

Congress of the United States
Washington, DC 20510

June 14, 2018

The Honorable Kathleen S. Tighe
U.S. Department of Education
Office of Inspector General
550 12th Street, S.W.
Washington, D.C. 20202

Dear Inspector General Tighe:

We write to bring to your attention additional information regarding Mr. Robert Eitel, a senior counselor to Secretary DeVos, and his potential conflict of interest in the Department of Education's ("the Department") Borrower Defense to Repayment ("borrower defense") and Gainful Employment rules. We also write to ask that you inspect and examine the Department's ethics program to prevent future instances of Department staff with conflicts of interest from influencing federal policies that impact millions of students and student loan borrowers.

A May 2018 report by ABC News revealed that Mr. Eitel played a more central role than previously indicated in the Department's decision to delay the enforcement of borrower defense and gainful employment, and raised questions about whether key Department officials have provided full and complete information to Congress.¹ We have asked the Department on multiple occasions to clarify Mr. Eitel's involvement in decisions around borrower defense, and the Department has failed to provide us with full and complete answers.² For example, the Department has never explicitly confirmed whether or not Mr. Eitel worked on the borrower defense rule while he was on unpaid leave from Bridgepoint Education.

Mr. Eitel's Role in Borrower Defense Rule Decision-Making

Documents obtained by ABC News through an open records request, however, finally begin to provide some clarity regarding Mr. Eitel's actual involvement with the borrower defense rule. These documents show that Mr. Eitel, shortly after finishing his unpaid leave from Bridgepoint Education, was included in a notice of intent to sue by the California Association of Private Postsecondary Schools (CAPPS) on May 22, 2017.³ Nine days later, he was involved in editing

¹ ABC News, "Exclusive: Former for-profit college executive shaped Education Department Policy that could benefit former employers: Documents," May 15, 2018, Erin Dooley, <https://abcnews.go.com/US/exclusive-profit-college-executive-shaped-education-department-policy/story?id=55108981>.

² Letter from Senator Warren to Secretary DeVos, August 15, 2017, https://www.warren.senate.gov/files/documents/2017_08_15_DeVos_letter_Eitel_conflicts.pdf; Letter from Senator Warren and Senator Murray to Assistant General Counsel and Designated Agency Ethics Official Marcella Goodridge-Keiller, May 22, 2017, https://www.warren.senate.gov/files/documents/2017_05_22_Eitel.pdf.

³ Democracy Forward, May 15, 2018, <https://democracyforward.org/wp-content/uploads/2017/11/CAPPS-Letter.pdf>.

and approving the Department's draft rule to delay borrower defense sent to the Office of Management and Budget in response to an email citing the CAPPS lawsuit.⁴ Mr. Eitel's calendar and subsequent emails suggest he also briefed Secretary DeVos, the White House, and Department staff on the decision and timeline to delay the rule, revealing more involvement in the borrower defense rule decision-making than previously disclosed.

Federal ethics law requires federal employees to be "recused" from any "particular matter" in which the individual has a financial interest.⁵ Considering Mr. Eitel's concurrent employment at the Department and Bridgepoint Education between February 13, 2017 and April 5, 2017, and the direct financial interest of Bridgepoint Education on the status of borrower defense and gainful employment, any involvement in the delay or rulemaking of these rules during that time period would appear to be a violation of the law. We have been in communication with the Department's designated ethics official, who has argued that the borrower defense rules do not constitute a "particular matter" involving specific parties that would be necessary for Mr. Eitel's recusal because the rule does not impact a "discrete and identifiable class of persons."⁶ We disagree with this conclusion because both rules apply only to institutions of higher education that participate in the federal student aid program—a clearly discrete and identifiable class of institutions.

Mr. Eitel's Role in Gainful Employment Rule Decisions and Discrepancies with Information Provided to Congress

Discrepancies between what Mr. Eitel and other Department officials told Congress about his role in the gainful employment rule and the actions revealed in the new documents are even more troubling. In an October 2017 letter from the Department, Secretary DeVos stated:

Mr. Eitel raised the question with Ms. Goodridge-Keiller of whether he should recuse himself from consideration of the gainful employment regulation; Mr. Eitel then decided to simply recuse himself on that issue regardless of whether the ethics rules required such a recusal.⁷

In response to questions for the record provided to Representative Krishnamoorthi after a November 14th, 2017 hearing hosted of the House Subcommittee on Healthcare, Benefits, and Administrative Rules, and the House Subcommittee on Intergovernmental Affairs, Mr. Eitel also stated that he "voluntarily recused [himself] from matters relating to the gainful employment regulations."⁸ The Department's Office of the General Counsel also reported this voluntary recusal to Congress in a February 2018 clarification letter to Senator Warren.⁹

But despite informing Congress that he had fully recused himself from matters related to the gainful employment regulation, an open records request revealed three instances where Mr. Eitel

⁴ Democracy Forward, May 15, 2018, <https://democracyforward.org/wp-content/uploads/2017/11/Draft-Rule.pdf>.

⁵ 18 U.S.C. § 208.

⁶ 5 C.F.R. § 2640.103.

⁷ Letter from Secretary DeVos to Senator Warren, October 11, 2017. Attached in Appendix A.

⁸ Questions for Robert Eitel, Questions from Ranking Member Raja Krishnamoorthi, Subcommittee on Healthcare, Benefits, and Administrative Rules, Committee on Oversight and Government Reform. Attached in Appendix A.

