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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 2, 2021

VIA ELECTRONIC TRANSMISSION

Denis McDonough
Secretary
U.S. Department of Veterans Affairs

Dear Secretary McDonough:

According to multiple whistleblowers and witnesses interviewed by my staff, the U.S. Department of Veterans Affairs (VA) appears to be sweeping under the rug a history of conflicts and ethical issues among senior officials at the Veterans Benefits Administration (VBA). These concerns and allegations have been highlighted in both the media as well as in recent court filings, raising numerous challenges as you begin your tenure leading the VA.¹

After reviewing both witness statements and documents provided to my office, I write to you to express concern over allegations of improper contracting practices, whistleblower reprisal, and VA officials allegedly failing to protect internal deliberative information which may have led to individuals trading on non-public information. I also understand that several whistleblowers have disclosed these concerns to the Office of Special Counsel (OSC), as well as the VA Inspector General (VA OIG). In November 2020, the National Legal and Policy Center (NLPC) reported on some of these very issues.² Of specific concern, whistleblowers have alleged that a VBA official has participated in VA business while her husband engaged in employment and consulting arrangements for companies with business before her, including Student Veterans of America (SVA) and Veterans Education Success (VES). In February of 2018, VA ethics lawyers allegedly determined that the VBA senior official, Charmain Bogue, should recuse herself from engaging in

¹ See NLPC Staff, *Are For-Profit College 'Critics' Up to Their Old Tricks?*, NATIONAL LEGAL AND POLICY CENTER (Nov. 4, 2020), <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>; NLPC Staff, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, NATIONAL LEGAL AND POLICY CENTER (Nov. 12, 2020), <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>; NLPC Staff, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, NATIONAL LEGAL AND POLICY CENTER (Dec. 4, 2020), <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>; Complaint, *Pomares v. United States Department of Veterans Affairs*, Case # 21-cv-00084-H-MSB (S.D. Cal., Jan 15, 2021) (Attached as Exhibit A).

² See NLPC Staff, *Are For-Profit College 'Critics' Up to Their Old Tricks?*, NATIONAL LEGAL AND POLICY CENTER (Nov. 4, 2020), <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>; NLPC Staff, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, NATIONAL LEGAL AND POLICY CENTER (Nov. 12, 2020), <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>; NLPC Staff, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, NATIONAL LEGAL AND POLICY CENTER (Dec. 4, 2020), <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>.

activity involving her husband's clients and employers, VES and SVA. Chairman Bogue serves as Executive Director of VBA's Education Service, and her husband, Barrett Bogue, serves as a Senior Communication Advisor for VES.³ Although this legal opinion was supposedly provided to Mrs. Bogue, as well as some other VA officials, it is unclear whether she ever did recuse herself, and if she did, when.

Mr. Bogue reportedly runs a consulting firm that has "a contract with VES ... generous enough to allow him to quit his day job and focus on his consulting business full time."⁴ It is further alleged that Mrs. Bogue failed to disclose her husband's place of work and his income on her mandatory ethics paperwork.⁵ Additionally, it appears that VES may have also failed to disclose payments it made to Mr. Bogue for his work.⁶

Whistleblowers further allege that the Bagues are indicative of a broader culture of corruption and cronyism at the VBA, one which is hostile to enforcing basic ethical standards, and punishes those who bring concerns to the forefront. For example, Paul Lawrence, former Undersecretary of Benefits, allegedly recommended three senior officials for suspension who were reported to have improperly, and potentially illegally, accepted gifts from outside stakeholders. However, these suspensions were supposedly overturned by the previous Secretary of the VA. One of the officials, former Principal Undersecretary Jamie Manker, abruptly retired, and another, Tom Murphy, is currently serving as Acting Undersecretary of Benefits.

Of additional concern, according to allegations in a federal Freedom of Information Act (FOIA) lawsuit, is that the VA is currently fighting the release of documents that would further shed light on another controversy surrounding the Bagues.⁷ According to the lawsuit, in January 2020, Mr. Bogue's employer, VES, wrote a letter to Mrs. Bogue, "which sought severe penalties against several for-profit educational institutions, [and] began with this salutation, 'Dear Charmain.'"⁸ Mr. Bogue's employer proposed that Mrs. Bogue and VBA "put four schools and a public company out of business," pushing her "to choke off the schools' income flow" by preventing veterans from using their GI Bill benefits at those institutions.⁹

In a March 3, 2020 email provided to my office, obtained via FOIA, as the VA prepared to publicly announce its intent to grant VES's request, one individual is seen to have cautioned those on the email chain that the information, and pending actions surrounding various schools, needed

³ Veterans Education Service, Who We Are, Barret Bogue, <https://vetsedsuccess.org/who-we-are/barrett-bogue/>.

⁴ NLPC Staff, *Are For-Profit College 'Critics' Up to Their Old Tricks?*, NATIONAL LEGAL AND POLICY CENTER (Nov. 4, 2020), <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>.

⁵ NLPC Staff, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, NATIONAL LEGAL AND POLICY CENTER (Nov. 12, 2020), <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>.

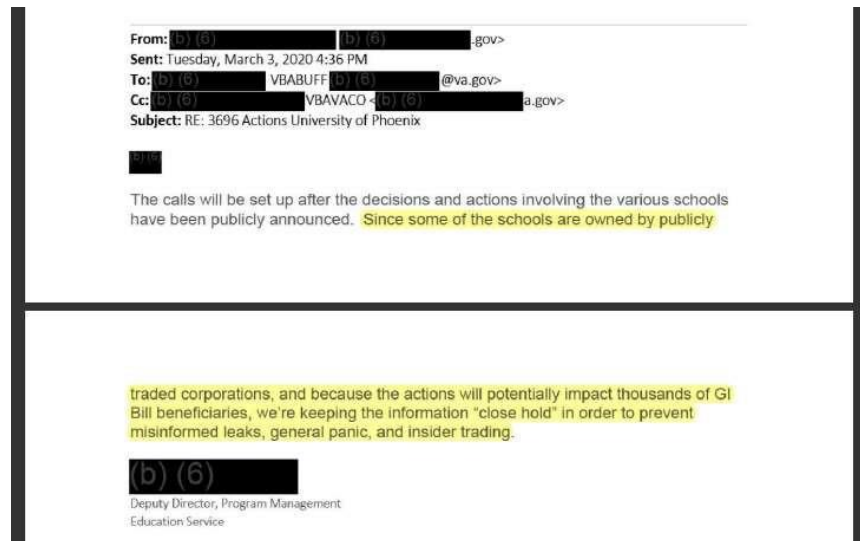
⁶ NLPC Staff, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, NATIONAL LEGAL AND POLICY CENTER (Dec. 4, 2020), <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>.

