Comment Submitted By

The Legal Aid Foundation of Los Angeles and
The National Consumer Law Center
to the Department of Education
Re: Intent to Establish Negotiated Rulemaking Committee
for programs authorized under
Title IV of the Higher Education Act of 1965, as amended (HEA)

Docket ID: ED-2023-OPE-0039

April 24, 2023

On behalf of the low-income clients of the Legal Aid Foundation of Los Angeles (LAFLA) and the National Consumer Law Center (NCLC), we submit these comments in response to the Department's announcement of its intent to form a negotiated rulemaking committee to address program participation in federal student aid programs under Title IV of the HEA, including institutional eligibility under 34 C.F.R. § 600.2; the definition of state authorization reciprocity agreement under 34 C.F.R. § 600.9; third-party servicers and related issues; the definition of "distance education" under 34 C.F.R. § 600.2 as it pertains to clock hour programs and reporting for students who enroll primarily online; and the return of title IV funds. Our comments are informed by our work as legal aid practitioners. NCLC[1] and LAFLA[2] strive to meet the legal needs of individuals and families with limited economic means, who otherwise would be without professional legal assistance.

The majority of the people we work with are from communities of color and are often first-generation college students that are returning to education as older adults. Our clients overwhelmingly believe that higher education is a way to improve their job prospects and

[1] NCLC is a nonprofit organization specializing in consumer law and consumer protection issues on behalf of low-income people since 1969. NCLC has nationally recognized expertise in student loan law and publishes a widely used treatise, Student Loan Law (6th Ed. 2019), updated at www.nclc.org/library.
[2] LAFLA is a nonprofit public interest leader on student loan work and seeks to achieve equal justice for low-income people. It provides critical outreach and education, self-help clinics, and quality direct legal assistance to financially distressed student loan borrowers. LAFLA's policy and advocacy efforts are grounded in the legal assistance it has provided to the thousands of low-income students in Southern California for over thirty years.

brighten their futures. Often, they are single parents that are struggling to balance returning to school with supporting their family. Many clients we work with have other experiences or characteristics that make them more vulnerable to financial precarity and to predatory school practices, like being formerly incarcerated or having limited English proficiency. The communities our clients come from have historically been targeted by the most predatory actors within the higher education system and suffer most when the regulatory triad of states, accreditors, and the Department of Education does not robustly support consumer protection efforts. Even today, our clients and their communities are often targeted by unscrupulous and predatory for-profit schools,[3] private lenders,[4] and lead generators.[5] When illegal conduct is allowed to persist in the higher education space, our clients are often left with substantial debt but little means to repay it.

We are encouraged that the Department is considering revisiting several key aspects of program oversight, including state authorization, the role of third parties in federally-funded higher education, and how schools may return Title IV funds when a borrower withdraws, as well as proposing collecting additional data regarding how distance education programs serve students. We discuss each of these topics below:

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[3] *Characteristics of Postsecondary Students*, National Ctr. for Educ. Statistics (NCES) (updated May 2022), *available at* https://nces.ed.gov/programs/coe/indicator/csb; *Trend Generator: What is the percentage of undergraduate students awarded Pell grants?* NCES (accessed April 20, 2023), *available at* https://nces.ed.gov/ipeds/TrendGenerator/app/answer/8/35?f=4%3D3; Toby Merrill et al., *For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate,* Harvard L. Rev. Blog (July 30, 2018), *available at* https://harvardlawreview.org/blog/2018/07/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/; *New Report Finds For-Profit Schools Targeting Black and Latino Communities*, Student Borrower Prot. Ctr. (July 28, 2021), *available at* https://protectborrowers.org/for-profit-mapping/.

[4] *See* Stacy Cowley and Jessica Silver-Greenberg, *Loans 'Designed to Fail': States Say Navient Preyed on Students*, N.Y. Times (April 9, 2017), *available at* https://www.nytimes.com/2017/04/09/business/dealbook/states-say-navient-preyed-on-students.html.

[5] Lesley Fair, *Settlement with operator of post-secondary schools offers an education about lead generation*, FTC Business Blog (Aug. 27, 2019), *available at* https://www.ftc.gov/business-guidance/blog/2019/08/settlement-operator-post-secondary-schools-offers-education-about-lead-generation; Press Release, FTC, FTC Charges Education Lead Generator with Tricking Job Seekers by Claiming to Represent Hiring Employers (April 28, 2016), *available at* https://www.ftc.gov/news-events/news/press-releases/2016/04/ftc-charges-education-lead-generator-tricking-job-seekers-claiming-represent-hiring-employers; Stephanie Hall, *The Students Funneled Into For-Profit Colleges*, The Century Found. (May 11, 2021), *available at* https://tcf.org/content/report/students-funneled-profit-colleges/; Laura T. Hamilton et al., *The Private Side of Public Universities: Third-party providers and platform capitalism*, Berkeley Ctr. for Stud. in Higher Educ. at 12-13 (June 2022), *available at* https://escholarship.org/content/qt7p0114s8/qt7p0114s8_noSplash_1847d6a649017454cecf88b9e9e9961e.pdf (discussing how some OPM companies have contracts that involve recruitment, where they frequently target economically and racially marginalized students); *Private For-Profit Colleges and Online Lead Generation: Private Universities Use Digital Marketing to Target Prospects, Including Veterans, via the Internet*, U.S. PIRG & Ctr. for Digital Democracy, (May 2015), *available at* https://www.democraticmedia.org/sites/default/files/field/public-files/2015/forprofitcollegeleadgenreport_may2015_uspirgef_cdd_0.pdf (describing how lead generation can target specific prospective students using student information and outside data).

I. The Department Should Revise the Definition of State Authorization Reciprocity Agreements to Ensure Borrowers Are Protected By Their States' Education-Specific Consumer Protection Laws (34 C.F.R. § 600.2)

A. Current Regulations Fail to Protect Online Students and Pose Significant Risk to Taxpayers

Millions of students receive Title IV funding for online programs offered by schools that are physically located outside their states. Given the federal government's willingness to provide financial aid to these schools, most students reasonably assume that these schools are well vetted and that federal and state laws protect them from fraudulent and deceptive schools to the same extent as brick-and-mortar students in their state. As described below, the "state authorization" requirement of the Higher Education Act ("HEA") is a means of ensuring that states provide consumer protections for students. As part of their state authorization regimes, many states have enacted education-specific laws that provide, among other protections, refund rights for students who withdraw, cancellation rights, and prohibitions on deceptive practices commonly used by unscrupulous schools. Many states have also established student protection funds that reimburse students' financial losses when a school abruptly closes.[6]

In reality, the federal government provides Title IV funding to most of these schools while leaving online students unprotected. Under the current federal regulation, 34 C.F.R. § 600.9(c)(1)(ii), a school need only be covered by a "state authorization reciprocity agreement" to be eligible to obtain Title IV funding for distance education offered in a state in which it lacks a physical presence, as long as the distant state is a member of the reciprocity agreement. This means that if an out-of-state institution that exclusively offers distance education is approved by one state – typically the home state where the institution is headquartered – it is automatically authorized to offer distance education in any distant states that are members of the reciprocity agreement.

The federal regulation, however, does not include *any* requirements to ensure that the state authorization process and standards provided for in a reciprocity agreement comply with the state authorization requirement of the HEA. As one example, the regulation lacks any requirement to ensure that online students at out-of-state schools are covered by the same state education-specific consumer protections as their brick-and-mortar brethren. The current definition of "state authorization reciprocity agreement" allows agreements that prohibit states

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[6] Robyn Smith and Joanna Darcus, *How States Can Protect Students Harmed by Higher Education Fraud*, Nat'l Consumer Law Ctr. (Jan. 12, 2021), *available at* https://www.nclc.org/resources/how-states-can-help-students-harmed-by-higher-education-fraud/.

from enforcing their education-specific consumer protection laws against member schools.[7] As a result, the regulation has permitted 49 states to join an agreement administered by the National Council for State Authorization Reciprocity Agreements ("NC-SARA") that prohibits member states from applying or enforcing their education-specific consumer protections to member out-of-state schools.[8] Thus, the current federal regulation has permitted the creation of an unfair two-tier system that leaves millions of online students unprotected by state law and vulnerable to fraud and financial ruin.

