EXECUTIVE SUMMARY: THE 100 DAY DOCKET

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Student Defense's 100 Day Docket project explores a novel approach to expanding consumer protections as part of the Biden administration's first 100 days at the U.S. Department of Education. The 100 Day Docket recommends a series of initiatives and student protections that the Education Department can implement under existing authorities, without legislative action. The 100 Day Docket thus highlights little known--and even more rarely used--regulatory powers and statutory authorities that the Education Department can exercise immediately to protect college students and taxpayers.

As this collection of papers, policy briefs, and action memoranda in the 100 Day Docket project highlight, the vast scope of the Education Department's unused regulatory authorities and statutory obligations in the consumer protection sphere will likely come as a surprise, even to some policy analysts. The actions that the Department can take on its own under current legal authorities include: automatically discharging student loans held by over 400,000 totally and permanently disabled individuals; automating closed school loan discharges and extending the eligibility window for thousands of former students who attended several institutions that closed; holding executives at predatory colleges personally liable for liabilities and taxpayer losses, especially in cases of abrupt college closures; and establishing minimum student loan repayment rates for maintaining institutional or programmatic eligibility for the federal student aid program.

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The Higher Education Act (HEA) is filled with provisions that assign the Department a leading role in protecting students and taxpayers. Yet many of those provisions are rarely if ever used--obviating the law's requirements and ignoring the express will of Congress. The HEA dictates, for instance, that the Secretary of Education "shall" discharge the borrower's liability on any federal loan of a student who is "unable to complete the program…due to the closure of the institution." For decades, however, the Office of Federal Student Aid (FSA) has required that students left stranded by a college closure apply for their statutorily mandated loan relief and navigate a procedural obstacle course to obtain a loan discharge--which in practice meant tens of thousands of eligible students never received a discharge. Similarly, the HEA specifies that in the Direct Loan Agreement the Department signs with each postsecondary institution for the Title IV program, the Secretary "shall" implement "a quality assurance system…to ensure that the institution is complying with program requirements and meeting program objectives." And yet in the years since Congress enacted that provision, the Department has never truly developed or implemented quality assurance requirements to ensure student and taxpayers' rights to a decent education are enshrined in Direct Loan Agreements.[1]

An enduring puzzle of the Department's regulatory history is why it has so repeatedly failed to fulfill its consumer protection obligations. The papers and policy briefs in the 100 Day Docket suggest several reasons for the Department's reluctance to carry out its statutory role. From the start, Congress's chief motivation in enacting the federal student loan program in 1965, and subsequently the Pell Grant program in 1972, was to expand access to higher education for needy and deserving students--not to ensure that colleges and universities were accountable for program completion or the postsecondary outcomes of the legions of students newly enrolled in college with federal aid. In 1975, when 1,800 for-profit colleges alone were eligible to participate in the department's federal student loan program, the department had a grand total of seven compliance investigators for an $8 billion program, making each compliance investigator responsible, on average, for monitoring hundreds of schools and more than 2,000 lenders for fraud and abuse—an all but impossible assignment.[2] Nearly half-a-century later, the pattern of understaffing and weak enforcement persists. FSA did not establish a dedicated consumer-minded enforcement office until 2016, which was then largely dismantled by the Trump administration. Even today, FSA fails to systematically employ consumer fraud investigators or forensic auditors to monitor financial and consumer violations.

The most politically powerful stakeholders of the federal student aid program have traditionally been institutions, not students. This has led FSA to adopt an institutions-first mindset and a narrowly focused compliance approach to maintaining institutional access to federal dollars, instead of pursuing a commitment to consumer protection and program accountability. As the 100 Day Docket paper, "Promoting Student Opportunity Through Enforcement-Based Accountability" points out, the Department has a long and largely unbroken history of failing to fulfill its oversight responsibilities for the student loan program, including a repeated failure to detect and prohibit fraud and abuse or to assist students who have been victimized by schools with predatory marketing and recruiting practices. Those shortcomings, the paper notes, were documented by the Senate Permanent Subcommittee on Investigations in scathing reports in 1975 and then again in 1991, in hearings chaired by Senator Sam Nunn (D-GA). In 2012, a massive 1,000-plus page report on the for-profit college industry from the Senate Committee on Health, Education, Labor, and Pensions (the so-called "Harkin Report") spotlighted many of the same failures all over again. Today, these problems still persist.

