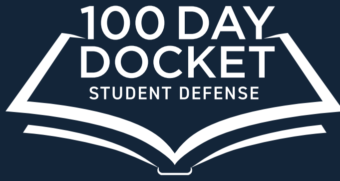

Protection and the Unseen

Protecting Students and Promoting Accountability Through Underused Authorities in the Higher Education Act

By Daniel A. Zibel

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ABSTRACT: The changing nature of higher education, combined with a student debt crisis that disproportionately impacts Black and Latino communities, demands enhanced oversight by the U.S. Department of Education. This paper, which is the third in a series, identifies existing authorities in the Higher Education Act of 1965 that have been underutilized but can be used to protect students and student loan borrowers from predatory behavior. Prior papers have focused on the Department's role as a gatekeeper for institutions of higher education participating in the student loan programs created by Title IV of the Higher Education Act[2] and the extent to which the Department can hold wrongdoers personally accountable for losses to students and taxpayers.[3] This paper discusses how the Department can more effectively use its civil investigative authorities and administrative enforcement proceedings to counter predatory and pernicious behavior by colleges and universities and the third-party entities that contract with those institutions.

INTRODUCTION

Higher education is changing. Costs and student debt levels continue to rise. Far too many students have tried to use higher education as a launching point for economic success, only to be left worse off than they were prior to enrollment. And within a broken system, disparities have disproportionate, negative, and long-lasting effects on Black and Latino communities. Exacerbated by COVID-19 driving students to online and for-profit education, the risks of inaction at the federal level are enormous.

Charged with overseeing the federal student assistance programs authorized by Title IV of the Higher Education Act ("HEA"), the U.S. Department of Education ("Department") has extensive responsibilities and authorities across higher education and with relation to growing student debt problems. But among its responsibilities in this space, perhaps none is more important than its authority to determine which institutions and entities can participate in the student loan programs and to enforce the laws that apply to those entities. This means not only institutions themselves, but also the companies that contract to provide services to institutions with respect to the financial aid programs, such as aid management, recruiting, or auditing. In giving the Department this responsibility, Congress has also provided the Department with the authority necessary to halt pernicious and illegal practices through enforcement and regulation.

Despite the availability of extensive tools, the Department has often considered its oversight role as limited to ensuring that participating colleges meet the statutory minimum standards governing Title IV participation, while separating itself from consumer protection responsibilities.[4] For instance, in the 2020 Final Rule on "Distance Education" standards, the Department noted that the so-called "triad" of higher education—in which states, accrediting agencies, and the Department share responsibility for oversight of colleges participating in the federal student aid system—"entrusts oversight of most consumer protection to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department."[5]

But the Department's oversight authorities are not restricted to technical issues of statutory compliance or protecting taxpayer investments. Rather, the HEA is replete with provisions cementing the Department's

role in guaranteeing student consumer protections and enforcing laws and regulations designed to protect student interests. For example, Federal Student Aid ("FSA")—which is a Performance Based Organization ("PBO") within the Department and charged with the authority to manage the "oversight functions"[6] of the student aid programs—has statutory authority to terminate Title IV eligibility for any institution that has engaged in substantial misrepresentation regarding the nature of its educational program, its financial charges, or the employability of its graduates.[7] Likewise, the Department has statutory authority to specify "which acts or omissions of an institution of higher education"—including, but not limited to, state law consumer protection claims—"a borrower may assert as a defense to repayment"[8] of a Title IV loan, and may then hold a college financially accountable for the costs of successfully-asserted defenses to repayment.[9] And to assess an institution's Title IV eligibility, the Department may look beyond that institution's compliance with statutory and regulatory standards to past Title IV violations—including consumer protection violations—by individuals or entities with "substantial control" over a different institution, even if the violation took place years before.[10]

As a representative of the American Council on Education—the largest association of colleges and universities—once opined, the Department possesses an "incredible range of powers" when it "determines students or taxpayers are at risk."[11] Nevertheless, these powers have been applied "rarely" and "unevenly" to take action against institutions that fail to comply with the law.[12] As a result, students—and disproportionately Black and Latino students—have suffered.

In an effort to provide greater protections for students and taxpayers, this paper highlights some of the Department's underused tools and recommends how better to use them.

1. The Department must **expand its investigatory reach** to obtain evidence from people and entities, regardless of whether they are directly regulated by the Department, in order to aid investigations of participating institutions and the companies with which they contract. This means taking advantage of the Department's scarcely used subpoena power.
2. The Department must **use its administrative enforcement authorities** not only to hold institutions and executives accountable, but also to provide a future deterrent effect on potential wrongdoers. The Department must also tailor remedies to wrongs, by using its authority (used only once in recent years) to impose appropriate limitations on institutional participation.
3. The Department must **develop a robust system of risk-based modeling** to appropriately target entities for investigation. With approximately 6,000 colleges participating in the Title IV student aid programs, FSA simply does not have the capacity to systematically review all IHEs on a regular basis. Accordingly, FSA must develop a risk-based model to effectively guide the nature and extent of compliance and enforcement investigations.

The Department Must Expand Its Investigatory Reach to Encompass Entities That Contribute to or Have Information Concerning Predatory Practices.

Despite well-documented abuses across higher education, the Department has only scratched the surface of using its investigative authorities. This must change.

In December 2018, Student Defense issued a request under the Freedom of Information Act ("FOIA") seeking the production of all subpoenas issued, since 2010, by the Department under HEA § 490A.[13] In response, the Department did not produce a single subpoena issued to an institution of higher education or an entity that did business with such an institution.[14] Instead, the Department only produced a subpoena that had been issued to the Iowa Attorney General, apparently related to an investigation of a school (whose name was redacted by the Department).[15] Meanwhile, during this same period of time, numerous large for-profit institutions collapsed under the weight of state and federal law enforcement investigations.

To be certain, the Department's investigative authorities are extensive. In addition to the subpoena authority noted above,[16] with respect to participating institutions, the Department has the authority to conduct unannounced site visits[17] and program reviews.[18] Institutions must also maintain records and make them available to the

Department in a "systematically organized manner."[19] Institutions must "cooperate" with the Secretary's "conduct of audits, investigations, program reviews, or other reviews authorized by law."[20] Institutions must also provide access for the Department to interview "personnel associated with the institution's . . . administration" of the Title IV programs, and interviewees must "supply all relevant information."[21] Likewise, the Department may conduct such interviews outside of the presence of institutional management and without recording by the institution.[22]

The Department's investigative authorities are not limited to institutions of higher education. Rather, the Department may investigate third parties that violate, or contribute to a violation of, the HEA. For example, the Department can investigate a "third-party servicer," *i.e.*, an entity that contracts with an institution to "administer . . . any aspect of such institution's student assistance programs".[23] The Department has additional authorities that apply specifically to compliance and financial auditors retained by institutions.[24] Finally, and perhaps most broadly, the Department's statutory subpoena 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.[25] The only limitations placed on the authority is that a subpoena must only be issued to "assist the Secretary in the conduct of investigation of possible violations of" Title IV, 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."[26]

Records from third parties would assist the Department in many complex investigations.[27] As institutions of higher education are increasingly complicated entities—with sophisticated contracts with outside corporate parties 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 firms, and communications consultants—there are many reasons why the Department should issue and enforce subpoenas.

