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December 2, 2022

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary Cardona:

We write regarding the recently published Government Accountability Office (GAO) report on online program managers (OPMs)¹ and the actions the Department of Education (Department) is planning to take to address the issues highlighted by the GAO report. OPMs are third-party entities that are contracted by institutions of higher education (IHEs) to handle the management and operations of a variety of online education programs and support services. OPMs' contracted duties often include the recruitment of students, and their compensation is often provided via tuition revenue-sharing agreements with their partner IHEs.

In the 1992 reauthorization of the *Higher Education Act of 1965* (HEA), Congress included what is known as the "incentive compensation ban" to ensure that postsecondary recruiters and admissions counselors were not incentivized based on per-student enrollment quotas.² Since then, the Department's enforcement of the ban has been piecemeal at best. In 2011, the Department issued guidance, clarifying that the incentive compensation ban includes an exception, known colloquially as the "bundled services exception."³ This exception allows tuition revenue sharing between an IHE and a third party, in this case an OPM, on a per-pupil basis if 1) a variety of bundled services is agreed to in addition to student recruiting (e.g., marketing, student advising, technology support) and 2) the agreement complies with additional

¹ See "Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers," Gov't Accountability Office, May 2022, available at <https://www.gao.gov/products/gao-22-104463> (hereinafter "GAO OPM Report").

² See 20 U.S.C. § 1094 (a)(20).

³ See "Program Integrity Questions and Answers - Incentive Compensation," U.S. Dep't of Ed. available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/compensation.html>.

safeguards that reflect the principles of the incentive compensation ban.⁴ These additional safeguards include requirements that: 1) the IHE pay the third party for the full set of bundled services and not compensate the IHE for the student recruiting services separately, 2) the IHE and the third party are independent and unaffiliated with each other, 3) the IHE, and not the third party, makes the enrollment decisions for students, and 4) the recruitment staff at the OPM does not receive incentive payments based on enrollments.⁵

As demand for online learning increased, especially during the COVID-19 pandemic, OPMs utilized the bundled services exception aggressively. Starting in 2010, there were approximately 20 IHEs setting up new OPM arrangements, with a steady increase over the next few years; however, in 2020, there was a “considerable increase” with 165 new arrangements.⁶ In 2010, approximately 25 new online programs were offered by IHEs with OPM; this number grew to at least 385 new online programs in 2020.⁷ GAO found that, as of July 2021, at least 550 IHEs worked with an OPM to support approximately 2,900 education programs.⁸ GAO also found that the majority of these OPM arrangements (90 percent) were with public or nonprofit institutions, and often include recruiting in the bundle of provided services.⁹ Additionally, many of these agreements utilize a tuition revenue-sharing model where OPMs are compensated based on a percentage of tuition paid. However, the total number of OPMs, arrangements with IHEs, and the number of programs they help run is unknown;¹⁰ this lack of transparency is of concern.

Recent reporting has shown that at certain institutions, OPMs recruit between 40 and 50 percent of the school’s total enrollment, and the terms of certain tuition revenue-sharing agreements split revenues 50-50 or in some cases dictate more than 50 percent of revenue for the OPM.¹¹ Practically, this means that, in some cases, more than half of the federal financial aid dollars (Title IV funds) an institution receives from its students to cover the cost of a program could be going directly to a third-party servicer.

While OPMs themselves are not subject to the HEA or the Department’s oversight, the arrangements they enter into with IHEs are, given the Title IV funds involved. The GAO report confirmed the current higher education accountability system, the triad of the Department, state authorizers, and private nonprofit accreditors, lacks adequate oversight of OPM arrangements, especially considering the significant amount of federal funding flowing to OPMs. However, based on what’s publicly known about IHE-OPM arrangements, it is clear how these arrangements may create incentives for OPMs to guide students to less selective, more expensive

⁴ See *id.*

⁵ See *id.*

⁶ See GAO OPM Report, *supra* n.1 at 11-12.

⁷ See *id.* at 12.

⁸ See *id.* at 2.