Thus, the recommendations of the 100 Day Docket project are neither radical nor aggressive—instead, the papers and policy briefs that follow are intended to encourage the Education Department, and especially FSA, to carry out its long-deferred statutory obligations to shield consumers from fraud and abuse and to protect taxpayers from the waste of federal dollars.

The Education Department's sweeping failure to enforce laws and regulations that protect consumers and taxpayers is underscored by new data reported in the 100 Day Docket project, drawn from department records obtained by Student Defense, primarily through Freedom of Information Act (FOIA) requests and litigation. Examples of the enforcement vacuum include:

- Since 1976, the Department has had the 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." Congress wanted the Department to *use* that authority, with the chairman of the House Subcommittee on Postsecondary Education labelling it "one of the key provisions" of the Education Amendments of 1976.[3] Yet the Department rarely used this authority in major enforcement actions over the next 40 years,[4] despite state and Federal Trade Commission findings over the decades that numerous for-profit institutions had engaged in substantial misrepresentation of their education program, financial charges, and the employability of their graduates. Even fining an institution for engaging in substantial misrepresentation—fraud, in other words—is rare. Student Defense's review of the Department's School Fine Report, for the nine-year period from FY 2010 to FY 2019, found only a single fine for misrepresentation of just $27,500. The Department's School Fine Report omitted a $29.7 million fine levied in April 2015 against Corinthian College's Heald College for substantial misrepresentation of the employability of its graduates, but Heald never paid the fine and closed all of its campuses less than two weeks after being fined.[5]

- For several decades, the Education Department has had the power to issue subpoenas to institutions of higher education (IHEs) to carry out its enforcement and compliance responsibilities. In December 2018, Student Defense sent a FOIA request to the Department asking for all subpoenas issued since 2010. The results: In the previous eight years, the Department had not issued a single subpoena to an IHE or to an entity that did business with an IHE. Subpoenas, of course, should not be used lightly; neither should they go entirely unused in compliance and fraud investigations.
- The Department, in addition to levying fines, has the authority under HEA to "limit" the participation of any institution that has violated Title IV, and the ability to tailor "reasonable and appropriate" conditions for an IHE's continued participation in Title IV. During the seven years inclusive of 2012-2018, the Department used its "limitation authority" just once—and then only to place conditions on DeVry University's participation in Title IV after DeVry could not substantiate job placement claims it made in advertising materials. Student Defense's review of decisions by the Department's Office of Hearings and Appeals found scant use of the limitation authority before 2012 as well.
- FSA has a statutory mandate to carry out "program reviews on a systematic basis" of the approximately 6,000 IHEs that participate in Title IV programs. In the seven years between 2013 and 2019 (inclusive), the Department completed only 1,544 program reviews—meaning that a given IHE had a 25 percent chance of having a program review conducted during a given seven-year period. At that pace, each school in the Title IV program would undergo a federal review every 28 years, a cycle that would span seven presidential terms.
- From January 2012 to December 2018, the Department issued 37 notices of intent to terminate the eligibility of an IHE or third-party provider to receive Title IV aid. However, 29 of the 37 notices the Department provided to Student Defense would have merely implemented non-discretionary terminations, caused by an institution becoming statutorily ineligible for Title IV programs due to a loss of accreditation or filing for bankruptcy. Just eight institutions or entities,

out of the roughly 6,000 participating in Title IV, were threatened with termination for any other reason, approximately one per year.

- The Department is failing to take account of its *own factual findings* from program reviews, audit determinations, and other relevant administrative channels in determining if borrowers are entitled to relief in the more than 300,000 borrower defense claims students have filed, alleging that their schools defrauded them. In 2016, for example, the Department denied recertification for Title IV aid to six schools and their affiliated campuses (Medtech College, Globe University and the Minnesota School of Business, Charlotte School of Law, Computer Systems Institute, and the Marinello School of Beauty), based on findings of misrepresentations and other consumer harms that would ordinarily give rise to borrower defense claims. Yet the Department to date has not made a single borrower defense finding related to the six school chains, and not a single borrower of the thousands who have filed for relief from those schools has received it, though the Department has denied some borrowers' claims.[6]

Reinvigorating Consumer Protection: Closing Enforcement and Accountability Gaps

The papers and policy briefs in the 100 Day Docket project can be read on two levels. For regulators at FSA and appointees in the Undersecretary's office, as well as for lawyers in the department's Office of General Counsel, the 100 Day Docket provides a legal roadmap to the statutory provisions, court rulings, and regulatory precedents undergirding detailed recommendations for reinvigorating the Department's consumer protection role. But the 100 Day Docket reports also are invaluable to non-lawyers, students, advocates, and taxpayers. Despite the occasionally down-in-the-regulatory-weeds nature of some recommendations, it is clear many of the steps that the Education Department can take now, on its own, would have far-reaching impact.

