



How the U.S. Department of Education Can Usher in a New Era of Equity and Civil Rights in Higher Education



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ABSTRACT: The global pandemic and the changing landscape of higher education and remote learning bring new opportunity and significant risk to communities of color across the country. This paper identifies how the U.S. Department of Education’s Office for Civil Rights can partner with the Office for Federal Student Aid to bring enhanced oversight and protect students from civil rights violations. By coordinating to bring joint investigations and enforcement actions the Department could create a more effective system of protections and oversight to promote equity in higher education.

Introduction

It is well documented that there are significant disparities plaguing our federal student loan system.¹ Black bachelor’s degree graduates are more likely to default than white borrowers who never finish a degree.² Latino students are more likely to drop out of school because of the high price of education.³ Women—and particularly Black women—are more likely to take on student loan debt, face a wage gap in the workforce, and struggle with repayment.⁴ Making matters worse, the pandemic has accelerated enrollment in online learning.⁵ This is an area dominated by for-profit schools,⁶ which frequently report poor student outcomes, such as earnings, and often target and enroll women and people of color.⁷

The response from the U.S. Department of Education (“Department”)—which administers the Federal Student Aid Program⁸ and is responsible for its oversight—has been woefully inadequate. In February 2020, U.S. Senators Elizabeth Warren, Cory Booker, and then-Senator Kamala Harris, wrote to the Department requesting information about how the Office for Civil Rights (“OCR”) “plans to address alarming racial disparities in our federal student loan system through vigorous enforcement of the nation’s civil rights laws.”⁹ In the letter, the Senators asserted that OCR “has a statutory and moral obligation to examine the root causes of these several racial disparities” in “student loan borrowing and student loan outcomes faced by students of color[.]”¹⁰

Indeed, OCR plays a critical role in the investigation and enforcement of our nation’s civil rights laws in the sphere of higher education.¹¹ And while OCR has many tools at its disposal to address violations, it rarely (if ever) restricts or terminates a school’s federal funding. Indeed, according to the Congressional Research Service, OCR has not terminated federal funding for any recipient in more than *two decades*.¹²

But what if OCR were to partner with the Office of Federal Student Aid (“FSA”) to leverage the expertise of OCR personnel with FSA’s statutory and regulatory authorities? In contrast to OCR, FSA *has* terminated or placed limitations on institutions’ participation in Federal Student Aid Programs in recent years, albeit for reasons other than civil rights violations.¹³ A partnership between OCR and another governmental office is not a novel concept. OCR is already coordinating with and referring cases to the U.S. Department of Justice, which has overlapping authority with OCR to enforce certain federal civil rights laws.¹⁴ Although FSA does not enforce civil rights laws, it does have authority to limit and restrict participation in the Federal Student Aid Program if an institution fails to comply with such laws.

The timing for coordination between OCR and FSA could not be better—or more crucial. In October 2021, the Department announced that it would be restoring FSA’s Enforcement Office, created in 2016 but gutted under the Trump administration.¹⁵ However, the office has yet to bring a major enforcement action. The Department’s resurrection of FSA’s Enforcement Office provides a significant

opportunity for OCR and FSA to coordinate efforts to more effectively address violations of federal civil rights laws and make progress to end systemic discrimination in higher education. Against this backdrop, we explore three areas of coordination:

1. Institutionalize OCR/FSA partnerships to better monitor and investigate institutions' practices that violate civil rights laws.
2. Bring joint OCR/FSA enforcement actions to stop the flow of unrestricted Federal Student Aid to institutions that violate federal civil rights laws.
3. Focus OCR and FSA oversight and enforcement on discriminatory practices such as "reverse redlining" that the Department has yet to investigate.

Scope of OCR and FSA

OCR's mission is to "ensure equal access to education and to promote educational excellence . . . through vigorous enforcement of civil rights."¹⁶ OCR handles a large volume and variety of claims¹⁷ alleging race, national origin and gender discrimination, which it administratively resolves through a series of procedures specified by federal civil rights laws and the Department's implementing regulations. Although OCR has the power to terminate an institution's federal financial support,¹⁸ that authority is hedged with a range of procedural requirements designed to spur voluntary compliance.

When OCR receives a complaint, the office first tries to obtain compliance from institutions by "provid[ing] assistance and guidance . . . to help [recipients] comply voluntarily" with the federal civil rights laws that OCR enforces.¹⁹ OCR's Case Processing Manual (CPM), which guides how "OCR promptly and effectively investigates and resolves complaints, compliance reviews, and directed investigations," lays out OCR's required steps to (1) evaluate a complaint; (2) facilitate a resolution between the complainant and the institution; and (3) investigate and determine whether there is noncompliance.²⁰ Even after a finding of noncompliance, OCR must provide additional opportunities for voluntary resolution and compliance. If an impasse is reached, OCR may end negotiations and issue a Letter of Impending Enforcement Action which may include notice to defer final approval of applications by the institution for federal funds.²¹

FSA has extensive oversight responsibilities across higher education, including the authority to determine which institutions and entities can participate in Federal Student Aid Programs.

Throughout OCR's protracted process to achieve voluntary compliance exist opportunities to share information with FSA about noncomplying institutions. If OCR were to do so, FSA could also act, perhaps more nimbly²² and under a different set of regulations, to ensure institutions comply with federal civil rights laws. FSA has extensive oversight responsibilities across higher education, including the authority to determine which institutions and entities can participate in Federal Student Aid Programs.²³ FSA has three enforcement tools at its disposal: first, it can impose tailored conditions on an institution's participation in Federal Student Aid Programs;²⁴ second, it can deny an institution's recertification to participate in Federal Student Aid Programs;²⁵ and third, it can impose civil penalties or fines against institutions.²⁶

With respect to the second tool, each participating institution in Federal Student Aid Programs is required to enter into a "Program Participation Agreement" or "PPA" with the Department that "condition[s] the initial and continuing eligibility" with certain statutorily enumerated requirements.²⁷ Notably, PPAs include standard general terms and conditions to comply with civil rights laws (see Figure 1).

