April 24, 2023

U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue S.W.
Washington, D.C. 20202
VIA ELECTRONIC SUBMISSION

Re: Intent to Establish a Negotiated Rulemaking Committee (Docket ID ED-2023-OPE-0039)

Dear Secretary Cardona,

The Student Borrower Protection Center (SBPC), a national policy non-profit organization committed to ending the student debt crisis, submits this comment in response to the U.S. Department of Education's (ED) Notice of Proposed Rulemaking (NPRM) published to the Federal Register on March 24, 2023.[1] This comment responds to ED's request for feedback on its selection of topics for consideration during its upcoming negotiated rulemaking (the rulemaking or the agenda) process. SBPC applauds ED for recognizing the need to revise student protections in certain areas, and it offers suggestions for additional topics that merit inclusion in the rulemaking process. In addition, SBPC offers preliminary commentary on the nature of the changes that ED and the rulemaking committee(s) should pursue via rulemaking to certain topics in the final agenda.

When proposing new regulations for programs authorized under the Higher Education Act (HEA), ED is quite literally deciding whether or not students will continue to be preyed upon by sophisticated actors ranging from large banks and for-profit colleges to small scams and unscrupulous debt collectors. For too long, and in too many areas, ED has allowed bad conduct and its associated harm to be widespread. But right now, with the rulemaking process, ED can change course. On behalf of tens of millions of students present and future, SBPC insists that it do so.

Accordingly, SBPC offers the following reflections on various topics that were and were not included in ED's proposed agenda.

[1] U.S. Dep't of Educ., *Intent to establish a negotiated rulemaking committee*, (Docket ID ED-2023-OPE-0039), 88 FR 17777 (Mar. 24, 2023).

I. SBPC should reform rules surrounding institutional debt and the return of Title IV funds so as to better protect students.

So-called "institutional debt"—debts owed by current and former students directly to their school—have garnered increased attention in recent years. This attention has in large part been focused on the tactics that schools use to collect on these debts, such as withholding students' transcripts or offsetting benefits.[2] Although these tactics are generally ineffective in helping schools recoup funds,[3] they can be extremely harmful to the students' financial, educational, and professional well-being.[4] For this reason, in the fall of 2022, the Consumer Financial Protection Bureau (CFPB) announced that schools' blanket transcript withholding policies are "abusive," meaning that they stand in violation of federal consumer protection law given their disproportionate harm to students relative to the benefit to the schools.[5]

These debts are extensive. One report based on national school survey responses revealed that institutional debts total $15 billion nationwide and affect an estimated 6.6 million individuals.[6] According to that report, the average balance owed at community colleges is more than $631.[7] A recent report by the Virginia Secretary of Education, which was derived from actual school data and is discussed in greater detail below, revealed that the average debt owed at a 2-year public college was $687,[8] which aligns with the national study.

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[2] *See*, *e.g.*, Jon Marcus, *Colleges are withholding transcripts and degrees from millions over unpaid bills*, The Hechinger Report (Mar. 22, 2021), https://hechingerreport.org/colleges-are-withholding-transcripts-and-degrees-from-millions-over-unpaid-bills/; Amir Vera, *HBCUs are canceling students' debt, highlighting how integral they are to Black Americans' lives*, CNN (Aug. 3, 2021), https://www.cnn.com/2021/08/03/us/hbcu-student-debt-cleared/index.html; Kirk Carapezza, *More Than Half Of Public Colleges in Mass. Used COVID Relief Funds To Cover Unpaid Student Bills*, W.G.B.H. (Aug. 19, 2021), https://www.wgbh.org/news/education/2021/08/19/more-than-half-of-public-colleges-in-mass-used-covid-relief-funds-to-cover-unpaid-student-bills; Megan Pauly, *Direct-to-school debt prevents students from finishing college and moving forward*, V.P.M. (Nov. 7, 2021), https://vpm.org/news/articles/26871/direct-to-school-debt-prevents-students-from-finishing-college-and-moving.

[3] Rebecca Maurer, *Withholding Transcripts: Policy, Possibilities, and Legal Recourse* 29 (Dec. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288837 (studying public college debts collected by Ohio Attorney General finding transcript withholding only yields $0.07 for every dollar owed).

[4] Megan Pauly, *Direct-to-school debt prevents students from finishing college and moving forward*, V.P.M. (Nov. 7, 2021), https://vpm.org/news/articles/26871/direct-to-school-debt-prevents-students-from-finishing-college-and-moving.

[5] Meredith Kolodner, *Withholding College Transcripts for Loan Payment Is 'Abusive,' Agency Says*, N.Y. Times (Sept. 30, 2022), https://www.nytimes.com/2022/09/30/business/college-transcripts-student-loans.html.

[6] Julia Karon, James Dean Ward, Katherine Bond Hill & Martin Kurzweil, Ithaka S+R, *Solving Stranded Credits* (Oct. 5, 2020), https://sr.ithaka.org/wp-content/uploads/2020/10/SR-Report-Solving-Stranded-Credits-100520.pdf.

[7] *Id.* at 12.

[8] Virginia Sec'y of Educ., *Report on Student Debt Collection Practices and Policies at Public Institutions of Higher Education (2022 Appropriation Act, Item 128.C)* 16 (Dec. 2022), https://rga.lis.virginia.gov/Published/2022/HD15/PDF (Virginia Report).

Although data about institutional debt remains limited, one clear source of these debts appears to be the federal Return to Title IV program (R2T4). Pursuant to R2T4, if a Title IV-receiving student withdraws from their program before 60 percent of the term has elapsed, their school must return a prorated amount of the student's federal aid to ED.[9] It is not required by R2T4, but schools generally then charge the withdrawn student for the amount of the returned funds, creating a balance on the student's account.[10] Given that these balances are institutional debts, schools can use the myriad of tactics described above to collect these balances. This creates severe barriers to enrollment, retention, graduation, and employment, all of which are critical priorities for ED.

In response to the COVID-19 pandemic, Congress included in the "Coronavirus Aid, Relief, and Security" Act (CARES Act), a waiver of the normal R2T4 rules for withdrawals related to a qualifying emergency.[11] Presumably, this was, in part, intended to protect students who had to withdraw due to the pandemic from incurring institutional debts that would pose future financial burdens and barriers to graduation and employment. Unfortunately, based on the limited available data, it appears as though schools continued to return federal financial aid for students throughout the applicable waiver periods, unnecessarily throwing their students into debt. One study estimates that during the pandemic's first two years, 750,000 students in California accrued $390 million in institutional debts due to this practice.[12]

What little data is available suggests that institutional debts disproportionately burden low-income students, and Black and Hispanic students.[13] A study commissioned by the Virginia General Assembly in 2022 required public institutions in the state to report on their institutional debt and collection practices, including demographic data.[14] To our knowledge, this is the first and only report of its kind to draw on actual debt and demographic data, rather than extrapolation. The results make clear that these debts are not borne evenly across the enrolled student population.

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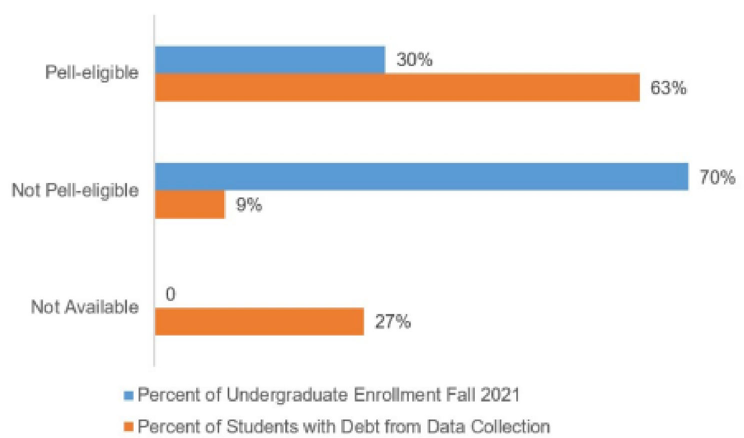
[9] *See* 34 C.F.R. § 668.22(e).
[10] *See generally* Charlie Eaton, Jonathan Glater, Laura Hamilton, & Dalie Jimenez, *Creditor Colleges: Canceling Debts that Surged During COVID-19 for Low-Income Students* 4 (Mar. 2022), https://protectborrowers.org/wp-content/uploads/2022/03/Creditor-Colleges.pdf.
[11] Coronavirus Aid, Relief, and Security Act, Public Law No. 116 - 136, 134 Stat. 281 (2020); Office of Postsecondary Educ., U.S. Dep't of Educ., *UPDATED Guidance for interruptions of study related to Coronavirus (COVID-19)* (Updated June 16, 2020), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-05-15/updated-guidance-interruptions-study-related-coronavirus-covid-19-updated-june-16-2020.
[12] *Eaton, Glater, Hamilton, & Jimenez, supra* note 10*,* at 4.
[13] Virginia Report, *supra* note 8, at 14 (Author Note: term "Hispanic" is used by Virginia Report authors and is used in these comments in reference to the findings of that report).
[14] *Id.*

For example, although low-income students—as measured by their eligibility for a Federal Pell Grant—make up only 30 percent of enrollment at Virginia's two-year public colleges, they comprise 63 percent of those students who owe debts to those schools.[15]

Pell-eligible students with debt at public two-year institutions

Student Type	Total Students with Debt	Share of Total Students with Debt	Total Debt Amount	Share of Total Debt	Averag e Debt Amount
Pell-eligible	9,402	63%	$7,221,639	71%	$768
Not Pell-eligible	1,369	9%	$1,121,655	11%	$819
Not Available	4,056	27%	$1,839,295	18%	$453
Total	**14,827**	**100%**	**$10,182,588**	**100%**	**$687**

Comparison of undergraduate enrollment and Pell-eligible students: public two-year institutions



Source: Virginia Report at 16

In the context of R2T4, the disproportionate rate at which Pell-eligible students accrue these institutional debts is alarming, as the data suggest a correlation between low-income students receiving federal financial aid and owing institutional debts.

