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Protection and the unseen: How the US Department of Education's underdeveloped authorities can protect students and promote equity in higher education

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STATEMENT OF INDEPENDENCE

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ABSTRACT

Higher Education is changing and demands enhanced oversight by the U.S. Department of Education. This paper identifies underused authorities in the Higher Education Act of 1965 that can promote equity and protect students and student loan borrowers. By using its gatekeeping agreements with institutions to ensure that programs are meeting the goals of the Higher Education Act, to require a system of quality assurance, and to guarantee that institutions have a financial interest in ensuring that their students repay loans, the U.S. Department of Education can create a more equitable and effective system of protections, accountability, and oversight to improve higher education.

Introduction

Higher education was at a crossroads even before the COVID-19 crisis. In recent years, the cost of college attendance has risen and student debt levels have exploded. Discussions about debt forgiveness and reconfiguring higher education finance have moved out of wonky policy circles and into public discourse. Meanwhile, the costs of college have risen dramatically in recent years, perhaps exacerbated by decreases in state funding, and leading many institutions of higher education ("IHEs") to provide online and lower-cost solutions to supplement or replace the "traditional" four-year, residential college—a trend that will be accelerated by the COVID-19 crisis. Simultaneously, college demographics have shifted, with an increasing population of "nontraditional" students, including those who are older, lack financial support from parents or other family members, and are more likely to have dependents. Disparities in higher education have had disproportionate, negative, and long-lasting effects on Black and Latino communities. And COVID-19 continues has caused or deepened devastating public health and economic impacts to IHEs and students alike.

To add fuel to the fire, these trends have come at a time of extreme deregulation of student protections. Under the leadership of Secretary Betsy DeVos, the United States Department of Education ("Department") has systematically eliminated policies and regulations designed to protect and benefit students and minimized the standards for the state authorizers and accreditors who comprise the other members of the "triad" of higher education oversight.[1]

But this can change. While the current deregulatory agenda and a divided Congress may not offer much hope for new student-centric policies, a more willing Secretary of Education would have ample tools at her disposal to use the student financial aid programs authorized by Title IV of the Higher Education Act of 1965 ("HEA") to promote equity, increase institutional accountability, and enhance student protections.

This is the first in a series of papers drafted by Student Defense that explore under-used authorities in the HEA and which highlight how a reinvigorated Department can use these powers, at this critical juncture, to promote equity and foster stronger protections and outcomes for students. The goal of this and future papers is not to promote or endorse the details of specific policy reforms. Nor is it to say that the Department should use every tool at its disposal to add additional regulations on IHEs during this economically precarious time. Nevertheless, by taking a hard look at the existing HEA, we aim to highlight statutory

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1. *See, e.g.*, Student Assistance General Provisions, The Secretary's Recognition of Accrediting Agencies, The Secretary's Recognition Procedures for State Agencies, 84 Fed. Reg. 58,834 (Nov. 1, 2019) (codified at 34 C.F.R. §§ 600, 602, 603, 654, 668, 674); Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392 (July 1, 2019) (codified at 34 C.F.R. §§ 600, 668) ("Gainful Employment Repeal"); Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019) (codified at 34 C.F.R. §§ 668, 682, 685) ("2019 BD Rule").

authorities the Department can rely upon to adopt existing policy proposals, promote equity, expand student protections, and ensure that the Department's enforcement authorities are being used appropriately.

This paper discusses one of the most fundamental aspects of how the Department can better use its gatekeeping authorities to determine which schools can participate in the federal Direct Loan Program, and the terms and conditions of such participation. Because IHEs must sign agreements with the Department in order to participate in the Direct Loan program (*i.e.*, the program under which the Department provides billions of dollars of taxpayer funded student loans each year and largest source of federal student aid dollars and student debt), and because the Department has wide authority over the content of those agreements, the Department can use those agreements as a gatekeeper to mandate "quality assurance" programs, promote social equity, and create structures for institutions to have financial "skin in the game" with respect to student loan repayment. Although the Department previously has used the HEA to establish accountability metrics for "Gainful Employment" programs—*i.e.*, virtually all programs offered by for-profit IHEs and non-degree programs offered by public and non-profit IHEs—the authorities tied to the Direct Loan Agreements provide the Department the ability to protect students across all institutions participating in the Direct Loan program, at an institutional or programmatic level, and ensure that those institutions and programs are promoting strong outcomes.

Statutory authority

Charged by Congress to administer and oversee the student financial assistance programs created under Title IV of the HEA (*e.g.*, federal student loans and Pell Grants), the Department has robust and extensive authority to regulate institutions that participate in those programs. *See, e.g.*, *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 459 (D.C. Cir. 2012) (noting that Congress enacted the HEA pursuant to its spending power and, "[i]ncident to that power," Congress may "condition[] federal moneys upon compliance by the recipient with federal statutory and administrative directives") (internal quotations omitted) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). That authority, however, is not boundless; as with all federal agencies, the Department must act within the authorities and limitations provided by statute. *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act, . . . unless and until Congress confers power upon it."). Congress has also placed additional limitations on the Department's authorities.[2]

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2. For example, the Department is not authorized to "exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law." 20 U.S.C. § 3403(b). Similarly, Congress has prohibited the Department from exercising "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or

In addition to authorizing regulation and enforcement, the HEA vests the Department with authority to determine which institutions can participate in Title IV programs in the first place.[3] The Department determines both whether a particular IHE satisfies the statutory definition of "institution of higher education"[4] and whether such an institution is "qualif[ied]" to participate.[5] To make this "qualified" determination, the Department must determine an institution's "legal authority to operate within a state," the institution's "accreditation status," and the institution's "administrative capability and financial responsibility."[6] For the most part, determining state authorization and accreditation status are straightforward.[7] In contrast, considerations related to "administrative capability" and "financial responsibility" involve agency discretion.