For example, there may be instances in which the Department rightfully needs to obtain information from an entity that may not have a contractual relationship with an institution. For example, in 2019, the Federal Trade Commission settled charges with the University of Phoenix over the use of "deceptive advertisements that falsely touted their relationships and job opportunities with companies such as AT&T, Yahoo!, Microsoft, Twitter, and The American Red Cross."[28] As the FTC noted, "[i]n reality, these companies were not working with [UOP] to create job options for UOP students or to develop curriculum."[29] If the Department had investigated this case, it could have assessed the veracity of these factual allegations by subpoenaing records from the employer companies, in addition to (or instead of) trying to obtain the records from the institution itself. Likewise, organizations that publish annual "rankings" based on data provided by schools themselves,[30] may have valuable information about the veracity of claims by one or more of those schools.

ENFORCEMENT IN PRACTICE: FSA MUST OVERSEE EXTERNAL AUDITORS

The Title IV compliance audit exemplifies how the Department needs to better use investigatory authorities.[31] Each year, every Title IV institution must have its financial aid transactions reviewed by an independent accountant or auditor under standards set by the U.S. Government Accountability Office ("GAO") and procedures set by the Department's Office of the Inspector General ("OIG").[32] With certain exceptions, the compliance audit must be submitted no later than six months after the last day of an institution's fiscal year.[33]

The compliance audit is a crucial part of Title IV oversight because it is the only review conducted annually of every participating institution. Although schools can be investigated or have a program review, neither of those must happen annually, or even every few years.

And because institutional certification can last for six years, the annual compliance audit may provide the only oversight of Title IV compliance by an institution between certifications.

Under current practice, however, FSA conducts little oversight of the compliance auditors who are retained, and paid by, the institutions. In 2018, the Government Accountability Office released a report titled *Education's Postsecondary School Certification Process*, in which it analyzed the Department's review of compliance audits submitted by participating institutions.[34] That report received scant attention but is noteworthy in its conclusions.

First, data establish that there is a greater need to increase oversight of compliance auditors. According to GAO, OIG's review of compliance audits shows widespread deficiencies: of the 739 compliance audits reviewed by OIG from fiscal years 2006 through 2017, 23 percent (173) passed, 59 percent (436) failed, and 18 percent (130) passed with deficiencies.35 This is not to say that 59 percent of sampled institutions are failing. Rather, according to GAO, OIG concluded that 77% of the compliance audits it reviewed over an eleven-year period were conducted in a failing or deficient manner. GAO, however, did acknowledge that this may not be a statistically representative sample. Nevertheless, it suggests huge failures in the system that demand greater oversight.

Second, the report establishes that, in practice, FSA has no oversight of the auditors themselves (*i.e.*, the CPAs conducting the compliance audits). As the report notes, FSA has given all responsibility for auditor oversight to the OIG. According to the report, "[b]oth FSA and OIG officials stated that the OIG has primary responsibility for issues related to audit quality."[36] More specifically, the report states that OIG—and not FSA—"is required to assess the quality of school compliance audits" and OIG—not FSA—"selects a sample to review each year."[37]

OIG oversight of external auditors is not structurally inefficient, and may be appropriate given that the Inspector General Act ("IG Act") directs agency Inspectors General to appoint an Assistant Inspector General for Auditing, with "responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment."[38] Nevertheless, nothing about the IG Act suggests that OIG has sole authority to oversee auditors. For example, the IG Act also mandates the appointment of an Assistant Inspector General for Investigations,[39] but that does not mean that FSA should not have concurrent investigative authority over its programs.

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Fundamentally, in light of GAO's conclusion that "FSA generally relies on compliance audits as the *only* annual on-site review to determine how schools applying for recertification administer federal student aid," FSA must directly and systematically oversee the overseers. Otherwise, as it stands, the Department has outsourced the most frequent oversight of colleges and universities to third-party auditors, and then outsourced the oversight of the auditors to OIG. This is in stark contrast to the HEA, which commands that FSA has responsibility "for managing the . . . oversight functions" of the student aid programs.[40]

Taken together, these facts make clear that the Department must increase oversight of compliance auditors, root out systemic failures, and determine the extent to which auditor breakdowns hide Title IV program failure and harm students. The Department must also consider bringing enforcement actions against auditors, to either formally suspend or debar those with poor performance, to reject audits submitted by certain auditors, and/or to inform institutions that using a particular auditor renders the institution ineligible for continued Title IV participation.

The Department Should Use Enforcement Authorities for Both Punitive and Deterrent Purposes.

An overwhelming percentage of Title IV violations are uncovered during either a periodic "program review" or an annual Title IV compliance audit. Under the procedures for resolving these reviews, however, in order to remedy identified problems, the Department will typically require the institution to come into compliance with the relevant statute or regulation. In some cases, this means that an institution will simply have to establish a required policy or revise a deficient policy. In other cases, typically when an institution is found to have procured excess Title IV funds without returning them, the Department will assess the improperly obtained funds as a "liability"—subject to certain policies discussed below—and demand repayment. This approach is rooted in regulations that provide the institution an opportunity to "correct or cure" the deficiencies found in an audit or program review, which it can do by "eliminat[ing] the basis for the liability."[41] Absent evidence of "fraud or misconduct related to the error,"—*i.e.*, as opposed to an "error" without "misconduct,"—the Department's regulations suggest that fixing the error is sufficient.

Such an approach has clear problems, most notably for its lack of deterrent effect. For example, as David Weil has noted in the context of the Federal Labor Standards Act, "[i]f the remedy remains only recovery of those payments, employers have been essentially provided a no-interest loan by its workforce."[42] Similarly, if the only punishment for robbing a bank is to return the money stolen, one could see little downside to thievery. If the robber gets caught, they are in the exact same situation in which they otherwise would have been. Because the baseline remedy under the Department's regulations is simply to return that which should not have been taken in the first place, there is neither an incentive to avoid "errors" nor a deterrent for institutional misconduct.

But even without changing the regulations related to the return of funds, the Department has three widely underutilized tools at its disposal that would not only protect students from predatory or problematic institutions but would also provide deterrence for the regulated community: *first*, actions to impose a civil penalty or fine; *second*, limitation actions to impose tailored conditions on an institution's participation in the Title IV programs; and *third*, revocation of provisional program participation agreements ("provisional PPAs") or denials of recertification based on findings from an investigation into consumer protection or related issues.

The Department Must More Meaningfully Use Its Fine Authority.

The HEA provides the Department with clear authority to "impose a civil penalty"—*i.e.*, a fine—upon any institution that has "violated or failed to carry out any provision" of Title IV, or any regulation prescribed under Title IV, or that has "engaged in substantial misrepresentation of the nature of its educational program, its financial charges, and the employability of its graduates."[43] Under the Department's precedent, a fine is to serve as a "punishment for past conduct."[44] Separately, the Department may also assess a "liability" on an institution, which is not a fine but is a demand that an institution repay to the Department funds inappropriately or illegally procured by the institution.[45] Typically, a "liability" is assessed using a "Final Audit Determination" ("FAD") or a "Final Program Review Determination" ("FPRD"). Although the HEA sets the fine amount at $25,000 "for each violation or misrepresentation," in 2020 that amount increased to $58,328 under the Federal Civil Penalties Inflation Adjustment Act Improvement Act.[46]

In practice, the Department's use of the fine authority for consumer violations is exceedingly rare.[47] According to the "School Fine Report" on the Department's website, between FY 2010 and FY 2019, the Department imposed fines totaling $168,739,724. Yet this figure should not be read to suggest that the Department has been forcefully using its administrative fine authority because the overwhelming majority of "fines" included in the figure are not fines, but