During the six-year term of a standard PPA, FSA has the authority to bring a "termination" action against an institution that is found in violation of the HEA or regulations.²⁸

The Secretary may also "provisionally" certify an institution's eligibility to participate in Federal Student Aid Programs

Figure 1. PPA conditions to comply with federal civil rights laws.

3. The Institution agrees to comply with —
 - a. Title VI of the Civil Rights Act of 1964, as amended, and the implementing regulations, 34 C.F.R. Parts 100 and 101 (barring discrimination on the basis of race, color or national origin);
 - b. Title IX of the Education Amendments of 1972 and the implementing regulations, 34 C.F.R. Part 106 (barring discrimination on the basis of sex);
 - c. The Family Educational Rights and Privacy Act of 1974 and the implementing regulations, 34 C.F.R. Part 99;
 - d. Section 504 of the Rehabilitation Act of 1973 and the implementing regulations, 34 C.F.R. Part 104 (barring discrimination on the basis of physical handicap); and
 - e. The Age Discrimination Act of 1975 and the implementing regulations, 34 C.F.R. Part 110.
 - f. The Standards for Safeguarding Customer Information, 16 C.F.R. Part 314, issued by the Federal Trade Commission (FTC), as required by the Gramm-Leach-Bliley (GLB) Act, P.L. 106-102. These Standards are intended to ensure the security and confidentiality of customer records and information. The Secretary considers any breach to the security of student records and information as a demonstration of a

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].”²⁹ A Provisional PPA differs from a standard PPA in that the Department can include additional conditions for an institution to satisfy. Put another way, Provisional PPAs function as corrective action plans when colleges start to fall below standards; schools continue to receive federal funds, but only if they agree to fix their problems and come back into compliance within a short time.³⁰

Provisional PPAs also allow the Department to act more quickly to end the participation of a school found to be in violation of the PPA, the HEA or regulations. Instead of waiting until the conclusion of a termination action or the expiration of a standard PPA to end a school’s participation, the Department can revoke the Provisional PPA effective on the date that the Secretary mails the notification notice.³¹

FSA’s flexibility to effectuate compliance sits in stark contrast to OCR’s cumbersome suspension/termination/refusal authority, which sets forth a multistep process of notice and opportunity for a full hearing, culminating in a full written report filed with the committees of the House and the Senate

having legislative jurisdiction over the program, followed by a 30-day waiting period.³²

But this isn’t OCR’s only option. It may also effectuate compliance “by any other means authorized by law,”³³ which, as discussed below, opens additional (untapped) opportunities to coordinate with and refer cases to FSA.

Institutionalize OCR/FSA partnerships to better monitor and investigate civil rights violations

OCR and FSA are largely siloed from one another. Based on responses to an open records request, it appears the two offices do not share information about civil rights violations. For example, FSA has no record of denying an institution’s recertification to participate in Federal Student Aid or even any communications with institutions “discussing, enforcing, or relating” to the PPA provision requiring compliance with Title VI.³⁴ Yet, OCR lists more than 150 resolved cases with postsecondary institutions on its website, which identify noncompliance with Title VI, and at least 200 more pending cases currently under investigation.³⁵

An OCR-FSA partnership could be far-reaching and potentially address systemic discrimination in higher education. Not only would it be a further incentive for institutions to

voluntarily resolve cases with OCR, but it may also give OCR additional leverage to negotiate more robust resolution agreements. For example, as Senators Warren and Booker, and then-Senator Harris, pointed out, OCR could use its investigative authority to learn more about the roles that schools and other entities play to create, contribute to, and perpetuate racial disparities in the federal student loan system. For schools and entities that have violated Title VI but refuse to voluntarily comply, OCR could partner with FSA to place limits on their participation in Federal Student Aid Programs, or fine them. If an institution is being recertified for participation in Federal Student Aid programs, the Department could also add provisions to its PPA or Provisional PPA that are designed to mitigate civil rights compliance failures. For institutions that are on provisional certification, the Department can unilaterally revoke participation. And information need not flow only one way: FSA's knowledge about problematic institutions could be shared to prompt OCR to investigate unexamined areas.³⁶

By institutionalizing an FSA/OCR partnership, possibly facilitated through a memorandum of understanding,³⁷ the two offices can coordinate compliance efforts in a number of ways, including:

- ▶ **Updating OCR's Case Processing Manual ("CPM").** The CPM³⁸ specifies that "if a recipient does not enter into an agreement to resolve the identified areas of non-compliance," OCR will prepare a Letter of Impending Enforcement, which may result in, *inter alia*, the deferral of final approval for any additional federal financial assistance.³⁹ If the recipient continues to resist entering into a resolution agreement, then OCR will initiate enforcement action. The current version of the CPM states that:

OCR will either: (1) initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance from, or, with respect to the Boy Scouts Act, funds made available through, the Department to the recipient; or (2) refer the case to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States.⁴⁰

OCR could update the CPM to more closely track the

statutory and regulatory language, and state that it will effectuate compliance through "other means authorized" by law, which may include, but is not limited to, a reference to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States.⁴¹ This change potentially would allow OCR to refer cases to FSA.

In addition, OCR could use more specific language and notify stakeholders that OCR and FSA may work together, which may have a significant deterrent effect. OCR could revise the CPM to state that OCR may refer the case to FSA to evaluate the institution's continued eligibility to participate in Federal Student Aid Programs, which may result in changes or revocation of the institution's PPA or Provisional PPA, or further proceedings.

