

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)	
)	
ITT EDUCATIONAL SERVICES, INC., <i>et al.</i> ¹)	Case No. 16-07207-JMC-7A
)	
Debtors.)	Jointly Administered
_____)	
)	
DEBORAH J. CARUSO, the CHAPTER 7)	
TRUSTEE for ITT EDUCATIONAL)	
SERVICES, INC., ESI SERVICE CORP. and)	
DANIEL WEBSTER COLLEGE, INC.,)	
)	
Plaintiff,)	Adversary No. _____
)	
vs.)	
)	
KEVIN MODANY, JOHN E. DEAN, C. DAVID)	
BROWN II, JOANNA T. LAU, THOMAS I.)	
MORGAN, JOHN VINCENT WEBER, JOHN F.)	
COZZI, SAMUEL L. ODLE, and JERRY M.)	
COHEN,)	
)	
Defendants.)	

ADVERSARY COMPLAINT

Plaintiff Deborah J. Caruso (“Plaintiff” or “Trustee”), as Chapter 7 trustee for ITT Educational Services, Inc., ESI Service Corp., and Daniel Webster College, Inc. (collectively, “ITT,” “Debtors,” or the “Company”) brings this action against ITT’s former Chief Executive Officer (“CEO”), Kevin Modany (“Modany”), and the eight individuals who served as members of ITT’s board of directors (the “Board”) during all or part of the period beginning on April 20, 2016 and ending with ITT’s September 16, 2016 bankruptcy: John E. Dean (“Dean”), C. David

¹ The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

Brown II (“Brown”), Joanna T. Lau (“Lau”), Thomas I. Morgan (“Morgan”), John Vincent Weber (“Weber”), John F. Cozzi (“Cozzi”), Samuel L. Odle (“Odle”), and Jerry M. Cohen (“Cohen” and together with Dean, Brown, Lau, Morgan, Weber, Cozzi, and Odle, the “Directors” or, collectively with Modany, “Defendants”).

PRELIMINARY STATEMENT

1. This case involves claims for breach of fiduciary duty and equitable subordination arising from Defendants’ breaches of their fiduciary duties of loyalty, care, and good faith owing to ITT and its stakeholders during the period April 20, 2016 until ITT’s September 16, 2016 bankruptcy (the “Crisis Period”).

2. As of March 31, 2016, ITT had reported in its public filings to the U.S. Securities and Exchange Commission (the “SEC”) that it held cash and cash equivalents of \$108,663,000 and enjoyed total shareholder equity of \$162,056,000.

3. Less than five months later, following demands made by the Department of Education (“ED”) and the Accrediting Council for Independent Colleges and Schools (“ACICS”), ITT abruptly shut down without an orderly plan for winding down its operations or even providing for a teach-out of its 40,000 active students; and on September 16, 2016, filed a petition for a liquidation under Chapter 7 of the Bankruptcy Code. ITT’s free-fall bankruptcy left it with no shareholder equity and billions of dollars in potential claims.

4. The resulting tragedy could have been avoided, or, at a minimum, the damages could have been significantly reduced, if Defendants had fulfilled their fiduciary duties to ITT and its stakeholders, including creditors and active students.

5. The Directors breached their fiduciary duties to ITT by, among other things:

- abdicating crucial decision-making authority to CEO Modany to negotiate with ED, ACICS, and potential transaction partners despite knowing that Modany was conflicted and could not be trusted to place ITT's interests above his own personal interests given, among other things, his desire to retain control of ITT and obvious incentive to maintain the benefits of his substantial compensation package;
- retaining Modany against ITT's best interests and the wishes of ED, ACICS, regulators, state attorneys general, and potential transaction partners;
- chronically failing to exercise reasonable oversight over Modany and other management throughout the Crisis Period;
- failing to independently investigate ITT's financial condition and ability to continue operations and ignoring evidence of ITT's insolvency;
- failing to investigate or secure an orderly merger, sale, or other transaction to maximize ITT's value for its constituents, including a transaction that might not be in Modany's personal interest (*e.g.*, a transaction involving his termination, a reduction in his compensation, and/or settlement of pending claims against ITT in a manner adverse to him); and
- failing to investigate or secure an orderly wind down of ITT's operations either inside or outside of bankruptcy that would have maximized the value of ITT's remaining assets for its shareholders and minimized potential claims against ITT, including ensuring that ITT had in place a program for the teach-out of its current student body, complying with all applicable rules and regulations regarding the disposition of student records, and complying with all applicable employment laws.

6. As for Modany, in light of the intense and increasing negative publicity, including publicly-disclosed lawsuits relating to him individually, Modany should have diligently pursued the above steps to benefit ITT, and if he was unable or unwilling to do so given the clear conflict of interest between his own interest in protecting his reputation, job and compensation package, and that of the Company, he should have either recused himself from all decisions in which he had a personal conflict or stepped down as CEO and left the Company. By failing to take any of these necessary actions, Modany breached his fiduciary duties to ITT.

JURISDICTION AND VENUE

7. On September 16, 2016 (the “Petition Date”), the Debtors filed voluntary petitions for relief under Chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of Indiana.

8. This Court has jurisdiction over this action under 28 U.S.C. §§ 157 and 1334(b) and Rule 7001, *et seq.*, of the Federal Rules of Bankruptcy Procedure because this adversary proceeding arises in and relates to Case No. 16-07207 pending in the Bankruptcy Court. Under 28 U.S.C. § 157(a), jurisdiction has properly been referred to this Court under S.D. Ind. L.R. 83-8. This action is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (O).

9. Venue is proper in this Court under 28 U.S.C. § 1409(a) because some Defendants reside in this judicial district and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district. In addition, all of the Defendants routinely attended meetings of the Board of Directors in this judicial district.

PARTIES

10. The Plaintiff, Deborah J. Caruso, is the Chapter 7 trustee appointed in each of the Affiliated Debtors’ Chapter 7 bankruptcy cases, with her principal executive office located at 135 N. Pennsylvania Street, Suite 1400, Indianapolis, IN 46204. The Trustee was appointed interim trustee on the Petition Date, under section 701(a)(1) of the Bankruptcy Code, and thereafter became the case trustee in each of the Affiliated Debtors’ bankruptcy cases following the conclusion of the first meeting of creditors on November 1, 2016, under section 702(d) of the Bankruptcy Code.

11. Defendant Kevin Modany served as ITT’s CEO from April 2007 until ITT’s September 2016 bankruptcy. In 2014, ITT paid Modany total compensation of \$3,194,632. In

2015, ITT paid Modany total compensation of \$1,379,345. Modany's 2016 annualized base compensation was \$824,076. He received other benefits, including use of a company car, a tax return preparation and financial planning allowance, tickets to sporting, theater, and other events, and enhanced disability benefits. Modany is a resident of Carmel, Indiana.

12. Defendant John E. Dean served as ITT's Executive Chairman of the Board during the Crisis Period. He specialized in higher education law since 1985 and touted his "current and valuable knowledge and insight of the actions of Congress and the U.S. Department of Education . . . related to higher education matters" as qualifying him for ITT's Board. Upon information and belief, Dean is a resident of Washington, D.C. During the Crisis Period, Dean received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. For example, Dean received \$1,890,920 in total compensation in 2014-2015. As of July 1, 2016, Dean held 130,004 shares in ITT. Dean routinely attended Board of Directors meetings at ITT's headquarters in Carmel, Indiana.

13. Defendant C. David Brown II served as a director and the Chairman of the Board during the Crisis Period. He had a 36-year legal career, with service on other public companies' boards, including CVS Health Corporation, Rayonier Advanced Materials Inc., and Orlando Health. Upon information and belief, Brown is a resident of Carmel, California. During the Crisis Period, Brown received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Brown held 20,367 shares in ITT. Brown routinely attended Board of Directors meetings at ITT's headquarters in Carmel, Indiana.

14. Defendant Joanna T. Lau served as a director on the Board during the Crisis Period. Lau has served for over fifteen years on the boards of various companies including Lau

Acquisition Corporation (of which she also the CEO), DSW, Inc. and ESI Group, SA (and was on its Audit Committee when it filed for bankruptcy). She touted her experience “developing and implementing a turnaround and growth strategy” as qualifying her for ITT’s board. Upon information and belief, Lau is a resident of Kiawah Island, South Carolina. During the Crisis Period, Lau received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Lau held 15,148 shares in ITT. Lau routinely attended Board of Directors meetings at ITT’s headquarters in Carmel, Indiana.

15. Defendant Thomas I. Morgan served as a director on the Board during the Crisis Period. Morgan held CEO and other management positions at numerous companies has served for over nineteen years as a director of other public companies, including Baker & Taylor, Inc., Hughes Supply, Inc., Rayonier, Inc., and Waste Management, Inc. He also has relevant bankruptcy experience as a director of US Office Products Company (which filed for bankruptcy shortly after he left its Board) and Value America (which also filed for bankruptcy). Upon information and belief, Morgan is a resident of Bigfork, Montana. During the Crisis Period, Morgan received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Morgan held 23,965 shares in ITT. Morgan routinely attended Board of Directors meetings at ITT’s headquarters in Carmel, Indiana.

16. Defendant John Vincent Weber served as a director of the Board during the Crisis Period. He is an accomplished businessman who served for twelve years in the U.S. House of Representatives and was a top advisor on numerous presidential campaigns. He has over 21 years’ experience as a director and member of upper management in various public companies, including Mercury Public Affairs LLC, Clark & Weinstock Inc., and the Lenox Group, Inc.

Weber's public policy involvement in a variety of highly-regulated areas, including higher education, which allowed him to develop strong knowledge and political insight concerning for-profit colleges. Weber also has relevant bankruptcy experience as a director at Chris-Craft, a manufacturer of luxury boats that went bankrupt twice. Upon information and belief, Weber is a resident of Washington, D.C. During the Crisis Period, Weber received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Weber held 32,055 shares in ITT. Weber routinely attended Board of Directors meetings at ITT's headquarters in Carmel, Indiana.

17. Defendant John F. Cozzi served as a director on the Board during a portion the Crisis Period until May 2016, when he left in the belief that ITT, as mismanaged by Defendants, including himself, would fail in relatively short order and he wished to not be associated with ITT's catastrophic failure. Upon information and belief, Cozzi possessed years of experience in private equity and investment banking. Cozzi is a resident of New York, New York. During the Crisis Period, Cozzi received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Cozzi held 26,149 shares in ITT. Cozzi routinely attended Board of Directors meetings at ITT's headquarters in Carmel, Indiana.

18. Defendant Samuel L. Odle served as a director on the Board during the Crisis Period. He held executive positions at numerous organizations in the healthcare industry, which he claims "provided him with the ability to analyze and assess numerous aspects of a complex and highly-regulated organization." Odle has been a senior policy advisor for the Bose Public Affairs Group since October 2012, and served as president and CEO of Methodist Hospital and Indiana University Hospital and executive VP of Indiana University Health since July 2004.

Upon information and belief, Odle is a resident of Indianapolis, Indiana. During the Crisis Period, Odle received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Odle held 10,414 shares in ITT. Odle routinely attended Board of Directors meetings at ITT's headquarters in Carmel, Indiana.

19. Defendant Jerry M. Cohen served as a director on the Board during the Crisis Period. Upon information and belief, Cohen joined Deloitte & Touche, LLP in 1973 and had many years of experience as an audit partner there before retiring as a senior partner in June 2014. Upon information and belief, Cohen is a resident of Manhasset, New York. During the Crisis Period, Cohen received substantial compensation from ITT in the form of salary, bonuses, and incentive and/or equity-based compensation. As of July 1, 2016, Cohen held 20,367 shares in ITT. Cohen routinely attended Board of Directors meetings at ITT's headquarters in Carmel, Indiana.

STATEMENT OF RELEVANT FACTS

I. ITT's background

20. ITT was founded in 1946 and became a publicly traded company in 1994. Before the Petition Date, ITT grew to be one of the largest for-profit education companies in the country, employing over 8,000 employees. ITT offered master, bachelor, and associate degree programs to approximately 40,000 students at its 130 campus locations and online programs to students located in at least 38 states and the District of Columbia in a number of subjects, including electronics, drafting and design, criminal justice, business, information technology, health sciences, and nursing.

21. Like nearly all for-profit education companies, ITT derived the overwhelming majority of its revenues from federal financial aid programs operated under Title IV ("Title IV")

of the Higher Education Act of 1965 (the “HEA”). ED, in turn, was responsible for regulating the flow of, among other things, Title IV funds, and ensuring that entities, like ITT that received Title IV funds, maintained certain financial and accreditation requirements. For example, to be eligible for Title IV aid, a for-profit company that owns a school must be accredited by an accrediting agency recognized by ED. 34 C.F.R. § 600.5. In order to maintain its accreditation, ITT was required to meet applicable standards established by accrediting agencies, including ACICS.

22. Another requirement to obtain and maintain eligibility for Title IV funding is the annual submission of a separate annual compliance or “attestation” audit report to ED. This “attestation” audit includes audited financial statements for the preceding full fiscal year, and a letter from the company’s management asserting that the institution is in compliance with the laws and regulations applicable to Title IV programs. A critical purpose of this audit is for the entity receiving federal funds to demonstrate that it is complying with federal law.

23. For nearly a decade, Modany led ITT’s management team. The compensation of ITT’s former management, including Modany, was tied directly to ITT’s earnings per share, which was correlated to ITT’s profit and revenue projections.

II. The Crisis Period begins with the ACICS Show-Cause Letter.

24. On April 20, 2016, ACICS sent ITT a Show-Cause Directive Letter (the “Show-Cause Letter”), a copy of which is attached as Exhibit A, ordering ITT to show cause why its grants of accreditation should not be withdrawn or conditioned, based on information which “call[s] into question the institutions’ administrative capacity, organizational integrity, financial viability, and ability to serve students in a manner that complies with ACICS standards.” The information cited by the Show-Cause Letter leading to its decision included, *inter alia*:

- the on-going status of ITT's participation in the Title IV program, including the financial implications of Heightened Cash Monitoring conditions applied to the institutions' access to funds;
- the insufficiency of ITT's response to "public and widely-known allegations" regarding the quality of instructional materials; and
- ITT's failure to comply with ACICS' directive to develop and submit a plan that provides for the continuation and completion of all students currently enrolled in the event that the institution elects to curtail or suspend operations.

25. Defendants knew (or recklessly disregarded the fact) that failing to satisfy ACICS's concerns would likely cause ITT to lose its accreditation, thereby rendering ITT ineligible to continue receiving Title IV funding, which accounted for roughly 90% of ITT's revenue. Loss of accreditation would spell financial ruin for ITT. Indeed, in a follow-up call with ACICS on or about April 23, 2016, ACICS told Modany that it had "run out of patience" with ITT's failure to respond to its teach-out request. (A teach-out is a way to provide a continuation of academic programming in the face of potential closure of a university. This can be done either at the university itself or by partnering with another institution of higher learning.) The ultimate failure to provide a teach-out for ITT's students resulted in the assertion of significant claims in its bankruptcy proceeding.

26. Defendants also knew (or recklessly disregarded the fact) that ACICS wanted ITT to terminate Modany and that his stepping down would significantly help ITT retain its accreditation. Upon receipt of the ACICS letter, ITT's then Executive Chairman, John Dean, and Director Cohen acknowledged that ACICS saw Modany "as part of the problem." And Modany himself wrote Dean opining that his and Dean's resignations were "a likely necessary action if we are going to respond with a sufficient politically charged reply" because "it's almost a certainty that we need to give these guys a dead body!"

27. Defendants also knew (or recklessly disregarded the fact) that Modany was a direct impediment to ITT successfully settling the various lawsuits cited in the ACICS Show-Cause Letter. Upon information and belief, each of the federal agencies and state attorneys general (the “AGs”) suing ITT had communicated to ITT their desire that ITT terminate Modany, who was responsible for implementing, continuing, participating in and/or cultivating a culture at ITT that encouraged much of the misconduct alleged in the lawsuits. The CFPB and AGs explicitly required Modany’s departure as a precondition to settlement. The SEC also made clear its desire for Modany’s termination, and stated that it had no interest in settlement unless Modany admitted to fraud.

28. However, it was not in Modany’s own personal interests to either step down or admit to any fraud or other misconduct – even though doing so was clearly in ITT’s best interest. Specifically, Modany was eligible for ITT’s Senior Executive Severance Plan, which provided Modany with a handsome severance payment if certain conditions were met, one of which was that Modany not be terminated for cause. Modany was also concerned with the damage to his reputation and future employment prospects if he admitted to fraud or was forced to resign as ITT’s CEO.

29. So, rather than stepping down, admitting to fraud, or addressing other issues identified in ACICS’s Show-Cause Letter like the need for a comprehensive teach-out agreement, Modany downplayed the risk of de-accreditation and pushed the Board to pursue a sale of the Company or its assets, but only on terms that were beneficial to Modany, personally. The Board held a meeting on April 25, 2016 at which Modany spoke about receipt of the ACICS Show-Cause Letter and said that he did not believe the claims in the letter, but noted that he

believed the letter increased the need to pursue a transaction as soon as possible to avoid any potential collateral consequences of ITT's receipt of the letter.

30. But here too, Modany was conflicted due to his severance agreement. ITT's Senior Executive Severance Plan, approved by the Directors, provided payments only in certain circumstances as stated in ITT's 2016 Proxy Statement: "The benefits under the Senior Executive Severance Plan are not payable merely because a change in control transaction occurs or is imminent. Instead, payment of the severance benefits is only triggered if a change in control has occurred or is imminent and certain types of termination of employment occur within certain limited time periods." The 2016 Proxy Statement makes it clear just how lucrative it would be for Modany if a strategic transaction triggered benefits under ITT's Senior Executive Severance Plan:

If benefits are triggered under the Senior Executive Severance Plan, our [CEO] would be entitled to payments under the "three times" multiplier and the other covered executives would be entitled to payments under the "two times" multiplier. Our [CEO] would also be entitled to certain benefits that would not be available to the other covered executives, including that our [CEO] would receive a tax gross[-]up payment on any excise taxes and that his severance benefits would not be limited in the event of the imposition of an excise tax. The Compensation Committee believes that our [CEO] should receive the higher multiplier and the enhanced benefits given his high level of responsibility and the substantial duties that he has with us, as well as the fact that it is common market practice for a chief executive officer to receive a higher level of severance benefits than other executive officers.

31. Thus, not only was Modany financially interested in crafting the terms of a potential sale of ITT in a manner that maximized the benefits to himself even at the expense of ITT's other constituencies (*e.g.*, its shareholders and creditors), but he also obsessed about protecting his reputational interest. He did not want to enter a strategic deal in which he would

not survive as CEO because he feared that the market would perceive him as being forced out by the SEC, AGs, the CFBP, ED or the Board.

32. So, rather than exploring strategies to maximize ITT's remaining value for the benefit of all of its stakeholders, Modany selfishly focused on securing a strategic transaction that would trigger his severance payment and provide him continued employment or some other face-saving exit.

33. In response to the ACICS Show-Cause Letter, and to prepare for a potential loss of accreditation, it was incumbent upon the Directors, consistent with their fiduciary duties, to immediately take steps to: (a) investigate whether ITT had a viable teach-out plan in place, which it did not; (b) direct management to immediately begin developing a teach-out plan; (c) supervise or monitor what steps, if any, management was taking to satisfy this requirement (d) retain a restructuring advisor; and (e) terminate Modany and put in place either a permanent or interim CEO who would have been acceptable to ED and other relevant governmental agencies. Unlike ITT's Board, the board of Daniel Webster College, a wholly-owned subsidiary of ITT with a separate board of directors, successfully negotiated a teach-out agreement with Southern New Hampshire University.

34. Also, given the potentially disastrous consequences that could result from a failure to satisfy the concerns raised in the ACICS Show-Cause Letter, it was also incumbent upon Defendants to seriously and expeditiously explore strategies to maximize ITT's remaining value for the benefit of all of its stakeholders, including exploring potential sales or other transactions that could preserve ITT as a going concern, or at least minimize the loss to ITT's stakeholders. By failing to adequately and promptly investigate and pursue such potential transactions, Defendants breached their fiduciary duties.

35. For example, during an April 24, 2016 Board meeting, ITT's management briefed the Directors on a possible transaction with U.S. Skills LLC ("U.S. Skills") and Thomas H. Lee Partners ("THL"). The Directors were advised that U.S. Skills/THL's advisors insisted on speaking to the SEC to address its pending lawsuit against ITT and Modany before signing a definitive transaction agreement. The Directors were further advised that the SEC had previously made it clear that it had no interest in a settlement, even in the context of a transaction, without both ITT and the individuals (*e.g.*, Modany) admitting to fraud. At this point, given his clear conflict of interest, Modany should have, at a minimum, recused himself from all discussions regarding the proposed U.S. Skills/THL transaction and any similar transactions in which Modany's interests potentially conflicted with those of the Company. Instead, Modany took affirmative efforts to undermine the U.S. Skills/THL offer by claiming that he had become increasingly doubtful about the seriousness of U.S. Skills/THL's offer and encouraged the Directors to cease discussions with U.S. Skills/THL. Indeed, in a subsequent email, Modany stated that: "The sooner we stop talking to these guys and wasting our time, resources and the globe's oxygen supply the better!"

36. The SEC's position created a clear conflict of interest between Modany's personal interests and those of ITT in terms of moving forward with a transaction with U.S. Skills/THL or any other transaction that contemplated an admission of guilt by Modany. At a minimum, it was incumbent upon the Directors, in furtherance of their fiduciary duties, to explore the propriety of pursuing a deal with U.S. Skills/THL or any other potential acquirer that would similarly require a resolution of the SEC action (among others) as a precondition to a transaction. In fact, given Modany's clear conflict of interest in light of the pending lawsuits against him alleging significant malfeasance in his management of ITT, the Directors should have either terminated

Modany or, at a minimum, ensured that non-conflicted members of ITT's management and/or the Directors themselves were intimately involved in all future transactions discussions with all potential deal partners. But the Directors neither terminated Modany nor took steps to preclude his interference in ITT's ability to pursue a deal with U.S. Skills/THL or other similar potential acquirers.

37. Despite the mortal threat facing ITT, the Directors were unengaged. For example, in an April 29, 2016 email to a colleague, Dean described his role as chairman of the board as quite limited: "I have been on the ITT board since 1994 and stepped in—supposedly temporarily—after the CEO was charged with civil fraud by the SEC. The CEO is still on board, *so my role is quite limited*. I spend most of my time these days in Florida" This was far from the all-hands-on-deck engagement that ITT's stakeholders could reasonably expect from the Directors during the Crisis Period.

38. Making matters worse, Modany thereafter became openly hostile to the Directors whenever they sought to engage him regarding potential transactions that could have a negative personal impact on Modany, like the U.S. Skills/THL deal. For example, on or about April 30, 2016, Odle asked Dean, as Chairman of the Board, to set up a conference call with Modany to discuss different transaction options. Dean later replied to Odle that Modany "declined the request," to which Odle responded, "John you are his boss. How does he decline your request?"

39. Upon information and belief, on or about May 12, 2016, Genki Capital inquired about acquiring ITT via a strategic transaction. ITT officer, Rocco Tarasi, forwarded the inquiry on to Modany, stating, "I'm going to ignore this unless you want otherwise." Modany replied, "I think you know the answer...wild ass fishing!" Thus, by May 2016, it appears that Modany and others in ITT's management were taking active steps to sabotage ITT's ability to secure a

transaction that could have maximized ITT's assets and minimized its liabilities. In breach of their fiduciary duty, the Directors stood idly by and allowed Modany to control the process relating to any potential transaction.

40. Rather than pursuing potential transactions with U.S. Skills/THL or Genki Capital or other similar transactions, Modany spoke with ED about a proposed deal with Dream Center Foundation ("DCF"), in which DCF would maintain control over ITT but would contract out for various services. Modany chose to pursue this transaction because DCF was willing to negotiate a side-deal with Modany that would have kept Modany involved as part of this transaction. Clearly, Modany was only interested in his own financial well-being, as evidenced by his choice of prospective deal partners for ITT.

41. While Modany was pursuing the DCF transaction with ED, ED continued to inquire about ITT's teach-out plans. For example, on June 6, 2016, ED asked Modany whether ITT had any teach-out plans and asked him to provide ED with the information provided to ACICS. ED also asked Modany whether there was a contract, memorandum of understanding, or agreement with another institution in the event an ITT program ended for whatever reason. In addition, ED issued its own letter to ITT, on June 6, 2016 (the "First ED Letter"), a copy of which is attached hereto as Exhibit B, in which ED demanded additional financial assurances from ITT due to increased financial risk to ED, Title IV funds, students, and taxpayers as a result of ACICS' action and ITT's shortcomings that gave rise to such action. ED then required ITT to increase its surety with ED by over 50% to \$123,646,182.

42. By this time, Defendants knew (or recklessly disregarded the fact) that because ITT had not secured teach-out agreements for its 40,000 active students, ED would be faced with determining whether to forgive the displaced students' federal loans and seeking their repayment

from ITT. They also knew (or recklessly disregarded the fact) that this liability could far exceed the amount of ITT's surety with ED and that, if ITT failed to secure teach-out agreements with a substantial number of its students in the coming weeks, it would incur massive liabilities. ITT's cessation of operations would require that it perform a comprehensive close-out audit for ED and inform its employees of coming lay-offs and that ITT's failure to do so would expose ITT to claims in staggering, catastrophic amounts. Nonetheless, Defendants failed to take steps to ensure that ITT had a viable teach-out plan to avoid such potentially catastrophic consequences.

43. Shortly after ITT received the First ED Letter, Defendants knew (or recklessly disregarded the fact) that ITT was not likely to continue as a going concern. For example, on June 11, 2016, Weber told Dean that "[u]nless we get a positive sign from ED, we will have to consider teaching out." In fact, Weber noted that "ED may have concluded we are dead meat. If so, they will reject all alternatives and focus on maximizing recoveries from our remaining assets." Despite the clear understanding that a teach-out needed to be pursued immediately, neither Dean nor Weber nor any of the other Defendants demanded that management do this to limit ITT's exposure.

44. On June 14, 2016, ITT received a letter of intent for a potential acquisition by Starcore Venture Group at \$2.20 per share. But Defendants refused to investigate the potential value of this offer or engage Starcore in negotiations. Instead, wholly uninformed of the potential value of this offer, the Directors deferred to Modany's recommendation to reject the transaction based on Modany's speculation that it would leave insufficient residual value for shareholders. Modany's concern about residual value for shareholders was a farce given that ITT's earnings report for the quarter ended June 30, 2016 *confirmed that ITT was insolvent*. That report showed that ITT had a negative current asset ratio and that ITT's revenue from the first two quarters fell

roughly 17% from the same period in 2015. Similarly, ITT's current cash equivalents for the first two quarters of 2016 fell approximately 40% from the same period in 2015. The report did not disclose that ITT would be unable to continue operating and that its failure to secure teach-out agreements, conduct a final close-out audit, or warn employees of coming lay-offs, all of which exposed ITT to massive liabilities.

45. Clearly, at this point, Defendants' fiduciary duties required them to maximize ITT's value for the benefit of its stakeholders, including its creditors. They knew (or recklessly disregarded the fact) that an orderly wind-down would require ED's cooperation and take many months and that by not so acting, they would be exposing ITT to otherwise avoidable catastrophic liabilities. An orderly wind-down would have allowed ITT to preserve significant enterprise value that would be lost in a freefall bankruptcy.

46. But Defendants disregarded their duties to take concrete steps to limit ITT's liabilities. Among other things, Defendants should have immediately performed a solvency analysis to determine the amount and duration of ITT's potential cash flow, and then explored all potential contingencies, including exploring:

- an orderly merger, sale or other transaction in which ITT might be able to continue as a going concern as part of another company's operations;
- an orderly and structured wind-down of ITT's operations outside of bankruptcy that would have included, *inter alia*, teach-out agreements for its tens of thousands of students, orderly compliance with all applicable rules and regulations regarding the disposition of student records, and a plan to lay off employees and close facilities in compliance with all applicable laws; and/or
- a Chapter 11 bankruptcy filing, coupled with a teach-out program, consistent with the model successfully implemented by Corinthian.

47. The Directors also acquiesced to Modany's refusal to hire a restructuring specialist, whose services would have been vital to the above analyses. On July 5, 2016,

restructuring specialist, FTI Consulting, reached out to Cohen offering to provide advice, but Modany refused to retain FTI or any other restructuring professional. On July 22, 2016, Odle passed on information about restructuring consultants, Alvarez & Marsal (“A&M”), to Dean, who replied that: “We have what I believe are major developments, so I think we are reaching something of a tipping point.” Dean then forwarded part of the email, not including the “tipping point” statement, to Modany saying that he had no plans to contact A&M. The Directors should have insisted that management hire FTI, A&M, or another firm capable of helping preserve as much value from ITT as possible. Instead, they again did nothing.

48. On July 23, 2016, Modany told Dean what was obvious: namely, that “[p]ressure from ED is materially intensifying...they seem to be looking in every nook and cranny for a reason to do something . . . we are weeks away from a material event . . . which I hope is a public announcement of an executed agmt [with a potential acquirer] but could be ED realizing we figured out a way to pay the surety so they now need to come up w/a plan to put the death nail in the coffin...once and for all!” Dean and Modany thus knew that ITT’s death spiral was gaining ineluctable momentum.

49. But rather than pursuing ITT’s best interests, Modany was only interested in maximizing his severance. Indeed, the very next day, on July 24, 2016, Modany told Morgan that “we are tracking towards a \$0.00 executive bonus. Without settlement of one or more of the legal/regulatory matters, I don’t think we have a chance to get much of anything...Pending what happens, these executives may not see any type of ‘change of control’ payout, which would typically be the case when a transaction is executed. I don’t think we would be talking about more than a couple million (probably less)...I can have a conversation with Towers and...potentially put a little more meat on the bone for something to seriously consider.”

50. On August 15, 2016, A&M again contacted Dean, who told A&M to direct all future communications to Modany. Dean told Modany that unless Modany suggested otherwise, he would decline A&M's offer to assist in restructuring. Modany responded by describing Odle's decision to contact A&M as "dysfunctional."

51. On August 17, 2016, due to ongoing failure to comply with applicable accreditation requirements, ACICS notified ITT that it would remain on "Show-Cause" status. The cited noncompliance included deficiencies with respect to the following standards:

- The "minimal eligibility requirements" for "compliance with all applicable laws and regulations";
- Requirements for student achievement, as measured by retention, placement, and licensure passage rate;
- Institutional integrity, as manifest in the efficiency and effectiveness of its overall administration of the institution;
- Financial stability, including having adequate revenues and assets to meet its responsibilities;
- Administrative capacity, including overall management and record-keeping;
- ACICS admissions and recruitment standards; and
- Federal and state student financial aid administration requirements.

52. On August 25, 2016, the feared but clearly foreseeable happened: ITT received a final letter from ED, which Modany described it as "the nuclear bomb" (the "Final ED Letter"), a copy of which is attached as Exhibit C. As a result of ITT's continued noncompliance with applicable laws, regulations, and other requirements, the Final ED Letter set forth additional requirements as a condition to ITT's continued participation in Title IV programs, including:

- Increase its surety on file from \$94,353,980 to \$247,292,364 within 30 days after the date of the letter (*i.e.*, an additional \$152,938,654—more than 150%);

- Comply with Title IV’s Heightened Cash Monitoring 2 (HCM2) payment method, as described in 34 C.F.R. § 668.162(e);
- Continue to be required to provide certain information to ED no later than 10 days after the occurrence of certain oversight or financial events;
- Not enroll or begin classes for any new students receiving Title IV funds at ITT schools in Indianapolis, IN, and Spokane Valley, WA; and
- Refrain from issuing payments, raises, or retention payments to any of its Management or Directors, nor pay special dividends, nor make any expenditures out of the ordinary course of business and consistent with prior practice, without separate approval from ED.

53. Only after receiving the Final ED Letter did Defendants even attempt to secure bankruptcy counsel. And even then, Modany enlisted Dean’s help in preventing the other Directors from “meddling” with ITT’s operations. On August 28, 2016, Modany emailed Dean, seeking his and Brown’s help “in avoiding the almost certain distractions from Jerry [Cohen] and possibly Sam [Odle]” and to “block any suggested efforts that are not necessary or helpful” to Modany’s management. Dean responded:

I would defer to you on that. . . . I fully agree with you that we can’t have multiple chefs in the kitchen. Thus, once the board decides to ask you and other key, specified executives to stay, the board will need to work in support of them rather than second guessing them. . . . I believe our current situation suggests that you have increased board awareness—that is why I suggested you might want to have one or two directors sit in, as listeners, on some of the calls. We are in a changed circumstance and if we have a surprise—say a criminal charge against you—we will want to be prepared for that highly unlikely event.

54. Dean then ended the email by reiterating his deference to Modany: “Before you get unhappy with anything in this email, note again the first sentence. I defer to you.” While such personal fidelity may be admirable in some circumstances, the Directors’ repeated and unquestioned abdication to Modany amounts to serious breaches of their fiduciary duties.

55. While Modany had been supporting the DCF deal when he had the hopes of a side deal with DCF, that all changed when DCF – working with ED – changed the deal terms in a manner that no longer profited Modany. On August 26, 2016, Jahm Najafi called Modany to inform him that “DCF wanted to put in a new CEO.” DCF prepared a draft application to ED, which it sent to ITT. In the application, DCF had added certain provisions that, based on its discussions with ED, DCF thought were “needed to get ED to roll back the [sanctions] . . . that threaten the ability of ITT to operate much longer.” These provisions included immediately changing ITT’s current management, allowing DCF executives to help manage ITT until the transaction closed, prohibiting any dividends, bonuses, raises, or severance or other payments to ITT’s management and directors, and accepting the appointment of a monitor. These were all common-sense measures that Defendants should have implemented months earlier. Although it was in ITT’s best interests to do whatever it took to appease ED, including changing management, Modany bristled at DCF’s recommendation and responded to DCF’s counsel by rejecting the proposal out of hand:

DCF can agree to do whatever they want post acquisition but ITT isn’t agreeing to do anything that was suggested in your summary.

-change Management

-give ED authority over our compensation (they don’t have it regardless of what they claim)

-accept a monitor

-etc, etc, etc

Of course you can do all of these things and you can commit to doing all of them as the new owners of the company post transaction so I don’t think our position in any way impacts your ability to deliver to ED whatever it is you speculate will improve your chances for approval.

The issue is that ITT isn’t going to do these things pre acquisition

56. Modany later clarified that his email reflected the Board's position and the Directors did not dispute this. While this transaction could have provided value to ITT, the Directors breached their fiduciary duties by allowing Modany to sabotage it based on his self-serving refusal to consider a change in management (*i.e.*, his removal as CEO) and ED controls over compensation to management. The Directors knew that Modany's desire to protect his employment status and compensation was impairing ITT's efforts to close a deal, but they nonetheless refused to intervene, even though they had the authority to replace Modany at any point in time.

57. In late August 2016, Modany finally capitulated to ITT's retention of bankruptcy counsel. Even then, Modany told Dean that if Cohen (who had questioned Modany's choice of counsel) was going to lead the bankruptcy process, he would consider it his termination. Incredibly, Dean apologized to Modany and let him know that the Board supported Modany and wanted him to stay. Morgan commented to Dean, "I trust him." Modany advised Dean that if the Board consensus is to support this approach of second-guessing management, he would view such a decision as commensurate with a request for a change in leadership. After some discussion, Brown and Morgan offered their support of Modany. Dean went so far as to state that "I would suggest that our sense of urgency precludes director participation in the interviews."

58. Instead of filing an orderly Chapter 11 liquidation with a teach-out program – similar to what Corinthian had done—on September 16, 2016, ITT simply ceased operations and commenced bankruptcy proceedings by filing voluntary Chapter 7 petitions in the Bankruptcy Court for the Southern District of Indiana, Indianapolis Division.

59. The manner in which Defendants caused ITT to file for bankruptcy created significant additional and unnecessary liability for ITT. Among other things, Defendants failed to

follow state law requirements to have ITT provide copies of student records to the applicable state agencies, resulting in seven-figure litigation costs to resolve this issue after the fact. In addition, the failure to proceed with an orderly wind down resulted in the Trustee paying millions of dollars in unnecessary rent on property leased by ITT while she had to pack up and store ITT assets remaining in those locations, including copies of vital student records.

60. In short, Defendants breaches of their fiduciary duties by letting ITT crater in a freefall bankruptcy with claims against the Debtors' estates in the billions.

First Claim for Relief

(Breach of Fiduciary Duties of Loyalty, Care, and Good Faith)

61. Plaintiff realleges and incorporates by reference each of the previous allegations.

62. By reason of their positions as officers and directors of ITT, each of the Defendants owed ITT and its stakeholders fiduciary duties of loyalty, care, and good faith. Defendants were required to inform themselves fully before making any business decisions and to act in the best interests of ITT and its stakeholders at all times. The Directors were also required, but failed, to exercise reasonable and prudent supervision over ITT's management, policies, practices, and controls of financial affairs, and to use their utmost ability to control and manage ITT in a fair, just, honest, and equitable manner. The Directors' sustained and systemic failure to exercise reasonable oversight over Modany and other management was a breach of their fiduciary duties.

63. Despite full knowledge of the hostile regulatory environment and the potential dire consequences confronting ITT, from the beginning of the Crisis Period, and at each step along the way, Defendants failed to exercise their duties of loyalty, care, and good faith.

64. Defendants' actions and inaction not only prevented ITT from satisfying the conditions and concerns raised by ED and ACICS, but predictably and inevitably magnified the eventual losses to all ITT stakeholders when ITT's bankruptcy petition was filed.