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rather were payments made to the government to resolve claims asserted by or on behalf of the United States under the False Claims Act. Such cases—the handling of which is led by the U.S. Department of Justice—remedy fraud against the United States and are legally distinct from fines that serve as "punishment for past conduct." For instance, although the Department publicly lists a $48.5 million fine levied on the University of Phoenix and $75.625 million fine against Education Management Corporation, both of those amounts were to resolve False Claims Act lawsuits. [48] In total, of the $168.7 million in "fines" listed on the School Fine Report, approximately $154 million came through the settlement of false claims act cases (or cases designated as "fraud"). Of the remaining approximate $13.7 million, $11.4 million was listed for violations of Campus Security issues, $909,000 for IPEDS data reporting issues, and a single case of "misrepresentation" was listed for $27,500. (We note that the Department's Fine Report fails to include the April 2015 fine in the amount of $29,665,000 to Corinthian Colleges, Inc. based on substantial misrepresentations made by Heald College).[49]

The data suggest that the Department has made scant use of its fine authority, even though there are plenty of situations in which a fine would have been appropriate. Take, for example, the case of Central Nursing College ("CNC") in Gardena, California, which received close to one million federal student aid dollars in 2013–2014.[50] In November 2014, the Department conducted a program review and issued its preliminary "program review report" ("PRR") in February 2015. CNC was provided an opportunity to respond.[51] In 2018, after CNC had closed, the Department issued its final program review determination ("FPRD") in which it found numerous Title IV violations. In one finding, for example, the Department concluded that "[t]he lack of adequate documentation [retained by the school] made it impossible to determine with certainty whether students were eligible for the Title IV funds they received."[52] Ultimately, in Finding 4, the Department concluded that of the 123 students it reviewed, "35 students received Title IV disbursements to which they were not entitled."[53]

The Department then determined that, with respect to this finding, CNC had procured $103,122 in Pell Grants and $276,482 in Direct Loans for students that were not Title IV eligible. With respect to the Pell Grant funds, the Department assessed the $103,122 (plus interest) as a liability to be repaid by the institution. With respect to the Direct Loans, however, the Department applied its "Estimated Actual Loss" policy—under which it asserts a liability not for the loan amount, but rather for the estimated actual or potential loss "that the government may incur with respect to the ineligible loan" or loan amount due to likely repayment—and determined that, "in this case, the [estimated loss] on the ineligible loans disbursed is $0."[54]

Putting aside the merits of the Department's longstanding, but highly questionable, "estimated actual loss" policy, and without consideration to why that policy permits a zero dollar liability for, and tacitly assumes borrower repayment on, more than $276,000 in illegal loans, CNC violated the Department's regulations, illegally disbursed funds to

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CNC also incorrectly disbursed a total of $276,482 in Direct Loans to students for whom it could not document earned disbursements. In lieu of requiring the institution to assume the risk of default by purchasing the ineligible loans from the Department, or asserting a liability for the entire loan amount, the Department asserts a liability for the EL that the government may incur with respect to the ineligible loans. However, in this case, the EL on the ineligible loans disbursed is $0.

The total liabilities for this finding are as follows:

Award Year	Pell Grant	Pell Grant Interest	EL	Total
2013-2014	$ 100,832.00	$ 1,352.33	$0	$ 102,184.33
2014-2015	$ 2,280.00	$ 10.12	$0	$ 2,290.12
Total	**$ 103,112.00**	**$ 1,362.45**	**$0**	**$ 104,474.45**

Letter from Federal Student Aid to Central Nursing College, regarding disbursements of Title IV funds to ineligible students[49]

students, went out of business, and nevertheless was never held to account for those funds. (It is unknown whether CNC or its owners ever returned the $103,122 in Pell Grant funds owed as a result of this finding.) Under the "estimated actual loss" policy, a school like CNC has no incentive to comply with certain rules surrounding the Direct Loan program if there is no sanction. In this situation, a fine would have been appropriate.

Beyond the institutions themselves, the Department could be using fines as a means to deter misconduct by third party servicers.

Beyond the institutions themselves, the Department could be using fines as a means to deter misconduct by third party servicers. For example, in June 2017, the Department issued an FPRD to Wells Fargo Bank, after a review of Wells Fargo's participation as a third-party servicer. According to the Department, in 2012–2013, Wells Fargo contracted with institutions that collectively received over $442,000,000 in Title IV funding to provide services related to the delivery of Title IV "credit balances" to students.

According to the Department, Wells Fargo, together with one or more client institutions, "failed to ensure that students or parents ha[d] fee-free access to their Title IV funds."[55] The Department found that, "[d]espite repeated requests," Wells Fargo "failed to provide the Department with the aggregate and/or student level fee information needed to assess how much in improper fees, if any, students that selected a Wells Fargo disbursement product for [receiving] Title IV funds were charged[.]"[56] Ultimately, the Department directed a response, and identified approximately $9,251 in illegal fees charged to students.

The Department did not fine Wells Fargo. The Department did not fine the institutions. Nor, quite remarkably, did the Department even require that all $9,251 be returned to the students. Instead, the Department demanded that only $3,410 be returned to students. With respect to the remaining $5,841, "[b]ecause the liability per student for those students that incurred fees of less than $25 is minimal," the Department "does not believe it would be cost effective to require Wells Fargo to attempt to reimburse individual students for the amount of the improper fees."[57] Accordingly, the Department required that Wells Fargo return the $5,841 to the Department.

Irrespective of the fact that Wells Fargo neither made students whole nor paid a fine, the Department's remedy was grossly ineffective from a deterrence perspective. Wells Fargo charged students approximately $10,000 in illegal fees, and the "punishment" was to return those funds.

Violations of this magnitude—*i.e.*, $10,000 in illegal fees, where a third-party servicer is doing business with institutions collectively receiving more than $442 million annually—may not rise to a level of terminating Wells Fargo's ability to act as a third-party servicer. Nevertheless, the Department *must* employ a deterrent. This is precisely the sort of situation in which the Department must be willing to deploy its fine authority.

Finally, the Department must go beyond publicizing its fines on a "School Fine Report" buried deep on its website. The Department must publicize its enforcement actions more generally for two reasons. First, providing public notification of unlawful business practices informs the public of potential dangers and unscrupulous conduct. Second, widespread publication can have a clear deterrent effect on companies concerned about tarnished reputations.

ENFORCEMENT IN PRACTICE: FAILURES TO HOLD THIRD PARTY SERVICERS JOINTLY AND SEVERALLY LIABLE

The Wells Fargo example raises another critical question about the Department's willingness to deploy authorities to deter misconduct by third-party servicers. Under the Department's regulations, third-party servicers are jointly and severally liable with an institution for Title IV or regulatory violations by the servicer.[58] The Department has failed to use this authority.

For example, in August 2018, the Department issued an FPRD to Educational Management Services, Inc. ("EMS"), based on a review—lasting nearly two years—between June 6, 2016 and March 5, 2018. This review is noteworthy, insofar as it is one of only eight final program review determinations that have been issued by the Department (all between February 2016 and September 2018), suggesting at least a point in time when the Department was beginning to take seriously oversight of these entities.[59] According to the FPRD, the Department first detailed thirteen preliminary findings of Title IV noncompliance in March 2018. In response to those preliminary findings, EMS informed the Department that it would "discontinue acting as a third party servicer." In the FPRD, rather than taking steps against EMS, the Department found it "appropriate, in this case, under these circumstances, to close the program review and require no further action at this time."[60] The FPRD noted that the noncompliance would be resolved through program reviews of the client institutions, despite the Department's authority to assess the liabilities against the third party servicer.

