

Zenith Education Group's Response to September-November 2016 Report

At the inception of the Independent Compliance Monitor relationship between Zenith and Squire Patton Boggs, it was agreed that Zenith would have an opportunity to respond to any published Monitor Report. This constitutes Zenith's response to the September-November 2016 Report.

1. Review of Admissions Materials

Zenith is pleased, and not surprised, that despite spending "the lion's share of the Monitor's time and attention" on marketing and admissions materials, the Monitor was unable—with only one contested exception—to identify any indication of "a failure to meet a state legal/regulatory or accreditation requirement."

And as to that single alleged "exception," the Monitor's allegation second-guesses a state's interpretation of its own regulations. Zenith's enrollment agreement includes a clause stating, "The School will not be responsible for any statement of policy, placement assistance activities, curriculum or facility that does not appear in The School catalog or in this Enrollment Agreement (EA)." This clarifies for students that written information in the EA and school catalog cannot be orally modified. The Monitor alleges this is noncompliant by misinterpreting a Georgia standard that read in full context, with several enumerated examples wholly unrelated to the language in question, requires an institution to oversee, supervise, and train ("be responsible for") its employees and their conduct. Zenith continues to be comfortable that the Monitor's interpretation is misguided since the Georgia state agency itself, which drafted and enforces these standards, reviewed the EA and found no issues.

The Monitor also asserts that despite no other findings of non-compliance, he was able to identify 69 instances of allegedly "unfair" or "misleading" language and states that in that assessment, "generally, the Department was of the same mind as the monitor." Having had its own conversations with the Department, Zenith disputes the implication that the Department is similarly concerned about the alleged 69 instances of "unfairness." Indeed, the Monitor's identified concerns that go far beyond a "fairness inquiry." Zenith remains comfortable that its documents are not only compliant, but also fair. Examples of the Monitor's alleged "unfairness" comments included the Monitor's:

- Insisting that the phrase "accepted in writing" should be changed to "signed by;"
- Insisting that Zenith should add its own language to supplement FTC-mandated consumer credit language, to make the *FTC's own language* "clear in plain English"
- Insisting that Zenith narrow its notice of potential expulsion for "disrupting the normal activities of the School" to reference only "violations of the Code of Student Conduct;"
- In multiple instances, insisting that Zenith add extensive and gratuitous statutory definitions and regulatory language to the enrollment agreements - despite the Monitor also noting, rightly, that "the longer the document the less likely it is that even the most sophisticated prospective enrollee will read it."
- Insisting that Zenith's requirement that its admissions representatives certify that they had made no extraneous verbal or written agreements or promises must be instead by

made and signed by the *prospective student*; thus creating a written waiver that effectively undercuts any student's later misrepresentation claim.

- Insisting that the school administrative official whose countersignature enrolls the student be referred to as "Accepting Officer" rather than "Administrative Official."
- Insisting that a separate acceptance letter be sent to all enrolled students, rather than enrolling upon a school official's signing the enrollment agreement, which is required by accreditor standards.
- Changing from "the school catalog" to "this school catalog."
- Insisting that each program at a given campus should have its own program-specific enrollment agreement—though such separate applications would feature no substantive differences;

Zenith is encouraged by the fact that the Monitor looked so closely at Zenith's documents and was only able to find a single alleged compliance violation, not even asserted by the relevant regulator. However, Zenith strongly disputes the monitor's contention that the 69 issues commented on by the monitor and exemplified above rise to the level of "unfair" or "misleading" conduct by Zenith.

2. Review of Admissions Representatives Recruiting Calls

Although Monitor-identified compliance issues in Zenith's admissions calls are certainly few and far between (6 out of 970, or roughly one half of one percent), "zero" is the only acceptable number of issues. Zenith is taking measures to remediate and has also requested, and the Monitor has agreed, that in the future the Monitor will alert Zenith to any identified compliance issues when they are identified, so that Zenith can remediate them more quickly.

3. Visit to Everest Woodbridge Campus

While Zenith is proud of its campuses, and is not surprised to hear a generally positive report about its campuses, it is difficult to even assess takeaways from that portion of the report related to what the Monitor refers to as "not a scientific survey of opinion." We hope that in the future, the Monitor will consider using a valid methodology, speaking with our Provost about issues like program design and the academic benefit of content review, and verifying information before simply reiterating anecdotal sentiments of a few students as though relevant to Zenith's regulatory or Conduct Provisions compliance.

