March 16, 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-2023-OPE-0030; Agency Information Collection Activities; Comment Request; Online Program Managers

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 their 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. Many of our members have intimate experience in contracting with Online Program Managers and represent a wide range of positive and negative points-of-view on the value of these vendors.

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 request for comment about both revenue-share and fee-for-service Online Program Managers (OPM). Our comments are based both upon our long and rich experience with a broad spectrum of public and private higher education institutions, a survey of both WCET and SAN members conducted the week of February 21, 2023, and interviews with a few members who took the survey and volunteered to provide additional context. They were chosen because they volunteered to share their insights and not due to preconceived expectations of what they would say.

Nine Questions by the Department to Better Understand Revenue-Share and Fee-for-Service OPMs

In 2011, the Department issued guidance (DCL GEN-11-05) providing its interpretation of regulations relating to the prohibition on incentive compensation. Commonly known as the "bundled services exception," the 2011 guidance allowed for "services that includes recruitment… as long as the entity does not make prohibited compensation payments to its employees, and the institution does not pay the entity separately for student recruitment services." In its recent request for comment, the Department opined, "Since issuing that guidance, the number of students who were recruited to institutions by entities operating under this bundled services exception has increased significantly, particularly through online programs operated by third-party entities, including Online Program Managers (OPMs)."

We recognize that there are incidents of OPMs taking large shares of tuition revenue, recruiting students aggressively, and exploiting institutional lack of control over a program. We have heard stories from members about conflicts with their OPM provider. We work deeply on institutional compliance issues and have seen some examples where actions and advice made us uncomfortable.

However, while egregious actions make the headlines, they do not seem to be the norm for our members. Several of our members have been able to develop programs, reach new markets, and educate students who otherwise would have been left behind. Even so, it is essential that institutions maintain their operational integrity and do all they can to protect students as vulnerable consumers. The below responses are based on our experiences with our members as well as the survey and interviews of both WCET and SAN members. To assure open responses and since the timeline limited the ability for official responses to be approved by institutional leadership, the identities of the respondents and their OPM companies are kept confidential.

1. **What are the benefits and disadvantages of the current incentive compensation exception for bundled services for institutions and students?**
   It is important to note that not all OPMs use incentive compensation.
   - When surveyed, our members reported several benefits of the incentive compensation exception for bundled services.
     - *These models often allow smaller or less well-resourced institutions to develop and offer high-quality online programs.* As one member wrote, "All OPMs are not created equal, all revenue-share contracts are not created equal. Do not throw the baby out with the bathwater. For our small public institution, a revenue-share with an OPM was the only way to promote growth in a sustainable way with the limited resources available and continue to provide access to education to rural students where there are no other options. As a small state school, we simply do not have the funds to take on all the risk in a fee-for-service at one time." A large non-profit research university said that without revenue-sharing they "could not have started some of the programs due to the start-up investment costs."
     - *In this time of institutional staffing shortages and the Great Resignation, OPMs can provide critical staffing resources.* As one member wrote, "The OPM is helping us keep our content and lessons fresh in the face of the Great Resignation. Their staff is highly capable and responsive and is helping us re-imagine eLearning."
     - *Some institutions find that OPMs in general, and the incentive compensation exception in particular, provides additional bandwidth around marketing resources.* As one member wrote, "They support where the institution falls short. We do not have the infrastructure to market programs on Social Media and across wide audiences. They do."
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    - *Some institutions have successfully used these arrangements as a way to build staff capacity and for staff development.* As one member wrote, "We've learned much from our OPM and as we reach the end of our current partnerships agreement we are now much better positioned to begin building some of the capacity for serving our online programs and bring those supports in-house."
- Not all surveyed members reported advantages to working with OPMs.
    - *Costs were the most referenced disadvantage of working with a revenue-sharing OPM.* As one member wrote, "The revenue-sharing model is a negative because it means an institution continues to pay for a service even when it was a one-time activity (such as online course development) and as enrollment grows, it means the school pays more for it."
    - *The services included in the bundles are sometimes inflexible.* One interviewed member said that you are often "paying for lots of things in the bundle that you don't need." Cable TV contracts were used as an analogy, as you are expected to pay for channels you will never watch.
    - *Length of revenue-share contracts were also frequently cited as problematic.* Several members indicated that the length of their revenue-share contracts was problematic and that they would prefer either a shorter contract or increased opportunities to revise or get out of contracts early.
    - *Lack of OPM transparency.* Although this was not highlighted as only a problem with revenue-share arrangements, several members expressed frustration with a lack of transparency on the part of the OPM, especially around lead generation and the OPM's activities with potential competitor institutions. As one member wrote, "The marketing and lead generation is an absolute black box. We have no idea how they are spending our tuition revenue. Their partners are anonymous. We don't know if they are partnering with our competitors."
    - *Problems with non-credit contracts.* One interviewed institution had significant non-credit offerings through an OPM. The contract limited the institution's access to student data, required students to file complaints with the OPM first, and raised some questions about state authorization compliance in some states.

