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Legal Memorandum

The Fiduciary Standard & Recertification Denials are the U.S. Department of Education's Strongest Tool to Stop Predatory Colleges from Harming Students

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Legal Memoradum

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In 2020, the Biden-Harris campaign pledged to require colleges to "prove their value" before "gaining eligibility for federal aid." Since 2021, the U.S. Department of Education has reiterated this promise, along with its intent to take strong stances against predatory colleges and programs. In recent weeks, the Department has made numerous announcements suggesting that it is ramping up its oversight over predatory actors. Investigative tools like secret shoppers, which advocates have been imploring the Department to use, are designed to uncover institutional misconduct. But the question remains: what actions will the Department take both to deter future wrongdoing and to create accountability for harming students at taxpayer expense?

Although the Department does not appear to have brought a termination, suspension, or limitation action against a Title IV participating institution in recent years, the agency is frequently tasked with evaluating applications from institutions looking to renew or expand their participation in the Title IV programs. When considering such applications, the Department has extensive authority to assess the institution's past conduct and—if misconduct is apparent—prevent that institution from accessing federal funding or condition Title IV participation on adherence with strong student protections.

The breadth of this authority is not reasonably questioned. The Department has the statutory mandate to determine which institutions are qualified to participate in the student aid programs and "[n]o institution of higher education shall have a right to participate in the [Direct Loan] program." HEA § 452(b), 20 U.S.C. § 1087b(b). *See also, e.g., Ass'n of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 867 (D.C. Cir. 1992) (noting that institutions have "no legally protectible interest in, or reasonable expectation of, continued eligibility" for participation in the student aid programs); Truck Driving Academy, U.S. Dep't of Educ., No. 98-4-SP, 1998 WL 736270, at *2 (Aug. 10, 1998) ("The very process of applying for recertification suggests that there is no entitlement to certification or continued eligibility.").[1]

The Higher Education Act ("HEA") requires the Department to consider numerous factors when making determinations regarding institutional eligibility.[2] The HEA also describes an additional process for the Department to determine whether an institution can participate in the Direct Loan program.[3] Once the Department determines the fact and scope of institutional eligibility, it then enters into a Program Participation Agreement ("PPA") with the institution, *i.e.*, the contract that "condition[s] the initial and continuing eligibility" with certain statutorily enumerated requirements.[4] The Department also has "broad discretion to impose whatever additional terms" into a PPA that "it deems appropriate under the circumstances." *Fla. Coastal Sch. of Law, Inc. v. Cardona*, No. 3:21-CV-721-MMH-JBT, 2021 WL 3493311, at *16 (M.D. Fla. Aug. 9, 2021).[5]

During the term of a PPA, if the Department wishes to curtail or condition an institution's participation in the Title IV programs, it must use its so-called "Subpart G" procedures, named after a regulatory subsection that outlines the process for imposing limitations, suspensions, terminations, or fines. A separate process exists for curtailing a "provisional PPA." *See* 34 C.F.R. § 668.13(d). Regardless, once any PPA has ended, the Department's options and authorities change. At that time, the Department may: (i) recertify the institution (with or without conditions, including provisionally); (ii) deny recertification in full; or (iii) assuming the institution has submitted a renewal application, the Department can allow the institution's existing certification to be extended on a month-to-month basis, until a decision is reached.[6]

With this backdrop, this memorandum is designed to educate interested parties on two discrete questions. *First*, when the Department denies or curtails recertification upon the expiration of a PPA, what standards of judicial review apply if an institution seeks to challenge the Department's determination. *Second*, given those judicial standards, what can the Department glean from its historical application of the "fiduciary" standard to inform both the duty of care owed by institutions and the Department's duty to oversee the use of taxpayer funded loans and grants.

I. Recertification Decisions are Subject to an "Arbitrary and Capricious" Standard.

Title IV eligibility determinations "constitute[] . . . informal adjudication[s] subject to judicial review as set out in the [Administrative Procedure Act]." *Int'l Junior Coll. of Bus. & Tech., Inc. v. Duncan*, No. 11-2257, 2013 WL 5323095, at *15 (D.P.R. Sept. 20, 2013), *aff'd sub nom. Int'l Jr. Coll. of Bus. & Tech., Inc. v. Duncan*, 802 F.3d 99 (1st Cir. 2015). Accordingly, any determinations regarding institutional eligibility must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Int'l Junior Coll. of Bus. & Tech., Inc.*, 2013 WL 5323095, at *15.

