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The Bundled Services Loophole

What Is It Good For? Absolutely Nothing

The ban on incentive compensation for recruitment and enrollment of students in Section 487 of the Higher Education Act is straightforward—employees and vendors cannot be paid based on the number of students they enroll.¹ The statute’s plain language admits of no exceptions for vendors that are also providing other services to colleges, which should close the question of whether the bundled services loophole that the Department of Education concocted in a 2011 Dear Colleague Letter guidance,² is lawful. It is not.³

If the questions are expanded beyond pure legality to whether the loophole can be reconciled with Congress’s purpose for banning incentive compensation or is good higher education policy, the answers remain the same—it cannot and it is not. The incentive compensation ban was instituted out of concern “that schools were creating incentives for recruiters to enroll students who could not graduate or could not find employment after graduating.”⁴ Compensation incentives that might be productive and commonplace in other sales settings were deemed perverse incentives when the consumers are students, the product is education, and it is paid for primarily through taxpayer-funded debt.

The Department rationalizes its defiance of the incentive compensation ban solely by its *ipse dixit* assertion that bundled-services providers don’t have the same incentive to recruit as aggressively as single-service providers:

When the institution determines the number of enrollments and hires an unaffiliated third party to provide bundled services that include recruitment, payment based on the amount of tuition generated does not incentivize the recruiting as it does when the recruiter is determining the enrollment numbers and there is essentially no limitation on enrollment.⁵

Common sense suggests otherwise—a bundled-services provider that recruits is, by definition, charging for more work than a provider which only recruits, so it stands to benefit more from increasing the student population receiving its services. The Government Accountability Office report issued in April 2022 on the Department’s oversight of schools’ Online Program

1 HEA § 487(a)(2), 20 U.S.C. § 1094.

2 Eduardo M. Ochoa, U.S. Dep’t of Educ., Dear Colleague Letter: Implementation of Program Integrity Regulations, GEN-11-05, at 8-10 (Mar. 17, 2011), <https://fsapartners.ed.gov/sites/default/files/attachments/dpclletters/GEN1105.pdf>.

3 Student Defense, *You Can’t Bundle That: How the U.S. Department of Education’s “bundled services” loophole is illegal under the Higher Education Act* (Mar. 2023).

4 *Ass’n. of Priv. Sector Colls. and Univs. v. Duncan*, 681 F. 3d 427, 434 (D.C. Cir. 2012).

5 Eduardo M. Ochoa, U.S. Dep’t of Educ., Dear Colleague Letter, GEN-11-05, *supra* note 2, at 11.

Management (OPM) arrangements, revealed that most OPMs received between 41-60% of each enrolled students' tuition.⁶ It's every bit as much in bundled-services providers' interest, if not more, to aggressively recruit students and share in their tuition revenue as it is for providers who only recruit.

The suggestion that tuition-share agreements with bundled-services providers do not incentivize aggressive recruitment when "the institution determines the number of enrollments" is particularly hard to sustain for online programs, where enrollment numbers can be more elastic than at brick-and-mortar campuses. (It's also unclear how the institution's control over enrollment distinguishes bundled-services providers from single-service providers.) Even where program enrollments are capped by a school, recruiters with tuition-share agreements have a financial stake in programs being fully subscribed. This has also, not surprisingly, proved a hard line to police, with OPMs sometimes consulting with their client schools about program size and enrollment, even if they are not dictating policy to them.⁷

The Department also fails to make any positive case for the bundled-services exception in the Dear Colleague Letter. The subregulatory guidance was apparently issued after OPMs and schools lobbied the department that it would help nonprofit colleges innovate. While it's true that OPMs provide technology and distribution capabilities for online programs that many schools have not developed themselves, that does not require coupling those services with recruiting and admissions, traditional functions that schools have typically handled themselves. There is no inherent reason that schools need to acquire these disparate services from the same companies that are running their platforms. The Department presents no evidence in the guidance that the only way schools can induce contractors to sell technological services is by also hiring them to be their recruiters and paying them a cut of tuition for each student that enrolls.

Schools have many options for securing the services they need, without the tuition-share carrot for increasing enrollment. They can contract with multiple companies, separating the recruiting function from other services an OPM is providing—either keeping it on campus or contracting it out to another provider. Alternatively, OPMs could retain the recruiting function, but work on a fee-for-services or fee-for-time, rather than fee-per-customer model (as some already do).⁸ At least one large university offering online education has taken all of its OPM functions in-house, rather than outsource it to a company "focused on generating leads and recruiting students."⁹ In addition, the state of North Carolina has formed a non-profit OPM, so that its university system can offer online education to adult learners without diverting money from the core educational services or pressuring students to enroll in programs they can't benefit from.¹⁰ Schools aren't supposed to be incentivizing recruitment. They don't need to either.

6 U.S. Gov't Accountability Off., GAO-22-104463, *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* ("GAO Report"), at 15 (Apr. 2022), <https://www.gao.gov/assets/720/719953.pdf>.

7 Stephanie Hall, *Invasion of the College Snatchers*, The Century Foundation (Sept. 30, 2021), <https://tcf.org/content/report/invasion-college-snatchers/>.

8 GAO Report, *supra* note 6, at 15.

9 Paul Pastorek, *President Speaks: To put students first, colleges need to rethink the OPM model*, HigherEd Dive (Dec. 12, 2022), <https://www.highereddive.com/news/president-speaks-university-arizona-global-campus-uagc-cut-ties-opm/638420/>.

10 Suzanne Smalley, *UNC's \$97 Million Plan to Reach Adult Online Learners*, Inside Higher Ed (Dec. 9, 2021), <https://www.insidehighered.com/news/2021/12/09/unc-system-launch-ambitious-97-million-ed-tech-start>.