Indeed, the existing bare-bones regulation has created the risk that NC-SARA schools may not in fact be eligible to receive Title IV funding because NC-SARA's agreement does not fulfill the letter or purpose of the HEA's state authorization requirement. The HEA provides for the regulation of postsecondary institutions through three different entities – the federal government, accrediting agencies, and states.[9] The HEA envisions complementary purposes for each member of this triad. While the Department of Education ("Department") is responsible for "protecting the administrative and fiscal integrity of the federal student aid programs" and accrediting agencies are responsible for assuring academic quality, primary responsibility for overseeing schools and protecting students from abusive for-profit school practices is left to the states.[10] The HEA established this state consumer protection role by requiring that schools be "legally authorized" by states to provide programs of postsecondary education.[11]

The current regulation significantly weakens states' role within the triad and renders the HEA's state authorization requirement meaningless with respect to online schools authorized through a state reciprocity agreement. It allows states to waive their education-specific consumer protection laws, enacted by state legislatures, as well as cede their approval and oversight authority to another state. The other state where the school is physically headquartered can then be limited to imposing weak standards and limited consumer protections, if any, allowed by a reciprocity agreement. This is exactly what has happened with NC-SARA's agreement.

Moreover, the regulation allows for so-called "state authorization" through an agreement drafted and administered by private entities, under which the private entities have ultimate decision-making authority regarding whether states may remain members or whether a school's

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[7] 34 C.F.R. § 600.2 (defining state authorization reciprocity agreement as one that does not "prohibit any member State . . . from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education.").

[8] *See Wake-up Call to State Governments: Protect Online Education Students From For-Profit School Fraud* Nat'l Consumer Law Ctr. (Dec. 2015); *Going the Distance: Consumer Protection for Students Who Attend College Online*, The Inst. for Coll. Access & Success (Aug. 28, 2018) *available at* https://ticas.org/accountability/going-distance/#:~:text=provided%20to%20residents.-,Going%20the%20Distance%3A%20Consumer%20Protection%20for%20Students%20Who%20Attend%20College,from%20poor%2Dquality%20online%20colleges.

[9] 20 U.S.C. § 1001(a).

[10] Rebecca Skinner, *Institutional Eligibility in Title IV Student Aid Programs Under the Higher Education Act: Background and Reauthorization Issues*, Cong. Rsch Serv., RL33909 at CRS-11 (Mar. 9, 2007).

[11] 20 U.S.C. § 1001(a)(2).

authorization may be revoked. Thus, the regulation allows for reciprocity even when states have little or no role drafting the terms of the reciprocity agreement, administering the agreement, or making final decisions about state and school participation.

In 2016, the Department itself indicated concern about this issue by defining state authorization reciprocity agreements acceptable for Title IV purposes as those that do not "prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions."[12] In 2019, the Department initially proposed retaining this definition based on the negotiated rulemaking committee's consensus.[13] However, the Department departed from this decision, overruling the consensus, by publishing a final regulation that amended the definition to allow reciprocity agreements that prohibit states from enforcing higher-education specific consumer protection laws.[14] The Department provided minimal and insufficient justification for removing the portion of the definition prohibiting reciprocity agreements from requiring states to waive their education-specific consumer laws with respect to member schools.

B. Recommendations for Rulemaking

We urge the Department to conduct a negotiated rulemaking to revise 34 C.F.R. §§ 600.2 and 600.9 with respect to the authorization of out-of-state online institutions. Below, we set forth recommendations for revising these provisions.

For the purposes of this comment, we use the following terms:

- Home state: The state where an institution is physically headquartered.
- Distant state: Any state in which an institution lacks a physical presence and exclusively offers distance education.
- Out-of-state institution: An institution that lacks a physical presence in a distant state and exclusively offers distance education.

In order to ensure that the state authorization requirement has the teeth that the HEA requires, any type of reciprocity arrangement among states applicable to distance education schools should comply with the following requirements. These recommendations are based in part on the history and problems of NC-SARA's agreement and processes, which we cite whenever possible. To the extent that a reciprocity agreement fails any of the following requirements, it likely violates both the spirit and the letter of the HEA state authorization requirement.

[12] 81 Fed. Reg. 92,232 (Dec. 19, 2016) (codified at 34 C.F.R. § 600.2 (in effect until July 1, 2020)).
[13] 84 Fed. Reg. 27,404, 27,411 (June 12, 2019).
[14] 84 Fed. Reg. 58,834 (Nov. 1, 2019). The Department claimed that the proposed definition amendment was unintentionally omitted. 84 Fed. Reg. at 58,841.

To reduce the administrative burden on both distant states and out-of-state schools that comes with in-depth approval and re-approval processes, we agree that a reciprocity agreement may provide for a distant state to accept a home state's approval of an out-of-state school. However, eliminating the distant state approval/re-approval process increases risk to both students and taxpayers. Thus, in order to ensure this type of state authorization process complies with the HEA, federal law should be clear that any reciprocity agreement must comply with all of the following to be accepted for Title IV purposes:

1. Administration: To ensure states' critical consumer protection role in the triad is maintained, any reciprocity agreement must be administered and controlled solely by the states themselves. States, not a separate entity controlled by private parties, and certainly not the regulated entities themselves, must be responsible for drafting and modifying the terms and minimum standards of the agreement. In addition, only the states should make decisions regarding (a) whether a state maintains sufficient minimum standards and adequately exercises oversight to be admitted to the agreement and remain a member; and (b) whether any institution's multi-state authorization under the agreement should be revoked. Such decisions should not be subject to review or veto by any private, non-governmental entity.

The initial recommendations regarding NC-SARA's agreement were drafted in 2012-2013 by a private "Commission on the Regulation of Postsecondary Distance Education."[15] The members of that commission included current and former state public institution executive officers and representatives, accreditors, executives from nonprofit and for-profit institutions, representatives of trade or lobbying organizations representing institutions, a former legislator, a lieutenant governor, and one representative of a state oversight agency.[16] While NC-SARA claims that it sought "input" from state regulators and the Department,[17] it appears that their role was limited.

As far as we are able to discern from available documents and past questions to NC-SARA, amendments to the agreement itself must be approved by the large regional compacts. While these compacts sometimes include representatives from the state oversight agencies, they are primarily composed of school representatives, trade association representatives, governor appointees, state legislators, and others.[18] NC-SARA's board,

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[15] *Advancing Access through Regulatory Reform: Findings, Principles, and Recommendations for the State Authorization Reciprocity Agreement,* Comm'n on the Regul. of Postsecondary Distance Educ. (April 2013).
[16] *Id*. at pp. 32-33.
[17] *See* NC-SARA, *The evolution of SARA*, nc-sara.org, downloaded on June 7, 2014 and available from NCLC.
[18] The compacts are the Midwestern Higher Education Compact (MHEC), the New England Board of Higher Education (NEBHE), the Southern Regional Education Board (SREB) and the Western Interstate Commission for Higher Education (WICHE). See NC-SARA, Regional Educ. Compacts, *available at* https://nc-sara.org/regional-education-compacts. The current members of the compacts are listed on each compact's website.

composed primarily of institutional representatives, accreditors, and other individuals who do not work for state oversight agencies, has the power to veto any changes to NC-SARA policy.[19]

In addition to ensuring states exert control over these agreements, the administration of the reciprocity agreement must be transparent. All meetings and records must be covered by state sunshine laws and therefore accessible to the public. While NC-SARA has recently attempted to improve the transparency of its process, it continues to fall short of what would be required under state sunshine laws.

2. <u>Education-specific Consumer Protection Laws</u>: Any reciprocity agreement must not require states to waive their most important education-specific consumer protection laws. Online out-of-state schools should be able to comply with these types of education-specific consumer protection laws to the same extent that brick-and-mortar schools do. Large chains for for-profit and other types of colleges have operated for decades in multiple states subject to these same consumer protections that differ between states. Online colleges will know where their students are located—they must provide an address to apply for federal financial aid, among other things. After they establish their online program, schools save money because they do not have the overhead of brick-and-mortar expenses and, if there is a reciprocity agreement, they will not have to undergo an approval process for each distant state in which they offer online programs. There is no reason out-of-state online schools should be exempt from education-specific consumer protection laws that are critical to protecting both students and taxpayers.

