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November 1, 2019

The Honorable Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

Dear Secretary DeVos:

This letter responds to the Department of Education's (Department's) October 29<sup>th</sup> letter, which indicated that you could not testify before the Committee on the issue of outstanding Borrower Defense claims until related litigation is resolved.<sup>1</sup> In this letter, the Department indicated that it would be willing to brief Committee staff in lieu of Secretary DeVos's testimony. I appreciate the Department's willingness to provide the briefing that I initially requested on March 25, 2019 and that Committee staff has requested more than a dozen times over the last six months.<sup>2</sup> While I accept the Department's offer for a briefing to better inform the Committee's ongoing inquiry, this letter serves to reiterate my request that you testify publicly on the Department's management of this program.

I also reiterate Committee Democrat's November 2018 request for documents and data related to the Department's implementation of Borrower Defense, to which the Department has yet to respond. Although the Department continues to delay legitimate oversight and supervision, the other two co-equal branches of the Federal Government appear to be of one mind: The Department must turn over documents explaining its failure to discharge loans under Borrower Defense. Just last week, a federal court expressed that "[i]t perturbs the Court that, nearly two years into this litigation, [the Department] seem[s] so woefully unprepared to produce an administrative record and accompanying privilege log in keeping with normal procedure."<sup>3</sup> The Department's delay tactics will not stand.

The Department's argument, that until related litigation concludes there is no "basis for oversight serving a legitimate legislative purpose," is without merit. If the Department's suggested interpretation of what constitutes "legitimate oversight" were accurate, the Department could avoid Congressional oversight altogether every time someone files a lawsuit. Long-standing Congressional and federal court precedent establishes that this is not the case. There is, of course

no restriction on Congress's ability to consider appropriate legislation on these issues during the pendency of litigation that involves the Department.

**Precedent clarifies that contemporaneous litigation does not impede Congress's ability to conduct oversight or legislate.**

The decision of whether to pursue Congressional oversight during litigation is exclusively within Congress's discretion.<sup>4</sup> The Supreme Court has long recognized that ongoing related litigation does not impair Congress's constitutional prerogative to conduct oversight.<sup>5</sup> As Chairman Raskin recently explained in response to a similar Executive Branch agency attempt to avoid Congressional testimony: "The existence of ongoing litigation does not change the facts of what occurred and should not impact your ability to share truthful information with Congress."<sup>6</sup> Indeed, your prior testimony provides concrete examples of this principle.

In the 116<sup>th</sup> Congress alone, Department officials—including yourself—have repeatedly testified about issues that are the subject of ongoing litigation, including the Department's refusal to implement Borrower Defense. In December 2017,<sup>7</sup> Corinthian students, who were fed up with the Department's failure to provide legally required debt relief, sued you to forgive their loans. Though you now use that lawsuit as a shield against Congressional oversight, you previously responded to questions regarding Borrower Defense in three separate budget hearings while the very same suit was ongoing: (1) on March 26, 2018<sup>8</sup>, before the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, (2) on March 28, 2018<sup>9</sup>, before the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies and (3) on April 10, 2019<sup>10</sup> before the House Committee on Education and Labor.

Your answers raised additional questions that necessitate the hearing that I am, again, requesting in this letter. For instance, on March 28, 2018, when Senator Murray asked you if the Department had approved even one Borrower Defense claim since a September 2018 court order, you responded, "I believe so."<sup>11</sup> But the Department had not.<sup>12</sup> When Senator Murray then asked why the Department would not approve the claims of tens-of-thousands of defrauded Corinthian students, you stated: "The Corinthian college students' claims are being processed and dealt with forthwith and will continue to be."<sup>13</sup> But the Department was not processing these cases "forthwith." In fact, the Department has not approved a single claim in more than a year, Corinthian or otherwise.<sup>14</sup>

Finally, the Committee is considering whether to enact or update legislation in light of these issues. Under the Rules of the House of Representatives, the Committee is charged with reviewing, studying, and coordinating, on a continuing basis, laws, programs, and Government activities relating to domestic education programs and institutions, and programs of student assistance within the jurisdiction of other committees.<sup>15</sup> That is exactly what the Committee seeks to do in this instance. It would be absurd if the Committee were prohibited from carrying out these essential duties while the Department is involved in litigation. In fact, there is no basis in the text of the Constitution, case law, or the House Rules for the rule you advocate for in your letter.

**The Department's offer to brief Committee staff indicates that the Department can divulge information related to its implementation of Borrower Defense to Congress.**

The Department's letter indicates that I can reach out to Ms. Harding to schedule a briefing "regarding the actual state of affairs including remedial action with respect to both the Corinthian College loans and the active litigation."<sup>16</sup> While this briefing is useful, though belated, and although it acknowledges the Committee's oversight and legislative obligations, it does not displace the compelling need for you to testify before the Committee.

The Department has resisted oversight of Borrower Defense for nearly a year. My staff initially requested data and documents related to the Department's implementation of Borrower Defense in November 2018. After months without a response, on March 25, 2018, I then reiterated this request and asked the Department to brief Committee staff.<sup>17</sup> In the intervening six months, Committee staff has repeated these requests more than two-dozen times. Committee staff consistently indicated that, to schedule the requested briefing, it would accommodate Department staff availability, but Department staff has failed to answer many of these emails and, until now, has refused to organize a briefing.

Consequently, my staff will reach out to Ms. Harding to schedule this briefing before our November 19<sup>th</sup> hearing. However, there is no reason the Department cannot both brief Committee staff on its Borrower Defense implementation *and* make you available for this essential Congressional testimony. In fact, the Department's offer to brief Committee staff undermines the Department's own argument, demonstrating that the Department can discuss information related to the litigation.