Although the Department identified six institutions as having done business with EMS, and although the Department noted it would resolve EMS's noncompliance through program reviews against those institutions, it appears to have only done so with respect to Fairview Academy and one other institution, Trumbull Business College ("Trumbull") in Warren, Ohio.

On October 2, 2019, over one year after the EMS FPRD, the Department issued an FPRD to Fairview Academy in which it assessed $254,933 in liabilities resulting from March 2018 preliminary findings.[61] Fairview closed in December 2018 and it is unknown whether the Department ever collected the quarter million-dollar liability.

With respect to Trumbull, on March 9, 2018—the same date the Department made its preliminary findings regarding EMS—the Department made eight findings of noncompliance, including for violating the fiduciary standards of conduct and for failing to comply with standards of administrative capability.[62] Although the Department made numerous findings that could have given rise to liabilities against Trumbull, no liabilities were imposed.

As of the date of this paper, and despite its 2018 statement that it would hold institutions accountable for the acts of EMS, the Department does not appear to have done so.[63]

Limitation Actions Can Tailor Title IV Restrictions to Institutional Wrongdoing.

In addition to the fine authority, the Department also has power to "limit[]" the participation of any institution that has violated Title IV, the Department's regulations, or any "applicable special arrangement, agreement, or limitation."[64] By regulation, the Department has interpreted this authority to allow it to place any "reasonable and appropriate" condition on an institution's participation.[65] Despite the clear flexibility that the limitation authority provides—and the ability to tailor a remedy to a wrong—during at least the seven years between and including 2012 and 2018, the Department used this authority only once.[66] And our review of the decisions by the Department's Office of Hearings and Appeals suggests scant use of that authority before this period.

The failure to use the limitation authority is perplexing for two reasons. *First*, the Department's limitation authority allows it to impose on an institution"*[any] conditions* as may be determined by the Secretary to be reasonable and

appropriate."[67] This means that, through the limitations authority, the Department can tailor actions and remedies to the particular wrongs of a situation. Presently, if an institution has violated the HEA, its regulations, or other governing laws, the Department generally only considers whether the institution should be allowed to continue to participate in the Title IV programs at all. But in many cases, a remedy in between disallowing participation and not sanctioning is appropriate, permitted by statute, and "serve[s] the non-punitive purpose of protecting students and the government from future harm."[68] Yet despite the flexibility afforded by the "limitation" authority, the Department has largely failed to bring such actions against institutions.

Second, in the single instance in recent years in which the Department used this authority, it clearly achieved its desired intent. In 2016, the FSA's Administrative Actions and Appeals Service Group concluded that for-profit DeVry University—then an institution owned by the publicly traded DeVry Education Group—did not have ample documentation to "substantiate the truthfulness"[69] of certain advertised job placement rates.[70] The Department did not allege that DeVry had affirmatively falsified job placement rates, nor did it allege that DeVry had made substantial misrepresentations to student and prospective students under the Department's prohibition on such conduct. But in the Notice, which was released in partnership with the announcement by the Federal Trade Commission of litigation regarding the veracity of the representations,[71] FSA alleged that DeVry had failed to maintain records necessary to "substantiate the truthfulness" of an advertised job placement rate. In this context, FSA required DeVry not only to maintain the factual support underlying its advertised job placement statistics, but to also have the statistics independently audited before publication. Such a limitation not only put DeVry—and other institutions—on notice of the importance of the Department's substantiation requirement, but it was also tailored to the Department's specific findings.

The limitation proceeding against DeVry was successful. Less than nine months after it was brought, the Department announced in October 2016 a settlement in which DeVry effectively agreed to all of the limitations sought by the Department.[72] If adequately staffed, with capable leadership and management, tailored limitation remedies can be used to enhance enforcement and protect students more effectively.

Recertification Denials and Provisional PPAs Should be Used More Effectively as an Enforcement Tool.

The Department may also use facts gathered as part of an investigation to decide whether to deny an application to recertify an institution for Title IV participation or to revoke or add conditions to an institution's provisional certification. Yet with the exception of some targeted efforts in the second term of the Obama Administration,[73] the Department's enforcement efforts have largely focused on discrete Title IV violations outside of consumer protections. To the extent the Department has looked at consumer violations—most notably for violations of the ban on incentive-based compensation—such efforts have largely been coordinated by the Department of Justice under the False Claims Act. To truly protect students, the Department must begin to systematically use its consumer protection authorities to police institutions.

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As background, each participating institution in the Title IV programs is required to enter into a "program participation agreement" or "PPA" with the Department that "condition[s] the initial and continuing eligibility" with certain statutorily enumerated requirements.[74] The Secretary may also "provisionally" certify an institution's eligibility to participate in Title IV programs if, among other reasons, the Department "determines that an institution that seeks to renew its certification is, in the

judgment of the Secretary, in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a [PPA]."[75]

A PPA with the Department generally lasts for six years, although there are exceptions, at the conclusion of which "the institution's existing certification will be extended on a month to month basis … until the end of the month in which the Secretary issues a decision on the application for recertification."[76]

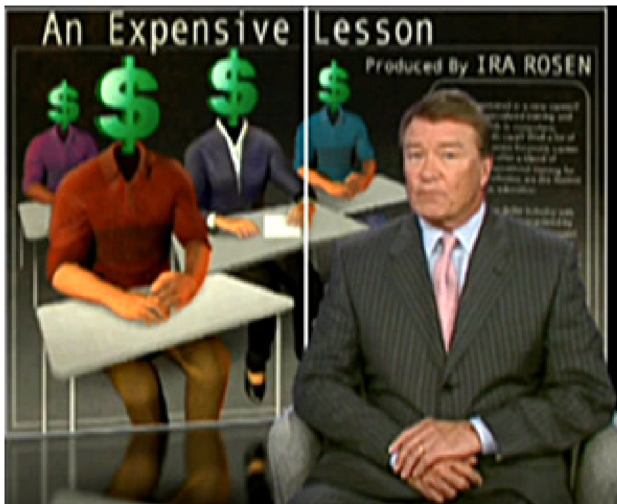
During the term of a PPA, the Department has the clear authority to bring a "termination" action against an institution that is found in violation of the statute or regulations. In reality, however, the Department has brought few of these proceedings in recent years. In 2018, Student Defense submitted a FOIA request seeking copies of notices provided to institutions or third-party service providers between January 2012 and December 2018 that constituted notices of intent to terminate the eligibility of either type of entity.[77] In response, the Department provided 37 such notices, or an average of 5.2 notices per year.[78] But perhaps most strikingly, 29 of the 37 notices provided were to implement non-discretionary terminations due to the institution becoming *statutorily ineligible* to participate in the Title IV programs due to a loss of accreditation or filing for bankruptcy. This means that only eight institutions or entities—approximately one per year—were subject to a termination action for any other reason. Of these actions, only one was brought against a third-party servicer, National Student Aid Services, Inc.[79]

The Department may also certify an institution using a "Provisional PPA," which is different in two key respects. First, and perhaps most importantly from an enforcement perspective, when a school is provisionally certified, the Department need not wait until the conclusion of a termination action (or the expiration of the PPA) to end a school's participation. Rather, the Department can "revoke" the provisional PPA, effective on the date that the Secretary mails the revocation notice.[80] Second, whereas the Department has historically considered a PPA to be a standardized agreement for all institutions,[81] the provisional PPA unambiguously allows the Department to include "any additional conditions . . . that the Secretary requires the institution to meet."[82] From a practical perspective, provisional certification is similar to month-to-month certification after the expiration of a PPA, insofar as institutions of higher education have fewer due process rights in continued participation.[83]

As noted above, the Department has made scant use of its termination authority for fully participating institutions. One reason for this is perhaps based on practicality and timing: for a provisionally certified institution, or an institution at or near the time of recertification, the Department has the authority to end the institution's participation in Title IV unburdened by procedural requirements that accompany termination and limitation actions. Likewise, a termination action only takes effect when "final," meaning that the institution has exhausted a sometimes years-long appeal to the Secretary. Thus, in many circumstances, it can both be more efficient and effective for the Department to wait until the time of recertification to take a swift action, rather than commence a protracted process—with a hearing, fact and expert witnesses, evidentiary determinations, a decision by an administrative judge, and an internal appeal to the Secretary—at an earlier time. By contrast, at the time of renewal, the Department is constrained only by the bounds of the Administrative Procedure Act's requirement not to act unlawfully, arbitrarily, or capriciously in denying the school a new PPA.