Furthermore, some of the laws are prohibitions of deceptive or abusive practices no school should be using in any state. Other laws are self-executing, such as making schools liable to students (and state governments) for violations of the consumer protections or for illegal actions of independent agents, providing criminal penalties for some illegal practices, and barring the authorization of a school controlled or owned by persons who have been convicted of crimes, among other things. Although compliance with the remaining protections impose some costs, those costs are justified and the protections should still be imposed because they provide extremely important protections to students and taxpayers. All industries that require consumer protections recognize that there must be a balance between reducing burdens on the businesses while protecting consumers. That is no different in higher education. Here, a reciprocity agreement can reduce burdens to schools by removing the costly process of obtaining authorization in distant states. However, there must be a balance. In exchange for allowing schools to bypass state approval in distant states—which is itself a very important consumer protection— schools should be required to comply with the most critical state consumer protection provisions, such as laws creating consumer protection funds, refunds, cancellations,

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[19] *See* Carolyn Fast, *Six Steps to Better Consumer Protections for Online Students*, The Century Found., (Jan. 26, 2023) *available at* https://tcf.org/content/report/six-steps-to-better-consumer-protections-for-online-students/.

terms of enrollment agreements, record retention, pre-approval of substantive changes, private student debt, disclosures regarding student outcomes, and bright-line minimum standards.

In addition, although schools may argue that compliance with laws in 50 different states would be too costly, schools could in fact choose to comply with the most protective state laws for all states in which they offer distance education. Indeed, a reciprocity agreement could provide that they do so. Then, in contrast to the current law, which encourages a race to the bottom because it allows schools to move their physical headquarters to the state with the least protective laws, this approach would encourage the opposite. Federal law should seek to strike an appropriate balance, ensuring that online students are protected from abusive and deceptive practices and able to access a high quality online education. Currently, federal law does not do so, leaving students vulnerable to unscrupulous online schools.

At a minimum, non-waivable laws should include:

- Laws that create student protection funds or bonds to reimburse students impacted by sudden school closures;
- Laws that provide students with a right to cancel their enrollment agreements and receive a 100% refund within some specified time period after first attending a class;
- Laws that require a school to provide a refund in the event a student withdraws;
- Laws that require specific terms in enrollment agreements (for example, that the school must itemize all fees and charges that they student will be required to pay to complete their program; the expected date of completion; etc.);
- Laws that prohibit the most common deceptive conduct engaged in by for-profit schools including for example:
    - Misrepresentations regarding expected earnings, placement services, placement rates of graduates, accreditation, time to completion, etc.;
    - Deceptive practices, such as implying military affiliations when none exists;
    - Payment of incentive compensation, bonuses, commissions to recruiters;
    - Changing the manner of program delivery or the schedule of classes;
    - Enrolling students who are ineligible for employment in professions for which they are training;
    - Enrolling students in a program that is represented to lead to licensure for a profession, when the program will not in fact qualify them for licensure;
    - Withholding transcripts, credentials, or documents required for licensure for non-payment of debts;
    - Paying compensation to a student to enroll; and
    - Enrolling non-English speaking students in programs taught only in English.
- Laws that create private causes of action for the violation of education-specific consumer protection laws, to ensure that students are able to seek redress for harm;
- Laws creating criminal penalties for violations of education-specific laws;

- Laws governing schools' acceptance of loan proceeds, origination of loans, or collection or servicing of debts, including:
  - Laws that provide that loans made by a school and unpaid tuition agreements are not enforceable if school closes;
  - Laws that prohibit deceptive arrangements with private lenders;
  - Laws that subject schools who routinely originate financial products to their students to state oversight; and
  - Laws that govern the making and collection of private student loans or any other financial products made to fund higher education.
- Laws governing the licensure of independent recruiters/agents;
- Laws that make schools liable for the illegal actions for independent recruiters/agents;
- Laws that require disclosures, including disclosures of graduate placement rates, licensure rates, and completion rates;
- Laws that bar the authorization of schools owned or operated by anyone who has been convicted of specified criminal violations, who failed to pay a fine or judgment to the state or to students, who owned or operated a school that closed with unpaid liabilities, or similar provisions;
- Laws requiring that a school retain student records;
- Laws that require pre-approval of substantive changes, including change of ownership or control, change of organizational business type, merging of programs or classes, or adding new programs; and
- Laws that impose minimum bright line standards, such as minimum completion, placement, or licensure rates and minimum financial responsibility requirements.

As NCLC has highlighted in numerous prior comments and reports, NC-SARA's agreement currently requires state members to waive all education-specific consumer protections with respect to out-of-state schools covered by NC-SARA's agreement.[20] 25 state attorneys general, in a letter, similarly highlighted how NC-SARA's agreement hinders state's ability to protect their residents.[21]

3. Student Complaint Process: Any reciprocity agreement should require states to accept complaints without requiring students to first seek resolution through a school's complaint process. In addition, the agreement should allow either the home state or the state of a student's residence to accept a complaint, then work together to investigate and resolve it. The distant state should retain its state law authority to take action against an out-of-state school for violations of that state's law or potential harm to its residents, including in response to a complaint from a resident student.

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[20] We have attached our prior comments and reports as Exhibits A through D.
[21] *See* Letter from 25 state attorneys general to NC-SARA Board of Directors (Aug. 2, 2021) *available at* https://www.marylandattorneygeneral.gov/news%20documents/080321_NC_SARA.pdf.

Currently, NC-SARA's agreement requires students attending out-of-state participating schools to first exhaust their schools' complaint process before they may submit a complaint.[22] In addition, students may only appeal a school's determination to the home state's designated agency, which has the sole authority to investigate and resolve the complaint (even though it may consult with the distant state where the student resides).[23] As pointed out in a report by The Institute for College Access & Success, this policy has resulted in very few complaints to NC-SARA's home states, even for large for-profit schools that have generated many complaints to federal agencies such as the Federal Trade Commision.[24]

4. State Investigative and Oversight Powers: Distant schools must maintain their authority to protect their resident students from out-of-state schools that pose a risk or violate their laws. They should have the authority to both investigate and take appropriate action, as permitted by state law, against out-of-state schools if they determine the school's home state's investigation or resolution is inadequate or if they determine that the alleged violations are serious enough for their involvement. Distant states should also have the authority to revoke an out-of-state school's authorization under the reciprocity agreement to operate in the distant state for violation of any of that state's law, including education-specific laws. The distant state should be able to do so and still remain a member of the reciprocity agreement.

This means that a reciprocity agreement should require out-of-state schools to comply with all state oversight and enforcement powers in the event a distant state decides to investigate, including its supervisory, inspection, and subpoena powers provided by state law.

Under NC-SARA, distant states problematically have no power to investigate or take any action against out-of-state schools based on violations of education-specific laws. Furthermore, it is unclear whether distant states, through their attorneys general or their state oversight agencies, could seek to revoke an out-of-state school's authorization under NC-SARA's agreement based on violations of generally applicable state consumer protection laws.

5. Minimum Reporting Requirements: State authorization must not allow states to be kept in the dark about the schools they are authorizing and how those schools impact their residents. A reciprocity agreement should therefore allow states to require that out-of-state schools provide notice when the school starts offering distant programs to students within the distant state, and should permit distant states to require the reporting of key information, such as the number of distant state residents enrolled, outcomes for those residents, revenues received from those residents, and information regarding the school's financial health. The reciprocity agreement

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[22] *Fact Sheet: Understanding State Authorization, Reciprocity, and NC-SARA to Protect Distance Education Students,* The Inst. for Coll. Access & Success (Mar. 2023), *available at* https://ticas.org/accountability/understanding-state-authorization-reciprocity-and-nc-sara-to-protect-distance-education-students/.

[23] *Id*.

[24] *Id*.

should provide that out-of-state schools must notify distant states regarding adverse actions by accreditors, private actions brought by students, any bankruptcy filing by the school, and any planned or sudden school closure.

NC-SARA's agreement does not allow distant states to require any type of reporting or notification by out-of-state schools that enroll resident students.