"Arbitrary and capricious" review has long been described as "narrow" and one in which a reviewing court "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *U.S. Postal Service v. Gregory*, 534 U.S. 1, 6-7 (2001). For this reason, when combined with the standards set forth in the HEA, the Department "retains 'significant discretion' to make Title IV eligibility determinations." *Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332, 350 (S.D.N.Y. 2015). Nevertheless, the Department must examine all relevant information, reach a reasonable conclusion, and explain its reasoning. *See, e.g., Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017) (Kavanaugh, J.) ("In short, an agency's exercise of discretion must be both reasonable and reasonably explained.").

The Department need not rest its decision on a single fact or justification. Rather, in denying recertification, the Department must outline each of the bases that, in whole or in part (and delineated as such) supports its ultimate determination. The reason for this is straightforward: if an institution challenges a recertification denial, the institution bears the burden of demonstrating that "none of the reasons the Department provided lawfully support the Department's decision." *Fla. Coastal Sch. of Law, Inc.*, No. 3:21-CV-721-MMH-JBT, 2021 WL 3493311, at *20 (emphasis added). Where a federal agency sets out "multiple independent grounds for a decision" a court "will affirm the agency so long as any one of those grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable." *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) (*quoting BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (Roberts, J.) (internal marks omitted)).

Procedurally, the HEA does not afford institutions with any due process rights with respect to this determination. *Ass'n of Proprietary Colls.*, 107 F. Supp. 3d at 350 (noting that the HEA does not afford institutions with "entitlements that receive constitutional protection"); *Bowling Green Jr. Coll. v. U.S. Dep't of Educ.*, 687 F. Supp. 293, 297 (W.D. Ky. 1988) ("The College has no property right to the funds as it acts only as a fiduciary in dispersing the funds to its eligible students. . . . The purpose of these Title IV programs is not to keep an institution in business, but to assist its students in gaining a post-secondary education."). Although the statute provides that the Department will promulgate an application, there is no statutory right to a hearing or administrative review or reconsideration of a certification decision. In practice, however, the Department affords institutions an opportunity to submit evidence to refute any factual determinations on which a recertification denial is based. If an institution submits additional evidence, the Department reviews it and notifies the institution if the denial will be modified, rescinded, or left in place.[7]

II. Institutions of Higher Education are Fiduciaries of Federal Funds, and the Department May Deny or Curtail Recertifications on an Institution's Failure to Comply with the "Highest" Duty of Care Known in the Law.

The Administrative Procedure Act requires that decisions to deny or curtail institutional participation in Title IV be rooted in the Department's authorities. *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress[.]"); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S. at 42 (noting that agencies must only act "within the scope of authority delegated to the agency by statute"). But within this constraint, the HEA and the Department's regulations both make clear that prior findings of institutional misconduct constitute an ample basis for the adverse action. The remainder of this memorandum focuses on the Department's ability to find that an institution has violated the "fiduciary" standard, *i.e.*, the long-standing requirement that institutions and their officers act with the "highest standard of care and diligence" in administering the Title IV programs. 34 C.F.R. § 668.82(a)-(b).[8] We also highlight numerous institutions in which the Department has applied this standard to end an institution's participation in Title IV.

A. The Department has a Long and Consistent History of Applying the Fiduciary Standard.

Although the HEA does not include a "fiduciary" standard, the Department has a long history of applying one. When the agency first proposed incorporating the standard into its regulations in May 1982, it stated that the then-proposed regulation "reflected the [extant] view of the Secretary and various Administrative Law Judges" that institutions were "acting in a fiduciary capacity in their administration of student assistance programs" and therefore must meet the "highest standards of care and diligence in their administration of the programs and in their accounting to the Government of program funds they received." Notice of Proposed Rulemaking, Student Assistance General Provisions and Pell Grant Program, 47 Fed. Reg. 19288-01, 1982 WL 150346 (May 4, 1982). In response to the 1982 NPRM, the Department received comments challenging the proposed regulatory incorporation of a fiduciary standard. The Department proceeded nevertheless, stating its view that the inclusion of a fiduciary standard was of "critical importance" because it "explicitly establishes the standard of conduct required of an institution participating in the title IV student financial assistance programs." Final Rule, Student Assistance General Provisions and Pell Grant Program, 48 Fed. Reg. 45670-01, 1983 WL 112571 (Oct. 6, 1983). The standard was expanded in 1987, *see infra*, and by April 1988 a Department Administrative Law Judge noted that while the fiduciary standard did not appear in the HEA, it was promulgated by regulation and carried "the force of law." Bowling Green Junior Coll., U.S. Dep't of Educ., ACN No. 83-040013R, 1998 WL 279269 (Apr. 20, 1988).