⁷ Complaint, *Pomares v. United States Department of Veterans Affairs*, Case # 21-cv-00084-H-MSB (S.D. Cal., Jan 15, 2021) (Attached as Exhibit A).

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

to be safeguarded.¹⁰ That official cautioned that the VA's impending announcement needed to be kept "close hold" in order to prevent misinformed leaks, general panic, and insider trading."



Unfortunately, the VA appears to have failed to observe that advice, and as the lawsuit alleges, retail investors, without access to this privileged information, were harmed as a result.

According to the complaint, "[o]n March 9, 2020, at 5:59 p.m., after the stock market had closed, the VA issued a press release announcing it was threatening to do exactly what VES had asked it to do ... to choke off the schools' income flow..."¹¹

However, someone appears to have released market sensitive information about the VA's impending announcement during the trading day and may have done so in the months between the January letter and the March 9 announcement as well. At least one recipient of the early heads-up was Mr. Bogue's employer, VES. "The VA gave early notice of its decision to some, including VES. During the trading day at 2:26 p.m. E.T., VES tweeted its own press before the official VA announcement."¹² For that reason, the lawsuit:

...seeks records ... relating to the VA's selective release of nonpublic information during the period from January through March 2020 that adversely affected the stock price of ... a U.S. publicly traded company. During this period, the stock price (ticker symbol: PRDO) fell from \$18.83 to \$7.96, a loss of 58 percent of its price and over \$800 million in market capitalization. By July 2020, the VA had decided it would take no action against CEC but for many investors who sold during the near panic, their losses had already been realized, and for the

¹⁰ Attached as Exhibit B.

¹¹ Complaint, *Pomares v. United States Department of Veterans Affairs*, Case # 21-cv-00084-H-MSB, at 5 (S.D. Cal., Jan 15, 2021) (Attached as Exhibit A).

¹² *Id.* at 6-7.

professional traders, who may have received those tips, their profits had already been banked.¹³

The Senate Judiciary Committee has jurisdiction over FOIA-related matters and an obligation to conduct oversight of FOIA compliance issues. Moreover, the allegations described by whistleblowers and witnesses interviewed by my staff raise broader, serious questions about potential ethics violations and whistleblower reprisal at the VA.

To that end, I respectfully request that you answer the following questions no later than April 16, 2021.

1. Has Acting Undersecretary Tom Murphy ever been recommended for suspension for accepting gifts as prohibited by law?
 - a. If so, was Mr. Murphy ever suspended?
 - b. Was a recommendation for suspension ever overturned? If so, why and by who?
2. Had former Deputy Undersecretary Robert Reynolds ever been recommended for suspension for accepting gifts as prohibited by law?
 - a. If so, was Mr. Reynolds ever suspended?
 - b. Was a recommendation for suspension ever overturned? If so, why and by who?
3. Had former Principal Undersecretary Jamie Manker ever been recommended for suspension for accepting gifts as prohibited by law?
 - a. If so, was Mr. Manker ever suspended?
 - b. Was a recommendation for suspension ever overturned? If so, why and by who?
4. Please provide all records, communications, and memorandums related to the suspensions, or proposed suspensions, of Tom Murphy, Jamie Manker, and Robert Reynolds.
5. What steps does the VA take to protect retail investors by safeguarding market sensitive information regarding potential enforcement announcements related to publicly-traded companies?

¹³ *Id.* at 6-7.

- a. Is it possible these steps failed in this instance? If so, what will VA do to prevent this from happening again in the future?
6. If the VA is aware that market sensitive information was potentially leaked, has the VA investigated this leak of information? Please provide the report of investigation.
7. Did the VA Office of General Counsel ever provide a legal opinion with respect to Mrs. Bogue and her involvement with any of her husband's companies?
 - a. Did the legal opinion recommend Mrs. Bogue recuse herself from any involvement with her husband's companies? If not, why not?
8. Please provide all records relating to any written ethics opinion by VA attorneys regarding Mrs. Bogue's recusal, whether and when this recusal occurred, and all communications regarding Mrs. Bogue's recusal obligations with respect to her husband's companies.
9. Did Mrs. Bogue engage in, participate in, or contribute to VA business with her husband's businesses? If so, why did VA allow Mrs. Bogue to participate?
10. Under current law and regulation, is Mrs. Bogue required to report financial information of her spouse via a public financial disclosure report? If so, did Ms. Bogue list her husband?
 - a. If Mrs. Bogue did report her husband on a public financial disclosure form, did she report Mr. Bogue's employer(s)? If not, why not?
 - b. If Mrs. Bogue did report her husband on a public financial disclosure form, did she report Mr. Bogue's salary with respect to his work? If not, why not?
 - c. Please provide Mrs. Bogue's public financial disclosure reports dating back five (5) years.
11. If Mrs. Bogue did not report where Mr. Bogue currently works, and if she participated in VA business related to VES, would that constitute a conflict of interest as described by applicable law or regulation?¹⁴ If not, why not?
12. Why has the VA attempted to block FOIA requests seeking information regarding these matters?
 - a. Does the VA plan to comply with FOIA requests in a timely and reasonable manner in order to afford the public greater transparency?

¹⁴ 18 U.S.C. § 208.

Secretary McDonough
U.S. Department of Veterans Affairs
April 2, 2021

Should you have questions, please contact my Committee staff at (202) 224-5225. Thank you for your attention to this important mater.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, slightly stylized font.