6. Payment of Fees: Effective state authorization and oversight of schools costs money. The reciprocity agreement should therefore collect sufficient fees from member schools to fund state authorization and oversight activity, including home state oversight and distant state investigation and action. In addition, both home and distant states should be able to charge out-of-state schools for the costs of any investigations and actions.

NC-SARA's agreement does not allow distant states to charge out-of-state schools any fees. It is also unclear whether it allows home states to charge sufficient fees to fully perform their approval and investigative duties under the agreement.

7. Interstate Processes: The reciprocity agreement must provide a procedure under which a home or distant state may seek revocation of a school's approval under the agreement for all member states based on abusive, unfair, illegal or deceptive conduct that poses or causes harm to students. Member states must have the ultimate decision-making authority on whether a school's authorization under the agreement is revoked or some other action is taken (i.e., probation and monitoring, reduced enrollments, etc.).

Similarly, the reciprocity agreement should provide a process for a review and determination of whether a state may become or remain a member. States should only become and remain members if they have sufficient financial and organizational capacity to fully undertake their approval/re-approval responsibilities as home states. In addition, the agreement must provide a process whereby the membership of any state may be revoked, or a state may be put on probation, if it fails to execute its home state responsibilities under the agreement. Again, the states themselves must have the sole authority to either admit or revoke a state's membership.

If private entities, rather than the states, determine the terms of the agreement and any modifications thereto; if they have ultimate authority to overrule a home state's decision to revoke an institution's authorization under the agreement; and if they have the ultimate authority to decide whether to admit or revoke a state's membership in the agreement, then the HEA's state authorization requirement is not met. If states do not have power over the state authorization process, standards, and decision-making, then authorization under a reciprocity agreement cannot stand in lieu of state authorization under the HEA. For this reason, the Department should convene a negotiated rulemaking proceeding to revise 34 C.F.R. § 600.9.

II. The Department Should Consider Increasing Oversight of Agreements Between Title IV Institutions and Non-Title IV OPMs and other Third Parties That Provide Instruction, Curriculum Content or Design, or Recruitment and Marketing Services.

A. OPMs That Engage In Recruitment, Instructional Delivery and/or Curriculum Design Create A High Risk Within the Title IV System of Harm to Taxpayers and Low-Income Borrowers

We are troubled by how for-profit Online Program Managers (OPMs) are creeping into the nonprofit higher education space. As of July 2021, at least 550 colleges were using an OPM to support at least 2900 educational programs.[25] Many, if not most OPMs are for-profit, and many are backed by private equity.[26] Research has revealed that OPMs are engaged in everything from recruitment—which should be subject to the incentive compensation ban—to marketing, course or program development, and providing instructional services.[27] Further, some OPMs have tuition sharing agreements with the institutions they serve[28] and exert outsized control over how their contracts with universities are structured.[29] These relationships blur the line between when institutional programs are truly non-profit and when profits are motivating programmatic decisions.

Despite the increasing influence of OPMs, the Department currently holds little information regarding OPMs' contracts with schools or the scope of services the OPMs provide. This is worrisome. As higher education researchers have observed, it is difficult to discern who actually controls the programs OPMs are involved in.[30] Indeed, in a Dear Colleague Letter published in June 2022, the Department acknowledged that "institutions and their accrediting

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[25] U.S. Gov't Accountability Office, GAO-22-104463*, Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* (April 2022), *available at* https://www.gao.gov/assets/720/719953.pdf

[26] Laura T. Hamilton et al., *The Private Side of Public Universities: Third-party providers and platform capitalism*, Berkeley Center for Studies in Higher Education at at 9, 11-12 (June 2022) *available at* https://escholarship.org/content/qt7p0114s8/qt7p0114s8_noSplash_1847d6a649017454cecf88b9e9e9961e.pdf;

[27] *Id.* at 9; Stephanie Hall & Taela Dudley, "Dear Colleges: Take Control of Your Online Courses," The Century Found. (Sept. 12, 2019), *available at* https://tcf.org/content/report/dear-colleges-take-control-online-courses/.

[28] Stephanie Hall & Taela Dudley, "Dear Colleges: Take Control of Your Online Courses," The Century Found. (Sept. 12, 2019), *available at* https://tcf.org/content/report/dear-colleges-take-control-online-courses/; U.S. Gov't Accountability Office, GAO-22-104463, *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* (April 2022), *available at* https://www.gao.gov/assets/720/719953.pdf; Complaint, *Favell v. University of Southern California*, Case No. 2:2023-CV-00846 (C.D. Cal. filed Feb. 3 2023).

[29] Laura T. Hamilton et al., *The Private Side of Public Universities: Third-party providers and platform capitalism*, Berkeley Ctr. for Studies in Higher Educ. at 21 (June 2022), *available at* https://escholarship.org/content/qt7p0114s8/qt7p0114s8_noSplash_1847d6a649017454cecf88b9e9e9961e.pdf.

[30] *See Online Program Management Companies: A For-Profit Pocket Within Higher Ed*, Arnold Ventures (May 25, 2022), *available at* https://www.arnoldventures.org/stories/online-program-management-companies-a-for-profit-pocket-within-higher-ed (Kevin Kinser comments).

agencies do not always accurately account for the percentage of a program that is provided by an ineligible entity." [31] The letter summarized examples of relationships that violated 34 C.F.R. § 668.5, which included instances where the institution misrepresented who was providing a program, who was providing instruction, who was compensating instructors, or who controlled curricular decisions.[32] Currently, schools are only required to report to the Secretary if a school outsources more than 25% of a program.[33] However, if schools were affirmatively required to report the existence of all of these relationships to the Department, the Department could more readily identify instances in which these relationships violate existing regulations.

In addition, the Department's oversight of OPMs engagement in recruitment is currently limited, even when those entities must follow the HEA's Incentive Compensation Ban.[34] A 2022 GAO report revealed that the Department's auditing process fails to fully capture complete information about OPM relationships that are implicated by the Department's incentive compensation ban.[35] Indeed, Department auditing instructions did not direct auditors to ask college officials to identify all OPM arrangements, including recruitment services, and did not direct them to collect information about how OPM recruiters are paid. Auditors explained to the GAO that college officials often failed to report when OPMs were engaged in recruitment for individual programs, and that at least in one instance, "few college staff knew details about the services the OPM provided."[36] The Department's lack of awareness of OPMs and other third parties engaged in recruitment—both institution-wide and for specific programs—weakens the Department's ability to determine whether the OPMs are running afoul of the incentive compensation ban and other prohibitions listed in 34 C.F.R. 668 Subparts F and R, and thus undermines the Department's ability to fulfill its responsibilities to protect students and taxpayers from exploitation of student aid programs.

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[31] Annmarie Weissman, "Dear Colleague Letter GEN-22-07: Written Arrangements Between Title IV-Eligible Institutions and Ineligible Third-Party Entities Providing a Portion of an Academic Program," Federal Student Aid (June 16, 2022), *available at* https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-06-16/written-arrangements-between-title-iv-eligible-institutions-and-ineligible-third-party-entities-providing-portion-academic-program.

[32] *Id.*

[33] 34 C.F.R. § 600.21(a)(13).

[34] The Higher Education Act requires that institutions receiving Title IV aid agree that they "will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance." 20 U.S.C. § 1094(a)(20). Department guidance clarifies that the ban also applies to entities an institution has hired to do recruitment or to make decisions related to securing financial aid.

[35] U.S. Gov't Accountability Office, GAO-22-104463, *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* at 22-25 (April 2022), *available at* https://www.gao.gov/assets/720/719953.pdf.