2. How can the Department better identify, define, and address the activities that may raise concerns under the current incentive compensation guidance?

We agree with the Department that better information regarding the incentive compensation activities is needed. We would particularly recommend that the Department collect student-centered research with current and former students to better understand their experiences so that the student voice can ground any changes in OPM and incentive compensation guidance. We do, however, feel the need to add a note of caution that there are inherent challenges in comparing incentive compensation and non-incentive compensation programs. Differences in programs could be attributed to a number of factors including modality, institutional type, geographical location, targeted student population, and program subject. As a result, one might erroneously conflate any differences in programs with a difference in incentive compensation when a myriad of other factors might be at play.

We also recommend that the Department interview institutional personnel to obtain their practical experiences. It is important to talk to representatives of different types of colleges and universities. Our interviews included individuals from larger universities who had experience with multiple OPMs both currently and over the past several years. They also have academic colleges within the university using revenue-share OPMs and others using fee-for-service vendors. Sampling small institutions that rely heavily on an OPM is also recommended. As our survey shows, institutions have had encounters that span the spectrum from negative to positive, with most being somewhere in between.

Our overwhelming recommendation is to base action on a more complete set of evidence. While the Department's Listening Session uncovered practices that were inarguably egregious, the same examples were cited repeatedly and do not reflect the breadth of institutional experiences we have seen. Guidance and regulations should address such mistreatment of students but not be based solely on those extreme cases.

Finally, there is a sense that OPMs are being examined only for online programs. Some of these entities are also recruiting students for on-campus and hybrid programs. Incentive compensation rules should apply regardless of modality of instruction.

3. **How much of an institution's spending on a bundle of services provided by a third-party entity is typically allocated to recruitment and related expenses?**
As with the previous question, we applaud the Department for wishing to understand the scope and extent of recruitment and related expenses. Again, however, we would caution that there are numerous factors that impact recruitment costs beyond the presence of bundled services and incentivized compensation. For example, recruitment and related costs associated with an engineering program could potentially be much different than those costs associated with a philosophy program. Additionally, recruitment costs associated with a national program as opposed to a regional program might also be more expensive.

Marketing was often cited as the top reason for engaging an OPM. A commenter in the Department's Listening Session suggested that marketing was easy and used a retail store as an example of simply advertising online. That comment shows a misunderstanding of the difficulty involved in branding an institution beyond the institution's locality, targeting students interested in a specific program, and engaging the student over time as that person decides among multiple education options. It is not the same as buying clothing online; it is a complex task and is quite expensive on a per student basis.

We would also caution the Department against setting limitations on marketing budgets and proportional expenses. Suggestions to set percentage expectations for marketing or academic spending have been proposed. It is hard to imagine that an equitable formula could be devised that services the many variations of institutions and programs that would be affected. For example, in the 2019 negotiated rulemaking, the Department had a difficult time developing a formula as a guidepost for a course to meet the "regular" requirement in "regular and substantive interaction." Additionally, as higher education becomes an increasingly competitive industry, institutions unable to appropriately invest in marketing for their programs, especially their online programs, may be placed at a disadvantage when competing with larger, better resourced institutions.

4. **How has contracting with a third-party providing services under the bundled services exception impacted enrollment tuition and fees, the types of programs offered, the modality through which programs are provided, student outcomes, revenues, and expenditures at institutions? How do these results compare to programs not supported by an OPM or students attending in-person at a program that is also supported by an OPM?**
The few institutions interviewed were institutions that each had several programs using an OPM. The larger institutions used multiple OPMs with a mix of revenue-sharing and fee-for-service contracts.
    - *Tuition and fees.* For none of their programs did the tuition and fees exceed the on-campus rate. One institution had a few programs charging a lower rate and another was considering a lower rate for a program. WCET's previous work on the cost and price of online learning shows that lower rates for online programs are rare and the expectation that online programs must cost less and be priced less is a common misconception.
    - *Types of programs.* A variety of programs were reported, such as nursing, engineering, business, computer science, and several non-credit offerings.
    - *Modality.* For those interviewed, all were online or had some hybrid options. We believe some programs also have in-person practical experiences.
    - *Student outcomes, revenues, and expenditures.* The interviewees did not share details on these items, but they track them closely. One of the smaller institutions is insistent on using the same faculty for both the online and on-campus courses so as to maintain the same level of quality. They reported that they intervened quickly when results were not as expected.