Colorado Technical University ("CTU") presents a prime example of how the Department must more aggressively use its consumer protection authorities to police institutions. CTU is owned by Perdoceo which is a publicly traded company formerly known as Career Education Corporation ("CEC"). CEC and its subsidiary institutions—including CTU—have been among the most high profile and controversial for-profit institutions of higher education in recent years. In 2005, after a 60 Minutes report on the company's recruiting practices, "the company's schools were investigated by State agencies in New Jersey and Pennsylvania, the U.S. Department of Justice, the U.S. Department of Education, and the U.S. Securities and Exchange Commission."[84]

Roughly a decade after the 60 Minutes report, CTU was operating under a provisional PPA that appears to have been executed in early 2016. Prior to 2016, CTU had been operating on a "month-to-month" basis since its prior PPA



A 60 Minutes investigation in 2005 alleged abuses in Career Education Corporation's recruiting practices. (CBS News: "For-Profit College: Costly Lesson", Jan. 31, 2005)

expired in September 2011.[85] The 2016 provisional PPA expired at the end of December 2016, at which point CTU resumed operation on a "month-to-month" status. In July 2017, the Department "distributed a new provisional [PPA] to CTU that would "take CTU off of . . . month-to-month status."[86] The 2017 provisional PPA expired in September 2018, at which point CTU resumed participating on a month-to-month approval, "pending [the Department's] review and processing of their pending application[] for recertification." [87] This is, by any measure, a rocky and unstable history for an institution.

While on month-to-month participation status, on January 3, 2019, CEC entered into agreements with 48 states and the District of Columbia to resolve a five-year-old multi-state inquiry into the company's practices, including with regard to CTU. In connection with those agreements, CEC agreed to, among other things, a $5 million payment to the attorneys general, and a write-off of approximately $1.3 million in accounts receivable not previously written-off.

Importantly, California was not part of the settlement, though CEC stated in a press release that the state was "expected" to enter into a stipulated judgment shortly.[88] Nor—at that point in time—was the Federal Trade Commission part of any settlement agreement, despite the fact that the FTC had issued a Civil Investigative Demand for information from CEC in August 2015.[89]

That was the state of play in May 2019 when the Department approved a new full, and standard, PPA. At that time, CTU was still participating in Title IV on a month-to-month certification. But in May 2019, with these law enforcement inquiries ongoing, the Department decided to provide CTU with a new Program Participation Agreement. And, unlike the prior PPA—which was "provisional" and could immediately be revoked by the Department if the Secretary determined that the institution was "unable to meet its responsibilities" under the PPA—the Department decided to remove CTU from provisional certification and fully certify the institution for two years, ending the Department's ability to deny recertification or immediately revoke the PPA during this term.[90]

In August 2019, approximately three months later, the Federal Trade Commission filed its own Stipulated Order for Permanent Injunction and Monetary Judgement against CTU and CEC, in which the company agreed to pay $30 million in restitution to students. The basis for the settlement was FTC findings that CEC and CTU "used an illegal and deceptive telemarketing scheme" to lure consumers to their schools.[91] Among the lead generators used by CTU and CEC was Edutrek, which itself "the subject of [an] FTC law enforcement action[]"[92] and a whistleblower lawsuit under the False Claims Act.

This is not to say that, in early 2019, the Department necessarily should have terminated CTU's participation. One possibility is that the Department could have kept the school on month-to-month certification, or granted a two-year, provisional certification while the Department conducted or completed its own investigation. Where the FTC had built enough evidence to obtain a sizeable settlement from CTU, and where California had refused to join a multi-state settlement, the Department should have investigated. The Department could have engaged the investigatory authorities described above, reviewed evidence, communicated with officials at the FTC and California Attorney General's office, and made a determination on next steps. Instead, despite the many red flags circling CTU, the Department chose to tie its enforcement hands by fully recertifying the institution for a two-year period, ensuring that, even if the Department uncovered evidence of wrongdoing that warranted a recertification denial or

revocation of the PPA, CTU would almost certainly have access to Title IV funding for the duration of its newly entered PPA. This is hardly the right answer for an agency that should be committed to using its authorities to ensure robust consumer protections for students.

Using a System of Risk-Based Modeling to Target Entities for Investigation.

Structurally, the Department's oversight systems lack adequate resources. As discussed above, there are clear failures with the annual system for auditor-conducted compliance reviews. The Department's own system for compliance review, the program review, is also insufficient. According to Departmental data, although approximately 6,000 institutions participate in Title IV programs, only 1,554 had program reviews finalized between 2013 and 2019 (inclusive). And although the Department has acknowledged a "backlog" in finalizing program review determinations, delays in the process correspond to delays in remediation, penalties, and deterrence of future wrongs. Seemingly, an institution can go many years—or even decades—without an on-site or off-site program review conducted by the Department.

The Department finalized 1,554 program reviews between 2013 and 2019, a pace that would have each school in the Title IV program undergo a review every 28 years.

The Department must do better. While clearly the Department cannot conduct frequent program reviews of all institutions, it could develop and publicize a risk-based model to more effectively allocate compliance and enforcement resources. As OIG noted in November 2019, a more robust risk-based model could allow FSA to more effectively oversee and monitor the Title IV programs, preventing waste, fraud, and abuse.[93] One such model was described in a recent Student Defense paper that argued for an "outcomes-focused framework" to review, monitor, and identify potential wrongdoers across higher education. [94]

The Consumer Financial Protection Bureau is one agency that has adopted such an approach. As then-Director Richard Cordray testified to the U.S. Senate in 2014, the CFPB "devised a system of risk-based prioritization to make the best use of [its] examination resources." Such an approach included "an assessment of potential consumer risk along with factors such as product market size, the entity's market share, the potential for consumer harm, and field and market intelligence that includes other factors such as management quality, prior regulatory history, and consumer complaints."[95] The CFPB has also published a "Risk Assessment" process in its Supervision Manual, showing industry and the public the factors that "will be used during the CFPB's supervision planning process to set priorities and focus examination and supervision activities."[96]

As the issuer of student debt, the Department has a wealth of data under its control that could be used to create such a model. For example, the Department could analyze institutional or programmatic cohort default rates, repayment rates, graduation rates, attrition rates, debt-levels, financial responsibility composite scores, as well as trends and outliers related to enrollment (spikes or dips) to identify schools that may have problems. The Department could systematically cross reference consumer complaints through the FTC's Consumer Sentinel and CFPB's complaint database, along with state-level enforcement actions and inquiries. Such an approach could help fulfill the Department's statutory mandate to "give priority" for program reviews those institutions with identified problems.

