May 23, 2024

Hampton Dellinger
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Re: OSC File No. DI-24-000101

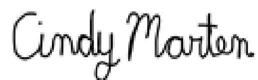
Dear Mr. Dellinger:

The enclosed report is in response to your December 4, 2023 letter to the U.S. Department of Education (ED) regarding a whistleblower disclosure alleging violations of law, rule, or regulation. The Secretary has delegated to me the authority to review and sign written reports of investigation prepared in response to referrals from the Office of Special Counsel (OSC) regarding whistleblower disclosures; to submit these reports of investigations to OSC; and to take actions as a result of the investigation pursuant to 5 U.S.C. §§ 1213(d) and (f)(2).

In your letter, you asked ED to investigate an allegation that the Department of Education had inappropriately provided full federal student loan discharges to a group of borrowers who had attended schools owned by the Center for Excellence in Higher Education, as well as to other groups of borrowers.

The enclosed report sets forth the findings of ED's investigation.

Sincerely,



Cindy Marten
Deputy Secretary
U.S. Department of Education

Enclosure

Report to the U.S. Office of Special Counsel
OSC File No. DI-24-000101

Report Date: May 23, 2024

Introduction

On December 4, 2023, the Office of Special Counsel sent the Department of Education (Department) a referral regarding a whistleblower complaint challenging the Department's use of its legal authorities to provide federal student loan discharges to a group of borrowers who had attended schools owned by the Center for Excellence in Higher Education, as well as other groups of borrowers. Secretary Cardona requested that the Office of General Counsel investigate. This report provides the Department's findings. We did not find support for the whistleblower's allegations—to the contrary, although the whistleblower's description of the general facts relating to the loan discharges is largely accurate, the description and alleged implications of the applicable law are incorrect.

Background

The William D. Ford Direct Loan Program (Direct Loan Program) is authorized by Title IV, Part D of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. §§ 1087a-1087j. Under the Direct Loan Program, the Department of Education makes loans to students and parents to pay the costs of attending institutions of higher education. The Direct Loan Program was created by Congress as part of the Student Loan Reform Act in 1993, the first regulations for the program were issued in 1994, and the first Direct Loans were made that same year. Prior to the creation of the Direct Loan Program, the primary Federal student loan program was the Federal Family Education Loan Program (FFELP) under which private lenders made loans to students and parents; those loans are insured by private or state

guaranty agencies using Federally-provided funds and reinsured by the Department. In 2010, Congress ended the making of new loans under the FFELP.

Section 455(h) of the HEA provides that "Notwithstanding any other provision of State or Federal law, the Secretary [of Education] shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under [Part D of Title IV of the HEA]". 20 U.S.C. §1087e(h). The Department first issued regulations to meet this requirement in 1994. 59 *Fed. Reg.* 61664 (Dec. 1, 1994). Until 2015, very few requests for borrower defense discharges were filed with the Department. In May 2015, Corinthian, a publicly traded company operating numerous postsecondary schools that enrolled over 70,000 students at more than 100 campuses nationwide, filed for bankruptcy. Corinthian collapsed under deteriorating financial conditions and while subject to multiple State and Federal investigations, one of which resulted in a finding by the Department that the college had misrepresented its job placement rates. Upon the closure of Corinthian, which included Everest Institute, Wyotech, and Heald College, the Department received thousands of claims for student loan relief from former Corinthian students. The Department developed a process to handle these incoming claims. As part of that process, the Department reviewed the information submitted by borrowers as well as public information about Corinthian's operations and made factual findings applicable to numerous applicants ("common findings") that Corinthian misrepresented job placement rates and misled borrowers with promises of guaranteed employment. Based on those findings, the Department then granted full discharges to borrowers who were determined to fit within these common findings. In addition, the Department began a regulatory process to develop new regulations. These new regulations, published on November 1, 2016, 81 *Fed. Reg.* 75926, and scheduled to take effect on July 1, 2017, delineated a different standard than the initial regulations and added terms related to the processes for borrower defense.

The new Administration that took office in January 2017 had certain policy disagreements with the 2016 borrower defense regulations. They took action to delay the effective date of those regulations and also began a new regulatory process to develop new regulations. However, in September 2018, the U.S. District Court in the District of Columbia ruled that the Department had not properly delayed the effective date of the 2016 regulations and that those regulations were therefore in effect. *Bauer v. DeVos,* 325 F. Supp. 3d 74 (D.D.C. 2018). The Department subsequently issued new regulations in 2019.

