



Neutral Citation Number: [2021] EWHC 2432 (QB)

Case No: QB-2019-002047

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/09/2021

**Before :**

**MRS JUSTICE MAY**

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**Between :**

**THE SECRETARY OF STATE FOR EDUCATION**

**Claimant**

**- and -**

**CCP GRADUATE SCHOOL LIMITED**

**Defendant**

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**Brendan McGurk** (instructed by **Government Legal Department**) for the **Claimant**

**Barry Coulter** (instructed by **Saracens Solicitors**) for the **the Defendant**

Hearing dates: 21-23 June 2021  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MAY DBE

## **Mrs Justice May :**

### **Introduction**

1. This is a claim by the Secretary of State for Education (“the SoS”) to recover £196,862.50 of tuition fees paid to the Defendant (“CCP”), in respect of 93 students enrolled on courses for a Diploma in the Life Long Learning Sector (“DTLLS”) starting in the Academic Year 2013/14. The tuition fees were paid to CCP by the Student Loans Company (SLC”) but ultimately funded by the Department for Education (“DfE”).
2. CCP was a designated provider of DTLLS courses, having been approved by the Department of Business and Skills Innovation (“BIS”, whose responsibility for higher and further education subsequently devolved to the DfE) in 2011 to provide such courses to students both full-time over a year, and part-time over two years. This claim concerns payments made to CCP in respect of full-time, one-year DTLLS courses starting in the academic year 2013/14.
3. Designation enabled students taking a DTLLS course at CCP to apply for student loans. CCP offered a number of other courses, but these were not designated, so that students undertaking them were not able to receive support through a student loan.
4. In 2014 the DTLLS qualification was phased out, being replaced by the Diploma in Education and Training (“DET”). In circumstances which are set out more fully below, CCP enrolled a number of students on its DTLLS courses in the academic year 2013/14 but registered them with the relevant awarding body, Pearson PLC (“Pearson”), for a DET qualification. The DfE maintains that as CCP was never approved for designation as a provider of DET courses, it was not entitled to be paid tuition fees in respect of students who, although taught on a DTLLS course, were registered by CCP for a DET qualification.

### **Legal Framework**

#### *Student funding*

5. SLC operates under, and is funded by, DfE to make loans to eligible students studying on designated courses. Student loans fall into two parts: fee support to cover tuition fees and a maintenance grant for living and other costs. Fee support is paid directly to the teaching institution whilst the maintenance grant, for living and other costs, is paid to the student. The two payments together comprise a loan which is ultimately repayable by the student to the SLC.
6. Financial support by way of loans to students during the period with which this case is concerned was provided by SLC in accordance with the Education (Student Support) Regulations 2011 (“the 2011 Regulations”), made under powers conferred by sections 22 and 42(6) of the Teaching and Higher Education Act 1998 (“the 1998 Act”).
7. Regulation 4(1) of the 2011 Regulations provides that “[a]n eligible student qualifies for support in connection with a designated course subject to and in accordance with these Regulations.”

8. The definition of a “designated course” is to be found at Regulation 5 of the 2011 Regulations, which at the material time provided as follows:

*“(1) Subject to paragraphs (3), (4), (5) and (6) a course is a designated course for the purposes of section 22(1) of the 1998 Act and regulation 4 if it is –*

*(a) mentioned in Schedule 2*

*(b) one of the following –*

*(i) subject to paragraph (3), a full-time course;*

*(ii) a sandwich course; or*

*(iii) a course for the initial training of teachers which –*

*(aa) begins before 1st September 2010; or*

*(bb) begins on or after 1<sup>st</sup> September 2010 where the student transfers to the current course pursuant to regulation 7 from a course for the initial training of teachers which began before 1<sup>st</sup> September 2010;*

*(c) of at least one academic year’s duration;*

*(d) either-*

*(i) wholly provided by an authority funded educational institution*

*(ii) provided by a publicly funded institution in the United Kingdom on behalf of an authority-funded educational institution; or*

*(iii) provided by an authority funded educational institution in conjunction with an institution outside the United Kingdom; and*

*(e) for a course beginning on or after 1<sup>st</sup> September 2012 which falls within paragraph 1, 2, 4, 7 or 8 of Schedule 2, a course which leads to an award granted or to be granted by a body falling within section 214(2)(a) or (b) of the Education Reform Act 1988.*

...