Charles E. Grassley

Ranking Member

Committee on the Judiciary

Exhibit A

1 Gary J. Aguirre (SBN38927)
Aguirre Law, APC
2 501 W. Broadway, Ste. 800
3 San Diego, CA 92101
4 Tel: 619-400-4960
5 Fax: 619-501-7072
6 Email: Gary@aguirrelawapc.com
Attorney for Plaintiff Maria A. Pomares

7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 **'21CV84 H MSB**

11 Case No.: _____

12 MARIA A. POMARES,
13 Plaintiff,

14 v.

15 UNITED STATES DEPARTMENT OF
16 VETERANS AFFAIRS,
Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1. This action is brought under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552, as amended, for an order compelling Defendant United States Department of Veterans Affairs ("VA") to produce, provide access to, and make available certain records specified below that were requested by Plaintiff Maria Pomares.

JURISDICTION AND VENUE

2. This Court has jurisdiction and venue over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff is a citizen of the United States and a resident of the County of San Diego.

4. Defendant is an agency of the United States Government and has possession and control of the records that are the subject of this action.

THE RELEASE OF THE RECORDS SOUGHT

WOULD SERVE THE HIGHEST PUBLIC INTEREST

5. Plaintiff seeks records from the Department of Veterans Affairs ("VA") relating to the VA's selective release of nonpublic information during the period from January through March 2020 that adversely affected the stock price of Career Education Corporation ("CEC"),¹ a U.S. publicly traded company. During this period, the stock price (ticker symbol: PRDO) fell from \$18.83 to \$7.96, a loss of 58 percent of its price and over \$800 million in market capitalization. By July 2020, the VA had decided it would take no action against CEC,² but for many investors who sold during the near

¹ The name of the company was changed from Career Education Corporation to Perdoceo Education Corporation effective January 1, 2020. The company's former name is used in this complaint, because the records requests and released records primarily use that name.

² Danielle Douglas-Gabriel, *VA Backs down from Plan to Suspend University of Phoenix and Other Colleges from Accessing GI Bill Benefits*, WASH. POST, July 2, 2020,

<https://www.washingtonpost.com/education/2020/07/02/va-backs-down-plan-suspend->

28 [university-phoenix-other-colleges-accessing-gi-bill-benefits/](#), last visited Jan. 13, 2021.

1 panic, their losses had already been realized, and for the professional traders, who may
2 have received those tips, their profits had already been banked.

3 6. Plaintiff is informed and believes, and thereon alleges, that the agency
4 decisions and the release of this nonpublic information involved a relationship between a
5 high-level agency official and an individual in the private sector that should have
6 required the agency official to recuse herself pursuant to agency regulations, which she
7 did not do, and that she should have fully disclosed in her Public Financial Disclosure
8 Report, which she also did not do.

9 7. The VA took the action at the prompting of a nonprofit organization with
10 prior and current relationships with market participants who may have profited by the
11 price movement of the public company.

12 8. Plaintiff seeks VA records containing information relating to (i) its decision
13 to make selective releases of nonpublic information, (ii) the identity of those who
14 received the selective releases of the nonpublic information, and (iii) the possible
15 conduits through which this nonpublic information may have flowed to market
16 participants who profited by its use.

17 9. On January 21, 2020, the nonprofit organization Veterans Education Success
18 ("VES") delivered a letter to Charmain Bogue, Executive Director of the Veterans
19 Benefits Administration ("VBA") Education Service in the VA.³ The letter, which sought
20 severe penalties against several for-profit educational institutions, began with this
21 salutation, "Dear Charmain." From this first-name greeting, VES proposed that Director
22 Bogue take action to put four schools and a public company out of business in the letter's
23 first sentence: "We are writing to bring information to your attention troubling
24 complaints alleging misleading advertising and enrollment practices by schools, *making*

25
26 ³ Letter from Aniela Szymanski, VES Sr. Dir. for Legal Affairs & Military Policy to VA
27 Exec. Dir. Charmain Bogue, Veterans Benefits Administration (Jan 21, 2020),
28 <https://vetsedsuccess.org/letter-to-va-regarding-gi-bill-feedback-tool-and-38-usc-3696-compliance/>, last visited Jan. 15, 2021.

1 *those schools ineligible for educational benefits under 38 US. C. § 3696* (emphasis
2 added)."4

3 10. VES's letter sought this extraordinary sanction based on evidence it had
4 helped prepare and deliver to the VA: "our staff has gathered evidence that these schools
5 aggressively recruit veterans and other GI Bill beneficiaries, making it especially
6 important that VA take appropriate action to address their behavior."⁵

7 11. Based on this evidence, YES's letter pushed the VA to choke off the
8 schools' income flow by declaring the schools were ineligible for educational benefits
9 under 38 U.S.C. § 3696.

10 12. The YES letter also pressed the VA to accept as its own all veterans'
11 purported complaints submitted by YES to the VA regarding for-profit educational
12 institutions and forward all YES generated complaints to law enforcement. To these ends,
13 the YES letter urged the VA to:

14 A. Modify its tracking system of veterans' complaints, the GI Bill tool, so it
15 would contain all complaints YES had collected from veterans and
16 submitted to the VA;

17 B. Modify its GI Bill tool to reflect student disagreement with the school's
18 response to a VA complaint, similar to the way the U.S. Consumer Financial
19 Protection Bureau reports that information;

20 C. Upload all complaints delivered by VESS to the VA "into Consumer
21 Sentinel, which law enforcement relies upon" ⁶ in its investigations of for-
22 profit schools; and

23 D. Explain why the VA had not reported all 1,189 complaints YES had
24 submitted to it.

25 *III*

26 ⁴ *Id.*

27 ⁵ *Id.*

28 ⁶ *Id.*

13. On March 9, 2020, at 5:59 p.m., after the stock market had closed, the VA issued a press release announcing it was threatening to do exactly what YES had asked it to do in its January 21, 2020, letter-to choke off the schools' income flow-using similar language to the YES letter and citing the same federal statute.⁷