In 1994, the Department again reinforced the fiduciary standard by proposing regulations that required institutions to acknowledge, in the PPA, their fiduciary responsibilities. *See* Notice of Proposed Rulemaking, Student Assistance General Provisions and Federal Pell Grant Program, 59 Fed. Reg. 9526-01, 1994 WL 57482 (Feb. 28, 1994). The Secretary's "goal" at that time was "to ensure that institutions are capable to operate as a fiduciary of Federal funds based on a sufficient financial base to properly provide education and meet the institution's financial obligations." *Id.* at 9541. When the Interim Final Rule was published in April 1994, the Department added language to the regulations governing the PPA, which now require institutions to acknowledge that they are acting as a "fiduciary responsible for administering Federal funds." *See* Interim Final Regulations with invitation for comment, Student Assistance General Provisions; Federal Family Education Loan Programs; Federal Pell Grant Program, 59 Fed. Reg. 22348-01, 1994 WL 155008 (Apr. 29, 1994). That language remains in the regulations and the PPAs today.

**SELECTED PROVISIONS FROM
GENERAL PROVISIONS REGULATIONS, 34 C.F.R. PART 668.14**

An institution's program participation agreement applies to each branch campus and other location of the institution that meets the applicable requirements of this part unless otherwise specified by the Secretary.

(b) By entering into a program participation agreement, an institution agrees that--

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

[SOURCE: An excerpt from the current PPA]

Although the Department's regulations have changed over time—to both add non-exhaustive examples of fiduciary breaches and make clear that third party servicers[9] are subject to the same standard—for more than thirty-five years, the Department has made clear that participating institutions are subject to the "highest standard of care and diligence."

The fiduciary standard has been consistently reaffirmed by Secretaries of both political parties. First adopted into regulation by Secretary Terrel Bell in 1983, the standard was expanded upon in 1987 under Secretary William Bennett. *See* Final Rule, Student Assistance General Provisions and Pell Grant Program, 52 Fed. Reg. 45712-01, 1987 WL 146579 (Dec. 1, 1987) (expanding the fiduciary standard and noting that the criteria used to determine compliance as a fiduciary "applies equally to a determination of whether an institution can be viewed as financially responsible"). In 1992, Secretary Lamar Alexander wrote that "the fiduciary obligation of an institution participating in a Title IV, HEA program may not be ignored or overlooked when it becomes inconvenient." *See* Puerto Rico Tech. & Beauty Coll., U.S. Dep't of Educ., Nos. 90-34-ST & 90-38-ST, 1991 WL 367981 (Lamar Alexander, Sec'y, U.S. Dep't of Educ.) (Oct. 7, 1991). Secretary Richard Riley reaffirmed the fiduciary relationship on numerous occasions,[10] as have at least Secretaries Duncan,[11] King,[12] DeVos, [13] and Cardona.[14] Numerous courts have also reaffirmed this standard.[15]

> "Institutions participating in Title IV programs agree to abide by some very stringent fiduciary guidelines, and it is intolerable for those institutions to view these guidelines with nonchalance and attempt to explain violations in terms of doing so to keep the institution solvent, or maybe to enhance its programs or facilities."
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> — U.S. Department of Education Administrative Law Judge Richard O'Hair in Valley Com. Coll., U.S. Dep't of Educ., No. 96-96-ST, 1997 WL 1048253 (June 17, 1997).

B. The Fiduciary Standard Commands a Broad Scope and Demands the Highest Care.

The Department has consistently maintained that the fiduciary standard is broad in scope and demands the highest level of care by institutions. In 1991, for example, Secretary Alexander described the standard as covering "all aspects of the administration of federal program funds." Puerto Rico Tech. & Beauty Coll., U.S. Dep't of Educ., Nos. 90-34-ST & 90-38-ST, 1991 WL 367981 (Lamar Alexander, Sec'y, U.S. Dep't of Educ.) (Oct. 7, 1991). He also noted that the fiduciary duty was:

> One founded on trust or confidence reposed by one person in the integrity and fidelity of another. . . . Out of such a relation, the law raises the rule that neither party may take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other...

Id. (quoting Black's Law Dictionary, 5th Ed., p. 564.). He further compared the requirement as akin to the duty that an agent owes her principal:

> The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent. . . . Along with the basic duty of full disclosure, moreover, an agent is under the further duty not to misrepresent any matter in connection with the agency.

Id. (quoting 3 Am. Jur. 2d *Agency* § 211).