*(10) For the purposes of section 22 of the 1998 Act and regulation 4(1) the Secretary of State may designate courses of higher education which are not designated under paragraph (1).”*

9. CCP was not an authority funded institution, nor a publicly funded institution; accordingly its courses were not automatically designated under Regulation 5(1). It was a private institution, also known as an “alternative provider”; as such CCP’s courses required special designation by the SoS under regulation 5(10).
10. In respect of eligible students on a designated course, SLC made payments of fee support to course providers in three tranches a year. For courses starting in the academic year 2013/14, the requirements for payment of tuition fees to the course provider were contained in Regulations 108 and 113:

***“Payments of grants for fees***

***108-(1) The Secretary of State must not pay the grant for fees for which a student qualifies until the Secretary of State has received a request for payment from the academic authority.***

***(2) Payment must be made to the academic authority-***

***(a) not before the expiry of a period of three months beginning with the first day of the academic year; and***

***(b) not later than 10 weeks after the expiry of the period in sub-paragraph (a), or promptly after a request for payment has been received, if that is later.***

...

***(4) No payment of the grant for fees can be made in respect of a designated course if-***

***(a) before the expiry of a period of three months beginning with the first day of the academic year the eligible student ceases to attend...; and***

***(b) the academic authority has determined or agreed that the student will not begin attending or, as the case may be, undertaking in the United Kingdom the course again during the academic year in respect of which the fees are payable or at all.***

***Payment of Fee Loans***

***113.-(1) The Secretary of State must pay the fee loan for which an eligible student qualifies to an institution to which the student is liable to make payment.***

...

*(3) The Secretary of State must not pay the fee loan or instalment of fee loan until the Secretary of State has received from the academic authority –*

*(a) a request for payment; and*

*(b) confirmation (in such form as may be required by the Secretary of State) of the student’s attendance on the course for the period to which the instalment relates.*

*(4) In this regulation, “confirmation of the student’s attendance” means confirmation from the academic authority that the student-*

*(a) has enrolled for the academic year and has begun to attend... the course for that academic year, where the confirmation relates to payment of the fee loan or the first instalment of the fee loan for the academic year; or*

*(b) remains enrolled and continues to attend...the course, where the confirmation relates to payment of an instalment of the fee loan other than the first instalment.*

*(5) The academic authority must inform the Secretary of State if a student ceases to attend or undertake the designated course during the academic year.”*

11. Regulation 113 was later amended to include a new requirement at paragraph 3A:

*“(3A) For a student beginning the current course on or after 1<sup>st</sup> August 2016, an academic authority must not send confirmation of the student’s attendance to the Secretary of State-*

*In the case of an institution with degree awarding powers pursuant to section 76 of the Further and Higher Education Act 1992, until the student is registered on the course at the institution;*

*In the case of a course validated by an institution with degree awarding powers...until the validating institution has been notified by the institution teaching the student that the student is studying on the course covered by the validation agreement; or*

*Where neither sub-paragraph (a) or (b) applies, until the student has been registered with the relevant awarding body.”*

It is important to note that this amendment post-dated the provision of support to students enrolling on CCP’s DTLLS course in the academic year 2013/14. It was not in force during the period with which this case is concerned.

12. Regulation 117 of the 2011 Regulations provided for recovery of any overpayment in respect of fee support:

*“117.- (1) Any overpayment of fee support is recoverable by the Secretary of State from-*

*(a) the academic authority; or*

*(b) the student in respect of whom the payment of fee support was made.*

*(2) An overpayment of a fee loan may be recovered from a student under paragraph 1(b) in whichever one or more of the following ways the Secretary of State considers appropriate in all the circumstances:*

*(a) by subtracting the overpayment from any amount of the fee loan which remains to be paid;*

*(b) by requiring the student to repay the fee loan in accordance with regulations made under section 22 of the 1998 Act;*

*(c) by taking such other action for the recovery of an overpayment as is available to the Secretary of State.*

The term “overpayment” is not defined in the 2011 Regulations.

### *2013 Guidance for course designation*

13. As part of a move to strengthen processes relating to course designation, in June 2013 the DfE issued guidance entitled *“Alternative Providers: Specific Course Designation. Guidance for Providers: Criteria and Conditions”* (“the 2013 Guidance”). The Introduction to the 2013 Guidance set out for whom, and for what purposes, it was intended:

*“This guidance is for alternative providers of higher education courses in the UK who wish to apply for courses to be specifically designated for student support purposes allowing eligible English-domiciled students to access loans and grants from the [SLC]. It is also for alternative providers who already have specific course designations as they will be expected to meet the requirements of the new process as part of the transition to new arrangements.*

...