- ▶ **Setting Priorities for Coordinated Civil Rights Enforcement.** OCR and FSA should meet periodically to discuss the institutions that have not come into voluntary compliance despite OCR's efforts to reach an informal resolution. OCR and FSA should consider, among other things, the cases in which a coordinated enforcement effort could have a wide-ranging impact, both at the target institution and on other schools.
- ▶ **Program Participation Agreements.**⁴² OCR and FSA can coordinate to add provisions to an institution's PPA or Provisional PPA that are designed to address findings that OCR has made. FSA's compliance office has information from program reviews, audits and Title IV investigations to confirm this information, and often adds terms and conditions to PPAs for institutions that have had compliance issues or concerns. However, there is little to no coordination between the FSA office issuing new PPAs and OCR teams that may be conducting investigations into Title VI and Title IX violations by these colleges and universities.⁴³ The result is that institutions known to be non-compliant or under investigation may be getting fully certified PPAs renewed for up to six years that do not contain any provisions to ensure they are coming into compliance with civil rights laws.

As discussed above, PPAs require institutions to agree that they will comply with Title VI, Title IX, Section 504, and the Age Discrimination Act, all enforced by OCR. In order to ensure that institutions will remedy civil rights

violations, FSA should work with OCR to require compliance as a condition for continued receipt of Title IV funds.

There are also cases where institutions operating under Provisional PPAs become the subject of OCR investigations. In these situations, FSA should coordinate with

OCR to determine whether certain provisions or requirements should be added to the schools' PPAs or whether the violation merits the termination of the institution's participation in Federal Student Aid Programs. Vatterott College provides an illustrative case study.

CASE STUDY: FSA Declines to Amend Vatterott College's PPA Despite OCR's Resolution of Title IX Violations

Background

The Office for Civil Rights received a complaint on January 17, 2017 that alleged discrimination on the basis of sex by Vatterott College operating out of Berkeley, Missouri. The complaint was serious enough for OCR to investigate four categories of issues and eventually enter into a Resolution Agreement with the school.⁴⁴ The issues included:

1. whether the College failed to respond promptly and equitably to complaints and reports of sexual harassment by the Complainant, and if so, whether the College perpetuated a sexually hostile environment, in violation of 34 C.F.R. §§ 106.8(b), 106.31(a) and (b);
2. whether the College failed to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee Title IX complaints of sexual harassment, in violation of 34 C.F.R. § 106.8(b);
3. whether the College failed to designate a Title IX coordinator to coordinate its efforts to comply with and carry out its responsibilities under Title IX, including any investigation of the Complainant's Title IX reports/complaints, in violation of 34 C.F.R. § 106.8(a); and,

4. whether the College failed to implement, publish, and distribute a notice of non-discrimination, in violation of 34 C.F.R. § 106.9.

While OCR often receives complaints from students or employees of schools that identify violations that may be considered isolated incidents, the allegations against Vatterott highlighted systemic Title IX violations with the potential to impact the entire student body.

Despite Vatterott College operating under a Provisional PPA, FSA did not alter the terms of the PPA following OCR's Title IX investigation or take further action to address Vatterott's non-compliance.

The Department's oversight failures regarding Vatterott were far from limited to its Title IX violations, but additional restrictions in its PPA or in its continued participation in Title IV may have helped prevent the fall-out from the company's eventual demise. Vatterott closed in 2018 after failing the Department's financial responsibility test for twelve consecutive years. The Department assessed a liability against Vatterott of over \$244.3 million on December 8, 2020, largely related to the school's closure. The amount remains uncollected.

Bring joint OCR/FSA enforcement actions to stop the flow of unrestricted Federal Student Aid to institutions that violate federal civil rights laws

While a number of institutional and statutory challenges have historically prevented OCR from bringing termination actions under Title VI, FSA can move much faster and has broad authority to bring actions to restrict or cut off federal student aid to schools based on its determination that institutions lack the administrative capability to administer Federal Student Aid Programs.⁴⁵ OCR does not publish data on its use of fund termination proceedings, but an April 4, 2019 Congressional Research Service (CRS) report noted that searches of the Westlaw and the Lexis databases of “OCR administrative proceedings by CRS researchers failed to uncover any termination orders issued under Title VI in the last 25 years.”⁴⁶

By partnering with FSA to bring such actions under Title IV enforcement authority, OCR would allow the Department to move faster and expand the enforcement options available to protect students from widespread civil rights violations at colleges and universities. Examples of actions that suspend, limit or terminate participation in Title IV that FSA could partner with OCR in bringing, include:

- ▶ **Limitation Proceedings.**⁴⁷ The Secretary can limit an institution’s participation in Title IV, and has wide latitude on the types of limitations that may be imposed in response to civil rights violations, including:
 - Limiting targeted advertisements, outreach, and recruiting based on race or socioeconomic status.
 - Training requirements for staff and students. This could apply in a variety of contexts, and could include implicit bias training, harassment training, training on the school policy on LGBTQ+ students.
 - Requiring institutions to address physical accessibility violations in an expedited timeframe.
 - Revising grievance procedures.

- Hiring a civil rights coordinator.
 - Issuing a policy/handbook on nondiscriminatory treatment of transgender students.
 - Requiring institutions to treat students consistent with their gender identity.
 - Resolving any Title IX athletics concerns (*e.g.*, equitable opportunities for sex-segregated teams).
 - Requiring that the institution enter into a resolution agreement with OCR that resolves findings that the institution violated Title VI, Title IX, Section 504, or the Age Discrimination Act.
- ▶ **Fine Proceedings.** OCR and FSA may coordinate to impose a fine on an institution for its failure to carry out its agreement to comply with federal civil rights laws. The fine would be based on the gravity of OCR’s findings, the refusal of the institution to come into voluntary compliance, or the size of the institution, and could be analogous to fines imposed for violations of the Clery Act.⁴⁸
 - ▶ **Suspension, Termination, or Refusal Proceedings.** OCR and FSA can coordinate proceedings to suspend, terminate, or refuse federal financial assistance to an institution in instances in which there is no other mechanism that could lead to compliance.

There are additional, significant efficiencies that would result from coordination between OCR and FSA.⁴⁹ For example, under the current siloed approach, FSA may recertify institutions for continued participation in Title IV and accept their certification of compliance with Department regulations while, at the same time, OCR is investigating and preparing to commence an action for violations of those same provisions. Similarly, FSA could come across information during its investigations that directly relates to a civil rights investigation OCR is conducting into the same institution. In areas such as Clery Act enforcement (which falls under Title IV and is thus delegated by statute to FSA), the overlap with OCR’s Title IX oversight is clear. The story of Penn State University is illustrative.

