NATIONAL STUDENT
LEGAL DEFENSE NETWORK

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February 15, 2019

VIA ELECTRONIC MAIL
Senator Elizabeth Warren
Senator Kamala Harris
Senator Catherine Cortez Masto
Senator Doug Jones
United States Senate
Washington, D.C. 20510

RE: Protections for Student Loan Borrowers of Color

Dear Senators Warren, Harris, Cortez Masto, and Jones,

Thank you for the opportunity to share our thoughts on how to better protect and empower students of color. We appreciate your leadership on this vital issue. The National Student Legal Defense Network is a nonpartisan, non-profit organization with a mission of advancing students' rights to educational opportunity and ensuring that higher education provides a launching point for economic mobility. We write today to suggest that one of the most impactful ways to protect and empower students of color would be to only reauthorize the Higher Education Act (HEA) if it includes a provision that allows states and individuals to bring lawsuits to enforce protections enshrined in the HEA. Such an amendment would empower students and their states to hold predatory actors accountable for trampling on students' rights.

As you noted in January, students of color face serious challenges at every step of the process obtaining higher education, from enrolling in high-quality programs to taking out student loans to completing courses of study on time to paying down their student loan debt successfully. Students of color tend to start out with less wealth and to borrow more.[1] They are more likely to be targeted by predatory, for-profit colleges, which deliberately seek out vulnerable populations.[2] Four years after graduation, black students hold nearly twice as much student loan debt as their white counterparts and forty-eight percent of black graduates have seen their federal undergraduate loan balances increase over that same period of time.[3] A recent study using high-quality longitudinal data from the Bureau of Labor Statistics, covering young adults with student

[1] Fenaba R. Addo, Jason N. Houle, & Daniel Simon, *Young, Black, and (Still) in the Red: Parental Wealth, Race, and Student Loan Debt,"* 8 Race and Social Problems 64, 64–76 (Mar. 2016).

[2] Peter Smith & Leslie Parrish, *Do Students of Color Profit from For-Profit Colleges?* Center for Responsible Lending (Oct. 2014), http://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf.

[3] Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation*, Economic Studies at Brookings: 2 Economic Speaks Reports 1, 3–4 (Oct. 20, 2016), https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf.

debt from ages 20 to 30, concluded that "it is plausible that student debt is a new mechanism by which racial and social and economic inequalities are reproduced across generations."[4]

Given the dire situation for student borrowers of color, Congress must not satisfy itself with merely incremental improvements. We hear often of needs for enhanced accountability measures, increasing disclosure requirements, and similar changes that make changes at the margins. Although these are positive steps, we believe that Congress must take bold action to protect all borrowers from the kinds of actions that disproportionately harm borrowers of color.

Critically, when students and borrowers are harmed, they may find the courtroom doors closed or virtually impenetrable. Only the Department of Education has the power to take action against schools and loan servicers under the HEA, a limitation that denies justice to countless student borrowers every year. Indeed, the overwhelming majority of the Department's authorities under the HEA are *prospective—e.g.*, eliminating or limiting a bad actor's eligibility to participate in the Title IV programs in the future. But far too few authorities are focused on remedying the harm to borrowers and making sure that the burden of such remedies lands on the entity responsible for that harm (*e.g.*, predatory institutions, loan servicers, and other actors involved in Title IV programs), rather than the students themselves and other taxpayers. And as the events of the past few years have demonstrated, even when the Department takes action against a bad actor, it can take years for the Department to decide whether the misconduct can, or will, give rise to some form of redress for harmed students.

Every day, the National Student Legal Defense Network hears from students and graduates who have had their lives upended by deceptive school recruiters or careless loan servicers. Under current law, however, the path to justice is extremely limited. For example, we recently became aware of students whose enrollment agreements contained mandatory arbitration clauses, requiring any disputes to be heard in front of an arbitrator hand-picked by the school itself. By including these clauses, the school clearly violated the Department's regulations, specifically the 2016 Borrower Defense rule. Yet it is, at best, unclear whether these students have any mechanism of forcing their school to release them from mandatory arbitration. There is no question that the Department has that authority. But under Secretary Betsy DeVos, the Department has shown virtually no desire to enforce the laws.

Under the HEA, schools are also prohibited from paying commissions or bonuses to recruiters for enrolling students. *See* HEA § 487(a)(20). This ban on incentive compensation was born out of a sordid, well-documented history of deception and fraud committed by for-profit recruiters chasing huge cash awards by going to extreme lengths to sign up more students by any means necessary. Just because something is banned does not mean it is gone, of course. It is an open secret that many schools are still aggressively pushing the limits of—or outright ignoring—the incentive compensation ban. At NSLDN, we sometimes hear from students who have discovered that their recruiter was paid a cash bonus for signing them up. These are generally students who also discovered too late that they were sold an education that does not match up to the recruiter's promises. At the end of the day, these students find themselves saddled with huge

[4] Jason N. Houle & Fenaba R. Addo, *Racial Disparities in Student Debt and the Reproduction of the Fragile Black Middle Class,* Sociology of Race and Ethnicity (Aug. 2, 2018).

loans and questionable course credits. But because the school violated the HEA, nothing can be done about the school's blatant use of incentive compensation, short of meaningful oversight by the Department of Education.[5]

Giving states and individuals a right of action under federal financial regulations is not a new idea. Under section 1042(a) of the Dodd-Frank Act, 12 U.S.C § 5552, for example, a state attorney general or state regulator has the power to bring a civil action to enforce the Act and its implementing regulations.