65. Among other things, the Directors breached their fiduciary duties to ITT by:

- abdicating crucial decision-making authority to Modany to negotiate with ED, ACICS, and potential transaction partners despite knowing that Modany was conflicted and could not be trusted to place ITT's interests above his own personal interests given, among other things, his desire to retain control of ITT and obvious incentive to maintain the benefits of his substantial compensation package;
- retaining Modany against ITT's best interests and the wishes of ED, ACICS, regulators, state attorneys general, and potential transaction partners;
- chronically failing to exercise reasonable oversight over Modany and other management throughout the Crisis Period;
- failing to independently investigate ITT's financial condition and ability to continue operations and ignoring evidence of ITT's insolvency;
- intentionally disregarding their responsibilities by knowingly failing to investigate, secure, or make informed decisions regarding an orderly merger, sale, or other transaction to maximize ITT's value for its constituents, including a transaction that might not be in Modany's personal interest (e.g., a transaction involving his termination, a reduction in his compensation, and/or settlement of pending claims against ITT in a manner adverse to him); and
- intentionally disregarding their responsibilities by knowingly failing to investigate, secure, or make informed decisions regarding an orderly wind down of ITT's operations either inside or outside of bankruptcy that would have maximized the value of ITT's remaining assets for its shareholders and minimized potential claims against ITT, including ensuring that ITT had in place a program for the teach-out of its current student body, complying with all applicable rules and regulations regarding the disposition of student records, and complying with all applicable employment laws.

66. As for Modany, in light of the intense and increasing negative publicity, including publicly-disclosed lawsuits relating to him individually, Modany should have diligently pursued the above steps to benefit ITT, and if he was unable or unwilling to do so given the clear conflict

of interest between his own interest in protecting his reputation, job and compensation package, and that of the Company, he should have either recused himself from all decisions in which he had a personal conflict or stepped down as CEO and left the Company. By failing to take any of these necessary actions, Modany breached his fiduciary duties to ITT.

67. As a direct and proximate result of the wrongful acts, omissions and breaches of duty alleged herein, ITT has been damaged in amount subject to proof at trial, but in any event no less than \$250,000,000. Defendants should also be ordered to disgorge all compensation they received by reason of their roles as Officers and Directors of ITT.

Second Claim for Relief
(Equitable subordination of Kevin Modany's
creditor claims under 11 U.S.C. §§ 510(c), and 105(a))

68. Plaintiff realleges and incorporates by reference each of the previous allegations.

69. On November 16, 2016, Modany filed a proof of claim asserting an unsecured creditor claim in ITT's liquidation seeking \$5,008,199.00, or alternatively, not less than \$3,360,199.00 under his severance plan. *See* Claim No. 846. Modany amended this claim on January 30, 2017 to, among other things, seek indemnification or any other rights Modany is entitled to under ITT's by-laws. *See* Claim No. 2452. Modany's two proofs of claims (the "Claims") are attached as Exhibit D.

70. Modany is an insider of ITT due to his position as ITT's CEO.

71. As described in this complaint, Modany engaged in inequitable conduct by willfully breaching his fiduciary duties to ITT. Modany's breaches of fiduciary duty directly injured ITT's creditors in that Modany's breaches of fiduciary duty directly reduced ITT's enterprise value and saddled ITT's bankruptcy estate with unnecessary liabilities.

72. Equity dictates that, under Sections 510(c) and 105(a) of the Bankruptcy Code, Modany's Claims should be subordinated to the claims of all of ITT's other unsecured creditors.

73. Subordination of Modany's Claims is not inconsistent with the Bankruptcy Code.

Prayer for Relief

WHEREFORE, Plaintiff demands judgment as follows:

A. Against Defendants and in favor of the Plaintiff for the amount of damages sustained by ITT as a result of Defendants' breaches of their fiduciary duties, but in any event no less than \$250,000,000.

B. Requiring Defendants to disgorge all compensation they received by reason of their roles as Officers and Directors of ITT;

C. Equitably subordinating Defendant Modany's Claims (Nos. 846 and 2452) to the claims of all of ITT's other unsecured creditors.

D. Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

E. Granting such other and further relief as the Court deems just and proper.

Dated: May 31, 2018

Respectfully submitted,

/s/ John C. Hoard

John C. Hoard

Ronald J. Schutz (admitted *pro hoc vice*)
Carly A. Kessler (*pro hoc vice* application to
be filed)

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Co-counsel to the Trustee

-and-

Michael A. Collyard (admitted *pro hoc vice*)
Richard B. Allyn (*pro hoc vice* application to
be filed)

Thomas F. Berndt (*pro hoc vice* application to
be filed)

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Facsimile: (612) 339-4181

Co-counsel to the Trustee

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of any and all issues in this action triable by right of jury

Dated: May 31, 2018

Respectfully submitted,

/s/ John C. Hoard

John C. Hoard

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Carly A. Kessler (*pro hoc vice* application to
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Co-counsel to the Trustee

EXHIBIT A



April 20, 2016

VIA E-MAIL AND OVERNIGHT DELIVERY

Mr. Kevin Modany
President and CEO
ITT Educational Services, Inc.
13000 North Meridian Street
Carmel, IN 46032

kmodany@ittesi.com

Dear Mr. Modany:

ITT TECHNICAL INSTITUTE, INDIANAPOLIS, IN
ITT TECHNICAL INSTITUTE, SPOKANE VALLEY, WA

ID CODE 00016040(MC)
ID CODE 00016074(MC)

Subject: Show-Cause Directive Letter

The Council, at its recent meeting, reviewed the responses provided by ITT Educational Services, Inc. (ITT) to multiple sources of adverse information since 2014 regarding a variety of financial and regulatory issues confronting the institutions. As a result of this review, the Council found the following based on the *Accreditation Criteria*:

- The nature of the adverse information and ITT's responses to Council requests for information call into question the institutions' administrative capacity, organizational integrity, financial viability and ability to serve students in a manner that complies with ACICS standards (Sections 1-2-100(f), 3-1-202(a), 3-1-203, 3-1-300, 3-1-410, and 3-1-434)

Specifically, the Council reviewed information from a variety of sources and the institutions' responses in connection with the following items:

- Unresolved civil investigative demands from the attorneys general of Arkansas, Arizona, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Pennsylvania, Tennessee, Washington and the District of Columbia under the authority of state consumer protection statutes regarding ITT's marketing and advertising; recruitment; financial aid; academic advising; career services; admissions practices; programs; licensure exam pass rates; accreditation; student retention; graduation rates; and job placement performance.

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- Unresolved litigation and investigations by the Consumer Financial Protection Bureau, the Securities Exchange Commission and the U.S. Department of Justice for a variety of issues related to the institution's student lending practices and misrepresentations to investors and an alleged violation of the federal False Claims Act.
- The on-going status of ITT's participation in the Federal Student Aid program (Title IV), including the financial implications of the Heightened Cash Monitoring conditions applied to the institutions' access to funds.
- The insufficiency of ITT's response to public and widely-known allegations regarding the quality of instructional materials.
- ITT's failure to comply with the Council directive to develop and submit a plan that provides for the continuation and completion of all students currently enrolled in the event that the institution elects to curtail or suspend operations.

Council Action

Based on its review, the Council determined that the institutions have not demonstrated compliance with the *Accreditation Criteria*. Therefore, the Council directed the institutions, defined as the main campuses and their respective branches, to show cause at the next Council meeting why its current grants of accreditation should not be withdrawn by suspension or otherwise conditioned.

The Council has directed that ITT appear before the Council **in person** at the August 2016 meeting. There is a \$5,000 fee for personal appearances before the Council. This fee is due within ten days of receipt of this notice.

In response to the directive, ITT must submit the following information by **June 15, 2016**:

- Evidence that ITT has investigated and remedied, across the system, any operational or procedural deficiencies regarding compliance with state consumer protection statutes of its marketing, advertising, recruitment and admissions, academic advising and career services activities.
- Evidence that ITT has investigated and remedied any operational or procedural deficiencies, across the system, regarding instructional resources of insufficient quality.

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- Evidence that ITT has reviewed and remedied any policy or procedural issues derived from the collection, analysis, reporting and public disclosures of data regarding retention, placement, and graduation rates.
- A full description of the depth and breadth of ITT's efforts to resolve litigation and investigations by the Consumer Financial Protection Bureau regarding the lending practices of the institution.
- A full description of the depth and breadth of the ITT's efforts to resolve of investigations by the Securities and Exchange Commission regarding representations made to investors by ITT senior management.
- A full description of the resolution of the False Claims Act action brought by the U.S. Department of Justice regarding disbursements of public funds made to the institution.
- Evidence that ITT has reviewed and resolved the administrative issues that led to a late financial audit submittal to the U.S. Department of Education and restricted access to cash.
- A full description of the depth and breadth of ITT's efforts to generate enrollment demand sufficient to maintain its financial stability and sustain its current operations.
- The institutions are directed to submit to the Council office a plan for the continued operations of its campuses that includes:
 - a. A listing, by campus, of students with the student name; program of study; and expected graduation date.
 - b. An aggregate total, by campus, of the status of unearned tuition, status of refunds due, and current student account balances.
 - c. A listing, by campus including all online activity, of comparable programs offered at other institutions in case teach-out agreements or transfer arrangements are needed for students to complete their programs elsewhere.
 - d. A custodian for all permanent academic records in case of closure that includes contact information for this individual or entity and the process by which students can obtain their records.
 - e. A description of the financial resources available to ensure that students can complete their programs or receive refunds in the event that the institution does suspend or cease operations.

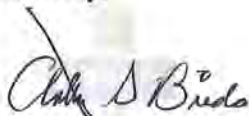
Mr. Kevin Modany
April 20, 2016
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Please submit eight hard copies of your response and one electronic copy via flash drive(s) by the date indicated above. Following submission and review of the institutions' response, ACICS may conduct a special visit to the institutions. Failure to provide all information requested by the Council may result in the withdrawal of your institutions' grants of accreditation.

The Council is obligated to take adverse action against any institution that fails to come into compliance with the *Accreditation Criteria* within established time frames without good cause. Please consult the Introduction of Title II, Chapter 3 for additional information.

Your immediate attention to this matter is required. If you have any questions, please contact me at (202) 336-6781 or abieda@acics.org.

Sincerely,



Anthony S. Bieda
Executive in Charge

c: ITT Technical Services, Inc.: RegulatoryAAC@itt-tech.edu
ITT Technical Institute, Indianapolis, IN: Regulatory011@itt-tech.edu
ITT Technical Institute, Spokane Valley, WA: Regulatory051@itt-tech.edu
U.S. Department of Education: aslrecordsmanager@ed.gov
Atlanta School Participation Division- Region IV: christopher.miller@ed.gov
Boston/New York School Participation Team- Region I & II: Betty.coughlin@ed.gov
Chicago/Denver School Participation Team- Region V & VIII: douglas.parrott@ed.gov
Chicago/Denver School Participation Team- Region V & VIII: Kerry.O'Brien@ed.gov
Dallas School Participation Team- Region VI: cynthia.thornton@ed.gov
Kansas City School Participation Team- Region VII: ralph.lobosco@ed.gov
Philadelphia School Participation Team- Region III: Nancy.paula.gifford@ed.gov
San Francisco/Seattle School Participation Team- Region IX: martina.fernandez-rosario@ed.gov
Alabama Department of Postsecondary Education: amcgrady@dpe.edu
Arizona State Board For Private Postsecondary Education: teri.stanfill@azppse.gov
Arkansas State Board of Private Career Education: brenda.germann@arkansas.gov
California Bureau For Private Postsecondary Education: Leeza.Rifredi@dca.ca.gov
Colorado Department of Higher Education: lorna.candler@dhe.state.co.us
Commission On Postsecondary Education (Nevada): kdwuest@cpe.state.nv.us
Florida Department of Education: Susan.Hood@fldoe.org

Mr. Kevin Modany
April 20, 2016
Page 5

Georgia Nonpublic Postsecondary Education Commission: billc@npec.state.ga.us
Idaho State Board of Education: valerie.fenske@osbe.idaho.gov
Illinois Board of Higher Education: campbell@ibhe.org
Indiana Commission On Proprietary Education: rmiller@che.in.gov
Iowa College Student Aid Commission: Carolyn.small@iowa.gov
Kansas Board of Regents: jjohnson@ksbor.org
Kansas Board of Regents: cpuderbaugh@ksbor.org
Kentucky Council On Postsecondary Education: aaron.thompson@ky.gov
Maryland State Board of Nursing: marykay.goetter@maryland.gov
Massachusetts Division of Professional Licensure:
occupational.schools@MassMail.State.MA.US
Michigan Department of Licensing and Regulatory Affairs: beamishm@michigan.gov
Minnesota Office of Higher Education: betsy.talbot@state.mn.us
Mississippi Commission of Proprietary School and College Registration:
kverneuille@mccb.edu
Missouri Department of Higher Education: leroy.wade@dhe.mo.gov
Nebraska Department of Education: brad.dirksen@nebraska.gov
New Mexico Higher Education Department: Diane.Vigil@state.nm.us
New York State Education Department: carole.yates@nysed.gov
NJ Department of Labor and Workforce Development:
trainingevaluationunit@dol.state.nj.us
North Carolina Community College System: corls@ncccommunitycolleges.edu
Ohio State Board of Career Colleges and Schools: john.ware@scr.state.oh.us
Oklahoma Board of Private Vocational Schools: nhouse@obpvs.ok.gov
Oklahoma Career and Technology Education Board of Education:
Robert.Sommers@okcareertech.org
Oregon Office of Degree Authorization: hilda.rosselli@state.or.us;
helen.dunford@state.or.us; alethia.miller@state.or.us
Pennsylvania Division of Private Licensed Schools: plandis@pa.gov
South Carolina Commission On Higher Education: lgoodwin@che.sc.gov
State Council of Higher Education For Virginia: sylviarosacasanova@schev.edu
Tennessee Higher Education Commission: julie.woodruff@tn.gov
Texas Higher Education Coordinating Board: cathie.maeyaert@thecb.state.tx.us
Texas Workforce Commission: michael.delong@twc.state.tx.us
Utah Dept. of Commerce: mwinegar@utah.gov
Utah Dept. of Commerce: egaleria@utah.gov
Washington Student Achievement Council: michaelb@wsac.wa.gov
Wisconsin Educational Approval Board: David.Dies@eab.wisconsin.gov
Wisconsin Educational Approval Board: Linda.Heidtman@eab.wisconsin.gov
Dr. Joseph Gurubatham, ACICS Executive Vice President: jgurubatham@acics.org

EXHIBIT B



June 06, 2016

Kevin M. Modany, CEO
ITT Educational Services, Inc.
13000 North Meridian Street
Indianapolis, IN 46032-1404

RE: Provisional/LOC Alternative
OPE IDs: 00473100 – Daniel Webster College
00732900 – ITT Technical Institute
03071800 – ITT Technical Institute

Dear Mr. Modany:

On August 19, 2014 ITT Educational Services, Inc., (ITT) was cited by letter from the Department of Education (Department) for late submission of its annual compliance audits and financial statements. As a result of this past performance failure and the requirements of 34 C.F.R. §668.175(f), the Department required ITT to participate in the Title IV, HEA programs under a Provisional Program Participation Agreement (PPPA) for three award years.

In accordance with the Zone Alternative Reporting Requirements, ITT must notify the Department by certified mail or electronic or facsimile transmission no later than 10 days after any adverse action, including probation or similar action, taken against the Institution by its accrediting agency, state authorizing agencies or other federal agency.

On April 22, 2016 the Department received notification that ITT Technical Institutes in Indianapolis, IN and Spokane Valley, WA received a Show-Cause Directive Letter dated April 20, 2016 from the Accrediting Council for Independent Colleges and Schools (ACICS).

ACICS' letter stated that a number of actions called into question ITT's administrative capacity, organizational integrity, financial viability and ability to serve students in a manner that complies with ACICS standards. Specifically:

- Civil investigative demands from 19 State Attorney General Offices, regarding: ITT's marketing and advertising; recruitment; financial aid; academic advising; career services; admissions practices; programs; licensure exam pass rates; accreditation; student retention; graduation rates; and job placement performance are still unresolved.
- Litigation and investigations by three federal agencies, for a variety of issues related to the institution's student lending practices and misrepresentations to investors and alleged violation of the federal False Claims Act are still unresolved.

Federal Student Aid

AN OFFICE of the U.S. DEPARTMENT of EDUCATION

Federal Student Aid, Multi-Regional and Foreign School Participation Division
400 First Street NE, Olson Center Plaza, 7th Floor, Washington, DC 20002-5140
www.federalstudentaid.ed.gov

ITT Educational Services, Inc.
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- ITT continues to participate in the Title IV, HEA programs under the Heighted Cash Monitoring conditions applied to the institutions' access to funds, with the attendant financial implications.
- ITT's response to public and widely-known allegations regarding the quality of instructional materials has been insufficient.
- ITT's has failed to comply with an ACICS directive to develop and submit a plan that provides for the continuation and completion of all students currently enrolled in the event that the institutions curtail or suspend operations.

The Department believes that the ACICS "Council" action represents an increased risk to Title IV funds that ITT administers on behalf of its students. ITT's failure to demonstrate compliance with the Accreditation Criteria, within the time period specified by the accreditor, may result in the accreditor's taking an adverse action with respect to the school's accredited status, including by Probation, a "Withholding" Action, or a "Withdrawal" Action. We note that this concern from ACICS comes at a point where the company's financial performance is also being questioned, and that discussions about a potential sale have fallen through. If any of the actions are imposed on ITT because the institution is unable to demonstrate that it consistently operates in accordance with the Accreditation Criteria, the risk of loss of accreditation may result in the institution's losing students and the loss of accreditation would result in the loss of its Title IV eligibility.

The purpose of a Letter of Credit (LOC) is to allow for meeting liabilities that would be owed should the institution precipitously close or terminate classes at other than the end of an academic period. The LOC assures the Secretary that funds would be available from which to make refunds, provide teach-out facilities, and meet institutional obligations to the Department. Due to this increased risk of the ACICS, the Department has determined the surety on file must be increased from \$79,707,879 to \$123,646,182.

ITT must also continue to comply with the zone alternative requirements currently in effect. Specifically:

1) **Method of Payment** – ITT is required to make disbursements to eligible students and parents under the cash monitoring described under 34 C.F.R. § 668.162(e).

Under the Heightened Cash Monitoring 1 (HCM1) payment method, as required by 34 C.F.R. § 668.162(e), the Institution must first make disbursements to eligible students and parents before it requests or receives funds for the amount of those disbursements from the Department. This "Records First" requirement is fully described in the 2013-2014 Funding Authorization and Disbursement Information eAnnouncement, issued March 15, 2013. The funding request may not exceed the amount of the actual disbursements that were made to the students and parents included in the funding request. Provided the student accounts are credited before the funding requests are initiated, the Institution is permitted to draw down funds through the Department's electronic system for grants management and payments, G5, for the amount of disbursements it made to eligible students and parents.

The Records First requirement also means that institutions on HCM1 that are participating in the Direct Loan (DL) program will have their Current Funding Level (CFL) reduced to the greater of Net Approved and Posted Disbursements (NAPD) or Net Draws (processed payments less all refunds, returns, offsets, and drawdown adjustments). In the event of returning to Advanced

ITT Educational Services, Inc.
Page 3 of 6

Funded status, the institution will be expected to continue processing DL awards as Records First until the next DL global funding increase is processed.

Refer to the following eAnnouncement,
<http://ifap.ed.gov/cannouncements/attachments/031513AttachImportantReminders1314FundingAu>
[thandDisbursInfo.pdf](http://ifap.ed.gov/cannouncements/attachments/031513AttachImportantReminders1314FundingAu), for additional information about the Records First requirement.

2) Notification Requirements – ITT is required to provide information to the Department by certified mail or electronic or facsimile transmission no later than 10 days after any of the oversight or financial events, as described below, occur. ITT must also include with the information it submits, written notice that details the circumstances surrounding the event(s) and, if necessary, what steps it has taken or plans to take, to resolve the issue.

- Any adverse action, including probation or similar action, taken against the Institution by its accrediting agency, State authorizing agencies or other Federal agency;
- Any event that causes the Institution, or related entity as defined in the Statement of Financial Accounting Standards (SFAS) 57, to realize any liability that was noted as a contingent liability in the Institution's or related entity's most recent audited financial statements;
- Any violation by the Institution of any loan agreement;
- Any failure of the Institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations;
- Any withdrawal of owner's equity/net assets from the Institution by any means, including by declaring a dividend; or
- Any extraordinary losses as defined in accordance with Accounting Principles Board (APB) Opinion No. 30
- Any filing of a petition by the Institution for relief in bankruptcy court.

Additional Reporting Requirements – Under the Zone Alternative, In order for the Department to monitor ITT's progress in improving the Institution's financial stability, ITT must continue to provide the following information about its current operations and future plans within the timeframe outlined in the Departments May 20, 2015, June 08, 2015, and October 19, 2015 letters:

- A Biweekly Report of ITT's 13 Week Projected Cash Flow Statement with financial disclosure notes;
- Cash Management and Disbursement Certification Forms regarding Title IV, HEA funds administered and drawn by ITT on behalf of its students.
- Monthly Student Roster and Disbursement Report;
- Reconciliation Report of all Title IV funds drawn as of the last day of the month proceeding the month before the submission date;
- Description of any conditions that have been established by any bank or other entity that are related to ITT's participation in the Title IV HEA programs;
- List of all individuals who have the authority to direct or otherwise control the payment of any "refund[s] of unearned institutional charges" to the Department;

ITT Educational Services, Inc.
Page 4 of 6

Please refer to the Departments May 20, 2015, June 08, 2015, and October 19, 2015 letters, and any other modifications provided under a separate cover (ex: Emails) for detailed submission requirements (timeframe, formatting, etc.) for the above listed additional reporting documents.

Please continue to submit the additional reporting documents to the designated contact(s) outlined in the Departments May 20, 2015, June 08, 2015, and October 19, 2015.

Documents containing Personally Identifiable Information (PII) being submitted to the Department via electronic mail must be password protected. PII is any information about a student which can be used to distinguish or trace the student's identity (some examples are name, social security number, date and place of number, special character).

If ITT fails to continue to provide the information requested, the Department will be unable to determine if the financial responsibility standards have been met. Therefore, ITT may be referred to the Administrative Actions and Appeals Service Group for administrative action.

Surety Requirements

The increased surety is necessary in the event that the Institution would close or terminate classes at other than the end of an academic period. It assures the Secretary that funds would be available from which to make refunds provide teach-out facilities and meet institutional obligations to the Department.

Our records indicate that ITT already has surety on file in a Federal Holding Account with the Department for \$79,707,879 until November 04, 2019. ITT may provide the increased amount by Federal Wire Transfer, or can provide a new LOC in the amount of \$43,938,303. ITT should advise the Department within 10 days of its receipt of this letter whether it will increase the funds maintained in the Department's Federal Holding Account, or provide a letter of credit for that additional amount. The increased surety must be provided under either option within 45 days from the date of this letter.

A sample irrevocable letter of credit is enclosed for ITT to use if it chooses that option. The ITT letter of credit must be issued by a United States bank. Your lending institution must use this format on its letterhead with no deviation in the language contained therein. The letter of credit must provide coverage until November 04, 2019. Please note that if ITT fails to provide the irrevocable letter of credit within 45 calendar days the institution may be referred to the Department's Administrative Actions and Appeals Service Group (AAASG) office for termination and/or other administrative action under 34 C.F.R. § 668.86. Also, note that information regarding the financial analysis score, results, and the LOC is subject to the Freedom of Information Act (FOIA) of 1966, as amended.

Please mail the irrevocable letter of credit to the following address:

Veronica Pickett, Director
Performance Improvement and Procedures Service Group
U.S. Department of Education
Federal Student Aid/Program Compliance
830 First Street, NE, UCP3, MS 5435

ITT Educational Services, Inc.
Page 5 of 6

Washington, DC 20002-8019

ITT is required to notify the SPD within 3 calendar days, in the event the LOC issuing institution should fail, resulting in financial transactions and operations being administered by the Federal Deposit Insurance Corporation. ITT will also be required to submit a new replacement LOC issued by a different and non-failed U.S. bank, within 75 calendar days.

If you have any questions regarding the financial responsibility determination, or disagree with the reason or methodology used for this determination, please contact Tiffany Hill, Financial Analyst, within 10 calendar days at (202) 377-4225.

Sincerely,



Michael J. Frola
Director, Multi-Regional and Foreign Schools Participation Division

Enclosures: Sample Letter of Credit
Federal Wire Transfer Instructions
The Departments August 19, 2014 Letter to ITT
The Departments August 21, 2014 Letter to ITT
The Departments May 20, 2015 Letter to ITT
The Departments June 08, 2015 Letter to ITT
The Departments October 19, 2015 Letter to ITT
The Departments December 10, 2015 Letter to ITT

cc: Kevin M. Modany, Chief Executive Officer (kmodany@ittesi.com)
Daniel M. Fitzpatrick, Chief Financial Officer (dfitzpatrick@ittesi.com)
Michael E. Diffily, Daniel Webster College President (diffily@dwc.edu)
New England Association of Schools and Colleges – CHE (Higher Education)
Accrediting Council for Independent Colleges and Schools
WA Student Achievement
Texas Work Force Commission
PA Division of Private License Schools, Bureau of Postsecondary Services
PA Division of Program Approval Bureau of Academic Programs
AL Commission on Higher Education
Arkansas Department of Higher Education
Colorado Commission on Higher Education
Commission for Independent Education – Florida Department of Education
ID State Board of Education
MO Coordinating Board for Higher Education
TX Higher Education Coordinating Board
Maryland Higher Education Commission
WV Council for Community and Technical College Education
State Council of Higher Education for Virginia

ITT Educational Services, Inc.
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Minnesota Office of Higher Education
NM Higher Education Department
AL Department of Postsecondary Education
AZ State Board for Private Postsecondary Education
NE Department of Education
SC Commission on Higher Education
OH Board of Regents
CA Bureau for Private Postsecondary Education
MA Department of Higher Education (formerly MA Board of Higher Edu)
Michigan Department of Labor & Economic Growth
Louisiana State Board of Regents
Iowa College Student Aid Commission
NY The State Education Department, Office of Higher Education
NV Commission on Postsecondary Education
Oregon Student Assistance Commission Office of Degree Authorization
KY Council on Postsecondary Education
Tennessee Higher Education Commission
GA Non-Public Postsecondary Education Commission
The Board of Governors of the University of NC
WI Educational Approval Board
UT System of Higher Education
MS Commission on Proprietary School & College Registration
Ohio State Board of Career Colleges and Schools
Oklahoma State Regents for Higher Education
Illinois Board of Higher Education
KS Board of Regents
NJ Commission on Higher Education
Indiana Commission for Higher Education Board for Proprietary Education
NH Dept. of Education, Division of Higher Education

IRREVOCABLE LETTER OF CREDIT

<Insert name, address and telephone number of issuing bank>

To beneficiary:

U.S. Department of Education
ATTN: Veronica Pickett, Director
Performance Improvement and Procedures
Federal Student Aid/Program Compliance
830 First Street, NE, UCP3, MS 5435
Washington, DC 20002-8019

Date: <Insert Date LOC Issued>

Amount: \$ <Insert U.S. Dollar amount>

Expiration Date: <Insert Date>

Dear Sir/Madam:

We hereby establish our Irrevocable Letter of Credit Number <Insert LOC Number> in your favor for the account of:

<Insert Name and Address of Institution>

OPE-ID #: <Insert 8 digit Office of Postsecondary Education ID number>

Hereafter, <Insert Name of Institution> ("Institution"), presents, in the amount of \$<Insert Dollar Amount> (U.S. dollars), available by your draft (or drafts drawn on us) at sight accompanied by:

- a) the original of this letter of credit instrument (along with originals of all amendments), and
- b) a statement signed by the Secretary ("Secretary"), U.S. Department of Education ("Department"), or the Secretary's representative, certifying that the drafted funds will be used for one or more of the following purposes, as determined by the Secretary:
 - 1) to pay refunds of institutional or non-institutional charges owed to or on behalf of current or former students of the Institution, whether the Institution remains open or has closed,
 - 2) to provide for the "teach-out" of students enrolled at the time of the closure of the Institution, and
 - 3) to pay any liabilities owing to the Secretary arising from acts or omissions by the Institution, on or before the expiration

U.S. Department of Education
Irrevocable Letter of Credit for
<Insert Name of Institution>
Page 2

of this letter of credit, in violation of requirements set forth in the Higher Education Act of 1965, as amended ("HEA"), including the violation of any agreement entered into by the Institution with the Secretary regarding the administration of programs under Title IV of the HEA.

Should the Institution fail to renew the letter of credit within ten (10) days prior to its expiration, as directed by the Department, the Department may call the letter of credit and place the funds in an escrow account at the Department pending a prompt determination of the extent to which those funds will be used in accordance with subparagraphs 1) through 3), above.

We hereby agree with you that partial drawings are permitted and that drafts drawn under and in compliance with the terms of this letter of credit will be duly honored upon due presentation at our offices on or before the expiration date of this letter of credit.

This letter of credit is subject to the International Standby Practices (ISP98), International Chamber of Commerce Publication Number 590.

Printed Legal Name

Authorized Signature

Date Signed

Printed Official Title of Authorized Signer

DEPARTMENT OF EDUCATION FED-WIRE EFT MESSAGE FORMAT & INSTRUCTIONS

ABA Number 021030004	Type/Sub-Type	
Sender No.:	Sender Ref. No.	Amount <div style="text-align: center; font-size: 1.5em;">①</div>

Sender Name (Automatically inserted by the Federal Reserve Bank)

Treasury Department Name/CTR/
 TREAS NYC / CTR /

BNF=ED / AC - 91020001 OBI=

Name / City / State:

②

DUNS / TIN:

③

FOR:

④

INSTRUCTIONS

A. Complete circled items 1-4 above as follows:

- ① Indicate amount including cents digits.
- ② Indicate Name, City, and State.
- ③ Indicate DUNS Number and Taxpayer Identification Number (TIN).
- ④ Enter the reason for the remittance: Name of Institution, OPE ID Number, LOC Number (include any amendments) and LOC Amount.

EXHIBIT C



August 25, 2016

Kevin M. Modany, CEO
ITT Educational Services, Inc.
13000 North Meridian Street
Indianapolis, IN 46032-1404

RE: Provisional/LOC Alternative
OPE IDs: 00732900 – ITT Technical Institute
03071800 – ITT Technical Institute
00473100 – Daniel Webster College

Dear Mr. Modany:

On August 19, 2014, ITT Educational Services, Inc., (ITT) was cited by the U.S. Department of Education (Department) for its late submission of annual compliance audits and audited financial statements. As a result of this financial responsibility failure, 34 C.F.R. §668.174(a)(3), and beginning in October 2014, the Department permitted schools owned and operated by ITT to participate in the Title IV, HEA programs only under a Provisional Program Participation Agreement (PPPA) for three award years. As a further result of this financial responsibility failure, in August 2014, the Department also required ITT to post an irrevocable, five-year Letter of Credit (LOC) in the amount of \$79,707,879.

Since August 2014, the Department has been actively monitoring ITT's ongoing operations and finances. We have also been continuing to monitor civil litigation filed against ITT by federal and state law enforcement agencies. Moreover, on April 22, 2016 the Department received notification that ITT institutions operating under the Indianapolis, IN and Spokane Valley, WA OPEIDs received a Show-Cause Directive Letter ("Directive") dated April 20, 2016 from ITT's accreditor, the Accrediting Council for Independent Colleges and Schools (ACICS). ACICS directed ITT to show cause why its grants of accreditation should not be withdrawn by suspension or otherwise conditioned.

On June 6, 2016, the Department issued a letter to ITT, wherein the Department both summarized the bases cited by ACICS in its April 20, 2016 directive and described the increased financial risk to the Department, Title IV funds, students, and taxpayers posed by potential ACICS action. As described in the June 6 letter, the Department then required ITT to increase its surety from \$79,707,879 to \$123,646,182. In July 2016, the Department permitted ITT to provide the increased surety in three installments of \$14,646,101 on July 20, 2016, September 30, 2016, and November 30, 2016.

On August 4, 2016 ACICS held the hearing regarding the show cause imposed on ITT Technical Institutes in Indianapolis, IN and Spokane Valley, WA. On August 17, 2016, ACICS informed the Department that ACICS continued both institutions on Show Cause after ITT had submitted information requested by the accrediting agency and participated in the hearing.

Federal Student Aid

AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION

Federal Student Aid, Multi-Regional and Foreign School Participation Division
830 First Street NE, Union Center Plaza, 7th Floor, Washington, DC 20202-5340
www.FederalStudentAid.ed.gov

ITT Educational Services, Inc.

Page 2 of 7

The August 17, 2016 Continue Show-Cause Directive Letter ("Continue Directive") continues to question ITT's compliance with a number of ACICS accreditation standards, finding that ITT has not demonstrated full compliance. The standards in question are these:

1-2-100(f): the "minimal eligibility requirements" for "compliance with all applicable laws and regulations;"

2-1-809: requirements for student achievement, as measured by retention, placement, and licensure passage rate. Normally, an institution must comply with such standards within a year after being found out of compliance; ACICS questioned ITT's compliance for a period of at least two years;

3-1-202(a): institutional integrity, as manifest in the efficiency and effectiveness of its overall administration of the institution;

3-1-204: financial stability, including having adequate revenues and assets to meet its responsibilities;

3-1-300: administrative capacity, including overall management and record-keeping;

3-1-410: ACICS admissions and recruitment standards; and

3-1-434: federal and state student financial aid administration requirements.

The specific information that ACICS cites in its August 17 Continue Directive continues the concerns that the agency expressed in its April 20, 2016 Show-Cause Directive Letter with respect to the first three grounds expressed in the April 20 letter. It no longer expresses concerns about the quality of instructional materials or development and submission of a teach-out plan. However, its on-going investigation has caused ACICS to add two more concerns which are at the foundation of the educational enterprise and therefore to the actions that the Department must take. The August 17 Continue Directive reiterates ACICS' concern about the financial stability of ITT by noting ITT has an assets to liabilities ratio of 0.72. It also noted the below-standard student achievement outcomes reported for retention rates for eight campuses including the main Indianapolis campus, for both the 2014 and the 2015 years.

According to the ACICS Accreditation Criteria, the Show-Cause Directive is issued "[w]hen the Council determines that an institution is not in compliance, and is unlikely to become in compliance, with the Accreditation Criteria." (Standards Section 2-3-230). Because ACICS has determined, after ITT presented information in response to the Show-Cause Directive and participated in a hearing, that ITT is "not in compliance" and is "unlikely to become in compliance" with ACICS Accreditation Criteria, ITT has therefore failed to "meet the requirements established" by its accreditor, as is required by its PPPA.

In addition, on June 24, 2016, the National Advisory Council on Institutional Quality and Integrity (NACIQI) recommended to the Department that it not re-recognize ITT's accreditation agency.

ITT Educational Services, Inc.
Page 3 of 7

Should the Senior Department Official and the Secretary agree, ITT would need to find a new accreditation agency to remain eligible for Title IV funds.

As a direct result of the facts described above, and as further detailed in the Department's letters dated August 19, 2014, August 21, 2014, May 20, 2015, June 8, 2015, October 19, 2015, December 10, 2015, June 6, 2016, and July 6, 2016 the Department is hereby imposing the following conditions on ITT's continued participation in Title IV, HEA programs.

1. Increased Letter of Credit/Surety

Due to this increased risk of the actions taken by ACICS regarding ITT the Department has determined the surety on file must be increased from the current \$94,353,980 to \$247,292,364. This amount represents 40% of the Title IV, HEA program funds received by the Institution during its most recently completed fiscal year.

The purpose of a Letter of Credit (LOC) is to allow for meeting liabilities that would be owed to the Department, such as those that may trigger should the institution precipitously close or terminate classes at other than the end of an academic period. The LOC assures the Secretary that funds would be available from which to make refunds, provide teach-out facilities, and meet institutional obligations to the Department.

In the Department's July 6, 2016 letter, ITT was required to post \$43,938,303 over three (3) installments of \$14,646,101 on July 20, 2016, September 30, 2016, and November 30, 2016. On July 20, 2016 ITT submitted to the Department the first installment of \$14,646,101 and currently has on file surety in the amount of \$94,353,980. The Department is requiring that ITT post an additional \$152,938,654 within 30-days from the date of this letter.

2. Change to Method of Payment Requirements (HCM2)

Effective immediately, ITT Technical Institutes operating the Indianapolis, IN and Spokane Valley, WA OPEIDs are required to make all Title IV program fund disbursements under the Heightened Cash Monitoring 2 (HCM2) payment method, as described in 34 C.F.R. § 668.162(e). The Department reserves the right to offset any federal claims against funds due to both institutions. ITT will receive additional information regarding HCM2 under a separate cover.

3. Notification Requirements for Oversight or Financial Events

Consistent with prior communications, ITT remains required to provide information to the Department by certified mail or electronic or facsimile transmission no later than 10 days after any of the oversight or financial events, as described below, occur. ITT must also include with the information it submits, written notice that details the circumstances surrounding the event(s) and, if necessary, what steps it has taken or plans to take, to resolve the issue. These events include:

- Any adverse action, including probation or similar action, taken against the Institution by its accrediting agency, State authorizing agencies or other Federal agency;
- Any event that causes the Institution, or related entity as defined in the Statement of Financial Accounting Standards (SFAS) 57, to realize any liability that was noted as a

ITT Educational Services, Inc.

Page 4 of 7

contingent liability in the Institution's or related entity's most recent audited financial statements;

- Any violation by the Institution of any loan agreement;
- Any failure of the Institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations;
- Any withdrawal of owner's equity/net assets from the Institution by any means, including by declaring a dividend;
- Any extraordinary losses as defined in accordance with Accounting Principles Board (APB) Opinion No. 30; or
- Any filing of a petition by the Institution for relief in bankruptcy court.