14. In particular, on March 9, the VA "notified the University of Phoenix [and] Career Education Corporation (Colorado Technical University and American InterContinental University) of the agency's intent to disapprove the enrollment of new GI Bill students at these institutions." ⁸In particular, the VA took the following actions:

A. "The U.S. Department of Veterans Affairs (VA), acting within its required approval authority under the law limiting certain advertising, sales, and enrollment practices, notified the University of Phoenix, Career Education Corporation (Colorado Technical University, American InterContinental University), Bellevue University and Temple University, March 9, of the agency's intent to disapprove the enrollment of new GI Bill students at these institutions."⁹

B. "After careful review and consideration of findings provided by the Federal Trade Commission and State Attorneys General Offices, VA has concluded there is sufficient evidence to support a finding that these schools have utilized advertising, sales, or enrollment practices that are erroneous, deceptive, or misleading either by actual statement, omission, or intimation against GI Bill beneficiaries, in violation of the law."¹⁰

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⁷ Press Release, VA, VA intends to suspend enrollment of new GI Bill students at University of Phoenix, Career Education Corporation, Bellevue University and Temple University (Mar 9, 2020), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5399>,

visited Jan. 15, 2021.

15. The VA issued its press release almost two hours after the markets had closed, but the press release was not news to those who sold CEC stock short that day.¹¹ During trading hours on March 9, 2020, the market traded 1.640 million shares of , roughly 370 percent of its daily average volume since the beginning of the year. Traders also sold short 512,000 shares, roughly 350 percent of its average daily short sale volume since the beginning of the year. The price of CEC stock fell from \$18.83 on January 21, 2020, to \$7.96 on March 18, 2020, a fall of 58 percent of its value.

16. The VA gave early notice of its decision to some, including VES. During the trading day at 2:26 p.m. E.T., VES tweeted its own press before the official VA announcement. The VES press release identified CEC and stated the VA had "notified military and veterans service organizations today" of its impending enforcement action.¹²

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¹¹ The Securities and Exchange Commission provides this concise description of a short sale:

A short sale is generally the sale of a stock you do not own (or that you will borrow for delivery). Short sellers believe the price of the stock will fall, or are seeking to hedge against potential price volatility in securities that they own.

If the price of the stock drops, short sellers buy the stock at the lower price and make a profit. If the price of the stock rises, short sellers will incur a loss.

Short sales must be done in compliance with SEC Regulation SHO.

<https://www.sec.gov/investor/pubs/regsho.htm>, last visited Jan. 14, 2021.

¹² Press Release, VES, Veterans Education Success Praises Decision by the Department of Veterans Affairs to Suspend New GI Bill Students from Enrolling at the University of Phoenix, Career Education Corporation Institutions, Bellevue University, and Temple University (March 9, 2020), <https://vetsedsuccess.org/press-release-veterans-education-success-praises-decision-by-the-department-of-veterans-affairs-to-suspend-new-gi-bill-students-from-enrolling-at-the-university-of-phoenix-career-education-corporati/>, last visited Jan. 15, 2021.



15 17. The VA's selective release of nonpublic information during the trading day
16 shows its lack of understanding how nonpublic information can dramatically move the
17 market. It also suggests the possibility the VA may have released nonpublic information
18 between the arrival of the VES letter on January 21, 2020, and the VA's press release on
19 March 9, 2020. VES also has a history of prior connections with at least one hedge fund
20 that engaged in short selling the stocks of for-profit educational companies.¹³

21 18. The chart below shows the fall of CEC stock from January 21 to March 18,
22 2020, is consistent with the VA's selective release of nonpublic information of the
23 impending enforcement proceeding against CEC that found its way to market participants
24 during this period. As the chart illustrates, the price fell from \$18.83 to \$7.96:

25 *///*

26 ¹³ National Legal and Policy Center, *Are For-Profit College 'Critics' Up to Their Old*
27 *Tricks?* Nov. 4, 2020, [https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-](https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/)
28 [their-old-tricks/](https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/), last visited Jan. 15, 2021.



19. Barrett Bogue, Director Bogue's husband, is VES Senior Communications Advisor.¹⁴ The full extent of his involvement in VES's effort to persuade the VA to implement VES's January 21 letter is unknown and may never be known, given the nature of his relationship with Director Bogue. He clearly supported VES's efforts to get the VA to crackdown on for-profit schools, as he demonstrated on December 18, 2019, when he tweeted an article focused on how the VA was failing to hold for-profit colleges accountable.¹⁵

20. Director Bogue's Public Financial Disclosure Report does not disclose her husband's financial relationships with VES. On the form, Director Bogue disclosed her husband is self-employed through a consulting firm, but did not identify the firm or answer questions about the value of his firm and the amount of his income. She merely

¹⁴ See: <https://vetsedsuccess.org/who-we-are/barrett-bogue/>, last visited Jan. 15, 2021.

¹⁵ Jasper Craven, *Scrutiny of Colleges that Get Billions in GI Bill Money Remains Mired in Bureaucracy*, THE HECHINGER REPORT, Dec. 11, 2019, <https://hechingerreport.org/scrutiny-of-colleges-that-get-billions-in-gi-bill-money-remains-mired-in-bureaucracy/>, last visited Jan. 15, 2021.

disclosed that he is paid a salary and receives an unspecified amount in "consulting fees."¹⁶ The public interest in the release of information and its implications are growing, as a recent series of posts by a national ethics watchdog confirms.¹⁷

21. Plaintiff is informed and believes and thereon alleges that Director Bogue was obligated to recuse herself under 18 U.S.C. § 208 and 5 C.F.R. 2640.101, but failed to do so. Plaintiff is further informed and believes and thereon alleges, that Defendant VA is withholding records relating to Director Bogue's failure to enforce 18 U.S.C. § 208 and 5 C.F.R. 2640.101.

22. Plaintiff is further informed and believes and thereon alleges, that the VA Office of the Inspector General ("OIG") conducted an investigation of Director Bogue's failure to comply with 18 U.S.C. § 208 and 5 C.F.R. 2640.101 and is wrongfully withholding nonexempt agency records relating to that investigation.