Consider just two examples. First, as highlighted in "Automating the Discharge of Federal Student Loan Debt for Individuals who are Totally and Permanently Disabled," federal law has long stipulated that student loan borrowers who are totally and permanently disabled (TPD) and unable to work should have their federal student loans erased. Yet for more than a half-century, these borrowers have had to apply for a loan discharge--and in most cases be monitored and recertified as totally disabled annually for three years after their loans are discharged.

Following years of bipartisan pressure, the Trump administration announced in August 2019 that the Department would automatically discharge the student loan debts of tens of thousands of disabled veterans. While that step was important progress and overdue, the Trump administration provided automatic discharges to severely disabled veterans only and left a far larger universe of totally and permanently disabled non-veterans who remained stuck with debt, and unaware of the opportunity for a discharge. Hundreds of thousands of totally and permanently disabled individuals do not know that their student loans should be forgiven, with more than 225,000 of those borrowers needlessly defaulting on their loans.[7] Meanwhile, each year, more than 60,000 totally and permanently disabled student borrowers who had managed to apply for relief had their loans reinstated for failing to submit an annual income verification form—not necessarily a simple task for disabled individuals living with Alzheimer's, traumatic brain injuries, or long-term hospitalizations.

Thanks to a data matching program with the Social Security Administration (SSA), the Education Department has now been able to identify nearly 600,000 totally and permanently disabled borrowers eligible for a full loan discharge. But due to the fact that the Department makes borrowers apply, roughly 400,000 eligible borrowers still have not received the debt relief they deserve. This is not merely egregiously unfair -- it is a stunningly widespread miscarriage of justice, affecting enough disabled Americans to make them equivalent in population to every man, woman, and child in the city of New Orleans.

Put simply, life-altering loan relief is at stake. The Education Department has already provided over $8 billion in loan discharges to 227,000 borrowers who were identified by SSA as totally and permanently disabled and who managed to successfully apply for loan relief--an average of roughly $36,125 per disabled borrower. If the Education Department follows Student Defense's recommendation to implement the law by automatically discharging the loans of totally and permanently disabled borrowers, Student Defense estimates that an additional 400,000 severely disabled Americans would ultimately receive about $14 billion in loan relief.

A second example of an opportunity for Departmental reform is the Public Service Loan Forgiveness Program (PSLF). The PSLF program presents a different bureaucratic nightmare in need of urgent regulatory remedies. Congress established PSLF during the Bush administration in 2007 to provide student loan forgiveness to borrowers who did public service work (e.g., teachers or firefighters) after the borrowers had made ten years of on-time payments. Public service employees who believed they were in the PSLF program first became eligible for loan forgiveness in 2017, but by the summer of 2020, the Department had only approved relief for about two percent of the 200,000 applications it had received, primarily because students made loan payments that did not meet the criteria of "qualifying" payments. Loan servicers often gave incorrect information to borrowers about which employers and jobs qualified as public service and which repayments plans, especially in the cases of consolidated student loans, qualified for PSLF relief. In 2018, Congress tried to fix the PSLF mess by creating the Temporary Expanded Public Service Loan Forgiveness Program (TEPSLF), appropriating $700 million to expand PSLF eligibility to forgive the loans of borrowers who had used the wrong type of repayment plan. But the Department only approved about six percent of TEPSLF applications for loan discharges too.