Once an IHE is "qualified" to participate in the Title IV programs, by statute, it must enter into a Program Participation Agreement ("PPA") with the Department. In practice, the PPA is a standard agreement that incorporates Title IV and its implementing regulations.[8] Notwithstanding this general requirement, the HEA also gives the Secretary authority to "provisionally" certify an IHE's eligibility to participate in Title IV if, among other reasons, the Department "determines that an institution that seeks to renew its certification is, in the judgment of the Secretary, in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a PPA."[9] In such circumstances, the Secretary enters into a "provisional" PPA ("PPPA") with the institution that can incorporate other such provisions as the Secretary deems necessary.[10] In recent years, conditions have included, for example, requirements related to financial sureties, restrictions on new programs, locations, or enrollment, reporting requirements, and restrictions on the use of mandatory arbitration provisions.[11]

In certain instances, Congress requires more. The Direct Loan program—which is the biggest of the Title IV programs—provides funds to students in the form of loans, rather than

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school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance." 20 U.S.C. § 1232a.

3. HEA § 498(a), 20 U.S.C. § 1099c(a).

4. HEA § 102, 20 U.S.C. § 1002 (defining "the term 'institution of higher education' for purposes of title IV")

5. HEA § 498(a), 20 U.S.C. § 1099c(a).

6. *Id*.

7. Of course, complicated issues can arise particularly in the context of state authorization over online and distance education. Those topics are beyond the scope of this paper.

8. HEA § 487, 20 U.S.C. § 1094; 34 C.F.R. § 668.14; *see also, e.g.*, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,976-77 (Oct. 31, 2014) ("The PPA is a standardized document that largely mirrors the requirements in 34 C.F.R. § 668.14. Unless an institution has a provisional PPA, the PPA for one institution will be nearly identical to that of another except for the list of the institution's GE programs.").

9. HEA § 498(h)(1)(B)(iii), 20 U.S.C. § 1099c(h)(1)(B)(iii).

10. *See* 34 C.F.R. § 668.13(c).

11. Letter from Michael Frola to Tracy Lorenz & Timothy Slottow re: Preacquisition Review of the Proposed Change in Ownership (Dec. 7, 2016), https://www.insidehighered.com/sites/default/server_files/files/Apollo-%20change%20of%20ownership-%20pre-acquisition_Redacted.pdf

grants, and results in students and families incurring repayment obligations to the U.S. Treasury that can stretch thirty years. The financial stakes are high for students and taxpayers alike. Perhaps for that reason, the HEA provides that "[n]o institution of higher education shall have a right to participate" in the Direct Loan program.[12] Instead, Congress established a unique structure where an IHE wishing to participate in the program must apply to,[13] and be selected by,[14] the Secretary to participate, and then enter into an additional agreement with the Secretary setting forth the terms of participation.[15] Such an agreement is known as the Direct Loan Agreement or DLA.[16] In practice, the DLA is a component of the PPA, and approval for Direct Loan program participation is concomitant with approval and execution of the PPA.[17] Formally, however, the HEA requires that an IHE participating in the Direct Loan program enter into a PPA and a DLA.[18]

The HEA's application and selection provisions frame the Department's broad authority to serve as a gatekeeper of participating IHEs. The Secretary's authority over the application itself permits her to require an IHE to provide any "assurances" that she believes are necessary.[19] And as part of the "selection procedure," the HEA specifically allows the Department to base a participation decision on an IHE's ability to "meet other such eligibility requirements as the Secretary may prescribe."[20]

Much of the content of the DLA is dictated by statute. For example, HEA § 454(a)(1) provides conditions under which the institution shall establish and maintain the Direct Loan program (including identifying eligible students, estimating the need of each student for loans under the program, certifying student eligibility, etc.). Other provisions are less explicit and provide the Department discretion when regulating. For example, the DLA must include a provision through which an IHE "accepts responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement."[21] Congress

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12. HEA § 452(b), 20 U.S.C. § 1087b(b). None of the other Title IV programs contain this statutory restriction.
13. HEA § 453(b)(1), 20 U.S.C. § 1087c(b)(1).
14. HEA § 453(b)(2), 20 U.S.C. § 1087c(b)(2); *see also* HEA § 453(a), 20 U.S.C. § 1087c(a) (directing the Secretary to "enter into agreements pursuant to section 454(a) with institutions to participate in the direct student loan program").
15. *See generally* HEA §§ 451–454, 20 U.S.C. §§ 1087a–1087d.
16. *See generally* HEA § 454; 20 U.S.C. § 1087d
17. *See, e.g.*, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, 81 Fed. Reg. 39,330, 39,381 (proposed June 16, 2016) (codified at 34 C.F.R. §§ 30, 668, 674, 682, 685, 686) (repealed 2020) ("2016 BD NPRM") ("The Direct Loan Agreement described in section 454 of the HEA is now included as a separate component of the program participation agreement required under section 487(a) of the HEA[,] 20 U.S.C. 1094(a).").
18. Although, as a practical matter, the Department's decision with respect to a PPA is tied to the Direct Loan participation decision, this is not required by the HEA.
19. HEA § 453(b)(1); 20 U.S.C. § 1087c(b)(1).
20. HEA § 453(b)(2), 20 U.S.C. § 1087c(b)(2).
21. HEA § 454(a)(3), 20 U.S.C. § 1087d(a)(3).

also entrusted the Department with the authorities to establish a "quality assurance system . . . to ensure that the institution is complying with program requirements and meeting program objectives,"[22] and to "include other such provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes" of the Direct Loan program.[23]

With a command of these authorities and the Administrative Procedure Act, the Department can better use these provisions to promote equity and safeguard students and taxpayers.

Historical use of DLA to regulate postsecondary institutions authority

Prior to 2016 the Department had never used HEA § 453 (*i.e.*, application and selection) or HEA § 454 (DLA) as the core authority to support increased student protections around the Direct Loan program.[24] In 2016, the Obama Administration used this statutory authority to justify aspects of its 2016 Borrower Defense Rule—*i.e.*, a regulation designed to protect students and taxpayers and afford relief to defrauded borrowers—in two ways.[25] *First*, and most directly, the Department relied on HEA § 454(a)(6) (the "protect and promote authority"), allowing the Secretary to incorporate provisions she "determines are necessary to protect the interest of the United States and to promote the purposes of [Title IV]"—to propose and adopt regulations conditioning Direct Loan participation on an IHE's agreement not to enforce mandatory arbitration or class action waiver requirements in student

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22. HEA § 454(a)(4), 20 U.S.C. § 1087d(a)(4).

