be reported to one or more of the national credit bureaus. *Note: This provision is critical if a school intends to pass any collection agency fees on to a defaulting student. The provision will not allow fees in states*

*that prohibit the assessment of collection fees. As an example, [see the North Carolina Department of Insurance memo](#). The bracketed items may be adjusted to fit the specific laws which apply to the jurisdiction in which the provision shall be enforced.*

## COMMUNICATION

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

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

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

## ENTIRE AGREEMENT

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

## Optional Subjects and Text

### FINANCIAL AID

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

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

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

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

**Federal Aid:** I understand that any federal Title IV financial aid that I receive, except for Federal Work Study wages, will first be applied to any outstanding balance on my account for tuition, fees, room and board. Title IV financial aid includes aid from the Pell Grant, Supplemental Educational Opportunity Grant (SEOG), Direct Loan, PLUS Loan, Perkins Loan, and TEACH Grant programs. I authorize {Institution Name} to apply my Title IV financial aid to other charges assessed to my student account such as student health insurance, parking permits, bookstore charges, service fees and fines, and any other education related charges. I further understand that this authorization will remain in effect until I rescind it or the end of {Institution’s authorization term} and that I may withdraw it at any time by following the instructions at {Institution’s authorization website}. *Note: This authorization cannot be mandatory or coerced. The institution may also want an authorization from the student to use Title IV funds to pay other educationally related charges from the prior year.*

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

## METHOD OF BILLING

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

## BILLING ERRORS

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

## RETURNED PAYMENTS/FAILED PAYMENT AGREEMENTS

If a payment made to my student account is returned by the bank for any reason, I agree to repay the original amount of the payment plus a returned payment fee of \${Institution fee amount}. I understand that multiple returned payments and/or failure to comply with the terms of any payment plan or agreement I sign with {Institution Name} may result in cancellation of my classes and/or suspension of my eligibility to register for future classes at {Institution Name}.  
*Note: Make sure any amount assessed for NSF payments comports with applicable law.*

## WITHDRAWAL

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

## PRIVACY RIGHTS & RESPONSIBILITIES

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

## IRS FORM 1098-T

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

I consent to receive my annual IRS Form 1098-T, Tuition Statement, electronically from {Institution Name}. I understand that if I do not consent to receive my Form 1098-T electronically, a paper copy will be provided. I understand that I can withdraw this consent or

request a paper copy by following the instructions at {Institution's IRS Form 1098-T reporting website}.

## STUDENT AGE

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

## OTHER CONSIDERATIONS

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

- **Governing Law.** The reference to state law should not be a default provision. This provision should be considered carefully depending on whether the institution is located in a consumer friendly or creditor friendly state.
- **Arbitration or Mediation.** A clause may be added requiring the use of arbitration or mediation rather than civil litigation in the case of disputes. Alternative dispute resolution can be extremely helpful in avoiding class action liability and limiting the public nature of civil litigation. Specific provisions regarding this issue should be developed by the institution's counsel.
- **Additional Title IV Authorizations.** Students may also authorize a school to hold Title IV funds in their student account rather than pay out a credit balance, to apply Federal Work-Study wages to outstanding charges on the student account, or to pay other educationally related charges from prior years. Some institutions may want to include these authorizations as part of this agreement.

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## **APPENDIX: Background Information**

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

### **Telephone Consumer Protection Act (TCPA)**

[Court Rules on FCC's Restriction on Use of Autodialers Calling Cell Phones](#) (March 28, 2018)

[FCC Guide to Robocalls](#)

### **Department of Education Rules on Student Authorizations**

Regulations from Subpart K, Cash Management, [34 CFR 668.165](#) – Notices and Authorizations

[Student Financial Aid Handbook](#), Volume 4, Chapter 2

### **IRS Guidance on Providing 1098-Ts Electronically**

[26 CFR 1.6050S-2](#) Information reporting for payments and reimbursements or refunds of qualified tuition and related expenses.