For the lucky few who have received public service loan forgiveness, the program worked as intended. It provided a valuable incentive for undertaking public service--the average discharge amount for an approved PSLF applicant today is around $70,000. That outcome, however, has to date been the exception to the norm. For most of the hundreds of thousands of students who thought they would qualify for student loan forgiveness, the PSLF program has proved an exercise in futility and frustration. The Student Defense paper on PSLF suggests a series of administrative steps that the Department can take now to reduce misinformation and get PSLF working properly, such as creating a public database of employers that qualify for PSLF, providing clear explanations of how borrowers denied PSLF can obtain approval for loan discharges, and working with the IRS to explore options for an auto-enrollment process.

While the Education Department has the authority to meet critical consumer needs in the first 100 days of the Biden administration, even highlighting the tens of thousands of consumers and the billions of dollars of federal aid at stake do not convey the personal urgency and sacrifices felt by many students just looking to be treated fairly. Behind the numbers are the vivid stories of consumers painfully victimized by the Department's inaction and obstruction.

Consider the poignant tale of Amanda Lawson-Ross, who borrowed to earn a master's and doctoral degree in counseling psychology, before going on to work as a psychologist at the University of Florida's Counseling and Wellness Center and at Florida Gulf Coast University's Counseling and Psychological Services Office. Nearly seven years into making her loan payments, and after confirming her PSLF eligibility on roughly ten occasions with her loan servicer, Great Lakes, a loan officer at her servicer informed her in 2017 that she was enrolled in the wrong student loan program and her dutiful years of payments would not qualify for PSLF. “I immediately broke down and just started sobbing,” Lawson-Ross told CNBC. “I had planned everything around this.”[8]

Lawson-Ross sued Great Lakes under state law for its affirmative misrepresentations--only to have a U.S. district court rule that federal law preempted a challenge based in state law against the servicer. The ruling came after the Trump administration, in a classic example of federal overreach, advanced a sweeping interpretation of federal preemption in a “Notice of Interpretation” published in March 2018. Fortunately, after Student Defense represented Lawson-Ross in her appeal, the 11th Circuit Court of Appeals reversed the district court in April 2020, ruling that the HEA did not preempt state law when loan servicers make affirmative misrepresentations to borrowers. In a 100 Day Docket policy brief, “Ensuring States Can Protect Student Loan Borrowers,” Student Defense details how Education Department officials can quickly rescind and replace the flawed 2018 Notice of Interpretation, which has fared poorly in the federal courts. Even so, Lawson-Ross, like tens of thousands of misled borrowers, has not yet received the public service loan forgiveness that she planned for and depended on for nearly a decade.

The Secretary of Education also has the authority to extend the 180-day “look-back” window to mark the beginning of approved closed school discharges for a wide array of “exceptional circumstances.” As detailed in the 100 Day Docket paper, “Justice at Last: Pathways to Promptly Expanding Closed School and Borrower Defense Relief Using Existing Regulations,” the Dream Center chain of closures is one of several textbook examples for extending closed school discharge look-back windows.

Numerous U.S. senators and state Attorneys General have already urged the Education Department to extend the closed school discharge look-back date for Dream Center schools to October 17, 2017, the date Dream Center Educational Holdings took over the schools after purchasing them from the Education Management Corporation (EDMC). In fact, the look-back date should extend well beyond the EDMC sale, to November 16, 2015, the date of the Consent Judgement that documented EDMC’s history of egregious misconduct and set its schools firmly on a path to financial ruin, closure, and EDMC’s eventual bankruptcy. EDMC agreed then to an unprecedented Consent Judgment with 39 states and the District of Columbia to resolve allegations of fraud and abuse, deceptive marketing, false claims of accredited programs, and misrepresented job placement and graduation rates. The next day, EDMC separately agreed to a $95.5 million settlement with the U.S. Department of Justice to resolve allegations that the company was running a “high-pressure recruitment mill.” Attorney General Loretta Lynch hailed the settlement, labelling it “the largest False Claims Act settlement with a for-profit educational institution in American history.”[9] In short, if there is any example of “exceptional circumstances” that warrant backdating the window for closed school discharges, the ill-fated Dream Center venture would be at the top of the list.

One former student who should have qualified for a closed school loan discharge was Robert Armour, a 54-year-old corrections officer from Illinois and a client of Student Defense. Armour attended the psychology doctoral program at Argosy University’s Schaumburg, IL campus, which closed abruptly in December 2018, as part of the nationwide collapse of Dream Center Education Holdings. Armour had started the doctoral program to pursue his goal of becoming a staff psychologist, at much better pay, for the Illinois Department of Corrections. But near the end of his 2018 spring semester, Armour was forced to take a leave of absence after he discovered his colon cancer had metastasized to his liver.