In addition, in 2019, the Department undertook the development of a methodology to determine the amount of discharge a borrower should receive based on the income they received after completing or leaving the program paid for with the loan they received (a "partial relief methodology"). The Department was enjoined from using the initial partial relief methodology it developed by the U.S. District Court for the Northern District of California in *Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018). After that injunction was issued, the Department stopped making decisions on any borrower defense claims while it developed a new partial relief methodology. In June 2019, a class action lawsuit was filed, *Sweet v. DeVos*, C.A. #5:19-cv-03674 (N.D. Cal., filed June 25, 2019), alleging that the Department had violated the Administrative Procedure Act by unreasonably delaying action on the pending applications. At the time, borrowers had filed a total of 272,721 applications and 210,168 of them remained pending. In December 2019, the Department announced a new partial relief methodology and began issuing decisions to borrowers. That methodology was also challenged in court, *see Pratt v. DeVos*, C.A.# 1:20-cv-01501 (D.D.C., filed June 9, 2020), and effective October 21, 2020, the Department stopped issuing further decisions denying borrower defense applications of *Sweet* class members pending a final decision by the *Sweet* court.

Since 2021, the Department has been working to resolve the litigation relating to the borrower defense discharge process and develop new rules to govern the consideration of those applications. By

November 2022, when a settlement of the *Sweet* lawsuit was approved by the District Court, approximately 443,000 borrowers had pending borrower-defense applications. Under the settlement, the Department agreed to automatically grant full discharges to approximately 200,000 class members who borrowed federal loans to attend certain specific schools. This provision of the settlement reflected the parties' determination that borrowers associated with these schools should be provided presumptive relief under the settlement due to strong indicia of substantial misconduct by the listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed school. The settlement also provided for a streamlined adjudication of the claims of other class members. In approving the settlement, the District Court noted that, without the settlement, if "the Department's Borrower Defense Unit had all 33 of its claim adjudicators working 40 hours a week, 52 weeks a year (no holidays or vacation), with each claim adjudicator processing two claims per day, it would take the Department *more than twenty-five years* to get through the backlog." *Sweet v. Cardona*, 641 F. Supp. 3d 814, 825 (Nov. 16, 2022).

In light of the rapidly increasing backlog of borrower defense claims, with over 140,000 claims pending and fast approaching the over 200,000 claims pending when the *Sweet* lawsuit was filed, the Department examined ways to appropriately address large groups of applications that all involved similar facts and allegations regarding a particular school or group of schools with the same ownership and management. As a result of these efforts, the Department granted discharges for numerous borrowers who had attended the same school or school group and who had been subject to the same significant misrepresentations or other misconduct giving rise to a defense against collection of the loan. That is, the Department granted discharges to borrowers whose loans would not be collectible under applicable regulations in light of Department findings about their school's misconduct. The Department also reviewed the formulas that had been used earlier to determine the amount of relief to provide to

borrowers. The Department found that those earlier formulas improperly relied on data that was not representative of the population of borrowers at issue and incorrectly used statistical methodologies. The Department concluded that it was unable to identify a partial relief formula that would result in consistent and equitable decisions for borrowers. As a result, in March 2021, the Department announced that it would not use the earlier partial relief formulas and instead adopted a rebuttable presumption in favor of full relief. *See* https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51 (describing basis for presumption and flaws in the 2019 partial relief methodology).

Allegations

The whistleblower, who chose to remain confidential, alleges that Department officials have not complied with the Department's regulations in discharging student loan debt on behalf of groups of borrowers pursuant to 20 U.S.C. § 1082(a)(6). Specifically, the whistleblower alleges that in June 2023, the Department approved a group discharge of approximately $130 million of Federal student loans for borrowers who attended Colorado campuses of CollegeAmerica, a defunct institution of higher education formerly operated by the Center for Excellence in Higher Education (CEHE). The whistleblower alleges that the CEHE discharge procedure violated 34 C.F.R. § 30.70, the regulation that governs the procedures by which the Secretary may "compromise, waive, or release any right, title, claim, lien, or demand" of the Department under 20 U.S.C. § 1082(a)(6). Your referral letter asked us to investigate these allegations, including that:

- Agency officials have failed to adhere to regulatory requirements, including those of 34 C.F.R. § 30.70, in discharging student loan debt on behalf of borrowers pursuant to the Secretary's settlement and compromise authority; and

- Any additional or related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

The whistleblower disclosed that the Department's Borrower Defense Group received an application from the Colorado Attorney General for a group discharge for the CEHE borrowers in June 2022. The Attorney General asked the Department to relieve their student loan debt using the group discharge process set forth in 34 C.F.R. § 685.222.2. The whistleblower provided a June 2023 memorandum from the Department's office of Federal Student Aid's Borrower Defense Group, and a June 2023 approval notice from Under Secretary James Kvaal, in which the agency elected not to initiate a group discharge process. In lieu of a group process, agency officials recommended that the Secretary exercise his settlement and compromise authority under 20 U.S.C. § 1082(a)(6) to discharge all debt on behalf of the CEHE borrowers. The Department's decision reflects the reasoned policy decisions and legal analysis of Departmental leaders, approved through the proper channels and by the leadership authorized to make such decisions. This was documented in a decision memo, as approved by an Under Secretary James Kvaal, and reviewed by General Counsel Lisa Brown.