[36] *Id.*

The lack of Department awareness of the volume and scope of these relationships is even more disconcerting given information that has recently come to light regarding how these entities operate. Recent reports reveal the extent of the financial and fraud risk created by partnerships between putatively nonprofit schools and for-profit companies without sufficient oversight. The conduct uncovered is reminiscent of much of the playbook utilized by for-profit colleges in the 2000s.[37] For example,

- **OPM programs engage in aggressive recruitment practices driven by quotas:** OPM contracts involving recruitment often specify a minimum number of contacts the OPM must make with prospective students; for example, in one contract, the OPM specified that its agents will make at least 13 attempts to contact prospective students for 10 days in a row.[38] In addition, OPMs may hide critical program information from prospective students. As the Century Foundation reported, at least one program operated by Eastern Kentucky University and the OPM Pearson Embanet would not provide prospective students with the program's cost, schedule, faculty, or admissions policies unless the prospective student entered their phone number and email address.[39] Pearson's contract with Eastern Kentucky University then allowed Pearson to control recruitment communications with prospective students.[40]

- **OPM programs may apply admissions standards that are weaker than those applied in equivalent brick-and-mortar programs offered by the partner school:** The Wall Street Journal revealed that OPM 2U and University of California's (USC) online Social Work Masters Degree program recruited students with GPAs lower than those required for the brick and mortar program to meet enrollment targets. Students of the online program claimed that the program "started to feel like a degree mill."[41] In a lawsuit against USC and 2U, plaintiffs alleged that USC deliberately withheld data from U.S. News and World Report regarding this online program to manipulate the program's ranking.[42]

  Another investigation revealed that the University of Texas at Arlington ("UT") "was accepting unqualified students" into a nursing program it operated with a for-profit

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[37] *See* Senate Rep. 112-37, 112th Cong., 2d Sess. (July 30, 2012), *available at* https://www.help.senate.gov/imo/media/for_profit_report/PartI.pdf.
[38] *Id.*
[39] Stephanie Hall & Taela Dudley, *Dear Colleges: Take Control of Your Online Courses*, The Century Found. (Sept. 12, 2019), *available at* https://tcf.org/content/report/dear-colleges-take-control-online-courses/.
[40] *Id.*
[41] Lisa Bannon & Andrea Fuller, *USC Pushed a $115,000 Online Degree. Graduates Got Low Salaries, Huge Debts*, The Wall Street Journal (Nov. 9, 2021), *available at* https://www.wsj.com/articles/usc-online-social-work-masters-11636435900.
[42] Complaint, *Favell v. University of Southern California*, Case No. 2:2023-CV-00846 (C.D. Cal. filed Feb. 3 2023).

OPM called Academic Partnership.[43] Using a program called Direct Admit, the school immediately admitted online transfer students before evaluating their academic credentials, despite several concerns raised by UT admissions officers.[44] The investigation found that school officials were "improperly influenced" by Academic Partnerships. The investigation report stated, "Academic Partnership staff met with UTA staff on a weekly basis, and were part of many decision-making meetings, including when Direct Admit was created. [...]."[45] The OPM then exerted improper control over how UT's admissions office decided to enroll students.[46] This is problematic, as the OPM aimed to maximize enrollments, and thus revenues, instead of prioritizing the best interests of students and their likelihood of benefiting from the program.

- **OPM-run programs that fail to provide institutional faculty with sufficient control may lead to programs of reduced or substandard quality:** The Chronicle of Higher Education reported that an OPM-run online physician assistant ("PA") program operated by 2U in partnership with Arcadia University has been rife with problems. One professor stated "2U was basically trying to turn our PA program into a cash cow[…] they made it obvious they didn't care about the quality of the program." Faculty members repeatedly complained that 2U ignored their input. Eventually the program failed an accreditation visit, in part because the program did not have the necessary clinical sites in place.[47]

- **Improper relationships between OPMs and school administrators also create risks:** Inside Higher Ed reported on an investigation into an improper financial relationship between UT President Vistasp Karbhari and its OPM, Academic Partnerships. In addition to improper dealings between Karbhari and Academic Partnerships, "the university allowed the vendor to reimburse admissions employees for overtime so that they could process more applicants."[48]

[43] Emma Whitford, *UT Arlington President Resigns After Investigation Into OPM Dealings*, Inside Higher Ed (March 22, 2020), *available at* https://www.insidehighered.com/news/2020/03/23/ut-arlington-president-steps-down-after-investigation-improper-financial-dealings.
[44] *Id.*
[45] *The University of Texas Internal Investigation Report* at 1-2, 15 (Oct. 21, 2019) *available at* https://www.insidehighered.com/sites/default/files/media/Protiviti%20Report%20and%20Responses_Protiviti%20Report_UTA%20Internal%20Investigation%20Report%20FINAL%2010-21_REDACTED.PDF
[46] *Id.*
[47] Michael Vasquez, *'They Didn't Care': Inside One University's Sputtering Online Partnership With 2U*, Chron. of Higher Educ. (June 1, 2022), *available at* https://www.chronicle.com/article/they-didnt-care-inside-one-universitys-sputtering-online-partnership-with-2u?cid=gen_sign_in.
[48] Emma Whitford, *UT Arlington President Resigns After Investigation Into OPM Dealings*, *Inside Higher Ed* (March 22, 2020), *available at*

While there is a lack of data on online programs' student composition and outcomes,[49] there is reason to believe that low-income borrowers and borrowers of color will suffer disproportionate harm as a result of these sorts of conduct. As we have noted in previous comments regarding the Department's borrower defense regulations,[50] borrowers we work with have been persuaded to enroll in programs that were not in their best interest after being targeted with incessant calls, text messages, and emails from the predatory school, along with misrepresentations and omissions of critical information. Involvement of for-profit OPMs increases the risk of this sort of aggressive recruiting. Further, these partnerships can mislead students into believing that they are enrolling in a high quality program created and operated by faculty of a prestigious university, when in reality the online program is created and run by a for-profit OPM with no or little oversight from the university's faculty.

As a result, low-income and first-gen students who are less familiar with the higher education system are often targets for these OPM programs. For example, the Wall Street Journal recently reported that the online social work master's degree program offered through USC with OPM 2U used USC's "status-symbol image to attract students across the country, including low-income minority students it targeted for recruitment, often with aggressive tactics" and that "[r]ecruiters for 2U . . . repeatedly call and email prospective applicants" and "sometimes recruited people with low grades to meet enrollment targets."[51] We anticipate that with increased disclosure and oversight, similar arrangements would come to light at other universities as well.

In addition, recent news highlights how these relationships can financially destabilize colleges and make program offerings uncertain—circumstances that have disastrous consequences for low-income students as well as taxpayers. For example, one news agency reported that Concordia University-Portland was forced to close after it paid an OPM called Hotchalk hundreds of millions of dollars, eventually amounting to a third of its revenue, to "jumpstart its online programs" and those efforts failed.[52]

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https://www.insidehighered.com/news/2020/03/23/ut-arlington-president-steps-down-after-investigation-improper-financial-dealings.

[49] As discussed below, we strongly encourage the Department to include reporting for students who enroll primarily online in this negotiated rulemaking, and we ask that the Department solicit information about which programs involve OPM in instruction or recruitment.

[50] Comments from the Legal Aid Community re: Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program and Proposed Amendments to Closed School and False Certification Discharge Regulations, ED-2015-OPE-0103 at 21 (Aug. 1, 2016).

[51] Lisa Bannon & Andrea Fuller, *USC Pushed a $115,000 Online Degree. Graduates Got Low Salaries, Huge Debts*, Wall Street Journal (Nov. 9, 2021), *available at* https://www.wsj.com/articles/usc-online-social-work-masters-11636435900.

[52] Jeff Manning & Molly Young, *Concordia University's online vision hid grim reality*, The Oregonian (Feb. 28, 2020), *available at* https://www.oregonlive.com/education/2020/02/concordia-universitys-online-vision-hid-grim-reality.html.

Even short of rendering a Title IV-eligible university bankrupt, the central role of outside entities in operating institutions' Title IV programs mean that if that entity is to stop operating, students will be left in the lurch as the university tries to fill the gap. If the university chooses to discontinue the program or changes how the program is offered (i.e., changing an online program to in person), it exponentially raises the likelihood that the students previously enrolled in those programs will withdraw, which in turn raises the likelihood they will later default on their federal loans. Because these students' schools haven't closed, they will be ineligible for a closed school discharge.

