May 18, 2021

To Secretary of Education Miguel A. Cardona:

We write to you as a broad coalition of organizations committed to ensuring that the Department of Education (“ED”, or the “Department”) serves to advance the interest of student borrowers. Under Secretary of Education Elizabeth B. (“Betsy”) DeVos, crucial offices within the Department saw their functions sabotaged, and reversing the damage done during her tenure will be a difficult task. Many of our groups have joined previous letters to your office, in addition to this one, because we believe that these issues warrant a great deal of attention, wiping away the DeVos legacy is critical, and each passing day means more harm to students and borrowers. We are pleased by the selection of Richard Cordray to lead the office of Federal Student Aid. Cordray understands the challenges that student borrowers face, and unlike DeVos, we are confident he will fight on behalf of borrowers rather than making their lives even more difficult. We look forward to working with your leadership to fully turn the page on a dark period in the Department’s history.

In order to accomplish this, it is critical that the ED Office of General Counsel (“OGC”) be reinvigorated in the public interest. Tasked with providing legal advice to Department leadership and clearing regulatory documents, under DeVos the OGC blocked meaningful student relief and borrower protections. Student advocates have warned that the mismanagement and abuse in the student debt market could lead to economic hardship for millions of Americans. Unfortunately, thus far, the Biden Administration ED OGC has failed to take the necessary steps towards reversing the harm done by DeVos.

First and foremost, we must express our concern about the OGC’s refusal to rescind the Notice of Interpretation (“Notice”) in the Federal Register issued by DeVos in 2018. DeVos’ “interpretation” of the Higher Education Act (“HEA”) determined that state governments are preempted from regulating student loan service corporations. As a consequence, the ability of state attorneys general to enforce state consumer protection laws against deceptive student loan servicing companies were limited.

It is unconscionable that the OGC has not taken the basic measure of rescinding this interpretation, particularly when it has already been continuously rebuked by federal courts. In 2019, the 7th Circuit Court of Appeals rejected DeVos’s Notice in Nelson v. Great Lakes. The court held that the HEA does not necessarily preempt claims made under state law by student borrowers against loan servicing companies that engaged in deceptive behavior against them. In

1 https://www2.ed.gov/about/offices/list/ogc/index.html?src=oc
2 https://protectborrowers.org/debtreliereportlp/
3 https://tcf.org/content/commentary/four-things-devos-gets-wrong-about-state-laws-protecting-borrowers/
2020, the 11th Circuit Court of Appeals in *Lawson-Ross v. Great Lakes* made a similar ruling.\(^5\) A bipartisan coalitions of Governors have rejected the Notice\(^6\), as well as states attorneys general\(^7\), consumer groups\(^8\), as well as members of Congress.\(^9\)

We also wish to convey our concern over current OGC leadership’s failure to rescind the January 2021 memo on the legality of student loan forgiveness. Signed by then-ED General Counsel Reed Rubenstein in what has been described as an attempt to “hamstring Biden on student loan forgiveness”, the memo argues with limited basis that the Secretary of Education does not have sufficient statutory power to cancel student loan debt. This opinion conflicts with a great deal of legal authority and many noted legal scholars, who have affirmed that the office has the power to cancel student debt,\(^10\) and the memo was clearly made in an effort to “memorialize” DeVos’s policies past her term in office. Nonetheless, the OGC has continued to fail to respond to Senator Elizabeth Warren’s inquiry on whether the memo has been rescinded.\(^11\)

Defrauded borrowers across America continue to be hurt by DeVos’s Borrower Defense regulations that were designed to keep them from obtaining relief by imposing hurdles and onerous standards for debt cancellation.\(^12\) Yet, ED OGC has continued to defend these regulations against litigation from public interest groups.

Furthermore, we are alarmed that the OGC signed off on filing a motion to protect DeVos from legal scrutiny. Defrauded students are currently working to take DeVos to deposition for her role in sabotaging the borrower defense program.\(^13\) Outlets such as *Politico* have reported that the Biden Administration Department of Justice (“DOJ”) has assisted DeVos in her effort to quash the subpoena compelling her to testify in the case.\(^14\) What has been largely ignored, however, is the Department of Education OGC’s direct role in approving the antagonistic language against students in the motion to quash.\(^15\)

OGC leadership continues to defend the decision of DeVos to repeal Gainful Employment regulations implemented during the Obama Administration and fight lawsuits brought by the American Federation of Teachers, students, and State Attorneys General. These rules were

\(^5\)https://www.forbes.com/sites/adamminsky/2020/04/15/this-court-victory-for-student-loan-borrowers-could-have-huge-implications/?sh=35658b6026fd
\(^8\)https://www.defendstudents.org/news/body/docket/100-Day-Docket-Preemption.pdf
\(^12\)https://predatorystudentlending.org/cases/nylag-v-devos/
\(^15\)https://static.politico.com/cc/b0/ee17f96b4b53a477e9c41efaa7bb/devos-motion-to-quash.pdf
implemented to protect students against predatory for-profit college operators and prevent more students from graduating with massive debt burdens that they cannot afford to repay.\textsuperscript{16}

Additionally, the current OGC leadership signed off on the Department’s defense of DeVos’ “Distance Education and Innovation” regulations instituted in 2020. These measures made it easier for colleges to avoid regulations intended to prevent federal funding to “low-quality educational programs and predatory for-profit institutions. It is concerning that the Biden Administration OGC leadership filed a motion to dismiss a lawsuit by the State of California against the Department over these regulatory changes.\textsuperscript{17}

The OGC’s continued refusal to share complaints with state attorneys general and address concerns from state governments regarding the Privacy Act is also worrisome. The OGC has failed to rescind the policy that shields student loan records from state attorneys general and regulatory offices despite the urging of state regulators.\textsuperscript{18} The OGC has continued this practice by preempting the Department from sharing student complaints against for-profit colleges with state attorneys general and other regulators through the misapplication of the Privacy Act of 1974.

\textbf{The Office of the General Counsel and Department leadership likely share fault for OGC recent failures. Regardless of who bears ultimate responsibility, it is urgent that steps be taken to reinvigorate the OGC so as to reverse the damage that occurred during DeVos’s tenure. To do so, the Administration should either accelerate the appointment of a permanent General Counsel or institute a more effective process management strategy within the Secretary of Education's office.}

Sincerely,

Blue Future
Center for Popular Democracy
CODEPINK
Council of University of California Faculty Associations
Courage California
Debt Collective
Demand Progress Education Fund
Democracy for America
The Freedom BLOC
In the Public Interest

\textsuperscript{16} https://fortune.com/2020/02/06/betsy-devos-gainful-employment-rule/
\textsuperscript{17} https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-us-department-education-easing-oversight-profit
\textsuperscript{18} https://www.dfs.ny.gov/reports_and_publications/comment_letters/20210309_student_loan_borrowers
Jobs with Justice
Liberation in a Generation
New Jersey Association on Correction
Other98
Our Revolution
People Demanding Action
People’s Action
People's Parity Project
Progress America
Project Blueprint
Revolving Door Project
RootsAction.org
Social Security Works
Student Action
The X-Lab