CASE STUDY: HOW OCR AND FSA COULD HAVE PARTNERED ON JOINT ENFORCEMENT ACTIONS TO ADDRESS THE CRIMES AT PENN STATE

Background

On November 3, 2016, years after the horrific crimes at Penn State University involving the child sexual abuse by football coach Jerry Sandusky and the cover up by university officials, the Department of Education announced a “record fine” of a mere \$2.4 million for 11 violations of the Clery Act.

FSA and OCR Investigations on Separate Tracks

FSA started investigating Penn State’s Clery Act violations soon after Sandusky was indicted in November 2011, but it took nearly *six years* to bring an administrative action against the university. When FSA finally did, its findings included one of the most serious actions that FSA can bring, a determination that Penn State lacked administrative capability “as a result of the University’s substantial failures to comply with the Clery Act and the Drug-Free Schools and Communities Act throughout the review period.”⁵⁰

OCR’s reaction was even more delayed. Its compliance review pursuant to Title IX did not commence until 2014, and OCR did not issue a notice of resolution to Penn State until March 26, 2020.⁵¹ Even then, OCR did not issue findings of Title IX violations despite an entire section

titled “Sandusky’s Misconduct, The University’s Failure To Respond, And Title IX Implications.” Instead, OCR determined that Penn State “failed to respond promptly and equitably to complaints of sexual harassment, including student complaints received during the 2016–17 academic year and complaints initially reported to the Athletic Department during the 2015–16 and 2017–18 academic years.” In addition, Penn State’s Title IX policies and procedures during the 2019–2020 academic year failed to provide notice to students and employees where complaints may be filed and to ensure reliable and impartial investigations of complaints.

What FSA and OCR Could Have Achieved by Coordinating

FSA did not appear to coordinate and share evidence with OCR during the first several years of the Clery Act investigation. Had it done so, OCR may have initiated its investigation sooner and then shared its investigative findings with FSA. This could have led to FSA doing more administratively. For example, FSA could have—but did not—propose a suspension or limitation action against Penn State, arguably more meaningful than a relatively small fine.⁵²

Focus OCR and FSA oversight and enforcement on discriminatory practices such as “reverse redlining” that the Department has yet to investigate

Although the harm caused by predatory institutions falls disproportionately on students of color, federal and state efforts to reign in predatory conduct in higher education have focused largely on consumer protection and credit violations, not civil rights issues.⁵³ In many cases, for-profit institutions have induced large numbers of students of color into taking out federal student aid or predatory loans from the institutions themselves, for an education of little value. These practices, commonly referred to as “reverse redlining,”⁵⁴ are actionable and fall squarely under Title VI, as well as the Equal Credit Opportunity Act (ECOA) and the Consumer Credit Protection Act.⁵⁵

One of the first higher education reverse redlining cases was brought in 2011 against Richmond School of Health and Technology (“RSHT,” now known as Chester College).⁵⁶ The eight named plaintiffs alleged RSHT lied about the cost to attend and job prospects, to encourage students to take out large federal student loans for an education that the school knew was exceedingly poor. The students alleged RSHT targeted African Americans and residents of low-income neighborhoods for enrollment. At the time, RSHT’s student body was “75% African American even though the area population was only 30% African American.”⁵⁷ Plaintiffs alleged that RSHT used “various marketing strategies to target African Americans and low-income neighborhoods in the Richmond area,” including “advertising on BET and hip hop radio stations.”⁵⁸ The case settled in 2013, with RSHT paying \$5,000,000 to the class and agreeing to maintain and disclose information about its students’ success.⁵⁹

In 2014, a group of former Corinthian Colleges employees filed an action under the False Claims Act,⁶⁰ alleging Corinthian engaged in racial discrimination when it

“systematically and intentionally” targeted Black students to enroll in “sham” vocational programs that lacked adequate instruction and training equipment.⁶¹ The Complaint alleged that the school would not have been eligible for millions of dollars in student financial aid funds but for its commitment under its PPAs that it would not engage in conduct that violates Title VI.⁶² “This commitment,” the Complaint alleged, “is an absolute prerequisite to eligibility for receipt of HEA funds.”⁶³ The plaintiff employees in the case voluntarily dismissed their claims after Corinthian declared bankruptcy and claims in pending lawsuits were paid out by the Department as receiver.

Nine years later, in 2020, a group of students sued for-profit vocational school Florida Career College (FCC), alleging the school targeted Black students with high-pressure tactics and false statements and omissions about job placement rates and earnings to induce them to enroll in extremely low-quality career-training programs.⁶⁴ The students borrowed thousands of dollars in federal student loans to attend FCC. In September 2021, the parties were ordered into arbitration and a decision on the merits of the case has not yet been reached.⁶⁵ Just recently, in 2022, another group of students sued Walden University for the same illegal conduct (see case study below).

Why has the Department largely ignored reverse redlining? Some suggest that the Department is not collecting and tracking the right information, such as individual-level data on student demographics, amount and types of financial aid received; program; course credits completed; graduation status, and employment status upon graduation, including field and income.⁶⁶ However, some accreditors and state agencies do collect demographic and outcomes data,⁶⁷ which they can (and should) share with FSA.⁶⁸ If FSA were to then share this type of information with OCR, the offices could coordinate oversight to better detect discriminatory conduct like reverse redlining.

CASE STUDY: How OCR and FSA Could Partner to Address Allegations that a College is Targeting Students of Color With Illegal Recruitment Practices

BACKGROUND

In a complaint⁶⁹ filed on January 10, 2022, three named Plaintiffs alleged that Walden University lured Black and female students into its Doctor of Business Administration (DBA) program with false program requirements, then compelled them to complete more credit hours than originally advertised. Plaintiffs allege that Walden reaped significant financial gain from this scheme, stringing along students who were already deeply invested in their degree, knowing they would have no choice but to take the additional courses if they wanted to finish. In 2016, 41% of students across Walden's doctoral programs identified as Black—more than seven times the national average of Black students enrolled in doctoral coursework. Nearly 77% identified as female. Two years before the suit, the Minnesota Office of Higher Education, which oversees state authorization of Walden, released a review of Walden's DBA program which highlighted much of the same misconduct.