⁹ See *id.*

¹⁰ See *id.* at 11, fn.27. One of the reasons for the lack of transparency identified by GAO is the exclusion of OPM agreements from the definition of “written arrangements” under 34 CFR § 668.5. See “Distance Education and Innovation; Final Rule,” 85 Fed. Reg. 171 (to be codified at 34 C.F.R. pt. 600, 602 and 668), Sept. 2, 2020, pg. 54773, available at <https://www.govinfo.gov/content/pkg/FR-2020-09-02/html/2020-18636.htm>.

¹¹ See “Invasion of the College Snatchers,” Stephanie Hall, The Century Foundation, Sept. 30, 2021, available at <https://tcf.org/content/report/invasion-college-snatchers/> (hereinafter “Invasion of the College Snatchers”).

programs, at all levels of higher education (undergraduate, graduate, post-graduate).¹² There has also been litigation and reporting accusing OPMs of using aggressive recruiting practices, including the targeting of low-income and minority students, the type of abuse the incentive compensation ban was intended to prevent.¹³ Relatedly, reports also call into question the rigor of the admissions process used by IHEs to ensure that students that are recruited are able to succeed in these programs as well as the quality of some programs. Public reporting has shown that online programs, which are the bulk of the programs supported by OPMs, are also often priced to generate considerable revenue for both the schools and OPMs, passing costs for considerable expenses, like marketing and sales, onto students.¹⁴

Further, reporting also shows that there are legitimate concerns regarding the lines between administrative services, managerial decision-making, and instruction provided by an OPM are sometimes unclear.¹⁵ For example, at some institutions, OPMs are given control over recruitment practices, marketing methodology, and materials.¹⁶ At some institutions, OPM officials sit on steering committees or governing bodies and have a regular role in decision-making such as enrollment targets, tuition pricing, course scheduling, and curriculum decisions.¹⁷ These reported practices run counter to the required safeguards of the Department's 2011 sub-regulatory guidance.

Relatedly, recent controversial non-profit conversions, such as Grand Canyon University and University of Arizona Global Campus, are based on an OPM-type model.¹⁸ In both cases, for-profit institutions spun off or sold their assets to non-profit institutions, but the remaining for-

¹² See e.g., "How Companies Profit Off Education at Nonprofit Schools," Derek Newton, *The Atlantic*, June 7, 2016, available at <https://www.theatlantic.com/education/archive/2016/06/for-profit-companies-nonprofit-colleges/485930/>; "The Creeping Capitalist Takeover of Higher Education," Kevin Carey, *Huffpost*, April 1, 2019, available at <https://www.huffpost.com/highline/article/capitalist-takeover-college/> (hereinafter "Capitalist Takeover"); "Online degrees made USC the world's biggest social work school. Then things went terribly wrong," Harriet Ryan and Matt Hamilton, *LA Times*, June 6, 2019, available at <https://www.latimes.com/local/lanow/la-me-usc-social-work-20190606-story.html>.

¹³ See "USC Pushed a \$115,000 Online Degree. Graduates Got Low Salaries, Huge Debts.," Lisa Bannon and Andrea Fuller, *The Wall Street Journal*, Nov. 9, 2021, available at <https://www.wsj.com/articles/usc-online-social-work-masters-11636435900>; see also "Concordia gained thousands of new students -- and a federal inquiry," Molly Young, *Oregon Live*, Oct. 21, 2016, available at https://www.oregonlive.com/portland/2016/10/concordia_gained_thousands_of_new_students_-_and_a_federal_inquiry.html; H. Rpt. 102-630, 102d Cong., 2d. sess. ("The conferees note that substantial program abuse has occurred in the student aid programs with respect to the use of commissioned sales representatives. Therefore, this legislation will prohibit their use.").

¹⁴ See *id.*, see also *Capitalist Takeover*, *supra* n.12.

¹⁵ See *Capitalist Takeover*, *supra* n.12.

¹⁶ See *Invasion of the College Snatchers*, *supra* n.11.