23. HEA § 454(a)(6), 20 U.S.C. § 1087d(a)(6).

24. In 2013, the Department amended the DLA regulation, 34 C.F.R. § 685.300, to include a provision that institutions, "[o]n a monthly basis, reconcile institutional records with Direct Loan funds received from the Secretary and Direct Loan disbursement records submitted to and accepted by the Secretary." Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 78 Fed. Reg. 65,768, 65,838 (Nov. 1, 2013) (codified at 34 C.F.R. §§ 668, 674, 682, 685) (adding 34 C.F.R. § 685.300(b)(5)). The Department's explanation for this addition suggests that it was not to add a new requirement. Rather, in the NPRM leading to that Final Rule, the Department asserted that the provision was being added in order to "reflect in the regulations an existing requirement for schools participating in the Direct Loan Program." Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 78 Fed. Reg. 45,618, 45,727 (proposed July 29, 2013) (codified at 34 C.F.R. §§ 668, 674, 682, 685). In 2015, the Department cited HEA § 454(a)(3) and (5) in the Cash Management regulations to support its arguments that one of the purposes of the HEA is to ensure that students receive their Title IV funds. Program Integrity and Improvement, 80 Fed. Reg. 67,126, 67,128 (Oct. 30, 2015) (codified at 34 C.F.R. § 668).

25. Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 81 Fed. Reg. 75,926 (Nov. 11, 2016) ("2016 BD Rule").

enrollment agreements.[26] *Second*, the Department also used the protect and promote authority to allow it to identify causes of action that constitute a defense to repayment of a Direct Loan, as well as procedures for the receipt and adjudication of borrower defense claims.[27]

In proposing to use the DLA authority to enact these provisions, the Department highlighted many of the authorities discussed above, such as how institutions do not have a right to participate in the Direct Loan program, that an institution desiring to participate must submit an application containing information and assurances required by the Secretary, and that the DLA shall include such other provisions as the Secretary determines are necessary to protect the interests of the United States and promote the purposes of the Direct Loan program.[28] The Department noted in 2016 proposed Borrower Defense rule, "[t]he purpose of the Direct Loan Program is to provide loans to students and parents to finance the attendance of students in postsecondary education. Loans are not grants and are expected to be repaid."[29] The Department also described in detail how the proposed provisions fell within this statutory authority.[30]

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26. 34 C.F.R. §§ 685.300(b)(11), (d)–(l).

27. *See, e.g.*, 2016 BD Rule at 75,932 & 75,957.

28. 2016 BD NPRM, 81 Fed. Reg. at 39,381.

29. *Id.*; *see also id.* ("[T]he overall 'purpose' of the Direct Loan Program is to make loans that will then be repaid.").

30. *Id*. Although the provisions generated much controversy—both after the NPRM and Final Rule—there was little in terms of public comments on the Department's proposed use of the DLA authority. *See, e.g.*, Comment of American Public Education, Inc. to U.S. Dep't of Educ., Docket No. ED-2015-OPE-0103 at 19 (Aug. 1, 2016); Comment of California Association of Private Postsecondary Schools to U.S. Dep't of Educ., Docket No. ED-2015-OPE-0103 at 61 (Aug. 1, 2016) (hereinafter "CAPPS Comment"). In contrast, numerous comments focused on the specific policies proposed surrounding dispute resolution. Other comments reflected the view that the authority enumerated in HEA § 454(a)(6) was too vague to override the general federal policy favoring arbitration found in the Federal Arbitration Act ("FAA"). *See, e.g.*, Comment of U.S. Chamber of Institute for Legal Reform to U.S. Dep't of Educ., Docket No. ED-2015-OPE-0103 at 18 n.59 (Aug. 1, 2016) (asserting that the language in HEA § 454(a)(6) is "vague and general" and "patently insufficient to override the FAA"). Other comments similarly conceded that the HEA "confers on the Department authority to determine qualifications for schools to participate in the Direct Loan Program," but, with regard to the specific proposals made, section 454(a)(6) did "not overrule the FAA either expressly or implicitly." Comment of Career Education Colleges and Universities ("CECU") to U.S. Dep't of Educ., Docket No. ED-2015-OPE-0103 at 55 (Aug. 1, 2016).

    The California Association of Private Postsecondary Schools ("CAPPS") made the broadest comment regarding the Department's protect and promote authority. First, as it related specifically to the dispute resolution components of the proposed rule, CAPPS asserted in its comment that the protect and promote authority was insufficient because HEA § 454(a) does not "relate to contracts between students and schools." CAPPS Comment at 61. More broadly, CAPPS also asserted that the "lack of any provision that touches the direct relationship between student and institution in the current participation agreement regulations suggests that the Department's foray into that relationship is a novel interpretation of the language in the statute." *Id.* CAPPS further argued that the Department's interpretation of its protect and promote authority would constitute an impermissibly coercive attempt to require institutions to "cede all contractual rights to the federal government." *Id.* at 62.

    In addition, and largely in relation to the Department's invocation of the protect and promote authority to support other aspects of the proposed rule, CAPPS, citing the cannon of statutory construction known as *ejusdem generis*, argued that where a catch-all provision follows more specific words in a statutory list, the

On November 1, 2016, the Department published the final 2016 Borrower Defense rule. The California Association of Private Postsecondary Schools ("CAPPS") challenged the rule in court, teeing up the scope of the Department's "protect and promote" authority and asserting, *inter alia*, that the Department did not have statutory authority to adopt the DLA conditions.[31] In its Complaint, CAPPS reiterated the argument it had made during the comment period, *see supra* n. 30, that the protect and promote authority is a "catch-all phrase that comes at the end of a series of ministerial requirements for loan administration."[32] CAPPS further asserted that "any provision promulgated under [the protect and promote authority] should likewise deal with the calculating, tracking, and disbursement of loan funds—or at least a similar ministerial function." *Id.*

After a number of procedural twists and turns, CAPPS directly raised the scope of the protect and promote authority in its motion for summary judgment, arguing that it is a general catch-all that lacked the clear command necessary to displace the Federal Arbitration Act, *see supra* n.30, and thus did not give the Department the authority to adopt the dispute resolution provisions.[33] CAPPS did not argue, however, that irrespective of the FAA, the protect and promote authority was too narrow.