HOW OCR COULD INVESTIGATE UNDER ITS CURRENT PRACTICES

OCR has not initiated an enforcement action against Walden and there is no public information to suggest that it has investigated the school. If an investigation did occur, under existing practices OCR would likely conduct a Title VI or IX compliance review (or respond to a complaint) to examine whether Walden violated federal civil rights laws through its targeted recruitment of Black and female students.

If OCR found Title VI or Title IX violations, it would likely describe its findings with respect to the value of the

programs for which Black students and women were targeted.

Under current practices, OCR would push for Walden to come into voluntary compliance and enter into a resolution agreement with OCR. However, it is unlikely that this would limit Walden's enrollment growth or participation in federal student lending programs in any meaningful way.

HOW OCR AND FSA COULD PARTNER ON ENFORCEMENT

A partnership between OCR and FSA to bring a Title IV limitation action would be both more effective and efficient. Assuming violations were found, FSA could condition Walden's continued participation in Title IV on requirements such as:

- Ceasing use of racially-targeted advertisements, outreach, and other recruitment communications.
- Requiring the school to provide a written statement to currently enrolled DBA students regarding the number of credits and cost required to complete the DBA program.

Walden is provisionally certified to participate in Title IV programs.⁷⁰ If OCR and FSA were to find civil rights violations and determine that Walden's DBA program is not providing value to students, FSA could add provisions to Walden's Provisional PPA to address and mitigate its reverse redlining conduct. If the Department determined the allegations were so severe that the institution should no longer be in operation, FSA could revoke Walden's Provisional PPA.⁷¹

Conclusion

An OCR and FSA partnering potentially could be the path to more meaningful oversight of Federal Student Aid programs and better enforcement of federal civil rights laws. The fact that FSA has no record of denying an institution's recertification to participate in Federal Student Aid because they failed to comply with Title VI, while at the same time OCR lists more than 150 resolved cases identifying noncompliance (and more currently under investigation), underscores the failure of the offices to at least share information.⁷²

The Department's resurrection of FSA's Enforcement Office provides a significant opportunity for the two offices to initiate an agreement to work together. Not only would an

institutionalized partnering be further incentive for institutions to voluntarily resolve cases with OCR, but it may also give OCR additional leverage to negotiate more robust resolution agreements. A partnering would also enable the Department to act more nimbly where, for instance, an institution is being recertified for participation in Federal Student Aid programs. And, as the Walden case study illustrates, a partnering could focus OCR and FSA on discriminatory practices the Department has yet to investigate.

By coordinating to bring joint investigations and enforcement actions the Department could create a more equitable and effective system of protections and oversight to promote equity in higher education.