*This guidance sets out detailed information on the new specific course designation system, the new criteria for granting designation and the conditions that may be applied to providers with specifically designated courses, how student number controls will be applied, and the application process and timetable.”*

14. The 2013 Guidance introduced, amongst other things, a requirement for regular Quality Assurance reviews to be satisfactorily completed in order for designation to be obtained and retained.
15. Mr McGurk drew my attention to the requirement at page 15 of the 2013 Guidance stating that “*All courses should lead to qualifications validated by a body with UK degree awarding powers...*”. He referred me also to the “Checklist for Providers” at Annex D setting out what evidence providers would be required to give, including “*...evidence that the course will lead to a qualification validated by a body with UK degree awarding powers, or is approved by a recognised UK awarding body*”.
16. Under the heading “Sanctions” on page 21 of the Guidance there appears the following note:

*“If providers of specifically designated courses do not continue to meet the terms and conditions of specific course designation and/or there are concerns raised during monitoring, then the Department will consider whether the course(s) should continue to be specifically designated...”*

17. The implications for providers and their students of designated courses not meeting the requirements of the guidance are set out at page 26 under the heading “Review of Existing Specific Course Designations and Implications for Students”, which included the following passage:

*“Where providers do not meet the requirements new courses will not be approved and depending on the extent to which the new criteria are not met the Department will determine its approach on a case by case basis taking into account the particular circumstances. Possible action could include the issuing of an improvement notice, issuing time-limited designation or in some cases revoking designation. It is our firm expectation that in all cases existing students who are already in receipt of student support will be able to continue doing so until they complete the course – however we reserve our right to revoke designation in respect of existing students in exceptional circumstances for example where there is serious misconduct by a provider.”*  
(emphasis added)

## **Factual background**

18. I received evidence at the hearing from the following persons:
  - (1) For the Claimant: two witness statements of Paul Williams, Deputy Director and Head of Student Funding Policy at the DfE, two witness statements of Elliot Gibbons, Head of Investigation at Pearson and two witness statements of Paul

Smith, Head of Partner Services at SLC. Each of these witnesses gave oral evidence at the hearing.

- (2) For the Defendant: two witness statements of Dan Pathirana, Director of CCP; two statements of Bernard Kavyu, previously a Lecturer and Director of Studies at CCP; two statements of Mrs Smita Shah, formerly the Quality Manager at CCP; one statement each from Miss Naz Banamar, former Director of Business Development at CCP, and from Preetul Shah, former Recruitment Manager at CCP. Mr Pathirana, Mr Kavyu and Mrs Smita Shah each gave oral evidence at the hearing.
19. Much of the factual evidence given by the witnesses was uncontroversial, dealing with the designation of courses to be taught at CCP, the phasing out of DTLLS and its replacement with the DET qualification, and the circumstances in which students enrolled at CCP for the DTLLS course came to be registered with Pearson for the DET qualification. The principal factual dispute related to CCP's awareness of Pearson's withdrawal of certification for the DTLLS qualification from 1 September 2014.

*Specific designation for teaching courses provided by CCP*

20. CCP applied for and was granted designation in 2011 for one-year full time and two-year part time DTLLS courses. In its application for designation CCP confirmed that it had in place a validation agreement for the DTLLS course with the awarding body (Pearson). Mr Williams' evidence was that until January 2015 SLC did not carry out checks to confirm that students had been registered by their college with the awarding body, instead relying on the information given by providers that validation agreements were in place.
21. The letter approving course designation for the DTLLS courses at CCP was dated 4 April 2011 and included the following instruction:

*“If the course detail, structure of the course and/or validating institution/organisation change in any way, you must contact Phil Bell (Practitioner Support, Student Finance England) before implementing these changes as they may have an adverse effect on the designation of the course. This could mean that the course may no longer meet the specific designation eligibility criteria and students may not be able to apply for support.”*

22. Having received approval for its DTLLS course designation, CCP proceeded to enrol students and teach the courses, receiving fees through student loans made by SLC to its students.

*CCP's procedures for enrolment and registration with Pearson*

23. Enrolment and registration are distinct procedures. Enrolment refers to a prospective student's signing up with a provider, here CCP, to take a course; registration refers to the process of registering students with an awarding body, here Pearson, for the qualification to be awarded at the end of the course. There was some confusion in the terminology used in the pleadings and witness statements, however by the time of the hearing use of these terms had been clarified.