4. Additional Reporting Requirements

In order for the Department to monitor ITT's progress in improving the Institution's financial stability, ITT must continue to provide information about its operations, finances, and future plans as described in letters dated May 20, 2015, June 08, 2015, and October 19, 2015 letters, and any oral or written modifications to those communications. Please continue to submit the additional reporting documents to the designated contact(s) outlined in the Department's prior communications.

5. Additional Operational Requirements

As a further condition of maintaining its certification to participate in Title IV programs, ITT must adhere to the following requirements, effective immediately:

- ITT Technical Institutes in Indianapolis, IN and Spokane Valley, WA are restricted from enrolling or beginning classes for any new students who may receive Title IV, HEA program funds;
- ITT Technical Institutes operating under the Indianapolis, IN and Spokane Valley, WA OPEIDs must provide all students with a notice disclosing the ACICS Directive and Continue Directive including the fact that ACICS accreditation standards state that the "Council determines that [the] institution is not in compliance with the Accreditation Criteria, and is unlikely to become in compliance."
- ITT Technical Institutes in Indianapolis, IN and Spokane Valley, WA must provide to the Department within 30 days of its receipt of this letter teach out agreements for all ITT campuses and locations operating under OPEIDs 00732900 and 03071800.
- ITT will not pay, or agree to pay, any bonuses, severance payments, raises or retention payments to any of its Management or Directors, as so listed in the Corporate Governance section of the ITT Technical Institute website, at ITTESI.com, as of August 23, 2016, nor to pay special dividends, nor to make any expenditures out of the ordinary course of business and consistent with prior practice, without separate approval from the Department.

ITT's failure to meet any of these requirements will demonstrate to the Department that ITT is incapable of meeting the fiduciary and financial responsibility standards established by the Higher

ITT Educational Services, Inc.
Page 5 of 7

Education Act and the Department's regulations. Accordingly, the failure to meet these standards will result in the referral of this matter to the Administrative Actions and Appeals Service Group for administrative action, including the potential revocation of the PPAs for the affected OPEIDs.

By signing below, the institution acknowledges and agrees to the conditions specified in this letter, which must be returned no later than 12:00 p.m. (noon) Eastern Time, September 6, 2016.

(Name)	(Title)	(Date)
--------	---------	--------

Surety Requirements

The increased surety is necessary in the event that the Institution would close or terminate classes at other than the end of an academic period. It assures the Secretary that funds would be available from which to make refunds provide teach-out facilities and meet institutional obligations to the Department.

Our records indicate that ITT already has surety on file in a Federal Holding Account with the Department for \$94,353,980 until November 04, 2019. ITT may provide the increased amount by Federal Wire Transfer, or can provide a new LOC in the amount of \$152,938,654. ITT should advise the Department within 10 days of its receipt of this letter whether it will increase the funds maintained in the Department's Federal Holding Account, or provide a letter of credit for that additional amount. The increased surety must be provided under either option within 30 days from the date of this letter.

A sample irrevocable letter of credit is enclosed for ITT to use if it chooses that option. The ITT letter of credit must be issued by a United States bank. Your lending institution must use this format on its letterhead with no deviation in the language contained therein. The letter of credit must provide coverage until November 04, 2019. Please note that if ITT fails to provide the irrevocable letter of credit within 45 calendar days the institution may be referred to the Department's Administrative Actions and Appeals Service Group (AAASG) office for termination and/or other administrative action under 34 C.F.R. § 668.86. Also, note that information regarding the financial analysis score, results, and the LOC is subject to the Freedom of Information Act (FOIA) of 1966, as amended.

Please mail the irrevocable letter of credit to the following address:

Veronica Pickett, Director
Performance Improvement and Procedures Service Group
U.S. Department of Education
Federal Student Aid/Program Compliance


ITT Educational Services, Inc.
Page 6 of 7

830 First Street, NE, UCP3, MS 5435
Washington, DC 20002-8019

ITT is required to notify the SPD within 3 calendar days, in the event the LOC issuing institution should fail, resulting in financial transactions and operations being administered by the Federal Deposit Insurance Corporation. ITT will also be required to submit a new replacement LOC issued by a different and non-failed U.S. bank, within 75 calendar days.

If you have any questions regarding the financial responsibility determination, or disagree with the reason or methodology used for this determination, please contact Tiffany Hill, Financial Analyst, within 10 calendar days at (202) 377-4225.

Sincerely,



Ron Bennett
Director, School Eligibility Service Group

Enclosures: The Department's August 19, 2014 Letter to ITT
The Department's August 21, 2014 Letter to ITT
The Department's May 20, 2015 Letter to ITT
The Department's June 08, 2015 Letter to ITT
The Department's October 19, 2015 Letter to ITT
The Department's December 10, 2015 Letter to ITT
The Department's June 6, 2016 Letter to ITT
The Department's July 6, 2016 Letter to ITT

cc: Kevin M. Modany, Chief Executive Officer (kmodany@ittesi.com)
Rocco Tarasi III, Chief Financial Officer (rtarasi@itt-tech.edu)
Michael E. Diffily, Daniel Webster College President (diffily@dwc.edu)
New England Association of Schools and Colleges – CHE (Higher Education)
Accrediting Council for Independent Colleges and Schools
WA Student Achievement
Texas Work Force Commission
PA Division of Private License Schools, Bureau of Postsecondary Services
PA Division of Program Approval Bureau of Academic Programs
AL Commission on Higher Education
Arkansas Department of Higher Education
Colorado Commission on Higher Education
Commission for Independent Education – Florida Department of Education
ID State Board of Education
MO Coordinating Board for Higher Education
TX Higher Education Coordinating Board
Maryland Higher Education Commission
WV Council for Community and Technical College Education

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State Council of Higher Education for Virginia
Minnesota Office of Higher Education
NM Higher Education Department
AL Department of Postsecondary Education
AZ State Board for Private Postsecondary Education
NE Department of Education
SC Commission on Higher Education
OH Board of Regents
CA Bureau for Private Postsecondary Education
MA Department of Higher Education (formerly MA Board of Higher Edu)
Michigan Department of Labor & Economic Growth
Louisiana State Board of Regents
Iowa College Student Aid Commission
NY The State Education Department, Office of Higher Education
NV Commission on Postsecondary Education
Oregon Student Assistance Commission Office of Degree Authorization
KY Council on Postsecondary Education
Tennessee Higher Education Commission
GA Non-Public Postsecondary Education Commission
The Board of Governors of the University of NC
WI Educational Approval Board
UT System of Higher Education
MS Commission on Proprietary School & College Registration
Ohio State Board of Career Colleges and Schools
Oklahoma State Regents for Higher Education
Illinois Board of Higher Education
KS Board of Regents
NJ Commission on Higher Education
Indiana Commission for Higher Education Board for Proprietary Education
NH Dept. of Education, Division of Higher Education

EXHIBIT D

Fill in this information to identify the case:

Debtor 1 ITT Educational Services, Inc.Debtor 2
(Spouse, if filing) _____

United States Bankruptcy Court for the: Southern District of Indiana

Case number 16-07207**FILED****NOV 16 2016**By Rust / Omni, Claims Agent
For U.S. Bankruptcy Court
Southern District of Indiana**Official Form 410****Proof of Claim**

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim**1. Who is the current creditor?**Kevin M. Modany

Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else?☒ No☐ Yes. From whom? _____**3. Where should notices and payments to the creditor be sent?**Federal Rule of
Bankruptcy Procedure
(FRBP) 2002(g)**Where should notices to the creditor be sent?**Kevin M. Modany

Name

10369 Charter Oaks

Number Street

Carmel IN 46032

City State ZIP Code

Contact phone 317-287-9053Contact email kevinmmodany@gmail.com**Where should payments to the creditor be sent? (if different)**

Name

Number Street

City State ZIP Code

Contact phone _____

Contact email _____

Uniform claim identifier for electronic payments in chapter 13 (if you use one):
_____**4. Does this claim amend one already filed?**☒ No☐ Yes. Claim number on court claims registry (if known) _____Filed on _____
MM / DD / YYYY**5. Do you know if anyone else has filed a proof of claim for this claim?**☒ No☐ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim?	\$ <u>not less than \$3,360,199.00 (see attached)</u> Does this amount include interest or other charges? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. severance, deferred compensation and other amounts under applicable agreements, documents and at law. (see attached addendum)
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature of property: <input type="checkbox"/> Real estate. If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No☒ Yes. Check one:☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).☐ Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).☒ Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

Amount entitled to priority

\$ _____

\$ _____

\$ 12,850.00

\$ _____

\$ _____

\$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☒ I am the creditor.☐ I am the creditor's attorney or authorized agent.☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

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

Executed on date

6/11/2016
MM/DD/YYYY


Signature

Print the name of the person who is completing and signing this claim:

Name Kevin M. Modany

First name

Middle name

Last name

Title _____

Company _____

Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

10369 Charter Oaks

Number Street

Carmel

IN

46032

City

State

ZIP Code

Contact phone

317-287-9053

Email

kevinmmodany@gmail.com

**In re ITT Educational Services, Inc.
United States Bankruptcy Court for the Southern District of Indiana
Chapter 7, Case No. 16-07207**

ADDENDUM TO PROOF OF CLAIM OF KEVIN M. MODANY

**Debtor: ITT Educational Services, Inc. ("Debtor")
Case No.: 16-07207**

Claim of Kevin M. Modany ("Claimant")
Kevin M. Modany
10369 Charter Oaks
Carmel, IN 46032

SUMMARY OF CLAIM

1. Kevin M. Modany was employed as the Chief Executive Officer of the Debtor pursuant to an employment agreement (the "Employment Agreement") dated December 31, 2015. A copy of the Employment Agreement is attached hereto as Exhibit A and incorporated herein by reference.

2. On September 14, 2016, Mr. Modany was served with a termination letter severing the employment immediately due to the Debtor's lack of funds and cessation of operations. The termination letter is attached hereto as Exhibit B and incorporated herein by reference. The Debtor filed its chapter 7 petition the following day.

3. On October 22, 2007, the Debtor established A Senior Executive Severance Plan (the "Severance Plan"). A copy of the Severance Plan is attached as Exhibit C and incorporated herein by reference.

4. At the time of his termination Mr. Modany was owed deferred compensation of \$64,199.00 through December 15, 2015. See Exhibit D, excerpts from the Debtor's 2016 Annual Meeting Notice and Proxy Statement, which is incorporated herein by reference.

5. The Severance Plan provides that select executives, including Mr. Modany, are entitled to certain severance benefits, *inter alia*, if, (i) during an "Imminent Acceleration Event

Period” (as further defined in the Severance Plan) or (ii) within two years following an “Acceleration Event” (as further defined in the Severance Plan), the individual is terminated other than for “Cause” (as further defined in the Severance Plan).

6. Upon information and belief, Mr. Modany’s termination was without Cause. Thus, to the extent his termination occurred during an Imminent Acceleration Event or within two years following an Acceleration Event, Mr. Modany hereby asserts a claim for all amounts due and owing under the Severance Plan, including without limitation severance pay and deferred compensation in an amount not less than \$5,008,199.00, calculated as follows:

<u>AMOUNTS</u>	<u>TOTAL</u>
\$824,000.00 salary multiplied by 3	\$2,472,000.00
\$824,000.00 bonus multiplied by 3	\$2,472,000.00
\$64,199.00 deferred compensation	\$64,199.00
TOTAL	\$5,008,199.00

(Exhibit C, §§3,4(I)(a), Exhibit D). To the extent the conditions precedent under the Severance Plan have been satisfied, Mr. Modany also asserts an unliquidated claim for all other amounts due and owing thereunder, including without limitation: (i) the Savings Plan Lump Sum Amount; (ii) Welfare Coverage Stipend, and (iii) Gross-Up Payment (each as described in Section 4(I) of the Severance Plan).

7. In the alternative, the Employment Agreement provides that upon a termination without cause, Mr. Modany will be entitled to an amount equal to “two times the sum of (i) your base salary plus (ii) your target short-term compensation amount for the fiscal year in which the employment termination occurs. . .” (Agreement, §3(a)). Accordingly, if it is determined that the conditions precedent under the Severance Plan have not been satisfied, Mr. Modany hereby asserts

in the alternative a claim for all amounts due and owing under the Employment Agreement, including without limitation severance pay and deferred compensation of not less than \$3,360,199.00, consisting of:

<u>AMOUNTS</u>	<u>TOTAL</u>
\$824,000.00 salary multiplied by 2	\$1,648,000.00
\$824,000.00 target short-term compensation multiplied by 2	\$1,648,000.00
\$64,199.00 deferred compensation	\$64,199.00
TOTAL	\$3,360,199.00

(Exhibit C, §§3,4(I)(a), Exhibit D)

8. Accordingly, Claimant hereby files this Proof of Claim with respect to all of Debtor's outstanding obligations owed to Claimant, including without limitation: (i) under the Employment Agreement or Severance Plan, as applicable, and (ii) such other obligations as the Debtor may owe to the Claimant at law or under any applicable document or agreement, including without limitation pursuant to the by-laws of the Debtor. The summary of the bases for this Proof of Claim set forth herein is not exhaustive and do not constitute an election of remedies. Claimant hereby reserves the right to amend, restate or supplement this proof of claim as and if its claims become further liquidated, in the event that further material information is revealed concerning the facts and circumstances underlying the Claim, or for other lawful purposes, and, without limitation, to file additional proofs of claim against the Debtor or one or more of its affiliated debtors and debtors-in-possession, to reflect other amounts that may be (or may become) due and owing, whether based on the respective rights and obligations arising under the Severance Plan, the Employment Agreement or any other applicable document, agreement, applicable law, or otherwise (including without limitation due to any rejection of the Severance Plan, the Employment

Agreement or such other applicable document or agreement). By filing this Proof of Claim, Claimant does not concede that any amounts due and owing, or that may become due and owing, constitute pre-petition claims of the Debtor and Claimant reserves all rights to file one or more requests for payment of administrative expense claim for such amounts.

9. The filing of this Proof of Claim is not and shall not be deemed or construed as (a) a waiver or release of Claimant's rights against any person, entity or property (including, without limitation, any person or entity that is or may become a debtor in a case pending in this Court) who may be liable for all or part of the claims set forth herein, whether an affiliate, assignee, guarantor otherwise of the Debtor, or any entity that has engaged in transactions to evade or avoid withdrawal liability; (b) a consent by Claimant to the jurisdiction of this Court or any other court with respect to proceedings, if any, commenced in any case against or otherwise involving Claimant; (c) a waiver or release of Claimant's rights to trial by jury in this Court or any other court in any proceeding as to any and all matters so triable herein, whether or not the same be designated legal or private rights or in any case, controversy or proceeding related hereto, notwithstanding the designation or not of such matters as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2), and whether such jury trial right is pursuant to statute or the United States Constitution; (d) a consent by Claimant to a jury trial in this Court or any other court in any proceeding as to any and all matters so triable herein or in any case, controversy or proceeding related hereto, pursuant to 28 U.S.C. § 157(e) or otherwise; (e) a waiver or release of Claimant's rights to have any and all final orders in any and all noncore matters or proceedings entered only after de novo review by a United States District Court Judge; (f) a waiver of the right to move to withdraw the reference with respect to the subject matter of this Proof of Claim, any objection thereto or other proceeding that may be commenced in this case against or otherwise involving Claimant; (g) an election of remedies; (h) a waiver of the right to seek an administrative claim; or (i) a waiver or release of any right of setoff or recoupment that

Claimant may hold against the Debtor.

EXHIBIT A

EMPLOYMENT AGREEMENT

EX-10.2 3 exhibit10_2.htm EXHIBIT 10.2

Exhibit 10.2

December 31, 2015

Mr. Kevin M. Modany
ITT Educational Services, Inc.
13000 North Meridian Street
Carmel, IN 46032-1404

Dear Kevin:

This letter agreement (this "Agreement") is intended to set forth our mutual understanding and agreement regarding your continued employment as Chief Executive Officer of ITT Educational Services, Inc. (the "Company").

Accordingly, you and the Company agree as follows.

1. Termination of August 4, 2014 Letter Agreement. Effective as of the date hereof, the letter agreement between you and the Company dated August 4, 2014, as amended (the "August 4, 2014 Letter Agreement"), is hereby terminated and neither you nor the Company shall have any further rights, obligations or claims under the August 4, 2014 Letter Agreement.

2. At-Will Employment. You shall continue to be employed by the Company as its Chief Executive Officer. Such employment shall be on an at-will basis, which means that your employment may be terminated at any time by either you or the Company for any or no reason. You will continue to receive cash compensation (including base salary and compensation pursuant to the short-term compensation plan or other bonus plan) as determined by the Compensation Committee (the "Committee") of the Board of Directors (the "Board") from time to time, and participate in the Company's employee benefit plans, as such plans exist from time to time. You shall also be eligible to receive equity-based compensation as may be determined by the Committee from time to time.

3. Severance if Employment Terminated by the Company without Cause or by You for Good Reason.

(a) If the Company terminates your employment without Cause or if you resign your employment for Good Reason, you will be entitled to receive, subject to your compliance with subparts (d) and (e) below, severance compensation in an amount equal to two times the sum of (i) your base salary plus (ii) your target short-term compensation amount for the fiscal year in which the employment termination occurs, payable in substantially equal installments over the twenty-four (24) months following the employment termination date.

(b) For purposes of this Agreement, "Cause" shall have the meaning set forth in the ITT Educational Services, Inc. Senior Executive Severance Plan adopted on October 22, 2007, as amended (the "Senior Executive Severance Plan"), as in effect on the date hereof.

(c) For purposes of this Agreement, "Good Reason" shall have the meaning set forth in the Senior Executive Severance Plan as in effect on the date hereof, and a resignation of employment for "Good Reason" shall require the satisfaction of the conditions of subsections (A), (B) and (C) of Section 3(a) of the Senior Executive Severance Plan as in effect on the date hereof.

(d) You acknowledge and agree that the Company's payment of the severance compensation under this Agreement will be deemed to constitute a full settlement and discharge of any and all obligations of the Company to you arising out of this Agreement, your employment with the Company and/or the termination of your employment with the Company. You also acknowledge and agree that as a condition to receiving any of the severance compensation under this Agreement, you will execute, deliver to the Company, and not revoke a release agreement in a form prepared by, and satisfactory to, the Company (the "Release Agreement") pursuant to which you will release and waive, to the fullest extent permitted by law, all claims against the Company, its subsidiaries and affiliates, and all of its and their present and/or former owners, officers, directors, employees, agents, attorneys, insurers, representatives, employee benefit plans and their fiduciaries, both individually and in their representative capacities, including, without limitation, all claims arising out of this Agreement, your employment with the Company, and/or the termination of your employment with the Company; provided, however, that the Release Agreement will not affect or release (a) any rights to the severance compensation under this Agreement; (b) any vested rights or benefits you may have under any employee retirement or welfare benefit plan of the Company (except any severance plan), or (c) any vested rights or benefits you may have under the Company's Amended and Restated 2006 Equity Compensation Plan, any successor or other equity compensation plan, or any related option agreement or restricted stock unit agreement. The severance compensation described in this Agreement is in lieu of any severance benefits under any severance policy or plan the Company may have now or in the future, and you acknowledge that you are not entitled to any other severance benefits, except as set forth in subpart (g) below.

(e) Your entitlement to severance compensation under this Agreement is contingent on your compliance with the non-disclosure and restrictive covenant obligations of this Agreement. You acknowledge and agree that if you breach any of the non-disclosure or restrictive covenant provisions set forth in this Agreement, then in such event (i) you will have forfeited your right to receive, and the Company will have no further obligation to pay, any severance compensation that would otherwise be payable to you under this Agreement, and (b) you will be obligated to pay to the Company an amount equal to the amount of the severance compensation received by you under this Agreement, with such amount being due and payable immediately upon the Company making written demand on you for such payment. You further acknowledge and agree that such forfeiture and clawback are separate from, and not in lieu of, any and all other legal and/or equitable remedies that may be available to the Company in connection with your breach of any non-disclosure or restrictive covenant provision set forth in this Agreement and the Company reserves all such legal and/or equitable remedies.

(f) You acknowledge and agree that you will not be entitled to any severance in the event the Company terminates your employment because of a Disability Event. For purposes of this Agreement, the term "Disability Event" means either (i) when you are deemed disabled and entitled to benefits in accordance with any Company-provided long-term disability insurance policy, if any is applicable, covering you, (ii) your inability, because of injury, illness, disease or bodily or mental infirmity, to perform, with or without reasonable accommodation, the essential functions of your job for more than one hundred twenty (120) days during any period of three hundred sixty-five (365) days, or (iii) upon the written determination by a physician selected by the Company that, because of an injury, illness, disease or bodily or mental infirmity, you are unable to perform, with or without reasonable accommodation, the essential functions of your job, and, as of the date of determination, such condition is reasonably expected to last for a period of one hundred twenty (120) days or longer after the date of determination, based on the medical information reasonably available to such physician at the time of such determination.

(g) You shall be eligible to participate in the Senior Executive Severance Plan, subject to its terms and conditions, provided, however, that you and the Company agree that under no circumstances shall you be entitled to receive severance compensation or benefits under both this Agreement and under the Senior Executive Severance Plan. For purposes of clarity, the Severance Benefits (as defined in the Senior Executive Severance Plan) under the Senior Executive Severance Plan are in lieu of any severance payments or benefits described in this Agreement; accordingly, if your employment ends under circumstances in which you are eligible to receive the Severance Benefits (as defined in the Senior Executive Severance Plan) under Section 3(a) of the Senior Executive Severance Plan (subject to satisfaction of any applicable conditions as set forth in Section 3(b) of the Senior Executive Severance Plan), you shall not be entitled to the severance compensation described in this Agreement.

4. Non-Disclosure of Confidential Information.

(a) For purposes of this Agreement, the term "Confidential Information" means any and all of the Company's (and its subsidiaries' and affiliates') trade secrets, confidential and proprietary information and all other non-public information and data of or about the Company (and its subsidiaries and affiliates) and its business, including, without limitation, lists of customers, information pertaining to customers, marketing plans and strategies, information pertaining to suppliers, information pertaining to prospective suppliers, pricing information, engineering and technical information, software codes, cost information, data compilations, research and development information, business plans, financial information, personnel information, information received from third parties that the Company has agreed to keep confidential, and information about prospective customers or prospective products and services, whether or not reduced to writing or other tangible medium of expression, including, without limitation, work product created by you in rendering services for the Company; provided, however, that "Confidential Information" shall not include information that (i) is or becomes generally available to the public by use, publication or the like, through no fault of you or (ii) is obtained without restriction by you after termination of your employment with the Company from a third party who had the legal right to disclose such information to you.

(b) During your employment with the Company and thereafter, you will not use or disclose to others any of the Confidential Information, except (i) in the ordinary course of your work for and on behalf of the Company, (ii) with the prior written consent of the Company, (iii) as required by law or judicial process, provided you promptly notify the Company in writing of any subpoena or other judicial request for disclosure involving confidential information or trade secrets, and cooperate with any effort by the Company to obtain a protective order preserving the confidentiality of the confidential information or trade secrets, or (iv) in connection with reporting possible violations of law or regulations to any governmental agency or from making other disclosures protected under any applicable whistleblower laws. You agree that the Company owns the Confidential Information and you have no rights, title or interest in any of the Confidential Information. Additionally, you will abide by the Company's policies protecting the Confidential Information, as such policies may exist from time to time. At the Company's request or upon termination of your employment with the Company for any reason, you will immediately deliver to the Company any and all materials (including all copies and electronically stored data) containing any Confidential Information in your possession, custody or control. Upon termination of your employment with the Company for any reason, you will, if requested by the Company, provide the Company with a signed written statement disclosing whether you have returned to the Company all materials (including all copies and electronically stored data) containing any Confidential Information previously in your possession, custody or control. Your confidentiality/non-disclosure obligations under this Agreement continue after the termination of your employment with the Company. With respect to any particular trade secret information, your confidentiality/non-disclosure obligations will continue as long as such information constitutes a trade secret under applicable law. With respect to any particular Confidential Information that does not constitute a trade secret, your confidentiality/non-disclosure obligations will continue as long as such information remains confidential, and will not apply to information that becomes generally known to the public through no fault or action of you or others who were under confidentiality obligations with respect to such information.

5. Restrictive Covenants.

(a) For purposes of this Agreement, (i) "Competitive Business" means any for-profit entity that is engaged in the business of providing post-secondary education with annual revenues of at least \$100 million and is competitive with the business of the Company; (ii) "Person" means any individual or entity (including without limitation a corporation, partnership, limited liability company, trust, joint venture, or governmental entity or agency); (iii) "Prohibited Capacity" means: (A) the same or similar capacity or function to that in which you worked for the Company; (B) any executive or senior management capacity or function; (C) any officer or director capacity; (D) any consulting or advisory capacity or function; (E) any ownership capacity (except you may own as a passive investment up to five percent (5%) of any class of securities regularly traded on a national stock exchange or other public market); (F) any capacity or function in which you likely would inevitably use or disclose any of the Company's trade secrets and/or Confidential Information; or (G) any other capacity or function in which your knowledge of the Confidential Information would facilitate or assist your work for the Competitive Business; (iv) "Restricted Geographic Area" means each of the states of the United States, including, without limitation, each and every state in which the Company is doing business as of the date your employment terminates; and (v) "Restricted Time Period" means during your employment with the Company and for a period that is the longer of: (A) one year after the date your employment terminates; or (B) if you are entitled to severance compensation under this Agreement or the Senior Executive Severance Plan, the period during which such severance compensation is to be paid.

(b) During the Restricted Time Period, you will not within the Restricted Geographic Area engage in (including, without limitation, being employed by, working for, or rendering services to) any Competitive Business in any Prohibited Capacity; provided, however, if a Competitive Business has multiple divisions, units or segments, some of which are not engaged in providing post-secondary education, you may work for or consult with only that division, unit or segment that is not engaged in providing post-secondary education, provided that (i) you first provide the Company with a written notice describing in reasonable detail your position with and anticipated activities for the Competitive Business, which such written notice also includes an assurance that your affiliation with and work for the Competitive Business will relate only to the non-competitive division, unit or segment and will not involve any activities that are competitive with the Company, and (ii) your affiliation with and/or work for the non-competitive division, unit or segment of the Competitive Business would not likely cause you to inevitably use and/or disclose any Confidential Information.

(c) During the Restricted Time Period, you will not urge, induce or seek to induce any of the Company's independent contractors, subcontractors, business partners, distributors, brokers, consultants, sales representatives, customers, vendors, suppliers or any other Person with whom the Company has a business relationship to terminate their relationship with, or representation of, the Company or to cancel, withdraw, reduce, limit or in any manner modify any such Person's business with, or representation of, the Company.

(d) During the Restricted Time Period, you will not: (i) solicit or recruit for employment, hire, employ, engage the services of, or attempt to hire, employ, or engage the services of, any individual who is an employee of the Company; (ii) assist any Person in the recruitment, hiring or engagement of any individual who is an employee of the Company; (iii) urge, induce or seek to induce any individual to terminate his/her employment with the Company; or (iv) advise, suggest to or recommend to any Competitive Business that it employ, engage the services of, or seek to employ or engage or engage the services of any individual who is an employee of the Company.

(e) During the Restricted Time Period, you will not make or publish any statement or comment that disparages or in any way injures the reputation and/or goodwill of the Company or any of its subsidiaries or affiliates or any of its or their shareholders, members, officers, directors or employees; provided, however, that nothing in this section is intended to prohibit you from (i) making any disclosures as may be required or compelled by law or legal process or (ii) making any disclosures or providing any information to a governmental agency or entity, including without limitation in connection with a complaint by you against the Company or the investigation of any complaint against the Company.

(f) You acknowledge and agree that the restrictive covenants contained herein prohibit you from engaging in certain activities directly or indirectly, whether on your own behalf or on behalf of any other Person, and regardless of whether you are acting as an employee, independent contractor, owner, partner, agent, consultant, or advisor.

(g) In the event you violate any of the restrictive covenants contained herein, the duration of all restrictive covenants (and the Restricted Time Period) will automatically be extended by the length of time during which you were in violation of any of the restrictive covenants.

(h) Although you and the Company consider the restrictive covenants contained in this Agreement to be reasonable, particularly given the competitive nature of the Company's business and your position with the Company, you and the Company acknowledge and agree that: (i) if any covenant, subsection, provision, portion or clause of this Agreement is determined to be unenforceable or invalid for any reason, such unenforceability or invalidity will not affect the enforceability or validity of the remainder of this Agreement; and (ii) if any particular covenant, subsection, provision, portion or clause of this Agreement is determined to be unreasonable or unenforceable for any reason, including, without limitation, the time period, geographic area, and/or scope of activity covered by any restrictive covenant, such covenant, subsection, provision, portion or clause will automatically be deemed reformed such that the contested covenant, subsection, provision, portion or clause will have the closest effect permitted by applicable law to the original form and shall be given effect and enforced as so reformed to whatever extent would be reasonable and enforceable under applicable law. We agree that any court interpreting any restrictive covenant provision of this Agreement will, if necessary, reform any such provision to make it enforceable under applicable law.

6. Injunctive Relief. You acknowledge that a breach or threatened breach by you of any of your non-disclosure or restrictive covenant obligations under this Agreement will give rise to irreparable injury to the Company and that money damages will not be adequate relief for such injury and, accordingly, you agree that the Company shall be entitled to obtain equitable relief, including, but not limited to, specific performance, temporary restraining orders, preliminary injunctions and/or permanent injunctions, without having to post any bond or other security, to restrain or prohibit such breach or threatened breach, in addition to any other legal remedies which may be available, including the recovery of money damages.

7. Cooperation. You agree that, for the longer of (a) one (1) year after the date your employment terminates or (b) if applicable, the period during which you are eligible to receive severance compensation under this Agreement or the Senior Executive Severance Plan, if the Company desires you to provide any information or testimony relating to any judicial, administrative or other proceeding involving the Company (or any of its subsidiaries or affiliates), you will cooperate in making yourself reasonably available for such purposes and will provide truthful information and/or testimony. The Company agrees to reimburse you for all necessary and reasonable out-of-pocket expenses you incur in connection with such matters. Should you be served with a subpoena in any legal proceeding relating to the Company (or any of its subsidiaries or affiliates), you agree to (x) notify the Company immediately of the subpoena and provide it with a copy of the subpoena, (y) reasonably cooperate with the Company and its attorneys in responding to the subpoena and in preparing for any hearings, depositions or other formal process by which evidence is taken or received, and (z) provide truthful testimony in response to questions that are within the scope of proper discovery.

8. Company Property. You acknowledge and agree that all tangible materials, equipment, documents, copies of documents, data compilations (in whatever form), and electronically created or stored materials that you receive or make in the course of your employment with the Company (or with the use of Company time, materials, facilities or trade secrets or confidential information) are and will remain the property of the Company. Upon the termination of your service with the Company, or at the Company's request, you will immediately deliver to the Company (a) any and all memoranda, notes, records, drawings, manuals, computer programs, documentation, diskettes, computer tapes, electronic data (in whatever form or media), and all copies thereof, in your possession or under your control, whether prepared by you or others, containing any Confidential Information; and (b) any and all property or equipment belonging to the Company, including, without limitation, keys, access cards, computers, files and documents.

9. Successors and Assigns. The Company shall have the right to assign this Agreement, and the rights and obligations of the Company under this Agreement will inure to the benefit of and be binding upon any and all successors and assigns of the Company, including without limitation by asset assignment, merger, consolidation or other reorganization. As used in this Agreement, "Company" means the Company as hereinbefore defined and any successor to its business and/or assets which assumes and agrees to perform this Agreement by operation of law, or otherwise. The services to be provided by you to the Company hereunder are personal, and you shall not have the right to assign this Agreement or any of your rights or obligations under this Agreement.

10. Clawback. You acknowledge and agree that the amounts paid by the Company to you, including amounts payable pursuant to this Agreement, may be subject to recoupment or clawback pursuant to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act or other applicable law, or pursuant to a policy or plan of the Company in effect from time to time, and you agree to repay such amounts to the extent required thereunder.

11. Compliance with Code Section 409A. Our intent is that payments and benefits under this Agreement comply with Section 409A of the Internal Revenue Code of 1986, as amended, and Treasury Regulation Section 1.409A-1(h) (collectively "Code Section 409A"), to the extent subject thereto, and, accordingly, to the maximum extent permitted, this Agreement shall be interpreted and be administered to be in compliance therewith. Notwithstanding anything contained herein to the contrary, to the extent required in order to avoid accelerated taxation and/or tax penalties under Code Section 409A, you will not be considered to have terminated employment with the Company for purposes of this Agreement until you would be considered to have incurred a "separation from service" from the Company within the meaning of Code Section 409A. Any payments described in this Agreement that are due within the "short-term deferral period" (as defined in Code Section 409A) will not be treated as deferred compensation unless applicable law requires otherwise. Each amount to be paid or benefit to be provided to you pursuant to this Agreement that constitutes deferred compensation subject to Code Section 409A shall be construed as a separate identified payment for purposes of Code Section 409A. Notwithstanding anything to the contrary in this Agreement, to the extent that any payments to be made in connection with your separation from service would result in the imposition of any individual excise tax and late interest charges imposed under Code Section 409A, the payment will instead be made on the first business day after the earlier of (a) the date that is six (6) months following such separation from service or (b) the date of your death.

12. Notices. Any notice required or permitted under this Agreement shall be in writing and either delivered personally or sent by nationally recognized overnight courier, express mail, or certified or registered mail, postage prepaid, return receipt requested, at the following respective address unless the party notifies the other party in writing of a change of address:

If to the Company:

ITT Educational Services, Inc.
13000 North Meridian St.
Carmel, IN 46032
Attention: Chief Legal Officer

With a copy to (which copy will not constitute notice):

Faegre Baker Daniels LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Attention: David A. Given

If to you:

To you most recent address on file with the Company for payroll purposes

A notice delivered personally will be deemed delivered and effective as of the date of delivery. A notice sent by overnight courier or express mail will be deemed delivered and effective the next business day after it is deposited with the postal authority or commercial carrier. A notice sent by certified or registered mail will be deemed delivered and effective three (3) days after it is deposited with the postal authority.

13. Entire Agreement; Modification; Waiver. This Agreement contains the full, complete, and entire agreement between us, superseding any and all other contracts or proposals, oral or written, and any and all other communications between us relating to the subject matter of this Agreement, including but not limited to the August 4, 2014 Letter Agreement. This Agreement shall not be varied, altered, modified, canceled, changed, or in any way amended except by (a) our mutual agreement in a written instrument executed by you and a Company representative duly authorized by the Board, or (b) reformation by a court as provided herein. Failure to insist upon strict compliance with any of the terms, covenants or conditions of this Agreement will not be deemed a waiver of such term, covenant or condition.

14. Governing Law. To the extent not preempted by federal law, the provisions of this Agreement shall be construed and enforced in accordance with the laws of the State of Indiana, without giving effect to any choice-of-law or conflict-of-law principle that would cause the application of the substantive law of any jurisdiction other than Indiana. You and the Company agree that any legal action arising out of or relating to this Agreement, your employment with the Company or the termination of your employment shall be commenced and maintained exclusively before any appropriate state court of record in Hamilton County, Indiana, or in the United States District Court for the Southern District of Indiana, Indianapolis Division; further, you and the Company hereby irrevocably submit to the jurisdiction and venue of such courts and waive any right to challenge or otherwise object to personal jurisdiction or venue in any action commenced or maintained in such courts; provided, however, the foregoing shall not affect any applicable right a party may have to remove a legal action to federal court.

15. Construction. This Agreement is the result of negotiations between you and the Company, and neither you nor the Company shall be deemed to be the drafter of this Agreement. The language of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either you or the Company. This Agreement shall be interpreted and construed without any presumption or inference based upon or against the party causing this Agreement to be prepared.

16. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together will constitute one and the same Agreement. Signatures transmitted by facsimile or other electronic means shall be effective the same as original signatures for execution of this Agreement.

If the foregoing accurately reflects our agreement, please sign where indicated below and return to us the enclosed duplicate copy of this letter.

Sincerely,

ITT EDUCATIONAL SERVICES, INC.

By: /s/ John E. Dean

Name: John E. Dean

Title: Executive Chairman of the Board of Directors

ACCEPTED AND AGREED:

/s/ Kevin M. Modany

Kevin M. Modany

Date: 12/31/15

US103828496.01

EXHIBIT B

TERMINATION LETTER

MEMORANDUM

ITT Educational Services, Inc.

DATE: September 14, 2016
FROM: Erica Bisch
SUBJECT: *Termination of Employment*
COPIES: Personnel File

Kevin Modany
10369 Charter Oaks
Carmel, IN 46032

It has become necessary to permanently eliminate your position effective September 14, 2016 ("Termination Date") due to a significant and unforeseen business circumstance resulting in a company-wide reorganization to cease operations and close the business, including the location at which you work. The cessation of the Company's operations and termination of your employment is expected to be permanent. On August 25, 2016, without previous notice, the Department of Education (the "ED") notified ITT Educational Services, Inc. (the "Company") that it is required to meet certain conditions the Company determined it is unable to meet. As a result, many Company employees' employment terminated effective September 6, 2016. Subsequently, we were informed on September 9, 2016, that the Company's secured creditor had exercised its right to block the Company's access to its bank accounts. Despite our best efforts to negotiate release of the bank accounts since September 9, 2016, we have been unable to do so. Due to the secured creditor's actions, the Company is now illiquid and is not able to continue your employment for as long as the Company expected as of last week. As a result, your employment is being terminated effective as of the Termination Date. This notice is being given as soon as it was practicable and there are no bumping rights associated with this elimination.