At those same schools, Black and Hispanic students comprise 17 percent and eight percent of enrolled undergraduates, but make up 40 percent and 11 percent, respectively, of those students who owe debts to their schools.[16] In addition, the average balance among Black students who

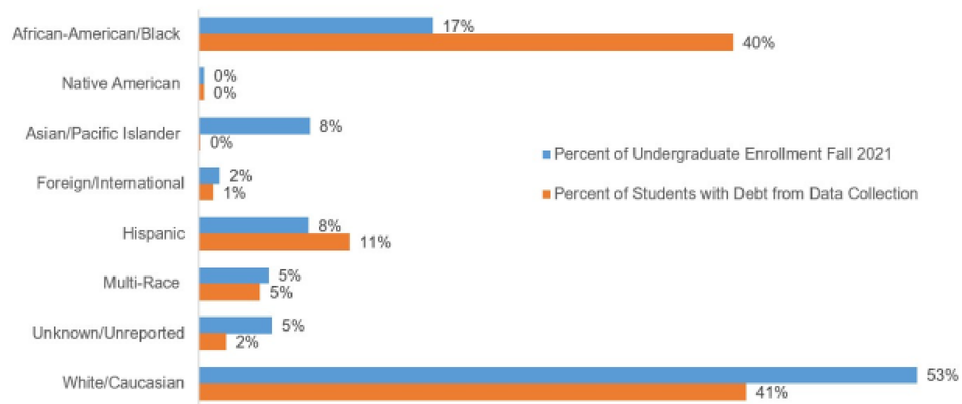
[15] Virginia Report, *supra* note 8, at 16.
[16] *Id*. at 14.

owe a debt to their school is more than $120 greater than the average balance among white students who do so, and the average balance among Hispanic students who owe on an institutional debt is more than $50 greater than the average balance among white students.

Student debt by ethnicity at public two-year institutions

Ethnicity	Total Students with Debt	Share of Total Students with Debt	Total Debt Amount	Share of Total Debt	Average Debt Amount
African American/Black	5,897	40%	$4,397,713	43%	$746
Native American	59	0%	$45,834	0%	$777
Asian/Pacific Islander	20	0%	$11,232	0%	$562
Foreign/International	160	1%	$136,730	1%	$855
Hispanic	1,663	11%	$1,125,057	11%	$677
Multi-Race	680	5%	$481,312	5%	$708
Unknown/Unreported	305	2%	$212,136	2%	$696
White/Caucasian	6,043	41%	$3,772,575	37%	$624
Total	**14,827**	**100%**	**$10,182,588**	**100%**	**$687**

Comparison of undergraduate enrollment and student debt by race/ethnicity at public two-year institutions



Source: Virginia Report at 14

The Virginia report must be a call to action for ED; Title IV schools are trapping their students in debt, with the effects felt disproportionately in low-income and Black and Hispanic communities.

In the upcoming rulemaking process, we therefore urge ED to consider the following two proposals related to R2T4:

- ***ED should publish school-level data on returned funds, including student demographic information***. ED is uniquely positioned to provide comprehensive, nationwide data on the relationship between R2T4 and institutional debt. It can use these data to inform its own programming and recruitment and retention programming at Title IV schools, as well as to examine ED's own role in trapping students in cycles of poverty.

- ***ED should revise the R2T4 amendments to prohibit schools from charging students for returned federal financial aid***. R2T4 returns are prorated based on how much of the aid the student "earned" up till the time of withdrawal.[17] Conversely, by charging students for returned funds, schools recoup the full term's revenue, including for time that the student was no longer enrolled and did not receive any educational instruction or benefit. This is a windfall for schools, which are paid for services that were not rendered and are out of sync with the student experience. ED should amend its regulations to restrict schools' ability to charge students for tuition and fees that the school has not itself "earned" through instruction to students.

II. ED must vastly improve its cash management rules to provide more safeguards for students.

ED's rules related to cash management, and particularly those housed in C.F.R. § 668.164 pertaining to the disbursement of student funds, provide important safeguards around the delivery of students' money. Under these rules, students are able to access surplus Title IV funds via school-sponsored prepaid cards and debit cards linked to deposit accounts (referred to as "campus cards") instead of being paid via paper check or direct deposit into an existing personal bank account. Present regulations define two avenues by which schools can enter into cash management deals with financial institutions: so-called Tier 1 agreements, where a school pays a company to disburse students' money into an account that the firm provides, and Tier 2 agreements, where companies pay the school for the ability to market their account offerings on campus.[18] Tier 1 agreements are generally governed by stricter terms, such as that the student must not face charges for overdrafts or for opening an account.[19] In addition, per existing regulations, both Tier 1 and Tier 2 agreements must be drafted such that the "the terms of the accounts offered" are "not inconsistent with the best financial interests of the students opening

[17] *See* 34 C.F.R. § 668.22(a).
[18] Consumer Fin. Prot. Bureau, *College Banking and Credit Card Agreements Annual Report to Congress*, 11-12 (Oct. 2022), https://files.consumerfinance.gov/f/documents/cfpb_college-banking-report_2022.pdf (The explanation above is simplified, but note that the CFPB has stated anyway that "[I]t is not always clear which category a partnership is governed by, and IHEs are not required to report this information").
[19] 34 C.F.R. § 668.164(e)(2)(iv) (2015).

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them."[20] Schools can satisfy the necessity to ensure that these products are not inconsistent with students' best financial interests if the colleges provide documentation that they conduct "reasonable due diligence reviews" at least every two years to determine whether their arrangements' fees are, "considered as a whole, consistent with or below prevailing market rates."[21] Further, for schools to satisfy the "not inconsistent" standard, the cash management contracts that they enter into with financial institutions must have provisions allowing the agreement to terminate based on student complaints or if information in the required biennial reviews shows that fees in student-facing products are above market rates.[22]

Unfortunately, recent evidence shows that the existing regulations governing cash management have proven to be insufficient to protect students from predatory practices. These regulations were promulgated in 2015 after investigations, audits, and legal actions by federal officials indicated that the providers of campus cards were using a wide range of junk fees and harmful tactics to damagingly nickel-and-dime students.[23] But in 2017, a CFPB examination found that campus card providers had charged students more than $27 million in a single year through fees such as "overdraft fees, out-of-network ATM fees," and other charges that ED's 2015 rulemaking had apparently failed to eliminate.[24] The CFPB found in the report that one bank, Wells Fargo, charged borrowers an average of $46.99 per account that year to generate more than $14 million in fees, all while passing more than $2 million back to schools.[25] Then, in 2019, the advocacy group U.S. PIRG published a report noting that campus cards continued to "carry a range of fees, such as out-of-network withdrawal fees, wire transfer fees, and overdraft fees that are typically around $35 each," leading students to pay tens of millions of dollars in dubious charges.[26] The publication exposed how paid marketing agreements between schools and financial