24. Mr Pathirana's evidence was that CCP enrolled its students and started to teach the DTLLS courses on the understanding that SLC would provide financial support to cover the course fees once a student's application for funding had been approved. After SLC had approved the application, and once CCP had confirmed attendance to SLC as required by Regulation 113 of the 2011 Regulations, SLC would remit the first tranche of fees to the college. It was only upon receiving this payment that CCP would register the student with Pearson for the DTLLS qualification. Mr Pathirana explained that there was a fee of £165 to register a student on the Pearson portal, which is why the college would wait until it had received the first tranche of fees from SLC before registering its students.
25. DTLLS courses run by CCP had start dates running throughout the academic year. Mr Pathirana's evidence was that in the academic year 2013/14 there were courses commencing each month up to June 2014. Although each DTLLS course had the same course content, the different start dates meant that SLC allocated each course a separate course number. Students seeking loans would enter the course number of the particular course for which they intended to enrol, or had enrolled. Applications for student loans could be made at any time up to nine months after a course had started. The different course numbers led to a number of "change of circumstance" applications made to the SLC to revise the number of the course which a student was attending, delaying the reconciliation of attendance figures provided by CCP for its students.
26. Mr Pathirana was taken in his evidence to the registration requirements issued by Pearson to providers such as CCP, in particular to the requirement that students be registered within a month of enrolling on and starting the course. His response was that CCP had never observed that requirement; moreover, he said, despite Pearson having details of dates of enrolment and registration it had never raised any objection with CCP to the registration of its students many months after enrolment. As to this, Mr Gibbons pointed out that Pearson's visiting adjudicators would have had no reason to monitor compliance with Pearson's administrative requirements regarding dates of registration, even if they had been provided with dates of enrolment. It remains the case, however, that CCP's consistently late registration was never remarked on, or challenged by Pearson; it only gave rise to difficulties in 2014 when Pearson imposed a cut-off date for registration in respect of the DTLLS qualification.

*Lingfield review and removal of designation for DTLLS courses*

27. There was a review of Further Education courses in 2012 conducted by Lord Lingfield ("the Lingfield review"). One of the recommendations made by the Lingfield review was that the DTLLS course should be replaced by a new Further Education teaching qualification, the Diploma in Education and Training (DET). The DfE determined that courses leading to a DTLLS qualification would no longer be considered as eligible courses for the purposes of student support.
28. By letter dated 5 June 2014 the DfE wrote to all providers to notify them of the change and of the transition arrangements. Providers were informed that designation for the DTLLS courses would be revoked with effect from 1 September 2014. New students starting a DTLLS course or after 1 September 2014 would not be entitled to apply for student finance, however any existing eligible students who had commenced a DTLLS course in the 2013/14 academic year and who were already in receipt of student support

would be able to continue to receive it until they had completed, or withdrawn from, their course. This was known as “teaching out”.

29. Many alternative providers sought and obtained designation from the SoS for the DET course which was to replace the DTLLS course. However CCP did not succeed in doing so; it had failed to secure the necessary Quality Assurance approval required under the 2013 Guidance (referred to above).
30. As counsel were at pains to stress, designation by the SoS for the purposes of student funding under the 2011 Regulations, and approval for registration by Pearson as the awarding body of a particular qualification, are two different and distinct processes. Although the DET courses at CCP were not designated, CCP was (from March 2014) automatically approved by Pearson to register students for the DET qualification. Accordingly CCP could enrol students on the DET course and register them for a DET qualification but without designation from the DfE none of its DET students would be entitled to receive student support from SLC, in particular fee support to cover CCP tuition fees.

*Pearson ceases registration for the DTLLS qualification*

31. As part of the transition from DTLLS to DET, Pearson notified providers of its intention to cease registering students for the DTLLS qualification. There is a dispute of fact concerning what CCP was told by Pearson, and/or what it understood about, the date upon which registration for a DTLLS qualification would cease.
32. Mr Pathirana’s evidence was that he understood CCP would be entitled to register its students with Pearson for a DTLLS qualification at any time up to 31 August 2015. He produced a page from the Pearson website, dating from September 2013, apparently giving notice that the portal would remain open for DTLLS registration up to that date. Mr Pathirana said that CCP had received no notification from Pearson of any other date and that it had come as a surprise to him when Mrs Shah reported in October 2014 that she could not access the DTLLS qualification on the Pearson portal.
33. Pearson’s evidence, given by Mr Gibbons, was that a notice went to all providers in February 2014 telling them that registration for DTLLS would cease as from 1 September 2014. A further update went out to all providers in June 2014 reminding them that the DTLLS qualification would be withdrawn for registration on 1 September 2014. Mr Gibbons said that the webpage dated September 2013 giving the date of August 2015 had been left up by mistake. Once Pearson became aware of the error (in 2019), it had taken the page down immediately. Mr Gibbons said that the notifications to all providers, which would have included CCP, had come after, and had thus superseded, the information on the webpage. He pointed also to a Pearson webinar, attended by Mr Pathirana in April 2014. Mr Gibbons believed that the (then imminent) change from DTLLS to DET would have been discussed at the webinar and participants reminded of the 1 September 2014 registration cut-off date. In cross-examination he accepted that he could produce no direct evidence of transition arrangements and the 1 September cut-off date specifically having been discussed at the webinar.
34. Contemporaneous emails between Pearson and CCP, found and disclosed by Pearson (though not by CCP), shed further light on events leading up to and after the September cut-off date for DTLLS registration:

- An email from Mrs Shah of CCP to Pearson dated 2 October 2014 confirmed that CCP had students who were waiting to receive funding “*and hence were not registered [for the DTLLS qualification]*”. Mrs Shah went on “*[t]he funding has now been approved but the window to register them [for the DTLLS qualification] has now closed*”.
- The response from Pearson on the same day confirmed that the DTLLS programmes had now expired and advised of two ways forward: (1) registering students onto the replacement DET programme and assessing their learning against the new standards, filling any gaps if necessary, or (2) appealing to ask for late registration, at a cost of £150. Pearson attached a form to be completed in the event that late registration was to be sought.
- Mrs Shah emailed Pearson back on 29th October 2014 stating as follows:

*“Please note that our learners had applied for student finance in June 2014, however their finance has only been approved recently. The Student Finance has been approved for the DTLLS qualifications and not the new Diploma in Education and Training.*

*We are therefore requesting your good office to consider registering them for the DTLLS programme to avoid contravening funding rules and losing out on business.*

*We are willing to register them for the new qualification provided that the final award will have either both qualifications or the OLD qualification”*

35. Despite Pearson sending the necessary forms CCP did not submit any appeal seeking late registration, instead, in December 2014, registering 93 students then being “taught out” on DTLLS courses for the new DET qualification.
36. For the reasons set out later in this judgment I have reached the view that the claim for repayment of tuition fees cannot succeed, notwithstanding any knowledge on the part of CCP of Pearson’s cut-off date for registration in September 2014. However in case it should later become important, I set out in the following paragraphs my conclusions on the evidence.

*CCP’s knowledge of the 31 August 2014 cut-off date for DTLLS registration*

37. I concluded that CCP was well aware of the Pearson cut-off date of 31 August 2014 for registration in relation to the DTLLS qualification. I accept Mr Gibbons’ evidence that Pearson sent a notification and reminder to all providers earlier in 2014, including CCP. Mr Coulter submitted that there was no evidence from the communications team at Pearson to confirm that the notices had been sent, but I accept that Mr Gibbons made the necessary enquiries with his colleagues and am satisfied that what he told me is reliable. I also accept that the cut-off date is likely to have been discussed at the webinar which Mr Pathirana attended in May 2014.

38. To alternative providers like CCP, the change from DTLLS to DET taken together with, in CCP's case, the absence of designation for the replacement DET course, would have been a matter of great concern, consequently something to which Mr Pathirana and Mrs Shah are likely to have paid close attention. This conclusion is supported by the total absence from any of the contemporaneous correspondence of any surprise or dismay on the part of CCP at the disappearance from Pearson's portal of the DTLLS qualification. Thus Mrs Shah in her email of 2 October asserts as a matter of fact that "*the window [for registration] has now closed*". There is nowhere in this correspondence any reference to the page on the Pearson website giving a later date in 2015 to which Mr Pathirana referred in his evidence. I think it likely that, as Mr McGurk suggested to him, Mr Pathirana came across this webpage only after the claim had been issued in 2019, which is the date of the download on the face of the document, and has thereafter sought to use it to support CCP's case.
39. I have also taken into account the initial Defence, prepared by Mr Pathirana personally and to which he attached a Statement of Truth, in which there was no mention of CCP having been unaware of Pearson's cut-off date; on the contrary the cut-off date is averred as a matter of fact in that first pleading.
40. I have concluded that CCP allowed the 31<sup>st</sup> August date to go by without registering its DTLLS students as its business model was to delay registering with Pearson until it had received the first tranche of tuition fees from SLC. Once the funds did come through, only then did Mrs Shah attempt to register students with Pearson, by which time the DTLLS qualification had been removed from the portal. Mrs Shah then asked repeatedly for CCP students to be registered on the DTLLS course. She did so, as she frankly accepted in cross-examination by Mr McGurk, because she was aware that registering DTLLS students on the DET course was against the rules and requirements of designation.
41. I am further satisfied that CCP proceeded to register a number of its DTLLS students on the DET qualification in order to avoid the expense and uncertainty of an appeal for late registration. It is right that Pearson suggested that CCP could assess DTLLS course units as credits for the DET qualification as a way around the difficulty, but Pearson did so without knowing that CCP was not a designated provider of DET courses. As an awarding body, Pearson was concerned with procedures for assessment leading to a specific qualification, it was no part of its function to ascertain or record whether a provider had been designated for the purposes of its students obtaining financial support from the SLC.