Although it did not address the precise scope and meaning of the protect and promote authority, the Court rejected CAPPS's argument that the use of that authority in the 2016 Borrower Defense rule conflicted with the FAA.[34]

1. In 2019, the Department finalized a rule amending the 2016 Borrower Defense rule and eliminating the dispute resolution provisions.[35] In proposing the 2019 Rule, the Department acknowledged its position that "the HEA gives the Department broad authority to impose conditions on schools that wish to participate in a Federal benefit program" and that "regulation of the use of pre-dispute arbitration agreements and class action waivers was necessary to 'protect the

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general words must be construed to embrace only objects similar in nature enumerated by the specific words. CAPPS Comment at 17–18 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001)). According to CAPPS, because the provisions of HEA § 454(a)(1)-(5) "deal[] with institutions' ministerial duties to properly calculate, monitor, and disburse student loans," the protect and promote authority in section 454(a)(6) must be limited to provisions that "deal with the calculating, tracking, and disbursement of loan funds—or at least a similar ministerial function." CAPPS Comment at 18. CAPPS never explained how the "implementation of a quality assurance system" was a "ministerial" duty.

31. *See generally* Complaint and Prayer for Declaratory and Injunctive Relief, *California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F. Supp. 3d 333 (D.D.C. 2020) ("*CAPPS* Complaint").

32. *CAPPS* Complaint ¶ 110.

33. Mem. in Supp. of its Mot. for Summ. J. at 18–21, *California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F. Supp. 3d 333 (D.D.C. 2020) (Dkt. 83-11); *see also California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F. Supp. 3d at 350 ("CAPPS makes only one argument in support of this theory: it argues that [HEA § 454(a)(6)] is a 'general catch-all clause' and, as such, is 'not sufficient to give the Department the authority to prohibit the enforcement of bilateral arbitration agreements.'").

34. *California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F. Supp. 3d at 350.

35. 2019 BD Rule, 84 Fed. Reg. at 49,788.

interests of the United States and promote the purposes' of the Direct Loan Program."[36] In repealing these provisions, the Department never asserted that the dispute resolution provisions exceeded the Department's authority under the HEA; instead, the Department relied on a policy "determin[ation] that [it] should take a position more in line with the benefits of arbitration."[37] Thus, even in repealing the substantive policy, the Department has not walked away from its position that the protect and promote authority justified the 2016 Borrower Defense rule.

Using the Direct Loan agreement to fulfill the promises of the HEA

In light of the discussion above and the Department's more general authority to regulate the Direct Loan Program,[38] the Department has yet to put its full legal weight behind efforts to regulate institutional participation in the Direct Loan program in a way that advances equity and truly protects students and taxpayers. This section highlights how two specific authorities, HEA § 454(a)(4) (quality assurance) and HEA § 454(a)(3) (financial liability)—bolstered by the protect and promote authority and the Department's more general regulatory authorities—can and should be used to promote equity and accountability in the Direct Loan program.

Using the Direct Loan agreement to establish systems of "quality assurance"

The concept of "quality assurance" in higher education has long driven advocacy and policy development on all sides of the ideological and political spectrum. For example, the higher education policy community has extensively explored proposals to develop and analyze systems of quality assurance, to discuss the roles of states and accreditors in promoting and evaluating systems of quality assurance, and to crunch numbers to facilitate the use of evidence-based policy quality assurance.[39] But little analysis has been done to assess the structural role and authority of the Department to implement a system of "quality assurance" with respect to the Direct Loan program (perhaps with the exception of debates . . .

36. Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 83 Fed. Reg. 37,242, 37,245 (proposed July 31, 2018) (codified at 34 C.F.R. §§ 668, 674, 682, 685) (quoting HEA 454(a)(6)).

37. *Id.*

38. 20 U.S.C. § 1221e-3 (authorizing the Secretary to "make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department."); 20 U.S.C. § 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.").

39. A search on Google Scholar for articles using the phrases "quality assurance" and "higher education" yielded over 20,000 results.

around whether the Department's 2014 (or 2011) Gainful Employment Rule served as a proxy for programmatic quality).

Nevertheless, section 454(a)(4) of the HEA (the "QA authority") unambiguously provides that the DLA "shall. . . provide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with institutions of higher education, to ensure that the institution is complying with program requirements and meeting program objectives." This provision—which, on its face only applies to participation in the Direct Loan program and not other of the Title IV programs (*e.g.*, Pell Grants)—was added to the HEA in 1993 and has never been invoked by the Department as authority to promulgate new policies. Currently, the Direct Loan portion of the general PPA includes language that mirrors the statutory requirement. Similar language also appears in the Department's regulations establishing the content of the DLA.[40] Read alongside the protect and promote authority (*i.e.*, to "include [in the DLA] such other provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes"[41] of Title IV), the Department has ample authority to condition systems of "quality assurance" to participation in the Direct Loan program.[42]

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40. *See* 34 C.F.R. § 685.300(b)(9). Specifically, that subsection states that, in the DLA, a school must agree to "[p]rovide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with the school, to ensure that the school is complying with program requirements and meeting program objectives." A key difference between the regulatory text and the statutory text is that the statute requires consultation with "institutions of higher education," whereas the regulatory text requires the Department to consult with "the school." There is no indication in the regulatory history that this was intentional, as the current regulatory language was adopted without notice and comment or negotiated rulemaking. *See* Final Standards, Criteria, and Procedures, Federal Direct Student Loan Program, 59 Fed. Reg. 472-01, 1994 WL 1333 (Jan. 4. 1994) (codified at 34 C.F.R. § 685). Of course, if the Department regulates in this area, it would be bound by the *statutory* consultation requirement, not by its own regulations.