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[20] *Id*. at § 668.164(e)(2)(ix), (f)(4)(viii).
[21] *Id*.
[22] *Id*.
[23] *See* discussion of "The College Banking Market" https://www.federalregister.gov/documents/2015/05/18/2015-11917/program-integrity-and-improvement; Press Release, FDIC, FDIC Announces Settlement with WEX Bank and Higher One for Deceptive Practices Related to Debit Cards for College Students (Dec. 23, 2015) (on file with author); Jason Lange & Sarah N. Lynch, *Higher One Must Repay Millions to Students Over 'Deceptive' Financial Aid Practices*, THE HUFFINGTON POST (Dec. 27, 2015), https://www.huffpost.com/entry/higher-one-repay-millions_n_56802738e4b06fa688805b43; *College Credit Card Agreements*, CFPB Ann. Rep. to Congress (Dec. 2014); Rich Williams & Edmund Mierzwinski, *The Campus Debit Card Trap: Are Bank Partnerships Fair to Students?*, U.S. PIRG EDUC. FUND (May 2012), https://uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf; *Perspectives on Financial Products Marketed to College Students*, CFPB (Mar. 26, 2014), https://www2.ed.gov/policy/highered/reg/hearulemaking/2014/pii2-cfpb-presentation.pdf.
[24] Cheryl Parker Rose, Letter to Dep't of Educ. (Feb. 5, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_foia_letter-to-department-education_record_2018-02.pdf.
[25] *Id*. at 8.
[26] U.S. PIRG Education Fund, *Debit Cards on Campus, Putting Students' Financial Well-Being at Risk* (April 2019), https://uspirg.org/sites/pirg/files/reports/USP_Debit-Cards-On-Campus_040419-v2.pdf.

institutions—which the CFPB has noted may cut against students' interests[27]—were associated with students paying 2.3 times more in fees than students at schools without them.[28]

The situation only got worse from there. In 2022, SBPC and U.S. PIRG sent a letter to the CFPB highlighting in part that many of the largest financial institutions in the world were still "burying borrowers under such junk fees as out-of-network ATM fees, account closure fees, monthly service charges, balance inquiry fees, and nearly universal overdraft and NSF fees."[29] In one notable example, the letter pointed to "a Truist-backed card available at Florida State University [that] has an account closure fee of up to $30, a $3 domestic out-of-network ATM fee, a monthly $15 dormant account fee, a $36 overdraft fee, and a $12.50 transfer fee for when borrowers overdraft their account but have sufficient funds to cover their transaction in another linked account at the same institution (that is, a $12.50 charge for Truist to wire money to itself that it knows it already has)."[30] The letter highlighted student narratives illustrating how junk fees associated with campus accounts forced students to grapple with food insecurity, housing insecurity, the inability to afford necessary medicines, and even the need to drop out of school.[31]

Then, later in 2022, the CFPB published a report finding that colleges and financial institutions were "steering students to more expensive financial products" under the existing cash management regulations, including through contract provisions allowing companies to charge students up to "five overdraft or NSF penalties, per day, costing $175."[32] In addition, the CFPB's report highlighted how the company BankMobile, which controls 70 percent of the campus card market, had deployed a host of deceptive tactics to extract fees from students, including misleading them away from less costly accounts that were available to them and stating only in their fine print that financial aid disbursements did not count toward the minimum balance that borrowers would need to have to avoid a fee.[33] The CFPB noted that many of the predatory practices it uncovered were "similar to those identified in [a] 2014 ED Inspector General report" outlining certain harmful practices in the campus card space, raising the question of what progress, if any, has been made since the 2015 rulemaking.[34]

[27] *CFPB Finds Bank Marketing Deals With Colleges Can Mean Costly Fees and Risks for Students*, Consumer Fin. Prot. Bureau (Dec. 14, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-bank-marketing-deals-colleges-can-mean-costly-fees-and-risks-students/.
[28] *Id*.
[29] Letter from the Student Borrower Prot. Ctr. and U.S. PIRG to Rohit Chapra, Dir., Consumer Fin. Prot. Bureau (Apr. 11, 2022), (on file with author) https://protectborrowers.org/wp-content/uploads/2022/04/SBPC_US-PIRG-EF_Junk-Fees.pdf (citations omitted).
[30] *Id*.
[31] *Id*.
[32] Consumer Fin. Prot. Bureau, *CFPB Report Finds High Fees Charged on Student Banking Products Endorsed by Colleges*, Consumer Fin. Prot. Bureau (October 13, 2022) (CFPB Report), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-high-fees-on-student-banking-products-endorsed-by-colleges/.
[33] CFPB Report, *supra* note 32.
[34] *Id.* at 40.

With every student harmed by the junk fees and predatory practices that pervade the campus card space, it becomes only more clear that ED's existing cash management regulations are insufficient. We applaud ED for including the topic in its agenda. In addition, we offer the following preliminary observations for how the cash management rules should ultimately be revised:

- ***ED should replace the "not inconsistent with" standard with a "consistent with" standard.*** ED's current stipulation that cash management products must be designed in a way that is "not inconsistent" with students' best financial interests is clearly falling short.[35] In the place of this failed standard, ED should require that these products must be affirmatively "consistent with" students' best financial interests. In doing so, ED should enshrine in its regulations that certain fees—such as NDF fees, overdrafts, minimum balance fees, inactivity fees, and more[36]—are presumptively *not* in students' best interest.[37] Further, noting that they lead students to pay 2.3 times more in fees and that even the CFPB has noted their ability to "compromise the ability of [colleges] to prioritize their students' financial well-being,"[38] ED should consider whether Tier 2 agreements as a whole might not be consistent with students' best financial interests.[39]

- ***ED should heighten specificity around "reasonable" due diligence and requirements "for termination of the arrangement" by the institution for poor counterparty conduct.*** As mentioned above, schools are required to conduct "reasonable due diligence reviews at least every two years to ascertain whether" fees imposed under their cash management arrangements are not above market rates, and they must have terms in their cash management contracts allowing them to terminate deals if either they find that fees are above market rates *or* that students are complaining about the school's counterparty.[40] Clearly, these regulations are not stringent enough. (Indeed, it is often unclear whether such reviews are happening, or what value they have when they do take place. The CFPB mentioned in the 2022 report cited above that "certain IHEs might not be conducting

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[35] Memorandum from Sarah Baker, Stefan Maletic, Brendan Morrissey, & Sydney Teng Consumer Financial Transaction Clinic at the University of North Carolina School of Law on Campus Debit and Prepaid Cards and the Best Financial Interest Standard to Student Borrower Protection Ctr. 8 (on file with Student Borrower Protection Ctr.) It is telling that ED has not bothered to clarify what this standard even means, *See* https://protectborrowers.org/wp-content/uploads/2021/05/SBPC-UNC-Legal-Memo.pdf#page=8.
[36] *Id*. at 15. (listing all the fees and how ED should think about them).
[37] Letter from Annmarie Weisman, Assistant Sec'y for Policy, Planning, and Innovation, Office of Postsecondary Education, to Colleagues (Oct. 13, 2022), (Of course, the Department has already raised the question of whether overdrafts are still even compatible with the "not inconsistent with" standard.) https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-10-13/cash-management-tier-one-and-tier-two-arrangements.
[38] CFPB Report, *supra* note 32; *See also* Rose, *supra* note 24*,* at 12.
[39] U.S. PIRG Education Fund, *supra,* at 18 (referring to Tier 2 agreements as "Paid Marketing Agreements").
[40] 34 C.F.R. § 668.164(e)(2)(ix), § 668.164(f)(4)(viii).

independent reviews" at all, and that where the reviews are conducted, they are haphazard and inconsistent.[41]) ED should heighten the requirements for due diligence reviews by adding greater specificity around schools' obligations pursuant to them. For example, schools are currently allowed to consider the fees that banks charge "as a whole," allowing for sharp and possibly harmful variations in fees on a month-to-month basis.[42] They should instead have to examine each particular fee and the detailed nature of how much students are paying under it.

In addition, third parties are currently required to provide schools with information regarding only the "mean and median of actual costs" incurred by account holders.[43] These limited reporting requirements leave students in the dark regarding how many students actually pay each fee, how much they pay on each fee, which fees are most commonly assessed, and more.[44] To address this, ED should require schools to consider and publish more granular detail on the charges students face, including requiring them to ask for all fee types assessed in order of assessment frequency, the number of student accounts assessed for each specific fee, the average and median fees paid by the student for each specific fee imposed, and much more.[45] Given that the CFPB's 2022 report noted that ED's database of cash management contracts had not, at that time, been updated since 2018,[46] ED should include in its regulation-specific calendar dates each year by which schools will be expected to update their disclosures, and it should include penalties for a failure to report. (Of course, if the bottleneck on these database updates is ED itself, then ED should simply do better.) Moreover, given that "banks are not currently required to notify or seek approval from schools for fee increases levied upon students after those banks reach agreements with colleges,"[47] ED should require schools to install in their cash management contracts a requirement for financial institutions to notify them immediately about any changes to fees, and it should, in turn, require schools to immediately disclose any fee changes to students and ED.