Other Department officials have framed the standard differently—but carrying equal importance. For example, in a 2012 decision, an agency Hearing Official stated that "[i]t is clear that the antithesis of acting as a fiduciary is 'putting your head in the sand' and ignoring clear reasons for concern."[16]

Importantly, the Department has a history of invoking the Law of Trusts to describe the scope of the fiduciary relationship, In 2000, Secretary Riley cited to the "common law" when describing the fiduciary standard, citing, *inter alia*, to both Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) and the Restatement (Second) of Trusts § 2 (1959).[17] Likewise, in 2020, a Federal Student Aid official referred to the fiduciary standard as one where the institution acts as a "trustee" of federal funds, *i.e.*, with the "duty to act for the benefit of the [Department] as to matters within the scope of the [Title IV] relationship."[18] And the Department's regulations refer to an institution's responsibility to hold Title IV funds "in trust for the intended beneficiaries," *i.e.*, students, "or the Secretary." 34 C.F.R. § 668.161(b).[19] These statements are not without consequence, and establish the Department's position that the fiduciary duty owed by institutions is the "highest [standard] known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (citing Restatement of Trusts 2d § 2, comment b (1959)).

In its current form, the Department's regulations provide:

- Title IV Participating institutions and third-party servicers that contract with participating institutions "act in the nature of a fiduciary in the administration of the Title IV" programs.
- To participate in any Title IV program, the institution or servicer "must at all times act with the competency and integrity necessary to qualify as a fiduciary."
- In the capacity of a fiduciary, participating institutions are "subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs."
- The failure to administer the program or account for program funds "in accordance with the highest standard of care and diligence required of a fiduciary" constitutes grounds for an emergency action, termination, limitation, or suspension of participation in Title IV.

34 C.F.R. § 668.82(a)–(c). The regulations also provide a non-exhaustive list of events that *de facto* constitute a breach of fiduciary duty. 34 C.F.R. § 668.82(d)-(f).

Consistent with these regulations, the Department has found fiduciary breaches in a broad array of circumstances, including: providing Title IV aid to ineligible students;[20] drawing Title IV funds for programs at unapproved locations;[21] drawing Title IV funds for unapproved programs;[22] fraudulent conduct;[23] misrepresentations to the Office of Inspector General;[24] misrepresentations to students and prospective students[25]; document falsification;[26] failure to properly account for Title IV funds or maintain adequate records;[27] failures with respect to the payment of Title IV credit balances and refunds;[28] taking action that will "cause undue hardship to its students";[29] and failures to comply with published policies regarding Satisfactory Academic Progress.[30]

C. Recognizing These Principles, the Department has Repeatedly Relied on Fiduciary Breaches to End Institutional Participation in the Title IV Programs.

"When deciding whether to grant an application to participate in Title IV programs, the [Department] is charged with making sure the college and the people managing that college will fulfill their fiduciary duties in handling many thousands of dollars of the public's money." *Nat'l Career Coll., Inc. v. Spellings*, 371 F. App'x 794, 796 (9th Cir. 2010). This means that the Department can consider the institution's compliance with the fiduciary standard (or capacity to comply) when evaluating an application for new, expanded, or renewed participation in Title IV.[31]

In this regard, the Department has repeatedly premised recertification denials—as well as termination actions[32]— on findings of fiduciary breaches.[33] As the head of the Administrative Actions and Appeals Service Group (within Federal Student Aid) noted in 2016:

> If the Department determines that an institution has not met the fiduciary standard of conduct, either through its failure to comply with applicable Title IV, HEA program standards and requirements, or through acts of affirmative misconduct, a denial of the institution's recertification application is warranted.[34]

For example, in 2016 alone, the Department relied, in whole or in part, on fiduciary breaches to deny applications for recertification submitted by Marinello School of Beauty, Computer Systems Institute, MedTech College, Globe University, Minnesota School of Business, and Charlotte School of Law.[35]

Although Marinello's conduct constituted a "severe breach" of fiduciary duty—and therefore is not the bellwether by which other misconduct should be measured—the case presents an excellent example of how the Department can rely on a finding of fiduciary breach to deny recertification in the Title IV programs. During a program review, the Department determined that Marinello was partnering with a private school (Parkridge), ostensibly to provide prospective students with the high school credential necessary to receive Title IV funding. When asked to describe the relationship between Marinello and Parkridge, the school provided "incomplete and, in some cases, patently false" information to obscure the facts underlying the Department's conclusion: Marinello used Parkridge as a front to create invalid high school diplomas for the purpose of rendering those students eligible for Title IV aid, which would then flow to Marinello.