The whistleblower alleges that the discharge procedure failed to comply with regulations governing the Secretary's settlement and compromise authority, namely, 34 C.F.R. § 30.70 and the Federal Claims Collection Standards (FCCS). The whistleblower alleges that agency officials approved the CEHE discharge without any determination of any individual debtor's ability to pay, the government's ability to collect within a reasonable time, the costs of collection, or the prospects of recovery through litigation. *See* 34 C.F.R. § 902.2. Instead, the whistleblower alleges that the agency applied a Department policy that establishes a presumption in favor of full relief, found that the presumption was not rebutted by sufficient countervailing evidence, and granted full relief to the CEHE borrowers. The whistleblower asserts that the presumption in favor of full relief is the Department's method of determining relief under the group

process. In contrast, the whistleblower argues that the settlement and compromise authority, by virtue of 34 C.F.R. § 30.70 and the FCCS, requires an individualized, case- by-case determination of relief. Therefore, the whistleblower maintains that the Department's use of a presumption in favor of full relief is inappropriate where, as here, a discharge is accomplished through the settlement and compromise authority. Consequently, the whistleblower alleges that the CEHE discharge was not an appropriate use of the settlement and compromise authority, as the discharge procedure failed to comply with 34 C.F.R. § 30.70 and the FCCS.

The whistleblower also alleges that agency officials approved similar discharges on behalf of other groups of borrowers between April 2022 and August 2022 without adhering to these same regulatory requirements. Specifically, the whistleblower alleges that ED approved group discharges on behalf of students who attended ITT Technical Institute, Westwood College, and Marinello School of Beauty. In each of these instances, the whistleblower alleges that agency officials elected to discharge the group's debt using the Secretary's settlement and compromise authority despite failing to assess the individualized factors set out in the FCCS that establish the permissible bases for compromise.

Investigation

The investigation was conducted by the Assistant General Counsel for Postsecondary Education in the Department's Office of the General Counsel. The investigation involved the review of the relevant statutory and regulatory provisions as well as the Department's memoranda relating to the group discharges.

Findings

The investigation determined that, while the whistleblower's description of the general facts relating to the CEHE group discharge is largely accurate, the description and alleged implications of the applicable law are incorrect.

The statutory provision at issue here, 20 U.S.C. §1082(a)(6), which gives the Secretary the authority to compromise, waive, or release claims, has been part of the HEA since the original enactment of the statute in 1965. The Department has long interpreted that provision as allowing the Secretary to provide relief to categories of persons or entities. As one example, in 1986, the Secretary established guidelines under which the Secretary would waive his right to recover from guaranty agencies and lenders in the FFELP under certain circumstances not applicable here and without regard to the factors identified in the FCCS. *See* 34 C.F.R. §682.406(b) and Part 682, Appendix D.

In 2016, the Department revised its debt collection regulations in 34 C.F.R. § 30.70 to reflect a series of statutory changes that expanded the Secretary's authority to compromise, suspend, or terminate the collection of, debts. *See* 81 *Fed. Reg.* 39330 (June 16, 2016); 81 *Fed. Reg.* 75926 (November 1, 2016). In particular, the Department wanted to highlight the ability of the agency to resolve debts of less than $100,000 without needing to obtain approval from the U.S. Department of Justice (DOJ) and to include the ability of DOJ to seek review of resolutions of claims of more than $1 million. But the inclusion of this provision was not intended to require the Department to strictly comply with the FCCS standards when compromising or waiving claims in the Federal student loan programs. Rather, the Federal Claims Collection Act (FCCA) and the FCCS regulations do not limit the Secretary's authority to apply Education-specific standards to the compromise of claims.[1] In addition, the Department's own

[1] When the FCCA was enacted in 1966, it stated that "[n]othing in this Act shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims." Federal Claims Collection Act of 1966, Pub. L. No. 89-508, § 4, 80 Stat. 308 (1966). And the FCCS specifically provides that it does not "preclude[] agency disposition of any claim under statutes and implementing regulations other than [the FCCA]," and that

regulations do not strictly bind the Secretary to the FCCS. The history of revisions to 34 CFR § 30.70 reflects that it has changed over time to incorporate new requirements and authorities but has consistently recognized the Secretary's broad authority to compromise student loan debts "in any amount." Reading § 30.70 as subjecting the Secretary's authority to the FCCS requirements would be contrary to the stated purpose of the 2016 amendments, which were intended to "reflect a series of statutory changes that have *expanded* the Secretary's authority to compromise, or suspend or terminate the collection of, debts." 81 *Fed. Reg.* 39,369 (emphasis added). Moreover, nothing in the 2016 amendments to the regulations or in the preamble discussion of those regulatory changes mention or even suggests that the Secretary intended to restrict the exercise of the authority under 20 U.S.C. §1082(a)(6) to individual case-by-case determinations.

