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RE: Office of Online & Blended Learning; School Successorship Guidance

Dear Bill:

Please accept the following comments in relation to the proposed guidance on online school successorship issues. We are making these comments on behalf of our firm, based on our experience dealing with multiple online programs, in various capacities, over the years.

### **Rulemaking vs. Guidance**

We have some concern that the real meat of the rule expressed in the guidance should have been subject to the more rigorous process of rulemaking. In effect, the legislature delegated power to the Department to adopt rules fleshing out the details of how to decide when a possible “successor” school should carry the accountability history of its predecessor and when, instead, it should be recognized as a *bona fide* new school. Instead of providing appropriate rulemaking detail, the rule remained general and deferred the real rulemaking to this guidance. This decision to bypass rulemaking as the place to test and develop a more specific statement of real governing policy means the process of making usable law has been deferred to the lowest possible level, with the most informal process. The vices inherent in that informality have then been compounded by the approach taken to drafting the guidance itself.

### **Multifactor Balancing**

Specifically, the proposed guidance creates a classic multi-factor balancing test. It requires the combination of the four bulleted factors to be “taken collectively” to decide what schools are successor schools. This actually understates the complexity of the rule, as the first bullet breaks out two lists totaling eight separate considerations.

The common flaws in unstructured multi-factor “balancing” have been subject to an appropriate, at times withering, critique at the highest levels. John Roberts, while in practice before the Supreme Court and before his elevation to Chief Justice, argued that: “Totality-of-the-circumstances balancing tests are by their nature vague, indeterminate, manipulable, and lead to different results, depending on who does the balancing ....”<sup>1</sup> Justice Souter’s opinion for the

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<sup>1</sup> Transcript of Oral Argument at 49-50, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513U.S. 527 (1995).

Court agreed: “the proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal.”<sup>2</sup> Justice Scalia described the task of making decisions under such tests as akin to “judging whether a particular line is longer than a particular rock is heavy.”<sup>3</sup> In a well-regarded law review article, Justice Scalia asserted that the tendency of this approach in making decisions meant: “equality of treatment is . . . impossible to achieve; predictability is destroyed; . . . arbitrariness is facilitated; . . . courage is impaired.”<sup>4</sup>

### **Operationalizing the Use of Factors**

Our suggested revision has both technical purposes related to the flaws in almost all multi-factor “balancing” and policy purposes. On the technical side the attached redline first offers a rebuttable presumption of successorship. This communicates clearly to a decision maker that if the condition stated is satisfied, the result should be to find a successor school *unless* there are real and substantial reasons for doing otherwise. The rebuttable presumption serves to make decisions more uniform and predictable and less subject to appeal.

Second, we list several factors that may justify departing from the presumption. But these are reworded in several significant respects. To begin, a “combination” of factors is required to overcome the presumption of successorship: one alone will never do (and four-out-of-four is not required). Next, each factor involves a single defining aspect of what makes a “school,” and then offers two or more illustrations of that topic. By collecting specific examples within broader categories, it is less likely that “lines” and “rocks” will get confused. The four categories may be summarized as: organizational; pedagogical; managerial; and instructional. In each case, this domain must be changed “substantially,” *and* that change must be supported with indicia of real operational measures to make it mean something.

Thus, each factor is tightened up internally, and all factors are treated in parallel fashion: the degree of the change is closely defined, and evidence of how change will be operationalized is required. Finally, we suggest that change in school code and one change often found during the organic process of a school’s evolution (new technology) simply have no significance in making a decision on successorship.

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<sup>2</sup> *Grubart*, 513 U.S. at 547.

<sup>3</sup> *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment).

<sup>4</sup> Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

In addition to this basic test, we break out an obvious and well-defined exception. The exception, essentially, covers a situation in which two unconnected schools exist. One of these schools closes and the number of students transferring from the closed school to a school that was at most a competitor trips over the 50%+1 barrier. In that instance, there was no initial identity and there is no reason for the sudden release of students from a closed school to create an illusion that a completely different school was a “successor.” Again, unlike the need to manipulate multiple factors to arrive at the obviously correct conclusion, this simply lays out an unusual but possible circumstance in which a sudden large enrollment of students from a closed school would not be diagnostic.

In sum, while the resulting proposed guidance honors the complexity of schooling as an activity, it makes multiple efforts to promote more uniformity, less opportunity for special pleading, greater predictability, and, one would hope, fewer valid reasons for appeal.

### **Policy Considerations**

Substantively, we would offer the following thoughts on why we put certain elements in different categories:

- The 50%+1 Rule. In general, if more than half of a “new” school is made up of students who were served by a single school the previous year, a measure of skepticism about the label “new” is warranted. The legal device that expresses skepticism without rushing to final judgment is a rebuttable presumption, which is used here.
  - Factors supporting rebuttal: the structure. Superficial change is easy. Real change is what a low-performing school needs. But it is hard. The factors allowing someone to rebut the presumption of identity should communicate to struggling schools that only real and substantial change, taken in a serious and sustained manner may be a means to recognizing an effort to create a “new” school. Thus, of the four domains identified, the test for rebuttal here calls for at least two of these factors to be satisfied.
  - Incentives. Further, requiring each factor to involve substantial change and evidence of commitment to such change encourages schools to at least consider whether a true fresh start requires changing more than two factors, as well as how much change is really needed in any one factor.
  - Cost and benefit. Closing schools always enhances mobility and has an educational cost for some, often most, students. Yet allowing schools to avoid or dabble in making changes fails to address underperformance. An incentive to look seriously at what substantial changes, with what operational

commitments, takes schools facing the horns of the school closure dilemma and directs them toward real organizational renewal: into creating a genuinely “new” school.