In making findings regarding the institution, the Department did not simply assert that the school had made misrepresentations to students or the Department, in violation of the HEA and regulations. Instead, the Department highlighted how the institution's misconduct formed the basis for a severe breach of fiduciary duty. The Department included the extent to which Marinello demonstrated a "callous disregard" for students, particularly those from "economically disadvantaged population[s]," which was "magnified by the fact that [Marinello] staff routinely lied to students about their rights."[36] Similarly, when denying recertification to the Computer Systems Institute, the Department determined that the submission of false job placement data to an accreditor and students constituted a breach of fiduciary duty to the Department.[37]

Likewise, in the MedTech College recertification denial, the Department concluded that the school had violated its fiduciary duties in two overarching respects. *First*, the Department found that MedTech had made numerous misrepresentations to the Department, the school's accreditor, and to enrolled and prospective students regarding the job placement rates of its students. *Second*, the Department found that MedTech had failed to report to the Department its use of a third-party entity called "Placement Verifiers" to verify its job placement rates, even though MedTech was obligated to report to the Department its use of this third-party servicer. Moreover, the Department highlighted how MedTech's contract with Placement Verifiers provided a financial incentive for the third-party servicer to falsify the evidence substantiating MedTech's verification of its job placement rates.

CONCLUSION

Read together, the three concepts addressed in this memorandum—*i.e.*, the limited scope of judicial review over recertification decisions, the broad scope of the fiduciary standard, and the high level of care required by that standard—suggest that the Department should be policing institutional compliance with the fiduciary standard and ensuring that institutions with significant noncompliance lose their eligibility to participate in the Title IV programs. Moreover, by couching institutional noncompliance with statutory and regulatory requirements within the defined fiduciary standard, as was done in the examples discussed herein, the Department can ensure that all institutions are on notice that they must adhere to the "highest standard known to law."

Endnotes

1 In this memorandum, I cite to numerous decisions from the Department's Office of Hearings and Appeals ("OHA"), as well as decisions of the Secretary of Education reviewing OHA decisions. Where available, I have provided both a Westlaw citation and a link the Department's website. For Secretarial decisions, I have also identified the Secretary issuing the decision.

2 The HEA provides that "[f]or purposes of qualifying institutions of higher education for participation" in the Title IV programs, the Secretary "shall determine": (i) the legal authority of the institution to operate in a state; (ii) the institution's accreditation status; and, (iii) the "administrative capability and financial responsibility of an institution ... in accordance with [statutory] requirements." HEA §498(a), 20 U.S.C. § 1099c(a).

3 HEA § 453, 20 U.S.C. § 1087c.

4 *See* HEA § 487, 20 U.S.C. § 1094.

5 The HEA establishes that a PPA can last no longer than six years, at which point the Department must make a new determination regarding institutional eligibility. At that time, the Secretary may also "provisionally" certify an institution's eligibility to participate in Title IV programs if, among other reasons, the Department "determines that an institution that seeks to renew its certification is, in the judgment of the Secretary, in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a [PPA]. HEA § 498(h)(1)(B)(iii), 20 U.S.C. § 1099c(h)(1)(B)(iii). Institutions are also placed on provisional status following the successful fine, limitation, or suspension action (or the settlement thereof), problematic compliance or financial audits, or the occurrence of other specified circumstances. 34 C.F.R. § 668.174 (listing "past performance" standards); 34 C.F.R. § 668.175(f)(1)(ii) (noting that a past performance violation constitutes a financial responsibility failure, which causes an institution to be placed on provisional certification).

6 34 C.F.R. § 668.13(b). In 2020, Department curtailed its authority to use month-to-month certification in perpetuity and enacted regulations establishing that a PPA automatically renews if the Department had not issued a recertification decision within 12 months following expiration of the prior PPA.

7 *See e.g.*, Letter from Susan Crim, Dir., FSA to Julia Lowder, CEO, Comput. Sys. Inst. 19 (Jan. 29, 2016) ("CSI Letter"), *available at*: https://studentaid.gov/sites/default/files/csi-denial-letter.pdf; Letter from Susan Crim, Dir., FSA to Rashad Elyas, CEO, Marinello Sch. of Beauty at 9 (Feb. 1, 2016) (same) ("Marinello Letter"), *available at*: https://studentaid.gov/sites/default/files/marinello-03094400-denial-letter.pdf; Letter from Susan Crim, Dir., FSA to William Winkowski, President, MedTech Coll. 10 (July 26, 2016) ("MedTech Letter"), *available at*: https://studentaid.gov/sites/default/files/medtech-recert-denial.pdf; Letter from Susan Crim, Dir., FSA to Jeffrey Myhre, President, Globe Univ. 13 (Dec. 6, 2016) ("Globe University Letter"), *available at*: https://studentaid.gov/sites/default/files/globe-recert-denial.pdf; Letter from Susan Crim, Dir., FSA to Jeffrey Myhre, President, Minnesota Sch. of Bus. 15 (Dec. 6, 2016) ("MSB Letter"), *available at*: https://studentaid.gov/sites/default/files/msb-recert-denial.pdf; Letter from Susan Crim, Dir., FSA to Chidi Ogene, President, Charlotte Sch. of Law 13 (Dec. 19, 2016) ("Charlotte Law Letter"), *available at*: https://studentaid.gov/sites/default/files/csl-recert-denial.pdf.

