July 11, 2018

The Honorable Betsy DeVos
U.S. Secretary of Education
400 Maryland Ave SW
Washington, DC 20202

Dear Madam Secretary:

We are writing to clarify the Department's obligation to reimburse loans disbursed by eligible colleges and universities ("colleges") in the Federal Perkins Loan Program ("Perkins," the "Program," or the "Act") when these institutions have been required by the Act to cancel portions of students' obligations to repay them.

Summary: Since Fiscal Year 2010, the Department has not reimbursed institutions of higher education for the money colleges loaned to students under the Perkins Program when that debt was cancelled pursuant to the terms of the Act. The Perkins statute explicitly mandates that canceled debts be paid by the Department. While the Tucker Act gives colleges the right to sue the Department for those funds, this is not a matter that needs to result in legal action, especially since the Department has repeatedly reiterated its obligation to reimburse institutions.

The Federal Government Has Cancelled Hundreds of Millions of Dollars in Student Obligations to Institutions Under the Perkins Loan Program: The Perkins program (Higher Education Act, Title IV, Part E, at 20 USC 1087aa et. seq.), previously known as the National Defense Student Loan Program, was the first federal student loan program. Perkins is a formula grant program, see., e.g., https://www2.ed.gov/programs/fpl/index.html?exp=0. It required a contribution of funds from participating institutions. Over the years, the required contribution increased from one-ninth to one-third of the amount of that provided by the federal government (1087cc(a)(1)(B)). The program is administered by the participating colleges, which are paid an administrative cost allowance for their work (1087cc(b)).

The federal government has provided in the Act for loan obligations to be cancelled incrementally, to create incentives for former students to enter and remain in professions that, as a matter of national policy, the federal government considers critical (1087ee). Over reauthorizations, the number of such professions and the number of people whose loans are ordered forgiven by the federal government have grown enormously. Nearly $2.5 billion in Perkins Loans have been cancelled for some 2 million borrowers.

Since the federal government stopped reimbursing for student obligations to colleges that were cancelled pursuant to the Act, the federal government has accumulated about $400 million that it owes to those colleges.

The Perkins Act Is Explicit that the Secretary Must Repay Institutions for Institutional Amounts that Were Forgiven Pursuant to the Provisions of the Act, and the Department Has Repeatedly Reiterated Its Obligation to Do So: The Act explicitly provides for the federal government to make good on the institutional funds whose repayment is forgiven, and expects it to do so promptly. In HEA Section 464, 20 USC 1087ee(b), the statute states:

"The Secretary **shall pay** to each institution for each fiscal year an amount equal to the aggregate of the amounts of loans from its student loan fund which are canceled pursuant to this section for such year, … To the extent feasible, the Secretary shall pay the amounts for which any institution qualifies under this subsection not later than 3 months after the institution files an institutional application for campus-based funds." (Emphasis added).

There is no discretion here. This is a mandatory obligation, and the exact amount of payment is specified in the statute. It is not subject to a separate allocation of appropriations. Only its timing is discretionary, and even here, the contemplated time range is noted by the requirement that "to the extent feasible" it be within three months of an institutional application.

While Congress has not made separate appropriations to reimburse the loan cancellations since Fiscal Year 2010, the Department has clearly stated that the cancelled debts are owed by the Department to participating institutions. In an electronic announcement posted on June 4, 2010, FSA stated there would be no reimbursement that year, but that FSA would calculate the 2008-09 reimbursement payment the school should have gotten. It reiterated: "Schools are entitled to reimbursement of the total amount cancelled." (Emphasis added).

As Congress continued to forego specific cancellation appropriations, FSA issued similar notices. As recently as May 4, 2018, FSA reiterated: "Institutions are entitled to reimbursement of the total amount cancelled." (Emphasis added).

Finally, every Program Participation Agreement ("PPA") providing the terms for participation in federal student aid programs is a direct contract between an institution's Chief Executive and the Secretary, which incorporates by reference the law (20 USC 1087aa et seq.) and regulations (34 CFR Part 674) of the Perkins Loan Program.

The Department Remains Liable for this Obligation Even If Congress Has Not Provided Direct Appropriations: From the Supreme Court to the Court of Federal Claims, the courts have held that statutory obligations are not dependent on appropriations.