- a) **Final Pay.** Based on the Company obtaining the secured creditor's approval to pay employees, the Company intends to issue your final paycheck for work performed through your Termination Date. If you do not have direct deposit, the Company intends to send your final paycheck to your home address on record with the Company.
- b) **Medical Benefits.** All medical, dental, vision and Flexible Spending Account coverage will end on your Termination Date. You may use this letter as evidence of termination of your benefits as you consider other coverage options. No payroll deductions have been taken for these benefits in your final paycheck. **Print this letter immediately for your records.**
- c) **Other Benefits.** No payroll deductions have been taken for life insurance, disability insurance, health savings account, or 401(k) contributions or loan repayments. No deductions were taken for welfare benefits because the company's welfare benefit plans have been or are in the process of being terminated. Deductions were not taken for 401(k) contributions or loan repayments because no personnel will be present to ensure that any such deductions are timely transferred to the plan's trustee for deposit in the plan's trust.
- d) **Unemployment Compensation.** You will be eligible to apply for unemployment compensation the day following your Termination Date.

Please see the attached Benefit Status Upon Separation notification that includes contact information for further details about post-employment benefits to which you may be entitled.

You are personally and solely responsible for paying all charges to your American Express Corporate credit card account with respect to any American Express Corporate credit card issued to you in conjunction with your ITT/ESI employment. You must pay any outstanding charges in full on or before the due date, failing which, ITT/ESI may deduct any balance due on your American Express Corporate credit card account from any pending business expense reimbursement, if you fail to pay such balance when due, in accordance with local law.

You should collect your personal property from your work location today. You must immediately return to ITT/ESI all ITT/ESI property, including, but not limited to, textbooks, equipment, licenses, cell phones, credit cards, and keys. Please return company property at your work location.

You may have received previous communications about planned terminations of employment. Please be advised that this document supersedes and replaces any such previous communications.

We realize that this will be a difficult time for you; however, we urge you to direct your attention and energies to your future.

If the address on this letter is not your current address, please email your current address to benefitquestions@ittesi.com.

Thank you for your efforts and contributions in working for ITT/ESI, and I wish you well in your future endeavors.

Unfortunately the employment of all remaining Company employees is terminating effective as of the Termination Date and therefore we are not able to provide the name and contact number of a Company official to contact for further information. You should refer to the attached Benefit Status Upon Separation to identify who may be the appropriate person(s) to contact depending on your question(s).

EXHIBIT C

SENIOR EXECUTIVE SEVERANCE PLAN

EX-10 2 exhibit10_26.htm

Exhibit 10.26

ITT Educational Services, Inc. Senior Executive Severance Plan**1. Purposes**

This document, to be known as the ITT Educational Services, Inc. Senior Executive Severance Plan, has been established by the Company as of the date set forth in Section 11, and it replaces and supersedes the ESI Special Senior Executive Severance Pay Plan and the ESI Senior Executive Severance Pay Plan, which have been terminated. The Plan provides Severance Benefits to certain key executives of the Company whose employment terminates under certain conditions following an Acceleration Event or during an Imminent Acceleration Event Period. The capitalized words and terms used throughout the Plan are defined in Section 9.

The purpose of the Plan is to reinforce and encourage the continued attention and dedication of Severance Executives to their assigned duties, without distraction in the face of potentially disruptive circumstances arising from the possibility of an Acceleration Event. The accomplishment of this purpose is in the best interest of the Company and its shareholders.

2. Covered Employees

This Plan covers Severance Executives.

3. Entitlement to Severance Benefits

(a) Subject to the provisions of Subsection 3(b), the Company will pay to a Severance Executive the applicable Severance Benefits set forth in Section 4 if (i) during an Imminent Acceleration Event Period, or within two (2) years after an Acceleration Event, the Company terminates a Severance Executive's employment with the Company other than for Cause, or (ii) within two (2) years after an Acceleration Event, the Severance Executive terminates his or her employment with the Company for Good Reason and the conditions described in the following sentence are satisfied. A Severance Executive will be entitled to Severance Benefits upon his or her termination of employment for Good Reason within two (2) years following an Acceleration Event only if all of the following additional conditions are satisfied:

- (A) the Severance Executive provides written notice to the Company of the existence of the condition claimed to constitute Good Reason within ninety (90) calendar days of the initial existence of the condition;
- (B) the Company does not remedy the condition within thirty (30) calendar days of the Company's receipt of the written notice described in clause (A); and
- (C) the Severance Executive terminates his or her employment with the Company during the six (6) month period following the expiration of the cure period described in clause (B) above.

(b) Notwithstanding any other provision of this Plan, a Severance Executive will not be eligible for any Severance Benefits under this Plan unless both of the following conditions are satisfied:

- (i) The Severance Executive timely signs, and does not timely revoke, a General Release, in substantially the form attached as Exhibit A (which may be amended from time to time in accordance with Section 8). The Severance Executive must sign the General Release by the deadline communicated to him or her in writing. If a Severance Executive is age 40 or older, and thereby covered by the ADEA, the Severance Executive will have a period of either 21 or 45 days, as specified in the General Release, to consider the General Release before signing it and the Severance Executive will be advised to consult an attorney before signing the General Release. If the Severance Executive is subject to the ADEA, he or she will also have the right to revoke the General Release within the Revocation Period. A Severance Executive must wait until his or her employment has terminated to sign a General Release. The Plan Administrator will not accept from any Severance Executive a General Release signed before the Severance Executive has terminated employment with the Company.
- (ii) The Severance Executive signs a Noncompetition Agreement, substantially in the form attached as Exhibit B (which may be amended from time to time in accordance with Section 8).

4. Severance Benefits

(1) Severance Benefits for Severance Executives in Band A shall be as follows:

- (a) Severance Pay. Severance Pay in a total amount equal to the sum of (i) three (3) times the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii) three (3) times the highest bonus paid or awarded (whether or not deferred) to the Severance Executive in any of the three (3) years preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), including, among the bonuses taken into account for this purpose, any bonus paid or awarded by reason of an Acceleration Event, without regard to whether such bonus is paid (whether or not deferred) during such three (3) year period or after an Acceleration Event.
- (b) Savings Plan Lump Sum Amount. A lump sum amount equal to three (3) times the product of (i) and (ii), where (i) is the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii)

is the highest percentage rate of Company contributions (including matching contributions) with respect to the Severance Executive under the Savings Plans at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period).

- (c) Welfare Coverage Stipend. A lump sum stipend equal to the sum of (i) thirty-six (36) times the monthly COBRA premium that, as of the date of the Severance Executive's termination of employment, is charged to COBRA qualified beneficiaries for the same coverage options and levels of medical, prescription drug, dental, and vision coverage that the Severance Executive had in effect under the Company's welfare plans immediately prior to his or her termination of employment; and (ii) thirty-six (36) times the full monthly premium payable to the Company's life insurance carrier for the type and level of life insurance coverage (including, if applicable, dependent life insurance coverage) in effect for the Severance Executive immediately prior to the Severance Executive's termination of employment. The Welfare Coverage Stipend shall be payable irrespective of whether or not the Severance Executive or any of his or her eligible family members elects COBRA continuation coverage or conversion or continuation of life insurance coverage, whether or not coverage is continued for the maximum permissible period, or whether or not the Severance Executive receives welfare benefits coverage from another employer. Payment of the Welfare Coverage Stipend will not in any way extend or modify the Severance Executive's continuation coverage rights under COBRA or any similar continuation coverage law or welfare benefit plan provision.
- (d) Gross-Up Payment. In the event that the Payments paid or payable to or for the benefit of a Severance Executive in Band A would be subject to any Excise Tax, then, in accordance with the provisions of this Subsection 4.I.(d), the Company will pay to the Severance Executive a Gross-Up Payment in an amount such that, after the Severance Executive's payment of all federal, state and local taxes (including any interest, penalties, additional tax, or similar items imposed with respect to such taxes), including, without limitation, any income and employment taxes (and any interest and penalties imposed with respect to such taxes) and Excise Tax imposed upon the Gross-Up Payment, the Severance Executive retains an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Payments. An initial determination as to whether a Gross-Up Payment is required pursuant to this Subsection 4.I.(d), and the amount of any such Gross-Up Payment, will be made at the Company's expense by an Accounting Firm selected by the Company and reasonably acceptable to the Severance Executive. The Accounting Firm will provide its determination, together with detailed supporting calculations and documentation, to the Company and the Severance Executive within ten (10) business days after the date on which the Severance Executive terminates employment with the Company. The determination will be final, binding, and conclusive on the Company and the Severance Executive, and the Company will pay the Gross-Up Payment, if any, to the Severance Executive, in accordance with the Accounting Firm's determination, within five (5) business days after the Company's receipt of the Accounting Firm's determination, except that no Gross-Up Payment shall be paid prior to the expiration of the applicable Revocation Period or in the event the

Severance Executive revokes the General Release during the Revocation Period. For purposes of determining the amount of the Gross-Up Payment, the Severance Executive will be deemed to pay federal income taxes at the highest marginal rate of federal income taxation in the calendar year in which the Gross-Up Payment is to be made and applicable state and local income taxes at the highest marginal rate of taxation in the state and locality of the Severance Executive's residence on the date of his or her termination of employment with the Company, net of the maximum reduction in federal income taxation that would be obtained from deduction of those state and local taxes. Notwithstanding anything in this Subsection 4.I.(d) to the contrary, in the event that, according to the Accounting Firm's determination, an Excise Tax will be imposed on the Payments, the Company will pay to the applicable governmental taxing authorities, as Excise Tax withholding, the amount of the Excise Tax that the Company has actually withheld from the Payments in accordance with applicable law. Notwithstanding any of the foregoing provisions of this Subsection 4.I.(d), any Gross-Up Payment due under this Subsection shall be paid by no later than March 15 of the calendar year following the calendar year in which the Severance Executive's termination of employment with the Company occurs.

(II) Severance Benefits for Severance Executives in Band B shall be as follows:

- (a) Severance Pay. Severance Pay in a total amount equal to the sum of (i) two (2) times the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii) two (2) times the highest bonus paid or awarded (whether or not deferred) to the Severance Executive in any of the three (3) years preceding an Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), including, among the bonuses taken into account for this purpose, any bonus paid or awarded by reason of an Acceleration Event, without regard to whether such bonus is paid (whether or not deferred) during such three (3) year period or after an Acceleration Event.
- (b) Savings Plan Lump Sum Amount. A lump sum amount equal to two (2) times the product of (i) and (ii), where (i) is the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii) is the highest percentage rate of Company contributions (including matching contributions) with respect to the Severance Executive under the Savings Plans at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period).

- (c) Welfare Coverage Stipend. A lump sum stipend equal to the sum of (i) twenty-four (24) times the monthly COBRA premium that, as of the date of the Severance Executive's termination of employment, is charged to COBRA qualified beneficiaries for the same coverage options and levels of medical, prescription drug, dental, and vision coverage that the Severance Executive had in effect immediately prior to his or her termination of employment; and (ii) twenty-four (24) times the full monthly premium payable to the Company's life insurance carrier for the type and level of life insurance coverage (including, if applicable, dependent life insurance coverage) in effect for the Severance Executive immediately prior to the Severance Executive's termination of employment. The Welfare Coverage Stipend shall be payable irrespective of whether or not the Severance Executive or any of his or her family members elects COBRA continuation coverage or conversion or continuation of life insurance coverage, whether or not coverage is continued for the maximum permissible period, or whether or not the Severance Executive receives welfare benefits coverage from another employer. Payment of the Welfare Coverage Stipend will not in any way extend or modify the Severance Executive's continuation coverage rights under COBRA or any similar continuation coverage law or welfare benefit plan provision.
- (d) Limitation on Severance Benefits. Notwithstanding anything to the contrary contained in this Plan, in the event that the total Payments to a Severance Executive in Band B pursuant to this Plan or otherwise in connection with an Acceleration Event would otherwise exceed the amount that could be received by the Severance Executive without the imposition of an Excise Tax (the "Safe Harbor Amount"), then the value of the Payments will be reduced to the Safe Harbor Amount, but only if, by reason of that reduction, the Net After-Tax Benefit to the Severance Executive would exceed the Net After-Tax Benefit to the Severance Executive if no such reduction was made. For purposes of this Subsection 4.II.(d), the determination of whether any portion of the Payments would be subject to an Excise Tax, and the determinations of the Safe Harbor Amount and the greater Net After-Tax Benefit, will be made at the Company's expense by an Accounting Firm selected by the Company and reasonably acceptable to the Severance Executive. For purposes of those determinations, the value of any non-cash benefit or any deferred payment or benefit included in the Payments will be determined by the Accounting Firm in accordance with the principles of Code Section 280G(d) (3) and (4). In the event that the Payments to a Severance Executive must be reduced pursuant to this Subsection 4.II.(d), the nature (cash or non-cash) and the source (the Plan or any other plan, agreement, or arrangement) of the Payments to be reduced first will be as directed by the Severance Executive. In the event a Severance Executive receives Payments that, according to the Accounting Firm, are subject to an Excise Tax, the Company will pay to the applicable governmental taxing authorities, as Excise Tax withholding, the amount of the Excise Tax that the Company has actually withheld from the Payments in accordance with applicable law.

5. Form and Time of Payment of Severance Benefits

Except as otherwise provided in this Section 5, the Severance Benefits due to a Severance Executive will be paid in a lump sum cash payment within thirty (30) calendar days after the date on which the Severance Executive's employment with the Company is terminated, or, if later, on

the first business day after expiration of the applicable Revocation Period (provided that the Severance Executive does not revoke the General Release during the Revocation Period), but in no case will payment be made later than March 15 of the calendar year following the calendar year in which the Severance Executive's termination of employment with the Company occurs. Payment of any amount due under Subsection 4.I.(d) will be paid as provided in that Subsection. Severance Benefits are intended to be short-term deferrals exempt from Code Section 409A, but in the event that any portion of the Severance Benefits due to a Severance Executive constitutes deferred compensation within the meaning of Code Section 409A, and the Severance Executive, at the time of his or her termination of employment, is a Specified Employee, then payment of the portion of the Severance Benefits that constitutes deferred compensation will be delayed until the first business day following the date that is six (6) calendar months after the date of the Severance Executive's termination of employment with the Company (or, if earlier, the date of the Severance Executive's death following his or her termination of employment).

6. Administration of Plan

The Compensation Committee or its designee will be the Plan Administrator and will have the exclusive right and discretionary authority to interpret this Plan, adopt any rules and regulations for carrying out this Plan as may be appropriate, and decide any and all matters arising under this Plan, including but not limited to the right to determine claims and appeals under Section 7. Subject to applicable federal and state law, all interpretations and decisions by the Plan Administrator will be final, conclusive, and binding on all affected parties.

7. Claims and Appeals Procedures

If a Severance Executive (or his or her beneficiary) believes that he or she is entitled to a benefit under the Plan that has not been paid, or to a different benefit than what has been paid, he or she may file a written claim for the benefit with the Plan Administrator. If any claim for benefits is denied, in whole or in part, the claimant will be given written notice of the denial within ninety (90) days following receipt of the claim. The notice will include (i) the specific reason or reasons for the denial; (ii) specific reference to the pertinent Plan provision(s) on which the denial was based; (iii) a description of any additional material or information necessary for the claimant to perfect the claims and an explanation of why that material is necessary, and (iv) an explanation of the Plan's claims review procedures. If special circumstances require an extension of time for processing the claim, written notice of the extension will be furnished to the claimant prior to the end of the initial ninety (90) day period following receipt of the claim. If the claim has not been granted, and a written notice of the denial of the claim is not furnished, within ninety (90) days after receipt of the claim, the claim may be treated as denied for purposes of proceeding to the claims review procedure described in the following paragraph.

A claimant or his or her authorized representative may request review of a denied claim within sixty (60) days after receipt of written notification of denial of a claim (or, if timely notice of denial is not given, within sixty (60) days after expiration of the ninety (90) day response period described in the preceding paragraph). To request review of the denial, the claimant or his or her authorized representative must submit a written request for review to the Plan Administrator. In connection with the request for review, the claimant or his or her authorized representative may review

pertinent documents in the Plan Administrator's possession or control and submit issues and comments in writing to the Plan Administrator within the sixty (60) days period following receipt of written notice of the claim denial. Not later than sixty (60) days after receipt of the request for review, the Plan Administrator will render and furnish to the claimant a written decision, which will include specific reasons for the decision and make specific reference to the pertinent Plan provision(s) on which the decision is based. If special circumstances require an extension of time for processing, the decision shall be rendered as soon as possible, but not later than one hundred twenty (120) days after receipt of the request for review, provided that written notice and explanation of the delay are given to the claimant prior to commencement of the extension.

If the claimant disputes the Plan Administrator's decision on review, the dispute will be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Notwithstanding the foregoing, if the claimant believes the claims procedure or dispute resolution mechanism provided under this Section 7 would be futile, the claimant, in his or her sole discretion, may elect to pursue his or her rights under the Plan pursuant to Section 502 of ERISA.

The Company shall bear the expense of any enforcement proceeding brought by a Severance Executive (or his or her beneficiary) under this Section 7 and shall reimburse the claimant for all of his or her reasonable costs and expenses relating to such enforcement proceeding, including, without limitation, reasonable attorney's fees and expenses, provided that the claimant is the prevailing party in the proceeding. For purposes of the preceding sentence, the trier of fact in the enforcement proceeding will be asked to make a determination as to the reimbursement of the claimant's costs and expenses as a prevailing party under the Plan. In no event shall the claimant be required to reimburse the Company for any costs or expenses relating to the enforcement proceeding.

If a claimant is entitled to payment or reimbursement of fees and expenses pursuant to the preceding paragraph, payment or reimbursement will be made within fifteen (15) business days after receipt of the claimant's written request for payment or reimbursement, accompanied by such evidence of fees and expenses as the Company may reasonably require, but the claimant may not submit such a request until the dispute has been finally resolved (either by agreement or by an order or judgment that is not subject to appeal or with respect to which all appeals have been exhausted). Notwithstanding the foregoing, any payment pursuant to this paragraph must be made no later than the end of the calendar year following the calendar year in which the dispute is finally resolved by a legally binding settlement or nonappealable judgment or order.

8. Termination or Amendment

ESI may make a Plan Change at any time, except that, during an Imminent Acceleration Event Period or following an Acceleration Event, no Plan Change that would adversely affect any Severance Executive may be made without the prior written consent of the affected Severance Executive.

9. Definitions

"Acceleration Event" means any of the following: (i) a report on Schedule 13D is filed with the Securities and Exchange Commission pursuant to Section 13(d) of the Act disclosing that any Person, other than ESI or an ESI Subsidiary or any employee benefit plan sponsored by ESI or an ESI Subsidiary, is the beneficial owner directly or indirectly of 20% or more of the outstanding shares of the Stock; (ii) any Person, other than ESI or an ESI Subsidiary, or any employee benefit plan sponsored by ESI or an ESI Subsidiary, purchases shares pursuant to a tender offer or exchange offer to acquire any Stock (or securities convertible into Stock) for cash, securities or any other consideration, provided that after consummation of the offer, the Person in question is the beneficial owner (as such term is defined in Rule 13d-3 under the Act), directly or indirectly, of fifteen (15) percent or more of the outstanding Stock (calculated as provided in paragraph (d) of Rule 13d-3 under the Act in the case of rights to acquire Stock); (iii) the stockholders of ESI approve (A) any consolidation or merger of ESI in which ESI is not the continuing or surviving corporation or pursuant to which shares of Stock would be converted into cash, securities or other property, other than a merger of ESI in which holders of Stock immediately prior to the merger have the same proportionate ownership of common stock of the surviving corporation immediately after the merger as they had in the Stock immediately before, or (B) any sale, lease, exchange or other transfer (in one transaction or a series of related transactions) of all or substantially all the assets of ESI, or (iv) a change in a majority of the members of the Board of Directors of ESI occurring within a twelve (12) month period, unless the election or nomination for election by ESI's stockholders of each new director during that twelve (12) month period was approved by the vote of two-thirds of the directors then still in office who were directors at the beginning of that twelve (12) month period.

"Accounting Firm" means an accounting firm that is designated as one of the five largest accounting firms in the United States (which may include the Company's independent auditors).

"Act" means the Securities Exchange Act of 1934, as amended.

"ADEA" means the Age Discrimination in Employment Act of 1967, as amended.

"Board" means the Board of Directors of ESI.

"Cause" means, with respect to a Severance Executive, action by the Severance Executive involving willful malfeasance or the Severance Executive's failure to act involving material nonfeasance that would have a materially adverse effect on the Company. An act or omission on the part of the Severance Executive shall not be considered "willful" unless it is done or omitted in bad faith or without reasonable belief that the action or omission was in the interest of the Company.

"COBRA" means the health care continuation coverage provisions of the Consolidated Omnibus Budget Reconciliation Act of 1984, as amended, and any health care continuation coverage available or provided pursuant to that law.

"Code" means the Internal Revenue Code of 1986, as amended, and interpretive rules and regulations.

"Company" means, collectively, ESI and all ESI Subsidiaries. After an Acceleration Event, the "Company" also includes any successors to ESI and the ESI Subsidiaries and any affiliates of those successors.

"Compensation Committee" means the Compensation Committee of the Board.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"ESI" means ITT Educational Services, Inc. After an Acceleration Event, "ESI" also includes any successor to ESI.

"ESI Subsidiary" means a subsidiary company of ESI. After an Acceleration Event, an "ESI Subsidiary" also includes any successor to an ESI Subsidiary.

"Excise Tax" means the excise tax imposed by Section 4999 of the Code, or any successor to that provision, and any interest or penalties incurred by a Severance Executive with respect to that excise tax.

"General Release" means a written document, substantially in the form attached to this Plan as Exhibit A (as it may be amended from time to time in accordance with Section 8), intended to create a binding agreement between the Company and a Severance Executive pursuant to which the Severance Executive, as a condition of receiving Severance Benefits under the Plan, agrees to release the Company and certain related entities and individuals from all claims that the Severance Executive has or may have against any or all of them that arise on or before the date on which the Severance Executive signs the General Release, including, without limitation, claims under the ADEA.

"Good Reason" means, with respect to a Severance Executive, one or more of the following conditions, arising without the Severance Executive's consent: (i) a material diminution in the Severance Executive's base compensation; (ii) a material diminution in the Severance Executive's authority, duties, or responsibilities; (iii) a material diminution in the authority, duties, or responsibilities of the person to whom the Severance Executive is required to report (including, for example, a requirement that a Severance Executive who previously reported to the Board instead report to a corporate officer or employee); (iv) a material diminution in the budget over which the Severance Executive retains authority; (v) a material change in the geographic location at which the Severance Executive must perform services; and (vi) if the terms and conditions of a Severance Executive's employment are governed by an agreement, any other action or inaction that constitutes a material breach by the Company of the agreement.

"Gross-Up Payment" means, with respect to a Severance Executive in Band A, the additional payment described in Subsection 4.I.(d).

"Imminent Acceleration Event Period" means the period (a) beginning on the first to occur of (i) a public announcement (whether by advertisement, press release, press interview, public statement, Securities and Exchange Commission filing, or otherwise) of a proposal or offer that, if consummated, would be an Acceleration Event, (ii) the making to a director or executive officer of the Company a written proposal that, if consummated, would be an Acceleration Event, or (iii) approval by the Board or the stockholders of ESI of a transaction that, upon closing, would be an Acceleration Event; and (b) ending upon the first to occur of (i) a public announcement that the prospective Acceleration Event contemplated by the events described in clause (a) has been terminated or

abandoned, (ii) the occurrence of the contemplated Acceleration Event, or (iii) 18 months after the beginning of the Imminent Acceleration Event Period.

"Net After-Tax Benefit" means, with respect to the total Payments or the Safe Harbor Amount, whichever is applicable, that amount net of all applicable federal, state, and local income and employment taxes and Excise Taxes. The Net After-Tax Benefit will be determined in accordance with the assumptions, principles, and other applicable provisions of Subsection 4.II.(d).

"Noncompetition Agreement" means a written agreement substantially in the form attached to this Plan as Exhibit B (as it may be amended from time to time in accordance with Section 8).

"Payments" means any payments or distributions by the Company in the nature of compensation to or for the benefit of a Severance Executive in connection with an Acceleration Event (with an Acceleration Event being defined for this purpose as a "change" described in Code Section 280G(b)(2)(A)(i) (I) or (II)), whether paid or payable or distributed or distributable pursuant to the terms of this Plan or otherwise, but determined without regard to any additional payments required under Subsection 4.I.(d). The following will not be treated as Payments with respect to a Severance Executive: (i) any payment or benefits the receipt or enjoyment of which the Severance Executive effectively waived in writing prior to the date of his or her termination of employment; and (ii) any payment that, in the opinion of the Accounting Firm, does not constitute a "parachute payment" within the meaning of Code Section 280G(b)(2). In determining the extent to which amounts constitute "parachute payments" within the meaning of Code Section 280G(b)(2), the Accounting Firm will make a reasonable determination of the value to be assigned to the restrictive covenant in effect for the Severance Executive pursuant to the Noncompetition Agreement, and the amount of the Severance Executive's potential parachute payment under Code Section 280G will be reduced by the value of the restrictive covenant to the extent consistent with Code Section 280G.

"Person" means a person within the meaning of Section 13(d) of the Act.

"Plan" means the ITT Educational Services, Inc. Senior Executive Severance Plan.

"Plan Administrator" means the Compensation Committee or its designee.

"Plan Change" means an amendment to or termination of the Plan.

"Revocation Period" means, with respect to a Severance Executive, the period of time during which the Severance Executive may revoke the General Release. If a Severance Executive is covered by the ADEA, the Executive's Revocation Period, which will be specified in the General Release, will be at least seven (7) calendar days from the date on which the Severance Executive signs the General Release. If a Severance Executive is not covered by the ADEA (for example, because he or she is under age 40), and there is no Revocation Period specified in the Severance Executive's General Release, then the Severance Executive's Revocation Period will be zero (0) days and will be deemed to expire on the day on which the Severance Executive signs the General Release.

"Safe Harbor Amount" has the meaning given such term in Subsection 4.II.(d).

"Savings Plan Lump Sum Amount" means, with respect to a Severance Executive, the Severance Benefits described in Subsection 4.I.(b) or 4.II.(b), whichever is applicable to the Severance Executive.

"Savings Plans" means the ESI 401(k) Plan and the ESI Excess Savings Plan and any successors to those plans.

"Severance Benefits" means the benefits described in Section 4.

"Severance Executive" means a full-time regular salaried employee and officer of the Company who is in either Band A or Band B. The Severance Executives in Band A include any Chief Executive Officer of ESI; and the Severance Executives in Band B include any officer below the level of Chief Executive Officer of ESI and above the level of Vice President of ESI.

"Severance Pay" means, with respect to a Severance Executive, the Severance Benefits described in Subsection 4.I.(a) or 4.II.(a), whichever is applicable to the Severance Executive.

"Specified Employee" has the meaning given in Code Section 409A(a)(2)(B)(i). The determination of which individuals are Specified Employees will be made in accordance with such rules and practices, consistent with Code Section 409A and interpretive regulations, as are established from time to time by the Board, or its designee, in its discretion.

"Stock" means the common stock, \$0.01 par value, of ESI.

"Welfare Coverage Stipend" means, with respect to a Severance Executive, the Severance Benefit described in Subsection 4.I.(c) or 4.II.(c), whichever is applicable to the Severance Executive.

10. Miscellaneous

The Severance Executive shall not be entitled to any notice of termination from the Company or pay in lieu of such notice.

Severance Benefits under this Plan will be paid entirely by the Company from its general assets.

This Plan is not a contract of employment, does not guarantee the Severance Executive employment for any specified period and does not limit the right of the Company to terminate the employment of the Severance Executive at any time.

If a Severance Executive dies while any amount is still payable to the Severance Executive under the Plan, all such amounts shall be paid in accordance with this Plan to the Severance Executive's designated heirs or, in the absence of such designation, to the Severance Executive's estate.

The numbered paragraph headings contained in this Plan are included solely for convenience of reference and shall not in any way affect the meaning of any provision of this Plan.

If, for any reason, any one or more of the provisions or part of a provision contained in this Plan shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision or part of a provision of this Plan not held so invalid, illegal or unenforceable, and each other provision or part of a provision will, to the full extent consistent with law, remain in full force and effect.

This Plan is intended to comply with the requirements of Code Section 409A, to the extent applicable, and will be construed accordingly. In construing or interpreting any vague or ambiguous provision of the Plan, the interpretation that will prevail is the interpretation that will cause the Plan to comply with the applicable standards for nonqualified deferred compensation plans established by Code Section 409A. Any provision that would cause the Plan or any benefits provided under it to fail to satisfy Code Section 409A will have no force or effect until amended to comply with Code Section 409A, which amendment may be retroactive to the extent permitted by Code Section 409A. For purposes of this Plan, a Severance Executive will not be treated as having terminated employment with the Company until he or she has incurred a separation from service within the meaning of Code Section 409A.

11. Adoption Date

The Plan was adopted by ESI on October 22, 2007 ("Adoption Date") and does not apply to any termination of employment that occurred or was communicated to any Severance Executive prior to the Adoption Date.

Exhibit A

GENERAL RELEASE

I am a participant in the ITT Educational Services, Inc. Senior Executive Severance Plan (the "Plan") and have terminated employment with ITT Educational Services, Inc. and its subsidiaries (the "Company") under circumstances that will entitle me to certain severance benefits (the "Severance Benefits") under the Plan, provided I meet the applicable conditions specified in the Plan. I understand that, under the terms of the Plan, I will only be able to receive the Severance Benefits in consideration for my signing this General Release ("Release").

I hereby acknowledge and agree to the following:

[I will have _____ () days [21 days for individual terminations, 45 days for group terminations] from the date I receive this Release to consider and sign it. If I do not return this signed Release in _____ () days, the Company will consider this my refusal to sign, and I will not receive the Severance Benefits. If I do sign this Release, it will not be effective for a period of seven (7) days, during which time I can change my mind and revoke my signature. To revoke my signature, I must notify the Company in writing within seven (7) days of the date I signed this Release.] [To be used for individuals age 40 or older.]

By signing this Release, I am giving up my right to sue ITT Educational Services, Inc. and any and all affiliates, parent companies and subsidiaries, and their past, present, and future officers, directors, employees, and agents (together, the "Releasees") based upon any act or event occurring prior to my signing this Release. Without limitation, I specifically release the Releasees from any and all claims arising out of my employment and termination, including claims based on discrimination under federal anti-discrimination laws such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and any and all federal, state, and local laws.

By signing this Release, I am NOT giving up my right to appeal a denial of a claim for benefits submitted under any health coverage (medical, dental, vision, and prescription drug coverage), life insurance or disability program maintained by the Company, nor am I giving up any claim for benefits under the terms of any pension or retirement plan maintained by the Company. Also, I am not giving up my right to file for unemployment insurance benefits at the appropriate time if I so choose, and my signing of this Release will not affect my rights, if any, to any coverage by workers' compensation insurance. In addition, this Release will not affect any benefits to which I am entitled under the Plan or any claim arising out of the enforcement of the Plan. I also am not giving up any right to indemnification or directors and officers liability insurance coverage and benefits to which I am entitled under applicable law, the Company's articles of incorporation or by-laws or any agreements, or under which I have been covered.

My signature below acknowledges that I have read the above, understand what I am signing, and am acting of my own free will. The Company has advised me to consult with an attorney and any other advisors of my choice prior to signing this Release.

Signature: _____

Date: _____

Print Name: _____

Witness: _____

Exhibit B

FORM OF NONCOMPETITION AGREEMENT

This Non-Competition Agreement ("Agreement") is made and entered into as of **[**date**]** by and between ITT EDUCATIONAL SERVICES, INC., a corporation having its principal place of business in Carmel, Indiana (the "Company"), and **[**NAME**]** ("Executive").

Recitals

- A. Executive has been employed with the Company in an executive capacity.
- B. During Executive's employment with the Company, Executive has had access to and has acquired trade secrets and confidential information of the Company.
- C. Executive is a participant in that certain ITT Educational Services, Inc. Senior Executive Severance Plan (the "Severance Plan").
- D. Executive's employment with the Company will terminate or has terminated effective as of **[**date**]** under circumstances that make Executive eligible for benefits under the Severance Plan. As a condition to Executive's entitlement to benefits under the Severance Plan, Executive must enter into this Agreement.
- E. Executive is willing to enter into this Agreement for the protection of the Company in exchange for Executive's receipt of benefits under the Severance Plan.

Agreement

NOW, THEREFORE, in consideration of the foregoing recitals, the Executive's receipt of benefits under the Severance Plan, the promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and Executive agree as follows:

- 1. **Acknowledgment.** Executive acknowledges that: (a) the Company is engaged in a highly competitive business; (b) Executive has served the Company in an executive and/or high-level managerial capacity; (c) Executive has had access to and has gained knowledge of substantial trade secrets and confidential information of the Company; and (d) the covenants and restrictions contained in this Agreement are reasonably necessary to protect the legitimate interests of the Company.
- 2. **Non-Disclosure of Confidential Information.** As used in Sections 2 and 3 of this Agreement, the term "Company" means and includes not only ITT Educational Services, Inc. but also any subsidiary of ITT Educational Services, Inc. and/or any other affiliate entity that controls, is controlled by, or is under common control with, ITT Educational Services, Inc., provided that Executive has provided services for the benefit of or has received or had access to confidential information concerning such subsidiary or affiliate. As used in this Agreement, the term "Confidential Information" means any and all of the Company's trade secrets, confidential and proprietary information and all other non-public information and data of or about the Company and its business, including, but not limited to, confidential business methods and processes, research and development information, business plans and strategies, marketing plans

and strategies, information pertaining to customers, pricing information, cost information, financial information, personnel information, contract information, data compilations, information received from third parties that the Company is obligated to keep confidential, and information about prospective products or services, whether or not reduced to writing or other tangible medium of expression, including work product created by Executive in rendering services for the Company. Executive acknowledges that the Confidential Information is a valuable, special and unique asset of the Company. For as long a period of time as permitted by applicable law, and in any event for a period of at least three (3) years after the termination of Executive's employment with the Company, Executive will not, except as may be authorized in writing by the Company, use or disclose to others any of the Confidential Information. Executive agrees that the Company owns the Confidential Information and Executive has no rights, title or interest in any of the Confidential Information. Executive will immediately deliver to the Company any and all materials (including all copies and electronically stored data) containing any Confidential Information in Executive's possession or subject to Executive's custody or control. Executive's non-disclosure obligations hereunder shall continue as long as the Confidential Information remains confidential, and shall not apply to any information which Executive is required by law or judicial process to disclose or which becomes generally publicly available through no fault or action of Executive or others who were under confidentiality obligations with respect to such information.

3. **Non-Competition Covenants.** Executive agrees to the following non-competition covenants:

a. During the Restricted Time Period, Executive will not within the Restricted Geographic Area be employed by, work for, consult with, lend assistance to, or engage in any Competitive Business (i) in the same or similar capacity or function to that in which Executive worked for the Company, (ii) in any executive or managerial capacity (iii) in any consulting capacity or function or (iv) in any other capacity in which Executive's knowledge of the Company's Confidential Information would facilitate or support Executive's work for the Competitive Business. For purposes of this Agreement, the term "Restricted Time Period" means the twelve (12) month period immediately after the termination of Executive's employment with the Company. For purposes of this Agreement, the term "Restricted Geographic Area" means each of the States of the United States of America. For purposes of this Agreement, the term "Competitive Business" means any for-profit entity that is engaged in the business of providing post-secondary education with annual revenues of at least \$100 million and that is competitive with the business of the Company. Executive acknowledges that the foregoing restriction is reasonable given (x) the position in which Executive has been employed with the Company, (y) the Company's business is national in scope, and (z) Executive, for or on behalf of a Competitive Business, could compete effectively with the Company from any location in the United States. Notwithstanding the restrictions contained in this Section 3.a, if a Competitive Business has multiple divisions, units or segments, some of which are not engaged in providing post-secondary education, Executive may work for or consult with only that division, unit or segment that is not engaged in providing post-secondary education, provided that (I) Executive first provides the Company with a written notice describing in reasonable detail Executive's position with and anticipated activities for the Competitive Business, which such written notice also includes an assurance that Executive's affiliation with and work for the Competitive Business will relate only to the non-competitive division, unit or segment and will not involve any activities that are competitive with the Company, and (II) Executive's affiliation with

and/or work for the non-competitive division, unit or segment of the Competitive Business would not likely cause Executive to inevitably use and/or disclose any Confidential Information.

b. During the Restricted Time Period, Executive will not (i) solicit, recruit, hire, employ or attempt to hire or employ any person who is an employee of the Company, (ii) assist any person or entity in the recruitment or hiring of any person who is an employee of the Company, (iii) urge, induce or seek to induce any person to terminate his/her employment with the Company, or (iv) advise, suggest to or recommend to any person or entity that it employ or solicit for employment any person who is an employee of the Company.

c. During the Restricted Time Period, Executive will not urge, induce or seek to induce any of the Company's customers, independent contractors, subcontractors, consultants, business partners, licensors, licensees, vendors, suppliers or others with whom the Company has a business relationship to terminate their relationship with, or representation of, the Company, or to cancel, withdraw, reduce, limit or in any manner modify any such person's or entity's business with, or representation of, the Company.

d. During the Restricted Time Period, Executive will not make or publish any statements or comments that disparage or injure the reputation or goodwill of the Company or any of its affiliates, or any of its or their respective officers or directors, or otherwise make any oral or written statements that a reasonable person would expect at the time such statement is made to likely have the effect of diminishing or injuring the reputation or goodwill of the Company, or any of its affiliates, or any of its or their respective officers or directors; provided, however, nothing herein shall prevent Executive from providing any information that may be compelled by law.

e. Executive acknowledges and agrees that the non-competition covenants contained in Section 3 of this Agreement prohibit Executive from engaging in certain activities on Executive's own behalf or on behalf of or in conjunction with any person or entity, regardless whether Executive is acting as an employee, owner, independent contractor, consultant or advisor and regardless whether Executive is acting directly or indirectly.

f. In the event Executive violates any non-competition covenant contained in Section 3 of this Agreement, the duration of such non-competition covenant shall automatically be extended by the length of time during which Executive was in violation of such covenant, including, but not limited to, an extension for the period from the date of Executive's first violation until an injunction is entered enjoining such violation.