A risk-based modeling approach will focus investigative and compliance activity. It will not result in, or determine, penalties—which must be considered on a case-by-case basis. But while the HEA provides that "all institutions of higher education participating in [Title IV] programs" should be subjected to this review process, the statute also makes clear that the Department should "give priority" for program

review to institutions with high cohort default rates, high dollar volume of defaults, significant fluctuations in loan and grant volume, deficiencies identified by state authorizers or accreditors, high annual dropout rates, or which otherwise present a "significant risk of failure to comply with the administrative capability or financial responsibility provisions" of Title IV.[97]

A data-driven approach to allocating limited enforcement resources can have real benefits. On the one hand, the Obama Administration made clear that policing some of the largest players in higher education—such as Corinthian Colleges and ITT Technical Institute—can have real impact on students. Such high-profile actions can also have a deterrent effect on the industry. But at the same time, the Department cannot fully depend on what some have called a "cascaded retreat" model of enforcement, which concentrates enforcement only on "high-end violations" to "induce[] violators not to be on the high end."[98] While such an approach is important to target the actors that cause the most harm, such an approach can also result in a system where smaller or mid-sized institutions can take advantage of holes in the system, resulting in harms to students and taxpayers.

* * * *

Despite its robust authority to conduct investigations and bring enforcement actions, the data and anecdotes above suggest that the Department's compliance and enforcement approach has been insufficient, given the scope of the Title IV programs and the enforcement tools available. The Department must use all of the tools that Congress has provided to protect students, protect taxpayers, and ensure

Endnotes

1 Dan Zibel is Chief Counsel, Vice President, and a co-founder of the National Student Legal Defense Network ("Student Defense"). He previously served as Deputy Assistant General Counsel for Postsecondary Education in the Office of General Counsel at the U.S. Department of Education.

2 Daniel A. Zibel & Aaron S. Ament, *Protection and the Unseen: How the U.S. Department of Education's Undeveloped Authorities Can Protect Students and Promote Equity in Higher Education* (Sept. 2020), *available at:* https://www.defendstudents.org/news/body/docket/100-Day-Docket-Direct-Loan-Authority.pdf.

3 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.

4 *See also, e.g., 101: Higher Education Triad,* Higher Learning Advocates, at 1 (Dec. 2017), *available at:* https://higherlearningadvocates.org/wp-content/uploads/2018/02/higher-ed-and-the-triad.pdf (describing the Department's role as one of "certify[ying] and ensur[ing] compliance with administrative and fiscal rules according to the [HEA]"); Clare McCann & Amy Laitinen, *The Bermuda Triad: Where Accountability Goes to Die,* New America, at 5–6 (Nov. 2019) *available at:* https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Bermuda_Triad_2019-11-20_022701.pdf (describing the Department's role with respect to IHEs as one of "certif[ying] institutions to be eligible for taxpayer-financed financial aid and oversee[ing] their administration of those funds"); *The Triad: Promoting a System of Shared Responsibility. Issues for Reauthorization of the Higher Education Act: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions,* 113 Cong. 18–19 (2013) (Prepared statement of Terry W. Hartle, Ph.D) (hereinafter "Hartle Testimony") (noting that the Department's "role in the triad" is being "charged with overseeing certification and eligibility for institutions that wish to be eligible to participate in Federal student aid programs"); Joel A. English, *The Role of the Triad in Higher Education,* Aviation Technician Education Council, *available at:* https://www.atec-amt.org/uploads/1/0/7/5/10756256/the_triad_of_higher_education.pdf.

5 Final Regulations, Distance Education and Innovation, 85 Fed. Reg. 54742, 54805 (Sept. 2, 2020).

6 HEA § 141(a)(1); 20 U.S.C. § 1018(a)(1).

7 HEA § 487(c)(3)(B)(i); 20 U.S.C. § 1094(c)(3)(B)(i); see also 34 C.F.R. Part 668, Subpart F.

8 HEA § 455(h), 20 U.S.C. § 1087e(h).

9 HEA § 498(c)(1)(C), 20 U.S.C. § 1099c(c)(1)(C); HEA § 498(e)(6), 20 U.S.C. § 1099c(e)(6).

10 HEA § 487(c)(2), 20 U.S.C. § 1094(c)(2).

11 Hartle Testimony at 19 (noting that "[d]espite [having an] incredible range of powers, most are rarely used or applied unevenly" by the Department).

12 *Id.*

13 *See* Ltr. From R. Bitner, Student Defense, to Freedom of Information Officer, U.S. Dep't of Educ. (Dec. 6, 2018) *available at:* https://www.defendstudents.org/news/body/nsldn_20181206.pdf.

14 Notably, in late 2020, the Department issued an interpretive statement in the *Federal Register* affirming its authority to "[a]dministratively [s]ubpoena [i]nformation" from third parties in order to investigate potential violations of Section 117 of the HEA, which relates to the receipt of gifts from foreign sources. *See* Notification of Interpretation, 85 Fed. Reg. 72,567, 72,568 (Nov. 13, 2020). We are unaware of the Department using its subpoena authority to facilitate these sorts of investigations.

15 *See* Subpoena, U.S. Dep't of Educ. to Office of the Attorney General, State of Iowa *available at:* https://www.defendstudents.org/foia/use-of-enforcement-authority#subpoena. Student Defense is independently aware of one other subpoena that that was issued by the Department to a non-governmental entity.

16 HEA § 409A, 20 U.S.C. § 1097a.

17 HEA § 498(f), 20 U.S.C. § 1099c(f).

18 HEA § 498a(a), 20 U.S.C. § 1099c-1(a).

19 34 C.F.R. § 668.24(d).

20 34 C.F.R. § 668.24(f).

21 34 C.F.R. § 668.24(f)(2)(ii), (f)(3)(i).

22 34 C.F.R. § 668.24(f)(3).

23 34 C.F.R. § 668.24(f)(1); *see also* HEA § 481(c), 20 U.S.C. § 1088(c) (defining third-party servicer); 34 C.F.R. § 668.2 (same).

24 34 C.F.R. § 668.23(e).

25 HEA § 490A, 20 U.S.C. § 1097a.

26 *Id.*

27 This is not to say that the Department should only use its subpoena authority against entities other than participating institutions. An investigative subpoena can elevate an issue within an institution, and frame the investigation as leading to a potential enforcement matter, rather than a matter of routine administrative compliance.

28 *FTC Obtains Record $191 Million Settlement from University of Phoenix to Resolve FTC Charges It Used Deceptive Advertising to Attract Prospective Students,* U.S. Fed'l Trade Comm'n (Dec. 10, 2019), *available at:* https://www.ftc.gov/news-events/press-releases/2019/12/ftc-obtains-record-191-million-settlement-university-phoenix.

29 Compl. For Perm. Injunction and Other Equitable Relief at ¶ 19, *Fed. Trade Comm'n v. Univ. of Phoenix,* No. 2:19-cv-05772-ESW (D. Ariz. Dec. 10, 2019).

30 *See* Robert Morse & Eric Brooks, *How U.S. News Calculated the 2021 Best Colleges Rankings,* U.S. News & World Report (Sept. 13, 2020), *available at:* https://www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings (noting that "[m]ost colleges report the data directly to U.S. News.").

31 *See* 34 C.F.R. § 668.23(b).

32 34 C.F.R. §§ 668.23(a), (b)(1)–(2).

33 34 C.F.R. § 668.23(a)(4).

34 U.S. Gov't Accountability Off., GAO-18-481, *Federal Student Aid: Education's Postsecondary School Certification Process* (2018) (hereinafter "GAO Report").