Finally, given the apparent rarity of schools terminating cash management contracts despite ample evidence of student harm, ED should require these contracts to have pre-defined, automatic triggers for termination. For example, ED could require schools to install a "three strikes" rule for cases of a school identifying above-market fees, where the contract would automatically terminate if such fees were found three times over a given period. To enforce this rule, ED could revise its regulations to include penalties for schools that fail to identify above-market fees. ED could also require schools to have

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[41] CFPB Report*, supra* note 32, at 9.
[42] *Id.*
[43] *Id*. at § 668.164(e)(2)(vii)(B), (f)(2)(ii), (f)(4)(iv)(B).
[44] *See* CFPB Report*, supra* note 32, at 12.
[45] *Id.* at 15.
[46] *Id.* at 14 ("The database has not been updated since 2018.").
[47] CFPB Report, *supra* note 32, at 11.

clearer tools for students to submit complaints about schools' cash management partners, and it should in parallel establish objective standards that would trigger automatic contract termination in instances where financial institutions draw an outsized share or volume of student complaints.

- ***ED should require that schools and their cash management contractors be held jointly and severally liable for student harm and violations of law.*** Under existing regulations, schools are required to "[t]ake affirmative steps, by way of contractual arrangements with the financial institution as necessary, to ensure that" financial institutions are complying with ED's cash management rules. As described above, however, this standard is clearly not delivering student protection. Schools play a distinct role in this breakdown; the CFPB's 2022 report, for example, found that many colleges are failing to prominently post the disclosures that students might rely on to make informed choices about cash management options, directing students to lists of account options that overtly violate ED's standards, and ignoring the requirement that their partners must present information on product offerings in a "neutral manner."[48] In response, ED should revise its regulations to stipulate that schools will be jointly and severally liable for any violations that financial institutions make while providing financial services to their students under cash management contracts. Students reasonably rely on schools to provide them trustworthy advice when directing them toward or otherwise putting the school's imprimatur on a financial product,[49] and schools should share liability in instances where they lead students astray.

III. ED must ensure that third-party servicers are subjected to reporting, disclosure, and audit requirements to ensure student safety.

Over the past several years, institutions of higher education have come to rely on a growing variety of outside third parties to perform or facilitate increasingly core aspects of colleges' jobs as schools.[50] As SBPC detailed in a recent letter to ED, these third parties range from firms that manage universities' relationships with private student lenders all the way to "online program managers" (OPMs) that provide bundled recruitment services alongside online, often low-quality

[48] CFPB Report, *supra* note 32, at 5.
[49] Univ. of Cal., Irvine Sch. of Law, *Ensuring Fair Dealing in Financial Markets with Director Rohit Chopra*, YouTube (Apr. 3, 2023), https://www.youtube.com/watch?v=P4SNQc_U6aU.
[50] *See generally* Letter from the Student Borrower Prot. Ctr., to Miguel Cardona, Sec'y, U.S. Dep't. of Educ. (on file with author) (Mar. 30, 2023), https://protectborrowers.org/letter-in-response-to-the-department-of-educations-request-for-comments-on-its-dear-colleague-letter-regarding-requirements-and-responsibilities-for-third-party-servicers-and-institutions/; *See also* Letter from Annmarie Weisman, Deputy Assistant Sec'y for Policy, Planning, and Innovation, Office of Postsecondary Educ., to Colleagues (Feb. 15, 2023), https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-feb-28-2023 (where ED acknowledges there being a "large and growing industry" that performs key "activities and functions" on behalf of institutions of higher education).

course delivery.[51] Congress sensibly authorized ED in the HEA to install regulations "to establish minimum standards with respect to sound management and accountability" for these so-called "third-party servicers" (TPS),[52] helping build a bulwark against the risks that necessarily arise when schools rely on outside entities to carry out vital functions.

ED's resulting regulations define a TPS as any "individual or a State, or a private, profit or nonprofit organization that enters into a contract with an eligible institution to administer . . . ***any*** aspect of the institution's participation in any Title IV, HEA program" (emphasis added).[53] The regulations then impose a range of responsibilities and standards on those companies, including requiring them to agree to be jointly and severally liable for violations of the Higher Education Act,[54] disclose contracts to ED upon the Secretary's request,[55] submit to independent audits,[56] and more.[57] Subsequent guidance, including a Dear Colleague letter that ED recently proposed, has noted that the tangled nature of TPS' involvement in schools' day-to-day work often makes it impossible or meaningless to determine that a given company performing third-party services is *not* involved in the school's engagement with Title IV programs and therefore not a TPS, even if the company is not necessarily involved with the financial aid aspects of participation in Title IV.[58]

Accordingly, as SBPC noted in its recent letter to ED, the existing TPS regulations amount to a robust starting point that the agency could use to install broad accountability and transparency across this space.[59]

However, the record around TPS supervision and the harms that have subsequently arisen for students illustrate that the existing regulations are insufficient both as written and as enforced to protect the public from predatory conduct. In particular, as SBPC wrote in its recent letter to ED, "the largest third-party servicers serve far more students than many small and mid-sized colleges. But there has not yet been an effort by the federal government to systematically scrutinize these firms' operations or finances at the enterprise level, to assess these companies' compliance with federal higher education law, or to evaluate whether the closure of one or more firms could pose

[51] *Supra* note 50.
[52] 20 U.S.C.S. § 1082 (2022); *Id*. at § 1088 (2015).
[53] 34 C.F.R. § 668.2 (2021).
[54] *Id*. § 668.25(c)(3).
[55] *Id*. § 668.25(e)(2).
[56] *Id*. § 682.416(e).
[57] *Id*. § 668.25, § 668.2.
[58] Letter from Annmarie Weisman, *supra* note 50. ("Since we issued our most recent Dear Colleague Letters regarding third-party servicers, the U.S. Department of Education (Department) has reviewed numerous contractual arrangements between institutions and outside entities. These reviews have confirmed that most activities and functions performed by outside entities on behalf of an institution are intrinsically intertwined with the institution's administration of the Title IV programs and thus the entities performing such activities are appropriately subject to TPS requirements.").
[59] *Id.*

a risk to the entire higher education sector—all of which constitutes the basic diligence expected of federal regulators across the economy."[60] Instead, ED has allowed TPS to expand and take on ever-more central roles at schools without a commensurate increase in scrutiny, despite growing evidence that this outsourcing involves risks to students.

The prevailing situation surrounding OPMs makes this broken status quo concrete. SBPC, its partners, and journalists have previously detailed how schools across the country have become extremely dependent on OPMs for key aspects of course marketing and subsequent program delivery, with some colleges now depending on OPMs for more than half of enrollment.[61] OPMs have consequently seen explosive growth, with industry-wide revenues estimated at $4 billion per year and slated to rise to $10 billion per year by 2025.[62] But as these firms have spread their reach, a wide range of investigators and advocates have documented how OPMs frequently use deceptive marketing, false promises, and boiler-room sales tactics usually associated with the last generation of disgraced for-profit colleges to drive students into massive debt for low-quality courses.[63] Worse, research shows that OPMs frequently target their high-pressure recruitment

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[60] Letter from Annmarie Weisman, *supra* note 50.

[61] Stephanie Hall, *Invasion of College Snatchers*, The Century Found (Sept. 30, 2021), https://tcf.org/content/report/invasion-college-snatchers/; Letter from the Student Borrower Prot. Ctr., to Miguel Cardona, Sec'y, U.S. Dep't of Educ. (Mar. 16, 2022) (on file with author), https://protectborrowers.org/letter-to-the-department-of-education-regarding-the-incentive-compensation-ban-and-bundled-services/; Lisa Bannon and Rebecca Smith, *That Fancy University Course? It Might Actually Come From an Education Company.*, The Wall Street Journal (July 6, 2022, 12:54 PM), https://www.wsj.com/articles/that-fancy-university-course-it-might-actually-come-from-an-education-company-11657126489.

[62] IBL News, *The Pandemic Accelerates the OPM Business: Universities Pay $4 Billion a Year*, IBL News (Jan. 26, 2021), https://iblnews.org/the-pandemic-accelerates-the-opm-business-universities-pay-4-billion-a-year/.