8 *See also, e.g.*, CSI Letter, *supra* note 7, (applying the standard to deny recertification); Marinello Letter, *supra* note 7 (same); MedTech Letter, *supra* note 7 (same); Globe University Letter, *supra* note 7 (same); MSB Letter, *supra* note 7 (same); Charlotte Law Letter, *supra* note 7 (same).

9 Although the Department's use of this authority with respect to third-party servicers is beyond the scope of this memorandum, we note that the Department's February 2023 guidance regarding Third Party Servicers reaffirms that such entities are subject to the fiduciary standard. *See* Annmarie Weisman, Deputy Assistant Sec'y for Pol'y, Plan., and Innovation, Off. of Postsecondary Educ., U.S. Dep't of Educ., Dear Colleague Letter: Requirements and Responsibilities for Third-Party Services and Institutions, GEN-23-03 (Updated Feb. 28, 2023), https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-feb-28-2023

Applying the fiduciary standard to Third Party Servicers is consistent with Departmental practice. *See* MedTech Letter, *supra* note 7 at 9 (discussing MedTech's unreported use of a Third Party Servicer; *see also infra* (discussing Medtech); Letter from Ralph LoBosco, Div. Dir., FSA, to Ed Kadletz, EVP, Head of Deposit Products Grp., Wells Fargo Bank, at Program Review Report at 9 (June 28, 2017) (noting that Wells Fargo had violated the fiduciary standard as applied to a Third Party Servicer) *available at:* https://studentaid.gov/sites/default/files/wells-fargo-bank-final-program-review-determination.pdf.

10 Cabot Colls., U.S. Dep't of Educ., No. 97-15-SP, 2000 WL 34531933 (Richard Riley, Sec'y, U.S. Dep't of Educ.) (July 25, 2000); Jon Louis Sch. of Beauty, U.S. Dep't of Educ., Nos. 96-108-ST & 97-19-ST, 2000 WL 34531931 (Richard Riley, Sec'y, U.S. Dep't of Educ.) (Mar. 3, 2000); Mr. Arnold's Excellence Beauty Sch., U.S. Dep't of Educ., No. 92-121-ST, 1995 WL 17213927 (Richard Riley, Sec'y, U.S. Dep't of Educ.) (July 18, 1995).

11 Northwest Fla. State Coll., U.S. Dep't of Educ., No. 12-18-SA, 2014 WL 8664145 (Arne Duncan, Sec'y, U.S. Dep't of Educ.) (July 24, 2014).

12 Bio-Chi Inst. of Massage Therapy, LLC, U.S. Dep't of Educ., No. 14-37-SP (John B. King Jr., Sec'y, U.S. Dep't of Educ.) (Apr. 19, 2016) ("Institutions act as a fiduciary of the Department.").

13 The Salon & Spa Inst. (TX), U.S. Dep't of Educ., No. 16-23-SP, 2020 WL 13557778 (Betsy DeVos, Sec'y, U.S. Dep't of Educ.) (Nov. 13, 2020); Margate Sch. of Beauty, U.S. Dep't of Educ., No. 17-36-SA, 2020 WL 13557784 (Betsy DeVos, Sec'y, U.S. Dep't of Educ.) (Oct. 16, 2020) ("An institution has a fiduciary duty to the Department" and "'is subject to the highest standard of care and diligence' in administering Title IV programs and accounting for funds it receives.").

14 Bramson Ort Coll., U.S. Dep't of Educ., No. 18-08-SP, 2021 WL 9493275 (Miguel Cardona, Sec'y, U.S. Dep't of Educ.) (Oct. 15, 2021).

15 *See, e.g.*, *Sistema Universitario Ana G. Mendez v. Riley*, 234 F.3d 772, 775 (1st Cir. 2000) ("As a result of their fiduciary status, institutions bear the burden of proving that their expenditures of Title IV funds were warranted and that they complied with program requirements."); *Fla. Coastal Sch. of Law, Inc.*, No. 3:21-CV-721-MMH-JBT, 2021 WL 3493311, at *1 (finding it "significant[]" that institutions must act in the nature of a fiduciary).

