

October 20, 2023

Heather Perfetti, President
Middle States Commission on Higher Education
1007 North Orange Street
4th Floor, MB #166
Wilmington, DE 19801

Via portal and email (hperfetti@msche.org)

Re: Comment Submission - Third-Party Providers Policy and Procedures

Dear Dr. Perfetti:

We write to express our concern with MSCHE’s draft of its policies and procedures relating to Third Party Providers, which follow U.S. Department of Education’s decision to reinterpret and expand the statutory definition of a “third party servicer” (“TPS”) under 20 U.S. Code § 1088(c). MSCHE, like the U.S. Department of Education (the Department), should limit its definition to that statutory definition and should refrain from any further efforts to reinterpret or otherwise expand its existing definition.

20 U.S.C. § 1088(c) limits the TPS definition only to work that includes “any aspect of [an] institution [of higher education]’s *student assistance programs* under [S]ubchapter [IV]” or “any aspect of [a] guaranty agency’s or lender’s *student loan programs* under part B of this subchapter, including originating, guaranteeing, monitoring, processing, servicing, or collecting loans” (emphases added).

The statute does not extend to the rest of Title IV. Yet, MSCHE proposes to adopt a definition, found at 34 CFR 668.2, where the Department defines “third-party servicer” as an entity responsible for “any aspect of the institution’s participation in any Title IV, HEA [Higher Education Act] program.” Although this definition seems expansive, the Department provides examples showing that the Department has historically intended to include only TPS work regarding student assistance programs.

On February 15, 2023, the Department issued Dear Colleague Letter (“DCL”) GEN-23-03—without any steps toward HEA, Title IV negotiated rulemaking—announcing that the Department would begin to include a wide variety of content, beyond student assistance programs, in its TPS definition. The new definition



would include online program management (OPM)—without regard to whether OPM had any relation to student assistance programs.

Facing significant resistance to the new rule and definition, the Department first amended the DCL on February 28, 2023, establishing an effective date of September 1, 2023, for the new rule. After receiving another round of critical feedback from interested parties, the Department then announced in DCL GEN-23-08 on May 16, 2023, that it would no longer make the rule effective on September 1.

The new DCL announced a plan “to issue a final revised DCL with an effective date at least six months after its publication.” The new DCL did not suggest any intention to formally request public comment pursuant to the Administrative Procedure Act, much less to engage in negotiated rulemaking.

If the Department still intends to issue a revised DCL in 2024, it must follow the law and enter negotiated rulemaking, as required under the HEA. We are concerned that MSCHE is attempting to short-circuit the Department’s process and unilaterally impose the withdrawn DCL on its member institutions under the guise of its accreditation criteria. We encourage you to suspend your activities in this area.

We are deeply concerned about the Department’s overreaching approach in contorting the TPS definition. While we welcome good-faith efforts to address soaring costs and other areas of public dissatisfaction with much of postsecondary education, and we might find points of agreement regarding accountability, affordability, and transparency in postsecondary education, the Department’s approach here is misguided for several reasons:

- 1. The scope of the Department’s regulation reaches far beyond previous guidance and regulations and sweeps in many more parties for Department regulation.**

By issuing the rule in the form of a guidance letter and showing an intention to continue to regulate by DCL, the Department has failed to follow the various laws that require, for example, benefit-cost analysis, the potential impact on small entities, and negotiated rulemaking. The Department’s rule and rulemaking are arbitrary and capricious in failing to follow such laws and take account of relevant data and evidence. In fact, the Department’s DCLs show no attention to the costs that institutions, their partners, and their students will occur because of the regulation and does not assess any alleged benefit. No effort to recast the



Department's rulemaking as merely an elaboration of an existing definition can mask the Department's failure to meet its statutory obligations.

Furthermore, the amended DCL acknowledges that it is regulating new parties that were not previously subject to regulation:

Institutions will be required to report any arrangements with third-party servicers that have not been reported to the Department, and entities meeting the definition of a third-party servicer will be required to submit the Third-Party Servicer Data Form to the Department. (p. 23)

Yet, the rule includes zero analysis of the potential impact on the new institutions and servicers swept up by the rule. This failure shows that the rule is arbitrary and capricious.

2. Any definition that sweeps more broadly than existing law is likely to increase students' costs and stifle innovation in postsecondary education.

While we may differ about what it means to increase transparency, accountability, and affordability in postsecondary education, it is worth noting that a majority of Americans say that a bachelor's degree is not worth the cost.¹ The Department errs in choosing a burdensome regulatory approach that would divert resources from students to unnecessary compliance.

Additionally, one-size-fits-all federal regulations in this area are ill-suited to the rapid innovation in postsecondary education that is increasing access, improving the educational experience, and reducing costs for millions of students nationwide. Inhibiting and interfering with the freedom to contract in education partnerships sends the postsecondary education sector in a worse direction.