[63] Student Borrower Prot. Ctr., *Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Towards Risky Private Debt and Credit* (June 2021), https://protectborrowers.org/pushing-predatory-products-how-public-universities-are-partnering-with-unaccountable-contractors-to-drive-students-toward-risky-private-debt-and-credit; Stephanie Hall, *Dear Colleges: Take Control of Your Online Courses*, The Century Foundation (Sept. 12, 2019), https://tcf.org/content/report/dear-colleges-take-control-online-courses/; Lisa Bannon & Andrea Fuller, *USC Pushed a $115,000 Online Degree. Graduates Got Low Salaries, Huge Debts,* The Wall Street Journal (Nov. 9, 2021), https://www.wsj.com/articles/usc-online-social-work-masters-11636435900; House Appropriations Comm., *FY 2023 Budget Request for the Department of Education (EventID=114648)* (Apr. 28, 2022), https://www.youtube.com/watch?v=qh9so6p2VOs; Andrea Fuller & Lisa Bannon, *Democratic Senators Probe Whether Online Degree Programs Contribute to High Student Loan Debt*, The Wall Street Journal (Jan. 14, 2022, 6:44 PM), https://www.wsj.com/articles/democratic-senators-probe-whether-online-degree-programs-contribute-to-high-student-debtloads-11642203842; Michael Vasquez, *'They Didn't Care': Inside One University's Sputtering Online Partnership With 2U*, The Chronicle of Higher Educ. (June 1, 2022), https://www.chronicle.com/article/they-didnt-care-inside-one-universitys-sputtering-online-partnership-with-2u?; Kevin Carey, *The Creeping Capitalist Takeover of Higher Education* (Apr. 1, 2019), https://www.huffpost.com/highline/article/capitalist-takeover-college/.

strategies toward Black and low-income students.[64]

OPMs are able to engage in this predatory conduct in no small part because the existing TPS regulations have provided the space for ED to shy away from strong enforcement. In particular, despite the clear language of the regulation, ED has historically (and puzzlingly) decreed through sub-regulatory guidance that OPMs and other firms that provide marketing and course delivery services do not qualify as TPS. (The recently proposed Dear Colleague letter mentioned above seeks to change that, but it has been delayed and is now subject to litigation.[65]) As a result, ED has been empowered to establish little oversight of this large and risky market. A recent Government Accountability Office report, for example, found that:[66]

- ED does not even know precisely how many arrangements there are between schools and OPMs;
- ED's audits of colleges' relationships with OPMs are so weak that schools can often pass through them with their OPM deals going wholly unexamined, generally because ED does not even know that such arrangements exist; and
- ED has handed over key responsibilities for diligence over OPMs to schools, but college staff often do not know the details of the services that OPMs provide, and in some cases colleges have withheld information from ED on their contracts with OPMs without apparent recourse.

Moreover, while the currently weak drafting of the TPS regulations allows OPMs to avoid the disclosure of their contracts with schools, what we *do* know about these contracts is extremely concerning. For example, U.S. Senators Elizabeth Warren, Sherrod Brown, and Tina Smith recently noted in a letter to OPM industry executives[67] that the companies' contracts have come to include penalties if the university counterparty "lowers tuition, raises admissions standards, or otherwise reduces revenue,"[68] as these actions could threaten the OPM's bottom line. One OPM contract for an online course at a public college required the company to "contact every

[64] Laura Hamilton & Christian Michael Smith, *OPM Contracts Reveal Risks for Students and Universities*, Student Borrower Protection Ctr. (July 19, 2022), https://protectborrowers.org/opm-contracts-reveal-risks-for-students-and-universities/.
[65] Alison Griffin & Noah Sudow, *ED Further Delays TPS Dear Colleague Letter, Signals More Changes to Come*, White Board Asvisors, https://whiteboardadvisors.com/ed-further-delays-tps-dear-colleague-letter-signals-more-changes-to-come/; Doug Lederman, *2U Sues Education Department Over Outsourcing Guidance*, Insider ED (Apr. 5, 2023), https://www.insidehighered.com/quicktakes/2023/04/05/2u-sues-education-department-over-outsourcing-guidance.
[66] U.S. Gov't Accountability Office, Higher Educ. Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers (Apr. 2022), https://www.gao.gov/assets/gao-22-104463.pdf.
[67] Letter from Elizabeth Warren, Tina Smith, & Sherrod Brown, U.S. Sen., U.S. Senate, to CEOs of Educational Services (Jan. 14, 2022), https://www.warren.senate.gov/imo/media/doc/2022.01.14%20Follow%20up%20letter%20to%20Online%20Program%20Managers%20(OPMs)_.pdf.
[68] *Id.*

prospective student at least 13 times per day, for ten days in a row."[69] Researchers have additionally described how in many contracts, "the OPM is granted formal decision-making power over key educational decisions, becoming a partner in controlling curriculum development, enrollment targets, and budget decisions."[70] Worse, in instances where researchers have been able to access agreements between schools and OPMs—which are often shielded from open records laws, despite their clear importance to public institutions—they have noted a range of terms that could "make it nearly impossible" for schools to back out of a bad deal.[71] These provisions include demands that schools provide notice years in advance if they desire to end an agreement, automatic renewals, and non-compete type terms that prevent schools from seeking similar services from other OPMs down the road.[72] These contracts also tend to be designed to last for extremely long periods; a contract between the University of Southern California and the OPM 2U, Inc. to run a Master's in Social Work program, for example, is slated to run through 2030,[73] while a 2U contract with the University of California, Berkeley to manage an online master's degree in information and data science has a 15-year timeframe.[74] These findings highlight that the weakness of the TPS regulations and the cover they provide for OPMs are allowing harmful contracts to proliferate.

As SBPC wrote in its recent letter to ED, however, OPMs are not the only example of firms and entire industries that ED's existing TPS regulations have fallen short of reigning in.[75] Education benefit managers such as Guild Education, for example, purport to connect working people with and facilitate attendance in online Title IV programs that can be paid for in part by the student's employer, creating clear TPS relationships for schools.[76] But these companies have been found to deliver questionable outcomes, all while both ED and its regulations have so far failed to deliver basic oversight, let alone stop these companies from taking advantage of students.[77] In addition, a range of previously standalone for-profit vocational training schools (stylized as "bootcamps") have recently been worming their way into the Title IV space through the third-party provisioning of educational and other services, but the existing TPS regulations have not delivered accountability for the companies' actions. In March 2023, for example, SBPC published a report exposing how a Title IV-eligible school partnered with a failing for-profit coding bootcamp in a scheme that aimed to drive mainly low-income students into debt for meaningless credentials, all so that the school and its service provider could boost their

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69 Bannon & Fuller, *supra* note 69.
70 *Invasion of the College Snatchers*, *supra* note 61.
71 *Dear Colleges: Take Control of Online Courses*, *supra* note 63.
72 *Id.*
73 Lisa Bannon & Andrea Fuller, *USC Officials Diverge on Plan to End Contract With Online Provider*, The Wall Street Journal (Nov. 24, 2021, 4:10 PM), https://www.wsj.com/articles/usc-officials-diverge-on-plan-to-end-contract-with-online-provider-11637788200.
74 Bannon & Smith, *supra* note 61.
75 The Guild Opportunity Platform, https://www.guildeducation.com/ (last visited Apr. 20, 2023).
76 *Id*.
77 David Yaffe Bellany, *How to Get Rich Sending Low-Income Workers to College*, Bloomberg (Dec. 14, 2021, 12:01 AM), https://www.bloomberg.com/features/2021-free-college-through-tuition-assistance-guild/.

respective bottom lines.[78] The bootcamp provided core recruitment and course delivery services, making it a clear third-party servicer to the school, but it was nevertheless able to fleece students by offering a costly, sub-standard program supported by misleading marketing under cover of light regulation.[79] The bootcamp eventually went out of business, leaving students stranded in debt with little to show for it, and SBPC has found that ED *did not even know* that the underlying TPS relationship existed.[80]

It is long overdue for ED to update and substantially strengthen its TPS regulations. Accordingly, we applaud ED for including the topic in its agenda. In addition, we offer the following preliminary observations for how the TPS regulations should ultimately be revised:

- ***ED should expand the regulations to more appropriately encompass the entire TPS market.*** In its recent Dear Colleague letter, ED proposed to update its implementation of the existing TPS regulations such that a more appropriately broad set of companies would be captured within them.[81] This change would bring ED's execution of the TPS regulations better in line with the intent of these rules and their underlying statute, and would help install accountability and transparency across the TPS landscape (in no small part by requiring schools to be jointly and severally liable with TPS for violations of the HEA).[82] ED was clearly within its rights to propose it.