4. **Cooperation.** During the Restricted Time Period, Executive agrees and covenants that if the Company desires Executive to provide any information or testimony relating to any judicial, administrative or other proceeding involving the Company or any of its affiliated entities, Executive will cooperate in making himself reasonably available for such purposes and will provide truthful information and/or testimony. The Company agrees to reimburse Executive for all necessary and reasonable out-of-pocket expenses Executive incurs in connection with such matters. Should Executive be served with a subpoena in any legal proceeding relating to the Company or any of its affiliates, Executive agrees: (a) to inform the Company immediately of the subpoena; (b) to reasonably cooperate with the Company and its attorneys in responding to such

subpoena and in preparing for any hearings, depositions or other formal process by which evidence is taken or received; and (c) to provide truthful testimony in response to questions that are within the scope of proper discovery.

5. **Severability; Reformation of Restrictions.** The covenants and restrictions in this Agreement are separate and divisible, and to the extent any covenant, provision or portion of this Agreement is determined to be unenforceable or invalid for any reason, the Company and Executive acknowledge and agree that such unenforceability or invalidity shall not affect the enforceability or validity of the remainder of this Agreement. If any particular covenant, provision or portion of this Agreement is determined to be unreasonable or unenforceable for any reason, including, without limitation, the time period, geographical area, and/or scope of activity covered by any non-competition or non-disclosure covenant, provision, or clause, the Company and Executive acknowledge and agree that such covenant, provision or clause shall automatically be deemed reformed such that the contested covenant, provision or clause will have the closest effect permitted by applicable law to the original form and shall be given effect and enforced as so reformed to whatever extent would be reasonable and enforceable under applicable law. The Company and Executive agree that any court interpreting any non-competition or non-disclosure provision of this Agreement shall, if necessary, reform any such provision to make it enforceable under applicable law.

6. **Remedies.** Executive recognizes that a breach or threatened breach by Executive of this Agreement will give rise to irreparable injury to the Company and that money damages will not be adequate relief for such injury, and, accordingly, agrees that the Company shall be entitled to obtain equitable relief, including, but not limited to, specific performance, temporary restraining orders, preliminary injunctions and/or permanent injunctions, without having to post any bond or other security, to restrain or prohibit such breach or threatened breach, in addition to any other legal remedies which may be available, including the recovery of monetary damages from Executive. In addition to all other relief to which it shall be entitled, the Company shall be entitled to recover from Executive all litigation costs and attorneys' fees incurred by the Company in any action or proceeding relating to this Agreement in which the Company prevails.

7. **Governing Law; Choice of Forum.** This Agreement shall be construed and enforced in accordance with the laws of the State of Indiana, without giving effect to any conflict of law principle (whether of the State of Indiana or any other jurisdiction) that would cause the application of the law of any jurisdiction other than the State of Indiana. This Agreement is intended, among other things, to supplement the provisions of the Indiana Uniform Trade Secrets Act, as amended from time to time. The parties agree that any legal action relating to this Agreement shall be commenced and maintained exclusively before any appropriate state court of record in Hamilton County, Indiana, or the United States District Court for the Southern District of Indiana, Indianapolis Division, and the parties hereby submit to the jurisdiction and venue of such courts and waive any right to challenge or otherwise object to personal jurisdiction or venue (including, without limitation any objection based on inconvenient forum grounds) in any action commenced or maintained in such courts; provided, however, the Company may, in its sole discretion, elect to bring an action or claim relating to or arising from this Agreement in the county or federal district where any breach by Executive occurred or where Executive resides.

8. **Successors and Assigns.** The Company shall have the right to assign this Agreement. This Agreement shall inure to the benefit of, and may be enforced by, any and all successors and assigns of the Company, including without limitation by asset assignment, stock

sale, merger, consolidation or other corporate reorganization. Executive shall not have the right to assign this Agreement.

9. **Entire Agreement; Modification.** This Agreement constitutes the entire agreement of the parties with respect to the subjects specifically addressed herein, and supersedes any prior agreements, understandings or representations, oral or written, on the subjects addressed herein. This Agreement may not be amended, supplemented, or modified except by a written document signed by both Executive and a duly authorized officer of the Company specifically designated by the Company's Board of Directors.

10. **No Waiver.** The failure of the Company to insist in any one or more instances upon such performance of any of the provisions of this Agreement or to pursue its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights.

11. **Voluntary Agreement.** Executive acknowledges that: (a) Executive has been given ample time to consider this Agreement; (b) Executive has been given the opportunity to consult with an attorney or other advisor if Executive so chooses; and (c) Executive is knowingly and voluntarily entering into this Agreement.

12. **Counterparts.** This Agreement may be executed in one or more counterparts (or upon separate signature pages bound together into one or more counterparts), all of which taken together shall constitute one agreement.

[Remainder of page intentionally left blank; signature page follows.]

IN WITNESS WHEREOF, the Company and Executive have executed this Agreement as of the date first hereinabove stated.

EXECUTIVE

ITT EDUCATIONAL SERVICES, INC.

[**Name**]

By: _____
Printed Name: _____
Title: _____

EXHIBIT D

RELEVANT EXCERPTS OF
2016 ANNUAL MEETING NOTICE
AND PROXY STATEMENT FOR
ITT EDUCATIONAL SERVICES, INC.

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ITT Educational Services, Inc.

2016 Annual Meeting Notice and Proxy Statement

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The following table sets forth information about the stock options and RSUs that were granted under the ITT Educational Services, Inc. Amended and Restated 2006 Equity Compensation Plan (the "Amended 2006 Plan") effective June 17, 2015 to each Named Executive Officer, other than Messrs. Modany and Dean, and as of August 6, 2015 for the additional grants to Mr. Tarasi, as described above.

Named Executive Officer	Stock Options			RSUs		Date Compensation Committee Took Action
	Number of Securities Underlying Option Granted	Exercise Price	Expiration Date	Number of RSUs	Grant Date ⁽¹⁾	
Rocco F. Tarasi, III	5,000 ⁽²⁾	\$4.91	06/17/22	2,250 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Rocco F. Tarasi, III	N/A	N/A	N/A	16,667 ⁽⁵⁾	08/06/15	07/27/15 ⁽⁶⁾
Daniel M. Fitzpatrick	15,000 ⁽²⁾	\$4.91	06/17/22	6,750 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Eugene W. Feichtner	17,500 ⁽²⁾	\$4.91	06/17/22	7,875 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Ryan L. Roney	12,500 ⁽²⁾	\$4.91	06/17/22	5,625 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Ryan L. Roney	5,208 ⁽⁷⁾	\$4.91	06/17/22	2,344 ⁽⁶⁾	06/17/15	07/21/14 ⁽⁹⁾

- (1) The effective date of the stock option and RSU grants.
- (2) Nonqualified stock option granted at 100% of the closing market price of a share of our common stock on June 17, 2015, the effective date of the grant. One-third of the option is exercisable on each of February 9, 2016, February 9, 2017 and February 9, 2018.
- (3) The period of restriction for this RSU grant lapses in thirds on each of February 9, 2016, February 9, 2017 and February 9, 2018.
- (4) These stock option and RSU grants were initially approved by the Compensation Committee during a Committee meeting on January 26, 2015, their vesting commencement date was approved by the Compensation Committee during a Committee meeting on May 20, 2015, and they had an effective grant date of June 17, 2015.
- (5) The period of restriction for this RSU grant lapses in thirds on each of August 6, 2016, 2017 and 2018.
- (6) This RSU grant was approved by the Compensation Committee during a Committee meeting on July 27, 2015.
- (7) Nonqualified stock option granted at 100% of the closing market price of a share of our common stock on June 17, 2015, the effective date of the grant. One-third of the option is exercisable on each of July 7, 2015, July 7, 2016 and July 7, 2017.
- (8) The period of restriction for this RSU grant lapses in thirds on each of July 7, 2015, July 7, 2016 and July 7, 2017.
- (9) These stock option and RSU grants were initially approved by the Compensation Committee during a Committee meeting on July 21, 2014, their vesting commencement date was approved by the Committee during a Committee meeting on May 20, 2015, and they had an effective grant date of June 17, 2015.

2016 Compensation

Base Salary. In January 2016, the Compensation Committee determined not to make any changes to the annual base salaries for any of the Named Executive Officers (other than Mr. Tarasi) based on the current market and business conditions. The Compensation Committee approved an increase in Mr. Tarasi's base salary from \$221,450 in 2015 to \$350,000 in 2016, to be effective as of February 8, 2016 (the date in 2016 that other employees at our headquarters received compensation adjustments), as a result of the increased duties and responsibilities assumed by Mr. Tarasi in connection with his appointment as our Chief Financial Officer. Mr. Tarasi's 2016 base salary amount was based on the Committee's review of peer group comparator information for similar positions.

In March 2016, the Compensation Committee discussed and approved a reduction in Mr. Dean's annual base salary from \$575,000, as provided in the Dean Letter Agreement, to \$200,000. On March 12, 2016, we and Mr. Dean entered into an Amendment No. 1 to the Dean Letter Agreement (the "Dean Amendment"), pursuant to which the Dean Letter Agreement was amended to change Mr. Dean's annual base salary thereunder to \$200,000.

The following table sets forth the annualized base salary information for each of the Named Executive Officers (other than Mr. Fitzpatrick) as of February 8, 2016 (except for Mr. Dean's base salary, which is as of March 12, 2016). As noted above, 2016 was the second consecutive year with no base salary increases for the Named Executive Officers, other than in connection with promotions.

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Named Executive Officer	2016 Annualized Base Salary	Dollar Increase/ (Decrease) From Prior Year	Percentage Increase/ (Decrease) From Prior Year
Kevin M. Modany	\$824,076	\$ 0	0%
Rocco F. Tarasi, III	\$350,000	\$ 128,550	58.0%
John E. Dean	\$200,000	\$(375,000)	(65.2)%
Eugene W. Feichtner	\$400,000	\$ 0	0%
Ryan L. Roney	\$360,000	\$ 0	0%

Short-Term Compensation. In January 2016, the Compensation Committee established a short-term compensation element for our executive officers (other than Mr. Dean) that will be payable in early 2017, if certain management objectives (the "2016 Management Objectives") are accomplished during 2016. As with the 2015 Management Objectives, the 2016 Management Objectives are not in any way related to the enrollment of students or the award of financial aid to avoid violating the Incentive Compensation Prohibition. Instead, the 2016 Management Objectives consist of various business objectives that relate to certain initiatives that are part of our strategic plan. The 2016 Management Objectives and their relative weightings are as follows:

Management Objectives	Weight
1. Resolve (through settlement or otherwise) outstanding legal and regulatory matters involving the company	20%
2. Increase the 2016 weighted average graduation rate for ITT Technical Institute (calculated utilizing a completion period equal to 1.5 times the anticipated program duration for a full-time student)	20%
3. Improve the 2016 ITT Technical Institute quarterly student evaluation average score	10%
4. Improve the average NCLEX score of the 2016 graduates of the Breckinridge School of Nursing and Health Sciences nursing program	10%
5. Establish relationships with Corporate Partners to deliver customized corporate training and other educational services	10%
6. Design, develop and obtain the necessary regulatory authorizations to offer an alternative delivery methodology for an accredited degree program	10%
7. Design, develop and implement a revised marketing and advertising campaign for ITT Technical Institute	10%
8. Obtain the requisite federal, state and accrediting commission authorizations for the ITT Technical Institutes to offer new diploma and/or degree programs	5%
9. Obtain the requisite federal, state and accrediting commission authorizations for the ITT Technical Institutes to open new campus locations	5%

ESI Excess Pension Plan. On June 9, 1998, we established, and effective January 1, 2008, we restated, the ESI Excess Pension Plan, an unfunded, nonqualified retirement plan for a select group of our management and highly compensated employees. The benefit accruals under the ESI Excess Pension Plan for all participants in the plan were frozen on March 31, 2006, such that no further benefits accrue under that plan after March 31, 2006. The purpose of the ESI Excess Pension Plan was to restore benefits earned, but not available, to eligible employees under the ESI Pension Plan due to federal limitations on the amount of benefits that can be paid and compensation that may be recognized under a tax-qualified retirement plan. The practical effect of the ESI Excess Pension Plan was to continue the calculation of retirement benefits to all employees on a uniform basis. The eligible employee's compensation upon which the benefits under the ESI Excess Pension Plan are based is the same as for that eligible employee's benefits under the ESI Pension Plan (but without regard to the IRC limit on includible compensation for qualified plans).

An eligible employee will receive his or her benefit under the ESI Excess Pension Plan in a lump sum cash payment within 60 days following his or her termination of employment. If an eligible employee is a "specified employee" as defined in Section 409A of the IRC, however, then his or her benefit will be paid on the first day that is six months after the eligible employee's termination of employment. If an eligible employee dies before the benefit due to the employee under the ESI Excess Pension Plan has been paid, then the benefit will be paid to the employee's beneficiary within 60 days after the employee's death. We do not have a policy with regard to crediting extra years of benefit service under our pension plans, but no extra years of benefit service under the ESI Excess Pension Plan have been credited to any of the Named Executive Officers. As of December 31, 2015, Mr. Felchtner was the only Named Executive Officer participant who qualified for retirement under the ESI Excess Pension Plan based on age and years of service. If Mr. Felchtner's employment with us terminated as of December 31, 2015, he would receive his accrued benefit under the ESI Excess Pension Plan as of that date, which was \$81,355. An eligible employee's benefits under the ESI Excess Pension Plan will generally be paid directly by us. See "—ESI Pension Plan."

Nonqualified Deferred Compensation Plan Table

The following table sets forth information concerning the compensation of the Named Executive Officers in our 2015 fiscal year under the ESI Excess Savings Plan and the Directors Deferred Compensation Plan. None of the Named Executive Officers has deferred any bonus compensation under the Deferred Bonus Plan.

Nonqualified Deferred Compensation in Fiscal Year 2015

Named Executive Officer	Executive Contributions in Last Fiscal Year ⁽¹⁾	ITT/ESI Contributions in Last Fiscal Year ⁽¹⁾	Aggregate Earnings in Last Fiscal Year	Aggregate Balance at Last Fiscal Year-End
Kevin M. Modany ESI Excess Savings Plan	\$0	\$0	\$ 4,920 ⁽²⁾	\$64,199 ⁽³⁾
Rocco F. Tarsi, III ESI Excess Savings Plan	\$0	\$0	\$ 0	\$ 0
Daniel M. Fitzpatrick ESI Excess Savings Plan	\$0	\$0	\$ 0	\$ 0
John E. Dean ESI Excess Savings Plan	\$0	\$0	\$ 0	\$ 0
Directors Deferred Compensation Plan	\$0	\$0	\$ 0	\$ 0
Eugene W. Felchtner ESI Excess Savings Plan	\$0	\$0	\$(95,227) ⁽⁴⁾	\$60,407 ⁽⁵⁾
Ryan L. Rohey ESI Excess Savings Plan	\$0	\$0	\$ 348 ⁽²⁾	\$ 4,540 ⁽³⁾
	\$0	\$0	\$ 0	\$ 0

(1) Effective for plan years beginning on and after January 1, 2008, we froze the ESI Excess Savings Plan, such that eligible employees may no longer make elective contributions and we no longer make contributions under the ESI Excess Savings Plan. See "—Nonqualified Deferred Compensation Plans—ESI Excess Savings Plan."

(2) Represents the dollar amount of the aggregate interest or other earnings accrued during 2015 to the Named Executive Officer's account under the ESI Excess Savings Plan. The only portion of these amounts that is reported as compensation to the Named Executive Officer in the Summary Compensation Table for the 2015 year is the above-market or preferential earnings in 2015 on the balance of the Named Executive Officer's account under the ESI Excess Savings Plan which are included in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column of the Summary Compensation Table. See "—Summary Compensation Table."

(3) Represents the dollar amount of the total balance of the Named Executive Officer's account at the end of 2015 under the ESI Excess Savings Plan. The only portion of these amounts that is reported as compensation to the Named Executive Officer in the Summary Compensation Table for each of the 2014 and 2013 years is the above-market or preferential portion of aggregate earnings under the ESI Excess Savings Plan in 2014 and 2013, which contribute to the aggregate balance of the Named Executive Officer's ESI Excess Savings Plan account at year-end 2015. Those earnings are included in the amount of the Named Executive Officer's compensation for the particular year and are reported in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column of the Summary Compensation Table for that particular year. The amount of those above-market or preferential earnings for each of the Named Executive Officers is specified in the table below.

Debtor: ITT Educational Services, Inc.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF INDIANA

Case Number: 16-07207

Claim No. 2452

January 30 2017

By Rust | Omni Claims Agent
For U.S Bankruptcy Court
Southern District of Indiana

Official Form 410

Proof of Claim

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Carefully read instructions included with this Proof of Claim before completing.

Part 1: Identify the Claim

1. Who is the current creditor?		Name of the current creditor (the person or entity to be paid for this claim)	KEVIN M. MODANY
		Other names the creditor used with the debtor	
2. Has this claim been acquired from someone else?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes From whom?	
3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent?		Where should payments to the creditor be sent? (if different)
	KEVIN M. MODANY		
	Name		Name
	10369 CHARTER OAKS		
	CARMEL, IN, 46032		
	Contact Phone 317-287-9053		Contact Phone
Contact email KEVINMMODANY@GMAIL.COM		Contact email	
Uniform claim identifier for electronic payments in chapter 13 (if you use one)			
4. Does this claim amend one already filed?		<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes Claim Number on court claims registry (if known) 846 Filed On 11/16/2016 MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes Who made the earlier filing?	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim?	\$ 3360199.00	Does this amount include interest or other charges? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information VARIOUS (SEE ATTACHED).	
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	The claim is secured by a lien on property Nature of property: <input type="checkbox"/> Real Estate If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded). Value of Property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7). Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate: (when case was filed) _____% <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	Identify the property: _____
12. Is this claim for the value of goods received by the debtor 20 days before the commencement date of this case (11 U.S.C. §503(b)(9)).?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	Amount of 503(b)(9) Claim: \$ _____

13. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?☐ No☒ Yes *Check all that apply***Amount entitled to priority**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

- ☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). \$ _____
- ☐ Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). \$ _____
- ☒ Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). 12850.00 \$ _____
- ☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). \$ _____
- ☐ Contributions to an employee benefit plan 11 U.S.C. § 507(a)(5). \$ _____
- ☐ Other. Specify subsection of 11 U.S.C. § 507(a)(____) that applies. \$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☒ I am the creditor.☐ I am the creditor's attorney or authorized agent.☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.☐ I am the guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

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

Executed on date 01/30/2017
MM / DD / YYYY

KEVIN M. MODANY

Signature

Print the name of the person who is completing and signing this claim:

Name KEVIN M. MODANY

Title

Company
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 10369 CHARTER OAKS
CARMEL, IN, 46032

Contact Phone 317-287-9053 Email KEVINMMODANY@GMAIL.COM

**In re ITT Educational Services, Inc.
United States Bankruptcy Court for the Southern District of Indiana
Chapter 7, Case No. 16-07207**

**ADDENDUM TO AMENDED AND RESTATED PROOF OF CLAIM OF KEVIN M.
MODANY**

**Debtor: ITT Educational Services, Inc. (“Debtor”)
Case No.: 16-07207**

Claim of Kevin M. Modany (“Claimant”)
Kevin M. Modany
10369 Charter Oaks
Carmel, IN 46032

SUMMARY OF CLAIM

1. Kevin M. Modany was employed as the Chief Executive Officer of the Debtor pursuant to an employment agreement (the “Employment Agreement”) dated December 31, 2015. A copy of the Employment Agreement is attached hereto as Exhibit A and incorporated herein by reference.
2. On September 14, 2016, Mr. Modany was served with a termination letter severing the employment immediately due to the Debtor’s lack of funds and cessation of operations. The termination letter is attached hereto as Exhibit B and incorporated herein by reference. The Debtor filed its chapter 7 petition the following day.
3. On October 22, 2007, the Debtor established Senior Executive Severance Plan (the “Severance Plan”). A copy of the Severance Plan is attached as Exhibit C and incorporated herein by reference.
4. At the time of his termination Mr. Modany was owed deferred compensation of \$64,199.00 through December 15, 2015. See Exhibit D, excerpts from the Debtor’s 2016 Annual Meeting Notice and Proxy Statement, which is incorporated herein by reference.
5. The Severance Plan provides that select executives, including Mr. Modany, are entitled to certain severance benefits, *inter alia*, if, (i) during an “Imminent Acceleration Event

Period” (as further defined in the Severance Plan) or (ii) within two years following an “Acceleration Event” (as further defined in the Severance Plan), the individual is terminated other than for “Cause” (as further defined in the Severance Plan).

6. Upon information and belief, Mr. Modany’s termination was without Cause. Thus, to the extent his termination occurred during an Imminent Acceleration Event or within two years following an Acceleration Event, Mr. Modany hereby asserts a claim for all amounts due and owing under the Severance Plan, including without limitation severance pay and deferred compensation in an amount not less than \$5,008,199.00, calculated as follows:

<u>AMOUNTS</u>	<u>TOTAL</u>
\$824,000.00 salary multiplied by 3	\$2,472,000.00
\$824,000.00 bonus multiplied by 3	\$2,472,000.00
\$64,199.00 deferred compensation	\$64,199.00
TOTAL	\$5,008,199.00

(Exhibit C, §§3,4(I)(a), Exhibit D). To the extent the conditions precedent under the Severance Plan have been satisfied, Mr. Modany also asserts an unliquidated claim for all other amounts due and owing thereunder, including without limitation: (i) the Savings Plan Lump Sum Amount; (ii) Welfare Coverage Stipend, and (iii) Gross-Up Payment (each as described in Section 4(I) of the Severance Plan).

7. In the alternative, the Employment Agreement provides that upon a termination without cause, Mr. Modany will be entitled to an amount equal to “two times the sum of (i) your base salary plus (ii) your target short-term compensation amount for the fiscal year in which the employment termination occurs. . .” (Agreement, §3(a)). Accordingly, if it is determined that the conditions precedent under the Severance Plan have not been satisfied, Mr. Modany hereby asserts

in the alternative a claim for all amounts due and owing under the Employment Agreement, including without limitation severance pay and deferred compensation of not less than \$3,360,199.00, consisting of:

<u>AMOUNTS</u>	<u>TOTAL</u>
\$824,000.00 salary multiplied by 2	\$1,648,000.00
\$824,000.00 target short-term compensation multiplied by 2	\$1,648,000.00
\$64,199.00 deferred compensation	\$64,199.00
TOTAL	\$3,360,199.00

(Exhibit C, §§3,4(I)(a), Exhibit D)

8. In addition, Claimant hereby asserts a claim for any and all other obligations of the Debtor that may be, or may become, due and owing to Claimant, including without limitation: (i) under the Employment Agreement or Severance Plan, as applicable, and (ii) such other obligations as the Debtor may owe to the Claimant at law or under any applicable document or agreement, including without limitation, any right of indemnification, whether such obligations arise under the Debtor's by-laws (a copy of which are attached hereto as Exhibit E and made a part hereof), any other document or agreement, or at law.

9. Accordingly, Claimant hereby files this Amended and Restated Proof of Claim with respect to all of Debtor's outstanding obligations owed to Claimant, including without limitation: (i) under the Employment Agreement or Severance Plan, as applicable, and (ii) such other obligations as the Debtor may owe to the Claimant at law or under any applicable document or agreement, at law, or otherwise. The summary of the bases for this Amended and Restated Proof of Claim set forth herein are not exhaustive and do not constitute an election of remedies. Claimant hereby reserves the right to further amend, restate or supplement this Amended and Restated Proof of

Claim as and if its claims become further liquidated, in the event that further material information is revealed concerning the facts and circumstances underlying the Claim, or for other lawful purposes, and, without limitation, to file additional proofs of claim against the Debtor or one or more of its affiliated debtors and debtors-in-possession, to reflect other amounts that may be (or may become) due and owing, whether based on the respective rights and obligations arising under the Severance Plan, the Employment Agreement or any other applicable document, agreement, applicable law, or otherwise (including without limitation due to any rejection of the Severance Plan, the Employment Agreement or such other applicable document or agreement). By filing this Amended and Restated Proof of Claim, Claimant does not concede that any amounts due and owing, or that may become due and owing, constitute pre-petition claims of the Debtor and Claimant reserves all rights to file one or more requests for payment of administrative expense claim for such amounts.

10. The filing of this Amended and Restated Proof of Claim is not and shall not be deemed or construed as (a) a waiver or release of Claimant's rights against any person, entity or property (including, without limitation, any person or entity that is or may become a debtor in a case pending in this Court) who may be liable for all or part of the claims set forth herein, whether an affiliate, assignee, guarantor otherwise of the Debtor, or any entity that has engaged in transactions to evade or avoid withdrawal liability; (b) a consent by Claimant to the jurisdiction of this Court or any other court with respect to proceedings, if any, commenced in any case against or otherwise involving Claimant; (c) a waiver or release of Claimant's rights to trial by jury in this Court or any other court in any proceeding as to any and all matters so triable herein, whether or not the same be designated legal or private rights or in any case, controversy or proceeding related hereto, notwithstanding the designation or not of such matters as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2), and whether such jury trial right is pursuant to statute or the United States Constitution; (d) a consent by Claimant to a jury trial in this Court or any other court in any proceeding as to any

and all matters so triable herein or in any case, controversy or proceeding related hereto, pursuant to 28 U.S.C. § 157(e) or otherwise; (e) a waiver or release of Claimant's rights to have any and all final orders in any and all noncore matters or proceedings entered only after de novo review by a United States District Court Judge; (f) a waiver of the right to move to withdraw the reference with respect to the subject matter of this Amended and Restated Proof of Claim, any objection thereto or other proceeding that may be commenced in this case against or otherwise involving Claimant; (g) an election of remedies; (h) a waiver of the right to seek an administrative claim; or (i) a waiver or release of any right of setoff or recoupment that Claimant may hold against the Debtor.

EXHIBIT A

EMPLOYMENT AGREEMENT

EX-10.2 3 exhibit10_2.htm EXHIBIT 10.2

Exhibit 10.2

December 31, 2015

Mr. Kevin M. Modany
 ITT Educational Services, Inc.
 13000 North Meridian Street
 Carmel, IN 46032-1404

Dear Kevin:

This letter agreement (this "Agreement") is intended to set forth our mutual understanding and agreement regarding your continued employment as Chief Executive Officer of ITT Educational Services, Inc. (the "Company").

Accordingly, you and the Company agree as follows.

1. Termination of August 4, 2014 Letter Agreement. Effective as of the date hereof, the letter agreement between you and the Company dated August 4, 2014, as amended (the "August 4, 2014 Letter Agreement"), is hereby terminated and neither you nor the Company shall have any further rights, obligations or claims under the August 4, 2014 Letter Agreement.

2. At-Will Employment. You shall continue to be employed by the Company as its Chief Executive Officer. Such employment shall be on an at-will basis, which means that your employment may be terminated at any time by either you or the Company for any or no reason. You will continue to receive cash compensation (including base salary and compensation pursuant to the short-term compensation plan or other bonus plan) as determined by the Compensation Committee (the "Committee") of the Board of Directors (the "Board") from time to time, and participate in the Company's employee benefit plans, as such plans exist from time to time. You shall also be eligible to receive equity-based compensation as may be determined by the Committee from time to time.

3. Severance if Employment Terminated by the Company without Cause or by You for Good Reason.

(a) If the Company terminates your employment without Cause or if you resign your employment for Good Reason, you will be entitled to receive, subject to your compliance with subparts (d) and (e) below, severance compensation in an amount equal to two times the sum of (i) your base salary plus (ii) your target short-term compensation amount for the fiscal year in which the employment termination occurs, payable in substantially equal installments over the twenty-four (24) months following the employment termination date.

(b) For purposes of this Agreement, "Cause" shall have the meaning set forth in the ITT Educational Services, Inc. Senior Executive Severance Plan adopted on October 22, 2007, as amended (the "Senior Executive Severance Plan"), as in effect on the date hereof.

(c) For purposes of this Agreement, "Good Reason" shall have the meaning set forth in the Senior Executive Severance Plan as in effect on the date hereof, and a resignation of employment for "Good Reason" shall require the satisfaction of the conditions of subsections (A), (B) and (C) of Section 3(a) of the Senior Executive Severance Plan as in effect on the date hereof.

(d) You acknowledge and agree that the Company's payment of the severance compensation under this Agreement will be deemed to constitute a full settlement and discharge of any and all obligations of the Company to you arising out of this Agreement, your employment with the Company and/or the termination of your employment with the Company. You also acknowledge and agree that as a condition to receiving any of the severance compensation under this Agreement, you will execute, deliver to the Company, and not revoke a release agreement in a form prepared by, and satisfactory to, the Company (the "Release Agreement") pursuant to which you will release and waive, to the fullest extent permitted by law, all claims against the Company, its subsidiaries and affiliates, and all of its and their present and/or former owners, officers, directors, employees, agents, attorneys, insurers, representatives, employee benefit plans and their fiduciaries, both individually and in their representative capacities, including, without limitation, all claims arising out of this Agreement, your employment with the Company, and/or the termination of your employment with the Company; provided, however, that the Release Agreement will not affect or release (a) any rights to the severance compensation under this Agreement; (b) any vested rights or benefits you may have under any employee retirement or welfare benefit plan of the Company (except any severance plan), or (c) any vested rights or benefits you may have under the Company's Amended and Restated 2006 Equity Compensation Plan, any successor or other equity compensation plan, or any related option agreement or restricted stock unit agreement. The severance compensation described in this Agreement is in lieu of any severance benefits under any severance policy or plan the Company may have now or in the future, and you acknowledge that you are not entitled to any other severance benefits, except as set forth in subpart (g) below.

(e) Your entitlement to severance compensation under this Agreement is contingent on your compliance with the non-disclosure and restrictive covenant obligations of this Agreement. You acknowledge and agree that if you breach any of the non-disclosure or restrictive covenant provisions set forth in this Agreement, then in such event (i) you will have forfeited your right to receive, and the Company will have no further obligation to pay, any severance compensation that would otherwise be payable to you under this Agreement, and (b) you will be obligated to pay to the Company an amount equal to the amount of the severance compensation received by you under this Agreement, with such amount being due and payable immediately upon the Company making written demand on you for such payment. You further acknowledge and agree that such forfeiture and clawback are separate from, and not in lieu of, any and all other legal and/or equitable remedies that may be available to the Company in connection with your breach of any non-disclosure or restrictive covenant provision set forth in this Agreement and the Company reserves all such legal and/or equitable remedies.

(f) You acknowledge and agree that you will not be entitled to any severance in the event the Company terminates your employment because of a Disability Event. For purposes of this Agreement, the term "Disability Event" means either (i) when you are deemed disabled and entitled to benefits in accordance with any Company-provided long-term disability insurance policy, if any is applicable, covering you, (ii) your inability, because of injury, illness, disease or bodily or mental infirmity, to perform, with or without reasonable accommodation, the essential functions of your job for more than one hundred twenty (120) days during any period of three hundred sixty-five (365) days, or (iii) upon the written determination by a physician selected by the Company that, because of an injury, illness, disease or bodily or mental infirmity, you are unable to perform, with or without reasonable accommodation, the essential functions of your job, and, as of the date of determination, such condition is reasonably expected to last for a period of one hundred twenty (120) days or longer after the date of determination, based on the medical information reasonably available to such physician at the time of such determination.

(g) You shall be eligible to participate in the Senior Executive Severance Plan, subject to its terms and conditions, provided, however, that you and the Company agree that under no circumstances shall you be entitled to receive severance compensation or benefits under both this Agreement and under the Senior Executive Severance Plan. For purposes of clarity, the Severance Benefits (as defined in the Senior Executive Severance Plan) under the Senior Executive Severance Plan are in lieu of any severance payments or benefits described in this Agreement; accordingly, if your employment ends under circumstances in which you are eligible to receive the Severance Benefits (as defined in the Senior Executive Severance Plan) under Section 3(a) of the Senior Executive Severance Plan (subject to satisfaction of any applicable conditions as set forth in Section 3(b) of the Senior Executive Severance Plan), you shall not be entitled to the severance compensation described in this Agreement.

4. Non-Disclosure of Confidential Information.

(a) For purposes of this Agreement, the term "Confidential Information" means any and all of the Company's (and its subsidiaries' and affiliates') trade secrets, confidential and proprietary information and all other non-public information and data of or about the Company (and its subsidiaries and affiliates) and its business, including, without limitation, lists of customers, information pertaining to customers, marketing plans and strategies, information pertaining to suppliers, information pertaining to prospective suppliers, pricing information, engineering and technical information, software codes, cost information, data compilations, research and development information, business plans, financial information, personnel information, information received from third parties that the Company has agreed to keep confidential, and information about prospective customers or prospective products and services, whether or not reduced to writing or other tangible medium of expression, including, without limitation, work product created by you in rendering services for the Company; provided, however, that "Confidential Information" shall not include information that (i) is or becomes generally available to the public by use, publication or the like, through no fault of you or (ii) is obtained without restriction by you after termination of your employment with the Company from a third party who had the legal right to disclose such information to you.

(b) During your employment with the Company and thereafter, you will not use or disclose to others any of the Confidential Information, except (i) in the ordinary course of your work for and on behalf of the Company, (ii) with the prior written consent of the Company, (iii) as required by law or judicial process, provided you promptly notify the Company in writing of any subpoena or other judicial request for disclosure involving confidential information or trade secrets, and cooperate with any effort by the Company to obtain a protective order preserving the confidentiality of the confidential information or trade secrets, or (iv) in connection with reporting possible violations of law or regulations to any governmental agency or from making other disclosures protected under any applicable whistleblower laws. You agree that the Company owns the Confidential Information and you have no rights, title or interest in any of the Confidential Information. Additionally, you will abide by the Company's policies protecting the Confidential Information, as such policies may exist from time to time. At the Company's request or upon termination of your employment with the Company for any reason, you will immediately deliver to the Company any and all materials (including all copies and electronically stored data) containing any Confidential Information in your possession, custody or control. Upon termination of your employment with the Company for any reason, you will, if requested by the Company, provide the Company with a signed written statement disclosing whether you have returned to the Company all materials (including all copies and electronically stored data) containing any Confidential Information previously in your possession, custody or control. Your confidentiality/non-disclosure obligations under this Agreement continue after the termination of your employment with the Company. With respect to any particular trade secret information, your confidentiality/non-disclosure obligations will continue as long as such information constitutes a trade secret under applicable law. With respect to any particular Confidential Information that does not constitute a trade secret, your confidentiality/non-disclosure obligations will continue as long as such information remains confidential, and will not apply to information that becomes generally known to the public through no fault or action of you or others who were under confidentiality obligations with respect to such information.

5. Restrictive Covenants.

(a) For purposes of this Agreement, (i) "Competitive Business" means any for-profit entity that is engaged in the business of providing post-secondary education with annual revenues of at least \$100 million and is competitive with the business of the Company; (ii) "Person" means any individual or entity (including without limitation a corporation, partnership, limited liability company, trust, joint venture, or governmental entity or agency); (iii) "Prohibited Capacity" means: (A) the same or similar capacity or function to that in which you worked for the Company; (B) any executive or senior management capacity or function; (C) any officer or director capacity; (D) any consulting or advisory capacity or function; (E) any ownership capacity (except you may own as a passive investment up to five percent (5%) of any class of securities regularly traded on a national stock exchange or other public market); (F) any capacity or function in which you likely would inevitably use or disclose any of the Company's trade secrets and/or Confidential Information; or (G) any other capacity or function in which your knowledge of the Confidential Information would facilitate or assist your work for the Competitive Business; (iv) "Restricted Geographic Area" means each of the states of the United States, including, without limitation, each and every state in which the Company is doing business as of the date your employment terminates; and (v) "Restricted Time Period" means during your employment with the Company and for a period that is the longer of: (A) one year after the date your employment terminates; or (B) if you are entitled to severance compensation under this Agreement or the Senior Executive Severance Plan, the period during which such severance compensation is to be paid.

(b) During the Restricted Time Period, you will not within the Restricted Geographic Area engage in (including, without limitation, being employed by, working for, or rendering services to) any Competitive Business in any Prohibited Capacity; provided, however, if a Competitive Business has multiple divisions, units or segments, some of which are not engaged in providing post-secondary education, you may work for or consult with only that division, unit or segment that is not engaged in providing post-secondary education, provided that (i) you first provide the Company with a written notice describing in reasonable detail your position with and anticipated activities for the Competitive Business, which such written notice also includes an assurance that your affiliation with and work for the Competitive Business will relate only to the non-competitive division, unit or segment and will not involve any activities that are competitive with the Company, and (ii) your affiliation with and/or work for the non-competitive division, unit or segment of the Competitive Business would not likely cause you to inevitably use and/or disclose any Confidential Information.

(c) During the Restricted Time Period, you will not urge, induce or seek to induce any of the Company's independent contractors, subcontractors, business partners, distributors, brokers, consultants, sales representatives, customers, vendors, suppliers or any other Person with whom the Company has a business relationship to terminate their relationship with, or representation of, the Company or to cancel, withdraw, reduce, limit or in any manner modify any such Person's business with, or representation of, the Company.