35 GAO Report at 15.

36 GAO Report at 5.

37 GAO Report at 4–5.

38 5a U.S.C. § 3(d)(1)(A).

39 5a U.S.C. § 3(d)(1)(B).

40 HEA § 141(a)(1), 20 U.S.C. § 1018(a)(1).

41 34 C.F.R. § 668.113(d)(1)–(2).

42 David Weil, *Creating a strategic enforcement approach to address wage theft: One academic's journey in organizational change,* J. Indus. Rel. at 6 (2018), *available at:* https://www.fissuredworkplace.net/assets/D.Weil.Creating_a_Strategic_Enforcement_Approach.JIR_2018.pdf.

43 HEA § 487(c)(3)(B), 20 U.S.C. § 1094(c)(3)(B).

44 Elec. Coll. and Comput. Programming, U.S. Dep't of Educ., Dkt. No. 91-7-ST, 1992 WL 877335, at *1 (July 21, 1992).

45 Salinas Beauty College, U.S. Dep't of Educ., Dkt. No. 18-67-SP (Feb. 14, 2020), *available at:* https://oha.ed.gov/oha/files/2020/03/2018-67-SP.pdf; *see also, e.g.,* Hair California Beauty Academy (CA), U.S. Dep't of Educ., Dkt. No. 18-13-SP (July 2, 2019), *available at* https://oha.ed.gov/oha/files/2019/08/2018-13-SP.pdf (contrasting fines and liabilities).

46 *See generally* Final Regulations, Adjustment of Civil Monetary Penalties for Inflation, 85 Fed. Reg. 2033 (Jan. 14, 2020).

47 On December 4, 2020, the Department announced a settlement with Temple University whereby Temple would pay $700,000 to the Department to resolve a potential claim that Temple had submitted false information substantially misrepresenting the nature of certain of Temple's educational programs in its Fox School of Business and Management to U.S. News and World Report for the purpose of inflating the rankings of those programs by that publication between 2014 and 2018. Even here, however, the Department reached this resolution two years after the $5.4 million settlement of a class action lawsuit and one year after a settlement with the Pennsylvania Attorney General's office over a seemingly broader set of conduct.

48 *See* Settlement Agreement at 4, *United States ex rel. Hendow v. Univ. of Phoenix,* No. 2:03-cv-00457-GEB-DAD, Dkt. No. 345-1 (E.D. Cal. Dec. 16, 2009) (settlement for $67.5 million, of which $19 million was designated for the *qui tam* relators); U.S. Dep't of Justice, *For-Profit College Company to Pay $95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud, and Other Violations* (Nov. 16, 2015), *available at:* https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and. The settlement resolved *United States ex rel. Washington et al. v. Education Management Corp., et al.,* Civ. No. 07-461 (WDPA); *United States ex rel. Sobek v. Education Management Corp., et al.,* Civ. No. 10-0131 (WDPA); *United States ex rel. Laukaitis et al. v. Education Management Corp., et al.,* Civ. No. 11-601 (WDPA); and *United States ex rel. Rainwater v. Education Management Corp., et al.,* Case No. 3:12-CV-01008 (MDTN).

49 *See* Ltr. from Robin Minor, Acting Director, Administrative Actions and Appeals Service Group, Federal Student Aid to Jack D. Massimino, President/Chief Executive Officer, Corinthian Colleges, Inc. re: Notice of Intent to Fine Heald College (Apr. 14, 2015).

50 Ltr. from Martina Fernandez-Rosario, Division Director, San Francisco/Seattle School Participation Division, Federal Student Aid to Ms. Katherine Han, Owner Central Nursing College re: Final Program Review Determination, Final Program Review Determination at 3 (March 29, 2018) ("CNC FPRD"), *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Central_Nursing_College_CA_041500_03_29_2018_FPRD_Redacted.pdf.

51 Ltr. from Gayle E. Polumbo, Ed.D., Compliance Manager, San Francisco/Seattle School Participation Division, Federal Student Aid to Ms. Katherine Han, Owner Central Nursing College re: Program Review Report (Feb. 3, 2015), *available within:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Central_Nursing_College_CA_041500_03_29_2018_FPRD_Redacted.pdf; *see also,* HEA § 498a(b)(7), 20 U.S.C. 1099c-1(b)(7)

52 CNC FPRD at 9–10.

53 *Id.* at 10.

54 *Id.* at 10–11. *See also, e.g.,* Ltr. from Betty Coughlin, Division Director, Federal Student Aid to Marcella Maria Garus, President, Villa Maria College of Buffalo re: Final Program Review Determination, Final Program Review Determination at 28 (July 16, 2015), *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Villa_Maria_College_of_Buffalo_NY_002896_07_16_2015_FPRD_Redacted.pdf (describing the EAL policy)

55 Ltr. from Ralph LoBosco, Division Director, Federal Student Aid to Ed Kadletz, EVP, Head of Deposit Products Group, Wells Fargo Bank re: Final Program Review Determination, Appendix A at 10 (June 28, 2017), *available at:* https://studentaid.gov/sites/default/files/wells-fargo-bank-final-program-review-determination.pdf.

56 *Id.* at 11.

57 *Id.* at 6.

58 34 C.F.R. § 668.25(c)(3).

59 *See* U.S. Dep't of Educ, Third-party Servicer Program Reviews (Nov. 25, 2020), *available at* https://studentaid.gov/data-center/school/program-reviews/third-party-servicers (linking to eight program review determinations, the most recent of which is dated September 2018 and indicating that "[f]uture FPRDs will be posted regularly).

60 *See* Ltr. from Dvak Corwin, Compliance Manager, Federal Student Aid to Christine Gregory, Educational Management Services, Inc. re: Final Program Review Determination (Aug. 29, 2018), *available at:* https://studentaid.gov/sites/default/files/educational-management-services-inc-final-program-review-determination.pdf.

61 Ltr. from Dvak Corwin, Division Director, Federal Student Aid to Ortelle Werner, Fairview Academy re: Final Program Review Determination at 1 (Oct. 2, 2019), *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/fairview-academy-oh0302710020191002fprdredacted.pdf.

62 Ltr. from R. LoBosco, Division Director, Federal Student Aid to Dennis Griffith, President, Trumbull Business College re: Expedited Final Program Review Determination at 3 (March 9, 2018), *available at:* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Trumbull_Business_College_OH_02054300_3_09_2018_EDL.pdf.

63 Based on a search of the Department's Final Program Review Determinations for Fiscal Years 2018, 2019, and 2020, *available at* https://studentaid.gov/data-center/school/program-reviews.

64 34 C.F.R. §668.86(a)(1).

65 34 C.F.R. §668.94(j).

66 *See* Use of Enforcement Power to Limit Institutions and Servicers Participating in the Title IV Programs – December 19, 2018, *available at:* https://www.defendstudents.org/foia/use-of-enforcement-authority#limitation.

67 34 C.F.R. §668.94(j).

68 Elec. Coll. and Comput. Programming, 1992 WL 877335, at *1.

69 34 C.F.R. § 668.14(b)(10).

70 Letter from Susan Crim, Director, U.S. Dep't of Educ. Administrative Actions and Appeals Service Group to Robert Paul, President, DeVry University re: Notice of Intent to Limit: Placement Rate and Employability Advertisements and Representations for DeVry University (Jan. 27, 2016), https://studentaid.gov/sites/default/files/devry-limitation-notice.pdf ("DeVry Limitation Letter").

