

RE: ED-2022-OPE-0103
DCL ID: GEN-23-03

March 28, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Via <https://www.federalregister.gov>

Dear Secretary Cardona:

This comment is in response to the proposed “rule” (DCL ID: GEN-23-03, p. 23), Requirements and Responsibilities for Third-Party Servicers and Institutions, as updated on February 28, 2023. The new rule, which the Department of Education characterizes as merely a guidance letter, reaches far beyond previous guidance and regulations, sweeping in many more parties for Department regulation.

By issuing the rule in the form of a guidance letter, the Department has failed to follow the various laws that require, for example, benefit-cost analysis and the potential impact on small entities. The Department’s rule is arbitrary and capricious in failing to follow such laws and take account of relevant data and evidence.

Where the American higher education system flourishes, it does so due to diversity, innovation, and equality of opportunity. Student choice is fundamental to effective higher education policy. Proprietary institutions and online offerings are fundamental to this ecosystem; they enable broad access and are more nimble than traditional public and nonprofit institutions.

Rather than further burdening public, nonprofit, and proprietary institutions of higher education, I recommend that the Department take a step back and limit its intervention to no more and no less than the authorizing statute requires. 20 U.S.C. 1094 is sufficiently detailed to demonstrate how the Department may ensure that institutions and their servicers comply with this area of the law.

Most American students today have direct experience with online education. Before the pandemic of 2020, many institutions, particularly over the past decade, had already incorporated digital learning. To provide more students with access to postsecondary education at a lower cost to the students as well as their institutions, postsecondary institutions have worked to meet the demand for innovative education technology.

Traditional colleges and universities, in addition to newer ones, often lack the expertise and funding to develop such resources independently. Online program managers (OPM) have served many such institutions and their students. OPMs drive progress, investment, and innovation in higher education. They empower schools to offer new academic offerings quickly as U.S. workforce needs change, and they mitigate institutions’ risk of developing expensive technologies that become obsolete.

OPMs’ scalable solutions for low-cost access would not have been possible without freedom to contract, innovate, and adapt outside of burdensome oversight by federal education officials who are not up to speed on such technologies. In a world where technology changes quickly, the Department of Education

is ill-suited to understand and regulate this area of student and institutional service. The Department's Office of Educational Technology cannot successfully compete for the high-paid technology experts required to keep up.

Burdening institutions that contract with service providers will harm a wide variety of students, and probably 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 (so long as they have sufficient connectivity).

The evidence is clear: Online education is more affordable than in-person education. Private institutions charge an average of \$60,593 for an online degree vs. \$129,800 for an in-person degree. In-state tuition for in-person instruction at public institutions averaged \$491.20 per credit hour in 2020–2021, but only \$320.80 for online instruction in 2019–2020.¹

The “rule”/guidance letter is arbitrary and capricious in failing to assess such evidence and the harm involved in its new interpretation of the law. The revised letter appears to acknowledge 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 institutions or their servicers, which is arbitrary and capricious.

Rather than burden innovation, the Department of Education 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.

For the reasons above, I urge the Department of Education to withdraw this letter and revisit its existing regulations and guidance with a focus on improving the ability of institutions to innovate and contract with third parties without having to fear overreach by a federal agency.

Sincerely,

/s/

Adam Kissel
Visiting Fellow, Higher Education Policy
The Heritage Foundation

¹ Melanie Hanson, “Cost of Online Education vs. Traditional Education,” Education Data Initiative, Dec. 24, 2022, <https://educationdata.org/cost-of-online-education-vs-traditional-education> (accessed March 28, 2023).