Supplemental Response to Final September-November 2016 Report

When Zenith received the original draft of the Monitor's September-November Report, it prepared the response set forth previously. The parties agreed that the Monitor would publish that response along with his report. He then amended his report to discuss Zenith's response, and to raise additional new material. Zenith now provides these further comments in response to the new material in the Monitor's final published report.

The Monitor's Suggestions and Areas for Potential Amendment Do Not Equate to "Unfair or Misleading" Content.

As explained in Zenith's original response, Zenith disagrees with the Monitor's characterization of minor suggestions—not implicating compliance or legal violations—as evidence of "unfair or misleading" content. Now in his final Report, the Monitor construes Zenith's disagreement with that "unfair or misleading" label as a rejection of the Monitor's suggestions themselves. Whether Zenith chooses to amend its materials or agrees with the Monitor's suggestions is a different issue than whether Zenith's current materials are "unfair or misleading;" and it is inappropriate to confuse the two.

For example, the Monitor mischaracterizes Zenith's stated objection to adding "gratuitous **statutory definitions and regulatory language**" (emphasis added), asserting that it was not statutory language that Zenith found "gratuitous", but indeed the Monitor's **comments themselves**—most of which had nothing to do with statutory definitions or regulatory language. As shown above, Zenith's statement about requiring gratuitous definitions was in reference to the Monitor's insistence on gratuitous **language**. For example, the Monitor insisted that Zenith insert into its enrollment agreements regulatory definitions governing "clock hour" and "credit hour" programs, such that a student could review those definitions and then try to ascertain on his or her own whether the program was designated by Zenith as a clock hour or credit hour program for Title IV purposes. This adds unnecessary confusion to Zenith's current practice of simply stating in the agreement which type of program the student is applying for. Zenith believes its current practice is more straightforward and lowers potential for student confusion. In another example, the Monitor requested that Zenith insert Georgia state regulations that require institutions to notify their students of any changes to instructors or textbooks. It was these kinds of suggestions to add unnecessary regulatory language into the agreement—when everyone agrees that the longer the agreement is, the less useful it is to students—that Zenith characterized as requesting addition of "gratuitous statutory definitions and regulatory language." Zenith continues to advocate for simpler and more straightforward agreements.

Ignoring this, the Monitor instead references a few unrelated instances of alleged unfairness supposedly relevant to his requested gratuitous statutory definitions. These allegations warrant brief comment.

The Monitor's insistence that Zenith require a student to sign disclaimers stating that the school does not guarantee "or imply" certain outcomes does not implicate unfairness or misleading conduct. More importantly, it ignores the multiple uses that such disclaimers

can have. One use is to notify a student that no guarantees are or can be made by the school as to outcomes; e.g., future employment. A second use is as evidence against the student who may make a claim against the school if an admissions representative *did* in fact improperly imply that an applicant could count on a job upon graduation. In such a case, the disclaimer and the student's accompanying signature would be evidence against the student's claim. In Zenith's view, adding the words "or imply", would be unnecessary and could broaden the scope of improper admissions statements against the student. Put another way, making the suggested change could be more "unfair" to the student. Zenith stands by its decision not to make this unnecessary change.

Additionally, the Monitor claims that Zenith "found to be gratuitous" his suggestion to amend its former General Release of Claims section. This is not accurate. To the contrary, Zenith had removed that former language and replaced it with a new, more student-favorable provision in late December 2016. The new provision eliminates separate opt-out language and clarifies that the release is intended only to cover inherent risks of the student's program.¹ Thus, Zenith did not deem the Monitor's suggestion to be "gratuitous." It did, however, have concerns with the Monitor's unsupported characterization of a legal, standard-form release provision as "unfair or misleading."

Similarly, the Monitor claims that Zenith "rejected as gratuitous" and "wonders why Zenith resists" his insistence that Zenith should change the phrase "education necessary to attain a career..." to "education necessary to prepare them for a career..." in its catalogs. The relevant issue for Zenith is not whether to "resist" this unnecessary revision; the issue is that the current language is not "unfair or misleading," contrary to the Monitor's assertion in his report.