Endnotes

- 1 Dominique J. Baker, *Race, Racism, and Student Loans*, Postsecondary Equity & Econ. Rsch. Project (2021), <https://www.peerrresearchproject.org/peer/research/body/RACE-RACISM-STUDENT-LOANS.pdf>.
- 2 Ctr. For Responsible Lending et al., *Quicksand: Borrowers of Color & the Student Debt Crisis* (Sept. 2019), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student-debt-crisis-jul2019.pdf>, p. 7.
- 3 *Id.* at 8.
- 4 *Id.* at 9.
- 5 See Current Term Enrollment Estimates Spring 2022, Nat'l Student Clearinghouse (Spring 2022), available at: https://nscresearchcenter.org/wp-content/uploads/CTEE_Report_Spring_2022.pdf, p. 1. See also Undergraduate Enrollment, Nat'l Ctr. for Educ. Stats. (May 2022), <https://nces.ed.gov/programs/coe/indicator/cha>. See also NC-SARA's 2021 Annual Data Report, which shows that distance education enrollment nearly doubled between 2019 and 2020. Nat'l Council for State Authorization Reciprocity Agreements, NC-SARA Annual Data Report 4 (Oct. 19, 2021), https://nc-sara.org/sites/default/files/files/2021-10/NC-SARA_2020_Data_Report_PUBLISH_19Oct21.pdf
- 6 "For-profits [] have been major contributors to the emerging market for online education and have driven a rapid increase in online enrollment." David J. Deming, et al., *The Value of Postsecondary Credentials in the Labor Market; An Experimental Study*, American Economic Review 2016, Vol. 106, No. 3, P. 779.
- 7 Stephanie Riegg Cellini, et al., *Gainfully Employed? Accessing the Employment and Earnings of For-Profit College Students Using Administrative Data*, The Journal of Human Resources, Vol. 54., No. 2, Spring 2019, pp. 359, 367. When compared to enrollment at public and nonprofit colleges, women, Black, Hispanic, and people who are over 25 years of age are all overrepresented at for-profit colleges. See Stephanie Hall et al., *What States Can Do to Protect Students from Predatory For-Profit Colleges*, The Century Found. & Veterans Educ. Success (May 2020), <https://tcf.org/content/report/states-can-protect-students-predatory-profit-colleges/>. See also Stephen Hayes & Andrea Lowe, *Combating Exploitative Education: Holding For-Profit Schools Accountable for Civil Rights Violations*, Student Borrower Prot. Ctr. (Dec. 2020), https://protectborrowers.org/wp-content/uploads/2020/12/Combating-Exploitative-Education_2020.pdf.
- 8 Higher Education Act of 1965, Title IV.
- 9 Letter from Sens. Elizabeth Warren, Kamala Harris, & Cory Booker to Kenneth L. Marcus, Asst. Sec'y for C.R., U.S. Dep't of Educ. (Feb. 27, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.02.27-Letter-to-ED-re-Borrowers-of-Color.pdf>. Although the letter requested certain actions to be taken by the Department, to our knowledge there is no public record of a response.
- 10 *Id.* at 2.
- 11 Of the federal civil rights laws that OCR enforces, this paper only addresses those that institutions of higher education agree to comply with when signing a Program Participation Agreement, including: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*; and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*
- 12 See Jared P. Cole, Cong. Rsch. Serv., R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964* 19 n.154 (Apr. 4, 2019) (hereinafter CRS Civil Rights at School), https://www.everycrsreport.com/files/20190404_R45665_a0ddea4244cc76cbf4e437c34e692ad73c323489.pdf ("A CRS search of Westlaw and Lexis databases of OCR administrative proceedings failed to uncover any termination orders issued under Title VI in the last 25 years."). Similarly, in the context of Title IX, "[o]ver the past half-century, the number of times the federal government has terminated funding for failure to comply with Title IX is exactly zero." R. Shep Melnick, *The Title IX Spotlight Shifts from the Campus to the Schoolhouse*, Education Next (last updated May 27, 2020), <https://www.educationnext.org/title-ix-spotlight-shifts-from-campus-to-schoolhouse/>.
- 13 FSA has authority to limit or terminate an institution's participation in Title IV. In 2016, FSA exercised its "limitation authority" to place conditions on DeVry University's participation in Title IV after DeVry failed to substantiate job placement claims in its advertisements. See Letter from Susan Crim, Dir., U.S. Dep't of Educ. Admin. Actions and Appeals Serv. Grp. to Robert Paul, President, DeVry Univ. re: Notice of Intent to Limit: Placement Rate and Employability Advertisements and Representations for DeVry University (Jan. 27, 2016), <https://studentaid.gov/sites/default/files/devry-limitation-notice.pdf>. Also in 2016, FSA terminated the Charlotte School of Law (CSL)'s participation in Title IV. The Department's decision was based on CSL's "substantial" and "persistent" noncompliance with its accreditor's standards, and its substantial misrepresentations regarding the nature of its academic program. See Letter from Susan Crim, Dir., U.S. Dep't of Educ. Admin. Actions and Appeals Serv. Grp. to Chidi Ogene re: Denial of Recertification Application to Participation in the Federal Student Financial Assistance Programs (Dec. 19, 2016), <https://studentaid.gov/sites/default/files/csl-recert-denial.pdf>.
- 14 OCR and the U.S. Department of Justice Civil Rights Division (CRT) have in place a memorandum of understanding that facilitates their ability to work collaboratively together on Title IX enforcement, public outreach, and technical assistance. See Memorandum of Understanding between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division (Apr. 28, 2014) (hereinafter OCR-CRT MOU), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleX-04-29-2014.pdf. The OCR-CRT Memorandum of Understanding could provide a template for an OCR/FSA partnership.
- 15 U.S. Department of Education, press release "U.S. Department of Education to Establish an Enforcement Office Within Federal Student Aid" (Oct. 8, 2021), available at: <https://www.ed.gov/news/press-releases/us-department-education-establish-enforcement-office-within-federal-student-aid>. "The Administration will prioritize Federal Student Aid's effective oversight and enforcement of postsecondary schools," stated Under Secretary James Kvaal in the release.
- 16 U.S. Dep't of Educ. Off. for C.R., *Case Processing Manual (CPM) 2* (Effective date: Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.
- 17 OCR has roughly 280 pending cases under investigation involving allegations of race and national origin discrimination at post-secondary schools; more than 960 pending cases involving sex discrimination in post-secondary schools; 60 pending cases involving age discrimination at post-secondary schools; and over 500 pending disability discrimination cases in post-secondary schools. See U.S. Dep't of Educ., Off. for C.R., *Pending Cases Currently Under Investigation as of June 3, 2022*, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html>.
- 18 34 C.F.R. § 100.8(a).
- 19 34 C.F.R. § 100.6(a). See also 34 C.F.R. Part 101. The Department's regulations implementing Title IX and Section 504 have incorporated the procedural requirements that are described in the implementing regulations for Title VI. See 34 C.F.R. § 106.81 (Title IX regulation incorporating 100.6–100.11 and 34 C.F.R. Part 101); 34 C.F.R. § 104.61 (Section 504 regulation incorporating 100.6–100.11 and 34 C.F.R. Part 101). The Department's implementing regulations for the Age Discrimination Act also require voluntary compliance, as well as mandatory referrals for mediation of complaints that fall within the jurisdiction of the Act. See 34 C.F.R. §§ 110.30–110.39.
- 20 CPM, *supra* note 13, at 2.
- 21 *Id.* at 21.
- 22 FSA is a Performance Based Organization ("PBO") within the Department. HEA § 141(a)(1); 20 U.S.C. § 1018(a)(1). "In general, PBOs are intended to be business-like, results-driven organizations that have clear objectives and measurable goals designed to improve an agency's performance and transparency." PBOs are "granted greater discretion to deviate from certain government-wide management processes and to operate more like private-sector companies." Cong. Rsch. Serv., R46143, *The Office of Federal Student Aid as a Performance-Based Organization* Summary 1 (Dec. 30, 2019), <https://crsreports.congress.gov/product/pdf/R/R46143>.