**Your testimony is critical to answer outstanding questions raised by your refusal to discharge defrauded borrowers' loans.**

As detailed in my initial invitation, in the six months since you testified before the Committee on the President's fiscal year 2020 budget request, the Department's conduct has only raised additional questions, necessitating Congressional oversight. Many of these events have involved you personally. Accordingly, we expect you to testify publicly and answer all questions raised by your policies.

Although your letter asserts that you are now ready to "commence the constitutionally mandated accommodation process," this process has been underway for weeks. As you know, Committee staff initially emailed Department staff on October 15<sup>th</sup> to request your testimony. On October 16<sup>th</sup>, Committee staff spoke with Department staff detailing the Committee's legislative interest and the necessity that you testify to the Department's conduct. Department staff provided no response at that time, and subsequently Committee staff reiterated this request in three separate emails. When the Department failed to respond for approximately two weeks, I formally invited you to testify on October 28<sup>th</sup>.

I was disappointed that you rejected my invitation to voluntarily participate in lawful Congressional oversight, relying only on the fact that students are suing you over the very policies you are refusing to provide Congress information on. The Department's refusal to



expediently adjudicate Borrower Defense claims naturally invites litigation from defrauded students desperate for relief. As explained above, a lawsuit by defrauded students seeking relief from your policies does not prohibit or restrict you from testifying to Congress and does not outweigh the Committee's obligation to conduct oversight and consider legislative reforms on these important issues.

Please accept my invitation to voluntarily testify by November 6, 2019. The Committee will treat a failure to respond by November 5, 2019 at 5:00 P.M. as a declination of this offer. If you choose to decline my invitation, the Committee will consider exercising its legal authority to compel your attendance.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**  
Chairman

cc: The Honorable Virginia Foxx, Ranking Member

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<sup>1</sup> Acting General Counsel Reed D. Rubinstein, responding on behalf of Secretary Betsy DeVos, Letter to Chairman Robert C. "Bobby" Scott, re: Hearing Invitation (October 29, 2019).

<sup>2</sup> Chairman Robert C. "Bobby" Scott, *Letter to Secretary Betsy DeVos*, re: Borrower Defense (Mar. 25, 2019) available at <https://edlabor.house.gov/download/letter-to-secretary-devos-regarding-departments-failure-to-implement-borrower-defense-rule->.

<sup>3</sup> Order Granting Motion to Extend Privilege Log Deadline, *California v. Department of Education* (N.S.C.A.) (Case No. 17-cv-07210-SK).

<sup>4</sup> See Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 *Hous. L. Rev.* 1, 9 (1988) ("The legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance.").

<sup>5</sup> See *Hutcheson v. United States*, 369 U.S. 599, 617 (1962) ("But surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding or when crime or wrongdoing is disclosed.") (internal citations omitted).

<sup>6</sup> Chairman Jamie Raskin, *Letter to Acting Director Ken Cuccinelli and Acting Director Matthew T. Albence*, re: Hearing Invitation (Sept. 10, 2019).

<sup>7</sup> Complaint, *Manriquez et al. v. DeVos*, (N.D.C.A.) (Case No. 17-cv-07210-SK).

<sup>8</sup> See *Review of the FY2020 Budget Request for the U.S. Department of Education: Hearing Before the Subcomm. On Labor, Health, and Human Services, Education, and Related Agencies of the H. Comm. On Appropriations*, 116th Cong. (2019) (questioning by Rep. Bustos of Sec'y DeVos).

<sup>9</sup> See *Department of Education Budget Request for FY 2020: Hearing Before the Subcomm. On Labor, Health, and Human Services, Education, and Related Agencies of the S. Comm. On Appropriations*, 116th Cong. (2019) (questioning by Sen. Murray of Sec'y DeVos).

<sup>10</sup> See *Examining the Policies and Priorities of the U.S. Department of Education: Hearing Before the H. Comm. On Education and Labor*, 116th Cong. (2019) (questioning by Rep. Takano of Sec'y DeVos).

<sup>11</sup> See *Department of Education Budget Request for FY 2020: Hearing Before the Subcomm. On Labor, Health, and Human Services, Education, and Related Agencies of the S. Comm. On Appropriations*, 116th Cong. (2019) (questioning by Sen. Murray of Sec'y DeVos).

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<sup>12</sup> See U.S. Dep't of Education, *Borrower Defense Quarterly Report* (Mar. 29, 2018); *see also* U.S. Dep't of Education, *Borrower Defense Quarterly Report* (Sept. 19, 2018).

<sup>13</sup> *See Department of Education Budget Request for FY 2020: Hearing Before the Subcomm. On Labor, Health, and Human Services, Education, and Related Agencies of the S. Comm. On Appropriations*, 116th Cong. (2019) (questioning by Sen. Murray of Sec'y DeVos).

<sup>14</sup> See U.S. Dep't of Education, *Borrower Defense Quarterly Report* (Mar. 29, 2018); *see also* U.S. Dep't of Education, *Borrower Defense Quarterly Report* (Sept. 19, 2018).

<sup>15</sup> *See, e.g.*, Rule X.3(d).

<sup>16</sup> Acting General Counsel Reed D. Rubinstein, responding on behalf of Secretary Betsy DeVos, Letter to Chairman Robert C. "Bobby" Scott, re: Hearing Invitation (October 29, 2019).

<sup>17</sup> Chairman Robert C. "Bobby" Scott, *Letter to Secretary Betsy DeVos*, re: Borrower Defense (Mar. 25, 2019) available at <https://edlabor.house.gov/download/letter-to-secretary-devos-regarding-departments-failure-to-implement-borrower-defense-rule->.