  However, as recent bad-faith industry actions illustrate,[83] ED could also be served by updating the TPS regulations themselves to make them even more clearly apply to the full range of companies that are involved in "any aspect of [an] institution's participation in any Title IV, HEA program."[84] Accordingly, drawing from the recent Dear Colleague letter,[85] ED should update the TPS definition housed in C.F.R. § 668.2 to read, "An individual or a State, or a private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated

[78] Student Borrower Prot. Ctr., New Investigation Exposes Years-Long Scheme by Private College and Failed Coding Bootcamp to Dupe Regulators and Push Predatory Loans on Low-Income Students, Student Borrower Prot. Ctr. (Mar. 20, 2023), https://protectborrowers.org/new-investigation-exposes-years-long-scheme-by-private-college-and-failed-coding-bootcamp-to-dupe-regulators-and-push-predatory-loans-on-low-income-students/.
[79] *Supra* note 78.
[80] Letter from Sandra Lewandowski, Gov't Informational Specialist, Office of the Sec'y, to Ben Kaufman, Dir. of Research and Investigations, Student Borrower Prot. Ctr. (Nov. 23, 2022), https://protectborrowers.org/wp-content/uploads/2023/03/2.-21-02644-F-Final-Letter-QA-Approved.pdf.
[81] Letter from Annmarie Weisman, *supra* note 50.
[82] *Id.*
[83] *2U, Inc. v. Cardona*, No. 1:23-cv-00925 (filed Apr. 4, 2023), https://storage.courtlistener.com/recap/gov.uscourts.dcd.253823/gov.uscourts.dcd.253823.1.0.pdf.
[84] 34 C.F.R.§ 668.2 (1994).
[85] Letter from Annmarie Weisman, *supra* note 50. (noting that the letter updates the TPS definition to include any company that "performs functions or services necessary— . . . [for a school] To provide Title IV-eligible educational programs").

processing, any aspect of the institution's participation in any Title IV, HEA program **and/or the provision of Title IV-eligible educational programs**." ED should then append the sub-bullets following the TPS definition in C.F.R § 668.2 to include all of the tasks it added to the revised Dear Colleague Letter, such as "Delivering instruction or mandatory tutoring," "[i]nteracting with prospective students for the purposes of recruiting or securing enrollment," "the provision of software products and services," and more.[86] In addition, ED should specify that the TPS regulations apply to firms that facilitate institutional lending programs at Title IV-eligible institutions.[87]

As SBPC wrote in response to the Dear Colleague letter referenced here, the revisions it contemplated reflect a commonsense vision for student protection: that the complete range of third-party companies involved in the delivery of a Title IV program can hurt students, and that all of these firms should therefore fall under at least basic transparency standards.[88] Those changes were entirely justified when they were delivered via sub-regulatory guidance; ED should simply cover all of its bases by updating the underlying regulation to reflect them.

- ***ED should vastly improve its TPS audits.*** Given both that ED's audits of OPMs are (as discussed above) far too weak and that the agency should aim for greater scrutiny across products, ED should strengthen and vastly expand the scope of its TPS audits. First, just as financial services companies generally come under heightened scrutiny when they are so big, complex, and integral to the system that they could pose a risk to the market as a whole, TPSs that support many students or schools should face more frequent and thorough audits to the extent that their scale makes them "systematically important." ED should set reasonable thresholds for this systemic importance designation, such as any TPS that services more than 100 schools or more than 10,000 students. There is already evidence that this heightened scrutiny is long overdue in the OPM space, particularly as it relates to audit requirements around financial soundness.[89]

  In addition, to the extent that ED would ideally be finally acknowledging that the delivery of course content by a third party makes that company a TPS, the agency should revise its audit guide to require all TPS that engage in such services to report on student outcomes in terms of graduation rates, loan repayment, and career results. Further, ED

[86] Student Borrower Prot. Ctr. *supra* note 50.
[87] *Id*. at 8.
[88] Letter in Response to the Dep't of Educ.'s Dear Colleague Letter Regarding Requirements and Responsibilities for Third-Party Servicers and Institutions, Student Borrower Prot. Ctr., https://protectborrowers.org/letter-in-response-to-the-department-of-educations-request-for-comments-on-its-dear-colleague-letter-regarding-requirements-and-responsibilities-for-third-party-servicers-and-institutions/.
[89] Ben Kaufman, *ED Needs to Begin Planning Now for the Possibility of a Large OPM Blowing Up*, Student Borrower Prot. Ctr. (June 15, 2022), https://protectborrowers.org/ed-needs-to-begin-planning-now-for-the-possibility-of-a-large-opm-blowing-up/.

should ensure that its audit results are public or at least accessible via open records requests and that these audits involve full investigations of and reports on additional third-party relationships that a TPS may itself have that are integral to their work. Given that the company exists centrally to connect people to Title IV-eligible programs via their employer, for example, Guild Education should be required to disclose its entire set of corporate partners. Similarly, to the extent that any OPM relies on subcontractors to carry out its work in the Title IV space, it should have to disclose those relationships and their underlying contracts to ED.[90]

Finally, just as certain financial institutions are required to have "living wills" that outline how they would unwind in the event of a sudden failure,[91] ED should require as part of its TPS audits that schools and their contractors have emergency plans for possible instances of unexpected disruption in the availability of third parties' services. As SBPC outlined in a recent letter to ED, the March 2023 episode involving the near-failure of Silicon Valley Bank and possible subsequent insolvency of its depositors—many of whom were likely tech firms that have TPS relationships with schools—shows that the risk of such a sudden stop in the delivery of vital TPS services is absolutely not hypothetical.[92] If such a failure were to happen without plans already being in place for a path forward, students would be immediately at risk. Accordingly, ED should require that all schools with TPS relationships and the third parties themselves have contingency plans in place that can be drawn on as soon as a given third-party servicer shows signs of trouble that could prevent it from delivering its services. For TPS that are involved in the delivery of educational services, this should include detailed plans for teach-outs.

- ***ED should strongly enforce its TPS regulations, including by collaborating with other agencies at the federal and state level.*** As SBPC noted in a recent letter to ED,[93] the need for ED to step firmly into its role as an enforcement agency is longstanding.[94] ED has taken several promising actions to address this complaint under the Biden administration, including having set up a new enforcement group within the Office of Federal Student Aid[95] and having recently announced the creation of a secret shopper team that will

[90] *See*, *e.g.*, *2U, Inc. v. Cardona*, No. 1:23-cv-00925, at 9.
[91] Living Wills (or Resolution Plans), Board of Governors of the Fedreal Reserve System (last updated March 14, 2022), https://www.federalreserve.gov/supervisionreg/resolution-plans.htm.
[92] Student Borrower Prot. Ctr., *supra* note 88.
[93] *Id*.
[94] *See*, *e.g.*, Letter from the Student Borrower Prot. Ctr., to Miguel Cardona, Sec'y, U.S. Dep't of Educ. (Feb. 10, 2022), https://protectborrowers.org/wp-content/uploads/2023/02/SBPC_Low-financial-value-programs.pdf (on file with author).
[95] U.S. Dep't of Educ. to Establish an Enforcement Office Within Federal Student Aid, U.S. Dep't of Educ. (Oct. 8, 2021), https://www.ed.gov/news/press-releases/us-department-education-establish-enforcement-office-within-federal-student-aid.

identify schools that deploy deceptive recruitment tactics.[96] ED now has an opportunity to follow through with strong enforcement to rein in predatory industry tactics across the TPS space such as the use of deceptive claims and high-pressure sales tactics to drive enrollment. But ED need not take this important step alone. First, ED could coordinate with peer agencies such as the Federal Trade Commission (FTC) and the CFPB to share information and work together on supervision and enforcement. This collaboration could pay special attention to ED and the CFPB's shared roles in ensuring that schools and private lenders are following all relevant laws and regulations pertaining to preferred lender arrangements, a set of rules against which (as discussed below) SBPC has documented widespread violations.[97] In addition, ED should revise its TPS regulations to stipulate that schools and third parties must comply with state law, then it should engage in robust collaboration with state regulators at attorneys general to monitor and hold companies accountable for compliance. As noted above, this compliance should extend to the subcontractors that aid TPS in addition to the TPS themselves.

IV. ED must count all time in deferment and forbearance as a qualifying payment towards cancellation in IDR and automate to the fullest extent possible, enrollment in IDR.

ED has invited public input on how the Department could, through its Title IV regulations, help improve borrowers' understanding of repayment options and ensure borrowers select an income-driven repayment plan—instead of enrolling in deferment or forbearance—if doing so would be in their best interest. As we stated in our comments to ED's proposed income-driven repayment NPRM,[98] policy design failures and student loan servicer misconduct have combined to keep some borrowers from accessing IDR at all or remaining in these plans over the long term.[99] Troublingly, Black borrowers in particular are more likely to fall into default without ever

[96] U.S. Dep't Of Educ., Educ. Dep't Announces Use of Secret Shopping to Protect Students, Crack Down on Institutions that Lure Students with Lies, U.S. Dep't of Education (Mar. 14, 2023), https://www.ed.gov/news/press-releases/education-department-announces-use-secret-shopping-protect-students-crack-down-institutions-lure-students-lies%E2%80%AF%E2%80%AF.

[97] Student Borrower Prot. Ctr., *Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Towards Risky Private Debt and Credit* (June 2021), https://protectborrowers.org/pushing-predatory-products-how-public-universities-are-partnering-with-unaccountable-contractors-to-drive-students-toward-risky-private-debt-and-credit.

[98] Student Borrower Prot. Ctr., *Letter in Response to the Department of Education's Notice of Proposed Rulemaking on Income-Driven Repayment* (Feb. 10, 2023), https://protectborrowers.org/wp-content/uploads/2023/02/SBPC_IDR_2023.pdf; U.S. Dep't of Educ., *Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program* (Docket ID ED-2023-OPE-0004), 88 Fed. Reg. 1894 (Jan. 11, 2023) (NPRM).