¹⁷ See *id.*; see also "Memo to College Leaders: Revising Your OPM Contracts Is In Your Best Interest," Stephanie Hall, *The Century Foundation*, <https://tcf.org/content/report/memo-to-college-leaders-revising-your-opm-contracts-is-in-your-best-interest/>.

¹⁸ See Letter from Chairman Robert "Bobby" Scott to Internal Revenue Service on Grand Canyon University, H. Cmte. on Ed. and Labor, Aug. 11, 2021, available at <https://edlabor.house.gov/download/chairman-scott-letter-to-irs-re-tax-status-decision-at-gcu>; Letter from Chairman Robert "Bobby" Scott to Internal Revenue Service on University of Arizona Global Campus, H. Cmte. on Ed. and Labor, Aug. 11, 2021, available at <https://edlabor.house.gov/download/chairman-scott-letter-to-irs-re-tax-status-decision-at-uagc>.

profit entities continue to provide a lion's share of services utilized by the IHE and the for-profit entities make a substantial portion of their revenue from the non-profit institutions.¹⁹

The Department is responsible for ensuring colleges and universities comply with the law banning incentive compensation and the regulatory safeguards of the bundled services exception. However, GAO found there is a high risk that the Department does not have the information it needs to detect violations of the incentive compensation ban.²⁰ We are encouraged by the Department's acceptance of GAO's recommendations and the actions the Department is taking to improve audit guidance to IHEs, and we believe more can be done to prevent harmful recruiting practices and provide more transparency about OPM arrangements with IHEs.

The Department has a responsibility to conduct proper oversight of the arrangements between institutions and OPMs. For that reason, we recommend the Department take immediate action to protect students by:

- 1) Conducting a formal legal review of the Department's guidance on the bundled services exception, especially whether tuition revenue-sharing arrangements should be permissible in the context of bundled services; and
- 2) Reviewing whether OPM arrangements are "written agreements" for the purpose of providing transparency disclosures to students about entities that are involved in educational programs.²¹

Additionally, to ensure that we understand the Department's oversight of the incentive compensation ban and the bundled services exception, please provide the following information:

- 1) How does the Department review institutions' relationships with OPMs during reapplications of the institutions' program participation agreement?
- 2) How does the Department plan to improve the data collection of information relevant to OPM arrangements, including:
 - a. Program cost by credential and degree type (e.g., short-term credentials, including micro credentials and boot camps, and longer-term credentials such as master's degrees);
 - b. Spending breakdowns of Title IV funding by OPMs (such as information on revenue and profit to the OPM, percent of Title IV funding provided to the OPM that is spent on instruction, marketing, and sales); and
 - c. The students enrolled in such programs, including by race, ethnicity, age, gender identity, veteran status, and socioeconomic status?
- 3) How many violations of the incentive compensation ban has the Department, including the Department's Office of Inspector General, found since 2011 and what were the details of those findings?

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See* 34 CFR § 668.5; *see also supra* n.10.

- 4) How many violations of the bundled services exception has the Department, including the Department's Office of Inspector General, found since 2011 and what were the details of those findings?
- 5) How is the Department planning to revise its guidance to IHEs and auditors regarding audit documentation?

Please provide the requested information within 2 weeks of the date of this letter or sooner, if available. Please send all official correspondence and information relating to this request to the House Committee on Education and Labor Clerk, Rasheedah Hasan at Rasheedah.Hasan@mail.house.gov, the Senate Committee on Health, Education, Labor and Pensions staff, Viviann Anguiano, at Viviann_Anguiano@help.senate.gov, and the House Committee on Appropriations staff, Philip Tizzani, at Philip.Tizzani@mail.house.gov. Please keep relevant staff from our Committees and respective offices, as appropriate, informed of work on this engagement. Thank you for your assistance in this matter.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Chairman
House Committee on Education
and Labor



PATTY MURRAY

Chair
Senate Committee on Health, Employment,
Labor and Pensions



ROSA L. DeLAURO

Chair
House Committee on Appropriations



ELIZABETH WARREN

U.S. Senator



TINA SMITH

U.S. Senator