23. On January 15, 2021, Defendant VA's OIG delivered a letter to Plaintiff in which it asserted a "Glomar" response and, on that basis, neither admitted nor denied whether any of the following inquiries of investigative records exist:

1. Any OIG inquiry or investigation or audit where Charmain Bogue was the subject.
2. Any OIG inquiry or investigation or audit where Charmain Bogue a witness.
3. Any OIG inquiry or investigation or audit relating to the handling or material nonpublic information.

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¹⁶ National Legal and Policy Center, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, Nov. 12, 2020, <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>, last visited Jan. 15, 2021.

¹⁷ *Id.*, See also: *supra*, n. 13 and National Legal and Policy Center, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, Dec. 4, 2020, <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>, last visited Jan. 15, 2021.

Plaintiff is informed and believes, and thereon alleges, that the records requests that are the subject matter of this complaint also sought records which Defendant VA is withholding on the basis of its "Glomar" response. Defendant VA failed to assert a "Glomar" response in any of its communications with Plaintiff in relation to the records sought by this complaint and therefore waived it.

FACTS COMMON TO ALL CAUSES OF ACTION

24. Plaintiff has submitted two FOIA requests to Defendant VA that are the subject of this complaint seeking records relating to the facts alleged in paragraphs 5 through 22.¹⁸ Defendant VA in effect restructured Plaintiffs two FOIA requests into 12 FOIA requests with separate tracking numbers, separate processing by different offices and administrations within the VA, separate appeal processes, and separate dates for exhausting administrative remedies. Plaintiff seeks declaratory and injunctive relief regarding two tracks of the VA's restructured FOIA requests where the administrative remedies have been exhausted. Plaintiff will seek leave of this Court to amend this complaint as necessary to incorporate Plaintiffs claims relating to the other tracks of her FOIA requests as the administrative remedies are exhausted.

FIRST CAUSE OF ACTION

25. On November 9, 2020, pursuant to the applicable provisions of FOIA, Plaintiff submitted a letter¹⁹ to Defendant VA requesting access to and copies of specified documents as follows:

- 1) All emails sent by any of the Designated VA Persons²⁰ to one or more of the following email addresses between December 15, 2019, and March 15, 2020:

- a. Any email address ending with this domain: @eangus.org;

¹⁸ Plaintiff's FOIA requests were submitted on November 9 and 13, 2020. A true and correct copy of said FOIA requests is attached hereto and incorporated herein as Exhibits 1, and 2.

¹⁹ A copy of the request is attached hereto and incorporated herein by reference as Ex. 1.

²⁰ The term "Designated VA Persons" was defined in the letter to include specific officials and staff with the VA. *Id.*, at 3.

- b. Any email address ending with this domain: @evocatillc.com;
 - c. Any email address ending with this domain: @paaresearch.com;
 - d. Any email address ending with this domain: @republicreport.org;
 - e. Any email address ending with this domain: @stripes.com;
 - f. Any email address ending with this domain: @tcf.org;
 - g. Any email address ending with this domain:
@veteranseducationsuccess.org;
 - h. Any email address ending with this domain: @vetsedsuccess.org;
and
 - i. Any email address ending with this domain: @washpost.com.
- 2) All emails received by any of the Designated VA Persons from one or more of the following email addresses between December 15, 2019, and March 15, 2020:
- a. Any email address ending with this domain: @eangus.org;
 - b. Any email address ending with this domain: @evocatillc.com;
 - c. Any email address ending with this domain: @paaresearch.com;
 - d. Any email address ending with this domain: @republicreport.org;
 - e. Any email address ending with this domain: @stripes.com;
 - f. Any email address ending with this domain: @tcf.org;
 - g. Any email address ending with this domain:
@veteranseducationsuccess.org;
 - h. Any email address ending with this domain: @vetsedsuccess.org;
and
 - i. Any email address ending with this domain: @washpost.com.
- 3) All emails sent or received by any of the Designated VA Persons between December 15, 2019, and March 15, 2020, **excluding** VA internal emails, that contain any of the following names in the email address:
- a. Wofford(e.g., Wofford in
carrie.wofford@veteranseducationsuccess.org would make this
email responsive),
 - b. Ang,
 - c. Beynon,
 - d. Bogue,
 - e. Douglas-Gabriel,
 - f. Halperin,
 - g. Saunders,
 - h. Safalow, and
 - i. Shireman.
- 4) All emails sent or received by any of the Designated VA Persons between December 15, 2019, and March 15, 2020, **excluding** VA internal emails, that contain any of the following names anywhere in the email:

- a. Carrie Wofford.
- b. Tanya Ang,
- c. Barrett Bogue,
- d. David Halperin,
- e. Robert Norton,
- f. Michael Saunders,
- g. Bradley Safalow, and
- h. Robert Shireman.

5) All emails sent or received by any of the Designated VA Persons between December 15, 2019, and March 15, 2020, ***excluding*** VA internal emails, that contain any of the following terms anywhere in the email:

- a. University of Phoenix,
- b. Perdoceo Education,
- c. PRDO,
- d. Career Education,
- e. CECO,
- f. Bellevue University,
- g. Temple University,
- h. Colorado Technical, and
- i. American InterContinental.

6) All emails sent or received by any of the Designated VA Persons between March 8 and March 10, 2020, ***including*** VA internal emails, that contain any of the following phrases in the subject line:

- a. VA intends to suspend enrollment,
- b. Any Background/TPs on this available?
- c. Talking Points on Suspension Actions,
- d. Suspension Action for Five GI Bill Approved Schools, and
- e. Talking Points on Suspension Action for Five GI Bill Approved Schools.

26. On November 10, 2020, Plaintiff received a letter from the VA acknowledging the receipt of her FOIA request. A true and correct copy of the said acknowledgment letter is attached hereto and incorporated by reference as Exhibit 3. The VA's November 10 letter assigned five different FOIA Tracking numbers to Plaintiffs requests.