B. Online Marketing Operations Run By OPMs And Other For-Profit Entities Pose Significant Risk To Low-Income Borrowers and Borrowers of Color

As Americans have become more dependent on the internet, higher education has become increasingly more focused on marketing and lead generation through social media and other online marketing mechanisms. Big data allows institutions and their contractors to target specific messages to specific consumer profiles.[53] For example, TikTok, Facebook, and Snapchat each aim to help lead generators target specific populations of consumers.[54]

Online advertising can be hidden from regulators unless disclosure is required by the party paying for lead generation services. While prior iterations of lead generators relied on a lead generation website, today lead generation forms can be integrated into a social media platform itself. As a result, they often disseminate short video advertisements to cultivate interest in prospective leads, and then direct borrowers within the same platform to provide their contact information. While organizations like Facebook have an ad library,[55] others like YouTube and TikTok do not. It is extremely difficult for a consumer who was targeted by those ads to preserve a copy after the fact to send to regulators, and it is difficult for a regulator to discern what advertisements were being displayed to specific audiences. In the higher education space, where cracking down on deceptive advertising is reliant on student or borrower complaints, the inability

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[53] Taela Dudley, *Colleges' Use of Display Advertising to Recruit Students May Run Risks*, The Century Found. (May 12, 2021), *available at* https://tcf.org/content/report/colleges-use-display-advertising-recruit-students-may-run-risks/.

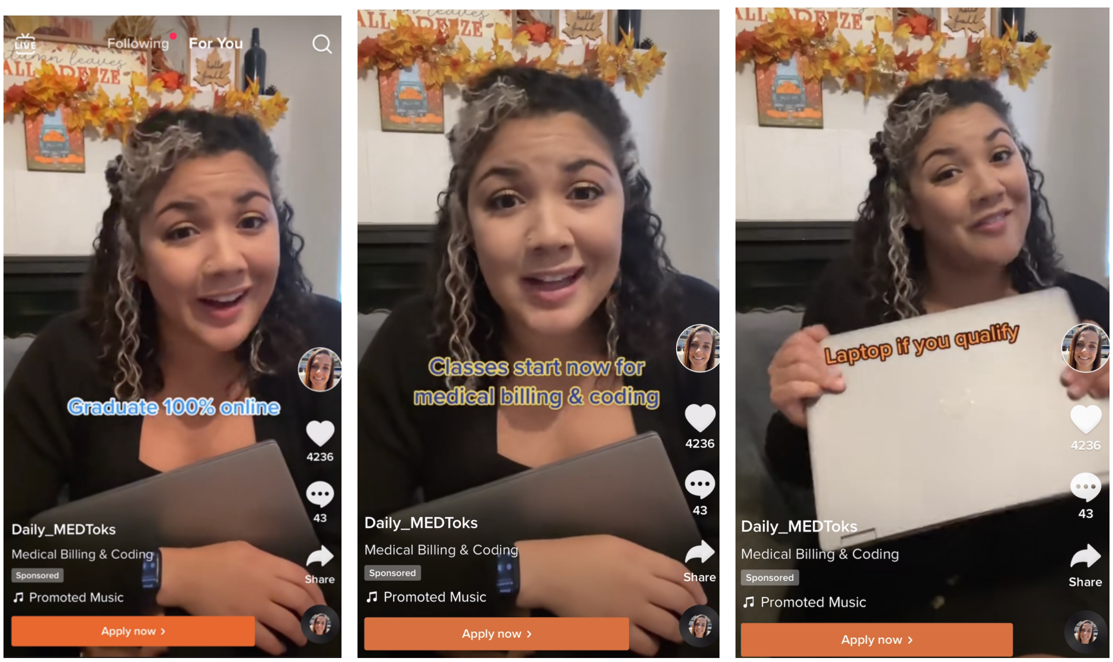
[54] *What's the Lead Generation Objective*, TikTok Business Help Ctr. (accessed April 20, 2023), *available at* https://ads.tiktok.com/help/article/lead-generation-objective?lang=en; *Lead Ads: Advertising Lead Generation Campaigns on Facebook*, Meta for Business (accessed April 20, 2023), *available at* https://www.facebook.com/business/ads/lead-ads; *Why Advertise on Snapchat?*, Snapchat for Business (accessed April 20, 2023), *available at* https://forbusiness.snapchat.com/advertising/why-snapchat-ads?_sid=PAID&utm_source=GoogleSEM&utm_medium=PAIDB2B&utm_campaign=US_G_Search_Brand_MKAG-snapchatmarketing&utm_term=US&utm_content=whysnapads2&gclid=Cj0KCQjwxYOiBhC9ARIsANiEIfaM8CdNhGOqOFTC4t2C0N8UODgowQ-gJNFXDMokRCQgTOO4-L4H_oUaAvSbEALw_wcB.

[55] *Ad Library,* Facebook (accessed April 20, 2023), *available at* https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&media_type=all.

to preserve these advertisements creates a new barrier to ensuring that schools and their contractors are complying with 34 C.F.R. 668 Subpart F.

Companies engaged in lead generation pose a high risk to our clients and their communities. Without additional oversight, institutions may enlist lead generators to target borrowers of color and Pell-grant eligible borrowers.[56] In turn, those lead generators may use deceptive advertising to entice prospective leads into providing their contact information. Even if these borrowers rely on the information relayed by a lead generator, they will not be able to find a copy of the ad to attach to a borrower defense application. At a minimum, the Department should require that institutions disclose their contracts with lead generation entities to determine what the institution has asked the lead generator to provide and what guardrails, if any, the institution has proscribed to ensure the OPM complies with limits on aggressive and deceptive recruitment.

The following is a TikTok ad that makes a dubious promise that prospective students will get a free laptop if they qualify for a medical coding and billing program.[57]



If the viewer chooses to open the lead generation form, it sends them to complete a form within the platform. However, if they choose to view the form in the web browser on their phone, it

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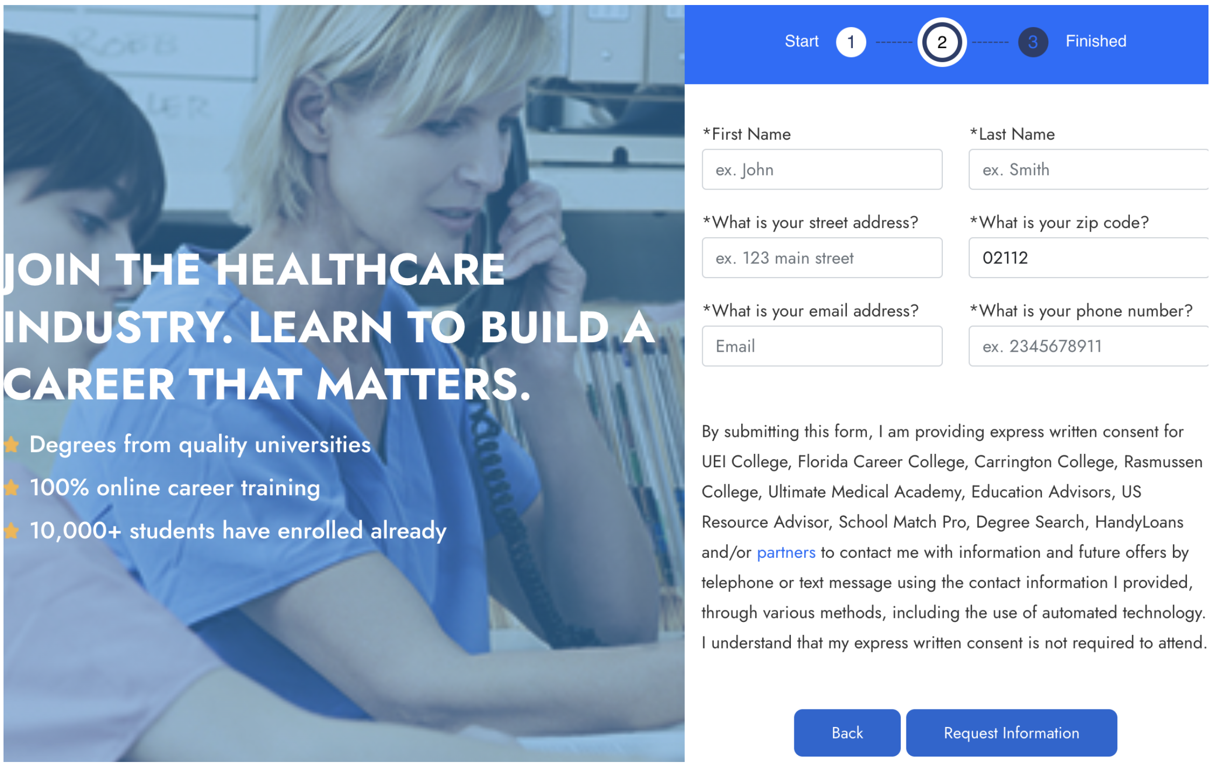
[56] *See generally* Private For-Profit Colleges and Online Lead Generation: Private Universities Use Digital Marketing to Target Prospects, Including Veterans, via the Internet, U.S. PIRG and Ctr. for Digital Democracy (May 2015), *available at* https://www.democraticmedia.org/sites/default/files/field/public-files/2015/forprofitcollegeleadgenreport_may2015_uspirgef_cdd_0.pdfhttps://publicinterestnetwork.org/wp-content/uploads/2015/05/ForProfitCollegeLeadGenReport_May2015_USPIRGEF_CDD_0.pdf

