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The Special Counsel

November 1, 2024

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-24-000101

Dear Mr. President:

I am forwarding to you a report transmitted to the Office of Special Counsel (OSC) by the Department of Education (ED) in response to the Special Counsel's referral of a disclosure of wrongdoing at the Federal Student Aid, Borrower Defense Group, Washington, D.C. I have reviewed the disclosure, agency report, and whistleblower's comments, and in accordance with 5 U.S.C. § 1213(e), have determined that the report contains the information required by statute and the findings appear reasonable. The following is a summary of those findings and comments.

The whistleblower, who chose to remain confidential, disclosed that ED officials failed to comply with agency regulations in discharging student loan debt on behalf of groups of borrowers pursuant to the Secretary's Higher Education Act of 1965, 20 U.S.C. § 1001 *et seq.* (HEA), "settlement and compromise" authority. Specifically, the whistleblower explained that in June 2023, the agency approved a group discharge of approximately $130 million on behalf of borrowers who attended Colorado campuses of CollegeAmerica, a defunct institution formerly operated by the Center for Excellence in Higher Education (CEHE).

The whistleblower alleged that the CEHE discharge procedure violated the ED's own regulation, 34 C.F.R. § 30.70, because it requires the Secretary to use the Federal Claims Collection Standards (FCCS) when compromising debt, and 31 C.F.R. § 902.2(a) of the FCCS requires agencies to make individualized determinations of debtors' ability to pay, the government's ability to collect within a reasonable time, the costs of collection, or the prospects of recovery through litigation, prior to compromising debt. Instead, the whistleblower alleged that the ED made collective findings concerning CEHE's pervasive and widespread misrepresentations concerning increased salaries, employment rates, and program offerings, applied an evidentiary presumption in favor of full relief for borrowers, and granted

this relief to all CEHE borrowers as a group pursuant to the Secretary's HEA "settlement and comprise" authority.

The whistleblower alleged that the agency's regulations lay out a separate process through which it can grant group discharges of debt related to student loan borrowers' collective defense of school misrepresentations, 34 C.F.R. § 685.222, but agency leadership elected to use the Secretary's HEA "settlement and comprise" authority instead due to the administrative burdens required by this process.

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

The agency investigation, conducted by the Assistant General Counsel for Postsecondary Education, did not substantiate the allegations. The investigation confirmed the whistleblower's description of the general facts but disagreed with the whistleblower's legal conclusions. The agency explained that it has historically interpreted 20 U.S.C. § 1082(a)(6) as allowing the Secretary to provide relief to categories of persons or entities and provided an example from 1986 where the Secretary waived his right to recover from student loan guaranty agencies and lenders without regard to the factors identified in the FCCS.

The report first concludes that the Secretary is not required to use the FCCS when exercising "settlement and compromise" authority pursuant to 20 U.S.C. § 1082(a)(6). While the ED's own regulation, 34 C.F.R § 30.70(a)(1), provides that the "Secretary uses the standards in the FCCS…to determine whether compromise of a debt is appropriate," the agency argues that the 2016 amendments to 34 C.F.R. § 30.70, which substantially revised the section, were not intended to require the Secretary to strictly comply with the FCCS when compromising claims in federal student loan programs. The agency explained that the "history of revisions to 34 C.F.R. § 30.70 reflects that it has…consistently recognized the Secretary's broad authority to compromise student loan debts 'in any amount.'"

The report then concludes that even if the Secretary must comply with the FCCS, the ED's group discharge procedures complied with the FCCS in the CEHE, ITT Technical Institute, Westwood College, and Marinello School of Beauty cases. The report explains that the FCCS does not preclude an agency from compromising debts on a group basis in appropriate circumstances. Critically, 31 C.F.R. § 902.2(a)(4) of the FCCS provides that "agencies may compromise a debt if the Government cannot collect the full amount because: …There is

significant doubt concerning the Government's ability to prove its case in court." Accordingly, the report states that in these cases, the ED found that the schools made substantial misrepresentations that gave rise to borrower defenses that created significant doubts concerning the ED's ability to collect any of the borrowers' student loan debt. The report further explained that requiring consideration of individual borrowers' defenses would have caused significant delays and resulted in maintaining loans that were uncollectible according the ED's own findings and conclusions. The report noted that maintaining uncollectible loans exposes the ED to risk of legal action for failing to act in a timely manner. The ED then applied a rebuttable evidentiary presumption in favor of full relief for borrowers pursuant to the agency's inherent authority, considered evidence offered by schools, borrowers, or other sources, and granted group discharges of students' entire student loan debts.

The whistleblower disagreed with the report's conclusions. The whistleblower disputed the ED's characterization of its historical use of HEA "settlement and compromise" authority, noting that the ED acknowledged in litigation that "the Secretary has most often used this authority to compromise student loan debts on an individualized, case-by-case basis, as opposed to providing group discharges," and identifying the earliest known group discharge as occurring in November 2019. Further, the whistleblower argued that the ED failed to present any plausible legal justification based on the plain text of 34 C.F.R. § 30.70 for its position that the Secretary is not required to use the FCCS when exercising HEA "settlement and compromise" authority.

In addition, the whistleblower criticized the report's *post hoc* rationale for the agency's purported compliance with the FCCS. The whistleblower explained that, at least in the CEHE group discharge, the agency's findings make no reference to the FCCS and explicitly condition discharge on "pervasive and widespread misrepresentations," not doubt about the ED's ability to prove their case in court. The whistleblower also stated that many CEHE borrowers were actively paying their loans or had not submitted borrower defense applications to the Secretary. The whistleblower claimed that the FCCS prohibits discharging debt while borrowers are paying their loans, and questioned how the ED could have significant doubts about the ability to collect from borrowers who had not even asserted a defense. Similarly, the whistleblower questioned whether the ED's use of a presumption in favor of full relief in these cases violated 31 C.F.R. § 902.2(d) of the FCCS's requirement to ensure "the amount accepted in compromise of such cases should fairly reflect the probabilities of successful prosecution to judgment," since the ED should value potential borrower defenses differently based on the impact of the schools' misrepresentations on specific borrowers. While the whistleblower believes that the best interpretation of the Secretary's HEA "settlement and compromise" authority is that it must be exercised on a case-by-case basis in compliance with the FCCS, the whistleblower's primary objection is that the Secretary exercised HEA "settlement and compromise" authority for an improper purpose: to effect group borrower defense relief that should have been pursued through the agency's delineated regulatory process.

I commend the whistleblower for bringing this matter to OSC's attention. As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of this letter, the agency report, and the whistleblower's comments to the Chairs and Ranking Members of the Senate Committee on Health, Education, Labor, and Pensions and House Committee on Education and the Workforce. I have also filed redacted versions of these documents and the referral letter in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,

Hampton Dellinger

Hampton Dellinger
Special Counsel

Enclosures