    We recognize the desire to better understand costs of OPM and non-OPM programs but would urge caution. To use the previous example, an OPM associated engineering program will have fundamentally different costs than a non-OPM related philosophy program, and only some of those costs might be associated with the presence of an OPM. In collecting such data, the Department should be careful to not inadvertently compare apples to oranges.

5. **How would changing third-party servicer contracts from a revenue-sharing model to a fee-for-service model impact the services, such as recruitment, currently provided to an institution under the bundled services exception?**
We are concerned that since very few institutions have experience with both models, it may be difficult for the Department to collect representative information. However, several of our members expressed concern that without a revenue-share model, they would be unable to

launch new programs due to a lack of startup capital. As one member wrote, "The revenue share expands the university's ability to create or expand online offerings. The university cannot afford the upfront costs of a strong marketing campaign for new programs or to take existing programs to a larger audience. A fee-for-service model, may limit the university's ability to grow new programs since the university may not have the available funds to start a new program."

We believe that there are a number of other potential impacts for institutions moving from revenue-share to fee-for-service contracts including the impact on student satisfaction, difficulties in converting contracts, the need to make decisions about outsourcing and internal resource allocation, and a lack of program sustainability if enrollments are not met.

We are also witnessing a natural move for many of the programs from revenue-share to fee-for-service contracts. Part of that move is due to the vendors changing their business practices due to market forces and regulatory fears. Part of it is due to institutions becoming more experienced and no longer needing all the services the OPM offered.
If the guidance for revenue-share models is revoked or changed, both institutions and the OPM providers will need sufficient time to rework their contracts. This becomes more complex because revenue-share OPMs have often invested greatly in the start-up investment for the program. A mechanism for recouping those sunk costs will need to be developed as institutions will likely not be able to repay in short order.

6. **How do tuition and fees of programs supported by third-party services differ when provided under a revenue-sharing model as compared to a fee-for-service model?**
Our survey revealed very few institutions that have experiences with both revenue-share and fee-for-service models. One institution shared its experiences with both models and its response is worth quoting in full: "We currently have both revenue-share and fee-for-service agreements with OPMs. The revenue-share makes it easier and quicker to enter the market (launch a program) but we lose transparency with the operations and revenue. The fee-for-service agreement was harder to get started (required university buy-in, investment, scaling operations), but it has given us a window into what is required to properly manage online programs, and, therefore, we are able to future plan to bring some of the workstreams in-house. We're learning how to fish. In either case, it will be difficult at the end of the contract to ensure program continuity."

Of the institutions surveyed, two have extensive current and past experiences with both revenue-sharing and fee-for-service models:

- For a large public research university, they have one set of programs offered through a revenue-sharing OPM. The tuition and fees for that program are lower than what is paid by on-campus students. They are also assuring that the quality of faculty and student experience are as similar as possible. For the remainder of their programs, the tuition and fees are the same as on-campus.
- For the private research university, the tuition and fees are the same regardless of modality or OPM revenue model.

7. **To what extent does the bundled services exception impact institution's ability to create or expand online education offerings? To what extent would fee-for-service models impact institutions' ability to create or expand online education offerings?**
As previously mentioned, many smaller institutions lack the resources to develop, launch, and manage new online programs in a timely way, especially in high-need workforce fields. As one institution wrote, "Small institutions simply do not have the resources to invest in this manner. This would result in only larger institutions being able to work with OPMs, further increasing the divide in [student] access." As another institution wrote, "For our small public institution, a revenue-share with an OPM was the only way to promote growth in a sustainable way with the limited resources available and continue to provide access to education to rural students where there are no other options. As a small state school, we simply do not have the funds to take on all the risk in a fee-for-service at one time." An interview with a smaller university confirmed that "we could not have started our programs without that initial investment, so the revenue-share was a plus."