16 Fortis Coll., U.S. Dep't of Educ., No. 12-55-SP, 2013 WL 6493419 (July 30, 2013).

17 Cabot Colls., U.S. Dep't of Educ., No. 97-15-SP, 2000 WL 34531933 (Richard Riley, Sec'y, U.S. Dep't of Educ.) (July 25, 2000).

18 Letter from Michael J. Frola, Dir., FSA to Mark Dottore, Dottore Cos. & Randall K. Barton, Chairman of the Bd., Dream Ctr. Educ. Holdings, at 2 (Feb. 27, 2019) (highlighting the role of the institution as a "trustee" of HEA program funds for the benefit of the "intended student beneficiaries"), *available at*: https://studentaid.gov/sites/default/files/argosy-cio-denial-redacted.pdf.

19 *Id.* at 2 (noting that students are the intended beneficiaries of Title IV funds).

20 The Salon & Spa Inst. (TX), U.S. Dep't of Educ., No. 16-23-SP, 2020 WL 13557778 (Betsy DeVos, Sec'y, U.S. Dep't of Educ.) (Nov. 13, 2020) ("An institution has a fiduciary duty to the Department to ensure Title IV funds are only distributed to eligible students."); Teddy Ulmo Inst., U.S. Dep't of Educ., No. 03-42-SF, 2005 WL 8132040 (Apr. 5, 2005); Pro. Career Training Inst. (TX), U.S. Dep't of Educ., No. 19-55-ST, 2020 WL 5250443 (July 14, 2020); Fortis Coll., U.S. Dep't of Educ., No. 12-55-SP, 2013 WL 6493419 (July 30, 2013) ("Fortis has failed to live up to its fiduciary duty to ensure that only eligible students receive Title IV funds."); *See* Marinello Letter, *supra* note 7, fabricating high school diplomas.

21 CC's Cosmetology Coll., U.S. Dep't of Educ., No. 13-56-SP, 2014 WL 8664150 (July 7, 2014); Jett Colls. of Cosmetology & Barbering, U.S. Dep't of Educ., No. 97-2-EA, 1997 WL 1048265 (Feb. 24, 1997).

22 In the Matter of Emergency Action Against Dayton Academy of Hair Design, U.S. Dep't of Educ. (Aug. 31, 1993).

23 Teddy Ulmo Inst., U.S. Dep't of Educ., No. 03-42-SF, 2005 WL 8132040 (Apr. 5, 2005) ("Fraudulent conduct is considered a severe breach of a school's fiduciary duty."); In the Matter of Emergency Action Against Clark College, U.S. Dep't of Educ. (Sept. 20, 1993).

24 Puerto Rico Tech. & Beauty Coll., U.S. Dep't of Educ., Nos. 90-34-ST & 90-38-ST, 1991 WL 367981 (Lamar Alexander, Sec'y, U.S. Dep't of Educ.) (Oct. 7, 1991).

25 Warnborough Coll., U.S. Dep't of Educ., Nos. 95-164-ST & 96-60-SF, 1996 WL 1056666 (Aug. 9, 1996) (finding an institution in violation of the required fiduciary standard due to its failure to properly oversee an employee who made substantial misrepresentations to students, and holding the institution responsible that employee's misrepresentations); Pro. Career Training Inst. (TX), U.S. Dep't of Educ., No. 19-55-ST, 2020 WL 5250443 (July 14, 2020) ("Institutions have a duty, inherent in a fiduciary standard of conduct, to operate in a truthful manner when dealing with students. This duty means that institutions are not allowed to make misrepresentations to students, or prospective students, regarding their educational programs, the financial charges assessed by the institution, or the employability of its graduates."); Charlotte Law Letter, *supra* note 7 (misrepresentations regarding nature of program offered); Globe University Letter, *supra* note 7 (misrepresentations regarding employability of graduates); MedTech Letter, *supra* note 7 (misrepresentations regarding employability of graduates).

26 Pro. Career Training Inst. (TX), U.S. Dep't of Educ., No. 19-55-ST, 2020 WL 5250443 (July 14, 2020); North Carolina Acad. of Cosmetic Art, U.S. Dep't of Educ., Nos. 98-123-EA & 98-129-ST, 2000 WL 34531937 (Richard Riley, Sec'y, U.S. Dep't of Educ.) (Dec. 12, 2000)

27 Cabot Colls., U.S. Dep't of Educ., No. 97-15-SP, 2000 WL 34531933 (Richard Riley, Sec'y, U.S. Dep't of Educ.) (July 25, 2000); Instituto de Educacion Universal, U.S. Dep't of Educ., Nos. 96-28-ST, 96-93-SP & 96-103-SA, 1997 WL 1048251 (Jan. 24, 1997); Cittone Inst., U.S. Dep't of Educ., No. 94-131-SA, 1995 WL 1049928 (Apr. 7, 1995).