71 Federal Trade Comm'n Press Release, FTC Brings Enforcement Action Against DeVry University (Jan. 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/ftc-brings-enforcement-action-against-devry-university (describing the FTC litigation and "related action" brought by the Department).

72 Settlement Agreement between DeVry University and the U.S. Dep't of Educ. (Oct. 2016), *available at:* https://www2.ed.gov/documents/press-releases/devry-settlement-agreement.pdf; U.S. Dep't of Educ. Press Release, U.S. Department of Education Reaches Settlement with DeVry University Over Job Placement Claims (Oct. 13, 2016), https://www.ed.gov/news/press-releases/us-department-education-reaches-settlement-devry-university-over-job-placement-claims.

73 In 2016, for example, the Department used that authority to end participation by Globe University, Minnesota School of Business, Charlotte School of Law, MedTech Colleges, Marinello Schools of Beauty, and Computer Systems Institute, among others.

74 *See* HEA § 487, 20 U.S.C. § 1094.

75 HEA § 498(h)(1)(B)(iii), 20 U.S.C. § 1099c(h)(1)(B)(iii). Institutions are also placed on provisional status following the successful fine, limitation, or suspension action (or the settlement thereof), problematic compliance or financial audits, or the occurrence of other specified circumstances. 34 C.F.R. § 668.174 (listing "past performance" standards); 34 C.F.R. § 668.175(f)(1)(ii) (noting that a past performance violation constitutes a financial responsibility failure, which causes an institution to be placed on provisional certification).

76 34 C.F.R. § 668.13(b)(2).

77 ED's Termination of Institutions' and Third-Party Servicers' Title IV Eligibility – December 24, 2018, *available at:* https://www.defendstudents.org/foia/use-of-enforcement-authority#termination.

78 *Id.*

79 Cf. National Student Aid Services, Inc. (OK), U.S. Dep't of Educ., Dkt. No. 17-63-ST (Jan. 28, 2019), *available at:* https://oha.ed.gov/oha/files/2019/02/2017-63-ST.pdf.

80 34 C.F.R. § 668.13(d).

81 *See* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,976–77 (Oct. 31, 2014) ("The PPA is a standardized document that largely mirrors the requirements in 34 C.F.R. § 668.14. Unless an institution has a provisional PPA, the PPA for one institution will be nearly identical to that of another except for the list of the institution's GE programs.").

82 34 C.F.R. § 668.13(c)(4)(ii).

83 *See, e.g., Ass'n of Proprietary Colls. v. Duncan,* 107 F. Supp. 3d 332, 350 (S.D.N.Y. 2015); *Bowling Green Jr. Coll. v. U.S. Dep't of Educ.,* 687 F. Supp. 293, 297 (W.D. Ky. 1988) ("The College has no property right to the funds as it acts only as a fiduciary in dispersing the funds to its eligible students.... The purpose of these Title IV programs is not to keep an institution in business, but to assist its students in gaining a post-secondary education.").

84 S. Rep. No. 112-37, Vol. 1 at 47 (2012), *available at:* https://www.help.senate.gov/imo/media/for_profit_report/PartI.pdf (Harkin Report).

85 According to CEC's 10-K for the Year Ending December 31, 2014, CTU had a PPA that expired in September 2011, and was on month-to-month certification since that time. *See* Career Educ. Corp., Annual Report (Form 10-K) (Mar. 3, 2015), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000119312515075170/d824438d10k.htm. In the FYE 2015 Form 10-K, CEC reiterated that CTU was "operating on a month-to-month" PPA. *See* Career Educ. Corp., Annual Report (Form 10-K) (Feb. 29, 2016), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000156459016013719/ceco-10k_20151231.htm. But in the Form 10-Q for the First Quarter of Fiscal Year 2016, CEC disclosed that "[a]ll of the Company's institutions ha[d] been issued provisional program participation agreements that extend through December 31, 2016.". *See* Career Educ. Corp., Quarterly Report (Form 10-Q) (May 4, 2016), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000156459016017651/ceco-10q_20160331.htm#SIGNATURES.

86 Career Educ. Corp., Quarterly Report (Form 10-Q) (Aug. 9, 2017), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000156459017016760/ceco-10q_20170630.htm.

87 *See* Career Educ. Corp., Quarterly Report (Form 10-Q) (Nov. 2, 2017), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000156459017021193/ceco-10q_20170930.htm; Career Educ. Corp., Annual Report (Form 10-K) (Feb. 20, 2019), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000156459019003457/ceco-10k_20181231.htm.

88 See Career Educ. Corp. Press Release, Career Education Corporation Reaches Significant Agreements to Resolve Multi-State Inquiry (Jan. 3, 2019), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000119312519001346/d679911dex991.htm; *see also* Career Educ. Corp., Current Report (Form 8-K) (Jan. 3, 2019), *available at:* (https://www.sec.gov/Archives/edgar/data/1046568/000119312519001346/d679911d8k.htm).

89 Career Educ. Corp., Current Report (Form 8-K) (Aug. 24, 2015), *available at:* https://www.sec.gov/Archives/edgar/data/1046568/000119312515300381/d95468d8k.htm.

90 Career Educ. Corp., Annual Report (Form 10-K) (Feb. 19, 2020), *available at:* https://sec.report/Document/0001564590-20-005289/prdo-10k_20191231.htm#ITEM_15_EXHIBITS_FINANCIAL_STATEMENT_SCH.

91 Fed. Trade Comm'n Press Release, Operator of Colorado Technical University and American InterContinental University Will Pay $30 Million to Settle FTC Charges it Used Deceptive Lead Generators to Market its Schools (Aug. 27, 2019), *available at:* https://www.ftc.gov/news-events/press-releases/2019/08/operator-colorado-technical-university-american-intercontinental.

92 *Id., see also Fed. Trade Comm'n v. Day Pacer LLC,* No. 1:19-cv-01984 (N.D. Ill. Mar. 22, 2019), *available at:* https://www.ftc.gov/enforcement/cases-proceedings/152-3126/edutrek-llc.

93 *See* U.S. Dep't of Educ. Office of the Insp. General, *FY 2020 Management Challenges Facing the U.S. Department of Education* (Nov. 2009), *available at:* https://www2.ed.gov/about/offices/list/oig/misc/mgmtchall2020.pdf.

94 *See* Spiros Protopsaltis & Sam Gilford, *Putting Students and Taxpayers First: An Outcomes-Driven Portfolio Approach to Accreditation, available at:* https://www.defendstudents.org/news/body/quality-assurance/Student-Defense-Quality-Assurance-Initiative-Putting-Taxpayers-and-Students-First.pdf. Although this paper focuses on risk-based modeling for accrediting agencies, the analysis would also apply to modeling by the Department.

95 Wall Street Reform: Assessing and Enhancing the Financial Regulatory System: Hearing Before the Committee on Banking, Housing, and Urban Affairs, 113 Cong. (2014) (testimony of Richard Cordray), *available at:* https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-richard-cordray-before-the-senate-committee-on-banking-housing-and-urban-affairs/.

96 Consumer Risk Assessment, Consumer Financial Protection Bureau Supervision Manual at 3–24, *available at:* https://files.consumerfinance.gov/f/supervision-manual/PartIIICFPBsupervisionmanual.pdf.

97 HEA § 498a(a)(2)(A)–(F), 20 U.S.C. § 1099c-1(a)(2)(A)–(F).

98 Margaret H. Lemos & Alex Stein, *Strategic Enforcement,* 95 Minn. L. Rev. 9, 10 (2010), *available at:* https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1428&context=mlr.

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