(d) During the Restricted Time Period, you will not: (i) solicit or recruit for employment, hire, employ, engage the services of, or attempt to hire, employ, or engage the services of, any individual who is an employee of the Company; (ii) assist any Person in the recruitment, hiring or engagement of any individual who is an employee of the Company; (iii) urge, induce or seek to induce any individual to terminate his/her employment with the Company; or (iv) advise, suggest to or recommend to any Competitive Business that it employ, engage the services of, or seek to employ or engage or engage the services of any individual who is an employee of the Company.

(e) During the Restricted Time Period, you will not make or publish any statement or comment that disparages or in any way injures the reputation and/or goodwill of the Company or any of its subsidiaries or affiliates or any of its or their shareholders, members, officers, directors or employees; provided, however, that nothing in this section is intended to prohibit you from (i) making any disclosures as may be required or compelled by law or legal process or (ii) making any disclosures or providing any information to a governmental agency or entity, including without limitation in connection with a complaint by you against the Company or the investigation of any complaint against the Company.

(f) You acknowledge and agree that the restrictive covenants contained herein prohibit you from engaging in certain activities directly or indirectly, whether on your own behalf or on behalf of any other Person, and regardless of whether you are acting as an employee, independent contractor, owner, partner, agent, consultant, or advisor.

(g) In the event you violate any of the restrictive covenants contained herein, the duration of all restrictive covenants (and the Restricted Time Period) will automatically be extended by the length of time during which you were in violation of any of the restrictive covenants.

(h) Although you and the Company consider the restrictive covenants contained in this Agreement to be reasonable, particularly given the competitive nature of the Company's business and your position with the Company, you and the Company acknowledge and agree that: (i) if any covenant, subsection, provision, portion or clause of this Agreement is determined to be unenforceable or invalid for any reason, such unenforceability or invalidity will not affect the enforceability or validity of the remainder of this Agreement; and (ii) if any particular covenant, subsection, provision, portion or clause of this Agreement is determined to be unreasonable or unenforceable for any reason, including, without limitation, the time period, geographic area, and/or scope of activity covered by any restrictive covenant, such covenant, subsection, provision, portion or clause will automatically be deemed reformed such that the contested covenant, subsection, provision, portion or clause will have the closest effect permitted by applicable law to the original form and shall be given effect and enforced as so reformed to whatever extent would be reasonable and enforceable under applicable law. We agree that any court interpreting any restrictive covenant provision of this Agreement will, if necessary, reform any such provision to make it enforceable under applicable law.

6. Injunctive Relief. You acknowledge that a breach or threatened breach by you of any of your non-disclosure or restrictive covenant obligations under this Agreement will give rise to irreparable injury to the Company and that money damages will not be adequate relief for such injury and, accordingly, you agree that the Company shall be entitled to obtain equitable relief, including, but not limited to, specific performance, temporary restraining orders, preliminary injunctions and/or permanent injunctions, without having to post any bond or other security, to restrain or prohibit such breach or threatened breach, in addition to any other legal remedies which may be available, including the recovery of money damages.

7. Cooperation. You agree that, for the longer of (a) one (1) year after the date your employment terminates or (b) if applicable, the period during which you are eligible to receive severance compensation under this Agreement or the Senior Executive Severance Plan, if the Company desires you to provide any information or testimony relating to any judicial, administrative or other proceeding involving the Company (or any of its subsidiaries or affiliates), you will cooperate in making yourself reasonably available for such purposes and will provide truthful information and/or testimony. The Company agrees to reimburse you for all necessary and reasonable out-of-pocket expenses you incur in connection with such matters. Should you be served with a subpoena in any legal proceeding relating to the Company (or any of its subsidiaries or affiliates), you agree to (x) notify the Company immediately of the subpoena and provide it with a copy of the subpoena, (y) reasonably cooperate with the Company and its attorneys in responding to the subpoena and in preparing for any hearings, depositions or other formal process by which evidence is taken or received, and (z) provide truthful testimony in response to questions that are within the scope of proper discovery.

8. Company Property. You acknowledge and agree that all tangible materials, equipment, documents, copies of documents, data compilations (in whatever form), and electronically created or stored materials that you receive or make in the course of your employment with the Company (or with the use of Company time, materials, facilities or trade secrets or confidential information) are and will remain the property of the Company. Upon the termination of your service with the Company, or at the Company's request, you will immediately deliver to the Company (a) any and all memoranda, notes, records, drawings, manuals, computer programs, documentation, diskettes, computer tapes, electronic data (in whatever form or media), and all copies thereof, in your possession or under your control, whether prepared by you or others, containing any Confidential Information; and (b) any and all property or equipment belonging to the Company, including, without limitation, keys, access cards, computers, files and documents.

9. Successors and Assigns. The Company shall have the right to assign this Agreement, and the rights and obligations of the Company under this Agreement will inure to the benefit of and be binding upon any and all successors and assigns of the Company, including without limitation by asset assignment, merger, consolidation or other reorganization. As used in this Agreement, "Company" means the Company as hereinbefore defined and any successor to its business and/or assets which assumes and agrees to perform this Agreement by operation of law, or otherwise. The services to be provided by you to the Company hereunder are personal, and you shall not have the right to assign this Agreement or any of your rights or obligations under this Agreement.

10. Clawback. You acknowledge and agree that the amounts paid by the Company to you, including amounts payable pursuant to this Agreement, may be subject to recoupment or clawback pursuant to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act or other applicable law, or pursuant to a policy or plan of the Company in effect from time to time, and you agree to repay such amounts to the extent required thereunder.

11. Compliance with Code Section 409A. Our intent is that payments and benefits under this Agreement comply with Section 409A of the Internal Revenue Code of 1986, as amended, and Treasury Regulation Section 1.409A-1(h) (collectively "Code Section 409A"), to the extent subject thereto, and, accordingly, to the maximum extent permitted, this Agreement shall be interpreted and be administered to be in compliance therewith. Notwithstanding anything contained herein to the contrary, to the extent required in order to avoid accelerated taxation and/or tax penalties under Code Section 409A, you will not be considered to have terminated employment with the Company for purposes of this Agreement until you would be considered to have incurred a "separation from service" from the Company within the meaning of Code Section 409A. Any payments described in this Agreement that are due within the "short-term deferral period" (as defined in Code Section 409A) will not be treated as deferred compensation unless applicable law requires otherwise. Each amount to be paid or benefit to be provided to you pursuant to this Agreement that constitutes deferred compensation subject to Code Section 409A shall be construed as a separate identified payment for purposes of Code Section 409A. Notwithstanding anything to the contrary in this Agreement, to the extent that any payments to be made in connection with your separation from service would result in the imposition of any individual excise tax and late interest charges imposed under Code Section 409A, the payment will instead be made on the first business day after the earlier of (a) the date that is six (6) months following such separation from service or (b) the date of your death.

12. Notices. Any notice required or permitted under this Agreement shall be in writing and either delivered personally or sent by nationally recognized overnight courier, express mail, or certified or registered mail, postage prepaid, return receipt requested, at the following respective address unless the party notifies the other party in writing of a change of address:

If to the Company:

ITT Educational Services, Inc.
13000 North Meridian St.
Carmel, IN 46032
Attention: Chief Legal Officer

With a copy to (which copy will not constitute notice):

Faegre Baker Daniels LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Attention: David A. Given

If to you:

To you most recent address on file with the Company for payroll purposes

A notice delivered personally will be deemed delivered and effective as of the date of delivery. A notice sent by overnight courier or express mail will be deemed delivered and effective the next business day after it is deposited with the postal authority or commercial carrier. A notice sent by certified or registered mail will be deemed delivered and effective three (3) days after it is deposited with the postal authority.

13. Entire Agreement; Modification; Waiver. This Agreement contains the full, complete, and entire agreement between us, superseding any and all other contracts or proposals, oral or written, and any and all other communications between us relating to the subject matter of this Agreement, including but not limited to the August 4, 2014 Letter Agreement. This Agreement shall not be varied, altered, modified, canceled, changed, or in any way amended except by (a) our mutual agreement in a written instrument executed by you and a Company representative duly authorized by the Board, or (b) reformation by a court as provided herein. Failure to insist upon strict compliance with any of the terms, covenants or conditions of this Agreement will not be deemed a waiver of such term, covenant or condition.

14. Governing Law. To the extent not preempted by federal law, the provisions of this Agreement shall be construed and enforced in accordance with the laws of the State of Indiana, without giving effect to any choice-of-law or conflict-of-law principle that would cause the application of the substantive law of any jurisdiction other than Indiana. You and the Company agree that any legal action arising out of or relating to this Agreement, your employment with the Company or the termination of your employment shall be commenced and maintained exclusively before any appropriate state court of record in Hamilton County, Indiana, or in the United States District Court for the Southern District of Indiana, Indianapolis Division; further, you and the Company hereby irrevocably submit to the jurisdiction and venue of such courts and waive any right to challenge or otherwise object to personal jurisdiction or venue in any action commenced or maintained in such courts; provided, however, the foregoing shall not affect any applicable right a party may have to remove a legal action to federal court.

15. Construction. This Agreement is the result of negotiations between you and the Company, and neither you nor the Company shall be deemed to be the drafter of this Agreement. The language of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either you or the Company. This Agreement shall be interpreted and construed without any presumption or inference based upon or against the party causing this Agreement to be prepared.

16. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together will constitute one and the same Agreement. Signatures transmitted by facsimile or other electronic means shall be effective the same as original signatures for execution of this Agreement.

If the foregoing accurately reflects our agreement, please sign where indicated below and return to us the enclosed duplicate copy of this letter.

Sincerely,

ITT EDUCATIONAL SERVICES, INC.

By: /s/ John E. Dean

Name: John E. Dean

Title: Executive Chairman of the Board of Directors

ACCEPTED AND AGREED:

/s/ Kevin M. Modany

Kevin M. Modany

Date: 12/31/15

US.103828496.01

EXHIBIT B

TERMINATION LETTER

MEMORANDUM

ITT Educational Services, Inc.

DATE: September 14, 2016
FROM: Erica Bisch
SUBJECT: *Termination of Employment*
COPIES: Personnel File

Kevin Modany
10369 Charter Oaks
Carmel, IN 46032

It has become necessary to permanently eliminate your position effective September 14, 2016 ("Termination Date") due to a significant and unforeseen business circumstance resulting in a company-wide reorganization to cease operations and close the business, including the location at which you work. The cessation of the Company's operations and termination of your employment is expected to be permanent. On August 25, 2016, without previous notice, the Department of Education (the "ED") notified ITT Educational Services, Inc. (the "Company") that it is required to meet certain conditions the Company determined it is unable to meet. As a result, many Company employees' employment terminated effective September 6, 2016. Subsequently, we were informed on September 9, 2016, that the Company's secured creditor had exercised its right to block the Company's access to its bank accounts. Despite our best efforts to negotiate release of the bank accounts since September 9, 2016, we have been unable to do so. Due to the secured creditor's actions, the Company is now illiquid and is not able to continue your employment for as long as the Company expected as of last week. As a result, your employment is being terminated effective as of the Termination Date. This notice is being given as soon as it was practicable and there are no bumping rights associated with this elimination.

- a) **Final Pay.** Based on the Company obtaining the secured creditor's approval to pay employees, the Company intends to issue your final paycheck for work performed through your Termination Date. If you do not have direct deposit, the Company intends to send your final paycheck to your home address on record with the Company.
- b) **Medical Benefits.** All medical, dental, vision and Flexible Spending Account coverage will end on your Termination Date. You may use this letter as evidence of termination of your benefits as you consider other coverage options. No payroll deductions have been taken for these benefits in your final paycheck. **Print this letter immediately for your records.**
- c) **Other Benefits.** No payroll deductions have been taken for life insurance, disability insurance, health savings account, or 401(k) contributions or loan repayments. No deductions were taken for welfare benefits because the company's welfare benefit plans have been or are in the process of being terminated. Deductions were not taken for 401(k) contributions or loan repayments because no personnel will be present to ensure that any such deductions are timely transferred to the plan's trustee for deposit in the plan's trust.
- d) **Unemployment Compensation.** You will be eligible to apply for unemployment compensation the day following your Termination Date.

Please see the attached Benefit Status Upon Separation notification that includes contact information for further details about post-employment benefits to which you may be entitled.

You are personally and solely responsible for paying all charges to your American Express Corporate credit card account with respect to any American Express Corporate credit card issued to you in conjunction with your ITT/ESI employment. You must pay any outstanding charges in full on or before the due date, failing which, ITT/ESI may deduct any balance due on your American Express Corporate credit card account from any pending business expense reimbursement, if you fail to pay such balance when due, in accordance with local law.

You should collect your personal property from your work location today. You must immediately return to ITT/ESI all ITT/ESI property, including, but not limited to, textbooks, equipment, licenses, cell phones, credit cards, and keys. Please return company property at your work location.

You may have received previous communications about planned terminations of employment. Please be advised that this document supersedes and replaces any such previous communications.

We realize that this will be a difficult time for you; however, we urge you to direct your attention and energies to your future.

If the address on this letter is not your current address, please email your current address to benefitquestions@ittesi.com.

Thank you for your efforts and contributions in working for ITT/ESI, and I wish you well in your future endeavors.

Unfortunately the employment of all remaining Company employees is terminating effective as of the Termination Date and therefore we are not able to provide the name and contact number of a Company official to contact for further information. You should refer to the attached Benefit Status Upon Separation to identify who may be the appropriate person(s) to contact depending on your question(s).

EXHIBIT C

SENIOR EXECUTIVE SEVERANCE PLAN

EX-10 2 exhibit10_26.htm

Exhibit 10.26

ITT Educational Services, Inc. Senior Executive Severance Plan**1. Purposes**

This document, to be known as the ITT Educational Services, Inc. Senior Executive Severance Plan, has been established by the Company as of the date set forth in Section 11, and it replaces and supersedes the ESI Special Senior Executive Severance Pay Plan and the ESI Senior Executive Severance Pay Plan, which have been terminated. The Plan provides Severance Benefits to certain key executives of the Company whose employment terminates under certain conditions following an Acceleration Event or during an Imminent Acceleration Event Period. The capitalized words and terms used throughout the Plan are defined in Section 9.

The purpose of the Plan is to reinforce and encourage the continued attention and dedication of Severance Executives to their assigned duties, without distraction in the face of potentially disruptive circumstances arising from the possibility of an Acceleration Event. The accomplishment of this purpose is in the best interest of the Company and its shareholders.

2. Covered Employees

This Plan covers Severance Executives.

3. Entitlement to Severance Benefits

(a) Subject to the provisions of Subsection 3(b), the Company will pay to a Severance Executive the applicable Severance Benefits set forth in Section 4 if (i) during an Imminent Acceleration Event Period, or within two (2) years after an Acceleration Event, the Company terminates a Severance Executive's employment with the Company other than for Cause, or (ii) within two (2) years after an Acceleration Event, the Severance Executive terminates his or her employment with the Company for Good Reason and the conditions described in the following sentence are satisfied. A Severance Executive will be entitled to Severance Benefits upon his or her termination of employment for Good Reason within two (2) years following an Acceleration Event only if all of the following additional conditions are satisfied:

- (A) the Severance Executive provides written notice to the Company of the existence of the condition claimed to constitute Good Reason within ninety (90) calendar days of the initial existence of the condition;
- (B) the Company does not remedy the condition within thirty (30) calendar days of the Company's receipt of the written notice described in clause (A); and
- (C) the Severance Executive terminates his or her employment with the Company during the six (6) month period following the expiration of the cure period described in clause (B) above.

(b) Notwithstanding any other provision of this Plan, a Severance Executive will not be eligible for any Severance Benefits under this Plan unless both of the following conditions are satisfied:

- (i) The Severance Executive timely signs, and does not timely revoke, a General Release, in substantially the form attached as Exhibit A (which may be amended from time to time in accordance with Section 8). The Severance Executive must sign the General Release by the deadline communicated to him or her in writing. If a Severance Executive is age 40 or older, and thereby covered by the ADEA, the Severance Executive will have a period of either 21 or 45 days, as specified in the General Release, to consider the General Release before signing it and the Severance Executive will be advised to consult an attorney before signing the General Release. If the Severance Executive is subject to the ADEA, he or she will also have the right to revoke the General Release within the Revocation Period. A Severance Executive must wait until his or her employment has terminated to sign a General Release. The Plan Administrator will not accept from any Severance Executive a General Release signed before the Severance Executive has terminated employment with the Company.
- (ii) The Severance Executive signs a Noncompetition Agreement, substantially in the form attached as Exhibit B (which may be amended from time to time in accordance with Section 8).

4. Severance Benefits

(1) Severance Benefits for Severance Executives in Band A shall be as follows:

- (a) Severance Pay. Severance Pay in a total amount equal to the sum of (i) three (3) times the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii) three (3) times the highest bonus paid or awarded (whether or not deferred) to the Severance Executive in any of the three (3) years preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), including, among the bonuses taken into account for this purpose, any bonus paid or awarded by reason of an Acceleration Event, without regard to whether such bonus is paid (whether or not deferred) during such three (3) year period or after an Acceleration Event.
- (b) Savings Plan Lump Sum Amount. A lump sum amount equal to three (3) times the product of (i) and (ii), where (i) is the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii)

is the highest percentage rate of Company contributions (including matching contributions) with respect to the Severance Executive under the Savings Plans at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period).

- (c) Welfare Coverage Stipend. A lump sum stipend equal to the sum of (i) thirty-six (36) times the monthly COBRA premium that, as of the date of the Severance Executive's termination of employment, is charged to COBRA qualified beneficiaries for the same coverage options and levels of medical, prescription drug, dental, and vision coverage that the Severance Executive had in effect under the Company's welfare plans immediately prior to his or her termination of employment; and (ii) thirty-six (36) times the full monthly premium payable to the Company's life insurance carrier for the type and level of life insurance coverage (including, if applicable, dependent life insurance coverage) in effect for the Severance Executive immediately prior to the Severance Executive's termination of employment. The Welfare Coverage Stipend shall be payable irrespective of whether or not the Severance Executive or any of his or her eligible family members elects COBRA continuation coverage or conversion or continuation of life insurance coverage, whether or not coverage is continued for the maximum permissible period, or whether or not the Severance Executive receives welfare benefits coverage from another employer. Payment of the Welfare Coverage Stipend will not in any way extend or modify the Severance Executive's continuation coverage rights under COBRA or any similar continuation coverage law or welfare benefit plan provision.
- (d) Gross-Up Payment. In the event that the Payments paid or payable to or for the benefit of a Severance Executive in Band A would be subject to any Excise Tax, then, in accordance with the provisions of this Subsection 4.1(d), the Company will pay to the Severance Executive a Gross-Up Payment in an amount such that, after the Severance Executive's payment of all federal, state and local taxes (including any interest, penalties, additional tax, or similar items imposed with respect to such taxes), including, without limitation, any income and employment taxes (and any interest and penalties imposed with respect to such taxes) and Excise Tax imposed upon the Gross-Up Payment, the Severance Executive retains an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Payments. An initial determination as to whether a Gross-Up Payment is required pursuant to this Subsection 4.1(d), and the amount of any such Gross-Up Payment, will be made at the Company's expense by an Accounting Firm selected by the Company and reasonably acceptable to the Severance Executive. The Accounting Firm will provide its determination, together with detailed supporting calculations and documentation, to the Company and the Severance Executive within ten (10) business days after the date on which the Severance Executive terminates employment with the Company. The determination will be final, binding, and conclusive on the Company and the Severance Executive, and the Company will pay the Gross-Up Payment, if any, to the Severance Executive, in accordance with the Accounting Firm's determination, within five (5) business days after the Company's receipt of the Accounting Firm's determination, except that no Gross-Up Payment shall be paid prior to the expiration of the applicable Revocation Period or in the event the

Severance Executive revokes the General Release during the Revocation Period. For purposes of determining the amount of the Gross-Up Payment, the Severance Executive will be deemed to pay federal income taxes at the highest marginal rate of federal income taxation in the calendar year in which the Gross-Up Payment is to be made and applicable state and local income taxes at the highest marginal rate of taxation in the state and locality of the Severance Executive's residence on the date of his or his termination of employment with the Company, net of the maximum reduction in federal income taxation that would be obtained from deduction of those state and local taxes. Notwithstanding anything in this Subsection 4.I.(d) to the contrary, in the event that, according to the Accounting Firm's determination, an Excise Tax will be imposed on the Payments, the Company will pay to the applicable governmental taxing authorities, as Excise Tax withholding, the amount of the Excise Tax that the Company has actually withheld from the Payments in accordance with applicable law. Notwithstanding any of the foregoing provisions of this Subsection 4.I.(d), any Gross-Up Payment due under this Subsection shall be paid by no later than March 15 of the calendar year following the calendar year in which the Severance Executive's termination of employment with the Company occurs.

(II) Severance Benefits for Severance Executives in Band B shall be as follows:

- (a) Severance Pay. Severance Pay in a total amount equal to the sum of (i) two (2) times the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii) two (2) times the highest bonus paid or awarded (whether or not deferred) to the Severance Executive in any of the three (3) years preceding an Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), including, among the bonuses taken into account for this purpose, any bonus paid or awarded by reason of an Acceleration Event, without regard to whether such bonus is paid (whether or not deferred) during such three (3) year period or after an Acceleration Event.
- (b) Savings Plan Lump Sum Amount. A lump sum amount equal to two (2) times the product of (i) and (ii), where (i) is the highest annual base salary rate paid (whether or not deferred) to the Severance Executive at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period), and (ii) is the highest percentage rate of Company contributions (including matching contributions) with respect to the Severance Executive under the Savings Plans at any time during the three (3) year period immediately preceding the Acceleration Event (or, in the case of a termination of employment that occurs prior to an Acceleration Event, the three (3) year period immediately preceding the first day of the Imminent Acceleration Event Period).

- (c) Welfare Coverage Stipend. A lump sum stipend equal to the sum of (i) twenty-four (24) times the monthly COBRA premium that, as of the date of the Severance Executive's termination of employment, is charged to COBRA qualified beneficiaries for the same coverage options and levels of medical, prescription drug, dental, and vision coverage that the Severance Executive had in effect immediately prior to his or her termination of employment; and (ii) twenty-four (24) times the full monthly premium payable to the Company's life insurance carrier for the type and level of life insurance coverage (including, if applicable, dependent life insurance coverage) in effect for the Severance Executive immediately prior to the Severance Executive's termination of employment. The Welfare Coverage Stipend shall be payable irrespective of whether or not the Severance Executive or any of his or her family members elects COBRA continuation coverage or conversion or continuation of life insurance coverage, whether or not coverage is continued for the maximum permissible period, or whether or not the Severance Executive receives welfare benefits coverage from another employer. Payment of the Welfare Coverage Stipend will not in any way extend or modify the Severance Executive's continuation coverage rights under COBRA or any similar continuation coverage law or welfare benefit plan provision.
- (d) Limitation on Severance Benefits. Notwithstanding anything to the contrary contained in this Plan, in the event that the total Payments to a Severance Executive in Band B pursuant to this Plan or otherwise in connection with an Acceleration Event would otherwise exceed the amount that could be received by the Severance Executive without the imposition of an Excise Tax (the "Safe Harbor Amount"), then the value of the Payments will be reduced to the Safe Harbor Amount, but only if, by reason of that reduction, the Net After-Tax Benefit to the Severance Executive would exceed the Net After-Tax Benefit to the Severance Executive if no such reduction was made. For purposes of this Subsection 4.II.(d), the determination of whether any portion of the Payments would be subject to an Excise Tax, and the determinations of the Safe Harbor Amount and the greater Net After-Tax Benefit, will be made at the Company's expense by an Accounting Firm selected by the Company and reasonably acceptable to the Severance Executive. For purposes of those determinations, the value of any non-cash benefit or any deferred payment or benefit included in the Payments will be determined by the Accounting Firm in accordance with the principles of Code Section 280G(d) (3) and (4). In the event that the Payments to a Severance Executive must be reduced pursuant to this Subsection 4.II.(d), the nature (cash or non-cash) and the source (the Plan or any other plan, agreement, or arrangement) of the Payments to be reduced first will be as directed by the Severance Executive. In the event a Severance Executive receives Payments that, according to the Accounting Firm, are subject to an Excise Tax, the Company will pay to the applicable governmental taxing authorities, as Excise Tax withholding, the amount of the Excise Tax that the Company has actually withheld from the Payments in accordance with applicable law.

5. **Form and Time of Payment of Severance Benefits**

Except as otherwise provided in this Section 5, the Severance Benefits due to a Severance Executive will be paid in a lump sum cash payment within thirty (30) calendar days after the date on which the Severance Executive's employment with the Company is terminated, or, if later, on

the first business day after expiration of the applicable Revocation Period (provided that the Severance Executive does not revoke the General Release during the Revocation Period), but in no case will payment be made later than March 15 of the calendar year following the calendar year in which the Severance Executive's termination of employment with the Company occurs. Payment of any amount due under Subsection 4.I.(d) will be paid as provided in that Subsection. Severance Benefits are intended to be short-term deferrals exempt from Code Section 409A, but in the event that any portion of the Severance Benefits due to a Severance Executive constitutes deferred compensation within the meaning of Code Section 409A, and the Severance Executive, at the time of his or her termination of employment, is a Specified Employee, then payment of the portion of the Severance Benefits that constitutes deferred compensation will be delayed until the first business day following the date that is six (6) calendar months after the date of the Severance Executive's termination of employment with the Company (or, if earlier, the date of the Severance Executive's death following his or her termination of employment).

6. Administration of Plan

The Compensation Committee or its designee will be the Plan Administrator and will have the exclusive right and discretionary authority to interpret this Plan, adopt any rules and regulations for carrying out this Plan as may be appropriate, and decide any and all matters arising under this Plan, including but not limited to the right to determine claims and appeals under Section 7. Subject to applicable federal and state law, all interpretations and decisions by the Plan Administrator will be final, conclusive, and binding on all affected parties.

7. Claims and Appeals Procedures

If a Severance Executive (or his or her beneficiary) believes that he or she is entitled to a benefit under the Plan that has not been paid, or to a different benefit than what has been paid, he or she may file a written claim for the benefit with the Plan Administrator. If any claim for benefits is denied, in whole or in part, the claimant will be given written notice of the denial within ninety (90) days following receipt of the claim. The notice will include (i) the specific reason or reasons for the denial; (ii) specific reference to the pertinent Plan provision(s) on which the denial was based; (iii) a description of any additional material or information necessary for the claimant to perfect the claims and an explanation of why that material is necessary, and (iv) an explanation of the Plan's claims review procedures. If special circumstances require an extension of time for processing the claim, written notice of the extension will be furnished to the claimant prior to the end of the initial ninety (90) day period following receipt of the claim. If the claim has not been granted, and a written notice of the denial of the claim is not furnished, within ninety (90) days after receipt of the claim, the claim may be treated as denied for purposes of proceeding to the claims review procedure described in the following paragraph.

A claimant or his or her authorized representative may request review of a denied claim within sixty (60) days after receipt of written notification of denial of a claim (or, if timely notice of denial is not given, within sixty (60) days after expiration of the ninety (90) day response period described in the preceding paragraph). To request review of the denial, the claimant or his or her authorized representative must submit a written request for review to the Plan Administrator. In connection with the request for review, the claimant or his or her authorized representative may review

pertinent documents in the Plan Administrator's possession or control and submit issues and comments in writing to the Plan Administrator within the sixty (60) days period following receipt of written notice of the claim denial. Not later than sixty (60) days after receipt of the request for review, the Plan Administrator will render and furnish to the claimant a written decision, which will include specific reasons for the decision and make specific reference to the pertinent Plan provision(s) on which the decision is based. If special circumstances require an extension of time for processing, the decision shall be rendered as soon as possible, but not later than one hundred twenty (120) days after receipt of the request for review, provided that written notice and explanation of the delay are given to the claimant prior to commencement of the extension.

If the claimant disputes the Plan Administrator's decision on review, the dispute will be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Notwithstanding the foregoing, if the claimant believes the claims procedure or dispute resolution mechanism provided under this Section 7 would be futile, the claimant, in his or her sole discretion, may elect to pursue his or her rights under the Plan pursuant to Section 502 of ERISA.

The Company shall bear the expense of any enforcement proceeding brought by a Severance Executive (or his or her beneficiary) under this Section 7 and shall reimburse the claimant for all of his or her reasonable costs and expenses relating to such enforcement proceeding, including, without limitation, reasonable attorney's fees and expenses, provided that the claimant is the prevailing party in the proceeding. For purposes of the preceding sentence, the trier of fact in the enforcement proceeding will be asked to make a determination as to the reimbursement of the claimant's costs and expenses as a prevailing party under the Plan. In no event shall the claimant be required to reimburse the Company for any costs or expenses relating to the enforcement proceeding.

If a claimant is entitled to payment or reimbursement of fees and expenses pursuant to the preceding paragraph, payment or reimbursement will be made within fifteen (15) business days after receipt of the claimant's written request for payment or reimbursement, accompanied by such evidence of fees and expenses as the Company may reasonably require, but the claimant may not submit such a request until the dispute has been finally resolved (either by agreement or by an order or judgment that is not subject to appeal or with respect to which all appeals have been exhausted). Notwithstanding the foregoing, any payment pursuant to this paragraph must be made no later than the end of the calendar year following the calendar year in which the dispute is finally resolved by a legally binding settlement or nonappealable judgment or order.

8. Termination or Amendment

ESI may make a Plan Change at any time, except that, during an Imminent Acceleration Event Period or following an Acceleration Event, no Plan Change that would adversely affect any Severance Executive may be made without the prior written consent of the affected Severance Executive.

9. Definitions

"Acceleration Event" means any of the following: (i) a report on Schedule 13D is filed with the Securities and Exchange Commission pursuant to Section 13(d) of the Act disclosing that any Person, other than ESI or an ESI Subsidiary or any employee benefit plan sponsored by ESI or an ESI Subsidiary, is the beneficial owner directly or indirectly of 20% or more of the outstanding shares of the Stock; (ii) any Person, other than ESI or an ESI Subsidiary, or any employee benefit plan sponsored by ESI or an ESI Subsidiary, purchases shares pursuant to a tender offer or exchange offer to acquire any Stock (or securities convertible into Stock) for cash, securities or any other consideration, provided that after consummation of the offer, the Person in question is the beneficial owner (as such term is defined in Rule 13d-3 under the Act), directly or indirectly, of fifteen (15) percent or more of the outstanding Stock (calculated as provided in paragraph (d) of Rule 13d-3 under the Act in the case of rights to acquire Stock); (iii) the stockholders of ESI approve (A) any consolidation or merger of ESI in which ESI is not the continuing or surviving corporation or pursuant to which shares of Stock would be converted into cash, securities or other property, other than a merger of ESI in which holders of Stock immediately prior to the merger have the same proportionate ownership of common stock of the surviving corporation immediately after the merger as they had in the Stock immediately before, or (B) any sale, lease, exchange or other transfer (in one transaction or a series of related transactions) of all or substantially all the assets of ESI, or (iv) a change in a majority of the members of the Board of Directors of ESI occurring within a twelve (12) month period, unless the election or nomination for election by ESI's stockholders of each new director during that twelve (12) month period was approved by the vote of two-thirds of the directors then still in office who were directors at the beginning of that twelve (12) month period.

"Accounting Firm" means an accounting firm that is designated as one of the five largest accounting firms in the United States (which may include the Company's independent auditors).

"Act" means the Securities Exchange Act of 1934, as amended.

"ADEA" means the Age Discrimination in Employment Act of 1967, as amended.

"Board" means the Board of Directors of ESI.

"Cause" means, with respect to a Severance Executive, action by the Severance Executive involving willful malfeasance or the Severance Executive's failure to act involving material nonfeasance that would have a materially adverse effect on the Company. An act or omission on the part of the Severance Executive shall not be considered "willful" unless it is done or omitted in bad faith or without reasonable belief that the action or omission was in the interest of the Company.

"COBRA" means the health care continuation coverage provisions of the Consolidated Omnibus Budget Reconciliation Act of 1984, as amended, and any health care continuation coverage available or provided pursuant to that law.

"Code" means the Internal Revenue Code of 1986, as amended, and interpretive rules and regulations.

"Company" means, collectively, ESI and all ESI Subsidiaries. After an Acceleration Event, the "Company" also includes any successors to ESI and the ESI Subsidiaries and any affiliates of those successors.

"Compensation Committee" means the Compensation Committee of the Board.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"ESI" means ITT Educational Services, Inc. After an Acceleration Event, "ESI" also includes any successor to ESI.

"ESI Subsidiary" means a subsidiary company of ESI. After an Acceleration Event, an "ESI Subsidiary" also includes any successor to an ESI Subsidiary.

"Excise Tax" means the excise tax imposed by Section 4999 of the Code, or any successor to that provision, and any interest or penalties incurred by a Severance Executive with respect to that excise tax.

"General Release" means a written document, substantially in the form attached to this Plan as Exhibit A (as it may be amended from time to time in accordance with Section 8), intended to create a binding agreement between the Company and a Severance Executive pursuant to which the Severance Executive, as a condition of receiving Severance Benefits under the Plan, agrees to release the Company and certain related entities and individuals from all claims that the Severance Executive has or may have against any or all of them that arise on or before the date on which the Severance Executive signs the General Release, including, without limitation, claims under the ADEA.

"Good Reason" means, with respect to a Severance Executive, one or more of the following conditions, arising without the Severance Executive's consent: (i) a material diminution in the Severance Executive's base compensation; (ii) a material diminution in the Severance Executive's authority, duties, or responsibilities; (iii) a material diminution in the authority, duties, or responsibilities of the person to whom the Severance Executive is required to report (including, for example, a requirement that a Severance Executive who previously reported to the Board instead report to a corporate officer or employee); (iv) a material diminution in the budget over which the Severance Executive retains authority; (v) a material change in the geographic location at which the Severance Executive must perform services; and (vi) if the terms and conditions of a Severance Executive's employment are governed by an agreement, any other action or inaction that constitutes a material breach by the Company of the agreement.

"Gross-Up Payment" means, with respect to a Severance Executive in Band A, the additional payment described in Subsection 4.I.(d).

"Imminent Acceleration Event Period" means the period (a) beginning on the first to occur of (i) a public announcement (whether by advertisement, press release, press interview, public statement, Securities and Exchange Commission filing, or otherwise) of a proposal or offer that, if consummated, would be an Acceleration Event, (ii) the making to a director or executive officer of the Company a written proposal that, if consummated, would be an Acceleration Event, or (iii) approval by the Board or the stockholders of ESI of a transaction that, upon closing, would be an Acceleration Event; and (b) ending upon the first to occur of (i) a public announcement that the prospective Acceleration Event contemplated by the events described in clause (a) has been terminated or

abandoned, (ii) the occurrence of the contemplated Acceleration Event, or (iii) 18 months after the beginning of the Imminent Acceleration Event Period.

"Net After-Tax Benefit" means, with respect to the total Payments or the Safe Harbor Amount, whichever is applicable, that amount net of all applicable federal, state, and local income and employment taxes and Excise Taxes. The Net After-Tax Benefit will be determined in accordance with the assumptions, principles, and other applicable provisions of Subsection 4.II.(d).

"Noncompetition Agreement" means a written agreement substantially in the form attached to this Plan as Exhibit B (as it may be amended from time to time in accordance with Section 8).

"Payments" means any payments or distributions by the Company in the nature of compensation to or for the benefit of a Severance Executive in connection with an Acceleration Event (with an Acceleration Event being defined for this purpose as a "change" described in Code Section 280G(b)(2)(A)(i) (I) or (II)), whether paid or payable or distributed or distributable pursuant to the terms of this Plan or otherwise, but determined without regard to any additional payments required under Subsection 4.I.(d). The following will not be treated as Payments with respect to a Severance Executive: (i) any payment or benefits the receipt or enjoyment of which the Severance Executive effectively waived in writing prior to the date of his or her termination of employment; and (ii) any payment that, in the opinion of the Accounting Firm, does not constitute a "parachute payment" within the meaning of Code Section 280G(b)(2). In determining the extent to which amounts constitute "parachute payments" within the meaning of Code Section 280G(b)(2), the Accounting Firm will make a reasonable determination of the value to be assigned to the restrictive covenant in effect for the Severance Executive pursuant to the Noncompetition Agreement, and the amount of the Severance Executive's potential parachute payment under Code Section 280G will be reduced by the value of the restrictive covenant to the extent consistent with Code Section 280G.

"Person" means a person within the meaning of Section 13(d) of the Act.

"Plan" means the ITT Educational Services, Inc. Senior Executive Severance Plan.

"Plan Administrator" means the Compensation Committee or its designee.

"Plan Change" means an amendment to or termination of the Plan.

"Revocation Period" means, with respect to a Severance Executive, the period of time during which the Severance Executive may revoke the General Release. If a Severance Executive is covered by the ADEA, the Executive's Revocation Period, which will be specified in the General Release, will be at least seven (7) calendar days from the date on which the Severance Executive signs the General Release. If a Severance Executive is not covered by the ADEA (for example, because he or she is under age 40), and there is no Revocation Period specified in the Severance Executive's General Release, then the Severance Executive's Revocation Period will be zero (0) days and will be deemed to expire on the day on which the Severance Executive signs the General Release.

"Safe Harbor Amount" has the meaning given such term in Subsection 4.II.(d).

"Savings Plan Lump Sum Amount" means, with respect to a Severance Executive, the Severance Benefits described in Subsection 4.I.(b) or 4.II.(b), whichever is applicable to the Severance Executive.

"Savings Plans" means the ESI 401(k) Plan and the ESI Excess Savings Plan and any successors to those plans.

"Severance Benefits" means the benefits described in Section 4.