28 Jon Louis Schs. of Beauty, U.S. Dep't of Educ., Nos. 96-108-ST & 97-19-ST, 1998 WL 736219 (Apr. 3, 1998); Instituto de Educacion Universal, U.S. Dep't of Educ., Nos. 96-28-ST, 96-93-SP & 96-103-SA, 1997 WL 1048251 (Jan. 24, 1997).

29 Marinello Letter, *supra* note 7 (fabricating high school diplomas).

30 Northwest Fla. State Coll., U.S. Dep't of Educ., No. 12-18-SA, 2014 WL 8664145 (Arne Duncan, Sec'y, U.S. Dep't of Educ.) (July 24, 2014)

31 The Department has also highlighted that an institutional breach of fiduciary duty "at *any* time, including past years, is grounds for denial of recertification." Letter from Mary Gust, Dir., FSA to Jack Massimino, Chairman & CEO, Corinthian Colls., Inc., at 2 n.2 (Aug. 22, 2014) ("Corinthian Letter"), *available at*: https://www.republicreport.org/wp-content/uploads/2014/08/EdCoColtr822.pdf; *see also* Pro. Career Training Inst. (TX), U.S. Dep't of Educ., No. 19-55-ST, 2020 WL 5250443 (July 14, 2020) ("The violations do not necessarily need to be on-going to justify termination of eligibility if the conduct is sufficient egregious to violate the fiduciary duty [standard]."); Yorktowne Bus. Inst., U.S. Dep't of Educ., No. 92-33-ST, 1993 WL 13957186 (Mar. 10, 1993) ("There is simply no requirement that a school currently be in violation of its legal obligations or have committed a pattern of abuse to face termination ... YBI failed to act as a fiduciary for the Department, YBI officials expressly admitted to this failure (and the proper sanction is termination, precluding receipt of yet additional student financial assistance funds.").

32 *See, e.g.*, Valley Com. Coll., U.S. Dep't of Educ., No. 96-96-ST, 1997 WL 1048253 (June 17, 1997); *see also, e.g.,* Pro. Career Training Inst. (TX), U.S. Dep't of Educ., No. 19-55-ST, 2020 WL 5250443 (July 14, 2020) ("A breach of fiduciary duty is enough to warrant termination."); Instituto de Educacion Universal, U.S. Dep't of Educ., Nos. 96-28-ST, 96-93-SP & 96-103-SA, 1997 WL 1048251 (Jan. 24, 1997) ("[I]f an institution's regulatory violations result in a breach of its fiduciary duty to administer Title IV programs in accordance with the highest standard of care and diligence, this conduct also constitutes grounds for termination of eligibility to participate in these programs.").

33 *See, e.g.*, *Nat'l Career Coll., Inc.*, 371 F. App'x at 795 ("The DOE denied HBC's request for reapplication, citing Mirzaei's previous breach of his fiduciary duty when he owned another college.").

34 Corinthian Letter, *supra* note 31 at 2.

35 *See* Marinello Letter, CSI Letter, MedTech Letter, Globe University Letter, MSB Letter, & Charlotte Law Letter, *supra* note 7.

36 The Department has never adopted a regulation stating that institutions owe a fiduciary duty directly to their students. As noted above, the Department has previously highlighted the extent to which students are the intended beneficiaries of the Title IV program. And in 2022, the Department asserted in a Dear Colleague Letter that "[i]nstitutions administer Title IV funds as fiduciaries for their students" and "[w]hen an institution has a campus banking partnership, it must also meet . . . fiduciary obligations on behalf of its students." Annmarie Weisman, Deputy Assistant Sec'y for Pol'y, Plan., and Innovation, Off. of Postsecondary Educ., U.S. Dep't of Educ., Dear Colleague Letter: Cash Management – Tier One and Tier Two Arrangements, GEN-22-14 (Oct. 13, 2022), https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-10-13/cash-management-tier-one-and-tier-two-arrangements. We note that at least two courts have rejected the idea that 34 C.F.R. § 668.82 creates a direct fiduciary relationship between an institution and the Department. *See, e.g.*, *Moy v. Adelphi Institute, Inc.*, 866 F.Supp. 696, 708 (E.D.N.Y. 1994); *Radin v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, No. 04 CIV. 704 (RPP), 2005 WL 1214281, at *14 (S.D.N.Y. May 20, 2005). We encourage the Department to more deeply consider whether—and when—an institution may have direct fiduciary obligations to its students.

37 CSI Letter, *supra* note 7.

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