*DTLLS course units mapped onto a DET qualification*

42. The unchallenged evidence of Mr Pathirana and Mr Kavyu was that CCP students who were enrolled on a DTLLS course in the academic year 2013/14 but who were later registered with Pearson for a DET qualification were nevertheless taught throughout on a DTLLS course. At the end of the course the assessments in respect of the DTLLS units were "mapped" onto the requirements for the DET qualification. As the two courses were very similar in content this was a straightforward exercise. In this way, although taught on the DTLLS course, the students received a DET qualification.

43. At no time did CCP notify the SLC or the DfE that it had registered “teach out” DTLLS students enrolled in academic year 2013/14 for a DET qualification. It was not until 2016 that the DfE realised that this had happened.

*Investigations into CCP*

44. In his witness statement Mr Williams detailed a series of investigations into CCP by SLC’s Counter Fraud Services following a whistle-blowing allegation in August 2014 concerning late applications by non-genuine students at CCP. Tuition fees were suspended whilst an audit was conducted by the Government Internal Audit Agency (“GIAA”).
45. The GIAA report ultimately cleared CCP of any fraud or serious malpractice but there remained discrepancies in the information provided by CCP as to student attendance on its DTLLS courses which the DfE sought to clarify.
46. It was in the course of seeking to clarify the figures that the SLC’s records for students on DTLLS courses at CCP were matched with registration records kept by Pearson. Mr Williams wrote to CCP on 21 December 2016 pointing out that a large number of CCP students for the academic year 2013/14 had been incorrectly registered with Pearson for a DET qualification, a course for which CCP had not received designation for student support. The letter went on:

*“Students at CCP are therefore eligible for support only if they remained on their DTLLS courses for the duration of their study. The College is not eligible to receive tuition fees in respect of such students, and is obliged to repay any tuition fees wrongly claimed.*

*In these circumstances I am unable to authorise any payment of any tuition fees to CCP until we have investigated this matter further, and in particular the extent of any overpayments made to CCP in respect of students on undesignated courses.”*  
(emphasis added).

47. Thereafter the DfE instructed SLC to make no further payments to CCP in respect of outstanding fees of £94,275 for students on designated courses, off-setting this against the sum of £319,612.50 already paid in respect of fees for the 93 students who had been registered with Pearson on the DET course. The DfE sought to recover the resulting balance from CCP as overpayments under regulation 117(1)(a) of the 2011 Regulations.
48. Mr Smith, from the SLC, confirmed in his evidence that the fee support payments have been removed from each of the 93 student’s loan records, consistent with the DfE’s case that the students were not entitled to receive support in circumstances where they had been registered for a DET qualification.
49. Subsequent correspondence between the parties failed to resolve the impasse; in the process the DfE identified two students who had been registered by CCP with Pearson on both the DET and DTLLS courses, but whose DET registration was later cancelled,

which reduced the calculation of the figure claimed back from CCP as overpayments. The DfE issued these proceedings on 13 June 2019.

50. The issue for determination at the hearing was accordingly whether the DfE is entitled to recover sums advanced by SLC in respect of tuition fees for students who had attended on a DTLLS course but who were subsequently registered for, and obtained, a DET qualification.