41. HEA § 454(a)(6), 20 U.S.C. § 1087d(a)(6).

42. As noted above, the Department used this authority in the 2016 BD Rule to ban Direct Loan participation for schools that enforce mandatory arbitration and class action waivers. *See* 81 Fed. Reg. at 76,022. Although not limitless (insofar as provisions must be necessary to "protect the interests of the United States" and to "promote the purposes" of the Title IV programs), this is a wide grant of authority to the Department. *Cf. Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10, 15 (7th Cir. 1990) (highlighting that, in a contract between the Department and a guaranty agency, "withholding funds [to the guaranty agency] for noncompliance" is an example of something that could be considered "necessary to protect the interests of the United States"); *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894, 901 (6th Cir. 1990) (same); *Com. of Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 101 F.3d 939, 943–44 (3d Cir. 1996) (noting that where a regulatory provision permits a federal agency to charge a higher rate of interest if it "reasonably determines that a higher rate is necessary to protect the interests of the United States," the decision to charge a higher rate is "almost *per se* reasonable").

    However broad it may be, the protect and promote authority is not limitless. The provision appears to stem conceptually from the Perkins Loan program statute, which requires institutions to enter into a participation agreement that includes "such other reasonable provisions as may be necessary to protect the United States from unreasonable risk of loss and as are agreed to by the Secretary and the institution." *See* HEA § 463(a)(9), 20 U.S.C. § 1087cc(a)(9). In the 1992 HEA amendments establishing the Direct Loan program, HEA § 454 did not use the "unreasonable risk of loss" language, but instead gave the Department authority to include "such other provisions as may be necessary to protect the financial interest of the United States and to promote the purposes" of the Direct Loan program. *See* PL 102-325 (July 23, 1992), 106 Stat. 448 at HEA § 454. In the 1993 Omnibus Reconciliation Act, PL 103-66 (Aug. 10, 1993), 107 Stat.

So, what does the QA authority allow the Department to do? Apart from the *procedural* requirement that such a "quality assurance system" must be "developed in consultation with institutions of higher education,"[43] the HEA is silent as to what is meant by "quality assurance," "program requirements," and what it means for an institution to "meet[] program objectives." In such situations, the law affords the Department ample discretion to fill these statutory voids, resolve statutory ambiguities, and ensure that institutions of higher education are serving students and taxpayers.

A system of quality assurance: Using a repayment rate to establish institutional compliance with an objective of the Direct Loan program

Developing a system of "quality assurance" to "ensure that the institution is . . . meeting program objectives" must, of course, consider what it means for an institution to "meet[] program objectives." In this regard, a core "program objective" of the Direct Loan program is to ensure not only that students have access to higher education, but also to ensure that federally issued loans are repaid. In light of the Department's statements in the 2016 Borrower Defense rule that the purpose of the program is to make loans that will be repaid,[44] any institution of higher education not providing a program of education that enables students to repay their federal Direct Loans is failing in its obligation to meet at least one of the objectives of the Direct Loan program. The Department could, therefore, use its QA authority to establish a repayment rate metric as a condition of participation in Direct Loan program.[45]

The concept of a repayment rate eligibility metric is not new, and was promulgated by the Department as part of the 2011 Gainful Employment regulation.[46] But the 2011 attempt to

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312, Congress amended HEA § 454 to delete the word "financial" and make the word "interest" plural (presumably broadening the scope to include financial and other interests). The language has been untouched since 1993.

43. Legislative history suggests that Congress took seriously this consultation requirement. When the provision was added to the HEA in 1993, the House of Representatives passed a version that did not include the consultation requirement. As noted in the Conference Report, the House receded to the Senate version which requires the Secretary "to consult with institutions of higher education in establishing a quality assurance system." H.R. Conf. Rep. No. 103-213, at 444 *as reprinted in* 1993 U.S.C.C.A.N. 1088, 1133. Given this history, the Secretary should include in the regulatory process an opportunity—beyond the negotiated rulemaking process set forth in HEA § 492—to consult with institutions of higher education. Of course, the statute requires simply the Department to "consult[]" with institutions, but does not afford institutions authority to veto the system chosen by the Department.

44. *See supra* at n. 29 & accompanying text

45. *See generally, e.g.*, Ben Miller, *Getting Repayment Rates Right*, Ctr. for Am. Progress (July 10, 2018) (summarizing repayment rate proposals and making recommendations), https://www.americanprogress.org/issues/education-postsecondary/reports/2018/07/10/453199/getting-repayment-rates-right/; Spiros Protopsaltis, *Searching for Accountability in Higher Education* 18, New America (2019), https://d1y8sb8igg2f8e.cloudfront.net/documents/Searching_for_Accountability_in_Higher_Education_2019-10-02_134947.pdf.

46. That aspect of the 2011 GE Rule was ultimately determined to be arbitrary and capricious under the Administrative Procedure Act because the Department failed to provide a reasonable explanation of the

adopt a repayment rate metric was limited to programs that only qualified for Title IV participation because they provided a program of training that "prepares students for gainful employment in a recognized occupation." Accordingly, not all programs or institutions that participated in the Title IV programs would have been subject to the repayment rate metric. But by tying a repayment rate metric to Direct Loan participation, the Department could make all institutions satisfy repayment rate thresholds, at an institutional level, as a condition of Direct Loan eligibility.

Moreover, as the Department noted in 2014, the Department has been limited by the lack of "expert studies or industry practice" to provide necessary factual support for "identifying a particular loan repayment rate as an appropriate threshold for determining whether a program prepares students for gainful employment."[47] But by relying on a different, and broader, statutory authority—one focused on "quality assurance" rather than whether a particular program "prepares students for gainful employment in a recognized occupation"—the Department could draw from a broader source of analyses. This could allow the Department to assess whether a particular loan repayment rate is an indicator of "quality" (an inherently subjective term), which may differ from whether such a rate indicates whether a program is preparing its students for gainful employment in a recognized occupation. In addition, by relying on a condition that is tied to Direct Loan eligibility—rather than institutional eligibility—remedies for failures would allow institutions to enable students to receive Pell Grants, even if Direct Loan funding was no longer available.

To use a repayment rate at an institutional level, policymakers and advocates need to assess a multitude of policy questions regarding the ideal approach to establishing the eligibility metric. For example, how should the Department calculate the repayment rate? Should the Department use an "on-time" repayment rate (*i.e.*, measuring whether borrowers have made some percentage of required payments by the end of a predetermined number of months in repayment),[48] or should the Department use a metric, akin to what is used in the College Scorecard, that measures whether borrowers are defaulting or have reduced the original principal balance of loans? The Department also must assess whether only student borrowers completing programs would be factored into such a repayment rate calculation.