Other comments show a similarly inappropriate classification of content as "unfair or misleading" unsupported by more than the Monitor's² opinion. For example, the Monitor defends his position that Zenith should add its own language to that *mandated by* the

¹ The new release states:

Many programs feature inherent risks. As to any such inherent risks, I understand and agree that the School and its employees or agents may not be held liable in any way for any occurrence in connection with my enrollment at the School that may result in injury, death, or other damages to me or my family, heirs, or assigns. I further agree to save and hold harmless said School and persons from any claim by me, or my family, estate, heirs, or assigns, arising out of my enrollment and participation in School activities. It is my intention by this instrument to exempt and release the School and its employees and/or agents from all liability whatsoever for personal injury, property damage or wrongful death caused by negligence, which arises out of any inherent risk of my enrollment or course of study. In consideration of being allowed to enroll in the School, I hereby personally assume all inherent risks in connection with said enrollment, for any harm, injury or damage that may befall me while I am enrolled as a student in my program of study at the School, including all inherent risks connected therewith, whether foreseen or unforeseen. The School and I agree that this limitation and assumption of risk is limited to inherent risks of my enrollment and educational program, and does not limit the school's liability for its own intentional and willful acts or violation of law.

² This prerogative is perhaps most readily apparent in the Report's section C, where the Monitor calls upon "the accrediting body [Georgia NPEC] and/or its legislative overseers" to address the fact that the Monitor disagrees with the NPEC's apparent interpretation of NPEC's own regulation.

Federal Trade Commission (FTC) as “merely suggesting,” and “acknowledging that Zenith is under no legal obligation to do so.” We disagree that Zenith’s adherence to the FTC-mandated language is “unfair and misleading.”

Similarly, Zenith is at a loss as to why Zenith’s current requirement that admissions representatives attest on each enrollment agreement, as a compliance reinforcement, that they have made no extra-contractual verbal or written assurances to the student, could be deemed “unfair or misleading.” This is simply a good compliance practice. There is certainly no requirement that Zenith force a **student** to make such an affirmation, as the Monitor insists, and in fact if the student did so, such a statement could be used against the student in a subsequent misrepresentation claim. The Monitor’s newly stated assumption that “if contrary claims were made to a student, the student would not certify that none had been made” ignores the practical reality that in the real world, people do sign agreements containing such disclaimers even if written or verbal misrepresentations *have* been made; and those statements can indeed be used against the signer if a verbal misrepresentation is later alleged.

Likewise, notwithstanding the Monitor’s “substantive reason for” his comment, Zenith stands by its contention that saying “The School catalog contains” (as opposed to “This School catalog”) within the school catalog itself is similarly not “unfair or misleading.” This is the Monitor merely stating his preferences for phrasing.

The Monitor’s Perception of a Single Telephone Call Does Not Justify Discrimination

In general, Zenith does not disagree with the Monitor’s concerns about any of the admissions calls cited, including the “fifth call” discussed in further detail in his report. Zenith does not want to improperly encourage enrollments from potential students who are unlikely to be able to complete or benefit from its programs, which would only serve to diminish Zenith’s retention and/or placement rates. This is one reason why Zenith is implementing academic readiness standards requiring all online students to provide evidence of at least one indication of academic readiness, such as minimum high school GPA, entrance test scores, etc., or alternatively, to take a separate readiness assessment and complete any indicated remediation prior to enrollment.

Those measures constitute valid and proper assessments and an objective basis for differentiation between likely capable and incapable potential students. The Monitor’s subjective assessment of a potential student’s demeanor on the phone, on the other hand, is *not* a valid basis to reach a judgment as to a student’s capability for success. Indeed, Zenith’s review of the call revealed that the prospective student actually was able to clearly explain to the representative what she meant by her reference to a “defaulted” divorce—that a default judgment had been entered against her—and any difficulty the Monitor had in understanding her was likely due to the quality of her phone connection, her accent, or both. And the potential student’s inability to understand the phone agent’s last name was quickly resolved. We found nothing to suggest that the potential student wasn’t qualified for the program, let alone the “fundamental intellectual infirmity” diagnosed by the Monitor.

To be sure, this can sometimes be a difficult issue, but Zenith intends to continue taking the legally safe route, relying on validated bases of differentiation to support its admissions process. Zenith does not intend train or instruct its employees to engage in conduct that could be viewed as age or other discrimination based on subjective over-the-telephone subjective assessments of potential students' capabilities.