27. On November 11, 2020, Plaintiffs counsel contacted the VA FOIA Office offering to clarify any issues relating to the November 9 Plaintiffs FOIA request to facilitate its processing as follows:

1 First, the request was drafted so the searches could be conducted
2 electronically. I would estimate the electronic searches could be conducted in
3 an hour or less. That will give you the number of hits.

4 Second, the requests seek emails with various organizations which are
5 unlikely to be subject to exemptions. In particular, they seek communications
6 with the media and non-governmental organizations.

7 Third, I would like to discuss any problems you see that could delay the early
8 release of the records sought.

9 A true and correct copy of this email is attached hereto and incorporated by reference as
10 Exhibit 4.

11 28. On November 13, 2020, Plaintiffs counsel was contacted by a different
12 FOIA specialist who was "taking the lead" on Plaintiffs November 9 FOIA request,
13 because it had "been assigned to multiple VA FOIA directorates." In this way, the lead
14 FOIA specialist explained, if any of the FOIA officers processing the requests needed
15 clarification, they "will submit their request to me. I have requested they provide me a
16 response by close of business on Monday, November 16, 2020 so that I may send you one
17 request for clarification for the group on Tuesday, November 17, 2020." The lead FOIA
18 specialist further explained that "each FOIA Officer will process the portion of the request
19 pertaining to their directorate and will provide a response directly to you." A true and
20 correct copy of said email is attached hereto and incorporated by reference as Exhibit 5.

21 29. On November 17, the lead FOIA specialist and Plaintiffs counsel
22 exchanged emails for the purpose of clarifying Plaintiffs FOIA requests. After the
23 requests were clarified to the satisfaction of the lead FOIA specialist, she forwarded the
24 clarifications to the FOIA officers in the different administrations working on Plaintiffs
25 FOIA request. The email also clarified the Veterans Benefits Administration ("VBA")
26 was "processing the request under FOIA tracking numbers 21-00931-F and 21-00956-F."
27 A true and correct copy of this email chain is attached hereto and incorporated herein as
28 Exhibit 6.

///

1 30. On November 17, 2020, Plaintiff received a letter via email from the VBA,
2 which once again acknowledged receipt of her FOIA request and assigned it tracking
3 number 21-00931-F. A true and correct copy of said letter is attached hereto and
4 incorporated by reference as Exhibit 7.

5 31. On November 27, 2020, Plaintiffs counsel received an email from the
6 VBA's FOIA specialist extending the response time 20 business days and setting the date
7 for the VBA FOIA Office to issue a response as January 6, 2021. A true and correct copy
8 of said email is attached hereto and incorporated by reference as Exhibit 8 at 30.

9 32. On November 30, 2020, Plaintiffs counsel responded to the VBA's FOIA
10 specialist November 27 email pointing out the extension failed "to comply with at least
11 two terms of 5 USC§ 552(a)(6)(B)." A true and correct copy of said email is attached
12 hereto and incorporated by reference as Exhibit 8 at 29-30.

13 33. On the same day, November 30, 2020, the VBA FOIA specialist replied
14 reiterating Plaintiff would have a response by January 6, 2021, and offering to discuss
15 with Plaintiffs counsel the extension. A true and correct copy of said email is attached
16 hereto and incorporated by reference as Exhibit 8 at 29.

17 34. After several email exchanges on November 30, the VBA FOIA specialist
18 and Plaintiffs counsel held a conference call which Plaintiffs counsel confirmed in his
19 email of December 1, 2020, as follows: the VBA FOIA specialist agreed to provide an
20 update on December 2, 2020, regarding (1) when the VBA's Office of Information
21 Technology ("OIT") would provide the search results to the FOIA specialist and (2) how
22 many pages had to be reviewed. A true and correct copy of said email is attached hereto
23 and incorporated by reference as the bottom email in Exhibit 9 at 35-36.

24 35. On December 2, 2020, the VBA FOIA specialist informed Plaintiffs
25 counsel the OIT was working on the ticket and "it should be resolved in a matter of a few
26 days." A true and correct copy of said email is attached hereto and incorporated by
27 reference as the second email from the bottom in Exhibit 9 at 35.

36. On December 11, 2020, Plaintiffs counsel confirmed with his email the conference call he held the day before with the VBA FOIA specialist. During the conversation, Plaintiffs counsel was informed the FOIA request had been transferred to "tier 3... because it involves upper or senior management, which will delay the release of these records." Plaintiffs counsel stated his position as follows:

As you know, I disagreed with any extension of time for this request, since it involves an electronic search of records that did not appear to be subject to any exemption. I also understand you have nearly completed your review, so there should be little justification for delay, absent the late decision to transfer this matter to Tier 3.

Plaintiffs counsel requested further information. Specifically:

1. Is there any internal rule or regulation (CFR) that defines, states, or discusses the different tier? For example, what is the guidance for deciding what is tier 2 versus tier 3?
2. Is there any internal rule or regulation (CFR) that expand the period to respond to a FOIA request when the agency transfers a request to a new tier?
3. What is the definition and rule or regulation applied in determining that Ms. Bogue is at a sufficient high level of management within the VBA that this request should now be transferred to Tier 3?

A true and correct copy of this email is attached hereto and incorporated by reference as Exhibit 9, at 34.

37. On December 15, 2020, since the VBA FOIA specialist had not responded, Plaintiffs counsel followed up with an email. On the same date, December 15, the VBA FOIA specialist informed Plaintiffs counsel the request was being reviewed by the Office of General Counsel (OGC). The email continued:

Once I receive feedback from OGC, I'm hopeful that a disclosure will be made this week. Secondly, I have reviewed your questions below concerning IT processes. I have contacted the Chief of VBACO Desktop Support Services for question #1 This request is being reviewed by OGC because the subject matter is of interest of senior leadership and, as such, has been designated as

1 a Substantial Interest (SI) request. Prior to issuing a disclosure determination,
2 OGC must review it before its release. This is an agency policy.