Then, while he was still on medical leave, the Schaumburg campus closed, and unfortunately the nearest school offering his doctoral program was in Chicago, a three-hour drive that Armour could not make while battling cancer. “It was devastating” to give up pursuing his degree, Armour told the *Washington Post.* Yet if there was no way to recover the years spent pursuing his doctorate, Armour was at least comforted by the idea that he could have his $100,000 in federal student loan eliminated under the Education Department’s closed school discharge regulations. However, the Education Department denied Armour’s loan discharge application because, in Armour’s recounting, his “chemotherapy didn’t work fast enough” to allow him to return to school within the time frame of the official look-back window. Tragically, Armour died from cancer in October 2020 while waiting to have his loans discharged but Student Defense continued the litigation on behalf of his wife.

Before he died, Armour told the Post, “When a giant college fails and destroys thousands of lives, one would hope the government is there to help pick up the pieces, not to pile on the damage.”[10] Thankfully, the Biden administration has the regulatory authority to help student victims of the Dream Center schools and other abruptly closed schools to pick up the pieces of their lives.

The 100 Day Docket Papers In Brief

The papers, policy briefs, and memorandum that comprise the 100 Day Higher Education Docket include:

1) "Protection and the Unseen: How the U.S. Department of Education's Undeveloped Authorities Can Protect Students and Promote Equity in Higher Education"—Explores undeveloped authorities under the HEA that Department officials can exercise to advance equity and protect students and taxpayers in Program Participation Agreements (PPA), Provisional Program Participation Agreements (PPPA), and Direct Loan Agreements (DLA). Unused authorities include DLA quality assurance protections, such as potentially setting minimum student loan repayment metrics for programs, and provisions to hold individuals who exercise substantial control over an IHE personally liable for financial losses to student borrowers and the Federal government.
2) "Protection and the Unseen: Protecting Students and Promoting Accountability Through Underused Authorities in the Higher Education Act"—Explores largely unused oversight powers of the Department under the HEA in guaranteeing student consumer protections. Rarely used accountability measures include termination from the Title IV program for substantial misrepresentation of an educational program, its costs, or the employability of graduates; civil penalties or fines; limitation actions to impose conditions on continued participation in Title IV; and revocation of provisional PPAs and denials of recertification for Title IV aid, based on findings of consumer abuses and mistreatment. A FOIA request from Student Defense found that the Department did not issue a single subpoena to an IHE from 2010 through 2018.
3) "Promoting Student Opportunity Through Enforcement-Based Accountability"—Examines the history of lax oversight of the federal student loan program dating back to the 1975 Nunn committee report and continued weak enforcement by FSA--which lacked a dedicated enforcement office until 2016 and still suffers a serious shortage of consumer fraud investigators, forensic auditors, and financial specialists. The Department's mandated compliance reviews of IHEs in the federal student aid program are currently on pace to do a compliance review for each institution once every 28 years.
4) "Action Memorandum: Automating the Discharge of Federal Student Loan Debt for Individuals who are Totally and Permanently Disabled"—Makes recommendations, in keeping with statutory obligations, for automatically discharging the federal student loan debt for nearly 400,000 totally and permanently disabled individuals, identified though SSA matching data. The paper projects the 400,000 totally and permanently disabled individuals could receive an estimated $14 billion in

student loan discharges. The memorandum documents serious shortcomings with the Department's current application-based process for discharges.

