

March 29, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW 2nd Floor
Washington, DC 20202

RE: Docket No.: ED-2022-OPE-0103; Requirements and Responsibilities for Third-Party Servicers and Institutions

Dear Secretary Cardona,

This comment is on behalf of the members of the WICHE Cooperative for Educational Technologies (WCET) and the State Authorization Network (SAN). As national organizations housed within the Western Interstate Commission for Higher Education (WICHE), we are dedicated to serving our postsecondary institution members by providing guidance, support, and facilitation of member collaboration to understand and apply state and federal regulation requirements when serving students participating in digital learning. Our members, representing postsecondary institutions from all sectors as well as organizations and state agencies, support the development of efficient and effective educational opportunities to advance learner access and success.

WCET and SAN recognize the importance of student protection and maintaining the integrity of the student aid process when serving all students. We have long advocated for regulations that safeguard both postsecondary students and federal financial aid expenditures. We also advocate for clarity in regulatory language so that institutions know what steps to take to comply.

We appreciate this opportunity to respond to the Department's invitation to submit comments regarding the recently released revised guidance provided in Dear Colleague Letter DCL ID: GEN-23-03. Our comments will address general concerns of overly broad guidance defining a third-party servicer causing unclear direction for affected parties. Additionally, we will share specific concerns and questions about criteria addressed in the guidance that may cause unintended complications for institutions and servicers to provide important functions to administer educational opportunities for students.

As the Department reviews the public comments and questions that have been received via the Help Center and the School Participation Division, we believe the Department will see clearly the substantial complications and ambiguity in this new revised guidance that was intended to provide statutory and regulatory clarity but failed to do so. We concur with the comments provided by [EDUCAUSE](#) and the comment draft we have reviewed from ACE encouraging the Department to rescind this new guidance plus the previous guidance related to the ban on foreign entities in favor of developing clear regulations to address issues of concern to the Department as has been announced for an upcoming negotiated rulemaking in Fall 2023.

The third-party servicers guidance had its roots in the Department's concerns over its [2011 guidance](#) on incentive compensation and Online Program Managers OPM. We recommend that any immediate guidance be focused on actions regarding those concerns. As we stated in our official comment, we

recommend that changes to the 2011 guidance preserve what works in fee-for-service OPM contracts and maintains a path for institutions that benefit from the investments inherent with incentive compensation. Meanwhile, we fully support guidance that addresses actual abuses that have caused harm to students and misused Title IV funds.

We look forward to the development of clear regulations that have the legal effect to offer protections for students and the integrity of Title IV programs as well as provide direction for institutions and servicers to manage compliance in a format that balances risk and regulatory complexity.

General Concern that the Definition of Third-Party Servicer in the Revised Guidance is Overly Broad and Unclear

The introductory paragraph declares the intention of the guidance to address a wider range of functions to be considered a third-party servicer. This declaration is found in the second statement of the opening paragraph. *"These reviews have confirmed that most activities and functions performed by outside entities on behalf of an institution are intrinsically intertwined with the institution's administration of the Title IV programs and thus the entities performing such activities are appropriately subject to TPS requirements."* To underscore the expanse, the guidance places in quotation marks, "any aspect" from the definition of third-party servicer as found in Federal statute. [HEA 20 U.S.C. § 1088\(c\)](#). Given this view, the guidance then expresses the interest in expanding the functions falling within the definition of a third-party servicer by indicating the need to provide an updated list of functions and activities subject to third-party servicer requirements. It is clear that the intention of this Dear Colleague Letter is to expand the definition and applicable functions that fall within the classification of a third-party servicer.

The statutory definition of a third-party servicer addresses administering and processing the institution's student assistance programs. Federal regulation, to implement the statutory definition, describes in further detail, student assistance programs as the institution's participation in Title IV HEA programs and also provides a non-exhaustive list of applicable servicer functions. It is worth noting that the list solely provides functions related to the handling and management of aid as overseen by the institution's financial aid offices.

Not only has this guidance expanded the Department's view of servicer functions, but the Department has done so through each iteration of guidance since 2012. This 2023 guidance added for the first time, functions related to three new areas: **student recruiting and retention**, the **provision of software products and services involving Title IV administration activities**, and the **provision of educational content and instruction**. The expansion requires that the institutions and servicers clearly understand increasing responsibilities offered through guidance in order to remain in compliance.