   In the interviews with a large public and private university, they indicated that it is not just small institutions that have benefited from revenue-sharing. Not all colleges within a university are equally funded. Some colleges benefited from the revenue-sharing. Other colleges within the university had enough revenue to rely on a fee-for-service model. There were indications that the ultimate goal is to move programs to a fee-for-service model or the programs in-house without outside contracting.

8. **How might the Department more clearly define what it means to be an unaffiliated third-party for purposes of the incentive compensation guidance to ensure there is no affiliation between the institution and the entity providing services?**
The simple answer seems to be "follow the money" and examine previous relationships with the institution. The most egregious seems to be divestitures at the time of acquisition or institutional change, such as from for-profit to non-profit. Those "spin-off" services should be closely examined.

   Regarding "unaffiliated" status or other regulations, the Department should be cautious and "case test" any resulting guidance or regulation against other relationships that might negatively affect institutions and their students. One of the most surprising elements of the recent "Third-Party Servicers" guidance was the Q&A response that "Yes. If a state agency performs Title IV functions or services on behalf of an eligible institution, the state agency is considered a TPS and subject to the applicable TPS regulations." There are state agencies that are performing activities that the Department might define as OPM services for their member public institutions. Examples include SUNY Online, Colorado Community Colleges Online, and California Community Colleges' Virtual Campus. Some of Colorado's services are mandated to be centralized by state law. If institutions support the service on a sliding enrollment scale, is that incentive compensation? Beyond state agencies, there are similar services provided by independent nonprofits, such as DigiTex and the Iowa Community College Consortium. All of these examples are not profit-making and assist institutions in improving their services to students.

9. **What steps can the Department take to better ensure compliance with the prohibition on incentive compensation?**
Clear articulation of what constitutes an OPM versus a Third-Party Servicer is needed. To ensure compliance with the prohibition on incentive compensation, the regulations and guidance need to focus on the risks associated with that activity and not diffuse Department and institutional focus across many other activities that pose fewer problems. As one institution wrote, “Curb the definition of an OPM. They manage full [degree] programs, not pieces of programs.”

When asked “What regulations, rules, or contractual agreements would improve your OPM experience?” institutional responses included:

- A desire for open access to OPM contracts in order to better educate all institutional stakeholders as well as ensure greater competitiveness across institutions.
- Caps on the initial revenue-share agreement length and fees. The institution should have an earlier ability to revise or revoke a contract based upon experience and performance.
- Consistent and federal student data handling guidelines.
- Insist on the same contract terms regarding how students are treated for non-credit offerings (access to student data, complaint processes) as are required for credit-earning courses.

One of the best and most complete answers to this question called for a greater reliance on accreditors in the OPM contracting process. One institution suggested building on the current “written arrangements” regulations. Institutions should be required to submit a “change notification” to their institutional accrediting agency before entering into or revising a revenue-sharing OPM agreement. This would provide at least three benefits:

1) There would be an earlier external review of the agreement. Relying on FSA institutional audits or on yearly Third-Party Servicer audits happen after the contract is in place and are simply too late.
2) Institutional personnel who are arguing for stronger terms in the contract would benefit from the external influence of accreditation oversight.
3) Additional responsibility would be placed on institutional personnel to assertively address their interests and rights and carefully consider contract terms.

When asked “What regulations, rules, or contractual arrangements would hamper your OPM experience?” institutional responses included:

- *A concern with over-regulation.* As one institution wrote, “Certainly too many regulations can hamper the experience. We need some freedom to structure agreements in a way that makes sense for both parties but encourages regular checks, transparency in reporting, and in strategies being employed. Institutions should have the right to 'look under the hood," so to speak, of the OPM and this is sometimes frowned upon."

- *Added reporting.* As one institution wrote, "Layering on additional reporting requirements beyond the initial contractual agreement would become very difficult." Another institution wrote, "Regulations that needlessly require more data. We generate data reports after data reports, and nobody ever reads this stuff. We generate enough data that serves no purpose other than giving a lot of people jobs."