[57] Recording on file with the National Consumer Law Center.

sends them to the following webpage, which lists a multitude of for-profit colleges (UEI College, Florida Career College, Carrington College, Rasmussen College, and Ultimate Medical Academy), as well as a number of other lead generation websites:[58]



We have also seen lead generators whose advertisements center on a questionable promise that students can receive $6000 dollars to attend online classes, which can go towards tuition, rent, or other expenses.[59]

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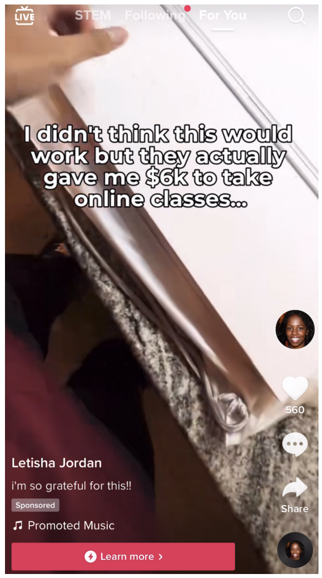
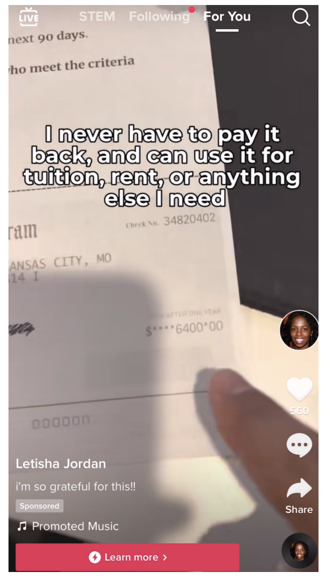
[58] MedicalDegreeSpots website (accessed April 20, 2023), *available at* https://medicaldegreespots.com/?transaction_id=9f77f6aed65740af9226e6856e9b7122.

[59] Recording on file with the National Consumer Law Center. The advertisement then links to an in-screen lead generation form, which, depending on how a consumer responds, leads to the lead generator DegreeSnap.





Needless to say, these types of advertisements harm our clients, who may be enticed to enroll for the "free money" or a "free laptop" instead of for the program itself (and who may never receive the "free" laptop or money promised, or may be deceived into thinking they are being offered things for free that they will in fact have to pay for, and with interest, via student loans).

C. The Department Should Explore Ways to Increase Oversight of OPMs and Other Third-Party Servicers Who Partner with Title IV Schools

We ask that the Department explore the following possibilities in its upcoming rulemaking to create sufficient safeguards against the risk and instability that OPMs and other third-party entities introduce into the Title IV system:

1) At a minimum, the Department should consider revising its program participation agreement regulation, 34 C.F.R. § 668.14, or other appropriate regulation to require institutions to provide the Department with a copy of any written agreement they enter into with a non-Title IV eligible entity to provide instruction or course content and program design, regardless of whether it is 25% or more of a program or not.[60] Disclosure of all of these arrangements is necessary because they raise questions about how much control the non-Title IV entity has over the educational program and whether the program is complying with all aspects of the HEA and its regulations. Moreover, these arrangements directly implicate the institutions' administrative capability to administer these programs in accordance with all regulatory and statutory provisions.[61] Disclosing all of these arrangements will also allow the Department to determine if the same third-party

[60] *See* 34 C.F.R. § 668.5, 600.21(a)(13).
[61] *See* 34 C.F.R. § 668.16(a).

entity is committing misconduct across institutions and across accreditation agencies' jurisdictions and if further enforcement actions are warranted.

2) Similarly, the Department should revise its program participation agreement regulation or other appropriate regulation to require that schools disclose to the public and the Department any contracts they enter with OPMs or other third-party servicers to provide marketing or recruit students. The Department should also require program participants to provide a copy of all such agreements to the Department. Requiring schools to disclose these relationships would serve three purposes. First, it would improve the Department's ability to detect and take action against violations of the incentive compensation ban. As the GAO report on OPMs identified, schools do not always provide complete information about third-party recruiters during the Department's auditing process.[62] Second, it would help the Department determine whether schools' advertising or recruiting arrangements violate 34 C.F.R. 668 Subparts F and R. Third, it would allow the Department to identify when an entity engaging in deceptive conduct is contracting with additional institutions of higher education, so that it can take action to ensure that such conduct ceases across the Title IV system.

3) Additionally, for the reasons stated above, the Department should consider requiring that schools only enter into agreements with OPMs that provide recruitment or educational services if they agree to routine third-party audits to ensure compliance with the HEA and its regulations.

4) The Department should collect disaggregated information about student demographics and outcomes for programs where instructional services are provided by an OPM and/or where OPMs provide recruitment services. The Department should closely track and be highly suspicious when Pell-eligible students or students of color are aggressively being recruited into online OPM programs, but are missing from the brick and mortar programs. We are deeply concerned that these programs may disproportionately target low-income students, first-generation college students, and students of color, as for-profit colleges have in the past, and that schools may be setting up separate and unequal educational programs.

III. The Department Should Consider Regulations that Would Prevent Institutional Transcript Withholding and Similar Debt Collection Practices That Impede Borrowers' Ability to Repay Their Federal Loans

[62] U.S. Gov't Accountability Office, GAO-22-104463, *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* (April 2022), *available at* https://www.gao.gov/assets/720/719953.pdf.

Transcript withholding, credential withholding, and the withholding of documents students need to become eligible for licensure in the profession for which they are trained as means of debt collection are a quiet crisis for millions of Americans whose economic potential is locked up. The Department should strongly consider adding a provision to Program Participation Agreements requiring participating schools to agree not to withhold transcripts, credentials, or other documents necessary for licensure for unpaid institutional debt or federal aid.

In our experience, these debts often arise when students have had to withdraw mid-semester and are then unexpectedly on the hook for some unpaid tuition because the school returned federal aid to the Department. We also see it when students are unable to repay Perkins loans they owe to their school (and Perkins loans are not eligible for income-driven repayment plans). It also happens where schools add institutional "overcharge fees" to student accounts when they have to retake classes.

These institutional debt collection tactics threaten both the borrower's financial security, and, in turn, threaten their ability to pay their Direct Loans. Students who have withdrawn cannot transfer their credits to complete their education without documentation from their prior school. Their inability to complete their program puts them at a higher risk for default. In addition, borrowers' inability to get documentation from their school often means they cannot get the jobs they are qualified for, which means they are less likely to be able to repay any Title IV funds that they owe. For low-income students in particular, transcript, credential, and document withholding permanently stymy their ability to benefit from their education. Addressing the practice of withholding as a debt collection tool is an essential aspect of ensuring that a school's Title IV practices do not harm students and that students are able to pay their Title IV debts.

IV. The Department Should Consider Collecting Information About Students Who Enroll in Online Programs

We strongly encourage the Department to collect more information about the demographics and outcomes of students who attend school predominantly online. In particular, this data collection will help identify whether Pell Grant eligible students are disproportionately attending these programs, the online programs cost in comparison to brick-and-mortar programs, completion rates, default rates of these borrowers, and other student demographic information and outcomes. This information will be critical to (1) identifying what types of OPM/institutional partnerships create the most risk to the Title IV program and students; (2) identifying institutions that have engaged OPMs who violate substantial misrepresentation or other HEA regulations or who illegally targeted communities based on their racial or ethnic characteristics; (3) determining other risks posed by online program to the Title IV system and students that should be addressed through guidance or future rulemaking. As noted above, this information should include information about whether or not an OPM provided a portion of that program's instruction or curricular design.

