

## BRIEF

# The Department of Education Is Still Failing to Use Its Subpoena Authority to Police Predatory Actors

## *Newly Released Records Show That the Department of Education Has Not Issued a Single Subpoena Since 2018*

In the 1990s, Congress provided the U.S. Department of Education with expansive authorities to investigate and remedy abuses within the Federal Student Aid system. As numerous Student Defense reports have established, the Department has—quite unfortunately and over a period of decades—allowed waste, fraud, and abuses to persist, while also failing to use the full extent of its law enforcement authorities. As the Biden Administration took charge in 2021, this was poised for change. Unfortunately, more than one year later, it appears that many of these authorities remain untouched.

Among the Department’s unused powers is its statutory power to issue subpoenas to assist the Secretary “in the conduct of investigations of possible violations” of Title IV of the Higher Education Act. *See* HEA § 490A, 20 U.S.C. § 1097a. The Republican-led Congress added this authority during the 1998 reauthorization of the HEA, specifically noting in a Committee report that it was doing so in order “to give the Secretary another tool to use in investigating fraud and abuse [in] the [Title IV] programs.” H.R. Rep. 105-481 at 144–45 (1998). The authority permits the Department to command that “any person” produce “information, documents, reports, answers, records, accounts, papers, and other documentary evidence pertaining to participation in any” Title IV program.<sup>1</sup> The only limitations placed on the authority are that a subpoena must only be issued to “assist the Secretary in the conduct of investigation of possible violations of” Title IV,<sup>2</sup> that the evidence sought by the subpoena must “pertain[] to participation” in a Title IV program, and that the records may be required from “any place in a State.”<sup>3</sup>

Yet in a December 2020 report, Student Defense highlighted the Department’s scant use of this authority.<sup>4</sup> That report also established how—when asked to produce copies of subpoenas issued between 2010 and December 2018—the Department identified only a single subpoena. That subpoena was not issued to a private company; rather, it was a subpoena for records held by the Attorney General of Iowa.

Of course, the Department has other authorities to obtain information from institutions participating in the Title IV program. But the 2020 Report highlighted how the Department could use subpoenas to investigate those institutions more effectively, including the myriad private companies that run aspects of the institution (*e.g.*, cohort default management companies, lead generators, financial aid management providers, online program managers), plus companies like auditors, market research

<sup>1</sup> HEA § 490A, 20 U.S.C. § 1097a.

<sup>2</sup> On its face, the HEA § 490A subpoena authority is limited to Department investigations of potential violations of “this subchapter,” meaning Title IV of the HEA. Under Secretary DeVos, the Department broadly interpreted the reach of that section to encompass violations of federal law *outside* of Title IV, the violation of which may run afoul of an institution’s obligations under its program participation agreement with the Department. *See* Notification of Interpretation, 85 Fed. Reg. 72,567, 72,568 (Nov. 13, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *See* Daniel A. Zibel, *Protection and the Unseen: Protecting Students and Promoting Accountability Through Underused Authorities in the Higher Education Act 2-3* (Dec. 2020), available at: <https://www.defendstudents.org/news/body/docket/100-Day-Docket-Enforcement-Authorities.pdf>.

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firms, and communications consultants. Administrative subpoenas could also be a useful tool to obtain information from *former* owners and executives—who have no current legal duty to comply with informal requests from the Department—including with respect to holding those owners and executives personally liable for losses to students and taxpayers.<sup>5</sup>

In December 2021, Student Defense submitted a Freedom of Information Act request for any subpoenas issued by the Department over the last three years. On March 16, 2022, the Department informed Student Defense that it was unable to locate any documents responsive to the request.<sup>6</sup>

**In other words, the Department—under President Biden and former President Trump—has not issued a single subpoena to any individual or private (for-profit or non-profit) company.**

At the same time, the Department has expressed interest in the types of oversight and enforcement that would clearly benefit from the use of administrative subpoenas. For example:

**OPMs:** Online Program Management companies (“OPMs”) are private, third-party companies that contract with institutions to effectively outsource aspects of educational provision and certain administrative or recruiting functions. In recent years, the use of OPMs has expanded substantially, resulting in increased attention and scrutiny over the sector.<sup>7</sup> But as the Department considers the role of OPMs within its regulations, it could use its subpoena authority to investigate OPMs to determine whether any such entity—or a school with which an OPM has contracted—has violated Title IV.