Finally, when asked "What else is important for other institutional personnel or regulators to know regarding OPMS?" notable responses included:

- "They are not all created equal. There are some that are more predatory than others. Some more obviously out for revenue than others. Some truly behave more as your partner and want to help you grow your own internal capacity. So, lumping them all into the same negative bucket is not a good idea and will harm the overall industry which I think serves a real need for many institutions. Don't do to them what was done to for-profit online universities. Institutions depend too heavily on the revenue that is generated from these agreements, and in this financial climate anything that harms that will likely cause more institutions to fold, which I don't think regulators want to see happen."
- "They can be very helpful for technical colleges such as ours as it allows us to prepare adult students for industry standard certifications that result in better job outcomes for them."
- "They do offer a valuable service, especially for new entrants into the online higher education sector or who face staffing shortages. I, personally, think the revenue sharing aspect is the most critical. If this was taken away, it would provide more accountability for the OPM to attract quality inquiries and applicants."
- "If OPMs weren't successful at generating enrollments and making education possible for so many students, why are so many universities using them? It is a complete win/win for everyone—universities, OPMs, but most importantly STUDENTS. This is not to say that there aren't some tyrannical practices by OPMs. I'm sure there are. But that has not been our experience. Our OPM is made up of decent, caring human beings who want to help students and universities thrive."
- "This broadened definition for a third-party servicer is a bastardization of the traditional OPM. Nonetheless, there will always be bad actors who can figure out how to skirt regulations. Do not punish the good actors to attempt to ferret out the bad."
- "These relationships can be beneficial in providing the seed funding to start online programs—just like angel investors start new companies. But there should be some oversight into what they do—especially for private companies. This may not need to be in the form of regulations—but in the form of detailed reporting that they are required to provide clients and the public. For example, many refuse to tell their clients how much they spend on marketing. This allows companies to potentially increase/decrease spend as they see fit or potentially to benefit more lucrative partners. With greater insight into spending, this wouldn't happen."

- One member contacted us outside of the survey and said that the OPM caused them to reconsider long-time business practices and to improve them. For example, they would let applications sit dormant for months. The student did not realize that their requested transcripts had not reached the institution. Admissions personnel thought that they were waiting on the student to request a transcript from their prior institution. The application was stalled due to a lack of communication. Processes were changed to check with students on their progress.

Finally, a recurring theme in our discussions with institutions has to do with maintaining institutional control. The OPM was hired because there was a need for marketing or business expertise. There was also a need for the program to move at something closer to business speed. Meanwhile, the institution continues to move at academic speed. The institutions with the most successful OPM experiences have a strong person or team that manages this mismatch in response expectations and closely manages the relationship. The person or team needs the strong backing of institutional leadership. This is a management issue, and we were at a loss as to how such a relationship could be mandated. It would have to look different across the many varieties of institutions. But leadership and control are key to a successful relationship.

In Conclusion

We wish to draw the Department's attention to what we believe to be important points we heard our members express.

- OPMs, when carefully contracted and administered, can provide institutions, colleges, and departments with critical resources to develop and operate online programs when the institution, college, or department does not have the initial financial or human capital to do so.
- Not all OPM providers are created equally. Like with any other business, there are good and bad actors. As a result, institutions have a variety of experience with OPMs that run the gamut from very negative to very positive.
- Our members seemed interested in more nuanced regulations that would allow for contracts to be revised or revoked earlier, curb aggressive recruiting, and require vendors to provide more transparency of OPM contracts with their clients.
- A rapid transition from OPM contracts to fee-for-service contracts would be difficult, messy, and highly disruptive as contracting revisions would take considerable time, institutions might not have the resources to replace the OPM services, and, in some cases, OPMs have invested millions of dollars in the development of new program which would need to be repaid by the institution.
- OPMs often provide resources and services that institutions would otherwise not be able to access. This is especially the case in the age of the Great Resignation on college and university campuses.
- OPM contracts and operations need to be more transparent to ensure that all programs are in compliance with state and federal regulations. Additionally, it is imperative that institutions be able to access all student and program data associated with OPM administered programs.

- Institutions, for the most part, must retain operational and quality control of OPM programs. Such control is essential in curbing abuses but will differ greatly in implementation by institution and program. We are hard-pressed to suggest a Department of Education regulatory fix that covers all circumstances.
- The idea of requiring accreditation oversight of new and revised OPM contracts is intriguing. It provides oversight earlier in the process than a Department of Education audit would provide and gives leverage to institutional personnel arguing for more favorable terms.

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.

Russell Poulin

Russ Poulin
Executive Director
WCET
(303)541-0305
rpoulin@wiche.edu

Cheryl Dowd

Cheryl Dowd
Senior Director, SAN & WCET Policy Innovations
WCET
(303)541-0210
cdowd@wiche.edu

Van L. Davis, Ph.D.
Chief Strategy Officer
WCET
vdavis@wiche.edu