3 A true and correct copy of this email is attached hereto and incorporated by reference as
4 Exhibit 9, at 33.

5 38. Defendant VA's time for responding to restructured FOIA request 21-
6 00931-F has expired for each of the following reasons:

7 A. Defendant VA knew the grounds for its designation of this request as a
8 Substantial Interest request from the date of its receipt of Plaintiff's November
9 9, 2020, request and thus Defendant VA was dilatory in making said
10 designation;

11 B. Defendant VA failed to comply with 38 C.F.R. § 1.556 in its processing of this
12 request; and

13 C. All conceivable time periods have expired for Defendant VA to comply with
14 this request under FOIA and 38 § C.F.R. § 1.556.

15 **SECOND CAUSE OF ACTION**

16 39. On November 13, 2020, pursuant to the applicable provisions of FOIA,
17 Plaintiff submitted her FOIA request to Defendant VA's (1) FOIA Office, (2) Office of
18 the General Counsel, (3) Veterans Benefits Administration and (4) Office of Information
19 Technology by email and first-class mail. Plaintiff requested access to and copies of
20 specified documents as follows:

- 21 1) All FOIA requests received by the VA or any of its Administrations,
22 Offices, and Centers that contain the following name: Charmain Bogue.
23 2) All FOIA requests received by the VA or any of its Administrations,
Offices, and Centers that contain any of the following terms:

- 24 a) University of Phoenix,
25 b) Perdoceo,
26 c) Bellevue University,
27 d) Temple University,
e) Colorado Technical,

f) American Intercontinental, and
g) Career Education.

3) All records released in electronic format in response to any of the FOIA requests identified in response to requests 1 and 2 above pursuant to 5 **USES** § 552(a)(2)(D)(i).

A true and correct copy of the Plaintiffs FOIA request is attached hereto and incorporated by reference as Exhibit 2.

40. On November 18, the VA FOIA Service assigned Plaintiffs request to the appropriate offices for processing. Each office assigned a different tracking number to the request, but the letter did not specify what tracking number the OIG had assigned to the FOIA request. A true and correct copy of the November 18, 2020, letter is attached hereto and incorporated by reference as Exhibit 10.

41. On December 8, 2020, Plaintiff received a letter via email from the VA's Office of the Inspector General ("OIG"). The letter stated the VA OIG had assigned tracking number 21-00078-FOIA to Plaintiffs FOIA request and a search of VA OIG records had yielded no responsive results. The letter also informed Plaintiff of her right to appeal the determination to the OIG's Office of Counselor. A true and correct copy of the VA OIG's letter is attached hereto and incorporated by reference as Exhibit 11.

42. On December 10, 2020, Plaintiff, through her counsel, appealed the OIG's determination. A true and correct copy of the Plaintiffs appeal is attached hereto and incorporated by reference as Exhibit 12.

43. On December 17, 2020, the VA OIG responded to Plaintiffs appeal finding "the VA OIG FOIA Office did not conduct an adequate search and" remanded "the FOIA file to that office to conduct a new search" and provide a final response. A true and correct copy of the letter remanding Plaintiffs request to the VA OIG FOIA Office is attached hereto and incorporated by reference as Exhibit 13.

44. On December 23, 2020, the VA OIG informed Plaintiff it had "conducted another search extending the search period from FY 2014 to" the present which had yielded 11 pages of records released with the letter. The released records were redacted

1 under Exemption 6. The letter also informed Plaintiff of her right to appeal the
 2 determination to the OIG's Office of Counselor. A true and correct copy of the VA
 3 OIG's letter is attached hereto and incorporated by reference as Exhibit 14.

4 45. On December 24, 2020, Plaintiff, though her counsel, appealed the OIG's
 5 determination. A true and correct copy of Plaintiffs appeal is attached hereto and
 6 incorporated by reference as Exhibit 15.

7 46. On December 28, 2020, the VA OIG denied the appeal finding the response
 8 was proper. The OIG's letter advised Plaintiff of her right to file a complaint with the
 9 U.S. District Court. A true and correct copy of the OIG's appeal denial is attached
 10 hereto and incorporated by reference as Exhibit 16.

11 **PLAINTIFF'S CLAIM FOR RELIEF: VIOLATIONS OF FOIA**

12 47. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

13 48. Plaintiff is entitled by law to access the records requested under the FOIA.

14 49. Defendant VA is in violation of the FOIA, 5 U.S.C. § 552, by failing to
 15 fully and lawfully comply with Plaintiffs November 9 and November 13, 2020, requests
 16 for records (Exhibits 1 and 2), as specified in paragraphs 25 and 39 above.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff respectfully requests the Court:

19 A. Declare that Defendant VA has violated the FOIA by failing to satisfy
 20 Plaintiffs November 9 and November 13, 2020, requests for records as specified in
 21 paragraphs 25 and 39 above;

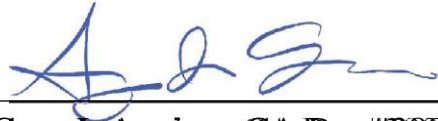
22 B. Order Defendant VA to immediately search for and release all records
 23 responsive to Plaintiffs November 9 and November 13, 2020, requests for records as
 24 specified in paragraphs 25 and 39 above;