- Avoiding Misuse of a Mathematical Measure. The 50%+1 rule looks at the enrollment of a target school. It is conceivable closure of an MDOL with a large student population would cause a sudden enrollment surge for a wholly unrelated small MDOL. In this instance, the math is an illusion. A categorical rule that one does not get follow the illusion creates added clarity.
- Circumstances Outside the Analysis. Buying new computers is nice and may improve the student-teacher experience at the margins. But it is not a fundamental change in *schooling*. Similarly, change of school codes may be a trigger for making an analysis of whether accountability history is continuous or should be viewed as starting anew; it is not itself part of that analysis. The circumstances listed in this last suggested edit may be things that happen to be present in relation to another, more significant, change but they should not have a bearing on the successorship analysis.

## Conclusion

In sum, there is an evil to be avoided, a good to be realized, and improved mechanisms to both ends. The evil is schools trying to perpetuate their existence by proclaiming they are “new,” at times based on nothing genuinely new, to avoid accountability. The good is a school recognizing the crisis in front of it and making serious and substantial efforts to do something genuinely “new,” especially if this avoids the disruption in student relationships and educational experience typically caused by school closure. And there is a further regulatory good in not trying to ask “whether a particular line is longer than a particular rock is heavy,” since the question is impossible to answer predictably, or even transparently, from case to case. For both the more technical and the policy reasons stated above, we suggest the changes in the attached redline and “clean” revisions that illustrate our suggested changes.

Thank you for the opportunity to offer these thoughts on the proposed guidance.

Sincerely,



William P. Bethke

Attachments as noted.

... An online school may be considered a successor school as follows:

1. If at least 50% of the students enrolled in the new school were enrolled in the predecessor , school(s), it shall be rebuttably presumed the School is a successor unless (1) the exception stated in section 2, below, applies; or (2) two or more of the factors listed in 1.1 through 1.4 supports a contrary decision:
  - 1.1. The new school substantially changes the governance, vision, and organization from that of the predecessor, and takes further step (such as developing strategic plans with measurable objectives) to make such organizational changes effective;
  - 1.2. The new school substantially changes curriculum, instruction, or grade levels served from that of the predecessor(s) and takes further steps (such as comprehensive training or changes instructional delivery) to make such pedagogical changes effective;
  - 1.3. The new school substantially changes the senior staff, substantially changes governance, or severs the relationship with a management company from that of the predecessor, and provides appropriate guidance for changes to be implemented through new governance and management;
  - 1.4. The school substantially changes the teaching staff or one or more significant educational service provider(s) from that of the predecessor(s) and assures appropriate induction of new staff or providers.
2. An existing online school that pre-existed the closure of another online school, and that operated under different authorization, governance and management at all relevant times, is not a “new” school and shall not be deemed a successor solely because more than 50% of its students are students who transfer from a closed online school.
3. Circumstances that are not part of the “successor” analysis called for in this guidance include:
  - 3.1. The school merges previous school codes into one, or separates existing school codes into several, without substantially altering other characteristics of the predecessor(s); or
  - 3.2. The school changes technology.

... An online school may be considered a successor school under any of the following conditions as follows:

1. At least 50% of the students enrolled in the new school's pupil enrollment is the same as were enrolled in the predecessor's school(s), it shall be rebuttably presumed the School is a successor unless (1) the exception stated in section 2, below, applies; or (2) two or more of the factors listed in 1.1 through 1.4 supports a contrary decision:

1.1. The new school maintains substantially changes the same governance, vision, and organization as from that of the predecessor, and takes further step (such as developing strategic plans with measurable objectives) to make such organizational changes effective; despite changing other characteristics (such as

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1.1.1. The new school substantially changes curriculum, instruction, technology, educational services/management provider, or grade levels served) from that of the predecessor(s) and takes further steps (such as comprehensive training or changes instructional delivery) to make such pedagogical changes effective;

2. The new school merges previous school codes into one, or separate existing school codes in several, without substantially altering other characteristics of the predecessor(s);

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1.3. The new school has different characteristics but substantially changes the same senior staff, substantially changes governance, or as severs the relationship with a management company from that of the predecessor, and provides appropriate guidance for changes to be implemented through new governance and management;

1.4. The school substantially changes the teaching staff or one or more significant educational service provider(s) from that of the predecessor(s) and assures appropriate induction of new staff or providers.

2. An existing online school that pre-existed the closure of another online school, and that operated under different authorization, governance and management at all relevant times, is not a "new" school and shall not be deemed a successor solely because more than 50% of its students are students who transfer from a closed online school.

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3. Circumstances that are not part of the "successor" analysis called for in this guidance include:

3.1. The new school merges previous school codes into one, or separate existing school codes in several, without substantially altering other characteristics of the predecessor(s); or

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The school changes technology

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4. At least 50% of the school's pupil enrollment is the same as the predecessor's;

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Or any combination of these considerations that, taken collectively, establish that the new school is substantially the same school as the predecessor.