⁹ Letter from Assistant General Counsel and Designated Agency Ethics Official Marcella Goodridge-Keiller to Senator Warren, February 16, 2018. Attached in Appendix A.

may have been involved in conversations, meetings, and events pertaining to the gainful employment regulation and the decision to delay it:

- 1) Mr. Eitel's calendar had a May 17, 2017 meeting from 4:30 PM to 5:30 PM titled "Call with [Executive Office of the President] on BD and GE Rulemakings." On his calendar it states: "Please hold this time for a call with EOP on BD and GE rulemaking matters."¹⁰
- 2) Mr. Eitel organized a briefing on March 29, 2017 from 3:30 PM to 5:00 PM titled: "Higher Education Act & Workforce Regulations Presentation," where he invited Ms. Diane Auer Jones to present to the Department's policy, legal, and communications team on: "(1) a history of the HEA and its role in financing vocational, career, and technical education and (2) the gainful employment regulations (their elements and possible suggestions for revision)." Mr. Eitel notes that he would "not participate in the second portion of the discussion regarding GE."¹¹ But Mr. Eitel handpicked a presenter and organized a presentation on the "elements and possible suggestions for revision" relating to the gainful employment regulation.
- 3) Mr. Eitel sent an email to senior department officials on June 13, 2017 at 4:11 PM titled "Regulatory Reset," in which Mr. Eitel writes: "I have attached the draft backgrounder (Rob, be sure to remove the reference to the GE insert when you send over), together with draft talking points."¹²

These documents reveal at least three instances where Mr. Eitel appeared to act in a way that was not consistent with recusal. Nevertheless, during the House Committee on Education and the Workforce hearing on May 22, 2018, Secretary DeVos was unwilling to acknowledge whether or not these documents conflict with Mr. Eitel's various statements and sworn testimony stating that he recused himself from the gainful employment regulation. Instead, in response to questions asked by Representative Krishnamoorthi, she said: "All of my team is very responsible to and responsive to the requirements and the expectations of their ethics agreements, and I am very confident of their following those appropriately and according to all of the rules set therein." This hearing followed an email sent by the Secretary during the week prior that communicated her expectation that Department employees "continue to join me in observing both the letter and spirit of the ethics laws and regulations that govern our conduct as federal civil servants."¹³

We believe the items from Mr. Eitel's calendar call into question whether or not Mr. Eitel actually recused himself from all matters related to the gainful employment regulation. And, we remain concerned that Mr. Eitel may have violated the law by working on either borrower defense or gainful employment while he was simultaneously employed by Bridgepoint and by

¹⁰ American Oversight, March 6, 2018, <https://www.americanoversight.org/document/department-education-political-appointee-calendars-23>.

¹¹ American Oversight, March 6, 2018, <https://www.americanoversight.org/document/department-education-political-appointee-calendars-23>.

¹² Democracy Forward, May 15, 2018, http://democracyforward.org/wp-content/uploads/2017/11/Eitel_CirculatedUpdates.pdf.

¹³ Politico, "Trump's donated salary to help fund aviation camp for girls," May 18, 2018, Michael Stratford, <https://www.politico.com/newsletters/morning-education/2018/05/18/trumps-donated-salary-to-help-fund-aviation-camp-for-girls-222975>.

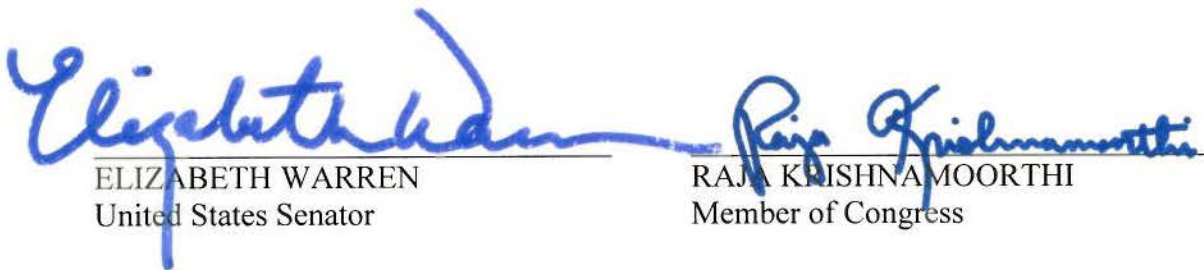
the Department. Most importantly, we are deeply troubled that Mr. Eitel’s questionable compliance with federal ethics rules, including his apparently misleading testimony to Congress, signal a critical breakdown in federal ethics at the Department of Education, which requires urgent attention and remedy.

We, therefore, ask that you:

- Inspect the issues and events surrounding Mr. Eitel’s involvement with the gainful employment and borrower defense rules, given this newly revealed information, and assess whether appropriate action was taken by Mr. Eitel or other individuals charged with executing the Department’s ethics program,
- Provide clarity as to what constitutes legitimate and full “recusal” in this context,
- Examine the Department of Education’s entire federal ethics program to determine if it ensures that Department employees are “observing both the letter and spirit of the ethics laws and regulations that govern [the] conduct as federal civil servants,” and
- Provide a briefing to our staff on your findings and on whether additional action is necessary to remedy the critical failures in the Department’s ethics program.

If you have any questions, please contact Josh Delaney in Senator Warren’s office at (202) 224-4543 or Brian Kaissi in Representative Krishnamoorthi’s office at (202) 225-3711. Thank you for your attention to this matter.

Sincerely,



ELIZABETH WARREN
United States Senator

RAJA KRISHNA MOORTHY
Member of Congress