"[W]hen a statute states a certain consequence 'shall' follow from a contingency, the provision creates a mandatory obligation." *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 36 (2017); *accord National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress's "use of a mandatory 'shall' . . . to impose discretionless obligations."); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion."); *Gilda Industries, Inc. v. United States*, 622 F.3d 1358, 1363 (Fed. Cir. 2010). Additionally, "[i]t has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself

defeat a Government obligation created by statute." *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) (citing to *United States v. Vulte*, 233 U.S. 509 (1914); *Ralston v. United States*, 91 Ct.Cl 91 (1940)).

Most recently, in *Moda Health Plan, Inc. v. United States*, 2017-1994, 2018 WL 2976278 (Fed. Cir. June 14, 2018), the U.S. Court of Appeals for the Federal Circuit reiterated the core principle that a mandatory Government funding obligation exists "independent of any budget authority and independent of a sufficient appropriation to meet the obligation." *Id.* at *8 (reversing lower court judgment in favor of insurers based on provisions of riders included in Affordable Care Act appropriations, which riders are not present in the Department's appropriations here).

The Tucker Act Allows Affected Colleges to Sue to Obtain These Owed Funds from the Government If the Funds Are Not Provided Voluntarily: The Tucker Act, 28 USC 1491, allows suits by parties against the federal government for express or implied contracts with the federal government in the Court of Federal Claims, for breach of those contracts. The court can grant monetary relief and sometimes enjoin the government. Here, the statute could not be more clear; there is an explicit agreement (the PPA), as well as the implied agreement reflected in FSA conduct and statements, and the courts have uniformly held that the lack of appropriations does not deter damages. For purposes of the Tucker Act, grants are treated as contracts. See, e.g., *Thermalon Indus., Ltd. v. United States,* 34 Fed Cl. 411 (1995); *Trauma Service Group, Ltd. v. United States,* 104 F.3d 1321, 1326 (1997).

As a Matter of Policy, The Department Should Make Institutions Whole: The Department has a vital policy interest in making institutions whole on their Perkins outlays. First, Congress has determined that it wants to assure the quality and quantity of the workforce that chooses to provide publicly valued services. Colleges should not be financially punished for partnering with government to meet government or societal needs. There are a number of programs requiring reimbursable outlays which will be affected if partnering non-governmental institutions cannot be sure of the federal commitment.

Second, a number of existing programs administered by the Department already require institutional contributions. By failing to meet its obligations, the Department's decision would result in a loss of institutional funds that would be otherwise available for student aid, as well as a loss of faith in the Department's commitment to meeting other obligations. This would undercut colleges' ability and willingness to participate in existing programs, diminishing the effectiveness of these programs.

Third, Congress and the Administration are considering initiating new higher education assistance programs, or modifying existing programs that would require participating institutions to have "skin in the game." Institutions' willingness to participate will depend on whether the government will live up to its side if the institutions perform well.

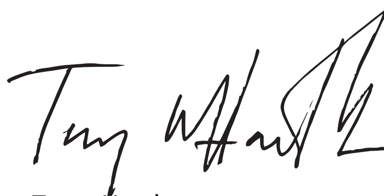
Finally, the Government should not effectively defraud its citizens as the failure to pay here does.

What Should the Department Do: The Senate Fiscal Year 2019 Labor, Health and Human Services, Education and Related Agencies Appropriations bill recently included report language on Perkins that "encourages the Secretary to use any authority granted for reimbursing colleges and universities for cancelled loans for which no reimbursement has been provided" and allowing the use of appropriated funds from the Student Aid Administration account for this purpose. The Secretary should respect the will of Congress in this matter and work to resolve the issue in the manner suggested.

If this course of action is not pursued, there are at least three potential alternative solutions to the Government's default, short of a suit and a court judgment to pay: 1) find funds available to the Department from other areas to pay; 2) ask the White House and OMB for additional funding for cancellation repayments; and 3) obtain permission to ask Congress to restore funding for cancellations, as it provided until FY 2010.

We appreciate your time and attention, and look forward to hearing from you concerning this important matter.

Sincerely,



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