- 23 20 U.S.C. §§ 1094 and 1099c; 34 C.F.R. §§ 668.11, 668.82.
- 24 The Department has the power to “limit[]” the participation of any institution that has violated Title IV, the Department’s regulations, or any “applicable special arrangement, agreement, or limitation.” 34 C.F.R. § 668.86(a)(1). The example of DeVry University illustrates the Department’s use of this power. See FN 11, *supra*.
- 25 34 C.F.R. § 668.13.
- 26 Upon determination after notice and hearing that an institution has “violated or failed to carry out any provision of [Title IV] or any regulation prescribed [Title IV]” the Secretary may impose a civil penalty not to exceed \$25,000 for each violation. 20 U.S.C. § 1094(c)(3)(B). The Department publishes a “School Fine Report,” the most recent of which is available here: <https://studentaid.gov/data-center/school/finest-and-findings>.
- 27 HEA § 487, 20 U.S.C. § 1094.
- 28 34 C.F.R. § 600.41; 34 C.F.R. § 668.14(f) (“[T]he Secretary terminates a program participation agreement through the proceeding in subpart G of this part.”); 34 C.F.R. § 668.86(b) (specifying that the effective date of termination is 20 days after notice unless the institution or servicer requests a hearing or responds in writing why the termination should not happen).
- 29 HEA § 498(h)(1)(B)(iii), 20 U.S.C. § 1099c(h)(1)(B)(iii).
- 30 Yan Cao, *Predatory Colleges Think They Are Too Flawed to Fail. Biden’s Department of Education Should Prove Them Wrong*, The Century Found. (Sept. 9, 2021), <https://tcf.org/content/commentary/predatory-colleges-think-flawed-fail-bidens-department-education-prove-wrong/>.
- 31 34 C.F.R. § 668.13(d).
- 32 42 U.S.C. 2000d-1; 34 C.F.R. 100.8(c). In addition to the 30-day wait after filing with Congress (34 C.F.R. § 100.8(c)(3)), the process is drawn out because the proceedings must be “on the record, after opportunity for hearing,” which means that any hearing is subject to the “formal adjudication requirements” of the Administrative Procedure Act, 5 U.S.C. § 554. The specific procedures for hearings under this provision are set forth in 34 C.F.R. § 100.9.
- 33 34 C.F.R. § 100.8(a). The regulation defines “other means authorized by law” broadly as “include[ing], but [] not limited to,” a reference to the Department of Justice with a recommendation to bring appropriate enforcement proceedings, and applicable proceeding under State or local law. *Id.*
- 34 See U.S. Department of Education response to Open Records Request dated December 15, 2021, which states that staff from FSA were “unable to locate any documents that were responsive” to requests for all communications and documents related to FSA’s enforcement of the PPA provision requiring compliance with Title VI, <https://www.defendstudents.org/news/body/2022.05.17-22-01269-F-Final-Response-Letter.pdf>.
- 35 See Off. for C.R. Complaint Assessment Sys., Office for Civil Rights Recent Resolution Search, <https://ocras.ed.gov/ocr-search?f%5B0%5D=it%3Apost%20Secondary> (last visited June 30, 2022) and Pending Cases Currently Under Investigation as of June 3, 2022, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tvi.html?sorts%5Binstitution-type%5D=-1&page=14&offset=260> (last visited June 30, 2022).
- 36 OCR may conduct a directed investigation when information indicates a possible failure to comply with the laws and regulations enforced by OCR, the matter warrants attention, and the compliance concern is not otherwise being addressed through OCR’s complaint, compliance review, or technical assistance. See 34 C.F.R. § 100.7(c). This provision is incorporated by reference in Title IX (34 C.F.R. § 106.71), Section 504 (34 C.F.R. § 104.61), the Age Discrimination Act (34 C.F.R. § 110.30) and Title II (28 C.F.R. § 35.172).
- 37 *Supra* note 14.
- 38 CPM, *supra* note 13.
- 39 *Id.* at 21.
- 40 *Id.* at 24.
- 41 See 34 C.F.R. § 100.8(a).
- 42 34 C.F.R. § 668.14 (a). This requirement does not apply to LEAP and NEISP programs.
- 43 OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681–1688, and its implementing regulation at 34 C.F.R. Part 106, which prohibits discrimination based upon sex in any educational program or activity operated by a recipient of Federal financial assistance.
- 44 Letter from Kelli Douglas, Supervisory Att’y to Vatterott Educ. Ctrs., Inc. re: Vatterott College, OCR Case Number: 07-17-2064 (April 4, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07172064-a.pdf>.
- 45 Under 34 C.F.R. 668.86, the “Secretary considers an institution to have that administrative capability if the institution” administers the Title IV, HEA programs in accordance with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority.
- 46 CRS Civil Rights at School, *supra* note 10, at 19.
- 47 See generally 34 C.F.R. § 668.94(j).
- 48 The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”) requires all Title IV participating colleges and universities to track and report information about crimes occurring on or near their campuses. 20 U.S.C. 1092(f).
- 49 Efficient enforcement of federal civil rights laws is a primary purpose behind OCR and CRT’s collaborating and partnering set forth in the offices’ MOU. For example, where complaints are filed with OCR and CRT against the same institution and raise allegations of sex discrimination and both offices elect to move forward, the offices shall “minimize duplication of effort; coordinate the course of their respective investigations and reviews; share information jointly in the investigation and review, including any appropriate remedies.” See OCR-CRT MOU, *supra* note 12, at II(A).
- 50 Press Release, U.S. Dep’t of Educ., U.S. Department of Education Levies Historic Fine Against Penn State Over Handling of Sexual Misconduct Incidents (Nov. 3, 2016), <https://www.ed.gov/news/press-releases/us-department-education-levies-historic-fine-against-penn-state-over-handling-sexual-misconduct-incidents>.
- 51 Letter from Carol Ashley, Enforcement Dir. to Eric J Barron, President, The Pennsylvania State University re: OCR Compliance Review 03-14-6001 (Mar. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03146001-a.pdf>.
- 52 For example, Penn State’s 2020–2021 operating budget reported more than \$4 billion in total revenue. See The Pennsylvania State University 2020-21 Operating Budget, PennState Univ. Budget Off. (July 2020), <https://budget.psu.edu/factbook/StateAppropriation/TtlOperBudget2021.aspx>. Also, by comparison, the NCAA levied a \$60 million fine along with other sanctions against Penn State, all in response to the schools’ conduct tied to Jerry Sandusky’s sexual abuse of players. See *Penn State Fined \$60 million, all wins from 1998-2011 vacated*, Dallas Morning News (July 23, 2012), <https://www.dallasnews.com/news/2012/07/23/penn-state-fined-60-million-all-wins-from-1998-2011-vacated/>.
- 53 See, e.g., NPR Fresh Air, *How For-Profit Colleges Sell “Risky Education” To The Most Vulnerable*, NPR, at 1:49 PM (Mar. 27, 2017), <https://www.npr.org/transcripts/521371034>; Allie Conti, *How For-Profit Schools Have Targeted and Taken Advantage of Black Students*, Vice (Sept. 10, 2019), <https://www.vice.com/en/article/bwj3d/how-for-profit-colleges-have-targeted-and-taken-advantage-of-black-students>; David Halperin, *Corinthian Colleges Files Show Big Fees to Google, BET, Lead Generators*, Republic Report (Dec. 7, 2016), <https://www.republicreport.org/2016/corinthian-colleges-files-show-big-fees-to-google-bet-lead-generators/>.
- 54 *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp 2d 7, 20 (D.D.C. 2000) (“In order to show a claim based on reverse redlining, the plaintiffs must show that the defendants’ lending practices and loan terms were ‘unfair’ and ‘predatory,’ and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race.”)
- 55 Hayes & Lowe, *supra* note 6.
- 56 Second Am. Class Action Compl., *Morgan, et. al. v. Richmond Sch. of Health and Tech., Inc.*, No. 1:11-cv-01066-GK (D.D.C. Dec. 7, 2011), ECF No. 21, https://www.relmanlaw.com/media/cases/351_RSHT-Second-Amended-Complaint-12.7.11.pdf.
- 57 *Id.* ¶ 8.