Indeed, American postsecondary education has flourished because of its diversity of options, innovation, constantly increasing access, and—especially in online programs—equality of opportunity. Facilitating student choice is fundamental to effective postsecondary policy. As institutions have sought new ways to serve students effectively and efficiently, online programs have increasingly become the norm. By far, the leading online institutions by enrollment serve the largest

¹ Doug Lederman, "Majority of Americans Lack Confidence in Value of 4-Year Degree," *Inside Higher Ed*, April 3, 2023, <https://www.insidehighered.com/news/2023/04/03/majority-americans-lack-confidence-value-four-year-degree> (accessed Sept. 18, 2023).



numbers of students in the entire sector, and these students in turn benefit from the largest aggregate amounts of federal student aid.

In fact, most American students today have direct experience with online education. Before the recent pandemic, many institutions had already incorporated digital learning, either in-house or through partnerships. This trend is accelerating as students seek lower-cost options and institutions seek to reduce costs of attendance.

Frankly, no federal agency is nimble enough to keep up with the sector’s rapid innovation, and the best way to help students is to stay out of the way, avoiding efforts that slow the pace of progressive change. The Department’s Office of Educational Technology cannot successfully compete for the high-paid technology experts required to keep up.

Instead, in this area the Department should do no more than maintain its narrow authority under the statutory TPS definition—limiting itself to contracts regarding *student assistance programs* and excluding contracts involving online program managers (OPMs) that characteristically have *no* role in student financial aid. There is no justification, for instance, for including OPMs that merely partner in “provid[ing] Title IV-eligible educational programs.”

3. New oversight will privilege early adopters and discourage new partnerships.

OPMs have been one of America’s greatest innovations for providing scalable, low-cost college access. They would not have been possible without freedom to contract, innovate, and adapt outside of burdensome oversight by federal education officials.

Traditional colleges and universities, in addition to newer ones, often lack the expertise and funding to develop such resources independently. OPMs have served many such institutions and their students. OPMs drive progress, investment, and innovation in higher education. They empower colleges and universities to keep pace with innovation and meet the needs of the modern workforce.

OPM contracts also mitigate institutions’ risk of developing expensive technologies that become obsolete. Through revenue-sharing models, which are the basis for most relationships between OPMs and institutions, institutions are able to transfer risk to their OPM partners. Revenue sharing, in turn, enables OPMs to assume this



risk and devote large sums to capital investment. Such models enable less-resourced institutions to compete.

But the Department's moves to sweep up traditional institutions' contracts in burdensome regulations, and potential investigations will only serve to discourage such partnerships in the future. The existing online education partnerships will adapt out of necessity, survive, and grow, while the OPM have-nots will be left farther and farther behind.

4. Burdening institutions that contract with service providers will harm nontraditional students most.

Online education has made education more accessible and affordable to millions of students who, for diverse reasons, are not best served by having all of their education in person. This accessibility also tends to best serve minority, low-income, and rural students. Layering vague, extensive new compliance costs on their institutions and their institutions' partners will result in higher tuition and hurt these students the most.

Rather than burden innovation, the Department should focus on low graduation rates at traditional colleges and universities, where millions of students go into large amounts of debt and still do not earn degrees after four, six, or even eight years. Nontraditional students are at high risk of poor outcomes, yet the Department's rule and further regulatory intentions put these students at higher risk.

For the reasons above, we urge MSCHE to suspend its consideration of new policies and procedures related to TPS and OPMs. Separately, we will encourage the Department to withdraw its DCLs and revisit its existing regulations and guidance to align with the statutory definition of a third party servicer. We urge MSCHE, as well as the Department, to focus on encouraging institutions to innovate and contract with third parties without having to fear overreach and stifling requirements by a federal agency or its accreditor.

Sincerely,

Mitchell M. Zais, Ph.D.
Former Deputy Secretary and Former Secretary (Acting)
U.S. Department of Education



Jim Blew
Former Assistant Secretary
Office of Planning, Evaluation, and Policy Development
U.S. Department of Education

Robert S. Eitel
Former Senior Counselor to the Secretary
Former Deputy General Counsel
U.S. Department of Education

Robert King
Former Assistant Secretary
Office of Postsecondary Education
U.S. Department of Education

Adam Kissel
Former Deputy Assistant Secretary
Office of Postsecondary Education
U.S. Department of Education

Dr. Christopher J. McCaghren
Former Deputy Assistant Secretary
Office of Postsecondary Education
U.S. Department of Education

Dr. Casey Sacks
Former Deputy Assistant Secretary
Office of Career, Adult, and Technical Education
U.S. Department of Education



Michael Brickman
Senior Advisor
Office of the Under Secretary
U.S. Department of Education