Once the Department chooses a methodology, what threshold should be set to establish that an institution is failing to "meet[] program objectives"? What timeframe should the Department assess? How many years of non-compliance should be allowed, to control for economic cycles and other externalities, particularly in light of COVID-19 and the resultant economic effects? How, if at all, should income-driven repayment plans and loan forgiveness programs impact the chosen repayment rate?

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threshold and metrics that it chose. *See Ass'n of Private Sector Coll. & Univs. v. Duncan*, 870 F.Supp.2d 133, 154 (D.D.C. 2012).

47. Program Integrity: Gainful Employment, 79 Fed. Reg 16,426, 16,445 (March 25, 2014).

48. *See* Ben Miller, *The Value of an On-Time Repayment Rate*, Ctr. for Am. Prog. (Oct. 24, 2019), https://www.americanprogress.org/issues/education-postsecondary/news/2019/10/24/476318/value-time-repayment-rate/.

While these policy questions must be answered—ultimately, any repayment rate metric and eligibility threshold must be supported by adequate research to survive judicial review—the question of the Department's *authority* to impose a repayment rate metric seems clear: as long as such a metric is tied to whether an institution is meeting an "objective[]" of the Direct Loan program (*i.e.*, loan repayment), the QA authority is sufficient for the Department to impose such a condition.

Quality assurance: Using eligibility metrics to promote equity

Passed in 1965 during the civil rights movement, the HEA had an initial, clear goal: to make sure that the door to higher education was open to all, and that students would not be turned away from education because of socioeconomic status.[49] Not an incidental part of the Great Society and the 1960's civil rights agenda, the HEA was a core component of President Johnson's efforts to ensure that America "could never rest while the door to knowledge remained closed to any American."[50] Today, as the largest part of the modern HEA, the Direct Loan Program embraces these same objectives.

Despite these lofty objectives, there is growing evidence and data establishing that while higher education opens doors for some, it slams the doors shut for others.[51] According to a report by the Center for Responsible Lending and other organizations, Black student debt

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49. *See, e.g.*, Presidential Statement on Signing the Higher Education Act 1965, The Lyndon Baines Johnson Museum (Nov. 8, 1965), https://lbjmuseum.com/higher-education-act-of-1965/ (noting that the Higher Education Act of 1965 "means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor"); *Rowe v. Educ. Credit Mgmt. Corp.,* 559 F.3d 1028, 1030 (9th Cir. 2009) (noting that the federal student aid programs were adopted in order "to keep the college door open to all students of ability, regardless of socioeconomic background"); *Bowling Green Jr. Coll. v. U.S. Dep't of Educ.*, 687 F. Supp. 293, 297 (W.D. Ky. 1988) ("The purpose of these Title IV programs is not to keep an institution in business, but to assist its students in gaining a post-secondary education."); Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, 43 J.C. & U.L. 195, 213 (2018) (discussing the history of the Higher Education Act through a civil rights lens). As Professor Jonathan Glater highlighted, numerous members of Congress in 1965 specifically emphasized the importance of equity when debating the original HEA. *See id.* at n.105 (quoting Rep. Mink, "[t]here must be no question that any youngster, regardless of his family circumstance has the right to fullest opportunity to develop his intellect for the good of both himself and the Nation"); *id.* (quoting Rep. Fogarty, "It is time to implement ... [a] century-old commitment with further measures to assure that every qualified high school graduate may attend and graduate from college"); *id.* at n.106 (highlighting the known disparities in access between high achieving students from low-income versus higher-income families).

50. Presidential Statement on Signing the Higher Education Act 1965, The Lyndon Baines Johnson Museum (Nov. 8, 1965), https://lbjmuseum.com/higher-education-act-of-1965/.

51. *See generally* William R. Emmons & Lowell R. Ricketts, *College Inadvertently Increases Racial and Ethnic Disparity in Income and Wealth*, In the Balance (Ctr. for Household Fin. Stability at the Fed. Reserve Bank of St. Louis), Feb. 27, 2017, https://www.stlouisfed.org/publications/in-the-balance/2017/college-inadvertently-increases-racial-and-ethnic-disparity-in-income-and-wealthd; Suzanne Kahn, Mar Huelsman, & Jen Mishory, *Bridging Progressive Policy Debates: How Student Debt and the Racial Wealth Gap Reinforce Each Other* (2019), https://production-tcf.imgix.net/app/uploads/2019/09/06161443/RI_Student-Debt-and-RWG-201908.pdf

levels are higher than those of any other racial or ethnic group.[52] Almost half of Black graduates owe more on their undergraduate loans four years after graduation than they did when they received their degree, compared to 17 percent of white graduates.[53] Twelve years after beginning college, the average white male borrower has *repaid* 44 percent of his loan balance while the average Black female borrower *owes* 13 percent more than she borrowed due to expanding interest.[54] Black and Latino borrowers are also far more likely to attend for-profit colleges,[55] which have a demonstrated history of predatory student lending behavior.[56] And according to analysis of data released by the National Center for Education Statistics, default rates for Black borrowers are higher than for those of their peers.[57] Default also disproportionately impacts borrowers of color: nearly half of Black male borrowers will experience default and Black borrowers default at five times the rate of white borrowers.[58] The consequences of default are real and long-lasting and can impact a borrower's ability to buy a car, buy a house, get a credit card; wages can be garnished; tax refunds—including the Earned Income Tax Credit—can be offset.[59]

These figures suggest that far from providing a launching point for social and economic mobility, structural inequality in higher education and the federal student loan programs is exacerbating social and racial inequality. As a recent report from Education Trust highlighted, "the overwhelming majority of the nation's most selective public colleges are still

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52. Ctr. for Responsible Lending et al., *Quicksand: Borrowers of Color & the Student Debt Crisis* 6 (2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student-debt-crisis-jul2019.pdf.

53. *Id.* (citing Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation*, Brookings Instit. (2016), https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/).

54. Mark Huelsman, Demos, *The Case for Bold, Equitable Student Loan Cancellation and Reform* 10 (2019), https://www.demos.org/sites/default/files/2019-06/Debt%20to%20Society.pdf.