*The parties' arguments*

51. Mr McGurk relied on what he termed a lack of equivalence between the course upon which students were enrolled at CCP and the qualification for which they were registered with Pearson. His case was that designation under Regulation 5(10) necessarily imports an equivalence requirement similar to that expressly set out at Regulation 5(1)(e), namely that students on a designated course will be taught towards a qualification matching that course. Registering students for a different or "non-equivalent" qualification was a failure to meet that designation requirement, the effect of which was to render the tuition ineligible for fee support from SLC. He relied, in this respect, on the 2013 Guidance, which he submitted had regulatory effect, having been issued under section 22 of the 1998 Act. He argued that, pursuant to the provisions in the 2013 Guidance referred to at [15] above, it was a requirement of designation, and thus of a student's entitlement to receive fee support, that they should have been registered for a qualification which matched the course on which they were studying.
52. Mr Coulter responded, first, that the pleaded case made no mention of the concept of equivalence now sought to be relied upon by the SoS. The DfE's case as initially pleaded was that students had been taught on a non-designated course, which was not the case, as the DfE now accepted. Mr Coulter next submitted that Regulation 5(10) could have included a condition similar to that set out in Regulation 5(1)(e) for any course granted designation by the SoS under that provision, but it did not. Nor was any such condition (of registration with an awarding body for an equivalent qualification) mentioned in the letter dated 4 April 2011 granting CCP designation for the DTLLS course (referred to at paragraph [21] above).
53. Mr Coulter maintained that at the material time the only conditions which were required to be satisfied before an alternative provider such as CCP was entitled to claim tuition fee support from SLC were those set out in Regulation 113 (2) of the 2011 Regulations, namely (i) enrolment on a designated course by an eligible student and (ii) confirmation of attendance on the course. Whilst colleges would register their students with an awarding body for the course qualification, he pointed out, Regulation 113 did not stipulate this as a requirement to be met in order to obtain payment of tuition fees from SLC as part of the financial support provided to students. Mr Coulter accepted that the logical consequence of his argument was that colleges designated to teach certain courses would in theory have been able to claim fees (thereby putting the student into debt for those fees) without registering students for the relevant qualification/certificate; he said that were that ever to happen then students would be able to make a claim against their college, there would be complaints and no doubt designation would swiftly be suspended or withdrawn. Nevertheless, he maintained, provided the college in question had taught the courses and confirmed attendance, then fee support payments would still have been payable to the college, under the regulatory framework as it was in 2013/14.

54. Mr Coulter pointed to the amendment to the 2011 Regulations with effect from January 2015, adding a new sub-paragraph 3A requiring proof of registration with an awarding body. He submitted that this additional requirement filled what the SoS must have appreciated was a lacuna prior to 2015. He argued that if Regulation 5(10) were to be construed as the DfE now suggests then there would have been no need to introduce the new provision in 2015. He submitted that if, which he did not accept, CCP was in breach of any designation requirement by failing to notify the DfE of its decision in December 2014 to register DTLLS students on the DET course once the Pearson portal had closed, then the proper sanction was suspension or (in exceptional circumstances) withdrawal of designation; in the event CCP's designation for DTLLS courses had ended on 31 August 2014 and it had not been approved for designation for the successor course.
55. Mr Coulter's alternative submission, that even if Regulation 5 included an equivalence requirement then it was incapable of fulfilment where CCP had no notice of the 31 August cut-off date for registration, is not maintainable given my findings above as to CCP's knowledge of this date.
56. Mr McGurk's response to Mr Coulter's position on the effect of the (unamended) Regulations was to highlight what he described as the significant risks to students if the construction for which Mr Coulter contended was correct: colleges like CCP could enrol students on a designated course and then obtain payments in respect of tuition fees for that course from SLC (to be set against the student's account as a debt to be repaid), without ever registering the student with any exam board or other awarding body, in effect exposing their student(s) to significant debt without any assurance of a certificate, degree or other award in return. Mr McGurk urged me to find that that cannot have been what Parliament intended in legislating for certain colleges to be designated to provide specific courses. He submitted that what was intended by Regulation 5 taken as a whole was that students would be taught on a designated course leading to a qualification matching that course, not towards another qualification, however similar in content.

## **Discussion**

57. Mr Coulter did not seek to suggest that the 2013 Guidance was advisory only, or that it did not apply to CCP in 2013/14. However the terms of the Guidance, in particular the Introduction, suggested to me that it was directed at providers seeking designation for the new DET courses, rather than those, like CCP, who were "teaching out" on a course for which they had previously been approved for designation. Nevertheless, for present purposes, I accept that the terms of the 2013 Guidance applied to CCP.
58. I was concerned to establish with Mr McGurk the precise legal route by which he maintained that the DfE was entitled to recover from CCP tuition fees loaned to an eligible student for attendance on a DTLLS course. I pressed him as to whether it was his case that the course for which students were registered is to be taken as the course upon which they were in fact taught; he said that that was not the DfE's case, that his client accepted that the students had been taught on the DTLLS course. His case was that the lack of equivalence between the course on which students had been taught and the qualification for which CCP had registered them breached the designation requirements and thereby removed CCP's entitlement to be paid for any of the tuition which it had provided.