**Auditors:** Despite recommendations from the Government Accountability Office that the Department more actively monitor third-party auditors of Title IV programs,<sup>8</sup> the Department has never issued a subpoena to even *investigate* a compliance or financial auditor. In contrast, the SEC has filed criminal charges against auditors for improper conduct during the audit of a non-profit college<sup>9</sup> and fined executives of ITT Technical Institute for financial fraud relating to the institution’s student loan program.<sup>10</sup>

**Individuals:** Although the Department has repeatedly affirmed its commitment to hold individual executives and owners personally liable for institutional misconduct, the Department’s FOIA response suggests that it has not sought records from individuals that further that goal. Such a subpoena could lead to critical information about an executive’s actions and could assist in the collection of liabilities from individuals or their insurance carriers. The lack of *any* subpoena regarding collections is particularly striking given that institutions (both open and closed) collectively owe more than one billion dollars to the Department.<sup>11</sup>

**Private Lenders (including ISA and other alternative finance providers):** In recent years, financial companies have offered an array of “alternative” financial products under a variety of names. Many of these products—including, but not limited to “Income Share Agreements”—have also been associated with allegations of misrepresentations (by advocates)

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5 See generally Daniel A. Zibel & Alice W. Yao, *Protection and the Unseen: Holding Executives Personally Liable under the Higher Education Act* (Sept. 2020), available at <https://www.defendstudents.org/news/body/docket/100-Day-Docket-Personal-Liability-Report.pdf>.

6 Letter from Deshawn Middleton, Gov’t Info. Specialist, Off. of the Exec. Secretariat to Isabel Tessier, National Student Legal Defense Network (Mar. 16, 2022), available at <https://www.defendstudents.org/news/body/2022.03.16-Final-Response-Letter.pdf>.

7 See, e.g., Letter from Elizabeth Warren, U.S. Senator *et al.* to Christopher “Chip” Paucek, Chief Exec. Officer 2U, Inc. *et al.* (Jan. 14, 2022), available at [https://www.brown.senate.gov/imo/media/doc/01142022\\_letter\\_to\\_opms.pdf](https://www.brown.senate.gov/imo/media/doc/01142022_letter_to_opms.pdf).

8 U.S. Gov’t Accountability Off., GAO-18-481, Federal Student Aid: Education’s Postsecondary School Certification Process (2018), available at <https://www.gao.gov/assets/gao-18-481.pdf>.

9 Press Release, U.S. Sec. and Exch. Comm’n, SEC Charges Two Former KPMG Auditors for Improper Professional Conduct During Audit of Not-for-Profit College (Feb. 23, 2021), available at <https://www.sec.gov/news/press-release/2021-32>.

10 Press Release, U.S. Sec. and Exch. Comm’n, SEC Announces Fraud Charges Against ITT Educational Services (May 12, 2015), available at <https://www.sec.gov/news/pressrelease/2015-86.html>.

11 See generally Daniel A. Zibel, Aaron S. Ament and Kirin Jessel, *The Missing Billion* (June 2021), available at [https://www.defendstudents.org/news/body/NSLDN\\_paper\\_Missing\\_Billion.pdf](https://www.defendstudents.org/news/body/NSLDN_paper_Missing_Billion.pdf).

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regarding the marketing of the products, including in connection with Title IV institutions.<sup>12</sup> When an institution has an arrangement with the company—and is an active participant in misrepresentations regarding “financial charges”—there is no question that the institution may be held accountable.<sup>13</sup> Accordingly, issuing a subpoena to the financial company may uncover information about any misrepresentations and an institution’s role in misconduct.

**Closed School Investigations:** The Department’s non-subpoena authority to obtain records from a Title IV participating institution is largely tied to the institution’s ongoing participation in the student aid programs. Although the Department’s regulations require institutions to retain records and provide “access to those records for inspection and copying,”<sup>14</sup> the Department has no enforcement mechanism for a non-compliant institution. By using a subpoena, the Department can work with the U.S. Department of Justice to bring an action for judicial enforcement.<sup>15</sup>

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The Biden Administration has both pledged—and taken preliminary steps—to “prioritize Federal Student Aid’s effective oversight and enforcement of postsecondary schools.”<sup>16</sup> Nevertheless, to truly make good on its promises—and to protect students and taxpayer interests—it must use the oversight and enforcement tools that it has. By exercising its subpoena authority, the Department will not only help ferret out fraud and other misconduct across student aid programs, but it will send a message to the sector that times have changed.

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12 For example, in May 2020, the Student Borrower Protection Center and the National Consumer Law Center filed a petition with the Federal Trade Commission regarding the practices of Vemo Education, Inc., which made allegations that Vemo—working with a number of Title IV participating institutions—made misrepresentations regarding the nature of its product vis a vis the federal student loans offered by the U.S. Department of Education. See Compl., Req. for Investigation, Inj., and Other Relief, *In re Vemo Educ., Inc.* (May 31, 2020), available at: <https://protectborrowers.org/wp-content/uploads/2020/05/Vemo-Complaint.pdf>.

13 See HEA § 487(c)(3); 20 U.S.C. § 1094(c)(3).

14 34 C.F.R. § 668.24(d)(4).

15 HEA § 490A(b), 20 U.S.C. § 1097a(b).

16 See Press Release, U.S. Dep’t of Educ., U.S. Department of Education to Establish an Enforcement Office within Federal Student Aid (Oct. 8, 2021), available at: <https://www.ed.gov/news/press-releases/us-department-education-establish-enforcement-office-within-federal-student-aid>.