V. The Department Should Make Its Default and Debt Collection Practices Less Punitive For Low-Income Borrowers.

We urge the Department to consider including reform to default and debt collection practices in this rulemaking, as well as in rulemakings under the Debt Collection Improvement Act, and to take action now by reforming its discretionary policies and practices related to default. In 2019 alone, more than 1.25 million federal student loan borrowers defaulted on their Direct Loans and more were behind and at risk of defaulting.[63] Current policies impose harsh penalties on defaulted borrowers that can trap them in poverty and prevent them returning to school and succeeding. Current federal student aid practices and policies hammer students that do not succeed the first time around. Defaulted borrowers experience extraordinarily punitive and expensive involuntary collection tactics, such as wage garnishment, social security offset, and tax refund offset. And as we know, these harsh realities are more likely to be felt by families of color. Because of decades of structural inequities and discrimination, student loans have burdened Black and Latinx borrowers more than other groups, and these borrowers experience default at twice the rate of their white peers.[64]

Borrowers in default who are subject to the government's vast collection powers often pay thousands of dollars more per year than if they had been able to access an income-driven repayment plan.[65] Notably, complaints to the Consumer Financial Protection Bureau ("CFPB") and numerous lawsuits brought by the CFPB, state attorneys general and private litigants show that loan servicing errors and problems cause many borrowers to have trouble accessing or remaining in income-driven repayment plans, leading many borrowers to default.[66] Further, once

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[63] U.S. Dep't of Educ., Federal Student Aid Data Center, Default Rates, available at https://studentaid.gov/data-center/student/default; U.S. Dep't of Educ., Federal Student Aid Data Center, Chart: Portfolio by Delinquency Status, available at https://studentaid.ed.gov/sa/about/data-center/student/portfolio.

[64] *Disproportionately Impacted: Closing the Racial Wealth Gap through Student Loan Cancellation, Payment Reforms, and Investment in College Affordability*, Nat'l Consumer Law Ctr. and Ctr. for Law and Social Policy (June 2022), https://www.nclc.org/wp-content/uploads/2022/10/2022_Disproportionately-Impacted.pdf; Judith Scott-Clayton, *The looming student loan default crisis is worse than we thought*, Economic Studies at Brookings (Jan. 2018), *available at* https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/; Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, Ctr. for Am. Progress (Dec. 2, 2019), *available at* https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers.

[65] *See Annual report of the CFPB Student Loan Ombudsman*, Consumer Fin. Prot. Bureau (Oct. 2016), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf.

[66] *Snapshot of Older Consumers and Student Loan Debt*, Consumer Fin. Prot. Bureau Off. for Older Americans & Off. for Students and Young Consumers (Jan. 2017) *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf. *See*, *e.g., Consumer Fin. Prot. Bureau v. Navient Corp*., 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017); *Lawson-Ross v. Great Lakes*

in default, default servicing and collection practices have repeatedly failed to effectively connect borrowers with available paths out of default and into income-driven repayment, meaning many borrowers remain stuck in default for years, even while paying more in default than they would in income-driven repayment. The effect of these involuntary collection tactics can have devastating effects on low-income families and, in aggregate, communities. Further, as the pandemic revealed, the Department is often unable to stop these tactics even when required by law.[67]

We ask that the Department consider the following reforms, many of which are addressed in more detail in our prior comments to the Department:[68]

- Allow defaulted borrowers to participate in income-driven repayment ("IDR"), as the Department recently proposed, and solidify the proposed protections by ensuring that borrowers in default:
    - are automatically enrolled in IDR,
    - are only responsible for paying their IDR payment amount and are not subject to any involuntary collections while making their IDR payment amount,
    - cannot have more than the amount they owe in IDR seized from them if they fall behind in payment,
    - are removed from default automatically by enrolling and making any required payments in an IDR plan.
- Eliminate the acceleration clause upon default, so that borrowers experiencing the financial distress that accompanies and often causes default are only immediately financially responsible for paying their past due amount, and not the full balance of their loan. Further, for borrowers in default who cannot be automatically enrolled in IDR, limit their monthly payment obligations to reflect a reasonable amount proportional to their debt owed, akin to what they would pay in the non-default servicing context.

Higher Education Corp., No. 18-14490 (11th Cir. 2020); *Grewal v. Navient Corp.*, No. ESX-C-172-2020 (N.J. Super. Ct. Ch. Div. Oct. 20, 2020); *People v. Pa. Higher Educ. Assistance Agency*, No. 1:2019cv09155 (S.D.N.Y. Oct. 3, 2019); *Vullo v. Conduent Educ. Services* (Jan. 4, 2019) (consent order), available at www.dfs.ny.gov; *Nelson v. Great Lakes Higher Education Corp.*, No. 18-1531 (7th Cir. 2019); *People v. Navient Corp.*, No. CGC-18-567732 (Cal. Super. Ct. Nov. 1, 2018) (first amended complaint); *Mississippi v. Navient Corp*, No. 25CH1:18-CV-00982 (Miss. Ch. Ct. Hinds Cty. July 17, 2018); *Commonwealth v. Navient Corp.*, No. 19-2116 (M.D. Pa. Oct. 5, 2017); Marek v. Navient Corp., 2017 WL 2881606 (N.D. Ohio July 6, 2017); *People v. Navient Corp.*, No. 17CH761 (Ill. Cir. Ct. Cook Cty. Jan. 18, 2017) (complaint).

[67] *Lawsuit Against DeVos Ends; Fight for Defaulted Borrowers Continues*, Nat'l Consumer Law Ctr. Student Loan Borrower Assistance (March 22, 2021), *available at* https://www.studentloanborrowerassistance.org/lawsuit-against-devos-ends-fight-for-defaulted-borrowers-continues

[68] *See* National Consumer Law Center and Legal Aid Foundation of Los Angeles Comments to Department of Education, Docket ID: ED-2021-OPE-0077, at pp. 3-8 (July 1, 2021), *available at* https://www.nclc.org/wp-content/uploads/2022/08/LAFLA_HEA_comment.pdf; Legal Aid Comments to Department of Education, Docket ID ED–2023–OPE–0004 at (Feb. 10, 2023), available at https://www.nclc.org/wp-content/uploads/2023/02/Legal-Aid-Comments-on-Changes-Income-Driven-Repayment-2023.pdf.

- On a one-time retroactive basis, provide credit toward IDR and PSLF forgiveness for past time in default, in recognition of the fact that many borrowers were only in default rather than IDR (or an IDR-qualifying economic hardship deferment) due to poor servicing and illegal forbearance steering, and that many borrowers in default either paid more in default than they would in IDR or would have been eligible for $0 IDR payments if they'd been properly serviced and the student loan system had worked as intended.
- Refrain from using involuntary collection methods, such as administrative wage garnishment, that cannot be controlled and impose better systems for protecting vital safety-nets.
- Align the disparate financial hardship standards policies and practices available to protect borrowers from involuntary collections that cause or exacerbate financial hardship, and reform the currently broken notice, default servicing, and application processes to ensure borrowers who qualify for hardship relief get it.[69] Ideally, borrowers in default should not have to figure out, request, and complete a separate application for each form of relief they may be entitled to, but rather should be proactively notified of opportunities for relief and helped through a unified process over the phone, online, or in paper that uses screening questions to identify the relief they are eligible for and enrolls them in the most beneficial relief option(s) they are eligible for unless they opt-out.
- Limit collection fees.
- Cancel defaulted debt that borrowers are unable to pay in full in a reasonable amount of time, that the Department cannot collect in full in a reasonable amount of time, and for which the cost of collection does not justify continued collection.[70]

[69] *See, e.g.*, .S. Gov't Accountability Office, GAO-17-45, Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief 39-42 (Dec. 2016) (finding that Education does not notify borrowers in default of the option to prevent or stop Social Security offset based on financial hardship, and that "unless Education takes steps to inform borrowers facing financial hardship that they may be eligible for relief, those with little or no discretionary income may continue to have their Social Security benefits reduced"), *available at* https://www.gao.gov/products/gao-17-45.
[70] 34 C.F.R. § 30.70; 31 C.F.R. § 902.2.