States have used that authority to great effect. For example, Mississippi Attorney General Jim Hood filed a lawsuit against Experian for failing to ensure that the data it included in consumers' credit reports was accurate.[6] Former Florida Attorney General Pam Bondi and former Connecticut Attorney General George Jepsen jointly filed a lawsuit against four companies and individuals involved in a mortgage rescue scam.[7] Former Illinois Attorney General Lisa Madigan brought a case against a for-profit college chain owned by Westwood College, Inc. and Alta Colleges, Inc.[8] New York's Department of Financial Services filed the first regulator lawsuit against a subprime auto lender and its CEO and president.[9] And Attorney General Josh Shapiro is currently relying on this provision as part of the Commonwealth of Pennsylvania's suit against the loan servicing giant, Navient.[10]

There are countless other provisions in the Higher Education Act and its implementing regulations that currently depend on enforcement by the Department of Education and that may not be clearly covered by state laws. For example, institutions are required to disclose certain information regarding completion rates, graduation rates, retention rates, and job placement

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[5] Although there has been some success in bringing lawsuits under the False Claims Act to expose this harm, damages from those lawsuits go to the United States and to the whistleblower. There is no corresponding remedy to the students who were harmed by the high-pressure sales tactics, incentivized by the payment of recruitment-based compensation.

[6] *Mississippi v. Experian Information Solutions, Inc.*, 1:14-cv-00243-LG-JMR (S.D. Miss. June 12, 2014) (Notice of Removal), *available at:* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2014/06/USDC-MS-14-243.pdf.

[7] *Florida v. Berger Law Group PA*, 8:14-cv-01825 (M.D. Fla. Aug. 22, 2014) (Amended Complaint), *available at:* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2014/09/amended-complaint.pdf.

[8] *Illinois v. Alta Colleges, Inc.*, 1:14-cv-03786 (N.D. Ill. Sept. 30, 2014) (Second Amended Complaint), *available at:* https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2014/11/IL-AG-second-amended-complaint.pdf. Attorney General Madigan also filed a separate case in state court against a small loan lender. *Illinois v. CMK Investments, Inc.*, No. 2014-CH-04694 (Cir. Ct. Cooks County, Mar. 18, 2014) (Complaint), *available at:* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2014/03/ALL_CREDIT_LENDERS_03-18-2014_16-26-531.pdf.

[9] *Lawsky v. Condor Capital Corp.*, 1:14-cv-2863 (S.D.N.Y. Apr. 23, 2014) (Complaint), *available at:* http://business.cch.com/BANKD/140423-lawsky-condor-complaint.pdf.

[10] *Pennsylvania v. Navient Corp.* 3:17-cv-01814-RDM (M.D. Pa Oct. 5, 2017) (Complaint), *available at*: https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf.

rates. While state UDAAP laws may be available to assist borrowers who are affirmatively misled by an institution, those laws are not as freely available to remedy harms caused when schools simply hide information that would be helpful to students. Moreover, providing a *private* right of action under the HEA would permit students to bring claims against predatory schools without having to show reliance, a mandatory element of many state UDAAP statutes, but not the Department's regulations. *See* 34 C.F.R. § 668.72 (defining substantial misrepresentation to include only a reasonable expectation of reliance). Indeed, many private UDAAP lawsuits have been dismissed because of a failure to show actual reliance. *See, e.g.*, *MacDonald v. Thomas M. Cooley Law School*, 880 F. Supp. 2d 785, 796 (W.D. Mich. 2012).

Although beyond the scope of this letter, there are many other examples of important provisions that are devoid of enforcement mechanisms outside of the Department of Education. For example, institutions are prohibited from charging fees for processing forms related to financial aid eligibility, HEA § 1094(a)(2). If an institution charges these fees, entire classes of students may have no recourse. And of course, allowing states and citizens to directly enforce the incentive compensation ban will provide an added watchdog over predatory schools that choose to violate it.

Laws are only as effective as their enforcement. For-profit college companies found to have violated the provisions of the HEA described above target their recruitment practices to enroll students from the most vulnerable populations, largely students of color from low-income neighborhoods. When the U.S. Department of Education chooses not to bring enforcement actions, and there is no state or private right of action under the Higher Education Act, the most vulnerable students of color are left with nowhere to turn. By expanding the rights of actions under the law, Congress has the opportunity to ensure that the Higher Education Act does not go unenforced and that student borrowers of color receive the protections they deserve.

Sincerely,

Aaron Ament
President
National Student Legal Defense Network