Even if the FCCS does apply, nothing in the FCCS itself precludes an agency from compromising or waiving claims on a group basis in appropriate circumstances. The regulations implementing the compromise provisions of the FCCS are in 31 C.F.R. § 902. In particular, 34 C.F.R. § 902.2(a) says that agencies may compromise a debt if the Government cannot collect the full amount because: (1) the debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information; (2) the Government is unable to collect the debt in full within a reasonable time by enforced collection proceedings; (3) the cost of collecting the debt does not justify the enforced collection of the full amount; or (4) there is significant doubt concerning the Government's ability to prove its case in court. In appropriate circumstances, issues of collectability and litigation risk may apply in like manner across a group of similarly situated individuals. In particular, doubt concerning the Government's ability to prove

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"[i]n such cases, the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence." 31 C.F.R. § 900.4. The FCCA and FCCS do not, on their own terms, limit the Secretary's authority because the HEA endows the Secretary with separate and independent authority to "compromise, waive, or release" a claim. *See* § 1082(a)(6).

its case in court could, and here did, apply broadly to a group of similar claims, and thus this basis for compromise could exist for identical reasons as to a group of federal student loan borrowers. *See generally* 31 C.F.R. 902.2(d) (specifying considerations for determining the amount of compromise in light of doubt concerning the Government's ability to prove its case in court). This could be true in the instant context of borrower defense, for example, where a widespread and pervasive practice of a school or company affected a population of students. Our review of the FCCS regulations and the discussion of those standards by the issuing agencies has not identified any language or discussion limiting agencies from applying this standard on a group basis.

As reflected in the decision memorandum explaining the group discharge for students who attended the CollegeAmerica institutions, the Department determined the CollegeAmerica Colorado schools made substantial misrepresentations that would give rise to a defense under Department regulations, that the publication and dissemination of the misrepresentations was systemic, pervasive, and widespread, and that the misrepresentations impacted the enrollment decisions of all or almost all students enrolled at one of those campuses during the relevant period. The Department also determined that, based on the Department's findings and the widespread and pervasive nature of the CollegeAmerica misconduct, each of these borrowers could very likely prove a defense to repayment individually. However, requiring individual consideration of each of these claims would cause significant further delays in the adjudication of the massive number of borrower defense claims received by the Department. *See, e.g.*, *Sweet v. Cardona*, 641 F. Supp. 3d 814, 825 (it "would take the Department *more than twenty-five years* to get through the backlog."). It would result in the Department maintaining loans that are uncollectible according to the Department's own findings and conclusions. Even in the context of a group adjudication like this one, the Department reviews information relating to individual borrowers to ensure that each individual is properly within the group.

As discussed in the Department's memorandum recommending the group discharge, the Department's decision to provide a group discharge for CollegeAmerica students in Colorado is fully supported by the facts and the applicable law. Because the Department had determined that the borrowers had a legitimate basis for a defense to collection of the loan based on the institution's misconduct, there was significant and well-founded doubt about whether the Department would be able to enforce these loans in court in light of these substantiated defenses. Thus, there is significant doubt that the Department could prove its case for collection in court. There is also risk that the Department would face legal claims regarding a failure to act on these cases in a timely manner, which is a likely result of the further decisionmaking delays that would be inevitable in the absence of group determinations such as this one. *See Sweet*, 641 F. Supp. 3d at 825.

The factors discussed above apply equally to the other group discharges mentioned by the whistleblower.

We also note that the whistleblower questioned the Department's use of the presumption in favor of full relief where, as here, a discharge is accomplished through the settlement and compromise authority, because, according to the whistleblower, the use of settlement and compromise authority requires individualized determinations of relief. The whistleblower cited no support for this assertion. In adjudicating claims, the Department, like all Federal agencies, can establish rebuttable presumptions. *See, e.g.*, *Chemical Mfrs. Ass'n v. Dept of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) ("It is well settled that an administrative agency may establish evidentiary presumptions."). The Department did so here. *See* https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51. That presumption can be applied appropriately in group determinations like that in this case and in individual cases. Moreover, the well-founded presumption, which the Department adopted consistent with its authority under the APA, the

HEA, and the FCCS, can reasonably be applied no matter which authority (regulatory or settlement and compromise) the Department uses to grant relief.

Conclusion

The investigation did not find evidence supporting the whistleblower's allegations.

I am submitting this report for the Department of Education under the authority delegated to my office by the Secretary of Education in Delegation EA/EB/176, dated July 13, 2018.

Cindy Marten

Deputy Secretary