Concern arises that analysis by some higher education lawyers indicates that parts of the revised guidance are binding parties beyond the language of regulation and statute. Therefore, it would be unenforceable. The Administrative Procedures Act (APA) provides the statutorily prescribed process in 5 U.S.C. 551-559 for the development of regulations to implement Federal statutes to ensure notice and comment opportunities. Agencies may clarify and interpret statutory and regulatory requirements

through non-binding guidance for which the APA exempts from the prescribed process. Additionally, the guidance provides very detailed direction that is not obvious or available in the U.S. Code or U.S.

Code of Federal Regulations. The guidance is not easily searchable in a manner accessible beyond the financial aid offices who find guidance and training through the Federal Student Aid office and the FSA Handbook. The broad interpretation through guidance is one that has an impact in offices and departments throughout an institution and well beyond the financial aid office. It was observed by a presenter, in the March 9, 2023, NACUA Briefing on Third Party Servicers and Online Program Management, that obligations through guidance addressing participation in Title IV HEA programs are not likely something that General Counsels follow closely.

A Department spokesman indicated to [Times Higher Education](#), that the Department's greatest concern is the area of recruitment and activities that are tied to the administration of federal student aid funds and not to broadly used software solutions. However, the institutions and servicers are not in a position to choose which parts of the guidance are a priority to the Department in order to be in compliance. Extensive guidance leaves institutions and servicers vulnerable to increased liability and could potentially cause institutions to cease relationships with servicers to provide and support student opportunities.

It would therefore be prudent for the Department to rescind the new revised guidance as well as the previous guidance to ban foreign entities to review and determine what elements are needed in clear regulation to ensure institutional understanding and compliance to provide student protections and maintain the integrity of Title IV HEA programs. Clear regulation, as could be obtained through the proposed negotiated rulemaking process, will limit or eliminate the need for nearly seventeen pages of guidance to clarify the definition of a term found in statute as well as regulations developed through the regulatory process imposed through the Administrative Procedures Act (APA) to implement the statute.

Specific Concerns of Criteria that Require Further Clarity

Ban on Non-US Entities as Third-Party Servicers

The language addressing the prohibition on institutions contracting with a third-party servicer that is a non-US Entity is a short but potentially far-reaching statement that requires further explanation for purposes of institution and servicer compliance. We note that this guidance language remains unchanged since originally provided in a Question and Answer attachment as [2016 guidance](#) that was intended by the Department to provide clarification to the 2015 Guidance found in [GEN 15-01](#). No further explanation has been provided nor parameters discussed by the Department. Additionally, there are questions of this guidance criterion's tie to regulation or statute in order for this ban to be enforceable.

Since the release of this revised guidance, institutions and servicers have raised many questions about applicability. A common question addresses whether a US incorporated company that is a subsidiary of a foreign parent be classified as foreign entity? There is additional concern for the institutions to know how to ascertain if there is foreign ownership given the complicated corporate relationships.

Furthermore, institutions are concerned about culpability if the servicer maintains that this criterion does not apply to their entity and the Department makes a different determination. Lastly, if an

institution determines that a servicer violates this provision, it may take months or years for public institutions to follow state procurement laws to determine a successor service and to implement that transition. This could be exacerbated if many institutions change servicers at the same time. Given the lack of clarity for institution and servicer assessment of applicability to this guidance criterion, not noted in statute or regulation, we urge the Department to rescind this ban provided in guidance. The Department shared, in the February 28, 2023, revision to the revised guidance, their concern about holding non-U.S. servicers liable. This would be an appropriate issue to address in rulemaking. If this criterion of the guidance is not rescinded, at minimum, an extended grace period will be needed for such cases to coordinate analysis of the servicers status as a foreign entity and make appropriate changes when necessary.

State Agencies

Questions arise about the determination of a state agency acting as a consortium to be determined as a third-party servicer. The role of the consortium is to collaborate with the institutions in the system to provide important services to support distance education offerings to students in a more efficient and effective manner. The expansion of the guidance to include state agencies seems to be contradictory to the commonly noted goals of higher education to be developing opportunities to provide greater access to education for students in a financially prudent manner.

One representative of a state agency providing such services asked how to come in compliance when there is no contract between and agency and its constituent institutions. Another noted that the state investment in joint services actually subsidizes institutional operations. For the Colorado community colleges, some of the services that could be included are mandated by state law. We urge the Department to rescind the new guidance. If the Department chooses not to rescind the guidance, Department direction is needed to ascertain compliance parameters and reconsider the response to GEN-Q2 whether a state agency is to be considered a third-party servicer.