55. *See, e.g.*, Dyvonne Body, *Worse Off Than When They Enrolled: The Consequence of For-Profit Colleges for People of Color*, Aspen Inst. (2019), https://www.aspeninstitute.org/blog-posts/worse-off-than-when-they-enrolled-the-consequence-of-for-profit-colleges-for-people-of-color/.

56. See, e.g., Staff of S. Comm. on Health, Educ., Labor and Pensions, 112 Cong., *For Profit Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* 37 (Comm. Print July 30, 2012).

57. Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, Ctr. for Am. Progress (Dec. 2, 2019), https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers/.

58. *See* Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse Than We Thought*, Brookings Inst. (2018), https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/.

59. *See also, e.g.*, Persis Yu, *Voices of Despair: How Seizing the EITC is Leaving Student Laon Borrowers Homeless and Hopeless During a Pandemic*, Nat'l Consumer Law Ctr. (2020), https://www.nclc.org/images/pdf/student_loans/voices-of-despair-seizing-eitc-in-pandemic.pdf.

inaccessible for Black and Latino undergraduates."[60] Indeed, over the past twenty years, "the percentage of Black students has decreased at nearly 60% of the 101 most selective public colleges and universities."[61] And as of 2015, the percentage of white college-educated graduates exceeds the percentages of Black and Latino graduates in 149 or the country's 150 largest metropolitan areas.[62]

The Department must, therefore, consider using the QA authority to base institutional eligibility on whether an IHE is living up to the promise of the HEA, *i.e.*, whether an institution is advancing equity—and not merely equality[63]—across the racial and socioeconomic spectrum, or is creating larger barriers for Black and Latino students. For example, the Department could condition Direct Loan participation on whether an IHE is enrolling students eligible for Pell Grants at a rate commensurate with enrollments for students who are not Pell-eligible. Such a metric—designed to ensure that an institution is enrolling students from low-income backgrounds in sufficient numbers—could also ensure that institutional completion rates for these populations are sufficiently equivalent; marked deviations could show that institutions are providing insufficient opportunity and support to Pell-eligible populations.[64] Alternatively, or in addition, in light of numerous studies showing a substantial correlation between repayment rate and completion rate,[65] the Department could mandate threshold institutional completion rates for continued Direct Loan participation. Such a metric could consider the relationship of programmatic length to the program-level completion rate. Likewise, the Department could consider attrition rates across

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60. Educ. Trust, *Segregation Forever? The Continued Underrepresentation of Black and Latino Undergraduates at the Nation's 101 Most Selective Universities* 2 (2020), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf.

61. *Id.* at 3.

62. Ron Brownstein & Janie Boschma, *Education Gaps Pose Looming Crisis for U.S. Economy*, The Atlantic (May 20, 2015), https://www.theatlantic.com/politics/archive/2015/05/education-gaps-pose-looming-crisis-for-us-economy/432045/.

63. *See generally* Angela Glover Blackwell, *The Curb-Cut Effect*, Stanford Social Innovation Review (Winter 2017), https://ssir.org/articles/entry/the_curb_cut_effect# (highlighting the importance of policies that promote equity, and not merely equality).

64. *See* Spiros Protopsaltis, *Searching for Accountability in Higher Education*, *supra* n. 45 at 18. Of course, while basing metrics on Pell-eligibility, rather than race, may avoid constitutional considerations, the two cannot be equated.

65. *See, e.g.*, College Board, *Federal Student Loan Repayment Rates Over Time and By Completion Status* (2019), https://research.collegeboard.org/trends/student-aid/figures-tables/federal-student-loan-repayment-rates-over-time-and-completion-status ("Within each sector, completers have higher repayment rates than noncompleters. Completers from the for-profit sector have lower repayment rates than noncompleters from the public and private nonprofit four-year sectors."); Michael Itzkowitz, *Want Students to Pay Down Their Loans? Help Them Graduate*, Third Way (2018), https://www.thirdway.org/report/want-more-students-to-pay-down-their-loans-help-them-graduate ("When examining the loan repayment data across all types and sectors of institutions, one finding is apparent: students who complete college are at least 20 percentage points more likely than non-completers to begin paying down their loan principal at every year of measurement. In fact, after just one year, those who complete college show a loan repayment rate 27 percentage points higher than non-completers, with most students who graduate successfully beginning the process of paying down their loan principal shortly after leaving."); Deanne Loonin & Julie Margetta Morgan, *Aiming Higher: Looking Beyond Completion to Restore the Promise of Higher Education*, 48 J.L. & Educ. 423, 427 (2019).

an institution as a proxy for a failure to meet programmatic objectives or build upon a 2019 legislative proposal with respect to Pell Grants for short term programs, by requiring institutions to show that cohorts of students are graduating at earnings levels above those of the average high school graduate. Such an approach could encourage institutions to increase support and retention programs for Pell-eligible students.

Such proposals could also be considered alongside proposals like repayment rate metrics, in order to ensure that institutions do not avoid repayment rate accountability by limiting enrollment by students who are statistically less likely to repay. Moreover, the Department could also consider whether different metrics—or different thresholds—could be applied to different types of institutions. For example, completion metrics may work well for institutions that tend to offer long-term programs, but not well for those that offer short-term programs. Institutions that serve certain demographic populations, such as community colleges, historically Black Colleges and Universities ("HBCUs") or other Minority Serving Institutions ("MSIs") may be appropriately considered under different thresholds, or have different metrics apply altogether.

Regardless of which of these proposals, or others, are best, the Department has the authority and moral imperative to ensure that the HEA is fulfilling its promise of opportunity, promoting racial equity, and helping advance students socioeconomically.