5) "Justice at Last: Pathways to Promptly Expanding Closed School and Borrower Defense Relief Using Existing Regulations"—Documents the Department's failure to use its own factual findings of misrepresentations and other consumer harms that could give rise to borrower defense claims. Recommends the Department develop borrower defense findings based on its own program reviews, audit determinations, and other administrative channels to establish borrower defense findings for defrauded students. The paper urges the Department to identify "exceptional circumstances," a range of which were identified in a November 2013 Education Department rule, to extend the look-back window for the start of closed-school loan discharge relief at a number of predatory or low-performing for-profit colleges that closed abruptly, and then to provide students that relief automatically. Finally, the paper advocates for returning to the Department's longstanding position of providing full loan relief to defrauded students, ending former Secretary Betsy DeVos's provision of partial relief (and in most cases, no relief for victims of institutional fraud).
6) "How to Bring Back and Improve Upon the Automatic Closed School Discharge Rule," Policy Brief—Recommends that the Automatic Closed School Discharge (CSD) Rule, promulgated by the Obama administration as part of the 2016 Borrower Defense Rule, be reinstated with several modifications. Notwithstanding the statutory mandate that the Secretary "shall" discharge the federal loan debt of students "unable to complete the program…due to the closure of the institution" for decades the Department has required students stranded mid-program by school closures to apply for loan relief. Tens, if not hundreds of thousands of students who deserved loan relief either did not know they were eligible for it or failed to successfully navigate the loan application relief process. In response to this problem, the 2016 Automatic CSD rule provided that any student enrolled at or who attended the school with 120 days of its closure would automatically receive a loan discharge after three years, so long as the Department did not have evidence that the student took out loans to continue their program at a different institution or campus. By December 2019, the Department had provided approximately $336 million in automatic closed school discharges to approximately 30,000 borrowers, an average of about $11,200 per borrower. However, Secretary DeVos repealed the Automatic CSD rule for schools or campuses that closed after July 1, 2020. The policy brief recommends that new rulemaking to reinstate the Automatic CSD rule should shorten the waiting period for an automatic discharge

from three years to one, examine if automatic discharges could be provided to students forced to transfer into a completely different program or a similar program they did not complete, and explore if automatic relief could be extended, as a statutory right, to borrowers at schools that closed prior to November 2013.

7) "Protection and the Unseen: Holding Executives Personally Liable Under the Higher Education Act"—Examines the failure of the Education Department to enforce provisions in the 1992 HEA reauthorization that allow, and in some cases, mandate, that the Department recover financial losses from individuals who own or substantially control IHEs that go bankrupt or engage in fraud. Notes that despite the clear grants of authority to the Department to impose personal liability or require financial guarantees from individuals with substantial control over an institution, the Department's regulations do not include specific procedures by which the Department can demand payment from an individual or effectuate a judgment to collect payments—letting owners of schools that close abruptly escape with large personal profits, while taxpayers and students are left to foot the bills for hundreds of millions of dollars. In praise of the paper, Senator Elizabeth Warren (D-MA) emphasized the importance of holding executives at predatory for-profit colleges personally liable who "got filthy rich off of taxpayer dollars with zero accountability."[11] The paper recommends that the Department start to hold owners personally liable by filing claims under the Federal Debt Collection Procedures Act, the Debt Collection Improvement Act, and by other legal routes.
8) "Improving the Public Service Loan Forgiveness Program"—Advances a series of recommendations for boosting loan forgiveness and fulfilling the purpose of the badly botched Public Service Loan Forgiveness Program (PSLF), as well as to fix the Temporary Expanded Public Service Loan Forgiveness Program, a Congressional correction to PSLF that also failed. Only about two percent of the nearly 200,000 borrowers who applied for public service loan forgiveness have received it--often because loan servicers provided incorrect information about loan programs and employers who qualified for the program.
9) "Ensuring States Can Protect Student Loan Borrowers: Rescind and Replace the 2018 Notice of Interpretation," Policy Brief—Recommends rescinding and replacing the Education Department's Notice of Interpretation, issued by Secretary DeVos in March 2018 on the preemption of state laws with respect to student loan servicing companies. Secretary DeVos asserted that if a student loan servicing company provides affirmatively false information to a borrower, that borrower is without judicial recourse and state attorneys general are preempted from bringing state law

enforcement action against a servicing company that acts deceptively, unfairly, untruthfully, or otherwise violates state consumer protection laws. U.S. Courts of Appeal have vacated the only two court rulings that conformed with the position espoused in the 2018 Notice, indicating that state investigations into violations of state consumer protection laws are not preempted insofar as the underlying law is not preempted. The policy brief recommends immediately revoking the 2018 Notice and issuing two revised interpretations, one on state consumer protection laws, and one on state regulations and oversight, with public comment afforded on both notices.