"Severance Executive" means a full-time regular salaried employee and officer of the Company who is in either Band A or Band B. The Severance Executives in Band A include any Chief Executive Officer of ESI; and the Severance Executives in Band B include any officer below the level of Chief Executive Officer of ESI and above the level of Vice President of ESI.

"Severance Pay" means, with respect to a Severance Executive, the Severance Benefits described in Subsection 4.I.(a) or 4.II.(a), whichever is applicable to the Severance Executive.

"Specified Employee" has the meaning given in Code Section 409A(a)(2)(B)(i). The determination of which individuals are Specified Employees will be made in accordance with such rules and practices, consistent with Code Section 409A and interpretive regulations, as are established from time to time by the Board, or its designee, in its discretion.

"Stock" means the common stock, \$0.01 par value, of ESI.

"Welfare Coverage Stipend" means, with respect to a Severance Executive, the Severance Benefit described in Subsection 4.I.(c) or 4.II.(c), whichever is applicable to the Severance Executive.

10. Miscellaneous

The Severance Executive shall not be entitled to any notice of termination from the Company or pay in lieu of such notice.

Severance Benefits under this Plan will be paid entirely by the Company from its general assets.

This Plan is not a contract of employment, does not guarantee the Severance Executive employment for any specified period and does not limit the right of the Company to terminate the employment of the Severance Executive at any time.

If a Severance Executive dies while any amount is still payable to the Severance Executive under the Plan, all such amounts shall be paid in accordance with this Plan to the Severance Executive's designated heirs or, in the absence of such designation, to the Severance Executive's estate.

The numbered paragraph headings contained in this Plan are included solely for convenience of reference and shall not in any way affect the meaning of any provision of this Plan.

If, for any reason, any one or more of the provisions or part of a provision contained in this Plan shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision or part of a provision of this Plan not held so invalid, illegal or unenforceable, and each other provision or part of a provision will, to the full extent consistent with law, remain in full force and effect.

This Plan is intended to comply with the requirements of Code Section 409A, to the extent applicable, and will be construed accordingly. In construing or interpreting any vague or ambiguous provision of the Plan, the interpretation that will prevail is the interpretation that will cause the Plan to comply with the applicable standards for nonqualified deferred compensation plans established by Code Section 409A. Any provision that would cause the Plan or any benefits provided under it to fail to satisfy Code Section 409A will have no force or effect until amended to comply with Code Section 409A, which amendment may be retroactive to the extent permitted by Code Section 409A. For purposes of this Plan, a Severance Executive will not be treated as having terminated employment with the Company until he or she has incurred a separation from service within the meaning of Code Section 409A.

11. Adoption Date

The Plan was adopted by ESI on October 22, 2007 ("Adoption Date") and does not apply to any termination of employment that occurred or was communicated to any Severance Executive prior to the Adoption Date.

and strategies, information pertaining to customers, pricing information, cost information, financial information, personnel information, contract information, data compilations, information received from third parties that the Company is obligated to keep confidential, and information about prospective products or services, whether or not reduced to writing or other tangible medium of expression, including work product created by Executive in rendering services for the Company. Executive acknowledges that the Confidential Information is a valuable, special and unique asset of the Company. For as long a period of time as permitted by applicable law, and in any event for a period of at least three (3) years after the termination of Executive's employment with the Company, Executive will not, except as may be authorized in writing by the Company, use or disclose to others any of the Confidential Information. Executive agrees that the Company owns the Confidential Information and Executive has no rights, title or interest in any of the Confidential Information. Executive will immediately deliver to the Company any and all materials (including all copies and electronically stored data) containing any Confidential Information in Executive's possession or subject to Executive's custody or control. Executive's non-disclosure obligations hereunder shall continue as long as the Confidential Information remains confidential, and shall not apply to any information which Executive is required by law or judicial process to disclose or which becomes generally publicly available through no fault or action of Executive or others who were under confidentiality obligations with respect to such information.

3. **Non-Competition Covenants.** Executive agrees to the following non-competition covenants:

a. During the Restricted Time Period, Executive will not within the Restricted Geographic Area be employed by, work for, consult with, lend assistance to, or engage in any Competitive Business (i) in the same or similar capacity or function to that in which Executive worked for the Company, (ii) in any executive or managerial capacity (iii) in any consulting capacity or function or (iv) in any other capacity in which Executive's knowledge of the Company's Confidential Information would facilitate or support Executive's work for the Competitive Business. For purposes of this Agreement, the term "Restricted Time Period" means the twelve (12) month period immediately after the termination of Executive's employment with the Company. For purposes of this Agreement, the term "Restricted Geographic Area" means each of the States of the United States of America. For purposes of this Agreement, the term "Competitive Business" means any for-profit entity that is engaged in the business of providing post-secondary education with annual revenues of at least \$100 million and that is competitive with the business of the Company. Executive acknowledges that the foregoing restriction is reasonable given (x) the position in which Executive has been employed with the Company, (y) the Company's business is national in scope, and (z) Executive, for or on behalf of a Competitive Business, could compete effectively with the Company from any location in the United States. Notwithstanding the restrictions contained in this Section 3.a, if a Competitive Business has multiple divisions, units or segments, some of which are not engaged in providing post-secondary education, Executive may work for or consult with only that division, unit or segment that is not engaged in providing post-secondary education, provided that (I) Executive first provides the Company with a written notice describing in reasonable detail Executive's position with and anticipated activities for the Competitive Business, which such written notice also includes an assurance that Executive's affiliation with and work for the Competitive Business will relate only to the non-competitive division, unit or segment and will not involve any activities that are competitive with the Company, and (II) Executive's affiliation with

and/or work for the non-competitive division, unit or segment of the Competitive Business would not likely cause Executive to inevitably use and/or disclose any Confidential Information.

b. During the Restricted Time Period, Executive will not (i) solicit, recruit, hire, employ or attempt to hire or employ any person who is an employee of the Company, (ii) assist any person or entity in the recruitment or hiring of any person who is an employee of the Company, (iii) urge, induce or seek to induce any person to terminate his/her employment with the Company, or (iv) advise, suggest to or recommend to any person or entity that it employ or solicit for employment any person who is an employee of the Company.

c. During the Restricted Time Period, Executive will not urge, induce or seek to induce any of the Company's customers, independent contractors, subcontractors, consultants, business partners, licensors, licensees, vendors, suppliers or others with whom the Company has a business relationship to terminate their relationship with, or representation of, the Company, or to cancel, withdraw, reduce, limit or in any manner modify any such person's or entity's business with, or representation of, the Company.

d. During the Restricted Time Period, Executive will not make or publish any statements or comments that disparage or injure the reputation or goodwill of the Company or any of its affiliates, or any of its or their respective officers or directors, or otherwise make any oral or written statements that a reasonable person would expect at the time such statement is made to likely have the effect of diminishing or injuring the reputation or goodwill of the Company, or any of its affiliates, or any of its or their respective officers or directors; provided, however, nothing herein shall prevent Executive from providing any information that may be compelled by law.

e. Executive acknowledges and agrees that the non-competition covenants contained in Section 3 of this Agreement prohibit Executive from engaging in certain activities on Executive's own behalf or on behalf of or in conjunction with any person or entity, regardless whether Executive is acting as an employee, owner, independent contractor, consultant or advisor and regardless whether Executive is acting directly or indirectly.

f. In the event Executive violates any non-competition covenant contained in Section 3 of this Agreement, the duration of such non-competition covenant shall automatically be extended by the length of time during which Executive was in violation of such covenant, including, but not limited to, an extension for the period from the date of Executive's first violation until an injunction is entered enjoining such violation.

4. **Cooperation.** During the Restricted Time Period, Executive agrees and covenants that if the Company desires Executive to provide any information or testimony relating to any judicial, administrative or other proceeding involving the Company or any of its affiliated entities, Executive will cooperate in making himself reasonably available for such purposes and will provide truthful information and/or testimony. The Company agrees to reimburse Executive for all necessary and reasonable out-of-pocket expenses Executive incurs in connection with such matters. Should Executive be served with a subpoena in any legal proceeding relating to the Company or any of its affiliates, Executive agrees: (a) to inform the Company immediately of the subpoena; (b) to reasonably cooperate with the Company and its attorneys in responding to such

subpoena and in preparing for any hearings, depositions or other formal process by which evidence is taken or received; and (c) to provide truthful testimony in response to questions that are within the scope of proper discovery.

5. **Severability; Reformation of Restrictions.** The covenants and restrictions in this Agreement are separate and divisible, and to the extent any covenant, provision or portion of this Agreement is determined to be unenforceable or invalid for any reason, the Company and Executive acknowledge and agree that such unenforceability or invalidity shall not affect the enforceability or validity of the remainder of this Agreement. If any particular covenant, provision or portion of this Agreement is determined to be unreasonable or unenforceable for any reason, including, without limitation, the time period, geographical area, and/or scope of activity covered by any non-competition or non-disclosure covenant, provision, or clause, the Company and Executive acknowledge and agree that such covenant, provision or clause shall automatically be deemed reformed such that the contested covenant, provision or clause will have the closest effect permitted by applicable law to the original form and shall be given effect and enforced as so reformed to whatever extent would be reasonable and enforceable under applicable law. The Company and Executive agree that any court interpreting any non-competition or non-disclosure provision of this Agreement shall, if necessary, reform any such provision to make it enforceable under applicable law.

6. **Remedies.** Executive recognizes that a breach or threatened breach by Executive of this Agreement will give rise to irreparable injury to the Company and that money damages will not be adequate relief for such injury, and, accordingly, agrees that the Company shall be entitled to obtain equitable relief, including, but not limited to, specific performance, temporary restraining orders, preliminary injunctions and/or permanent injunctions, without having to post any bond or other security, to restrain or prohibit such breach or threatened breach, in addition to any other legal remedies which may be available, including the recovery of monetary damages from Executive. In addition to all other relief to which it shall be entitled, the Company shall be entitled to recover from Executive all litigation costs and attorneys' fees incurred by the Company in any action or proceeding relating to this Agreement in which the Company prevails.

7. **Governing Law; Choice of Forum.** This Agreement shall be construed and enforced in accordance with the laws of the State of Indiana, without giving effect to any conflict of law principle (whether of the State of Indiana or any other jurisdiction) that would cause the application of the law of any jurisdiction other than the State of Indiana. This Agreement is intended, among other things, to supplement the provisions of the Indiana Uniform Trade Secrets Act, as amended from time to time. The parties agree that any legal action relating to this Agreement shall be commenced and maintained exclusively before any appropriate state court of record in Hamilton County, Indiana, or the United States District Court for the Southern District of Indiana, Indianapolis Division, and the parties hereby submit to the jurisdiction and venue of such courts and waive any right to challenge or otherwise object to personal jurisdiction or venue (including, without limitation any objection based on inconvenient forum grounds) in any action commenced or maintained in such courts; provided, however, the Company may, in its sole discretion, elect to bring an action or claim relating to or arising from this Agreement in the county or federal district where any breach by Executive occurred or where Executive resides.

8. **Successors and Assigns.** The Company shall have the right to assign this Agreement. This Agreement shall inure to the benefit of, and may be enforced by, any and all successors and assigns of the Company, including without limitation by asset assignment, stock

sale, merger, consolidation or other corporate reorganization. Executive shall not have the right to assign this Agreement.

9. **Entire Agreement; Modification.** This Agreement constitutes the entire agreement of the parties with respect to the subjects specifically addressed herein, and supersedes any prior agreements, understandings or representations, oral or written, on the subjects addressed herein. This Agreement may not be amended, supplemented, or modified except by a written document signed by both Executive and a duly authorized officer of the Company specifically designated by the Company's Board of Directors.

10. **No Waiver.** The failure of the Company to insist in any one or more instances upon such performance of any of the provisions of this Agreement or to pursue its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights.

11. **Voluntary Agreement.** Executive acknowledges that: (a) Executive has been given ample time to consider this Agreement; (b) Executive has been given the opportunity to consult with an attorney or other advisor if Executive so chooses; and (c) Executive is knowingly and voluntarily entering into this Agreement.

12. **Counterparts.** This Agreement may be executed in one or more counterparts (or upon separate signature pages bound together into one or more counterparts), all of which taken together shall constitute one agreement.

[Remainder of page intentionally left blank; signature page follows.]

IN WITNESS WHEREOF, the Company and Executive have executed this Agreement as of the date first hereinabove stated.

EXECUTIVE

ITT EDUCATIONAL SERVICES, INC.

[**Name**]

By: _____
Printed Name: _____
Title: _____

Exhibit A

GENERAL RELEASE

I am a participant in the ITT Educational Services, Inc. Senior Executive Severance Plan (the "Plan") and have terminated employment with ITT Educational Services, Inc. and its subsidiaries (the "Company") under circumstances that will entitle me to certain severance benefits (the "Severance Benefits") under the Plan, provided I meet the applicable conditions specified in the Plan. I understand that, under the terms of the Plan, I will only be able to receive the Severance Benefits in consideration for my signing this General Release ("Release").

I hereby acknowledge and agree to the following:

[I will have _____ () days [21 days for individual terminations, 45 days for group terminations] from the date I receive this Release to consider and sign it. If I do not return this signed Release in _____ () days, the Company will consider this my refusal to sign, and I will not receive the Severance Benefits. If I do sign this Release, it will not be effective for a period of seven (7) days, during which time I can change my mind and revoke my signature. To revoke my signature, I must notify the Company in writing within seven (7) days of the date I signed this Release.] [To be used for individuals age 40 or older.]

By signing this Release, I am giving up my right to sue ITT Educational Services, Inc. and any and all affiliates, parent companies and subsidiaries, and their past, present, and future officers, directors, employees, and agents (together, the "Releasees") based upon any act or event occurring prior to my signing this Release. Without limitation, I specifically release the Releasees from any and all claims arising out of my employment and termination, including claims based on discrimination under federal anti-discrimination laws such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and any and all federal, state, and local laws.

By signing this Release, I am NOT giving up my right to appeal a denial of a claim for benefits submitted under any health coverage (medical, dental, vision, and prescription drug coverage), life insurance or disability program maintained by the Company, nor am I giving up any claim for benefits under the terms of any pension or retirement plan maintained by the Company. Also, I am not giving up my right to file for unemployment insurance benefits at the appropriate time if I so choose, and my signing of this Release will not affect my rights, if any, to any coverage by workers' compensation insurance. In addition, this Release will not affect any benefits to which I am entitled under the Plan or any claim arising out of the enforcement of the Plan. I also am not giving up any right to indemnification or directors and officers liability insurance coverage and benefits to which I am entitled under applicable law, the Company's articles of incorporation or by-laws or any agreements, or under which I have been covered.

My signature below acknowledges that I have read the above, understand what I am signing, and am acting of my own free will. The Company has advised me to consult with an attorney and any other advisors of my choice prior to signing this Release.

Signature: _____

Date: _____

Print Name: _____

Witness: _____

Exhibit B

FORM OF NONCOMPETITION AGREEMENT

This Non-Competition Agreement ("Agreement") is made and entered into as of **[**date**]** by and between ITT EDUCATIONAL SERVICES, INC., a corporation having its principal place of business in Carmel, Indiana (the "Company"), and **[**NAME**]** ("Executive").

Recitals

- A. Executive has been employed with the Company in an executive capacity.
- B. During Executive's employment with the Company, Executive has had access to and has acquired trade secrets and confidential information of the Company.
- C. Executive is a participant in that certain ITT Educational Services, Inc. Senior Executive Severance Plan (the "Severance Plan").
- D. Executive's employment with the Company will terminate or has terminated effective as of **[**date**]** under circumstances that make Executive eligible for benefits under the Severance Plan. As a condition to Executive's entitlement to benefits under the Severance Plan, Executive must enter into this Agreement.
- E. Executive is willing to enter into this Agreement for the protection of the Company in exchange for Executive's receipt of benefits under the Severance Plan.

Agreement

NOW, THEREFORE, in consideration of the foregoing recitals, the Executive's receipt of benefits under the Severance Plan, the promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and Executive agree as follows:

- 1. **Acknowledgment.** Executive acknowledges that: (a) the Company is engaged in a highly competitive business; (b) Executive has served the Company in an executive and/or high-level managerial capacity; (c) Executive has had access to and has gained knowledge of substantial trade secrets and confidential information of the Company; and (d) the covenants and restrictions contained in this Agreement are reasonably necessary to protect the legitimate interests of the Company.
- 2. **Non-Disclosure of Confidential Information.** As used in Sections 2 and 3 of this Agreement, the term "Company" means and includes not only ITT Educational Services, Inc. but also any subsidiary of ITT Educational Services, Inc. and/or any other affiliate entity that controls, is controlled by, or is under common control with, ITT Educational Services, Inc., provided that Executive has provided services for the benefit of or has received or had access to confidential information concerning such subsidiary or affiliate. As used in this Agreement, the term "Confidential Information" means any and all of the Company's trade secrets, confidential and proprietary information and all other non-public information and data of or about the Company and its business, including, but not limited to, confidential business methods and processes, research and development information, business plans and strategies, marketing plans

EXHIBIT D

RELEVANT EXCERPTS OF
2016 ANNUAL MEETING NOTICE
AND PROXY STATEMENT FOR
ITT EDUCATIONAL SERVICES, INC.

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ITT Educational Services, Inc.

2016 Annual Meeting Notice and Proxy Statement

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The following table sets forth information about the stock options and RSUs that were granted under the ITT Educational Services, Inc. Amended and Restated 2006 Equity Compensation Plan (the "Amended 2006 Plan") effective June 17, 2015 to each Named Executive Officer, other than Messrs. Modany and Dean, and as of August 6, 2015 for the additional grants to Mr. Tarasi, as described above.

Named Executive Officer	Stock Options			RSUs		Date Compensation Committee Took Action
	Number of Securities Underlying Option Granted	Exercise Price	Expiration Date	Number of RSUs	Grant Date ⁽¹⁾	
Rocco F. Tarasi, III	5,000 ⁽²⁾	\$4.91	06/17/22	2,250 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Rocco F. Tarasi, III	N/A	N/A	N/A	16,667 ⁽⁵⁾	08/06/15	07/27/15 ⁽⁶⁾
Daniel M. Fitzpatrick	15,000 ⁽²⁾	\$4.91	06/17/22	6,750 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Eugene W. Feichtner	17,500 ⁽²⁾	\$4.91	06/17/22	7,875 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Ryan L. Roney	12,500 ⁽²⁾	\$4.91	06/17/22	5,625 ⁽³⁾	06/17/15	01/26/15 ⁽⁴⁾
Ryan L. Roney	5,208 ⁽⁷⁾	\$4.91	06/17/22	2,344 ⁽⁸⁾	06/17/15	07/21/14 ⁽⁹⁾

- (1) The effective date of the stock option and RSU grants.
(2) Nonqualified stock option granted at 100% of the closing market price of a share of our common stock on June 17, 2015, the effective date of the grant. One-third of the option is exercisable on each of February 9, 2016, February 9, 2017 and February 9, 2018.
(3) The period of restriction for this RSU grant lapses in thirds on each of February 9, 2016, February 9, 2017 and February 9, 2018.
(4) These stock option and RSU grants were initially approved by the Compensation Committee during a Committee meeting on January 26, 2015, their vesting commencement date was approved by the Compensation Committee during a Committee meeting on May 20, 2015, and they had an effective grant date of June 17, 2015.
(5) The period of restriction for this RSU grant lapses in thirds on each of August 6, 2016, 2017 and 2018.
(6) This RSU grant was approved by the Compensation Committee during a Committee meeting on July 27, 2015.
(7) Nonqualified stock option granted at 100% of the closing market price of a share of our common stock on June 17, 2015, the effective date of the grant. One-third of the option is exercisable on each of July 7, 2015, July 7, 2016 and July 7, 2017.
(8) The period of restriction for this RSU grant lapses in thirds on each of July 7, 2015, July 7, 2016 and July 7, 2017.
(9) These stock option and RSU grants were initially approved by the Compensation Committee during a Committee meeting on July 21, 2014, their vesting commencement date was approved by the Committee during a Committee meeting on May 20, 2015, and they had an effective grant date of June 17, 2015.

2016 Compensation

Base Salary. In January 2016, the Compensation Committee determined not to make any changes to the annual base salaries for any of the Named Executive Officers (other than Mr. Tarasi) based on the current market and business conditions. The Compensation Committee approved an increase in Mr. Tarasi's base salary from \$221,450 in 2015 to \$350,000 in 2016, to be effective as of February 8, 2016 (the date in 2016 that other employees at our headquarters received compensation adjustments), as a result of the increased duties and responsibilities assumed by Mr. Tarasi in connection with his appointment as our Chief Financial Officer. Mr. Tarasi's 2016 base salary amount was based on the Committee's review of peer group comparator information for similar positions.

In March 2016, the Compensation Committee discussed and approved a reduction in Mr. Dean's annual base salary from \$575,000, as provided in the Dean Letter Agreement, to \$200,000. On March 12, 2016, we and Mr. Dean entered into an Amendment No. 1 to the Dean Letter Agreement (the "Dean Amendment"), pursuant to which the Dean Letter Agreement was amended to change Mr. Dean's annual base salary thereunder to \$200,000.

The following table sets forth the annualized base salary information for each of the Named Executive Officers (other than Mr. Fitzpatrick) as of February 8, 2016 (except for Mr. Dean's base salary, which is as of March 12, 2016). As noted above, 2016 was the second consecutive year with no base salary increases for the Named Executive Officers, other than in connection with promotions.

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Named Executive Officer	2016 Annualized Base Salary	Dollar Increase/ (Decrease) From Prior Year	Percentage Increase/ (Decrease) From Prior Year
Kevin M. Modany	\$824,076	\$ 0	0%
Rocco F. Tarasi, III	\$350,000	\$ 128,550	58.0%
John B. Dean	\$200,000	\$(375,000)	(65.2)%
Eugene W. Feichtner	\$400,000	\$ 0	0%
Ryan L. Roney	\$360,000	\$ 0	0%

Short-Term Compensation. In January 2016, the Compensation Committee established a short-term compensation element for our executive officers (other than Mr. Dean) that will be payable in early 2017, if certain management objectives (the "2016 Management Objectives") are accomplished during 2016. As with the 2015 Management Objectives, the 2016 Management Objectives are not in any way related to the enrollment of students or the award of financial aid to avoid violating the Incentive Compensation Prohibition. Instead, the 2016 Management Objectives consist of various business objectives that relate to certain initiatives that are part of our strategic plan. The 2016 Management Objectives and their relative weightings are as follows:

Management Objectives	Weight
1. Resolve (through settlement or otherwise) outstanding legal and regulatory matters involving the company	20%
2. Increase the 2016 weighted average graduation rate for ITT Technical Institute (calculated utilizing a completion period equal to 1.5 times the anticipated program duration for a full-time student)	20%
3. Improve the 2016 ITT Technical Institute quarterly student evaluation average score	10%
4. Improve the average NCLEX score of the 2016 graduates of the Breckinridge School of Nursing and Health Sciences nursing program	10%
5. Establish relationships with Corporate Partners to deliver customized corporate training and other educational services	10%
6. Design, develop and obtain the necessary regulatory authorizations to offer an alternative delivery methodology for an accredited degree program	10%
7. Design, develop and implement a revised marketing and advertising campaign for ITT Technical Institute	10%
8. Obtain the requisite federal, state and accrediting commission authorizations for the ITT Technical Institutes to offer new diploma and/or degree programs	5%
9. Obtain the requisite federal, state and accrediting commission authorizations for the ITT Technical Institutes to open new campus locations	5%

The determination of the extent to which the 2016 Management Objectives are accomplished by our executive officers will be made by the Compensation Committee in early 2017. The Committee intends to assign zero to five points to each 2016 Management Objective, based on the extent to which the Committee determines the objective was accomplished. The number of points assigned to each 2016 Management Objective will be multiplied by the weight associated with that 2016 Management Objective, resulting in a weighted number of points for that 2016 Management Objective. The weighted number of points for all of the 2016 Management Objectives will be added together, resulting in a total number of weighted points. The following table sets forth the maximum short-term compensation percentage that is associated with each range of the total number of weighted points that are assigned to the 2016 Management Objectives by the Compensation Committee:

Total Weighted Points	Maximum Short-Term Compensation Percentage
4.76 - 5.00	200.0%
4.51 - 4.75	187.5%
4.26 - 4.50	175.0%
4.01 - 4.25	162.5%
3.76 - 4.00	150.0%
3.51 - 3.75	137.5%
3.26 - 3.50	125.0%
3.01 - 3.25	112.5%
2.76 - 3.00	100.0%
2.51 - 2.75	87.5%
2.26 - 2.50	75.0%
2.01 - 2.25	62.5%
1.76 - 2.00	50.0%
1.51 - 1.75	41.7%
1.26 - 1.50	33.3%
1.00 - 1.25	25.0%

To determine the maximum short-term compensation amount that an officer may receive, the maximum short-term compensation percentage (determined as described above) will be multiplied by a standard short-term compensation percentage of annualized base salary as of December 31, 2016, ranging from 32% to 100%, with the percentage depending on the officer's position, and the result will be multiplied by the officer's annualized base salary. The Committee believes that the current short-term compensation element is working effectively (given the Incentive Compensation Prohibition Limitations), and therefore, the Committee did not modify the standard short-term compensation percentage of annualized base salary for the Named Executive Officers, other than in connection with promotions. The following table sets forth the 2016 standard short-term compensation percentage of annualized base salary as of December 31, 2016 for each of the Named Executive Officers who currently are participants in the 2016 short-term compensation element:

Named Executive Officer	2016 Standard Short-Term Compensation Percentage of Annualized Base Salary
Kevin M. Modany	100%
Rocco F. Tarasi, III	65%
Eugene W. Feichtner	70%
Ryan L. Roney	65%

An executive officer's actual short-term compensation payment, however, may be more or less than the officer's potential short-term compensation amount as calculated as described above. An executive officer's actual short-term compensation amount will be based on the Compensation Committee's discretionary assessment of the officer's individual contribution toward accomplishing each 2016 Management Objective. Any 2016 short-term compensation payment will be made in cash. The Compensation Committee may, in its sole discretion, modify the terms of the short-term compensation element at any time before it is paid.

ESI Excess Pension Plan. On June 9, 1998, we established, and effective January 1, 2008, we restated, the ESI Excess Pension Plan, an unfunded, nonqualified retirement plan for a select group of our management and highly compensated employees. The benefit accruals under the ESI Excess Pension Plan for all participants in the plan were frozen on March 31, 2006, such that no further benefits accrue under that plan after March 31, 2006. The purpose of the ESI Excess Pension Plan was to restore benefits earned, but not available, to eligible employees under the ESI Pension Plan due to federal limitations on the amount of benefits that can be paid and compensation that may be recognized under a tax-qualified retirement plan. The practical effect of the ESI Excess Pension Plan was to continue the calculation of retirement benefits to all employees on a uniform basis. The eligible employee's compensation upon which the benefits under the ESI Excess Pension Plan are based is the same as for that eligible employee's benefits under the ESI Pension Plan (but without regard to the IRC limit on includible compensation for qualified plans).

An eligible employee will receive his or her benefit under the ESI Excess Pension Plan in a lump sum cash payment within 60 days following his or her termination of employment. If an eligible employee is a "specified employee" as defined in Section 409A of the IRC, however, then his or her benefit will be paid on the first day that is six months after the eligible employee's termination of employment. If an eligible employee dies before the benefit due to the employee under the ESI Excess Pension Plan has been paid, then the benefit will be paid to the employee's beneficiary within 60 days after the employee's death. We do not have a policy with regard to crediting extra years of benefit service under our pension plans, but no extra years of benefit service under the ESI Excess Pension Plan have been credited to any of the Named Executive Officers. As of December 31, 2015, Mr. Felchtner was the only Named Executive Officer participant who qualified for retirement under the ESI Excess Pension Plan based on age and years of service. If Mr. Felchtner's employment with us terminated as of December 31, 2015, he would receive his accrued benefit under the ESI Excess Pension Plan as of that date, which was \$81,355. An eligible employee's benefits under the ESI Excess Pension Plan will generally be paid directly by us. See "—ESI Pension Plan."

Nonqualified Deferred Compensation Plan Table

The following table sets forth information concerning the compensation of the Named Executive Officers in our 2015 fiscal year under the ESI Excess Savings Plan and the Directors Deferred Compensation Plan. None of the Named Executive Officers has deferred any bonus compensation under the Deferred Bonus Plan.

Nonqualified Deferred Compensation in Fiscal Year 2015

Named Executive Officer	Executive Contributions in Last Fiscal Year ⁽¹⁾	ITT/ESI Contributions in Last Fiscal Year ⁽¹⁾	Aggregate Earnings in Last Fiscal Year	Aggregate Balance at Last Fiscal Year-End
Kevin M. Modany ESI Excess Savings Plan	\$0	\$0	\$ 4,920 ⁽²⁾	\$64,199 ⁽³⁾
Rocco F. Tarasi, III ESI Excess Savings Plan	\$0	\$0	\$ 0	\$ 0
Daniel M. Fitzpatrick ESI Excess Savings Plan	\$0	\$0	\$ 0	\$ 0
John E. Dean ESI Excess Savings Plan	\$0	\$0	\$ 0	\$ 0
Directors Deferred Compensation Plan	\$0	\$0	\$ 0	\$ 0
Eugene W. Felchtner ESI Excess Savings Plan	\$0	\$0	\$(95,227) ⁽⁴⁾	\$60,407 ⁽⁵⁾
Ryan L. Roncy ESI Excess Savings Plan	\$0	\$0	\$ 348 ⁽²⁾	\$ 4,540 ⁽³⁾
	\$0	\$0	\$ 0	\$ 0

- (1) Effective for plan years beginning on and after January 1, 2008, we froze the ESI Excess Savings Plan, such that eligible employees may no longer make elective contributions and we no longer make contributions under the ESI Excess Savings Plan. See "—Nonqualified Deferred Compensation Plans—ESI Excess Savings Plan."
- (2) Represents the dollar amount of the aggregate interest or other earnings accrued during 2015 to the Named Executive Officer's account under the ESI Excess Savings Plan. The only portion of these amounts that is reported as compensation to the Named Executive Officer in the Summary Compensation Table for the 2015 year is the above-market or preferential earnings in 2015 on the balance of the Named Executive Officer's account under the ESI Excess Savings Plan which are included in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column of the Summary Compensation Table. See "—Summary Compensation Table."
- (3) Represents the dollar amount of the total balance of the Named Executive Officer's account at the end of 2015 under the ESI Excess Savings Plan. The only portion of these amounts that is reported as compensation to the Named Executive Officer in the Summary Compensation Table for each of the 2014 and 2013 years is the above-market or preferential portion of aggregate earnings under the ESI Excess Savings Plan in 2014 and 2013, which contribute to the aggregate balance of the Named Executive Officer's ESI Excess Savings Plan account at year-end 2015. Those earnings are included in the amount of the Named Executive Officer's compensation for the particular year and are reported in the Change in Pension Value and Nonqualified Deferred Compensation Earnings column of the Summary Compensation Table for that particular year. The amount of those above-market or preferential earnings for each of the Named Executive Officers is specified in the table below.

EXHIBIT E

BY-LAWS

EX-3.2 2 exhibit3_2.htm EXHIBIT 3.2

Exhibit 3.2

ITT EDUCATIONAL SERVICES, INC.

BY-LAWS

As Amended and Restated July 18, 2011

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ITT EDUCATIONAL SERVICES, INC.
(a Delaware Corporation)

BY-LAWS

ARTICLE I

OFFICES

SECTION 1. Registered Office. The registered office of ITT Educational Services, Inc. (the "Corporation") in the State of Delaware and the name of the registered agent at such address shall be as specified in the Corporation's Amended and Restated Certificate of Incorporation, or as subsequently changed as specified in the most recent certificate of change filed pursuant to law.

SECTION 2. Other Offices. The Corporation may also have offices at such other places both within and without the State of Delaware as the Board of Directors (the "Board") may from time to time determine or the business of the Corporation may require.

SECTION 3. Change of Location. In the manner permitted by law, the Board or the Corporation's registered agent may change the address of the Corporation's registered office in the State of Delaware and the Board may make, revoke or change the designation of the registered agent.

ARTICLE II

MEETINGS OF STOCKHOLDERS

SECTION 1. Place of Meetings. All meetings of stockholders for the election of directors and for the transaction of such other business as may properly come before the meeting shall be held at such place, either within or without the State of Delaware, as may be fixed from time to time by the Board and stated in the notice of the meeting or in a waiver of notice thereof. In lieu of holding a meeting of stockholders at a designated place, the Board, in its sole discretion, may determine that any meeting of stockholders may be held solely by means of remote communication.

SECTION 2. Annual Meeting. Annual meetings of stockholders, at which they shall elect members of the Board and transact such other business as may properly be brought before the meeting, shall be held on such date and at such time as shall be designated from time to time by the Board and stated in the notice of meeting or in a waiver thereof.

SECTION 3. Special Meetings. Special meetings of the stockholders for any purpose may be held at such time as shall be stated in the notice of the meeting or in a waiver of notice thereof. Special meetings of stockholders may be called at any time, for any purpose or purposes, by the Chairman of the Board, the Chief Executive Officer or a majority of the Board.

SECTION 4. Notice of Meetings. Except as otherwise expressly required by law, written or printed notice of each annual and special meeting of stockholders stating the place, if any, date and time of the meeting, the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting, and, in the case of a special meeting of the stockholders, the purpose or purposes thereof and the person or persons by whom or at whose direction such meeting has been called, shall be given not less than ten (10) nor more than sixty (60) days before the date of the meeting, by or at the direction of the Chief Executive Officer, or the Secretary, or the officer or persons calling the meeting to each stockholder of record entitled to vote at such meeting. Notice shall be provided in accordance with Article VI of these By-laws. Notice may be given to stockholders sharing an address in the manner and to the extent permitted by applicable law.

SECTION 5. Quorum. The holders of a majority of the shares of stock issued and outstanding and entitled to vote, represented in person or by proxy, shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by statute or by the Amended and Restated Certificate of Incorporation. If, however, such quorum shall not be present or represented at any meeting of the stockholders, the chair of the meeting or the stockholders present in person or represented by proxy shall have the power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present or represented by proxy. At such adjourned meeting at which a quorum shall be present or represented any business may be transacted which might have been transacted at the meeting as originally notified. If the adjournment is for more than thirty (30) days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting in accordance with these By-laws.

SECTION 6. Voting of Stock. Except as is otherwise required by law, the Amended and Restated Certificate of Incorporation or these By-laws, each holder of record of shares of stock of the Corporation having voting powers shall be entitled, at each meeting of the stockholders, to one vote for every share of such stock standing in his or her name on the record of stockholders of the Corporation and, if a quorum is present and unless otherwise required by the Amended and Restated Certificate of Incorporation, the affirmative vote of a majority of the shares of stock represented at the meeting and entitled to vote on the subject matter shall be the act of the stockholders, except with respect to the election of directors. If, as of a date that is fourteen (14) days in advance of the date the Corporation files its definitive proxy statement (regardless of whether or not thereafter revised or supplemented) with the U.S. Securities and Exchange Commission, the number of nominees for director exceeds the number of directors to be elected, directors shall be elected by the vote of a plurality of the shares represented in person or by proxy at the meeting and entitled to vote on the election of directors, subject to the rights of any holders of any series of preferred stock under the Amended and Restated Certificate of Incorporation. If, at such date, the number of nominees for director does not exceed the number of directors to be elected, each director shall be elected by the affirmative vote of a majority of the votes cast with respect to that director at any meeting for the election of directors at which a quorum is present, subject to the rights of any holders of any series of preferred stock under the Amended and Restated Certificate of Incorporation.

For purposes of this Section 6, a majority of votes cast shall mean that the number of shares voted “for” a director’s election exceeds the number of shares voted “against” that director’s election. Abstentions and broker non-votes will not be considered as votes cast in the election of a director. Any nominee for director who is an incumbent director and who is not elected in an election that is determined by the affirmative vote of a majority of the votes cast is expected to tender his or her resignation to the Board of Directors, subject to acceptance by the Board of Directors. The Board of Directors will act on the tendered resignation and publicly disclose (by a press release, a filing with the U.S. Securities and Exchange Commission or other broadly disseminated means of communication) its decision regarding the tendered resignation within 90 days from the date of the certification of the election results. The Board of Directors in making its decision may consider any factors or other information that it considers appropriate and relevant. If a director’s resignation is not accepted by the Board of Directors, the director shall continue to serve until the end of the term of his or her class and until his or her successor is duly elected, or his or her earlier resignation or removal. If a director’s resignation is accepted by the Board of Directors pursuant to this Section 6, or if a nominee for director is not elected and the nominee is not an incumbent director, then the Board of Directors may fill the resulting vacancy or decrease the size of the Board of Directors pursuant to the provisions of the Amended and Restated Certificate of Incorporation or these By-laws.

SECTION 7. List of Stockholders. At least ten (10) days before each meeting of stockholders, the Secretary or agent having charge of the stock transfer book shall make a complete list of the stockholders entitled to vote at such meeting, arranged in alphabetical order, with the address of each and the number of shares held by each. Such list shall be subject to inspection by any stockholder for a period of ten (10) days prior to such meeting, for any purpose related to the meeting, at the principal office of the Corporation at any time during usual business hours or on a reasonably accessible electronic network. Such list shall be produced and kept open at the time and place of meeting, or if the meeting is to be held solely by means of remote communication then on a reasonably accessible electronic network, and shall be subject to the inspection of any stockholder during the whole time of the meeting.

SECTION 8. Stockholder Business and Nominations.