59. I sought also to understand the legal mechanism relied upon for the DfE's claim to recover tuition fees already paid, since the pleaded case relied on both a free-standing statutory entitlement under Regulation 117 of the 2011 Regulations and on the equitable remedy of unjust enrichment. In his final submissions Mr McGurk did not seek to rely on unjust enrichment, instead placing his claim solely on what he said was a free-standing right to repayment conferred by Regulation 117.
60. It is important to stress that the DfE's case as finally argued was not that the students in question had been taught on an undesignated DET course, or that they had failed to attend the DTLLS courses. The DfE accepts that the students in question were properly eligible, that they were all enrolled on a DTLLS course at CCP prior to 1 September 2014 and were subsequently taught on DTLLS courses in respect of which sufficient attendance records have been provided, albeit very belatedly, by CCP.
61. That being the case, it seems to me that, in accordance with the terms of the "teach out" transitional arrangements set out in the letter of 5 June 2014, the students in question were entitled to continue to receive funding support until their DTLLS course was completed, or until they withdrew from it. Indeed that was Mr William's position set out in his first letter to CCP on 21 December 2016, as appears from the marked passage at paragraph [46] above.
62. I accept that in registering its DTLLS students for a DET qualification CCP acted contrary to the 2013 Guidance and that it failed to comply with the DfE's expectations for designated providers. In cross-examination Mrs Shah accepted that CCP had broken the rules in this respect. The issue is what the consequence of breaching those requirements was. In my view the consequence of CCP's actions was not automatically to remove designation retrospectively and/or entitle the SLC to recover all tuition fees incurred by students attending on the DTLLS courses. Sanctions for a failure to meet the requirements of course designation were covered by the 2013 Guidance, which contained no mention of automatic removal of designation, or of recovering payments already made. On the contrary, as the marked passage set out at paragraph [28] above makes clear, students already in receipt of support were expected to continue to receive it, save in exceptional circumstances involving serious misconduct. An allegation of serious misconduct has never formed part of this claim, nor did Mr McGurk seek to rely on one.
63. I agree with Mr Coulter that the sanction for CCP's actions would have been suspension or removal of CCP's designation; in the event however CCP's designation had already effectively ceased or been removed when student funding for DTLLS courses ended on 31 August 2014.
64. Neither side addressed me on the meaning of "overpayments" as the term is used in the 2011 Regulations. I asked for further written submissions on this point, as I was concerned that the term may have been restricted to making adjustments for arithmetical errors. As it is, I have decided this case on other grounds, but I remain concerned at the weight which the term was required to bear by the DfE's case.
65. Regulation 117(2) of the 2011 Regulations provides for specific ways of recovering overpayments of fee loans from a student, including "by taking other such action for the recovery of an overpayment as is available....". This suggests that Regulation 117 was not intended to provide a free-standing right of action to recover overpayments of



fee loans, at least in relation to recovery from students under Regulation 117(1)(b) and (2). In my view the same restriction must apply to the recovery of fee loans from an academic authority under the provisions of Regulation 117(1)(b). Regulation 117(1) enables the Secretary of State to take an action to recover fees, whether from the student or the college, for instance in restitution or unjust enrichment, where the circumstances are such as to enable such an action to be brought. But as Mr Coulter pointed out, there can be no question of restitution or unjust enrichment here, in circumstances where the students received tuition on the course for which they enrolled, obtaining a qualification of a similar kind to the DTLLS qualification. As I understand it none of the students who were registered for a DET qualification has expressed any dissatisfaction.

66. I bear in mind that although tuition fees are paid direct to the college, they are a loan made by the SLC to the student to enable them to attend a course. The DfE has carefully examined the attendance records and accepts that the students in question did in fact attend on the DTLLS course provided by CCP. In my view Mr McGurk's lack of equivalence does not remove the eligible student's entitlement to be funded for his or her attendance on a course which has been designated for that purpose. Requiring CCP to repay to SLC fees in respect of tuition that was given to students would be to cast the burden of paying for that teaching back onto the students, in circumstances where the students had no control over what qualification CCP registered them for.
67. There is a distinction between a student's entitlement to receive fee support for attendance on a designated course, and the evidence which a college is required to produce in order to make good its claim to be paid the tuition element of that financial support. After the introduction of the new requirement in sub-paragraph (3A) of Regulation 113, alternative providers were required to register the student with the awarding body before the first tranche of fees could be claimed or received. I accept Mr Coulter's point that the introduction of this new requirement was to fill a gap that had previously existed.
68. I should finally add this: it has never been part of the DfE's case that some part of the fees should be recovered, for instance fees paid in respect of the period after students had been registered with Pearson for the DET qualification. The case has remained that registration in December 2014 acted retrospectively, as well as prospectively, to remove the students' entitlement to receive funding support in respect of their DTLLS courses. For the reasons I have given I do not accept that the 2011 Regulations, taken together with the 2013 Guidance, had that effect.

## **Conclusion**

69. I have concluded that the DfE's claim to recover tuition fees paid to CCP in respect of students taught on a DTLLS course but registered for the DET qualification must be dismissed.