The analysis and recommendations in the 100 Day Docket papers for advancing consumer protections are carefully grounded in the law, court cases, and regulatory history. Yet it is also worth noting that many of these recommendations happen to accord with the bipartisan beliefs of voters--no small benefit at a time of bitter political polarization. A Data for Progress survey from September 2020 found that 80 percent of both Democrats and Republicans would support the Education Department holding owners and executives of for-profit colleges personally liable if their institutions were found to be engaging or fraudulent behavior.

By more than 40 percent margins, voters also gave a thumbs-up to other 100 Day Docket recommendations. They support automatically discharging federal loans when a college closes while a student is attending it (69 percent favor) and agree that those who work 10 years in public service should get their loans discharged “regardless of their repayment plan” (65 percent support). By even larger margins, Republicans, like Democrats, favor minimum earnings/performance standards for career colleges. Eighty percent of Democrats and 78 percent of Republicans agree that for-profit colleges should have to show that their graduates meet Education Department benchmarks to demonstrate their graduates earn enough to pay back their loans.[12]

The need for the Biden-Harris administration to enhance consumer protection has taken on new urgency because of the Trump administration’s abandonment of accountability in higher education.
Secretary DeVos repealed one of the Department’s only effective minimum performance program standards, the Obama administration’s gainful employment (GE) rule, which required career education programs, on average, to produce graduates who could afford to pay off their federal student loan debts from the earnings of the job for which they were trained. As a result of DeVos’s elimination of the GE rule, a career education program today can have zero graduates, no graduates who found employment in their

field of training, and every one of its students deep in debt--and yet still rake in millions of dollars in federal student aid.[13]

Secretary DeVos similarly eliminated the GE rule's disclosure requirements, which compelled career programs to directly provide students with information about the program's record of performance and to provide a warning when a program left most students saddled with unaffordable debts. She even did away with minimal quality requirements that obligated GE programs merely to certify they were approved by a recognized accrediting agency and that they met their state's educational prerequisites for professional licensure and/or certification exams needed for landing a job in their field of training.

Secretary DeVos defended her repeal of the gainful employment rule, and her opposition to setting and sanctioning programs for failing to meet minimum performance benchmarks, by claiming that "The Government must resist the urge to pick winners and losers among students, institutions, and occupations."[14] DeVos further maintained that the federal government was effectively incapable of making reasoned judgments about minimum performance standards for institutions that relied on federal student aid dollars.

It is noteworthy that DeVos's opposition to minimum outcome standards and sanctions for poorly-performing IHEs departed markedly from most of her Republican predecessors, including William Bennett and Lamar Alexander, who served, respectively, as Secretary of Education under Ronald Reagan and George H.W. Bush. The same is true of Secretary DeVos's opposition to a robust role for federalism in higher education and consumer protection. Traditionally, conservatives have supported a federal-state partnership in higher education, including the application of consumer protection statutes to IHEs by state attorneys general.

The proposals in the 100 Day Docket are rooted not just in the statutory authorities granted to the Department of Education, but also in the obligations and responsibilities imposed by Congress. While it would be a departure from the Department's past practices to, for example, pursue personal liability claims against executives and owners of IHEs, the truth is that previous practices are not compatible with the Department's clear directives under the Higher Education Act and should no longer be reflexively treated as the Department's policy default. Similarly, creating new quality assurance programs through Direct Loan Agreements is novel, and will likely prompt complaints from institutions that would rather not face quality assurance tests. Yet the HEA is clear that the Secretary "shall" implement "a quality assurance system…to ensure that the institution is complying with program requirements and meeting program objectives" – federal statutes do not evaporate merely because they have been neglected or underused. The provisions of the Higher Education Act should not and must not be treated as if they were antiquated, statutory relics of a bygone era.

The ultimate aim of the 100 Day Docket is to have the Education Department, consistent with its statutory authority and obligations, become a student-first and not an institution-first agency. It is well within the power of the Department to complete that overdue shift of mission and purpose.

ENDNOTES

[1] The closest the department has come to requiring quality assurance provisions in Direct Loan Agreements was its decision in 2016 to issue regulations conditioning Direct Loan participation on an IHE's agreement not to enforce mandatory arbitration or class action waiver requirements in student enrollment agreements. At the same time, the department issued regulations that allowed it to identify causes of action that constitute a defense to repayment of a Direct Loan, as well as procedures for the receipt and adjudication of borrower defense claims. The Trump administration sought to strike all of those provisions in its rewrite of the Obama administration's borrower defense regulations.