(a) Annual Meetings of Stockholders. (i) Nominations of persons for election to the Board of Directors and the proposal of other business to be considered by the stockholders may be made at an annual meeting of stockholders (A) pursuant to the Corporation’s notice of meeting under Section 4, (B) by or at the direction of the Board of Directors, or (C) by any stockholder of the Corporation who (1) was a stockholder of record at the time of giving of notice provided for in this Section 8 and is a stockholder of record at the time of the annual meeting, (2) is entitled to vote at the meeting, and (3) complies with the notice procedures set forth in this Section 8 as to such business or nomination; and clause (C) shall be the exclusive means for a stockholder to make nominations or submit other business (other than proposals for other business properly brought under Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and included in the Corporation’s notice of meeting) before an annual meeting of stockholders.

(ii) For any nominations or any other business to be properly brought before an annual meeting by a stockholder pursuant to clause (C) of paragraph (a)(i) of this Section 8, the stockholder must have given timely notice thereof in writing to the Secretary and such other business must otherwise be a proper matter for stockholder action. To be timely, a stockholder's notice shall be delivered to or mailed and received by the Secretary at the principal executive offices of the Corporation not earlier than the close of business on the 120th calendar day and not later than the close of business on the 90th calendar day prior to the first anniversary of the preceding year's annual meeting; *provided, however*, that in the event that the date of the annual meeting is more than 30 calendar days before or more than 60 calendar days after such anniversary date, then notice by the stockholder to be timely must be so delivered or received not earlier than the close of business on the 120th calendar day prior to the date of such annual meeting and not later than the close of business on the later of the 90th calendar day prior to the date of such annual meeting or the 10th calendar day following the day on which public announcement of the date of such meeting is first made by the Corporation. In no event shall any adjournment or postponement of an annual meeting or the public announcement thereof commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. To be in proper form, a stockholder's notice (whether given pursuant to this paragraph (a)(ii) or paragraph (b)) to the Secretary must set forth:

(A) as to each person whom the stockholder proposes to nominate for election or reelection as a director, (1) all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Exchange Act (including such person's written consent to being named in the proxy statement as a nominee and to serving as a director if elected), and (2) information relating to any agreement, arrangement or understanding, including a voting commitment, or any relationship, including financial transactions and compensation, between such person and the stockholder or any Stockholder Associated Person (as defined in Section 8(c)(ii) below); *provided*, that the Corporation may also require any proposed nominee to furnish such other information as the Corporation may reasonably require to determine the eligibility of such proposed nominee to serve as a director;

(B) as to any business, other than the nomination of a director or directors, that the stockholder proposes to bring before the meeting, (1) a brief description of the business desired to be brought before the meeting, the reasons for conducting such business at the meeting and any material interest of such stockholder and any Stockholder Associated Person in such business, (2) a description of all agreements, arrangements and understandings between such stockholder and any Stockholder Associated Person and any other person or persons (including their names) in connection with the proposal of such business by such stockholder, and (3) if the proposal or business is to be included in the Corporation's proxy statement, the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend these By-laws, the language of the proposed amendment); and

(C) as to the stockholder giving the notice and any Stockholder Associated Person, (1) the name and address of such stockholder, as they appear on the Corporation's stock ledger, and the name and address, if different, of such Stockholder Associated Person, (2) the class, series and number of all shares of stock of the Corporation which are held of record or are beneficially owned by such stockholder and by such Stockholder Associated Person, (3) the nominee holder for, and the number of, shares owned beneficially but not of record by such stockholder and by such Stockholder Associated Person, (4) any derivative position, including without limitation any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of shares of the Corporation or with a value derived in whole or in part from the value of any class or series of shares of the Corporation, directly or indirectly held or beneficially held by such stockholder and such Stockholder Associated Person, and whether and the extent to which any hedging, equity swap or other transaction or series of transactions has been entered into by or on behalf of, or any other agreement, arrangement or understanding (including any short position or interest or any borrowing or lending of shares of stock) has been made by, such stockholder or such Stockholder Associated Person with respect to any shares of stock of the Corporation, or whether such stockholder or Stockholder Associated Person has an economic interest in the Corporation not reported as record or beneficial ownership, (5) any proxy, contract, arrangement, understanding or relationship pursuant to which such stockholder or Stockholder Associated Person has a right to vote any shares of stock of the Corporation, (6) any rights to dividends on the shares of the Corporation owned beneficially by such stockholder or Stockholder Associated Person that are separated or separable from the underlying shares of the Corporation, (7) a representation that the stockholder is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person or through a qualified representative at the meeting to propose such nomination or business, and (8) a representation whether such stockholder or Stockholder Associated Person intends or is part of a group which intends (x) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the Corporation's outstanding capital stock required to elect the nominee or to approve or adopt the proposal and/or (y) otherwise to solicit proxies from stockholders in support of such nomination or proposal, and the information called for by this paragraph (ii)(C) shall be supplemented by such stockholder and Stockholder Associated Person not later than 10 days after the record date for the meeting to disclose such information as of the record date.

(iii) Notwithstanding anything in the second sentence of paragraph (a)(ii) of this Section 8 to the contrary, in the event that the number of directors to be elected to the Board of Directors at an annual meeting is increased and there is no public announcement by the Corporation naming all of the nominees for director or specifying the size of the increased Board of Directors at least 100 calendar days prior to the first anniversary of the preceding year's annual meeting, a stockholder's notice required by this Section 8 shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to the Secretary at the principal executive offices of the Corporation not later than the close of business on the 10th calendar day following the day on which such public announcement is first made by the Corporation.

(b) Special Meetings of Stockholders. Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting pursuant to the Corporation's notice of meeting under Section 4. Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders at which directors are to be elected pursuant to the Corporation's notice of meeting (i) by or at the direction of the Board of Directors or (ii) provided that the Board of Directors has determined that directors shall be elected at such meeting, by any stockholder of the Corporation who (A) was a stockholder of record at the time of giving of notice provided for in this Section 8 and is a stockholder of record at the time of the special meeting, (B) is entitled to vote at the meeting, and (C) complies with the notice procedures set forth in this Section 8 as to such nomination; and clause (ii) shall be the exclusive means for a stockholder to make nominations before a special meeting of stockholders. In the event the Corporation calls a special meeting of stockholders for the purpose of electing one or more directors to the Board of Directors, any such stockholder may nominate a person or persons (as the case may be), for election to such position(s) as specified in the Corporation's notice of meeting, if the stockholder's notice required by paragraph (a)(ii) of this Section 8 with respect to any nomination shall be delivered to or mailed and received by the Secretary at the principal executive offices of the Corporation not earlier than the close of business on the 120th calendar day prior to the date of such special meeting and not later than the close of business on the later of the 90th calendar day prior to the date of such special meeting or the 10th calendar day following the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting. In no event shall any adjournment or postponement of a special meeting or the public announcement thereof commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above.

(c) General. (i) Only such persons who are nominated in accordance with the procedures set forth in this Section 8 shall be eligible to serve as directors and only such business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 8. Except as otherwise provided by law, the Amended and Restated Certificate of Incorporation or these By-laws, the chairman of the meeting shall have the power and duty to determine whether a nomination was made, or any business proposed to be brought before the meeting was proposed, in accordance with the procedures set forth in this Section 8 (including whether the stockholder or any Stockholder Associated Person solicited (or is part of a group which solicited) or did not so solicit, as the case may be, proxies in support of such stockholder's nominee or proposal in compliance with such stockholder's representation as required by clause (a)(ii)(C)(8) of this Section 8) and, if any proposed nomination or proposed business is not in compliance with this Section 8, to declare that such defective nomination or proposal shall be disregarded. Notwithstanding the foregoing provisions of this Section 8, if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of the Corporation to present a nomination or proposal, such nomination or proposed business shall be disregarded, notwithstanding that proxies in respect of such vote may have been received by the Corporation.

(ii) For purposes of these By-laws, (A) "public announcement" shall mean disclosure in a press release reported by a national news service or in a document publicly filed by the Corporation with the Securities and Exchange Commission pursuant to Section 13, 14 or 15(d) of the Exchange Act; and (B) "Stockholder Associated Person" of any stockholder shall mean (1) any person or entity controlling, controlled by or under common control with, directly or indirectly, or acting in concert with, such stockholder, (2) any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder, and (3) any person or entity controlling, controlled by or under common control with a Stockholder Associated Person as defined in the foregoing clauses (B)(1) or (B)(2).

(iii) Notwithstanding the foregoing provisions of this Section 8, a stockholder seeking to include a nomination or other business in a proxy statement prepared by the Corporation shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder; *provided, however*, that any references in these By-laws to the Exchange Act or the rules promulgated thereunder are not intended to and shall not limit the requirements applicable to nominations or proposals as to any other business to be considered pursuant to paragraphs (a)(i)(C) or (b) of this Section 8. Nothing in this Section 8 shall be deemed to affect any rights (A) of stockholders to request inclusion of proposals in the Corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act, or (B) of the holders of any series of preferred stock of the Corporation if and to the extent provided for under law, the Amended and Restated Certificate of Incorporation or these By-laws.

SECTION 9. Proxies. At all meetings of stockholders, a stockholder may vote by proxy authorized by an instrument in writing or by an electronic transmission permitted by the laws of the State of Delaware by the stockholder or his duly authorized attorney-in-fact.

SECTION 10. Inspectors. The Board may, in advance of any meeting of stockholders, appoint one or more inspectors to act at such meeting or any adjournment thereof. If an inspector or inspectors are not appointed, the person presiding at the meeting may appoint one or more inspectors. Each inspector, if any, before entering upon the discharge of his duties, shall take and sign an oath faithfully to execute the duties of inspector at such meeting with strict impartiality and according to the best of his ability. The inspectors shall determine the number of shares of stock outstanding and the voting power of each, the number of shares represented at the meeting, the existence of a quorum, the validity and the fact of proxies, and shall receive votes, ballots or consents herein, determine all challenges and questions arising in connection with the right to vote, count and tabulate all votes, ballots or consents, determine the result, and do such other acts as are proper to conduct the election or vote with fairness to all stockholders. On request of the person presiding at the meeting, the inspector or inspectors shall make a report in writing of any challenge, request or matter determined by them and shall execute a certificate of any fact found by them. No director or candidate for the office of director shall act as an inspector on an election of directors. Inspectors need not be stockholders.

SECTION 11. No Written Consent. No action shall be taken by the stockholders of the Corporation except at an annual or special meeting of stockholders.

SECTION 12. Conduct of Meetings. The Chairman of the Board shall preside at all meetings of the stockholders. If the Chairman has not been elected or is not present, then the Chief Executive Officer shall preside. The Secretary of the Corporation, or in his absence, an Assistant Secretary, if any, shall act as Secretary of every meeting, but if neither the Secretary nor the Assistant Secretary is present, the Chairman or the Chief Executive Officer (as the case may be) shall appoint a secretary of the meeting.

ARTICLE III

DIRECTORS

SECTION 1. Number. The Board shall consist of at least three (3), but no more than twenty (20) directors, as shall be fixed from time to time by the affirmative vote of a majority of the entire Board of Directors; provided, however, that no decrease in the number comprising the entire Board made pursuant to this Section 1 shall shorten the term of any incumbent director. As provided by ARTICLE V of the Amended and Restated Certificate of Incorporation, the directors shall be divided into three classes and the number of directors in each such class shall be as set forth therein. Unless otherwise provided by the Amended and Restated Certificate of Incorporation, successors to each class of directors shall be elected for a three-year term at the annual meeting for the year in which the term of such class of directors expires and each such director elected shall hold office for a term continuing until the annual meeting held in the third year following the year of his or her election and until his or her successor is duly elected and qualified or until his or her resignation, death or removal; provided, that in the event of failure to hold such an annual meeting or to hold such election at such meeting, the election of directors may be held at any special meeting of the stockholders called for that purpose.

SECTION 2. Nominations. Nominations of persons for election as directors may be made only in accordance with Article II, Section 8 of these By-laws.

SECTION 3. Duties and Powers. The business affairs of the Corporation shall be managed by its Board which may exercise all such powers of the Corporation including all such lawful acts and things as are not by statute or by the Amended and Restated Certificate of Incorporation or by these By-laws directed or required to be exercised or done by the stockholders.

SECTION 4. Place of Meeting. Meetings of the Board, regular or special, may be held either within or without the State of Delaware.

SECTION 5. Annual Meeting. The first meeting of each newly elected Board shall be held immediately following the annual meeting of stockholders, and no notice of such meeting to the newly elected directors shall be necessary in order to legally constitute the meeting, provided a quorum shall be present, or the newly elected directors may meet at such time and place as shall be fixed by the consent in writing of all of the directors.

SECTION 6. Regular Meetings. Regular meetings of the Board may be held upon such notice, or without notice, and at such time and at such place as shall from time to time be determined by the Board.

SECTION 7. Special Meetings. Special meetings of the Board may be called by the Chairman of the Board, if one shall have been elected, the Chief Executive Officer of the Corporation or by a majority of the entire Board.

SECTION 8. Notice of Meetings. Notice of each special meeting of the Board (and of each regular meeting for which notice shall be required) shall be given by the Secretary or an Assistant Secretary at least twenty-four (24) hours before the time at which such meeting is to be held, and shall state the place, if any, date and time of the meeting, and the means of remote communications, if any, by which the directors may be deemed to be present in person and vote at such meeting. Except as otherwise required by the By-laws, neither the business to be transacted at, nor the business or the purpose of, any regular or special meeting of the Board need be specified in the notice or waiver of notice of such meeting. Notice of such meeting shall be provided in accordance with Article VI of these By-laws.

SECTION 9. Quorum and Voting. A majority of the directors then in office shall constitute a quorum for the transaction of business unless a greater number is required by law or by the Amended and Restated Certificate of Incorporation. The act of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board, unless the act of a greater number is required by statute or by the Amended and Restated Certificate of Incorporation. If a quorum shall not be present at any meeting of the Board, the directors present thereat may adjourn the meeting to another time and place. Notice of the time and place of any adjourned meeting shall be given to all of the directors unless such time and place were announced at the meeting at which the adjournment was taken, in which case such notice shall only be given to the directors who were not present thereat. At such adjourned meeting at which a quorum is present, any business may be transacted which might have been transacted at the meeting as originally called. The directors shall act only as a Board and an individual director shall have no authority to act except through the Board.

SECTION 10. Action Without a Meeting. Any action required or permitted to be taken by the Board, or by a committee of the Board, may be taken without a meeting if all the members of the Board or committee, as the case may be, consent in writing or by electronic transmission, and the writing or writings or electronic transmission or transmissions setting forth actions so taken are filed with the minutes of the proceedings of the Board or committee, as the case may be.

SECTION 11. Participation by Remote Communications. One or more members of the Board, or any committee designated by the Board, may participate in a meeting of such Board, or committee of the Board, by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and such participation in the meeting pursuant to this Section shall constitute presence in person at the meeting.

SECTION 12. Books. The directors may keep the books of the Corporation, except as such are required by law to be kept within the state, outside of the State of Delaware, at such place or places as they may from time to time determine.

SECTION 13. Compensation. The Board, by the affirmative vote of a majority of the directors then in office, and irrespective of any personal interest of any of its members, shall have authority to establish reasonable compensation of all directors for services to the Corporation as directors, officers or otherwise.

SECTION 14. Vacancies. Newly created directorships resulting from any increase in the authorized number of directors and any vacancies on the Board resulting from death, resignation, disqualification, removal from office, retirement or other cause shall be filled solely by the affirmative vote of the remaining directors then in office, even though less than a quorum, or by the sole remaining director, and each director so chosen shall hold office for a term expiring at the annual meeting of stockholders at which the term of the class to which he or she has been elected expires and until such director's successor shall have been duly elected and qualified.

SECTION 15. Removal. Any director may be removed from office with cause, by an affirmative vote of the holders of a majority of the combined voting power of the then outstanding shares of stock entitled to vote generally in the election of directors, voting together as a single class. Any director may be removed from office with cause by the affirmative vote of a majority of the members of the Board, other than the director who is subject to a removal vote.

SECTION 16. Organization. The Board may appoint one of its members as Chairman of the Board. The Chairman of the Board (or if there be no Chairman or in his or her absence, the Chief Executive Officer) shall preside over all meetings of the Board and stockholders.

SECTION 17. Standing Committees. By resolution adopted by a majority of the entire Board and based on the recommendations of the Nominating and Corporate Governance Committee, the Board shall elect, from among its members, individuals to serve on the Standing Committees established hereunder. Each Standing Committee shall be comprised of such number of Directors, not less than three, as shall be elected to such Committee, provided that no officer or employee of the Corporation shall be eligible to serve on any of the Standing Committees. Each Committee shall keep a record of all its proceedings and report the same to the Board. One-third of the members of a Committee, but not less than two, shall constitute a quorum, and the act of a majority of the members of a Committee present at any meeting at which a quorum is present shall be the act of the Committee. Each Committee shall meet at the call of its chairperson or any two of its members. The chairpersons of the various Committees shall preside, when present, at all meetings of such Committees, and shall have such powers and perform such duties as the Board may from time to time prescribe. The Standing Committees of the Board, and functions of each, are as follows:

(a) *Audit Committee*. The Audit Committee will perform the duties and functions set forth in the Charter of the Audit Committee as adopted by the Board of Directors.

(b) *Compensation Committee*. The Compensation Committee will perform the duties and functions set forth in the Charter of the Compensation Committee as adopted by the Board of Directors.

(c) *Nominating and Corporate Governance Committee*. The Nominating and Corporate Governance Committee will perform the duties and functions set forth in the Charter of the Nominating and Corporate Governance Committee as adopted by the Board of Directors.

SECTION 18. Other Committees. By resolution passed by a majority of the entire Board, the Board may also appoint from among its members such other Committees, Standing or otherwise, as it may from time to time deem desirable and may delegate to such Committees such powers of the Board as it may consider appropriate, consistent with the laws of Delaware, the Amended and Restated Certificate of Incorporation and these By-laws.

SECTION 19. Resignation. Any director may resign at any time by sending a written notice of such resignation to the principal executive officer of the Corporation addressed to the Chief Executive Officer, Secretary or the Chairman of the Board. Unless otherwise specified therein such resignation shall take effect upon receipt thereof by the Chairman of the Board, the Chief Executive Officer or the Secretary.

ARTICLE IV

OFFICERS

SECTION 1. General. The officers of the Corporation shall be chosen by the Board and may be a Chairman of the Board, Chief Executive Officer, President, Vice President, Secretary, Chief Financial Officer and Treasurer and as otherwise required by law. Any two or more offices may be held by the same person.

SECTION 2. Election. The Board at its first meeting after each annual meeting and from time to time, as vacancies occur, shall elect officers, none of whom need be a member of the Board, who shall exercise such powers and perform such duties as shall be set forth in these By-laws and as determined from time to time by the Board; and all officers of the Corporation shall hold office until their successors are chosen and qualified, or until their earlier resignation or removal. Any officer elected by the Board may be removed with or without cause at any time by the Chairman, Chief Executive Officer, President or a majority of the Board. Any vacancy occurring in any office of the Corporation shall be filled by the Board. The salaries of all officers of the Corporation shall be fixed by the Board.

SECTION 3. Other Officers. The Board may appoint such other officers and agents as it shall deem necessary who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board.

SECTION 4. Chairman of the Board. The Chairman of the Board, if any, shall preside at all meetings of the Board of Directors and of the stockholders at which he or she shall be present and shall have and may exercise such powers as may, from time to time, be assigned to him or her by the Board or as may be provided by these By-laws or by law.

SECTION 5. Chief Executive Officer. The Chief Executive Officer shall be the chief executive and principal policymaking officer of the Corporation. Subject to the authority of the Board of Directors, he or she shall formulate the major policies to be pursued in the administration of the Corporation's affairs. The Chief Executive Officer shall have general direction of the business of the Corporation, and shall authorize the other officers of the Corporation to exercise such powers as he or she, in his or her discretion, may deem to be in the best interest of the Corporation. He or she shall study and make reports and recommendations to the Board of Directors with respect to major problems and activities of the Corporation and shall see that the established policies are placed into effect and carried out. He or she shall see that all orders and resolutions of the Board are carried into effect and shall do and perform such other duties as may from time to time be assigned to him or her by the Board. In the absence of the Chairman of the Board, the Chief Executive Officer shall preside at meetings of the stockholders and, if a Director, at meetings of the Board of Directors.

SECTION 6. President. Subject to the provisions of Sections 4 and 5, the President shall exercise the powers and perform the duties which ordinarily appertain to such office and shall manage and operate the business and affairs of the Corporation in conformity with the policies established by the Board of Directors and the Chief Executive Officer, or as may be provided for in these By-Laws. In connection with the performance of his or her duties, he or she shall keep the Chairman of the Board and the Chief Executive Officer fully informed as to all phases of the Corporation's activities. In the absence of the Chairman of the Board and the Chief Executive Officer, the President shall preside at meetings of the stockholders and, if a Director, at meetings of the Board of Directors.

SECTION 7. Vice President. The Vice President, or if there shall be more than one, the Vice Presidents in the order determined by the Board, shall, in the absence or disability of the Chief Executive Officer and President, perform the duties and have such other powers as the Board may from time to time prescribe.

SECTION 8. Secretary and Assistant Secretaries. The Secretary shall attend all meetings of the Board and all meetings of the stockholders and record all the proceedings of the meetings of the Corporation and of the Board in a book to be kept for that purpose and shall perform like duties for the standing committees when required. He or she shall give, or cause to be given, notice of all meetings of the stockholders and special meetings of the Board in accordance with the By-laws and as required by law, and shall perform such other duties as may be prescribed by the Board, Chief Executive Officer or President, under whose supervision he or she shall be. He or she shall have custody of the records and corporate seal of the Corporation and he or she, or an Assistant Secretary, shall have authority to affix the same to any instrument requiring it and when so affixed, it may be attested by his or her signature or by the signature of such Assistant Secretary. The Board may give general authority to any other officer to affix the seal of the Corporation and to attest the affixing by his or her signature. The Assistant Secretary, or if there be more than one, the Assistant Secretaries in the order determined by the Board, shall, in the absence or disability of the Secretary, perform the duties and exercise the powers of the Secretary and shall perform such other duties and have such other powers as the Board may from time to time prescribe.

SECTION 9. Chief Financial Officer. The Chief Financial Officer shall be the chief financial officer of the Corporation and shall perform all of the duties customary to that office. He or she shall be responsible for all of the Corporation's financial affairs, subject to the supervision and direction of the Chief Executive Officer and President, and shall have and perform such further powers and duties as the Board of Directors may, from time to time, prescribe and as the Chief Executive Officer or President may, from time to time, delegate to him or her.

SECTION 10. Treasurer and Assistant Treasurers. The Treasurer shall perform all of the duties customary to that office and shall be responsible for maintaining the Corporation's accounting books and records and preparing its financial statements, subject to the supervision and direction of the Chief Financial Officer and other superior officers within the Corporation. The Assistant Treasurer, or if there be more than one, the Assistant Treasurers in the order determined by the Board, shall, in the absence or disability of the Treasurer, perform the duties and exercise the powers of the Treasurer and shall perform such other duties and have such other powers as the Board may from time to time prescribe.

ARTICLE V

CAPITAL STOCK

SECTION 1. Form and Signature. The shares of the Corporation may be represented by certificates or may be uncertificated, as provided under the laws of the State of Delaware. Every holder of stock represented by certificates shall be entitled to have a certificate signed by, or in the name of the Corporation by, the Chief Executive Officer, President or a Vice President and the Secretary or an Assistant Secretary or the Treasurer or an Assistant Treasurer of the Corporation, and may be sealed with the seal of the Corporation or a facsimile thereof. Each certificate representing shares shall state upon its face (a) that the Corporation is formed under the laws of the State of Delaware, (b) the name of the person(s) to whom it is issued, (c) the number of shares which such certificate represents and (d) the par value, if any, of each share represented by such certificate. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if such person were such officer, transfer agent or registrar on the date of issue.

SECTION 2. Lost, Stolen or Destroyed Certificates. The Corporation may issue a new certificate of stock or uncertificated shares in place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the Corporation and/or the Board may require the owner of such lost, stolen or destroyed certificate, or his or her legal representatives, to make an affidavit of that fact and/or to give the Corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of any such certificate or issuance of any such new certificate or uncertificated shares. Anything herein to the contrary notwithstanding, the Board, in its absolute discretion, may refuse to issue any such new certificate or uncertificated shares, except pursuant to legal proceedings under the laws of the State of Delaware.

SECTION 3. Transfer of Shares. Upon surrender to the Corporation or the transfer agent of the Corporation, if any, of a certificate representing shares of stock duly endorsed or accompanied by proper evidence of succession, assignment or authority to transfer, and, in the event that the certificate refers to any agreement restricting transfer of the shares which it represents, proper evidence of compliance with such agreement, the Corporation will issue a new certificate or evidence of the issuance of uncertificated shares to the person entitled thereto, cancel the old certificate and record the transaction upon the books of the Corporation. Upon the receipt by the Corporation or the transfer agent of the Corporation, if any, of proper transfer instructions from the registered owner of uncertificated shares or proper evidence of succession, assignment or authority to transfer, and, in the event that the stock records of the Corporation indicate that there is an agreement restricting transfer of the shares, proper evidence of compliance with such agreement, such uncertificated shares shall be cancelled, issuance of new equivalent uncertificated shares or certificated shares shall be made to the person entitled thereto and the transaction shall be recorded upon the books of the Corporation.

SECTION 4. Registered Stockholders. The Corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, and to hold liable for calls and assessments a person registered on its books as the owners of shares, and shall not be bound to recognize any equitable or legal claim or claims to or interest in such shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by the laws of the State of Delaware.

SECTION 5. Regulations. Except as otherwise provided by law, the Board may make such additional rules and regulations, not inconsistent with the By-laws, as it may deem expedient concerning the issue, transfer and registration of the securities of the Corporation. The Board may appoint, or authorize any officer or officers to appoint, one or more transfer agents and one or more registrars and may require all certificates for shares of capital stock to bear the signature or signatures of any of them.

SECTION 6. Record Date. For the purpose of determining stockholders entitled to notice of, or to vote at, any meeting of stockholders or any adjournment thereof, or for the purpose of determining stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitlements to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board may fix, in advance, a record date. Such date shall not be more than sixty (60) nor less than ten (10) days before the date of any such meeting, nor more than sixty (60) days prior to any other action.

ARTICLE VI

NOTICES

SECTION 1. Notices. Whenever, under the provisions of law or of the Corporation's Amended and Restated Certificate of Incorporation or of these By-laws, notice is required to be given to any stockholder, such notice may be given (a) in writing by depositing the same in the United States mail, postage prepaid, directed to the stockholder at such stockholder's address as it appears on the records of the Corporation, or (b) by a form of electronic transmission consented to by the stockholder to whom the notice is given in accordance with applicable law. All notices given to stockholders by mail, as above provided, shall be deemed to have been given as at the time of mailing. All notices given to stockholders by a form of electronic transmission, as above provided, shall be deemed to have been given: (1) if by facsimile, when directed to a number at which the stockholder has consented to receive notice; (2) if by electronic mail, when directed to an electronic mail address at which the stockholder has consented to receive notice; (3) if by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; and (4) if by any other form of electronic transmission, when directed to the stockholder.

Whenever, under the provisions of law or of the Corporation's Amended and Restated Certificate of Incorporation or of these By-laws, notice is required to be given to any director, such notice may be given personally, by telephone, by mail, by express delivery service, or by electronic transmission, in each case to the address provided by the director to the Corporation. All notices given to directors (i) personally or by telephone, shall be deemed to have been given when received; (ii) by mail, shall be deemed to have been given two (2) days after depositing the same in the United States mail, postage prepaid; (iii) by express delivery service, shall be deemed to have been given on the date shown on the confirmation of delivery issued by the delivery service; and (iv) by a form of electronic transmission, shall be deemed to have been given when directed to the electronic mail address, facsimile number, or other location provided by the director to the Corporation.

For purposes of these By-laws, "electronic transmission" means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

SECTION 2. Waiver of Notice. Whenever a notice is required to be given by any provision of law or under the provisions of the Amended and Restated Certificate of Incorporation or these By-laws, a waiver thereof in writing signed by the person or persons entitled to such notice, or a waiver by electronic transmission by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice. In addition, attendance of a person at a meeting in person or by proxy without protesting at the beginning of the meeting, the lack of notice thereof to him or her, shall be conclusively deemed to be a waiver of notice of such meeting.

ARTICLE VII

INDEMNIFICATION

SECTION 1. Nature of Indemnity. The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he or she is or was or has agreed to become a director or officer of the Corporation, or is or was serving or has agreed to serve at the request of the Corporation as a director or officer of another corporation, partnership, joint venture, trust or other enterprise, including an employee benefit plan, or by reason of any action alleged to have been taken or omitted in such capacity, and may indemnify any person who was or is a party or is threatened to be made a party to such an action, suit or proceeding by reason of the fact that he or she is or was or has agreed to become an employee or agent of the Corporation, or is or was serving or has agreed to serve at the request of the Corporation as an employee or agent of another corporation, partnership, joint venture, trust or other enterprise, including an employee benefit plan, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or her or on his or her behalf in connection with such action, suit or proceeding and any appeal therefrom, if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding had no reasonable cause to believe his or her conduct was unlawful; except that in the case of an action or suit by or in the right of the Corporation to procure a judgment in its favor (a) such indemnification shall be limited to expenses (including attorneys' fees) actually and reasonably incurred by such person in the defense or settlement of such action or suit, and (b) no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Delaware Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Delaware Court of Chancery or such other court shall deem proper.

The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

SECTION 2. Successful Defense. To the extent that a director, officer, employee or agent of the Corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Section 1 of this ARTICLE VII or in defense of any claim, issue or matter therein, he or she shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him or her in connection therewith.

SECTION 3. Determination That Indemnification Is Proper. Any indemnification of a director or officer of the Corporation under Section 1 of this ARTICLE VII (unless ordered by a court) shall be made by the Corporation unless a determination is made that indemnification of the director or officer is not proper in the circumstances because he or she has not met the applicable standard of conduct set forth in Section 1 of this ARTICLE VII. Any indemnification of an employee or agent of the Corporation under Section 1 of this ARTICLE VII (unless ordered by a court) may be made by the Corporation upon a determination that indemnification of the employee or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in Section 1 of this ARTICLE VII. Any such determination shall be made (a) by a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum, or (b) by a committee of such directors designated by majority vote of such directors, even though less than a quorum, or (c) if there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion, or (d) by the stockholders.

SECTION 4. Advance Payment of Expenses. Expenses (including attorneys' fees) incurred by a current or former director or officer in defending any civil, criminal, administrative or investigative action, suit or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of the current or former director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Corporation as authorized in this ARTICLE VII. Such expenses (including attorneys' fees) incurred by other current or former employees and agents may be so paid upon such terms and conditions, if any, as the Board deems appropriate. The Board may authorize the Corporation's counsel to represent such director, officer, employee or agent in any action, suit or proceeding, whether or not the Corporation is a party to such action, suit or proceeding.

SECTION 5. Procedure for Indemnification of Directors and Officers. Any indemnification of a director or officer of the Corporation under Section 1 of this ARTICLE VII, or advance of costs, charges and expenses to a director or officer under Section 4 of this ARTICLE VII, shall be made promptly, and in any event within thirty (30) days, upon the written request of the director or officer. If a determination by the Corporation that the director or officer is entitled to indemnification pursuant to this ARTICLE VII is required, and the Corporation fails to respond within sixty (60) days to a written request for indemnity, the Corporation shall be deemed to have approved such request. If the Corporation denies a written request for indemnity or advancement of expenses, in whole or in part, or if payment in full pursuant to such request is not made within thirty (30) days, the right to indemnification or advances as granted by this ARTICLE VII shall be enforceable by the director or officer in any court of competent jurisdiction. Such person's costs and expenses incurred in connection with successfully establishing his or her right to indemnification, in whole or in part, in any such action shall also be indemnified by the Corporation. It shall be a defense to any such action (other than an action brought to enforce a claim for the advance of costs, charges and expenses under Section 4 of this ARTICLE VII where the required undertaking, if any, has been received by the Corporation) that the claimant has not met the standard of conduct set forth in Section 1 of this ARTICLE VII, but the burden of proving such defense shall be on the Corporation. Neither the failure of the Corporation (including its Board, its independent legal counsel, and its stockholders) to have made a determination prior to the commencement of such action that indemnification of the claimant is proper in the circumstances because he or she has met the applicable standard of conduct set forth in Section 1 of this ARTICLE VII, nor the fact that there has been an actual determination by the Corporation (including its Board, its independent legal counsel, and its stockholders) that the claimant has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that the claimant has not met the applicable standard of conduct.

SECTION 6. Survival; Preservation of Other Rights. The foregoing indemnification and advancement of expenses provisions shall be deemed to be a contract between the Corporation and each director, officer, employee and agent who serves in any such capacity at any time while these provisions as well as the relevant provisions of the General Corporation Law of the State of Delaware are in effect, and any repeal or modification thereof shall not affect any right or obligation then existing with respect to any state of facts then or previously existing or any action, suit or proceeding previously or thereafter brought or threatened based in whole or in part upon any such state of facts. Such a "contract right" becomes vested at the time the director, officer, employee or agent begins to serve in such position, and may not be modified retroactively without the consent of such director, officer, employee or agent.

The indemnification and advancement of expenses provided by this ARTICLE VII shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any by-law, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

SECTION 7. Insurance. The Corporation shall purchase and maintain insurance on behalf of any person who is or was or has agreed to become a director or officer of the Corporation, or is or was serving at the request of the Corporation as a director or officer of another corporation, partnership, joint venture, trust or other enterprise, including an employee benefit plan, against any liability asserted against him or her and incurred by him or her or on his or her behalf in any such capacity, or arising out of his or her status as such, whether or not the Corporation would have the power to indemnify him or her against such liability under the provisions of this ARTICLE VII.

SECTION 8. Severability. If this Article or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify each director or officer and may indemnify each employee or agent of the Corporation as to costs, charges and expenses (including attorneys' fees), judgments, fines and amounts paid in settlement with respect to any action, suit or proceeding, whether civil, criminal, administrative or investigative, including an action by or in the right of the Corporation, to the fullest extent permitted by any applicable portion of this ARTICLE VII that shall not have been invalidated and to the fullest extent permitted by applicable law.

ARTICLE VIII

GENERAL PROVISIONS; DIVIDENDS

SECTION 1. Dividends. Subject to the provisions of the Amended and Restated Certificate of Incorporation relating thereto, if any, dividends may be declared by the Board at any regular or special meeting, pursuant to law. Dividends may be paid in cash, in property or in shares of the capital stock, subject to any provisions of the Amended and Restated Certificate of Incorporation. Before payment of any dividend, there may be set aside out of any funds of the Corporation available for dividends such sum or sums as the directors from time to time, in their absolute discretion, think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining any property of the Corporation, or for such other purpose as the directors shall think conducive to the interest of the Corporation, and the directors may modify or abolish any such reserve in the manner in which it was created.

SECTION 2. Checks. All checks, drafts, bills, demands for money and notes of the Corporation or other orders or payment of money shall be signed by such officer or officers or such other person or persons as the Board may from time to time designate and, in the absence of such designation, such checks, drafts, bills, demands for money and notes of the Corporation or other orders or payment of money shall be signed by the Chief Executive Officer, President, Chief Financial Officer or any Vice President of the Corporation.

SECTION 3. Fiscal Year. The fiscal year of the Corporation shall be fixed by resolution of the Board.

SECTION 4. Seal. The corporate seal shall have inscribed thereon the name of the Corporation and the words "Corporate Seal, Delaware" and the date of incorporation. The seal may be used by causing it or a facsimile thereof to be impressed or affixed or in any manner reproduced.

SECTION 5. General and Special Bank Accounts. The Board may authorize from time to time the opening and keeping of general and special bank accounts with such banks, trust companies or other depositories as the Board may designate or as may be designated by any officer or officers of the Corporation to whom such power of designation may be delegated by the Board from time to time. The Board may make such special rules and regulations with respect to such accounts, not inconsistent with the provisions of these By-laws, as it may deem expedient.

SECTION 6. Loans. Such of the officers of the Corporation as shall be designated from time to time by any resolution adopted by the Board of Directors and included in the minute book, and in the absence of any such designation, the Chief Executive Officer, President, Chief Financial Officer or any Vice President of the Corporation shall have the power, with such limitations thereon as may be fixed by the Board of Directors, to borrow money in the Corporation's behalf, to establish credit, to discount bills and papers, to pledge collateral and to execute such notes, bonds, debentures or other evidences of indebtedness, and such mortgages, trust indentures and other instruments in connection therewith.

SECTION 7. Execution of Documents. The Chief Executive Officer, President or any Vice President of the Corporation may, in the Corporation's name, sign all deeds, leases, contracts or similar documents that may be authorized by the Board of Directors, unless otherwise directed by the Board of Directors, otherwise provided herein or in the Corporation's Amended and Restated Certificate of Incorporation, or as otherwise required by law.

ARTICLE IX

AMENDMENTS OF BY-LAWS

The Board shall have the express power, without a vote of stockholders, to adopt any By-law, and to amend, alter or repeal the By-laws of the Corporation, except to the extent that the By-laws or the Amended and Restated Certificate of Incorporation otherwise provide. The Board may exercise such power upon the affirmative vote of a majority of the entire Board. Stockholders may adopt any By-law, or amend, alter or repeal the By-laws of the Corporation, upon the affirmative vote of the holders of at least a majority of the votes entitled to be cast by the holders of all then outstanding voting shares of the Corporation, voting together as a single class.

ARTICLE X

CONSTRUCTION

In the event of any conflict between the provisions of these By-laws as in effect from time to time and the provisions of the Amended and Restated Certificate of Incorporation of the Corporation as in effect from time to time, the provisions of such Amended and Restated Certificate of Incorporation shall be controlling.