- 58 *Id.* ¶¶ 6–9.
- 59 Press Release, Relman Colfax, *Court Approves \$5 Million Settlement of Nation’s First Reverse Redlining Case Against a For-Profit College* (July 25, 2013), <https://www.relmanlaw.com/news-RSHTsettlement>.
- 60 31 U.S.C. § 3729(a)(1).
- 61 *United States of America, ex rel. Boyd, et al. v. Corinthian Colleges, Inc. et al.*, Case 1:14-cv-06620, Complaint (False Claims Act), (filed Aug. 27, 2014), available at: <https://predatorystudentlending.org/wp-content/uploads/2018/03/2.-U.S.-ex-rel.-Boyd-v.-Corinthian-Coll.-Complaint-N.D.-Ill.-2014-4830-0354-7231-v.1.pdf>.
- 62 *Id.* at para. 5.
- 63 *Id.*
- 64 See Compl., *Britt v. IEC Corp.*, No. 20-CV-60814 (S.D. Fla. Apr. 20, 2020), ECF No. 1, <https://predatorystudentlending.org/wp-content/uploads/2020/04/Complaint-Britt-v.-FCC-filed-Apr-20-2020.pdf>.
- 65 See Order granting FCC’s Motion to Compel Arbitration in *Britt v. IEC Corporation d/b/a International Education Corp and IEC US Holdings, Inc. d/b/a Florida Career College*, Case 20-CV-60814, U.S. District Court Southern District of Florida. Available here: <https://predatorystudentlending.org/wp-content/uploads/2020/07/0143-Order-Granting-Mot.-to-Compel-Arbitration.pdf>.
- 66 Hayes & Lowe, *supra* note 6. An equivalent regulatory scheme in the mortgage industry has allowed regulators to identify potential discrimination and proven critical in supporting redlining and reverse redlining claims against mortgage lenders.
- 67 See, e.g. Walden University Doctoral Program Review, Minn. Off. of Higher Educ. (Oct. 23, 2019); Findings of Fact, Conclusions of Law, and Judgment 9–10, *State of Colorado v. Ctr. for Excellence in Higher Educ.*, No. 14-cv-34530 (Denver Dist. Ct. Aug. 21, 2020), <https://www.republicreport.org/wp-content/uploads/2020/08/FINDINGS-OF-FACT-CONCLUSIONS-OF-LAW-AND-JUDGMENT.pdf> (“CollegeAmerica has a ‘much larger ethnic and minority population’ than traditional universities.”); *Standards of Accreditation* 97–99, The Accrediting Commission of Career Schools and Colleges (ACCSC) (July 1, 2021), [https://www.accsc.org/UploadedDocuments/standards and alerts/ACCSC-Standards-of-Accreditation-and-Bylaws-070121.pdf](https://www.accsc.org/UploadedDocuments/standards%20and%20alerts/ACCSC-Standards-of-Accreditation-and-Bylaws-070121.pdf) (schools accredited by ACCSC must review and evaluate their recruiting policies and procedures for “compliance with accrediting standards and applicable law and regulation” and ACCSC may require a school to audit its recruiting activities for compliance with its standards or “applicable law and regulation” using an independent third-party). In 2022, the State of Illinois signed into law H.B. 5464, which requires public and private postsecondary institutions to report student data to ensure the state’s regulator has a complete picture of college students and ensure progress is made toward achieving educational equity. See *Gov. Pritzker signs legislation to expand access to higher education*, WAND (June 7, 2022), https://www.wandtv.com/news/gov-pritzker-signs-legislation-to-expand-access-to-higher-education/article_018a0d68-e689-11ec-aae2-abf9c4bca0cc.html.
- 68 See Clare McCann & Amy Laitinen, *The Bermuda Triad, Where Accountability Goes to Die*, New America (Nov. 19, 2019), <https://www.newamerica.org/education-policy/reports/bermuda-triad/>.
- 69 Compl., *Carroll v. Walden Univ.*, No. 1:22-cv-00051-JMC (D. Md. Jan. 1, 2022), ECF No. 1, <https://defendstudents.org/news/body/walden-complaint.pdf>.
- 70 See Postsecondary Education Participation System (PEPS) Database, The Century Found., <https://d3hxs4rmoyqa9b.cloudfront.net/>.
- 71 34 C.F.R. § 668.13(d).
- 72 See Off. for C.R. Complaint Assessment Sys., Office for Civil Rights Recent Resolution Search, [https://ocrcas.ed.gov/ocr-search?f%5B0%5D=it%3APost Secondary](https://ocrcas.ed.gov/ocr-search?f%5B0%5D=it%3APost%20Secondary) (last visited May 22, 2022).



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