Quality assurance at the programmatic level

The above discussion considers using the DLA to provide for the implementation of a "quality assurance system" at the institutional level. This, in part, is due to the fact that (i) the DLA—much like the more general Program Participation Agreement—governs institutional participation in the Direct Loan Program; and (ii) the QA authority focuses on whether the "*the institution* is . . . meeting program objectives."[66] Nevertheless, by combining the QA authority with the protect and promote authority, the Department can apply eligibility metrics at the programmatic—rather than institutional—level to ensure that (i) particular programs are meeting the Title IV objectives; and (ii) to protect the interests of the United States.[67]

The Department's recent regulatory efforts support such an approach. First, as discussed above, the Department's protect and promote authority is broad; indeed, in 2016, the authority was relied upon—largely without challenge—to prohibit certain dispute resolution provisions in enrollment agreements. Apart from criticisms regarding the intersection between the Department's protect and promote authority, and the policies embodied in the Federal Arbitration Act, CAPPS never seriously contended that the protect and promote

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66. HEA § 454(a)(4), 20 U.S.C. 1087(a)(4) (emphasis added)

67. HEA §§ 454(a)(4), (6); 20 U.S.C. §§ 1087d(a)(4), (6).

authority, on its own, insufficiently authorized the Department to adopt those policies.[68] And the 2019 Borrower Defense Rule tacitly reaffirmed this authority.[69]

If the Department determines that it protects the interest of the United States to condition programmatic eligibility on programmatic repayment metrics, the Department can readily do so by relying on the protect and promote authority and the QA authority to establish the scope of institution's Direct Loan eligibility. For example, if program level repayment metrics establish that enrollees (or graduates) of that program are not repaying debt at a sufficient level, the Department could consider it in best interest of the United States to refuse to allow students to use Title IV funding to pay for enrollment in that program. The Department can use the QA and protect and promote authorities to establish the metrics, the thresholds for determining compliance, and the sanctions for non-compliance.[70]

Accepting responsibility and financial liability for the failure to perform functions of the Direct Loan agreement through institutional risk sharing

Apart from promoting quality assurance, Congress has also required the Department in the DLA to include provisions requiring an "institution" to "accept responsibility and financial liability stemming from its failures to perform its functions pursuant to the [DLA]."[71] To our knowledge, this has never been expounded upon by regulation, and current regulations and the DLA simply mirror the statute.

The reference to "responsibility and financial liability" for "failures to perform its functions" under the DLA is not the only Title IV provision that allows the Department to require institutions to accept financial liability for failures due to, or resulting from, its participation in a Title IV program. For example, the Department has, under its authority to certify schools as eligible, the authority "to the extent necessary to protect the financial interest of the United States," to require "financial guarantees" from institutions of higher education in order to satisfy any "potential liability" to the U.S. Treasury or student loan borrowers.[72] Relatedly, the HEA also permits the Department to require that individuals

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68. *See supra* n. 30–33 & accompanying text.

69. *See supra* n. 35–37 & accompanying text.

70. Even apart from these authorities, as noted *supra*, the Department "enjoys broad authority 'to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department' and to 'prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.'" *Ass'n of Private Colleges and Univs.*, 870 F. Supp. 2d at 141 (internal citations omitted) (citing 20 U.S.C. § 1221e-3 & 20 U.S.C. § 3474).

71. HEA § 454(a)(3), 20 U.S.C. § 1087d(a)(3).

72. HEA § 498(e)(1)(A), 20 U.S.C. § 1099c(e)(1)(A).

who exercise "substantial control" over an institution of higher education be held *personally liable* for "financial losses to the Federal Government, student assistance recipients, and other program participants for funds under this subchapter, and civil and criminal monetary penalties."[73] And finally, the HEA gives the Department authority, albeit little if ever used, to hold personally liable any person who has substantial control over an institution and who "willfully fails to pay such refund" or "willfully attempts in any manner to evade payment of such refund."[74]

Together, these provisions suggest that Congress was adamant that institutions, owners, and those who exercise substantial control be held financially responsible for losses to the government and students (which include loan discharges like false certification, closed school, and borrower defense) due to the acts of the school. As it relates to HEA § 454(a)(3) (the "financial liability authority"), however, the DLA provisions clearly allow the Department to require an institution to "accept responsibility and financial liability" stemming from failures to "perform its functions pursuant to the [DLA]." And those "functions" can reasonably be read to include assurances that the institution is, as discussed above, "complying with program requirements and meeting program objectives." HEA § 454(a)(4).

Though tied to discussions about reauthorization and amendments to the HEA, policymakers across the ideological spectrum have expressed some interest in institutional "risk-sharing" proposals—*i.e.*, proposals that force colleges and universities to reimburse the government when its students are unable to pay back their Direct Loans. And while the contours of risk-sharing proposals vary widely,[75] the concept is clear: institutions could bear some amount of the financial liability when students fail to repay their loans. Particularly when combined with a repayment rate metric—institutional or programmatic—institutions would be incentivized to ensure that students are repaying their loans.

Of course, a low repayment rate does not mean that an institution has necessarily failed to "perform its functions" pursuant to the DLA (although, as discussed above, it is an indicator of "quality assurance"). Nevertheless, given the Department's ability to tie repayment rate metrics to institutional or programmatic eligibility, and to include other provisions that are "necessary to protect the interests of the United States" and "promote the purposes of" Title IV,[76] the Department could tie these authorities to the financial liability authority and require institutions to agree to a form of financial risk-sharing as a condition of Direct Loan participation, while building in consumer protections necessary to ensure that institutions are not simply steering student loan borrowers away from federal loan programs into third-party loans, institutional loans, or income-share agreements.

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73. HEA § 498(e)(1)(B), 20 U.S.C. § 1099c(e)(1)(B).

74. HEA § 498(e)(6), 20 U.S.C. § 1099c(e)(6).

75. *See, e.g.*, Ben Miller & Beth Akers, *Designing Higher Education Risk-Sharing Proposals* Ctr. for Am. Progress (May 22, 2017), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/05/22/432654/designing-higher-education-risk-sharing-proposals

76. *See supra* n.42.

Similarly, the Department could use this authority to require institutions and individuals "who exercise substantial control over such institution[s]" [77] to acknowledge and accept the fact that the Department can hold such individuals "personally liab[le]" for "financial losses to the Federal Government, student assistance recipients, and other program participants for funds" provided under Title IV, as well as for "civil and criminal monetary penalties authorized" by Title IV. By making individuals acknowledge their own liability for "financial losses" to the government and student loan borrowers, the Department will be placing these individuals on notice and providing a personal incentive to act in a manner consistent with law.

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77. HEA § 498(e)(2)(A), 20 U.S.C. § 1099c(e)(2)(A).

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