[2] *Guaranteed Student Loan Program,* Permanent Subcommittee on Investigations, Senate Committee on Government Affairs, Part 1, Nov. 1975, pp. 3, 37, and Part 2, Dec. 1975, p. 271.

[3] Remarks of Rep. James O'Hara (D-MI), chairman of the House subcommittee on postsecondary education, during the House floor debate on the Education Amendments of 1976. O'Hara likened the substantial misrepresentation provision to safeguards protecting consumers from unsafe drugs. He observed: "One of the nation's leading pharmaceutical companies advertises its quality with the slogan, 'We make drugs as if people's lives depend on them.' Schools, too, Mr. Chairman, must be persuaded to limit their claims and advertise their intellectual wares as though a prospective student's adult life may depend on what he gets from that school. A student's choice is too important to allow any room for misrepresentation of that school's program, charge, or the employability it confers upon a student." O'Hara explicitly rejected the argument that cutting off schools from federal aid that had overpromised and misled their students would lead to a narrowing of educational opportunity. "Surely, schools which have violated provisions of this title…should not be allowed to continue to participate in the programs…it is hardly penalizing a student to steer him away from a school which is unable to live within the law." *Congressional Record-House,* 94th Cong., 2nd Sess., Vol. 122, Part 11, May 12, 1976, p. 13496.

[4] While the Department has rarely, if ever, used the substantial misrepresentation test to terminate a program from Title IV mid-operation, in 2016, the Education Department cited evidence of substantial misrepresentation of the employability of a program's graduates in denying *recertification* for Title IV aid to Medtech College, Charlotte School of Law, Marinello Schools of Beauty, Computer Systems Institute, Globe University, and Minnesota School of Business, all of which were for-profit schools.

[5] In 2020, the Trump administration reached a settlement agreement with Temple University that included a $700,000 fine for misrepresentations by the Fox School of Business about the business school's selectivity to the *U.S. News* rankings.

[6] *See Sweet v. DeVos,* No. 19-cv-03674-WHA, Dkt. 108-2 (Letter from Kathryn Davis, U.D. Department of Justice, to Eileen Connor, Legal Services Center of Harvard Law School (Aug. 10, 2020)) at 9-10 (explaining that, to date, the Department has "established categories of eligible borrower defense claims" for only Corinthian and ITT).*See also id* at 2, 13-24 (explaining that claims from borrowers attending the Charlotte School of Law, Marinello School of Beauty, ITT, Westwood, ECA, and many others have been denied).

[7] Clare Lombardo and Cory Turner, "Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised," *National Public Radio,* Morning Edition, Dec. 4, 2019.

[8] Annie Nova, "She was denied public service loan forgiveness, so she filed a lawsuit," *CNBC,* Dec. 20, 2018.

[9] "Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing $95.5 Million Settlement with For-Profit College Company," Remarks as prepared for delivery, U.S. Department of Justice, Nov. 16, 2015.

[10] Danielle Douglas-Gabriel, "Trump administration fights cancer patient on student debt relief," *Washington Post,* Nov. 25, 2019.

[11] Kery Murakami, "Warren Calls for Owners of For-Profits to Be Held Financially Responsible," *Inside Higher Ed,* Oct. 6, 2020. Also see Dan Zibel, "For Profit College Execs Should Be Personally Liable For Their Crimes," *Washington Monthly,* Oct. 19, 2020.

[12] Ethan Winter, Data for Progress, "Voters Support Accountability for Predatory Colleges and Executives, Support Tackling Student Debt Issues," Data for Progress, Student Defense, and the Defend Students Action Fund, Sept. 2020, pp. 2-4, 7.

[13] The New York Times' editorial page summarized the impact of DeVos's plan to repeal the gainful employment rule by observing: "Executives in the for-profit education industry will soon be sleeping better, secure in the knowledge that even the worst are no longer at risk of being thrown off their taxpayer-backed gravy train, no matter how epically they fail their students." Editorial Board, "The DeVos School for the Promotion of Student Debt," *New York Times,* Aug. 26, 2018.

[14] Prepared statement of Secretary of Education Betsy DeVos, "Fiscal Year 2020 Budget Request for the Department of Education," Hearing before the Senate Subcommittee on Labor-HHS-Education Appropriations," March 28, 2019, p. 12.