Learning Management Systems (LMS) and Related Software Products

As we mentioned above, the Department's expansion in guidance of functions of a TPS adds for the first time, functions related to these three new areas: student recruiting and retention, the provision of software products and services involving Title IV administration activities, and the provision of educational content and instruction that can all be seen as tied to educational technologies. Educational and support services provided by these entities offers the institutions, and ultimately students, a valuable pathway to support students in an efficient and cost-effective manner. Additionally, the expanded definition could limit the ability to engage with entities with increased expertise to provide support services and technology-supported academic content. If learning management systems and other software products are ultimately identified as a TPS, it is likely that the efficiency and cost-effective benefit will be lost as the contract management costs will increase to accommodate the increased responsibilities of the servicer. We believe that this is a counterintuitive strategy at time when higher education has identified important goals to broaden access to underserved students effectively. We therefore urge the Department to rescind the third-party servicer guidance in favor of the development of regulations to address areas of concern to the Department.

Additional Functions

Additional questions arise addressing institution relationships with providers to facilitate clinical placements, providers of support services including mental health counseling, textbook publishers, police departments that collect and analyze campus crime statistics, and perhaps even churches who refer students to colleges. This is the tip of the iceberg. The institutions are in a quandary wondering about the parameters of their interactions in order to be compliant with third-party servicer requirements and consequences. Similar to the question about institution determinations and servicer determinations of applicability for purposes of non-US entities, the institutions are concerned about their culpability when a servicer maintains a defensible determination that they are not a third-party servicer. We therefore urge the Department to rescind the third-party servicer guidance to ensure requirements do not extend to unintended providers.

Questions of Liability

We are aware that the Department has responded to stakeholders who have inquired (through CaseTeams@ed.gov) about their contracts to determine whether the function is a TPS. Upon review of the Department's reply we see the Department offers to review all questions submitted along with the public comments to respond via Q&A on Partner Connect. The reply further offers the opportunity to submit the contract to be reviewed by the Department to assess whether the contract meets updated definitions of a TPS. These support options offered by the Department are a sure indication that the guidance is unclear and should be rescinded. We therefore urge the Department to rescind the new third-party servicer guidance and ban on foreign entities provided in previous guidance in favor of the development of regulations to address areas of concern to the Department rather than posting further guidance and undertaking the massive workload inherent in contract reviews.

In conversations with our members, they have also raised several practical questions regarding the legal risks that could arise due to unclear guidance. Given differing interpretations by the contracting parties and the timing of this guidance, several scenarios were posited:

- Suppose an institution believes that a servicer is a TPS. It reports it, but the servicer declines to do so. Is the institution at risk?
- Suppose a servicer believes that its service is a TPS. It reports it, but the institution declines to do so. Is the servicer at risk?
- Suppose a servicer is foreign controlled, but it is impossible to change out that service by September 1, what is an institution to do? Is there a reasonable implementation period?
- Suppose a service declares it is not foreign controlled but appears to be. We have witnessed a foreign company declare that its US incorporation of part of its operations as being sufficient. What is an institution to do?
- Suppose an institution collaborates with institutions within the state to provide distance education services and/or content coordinated by the state agency, but the state agency maintains that it is not a TPS. Is the institution at risk?



WICHE Cooperative for Educational Technologies



In Conclusion

We hope that the Department recognizes the considerable confusion raised nationwide by the revised guidance. The concerns and questions raised by this comment are based upon communications with our members. However, we anticipate that you will hear much more detail about functions at the institutions for which there are concerns of applicability and implementation through this nuanced and expanded guidance. Clear language in regulation is the route to consistent compliance and protection for students and the integrity of the Title IV HEA programs. Comments and questions raised through this process should inform the upcoming negotiated rulemaking on third-party-servicers. It is for these reasons we urge the Department to immediately rescind the new third-party servicer guidance and ban on foreign entities found in previous guidance in favor of clear regulation through the APA process to implement the statutory definition of third-party servicer.

We also urge the Department to focus its attention on addressing the direct concerns that it has around incentive compensation and Online Program Managers. There are changes in guidance that the Department could make that would protect both students and Title IV investments by directly targeting OPM contracts that are of the most concern.

We thank the Department of Education for this opportunity to share our comments on behalf of the WCET and SAN members. WCET and SAN member institutions wish to provide quality learning opportunities, support students, and be in compliance with all Federal and State requirements when serving students.

WCET and SAN intend to provide guidance and support for the implementation of any guidance or policy as provided by the Department of Education. We would be very pleased to offer further assistance to the Department of Education and to assist with communications to institutions.

A handwritten signature in blue ink that reads "Russell Poulin".

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