[99] For details on how shoddy and deceptive student loan servicing has consistently blocked borrowers from accessing and remaining IDR plans, *see 39 State Attorneys General Announce $1.85 Billion Settlement with Student Loan Servicer Navient,* Navient AG Settlement, https://navientagsettlement.com/Home/portalid/0?portalid=0?portalid=0?portalid=0 (last updated June 22, 2022)

accessing IDR.[100]

For these reasons, not only are borrowers deprived of affordable monthly payments, but cancellation through IDR—one of the plans' core benefits—has also remained elusive. Though debt cancellation under IDR has been available for qualifying borrowers since at least 2016, a recent Government Accountability Office (GAO) report found that only 132 borrowers have ever successfully achieved loan cancellation via IDR.[101]

The systematic collapse of the promise of relief that Congress made to borrowers flows from decades of inaction, incompetence, and unfortunately, frequent malfeasance from federal policymakers, regulators, and the student loan industry. For example, over the past several years, state attorneys general across the country and the CFPB have brought public enforcement actions against ED's largest student loan servicing contractors for a wide range of abuses related to borrowers' access to IDR, including deploying abusive forbearance steering tactics, deceiving borrowers regarding their obligation to annually recertify income, and failing to timely process IDR applications.[102] These abuses—conducted by the very same companies tasked with guiding borrowers through repayment and empowering them to access their protections under the law—will add years or decades to borrowers' repayment sequences even if they are eventually able to access IDR at all. By that time, borrowers will likely have undergone extensive but entirely unnecessary financial hardship including periods of disastrous delinquency or default.

A recent settlement between 39 states attorneys general and the federal student loan servicing giant Navient demonstrates that servicers have consistently and recklessly engaged in a startling variety of abusive practices with long-term consequences for borrowers.[103] This episode is yet

(settlement with Navient and dozens of Attorneys General resolving allegations that, in part, Navient steered borrowers towards forbearances and deferments rather than income-based plans); Consumer Fin. Prot .Bureau, S*tudent Loan Servicing: Analysis of Public Input and Recommendations for Reform* (Sep. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf (shoddy student loan servicing may have prevented as many as three-in-five borrowers who managed to enroll in IDR from staying on track year-over-year); *see generally Driving into a Dead End,* the Student Borrower Prot. Ctr. (2021), https://protectborrowers.org/wp-content/uploads/2021/10/SBPC_Driving_Into_A_Dead_End.pdf.

[100] Ben Kaufman, *New Data Show Borrowers of Color and Low-Income Borrowers are Missing Out on Key Protections, Raising Significant Fair Lending Concerns*, Student Borrower Prot. Ctr. (Nov. 2, 2020), https://protectborrowers.org/new-data-showborrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns/.

[101] Gov't Accountability Office, Education Needs to Take Steps to Ensure Eligible Loans Receive Income Driven Repayment Forgiveness (April 2022) 10, https://www.gao.gov/assets/gao-22-103720.pdf.

[102] Student Borrower Prot. Ctr., Driving Into a Dead End: Why IDR Has Failed Millions With Decades-Old Debts, 15 (Sept. 2021), https://protectborrowers.org/wp-content/uploads/2021/10/SBPC_Driving_Into_A_Dead_End.pdf#page=15.

[103] Student Borrower Prot. Ctr., Student Borrower Prot. Ctr. Statement on Navient's Settlement with 39 States Cancelling $1.7 Billion in Predatory Private Student Loans (Jan. 13, 2022), https://protectborrowers.org/student-borrower-protection-center-statement-on-navients-settlement-with-39-states-cancelling-1-7-billion-in-predatory-private-student-loans/.

another instance of the policy apparatus and specifically the promise of affordability through IDR failing borrowers entirely.

Overall, we are encouraged by many of the steps ED has taken to remedy the failures of IDR through the IDR Account Adjustment and to create a truly affordable repayment plan for millions of borrowers through ED's recent NPRM. Unfortunately, the wrongs that necessitated these remedial policies persist and currently undermine their ability to make borrowers whole. As such, those remedial policies do not go far enough to protect borrowers from future servicer abuse. As is described in greater detail in SBPC's comments[104] to ED's IDR NPRM, ED must:

- Address the issue of servicer steering and other misconduct through its servicing contracts and vigorous oversight;
- Automate IDR recertification and enrollment in IDR for delinquent borrowers through fully implementing the FUTURE Act;
- Permanently extend the benefits of the IDR Account Adjustment to all borrowers with loans in existence at the time of the Account Adjustment but who were unable to access that benefit at the time, to allow them to avail themselves of that benefit for the remainder of the life of their loans, including after any consolidation;
- Ensure that all borrowers have access to truly affordable IDR plans; and
- Award IDR credit for any time on a loan beginning after its initial grace period, including time spent in forbearance, deferment, or default.

V. ED included many important topics on its proposed agenda. However, it left others out. SBPC urges ED to add the following topics to the agenda:

A. Debt Collection

For the past several years, ED has included debt collection practices on its regulatory agenda.[105] During the October 2021 negotiated rulemaking session, in discussing whether to add debt collection practices to that rulemaking agenda, Federal negotiators said that it planned to address debt collection through a later rulemaking, which would deliver new rules to defaulted borrowers faster than that rulemaking could.[106] Yet nearly two years

[104] *Letter in Response to the Department of Education's Notice of Proposed Rulemaking on Income-Driven Repayment*, *supra* note 98.
[105] U.S. Dep't of Educ., Debt Collection Practices (Fall 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1894-AA12.
[106] Transcript of Dep't of Educ. Office of Postsecondary Educ. Affordability and Student Loans Committee Negotiated Rulemaking Session, 9-11 (Oct. 8, 2021), ://www2.ed.gov/policy/highered/reg/hearulemaking/2021/108am.pdf ("So, I mean, as you can see, the reason why we've, the uptake is on a different, different rulemaking slate is that these debt collection rules largely exist outside

later, ED has still failed to establish new rules for defaulted borrowers. The fact that the most distressed borrowers are still waiting is shameful. ED's debt collection tools are among its most severe and negatively impactful for the most vulnerable borrowers.[107] Stronger borrower protections are urgently needed. The continued illegal collection during the COVID-19 pandemic has laid bare how ED is incapable of controlling its own cruel and punitive collection mechanisms.[108]

The current debt collection system fails to put borrowers on a path to repayment and instead punishes those who are unable to navigate ED's byzantine bureaucracy. These borrowers are dealt consequences for what they are told is an individual failure, but it is clear that the breakdowns are systemic and run counter to the stated goals of the federal student loan program.[109] This system normalized the forcible collection of resources that borrowers from low-income backgrounds rely on to make ends meet.

Accordingly, ED should revise its debt collection rules so that, at a minimum, they include the following: the creation of additional pathways out of default; an end to the practice of so-called loan "acceleration," where borrowers are obligated to repay their entire loan balance immediately upon default; an end to administrative wage garnishment and the offset of Social Security, Earned Income Tax Credit, disability, and other similarly crucial benefits; and a limit to the amount collected to be equal to the borrower's IDR amount when ED uses involuntary collection (if it must be used at all).[110] ED should strive to create a world where low-income borrowers will not be forced to sacrifice basic necessities due to unaffordable student loan payments.

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of HEA, excuse me. Meaning that they're not subject to negotiated rulemaking. So, to Brian Siegel's point the other day, our legal counsel pointed out that we are not, because we're not subject to negotiated rulemaking for those debt collection rules, were able to move a lot quicker in advancing our agenda for debt collection. So, this rulemaking, again, as we mentioned, the final rules that results from this rulemaking would be effectuated, in July of 2023, which is too late for the population of bars that we are talking about here.").

[107] Johnson Tyler, *Turn the Ship: The Moral Imperative and Legal Authority to Protect Retirees with Defaulted Student Loans from Social Security Offset*, Beyond Fresh Start: Addressing the Flaws of the Current Student Loan Collection System, 84 (Aug. 2022), https://protectborrowers.org/wp-content/uploads/2022/08/Beyond-Fresh-Start.pdf#page=84.

[108] Student Borrower Prot. Ctr., Collections Catastrophe: New Evidence Exposes Fundamental Failures of the Government's Student Loan Collection Machine (Dec. 2022), https://protectborrowers.org/collections-catastrophe-new-evidence-exposes-fundamental-failures-of-the-governments-student-loan-collection-machine/; Ella Azoulay, *New Data Shows Guaranty Agencies Illegally Took and Failed to Refund Tens of Millions of Dollars From Borrowers After Already Getting Caught Breaking the Law*, Student Borrower Prot. Ctr. (Mar. 23, 2023), https://protectborrowers.org/new-data-shows-guaranty-agencies-illegally-took-and-failed-to-refund-tens-of-millions-of-dollars-from-borrowers-after-already-getting-caught-breaking-the-law/?_thumbnail_id=3945.