25 C. Award Plaintiff her costs and reasonable attorney's fees and litigation costs in
 26 this action; and

27 ///

1 D. Grant such other and further relief as the Court may deem just and proper.

2 DATED: January 15, 2021

3
4 

5 Gary J. Aguirre, CA Bar #38927

6 Aguirre Law, A.P.C.

7 501 W Broadway, Ste 800

8 San Diego, CA 92101

9 Telephone: 619-400-4960

10 Facsimile: 619-501-7072

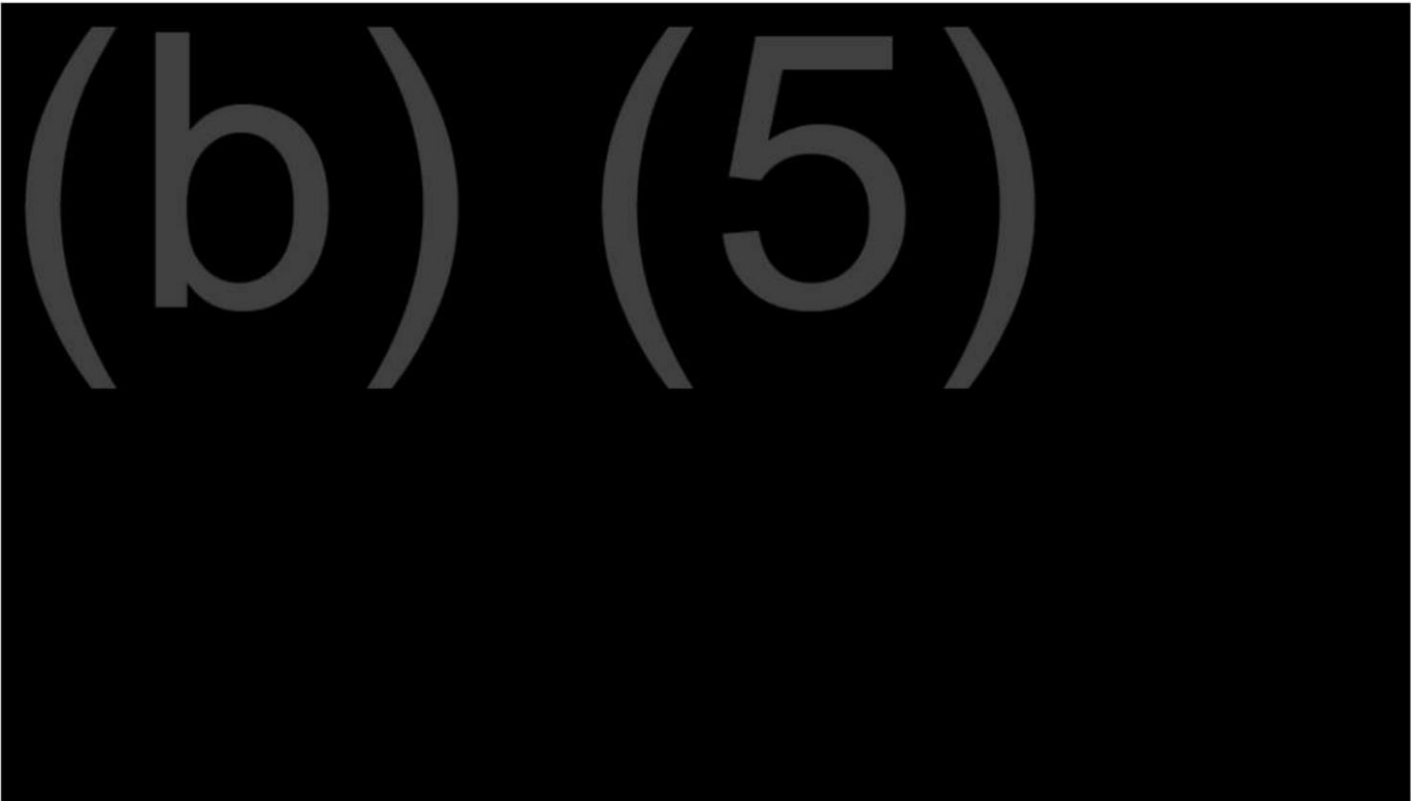
11 Attorney for Plaintiff Maria A. Pomares

Exhibit B

From: (b) (6) VBABUFF
To: (b) (6)
Cc: (b) (6) Mallia, Donna P.
Subject: RE: 3696 Actions University of Phoenix
Date: Wednesday, March 4, 2020 8:19:39 AM

Good Morning

While I understand the sensitivity of the matter, we need to ensure the folks who are to take action, based on this letter, are informed of the process. The letter notes the following:



Just want to ensure the RPOs are prepared to address the issue appropriately.

Thanks- [redacted]

From: (b) (6) [redacted] (b) (6) [redacted].gov>
Sent: Tuesday, March 3, 2020 4:36 PM
To: FF (b) (6) [redacted]@va.gov>
Cc: (VACO <(b) (6) [redacted]a.gov >
Subject: RE: 3 696 Actions University of Phoenix



The calls will be set up after the decisions and actions involving the various schools have been publicly announced. Since some of the schools are owned by publicly

traded corporations, and because the actions will potentially impact thousands of GI Bill beneficiaries, we're keeping the information "close hold" in order to prevent misinformed leaks, general panic, and insider trading.

(b) (6)

Deputy Director, Program Management
Education Service

From:

Sent: Tuesday, March 3, 2020 9:42 AM

To: VBAVACO

.a.gQY>

Cc: Bogue, Charmain, VBAVACO

@va.gov>; Mallia, Donna P.

(b) (6) @va.gov>

Subject: FW: 3696 Actions University of Phoenix

Importance: High

Good Morning- I understand that you are planning on establishing recurring calls with the field on this issue. Any idea when they will begin? We want to make sure we are prepared for school responses .

Thanks!

(b) (6)

From : Mallia, Donna P. @va.gov>

Sent: Monday, March 2, 2020 3:48 PM

To: VBABUFF

@va.gov>

Subject: 3696 Actions University of Phoenix

Importance: High

FYSA

From: VBAVACO @va.gov>

Sent: Monday, February 24, 2020 3:27 PM

To: Mcdellan, Jason, VBAMUSK

; Marsh, Mitzi A. VBASTL

(b) (6) @va.gov>; Mallia, Donna P.

@va.gov>

Cc: (b) (6) VBAVACO

@va.gov>; VBAVACO

(b) (6) @va.gov>

Subject: 3696 action(s) University of Phoenix

Importance: High

Good Afternoon

The purpose of this message is to provide attached details regarding University of Phoenix.

Education Service has received evidence in support of allegations of false and misleading advertising or enrollment practices by University of Phoenix, in violation of 38 U.S.C. § 3696. Based on current VA regulations (38 CFR § 21.4210(d)), the Director(s) of the Regional Processing Office(s) of jurisdiction provide formal notification of any decision(s) to suspend payments or disapprove all further enrollment or reenrollments of beneficiaries at schools believed to have employed such practices and refer the case(s) to the committee(s) on educational allowance.

YR

(b) (6)

Team Chief, Integrity & Protection Branch
Oversight & Accountability