[109] Josh Rovenger, *Illogical Collections: How the Department of Education's Involuntary Collection Efforts Undermine the Higher Education Act*, Beyond Fresh Start: Addressing the Flaws of the Current Student Loan Collection System, 69 (Aug. 2022), https://protectborrowers.org/wp-content/uploads/2022/08/Beyond-Fresh-Start.pdf.

[110] *Supra* note 109.

B. Program Participation Agreements

The Department should include the topic of program participation agreements (PPA) in the agenda, as the rules surrounding this key aspect of Title IV need to be revised to include clearer and stronger enforcement language to address violations of the HEA. The Department must do its part to protect students from institutions that violate their PPAs without any consideration for what consequences may come with non-compliance. SBPC has already written about schools that blatantly violate their PPA, such as Purdue University, which operated an illegal business relationship with private companies via its "Back-A-Boiler™ ISA".[111] This private lending scheme clearly violated the terms of Purdue's PPA by involving the school co-branding private loan products and otherwise failing to comply with regulations that govern schools' relationships with private creditors.[112] This program was funded by two private companies that operated under the school's imprimatur and that falsely advertised that ISAs were not loans, when in fact federal law enforcement has made it clear that these products constitute loans.[113] Yet Purdue was never held accountable for breaking the terms of its PPA.

In addition to bolstering enforcement, ED should consider leveraging PPAs to install higher standards for quality assurance across the Title IV space. In particular, SBPC recommended to ED in a recent comment that the agency set thresholds directly in schools' PPAs for institutional and programmatic quality measures such as completion and loan repayment rates.[114] Failure to meet those standards would be a per se violation of a school's agreement with ED, leading it to finally face automatic consequences for poor conduct.

It is time for ED to use every tool at its disposal to protect the students who are most vulnerable to institutional noncompliance. We look forward to ED adding this topic to its agenda and making revisions to the current regulations in order to set better standards for compliance and mechanisms for enforcing such compliance.

[111] Letter from Student Borrower Prot. Ctr., to Miguel Cardona, Sec'y, U.S. Dep't of Education (Mar. 31, 2022) https://protectborrowers.org/wp-content/uploads/2022/03/SBPC_Purdue.pdf (on file with author).
[112] *Income Share Agreements*, Student Borrower Prot. Ctr., https://protectborrowers.org/income-share-agreements-2/.
[113] *Supra* note 111; Consumer Fin. Prot. Bureau, Better Future Forward, Inc.; Better Future Forward Manager, LLC; Better Future Forward Opportunity ISA Fund (CP1), LLC; and Better Future Forward Opportunity ISA Fund (CH1), LLC, Enforcement Actions (Sept. 7, 2021), https://www.consumerfinance.gov/enforcement/actions/better-future-forward-inc/.
[114] Letter from the Student Borrower Prot. Ctr., *supra* note 94.

C. Preferred lender arrangements and lists

The current regulations regarding preferred lender arrangement disclosures and preferred lender lists are insufficient to protect students, who are often put at risk by these back-room deals.[115] Preferred lender arrangements are defined as an arrangement or agreement between a lender and covered institution in which a lender provides or issues education loans to the students attending such schools or their families, and relates to the school recommending, promoting, or endorsing such loan products.[116] As we continue to see abuses and blatant disregard for the existing rules,[117] it is important for ED to revise the current regulations, set expectations much higher for disclosure, and establish distinct consequences for noncompliance. The current rules do not go as far as to *require* that institutions compile and make available the preferred lender arrangements that they are involved in, but they only state that the schools should "at least" compile, maintain and make available for students and families.[118] It is not enough that the schools "at least" make these disclosures, but must make them and also describe the relationships between the schools and private lenders. The Department must be sure to be assertive when writing the rules, and even more persistent with actually enforcing the regulations. Currently, the regulations and ED offer neither.

The SBPC first documented several instances of violations of the rules in its June of 2021 report regarding predatory student loan lending by schools and third-party contractors.[119] The report found that many schools were blurring the line between school, lender, and service provider by pushing students into predatory loans with private lenders that come highly recommended by the schools.[120] There were several examples included in this report where public schools, in particular, were using their own websites to promote these private lenders to their students without any regard for the protection of the student, and without engaging in the range of disclosures and other compliance measures necessary for these clear preferred lender relationships.[121] This finding is exceedingly concerning because students are the ones most vulnerable to the assumption that these private lenders are the best or only option for them to receive a quality education when that is likely not

[115] 34 C.F.R. § 601.10.
[116] 34 C.F.R. § 601.2.
[117] *See e.g.*, *Pushing Predatory Products, supra* note 97.
[118] 34 C.F.R. § 668.14(b)(28) ("For any year in which the institution has a preferred lender arrangement (as defined in 34 CFR 601.2(b)), it will *at least* annually compile, maintain, and make available for students attending the institution, and the families of such students, a list in print or other medium, of the specific lenders for loans made, insured, or guaranteed under title IV of the HEA or private education loans that the institution recommends, promotes, or endorses in accordance with such preferred lender arrangement. In making such a list, the institution must comply with the requirements in 34 CFR 682.212(h) and 34 CFR 601.10;"). *Emphasis added*.
[119] *Pushing Predatory Products, supra* note 97.
[120] *Id*.
[121] *Pushing Predatory Products, supra* note 97, at 11. *See also* Student Borrower Prot. Ctr., Exhibits: Pushing Predatory Products (June 2021), https://protectborrowers.org/wp-content/uploads/2021/06/OPM-Exhibits.pdf.

the case.[122] The exhibits included in the report made it clear that major public schools are often utilizing these preferred lender arrangements as a way to promote educational opportunities to students who may not understand the relationship between the school and private lender, particularly among students who need financial support the most.[123]

The report also encouraged states to use comprehensive registration laws to drive transparency and accountability for student financing companies. In June of 2022, SBPC wrote about the Colorado Attorney General taking the first steps to enforce the Student Loan Equity Act signed into law by the Colorado Governor in 2021.[124] The law requires annual public disclosures on lending and borrower outcomes by private student loan companies operating in Colorado.[125] The Attorney General revealed the first round of disclosures in 2022 from the 2021 school year, and the revelations were disturbing. It was very apparent that these institutions and private loan lenders were driving students into high-balance debt for low-quality education along with outrageous junk fees.[126] These junk fees included late fees, origination fees, transaction fees, income documentation fees, and penalty interest rates, which are usually hidden and unfair for the students who are left with the debt hanging over their heads.[127] These were just the results revealed by the companies who complied with the law in Colorado, SBPC highlighted several others who did not follow the law by registering with the state, thus they did not submit the required disclosures.[128] This means that there are other lenders out there who are not registering and are not revealing their practices, making it even harder to protect students from being preyed upon.

We recommend that the Department rewrite the rules to be more clear on what institutions and private lenders must disclose, what they should include in their lists, and any repercussions that they will face if they do not comply with the regulations. ED should take the steps to conduct more oversight, including by engaging in consistent audits to more vigorously enforce existing rules. ED should collaborate with states to address issues with these violations in a substantive manner. The issue has been going on far too long, and it is the students who suffer the most without proper safeguards and protections from the Department.

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122 *Pushing Predatory Products*, *supra* note 97, at 15.
123 *Id.*
124 Ben Kaufman, *Colorado's Nation-Leading Work to Shine a Light on Shadow Student Debt Exposes Massive Risks for Borrowers,* Student Borrower Prot. Ctr. (June 27, 2022), https://protectborrowers.org/colorados-nation-leading-work-to-shine-a-light-on-shadow-student-debt-exposes-massive-risks-for-borrowers/.
125 Private Lenders Of Student Loans Acts And Practices, SB21-057 (2021) https://leg.colorado.gov/bills/sb21-057.
126 Kaufman, *supra* note 124.
127 *Id.*
128 *Id.*

VI. Lastly, the SBPC encourages the Department to add more consumer advocate seats to the rulemaking table.

Consumer advocates need to have a seat at the table when ED proposes to change its regulations. It is imperative that borrowers have more experts at the table who are there to *specifically* protect the borrowers' interests, and not to ultimately prioritize their own agenda. For far too long, ED has allowed the rulemaking table to be crowded with lenders, schools, and industry representatives, instead of advocates who can speak directly to the borrower experience. In order to ensure that there are both the expertise and the representation necessary to adequately protect students, **we urge you to include a *distinct* consumer advocate seat at this rulemaking table and those in the future.**

Thank you for your time and consideration.

Sincerely,

Student Borrower Protection Center