

Congress of the United States

Washington, DC 20515

May 24, 2023

Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Dear Secretary Cardona:

The Committee on Oversight and Accountability and the Committee on Education and the Workforce are investigating the Department of Education’s (“Department”) decision to discharge at least \$6 billion in student loans for over 200,000 borrowers through a class action settlement in *Sweet v. Cardona*.¹ The Department’s handling of this case has evolved significantly over the course of two administrations, raising serious questions about the Biden administration’s motivation to pursue a massive settlement that extends well beyond the relief initially sought by plaintiffs. Facts surrounding the *Sweet v. Cardona* litigation suggest the Biden administration may be working indirectly through the settlement to bypass lawful processes to fulfill student loan bailout promises made by the President. With this letter, we request documents and information to assist with our oversight of this massive student loan debt transfer scheme.

Under the *Higher Education Act of 1965*, the Department oversees federal student loan programs, and it must specify through regulation a process by which borrowers may assert a defense to loan repayment due to certain acts or omissions by institutions of higher education.² This is known as Borrower Defense to Repayment (“BDR”). Plaintiffs in *Sweet v. Cardona* (formerly *Sweet v. DeVos*) initially sought to require the Department to adjudicate promptly outstanding BDR claims on their merits.³ The Department eventually resumed adjudication of BDR claims, leading the government to argue that the plaintiffs’ claims in *Sweet v. Cardona* were moot and “must be dismissed.”⁴ However, three years after the case was filed, the Department abruptly changed course. Rather than continue to process BDR applications on the merits of each claim, the Department joined with the plaintiffs in the case to request the court approve a blanket settlement to discharge student loans for class members who attended any of

¹ *Sweet, et al. v. Cardona, Sec. of Ed., et al.*, 2022 WL 16966513, (N.D.Cal. Nov. 16, 2022); see also, *Sweet, et al. v. Cardona, Sec. of Ed., et al.*, No. 3:19-cv-03674-WHA, Order Re Motion to Stay Judgment Pending Appeal, Doc. 382 (Feb. 24, 2023); stay denied, *Everglades College, Inc. et al. v. Cardona, Sec. of Ed., et al.*, 598 U.S. ___, No. 22A867 (April 13, 2023).

² 20 U.S.C. §1087e(h).

³ “Class Action Complaint for Declaratory and Injunctive Relief” at 61, *Sweet v. Devos*, Case No. 19-cv-03674 (filed June 15, 2019).

⁴ “Defendants’ Notice of Motion, Cross Motion for Summary Judgment, Opposition to Plaintiffs’ Motion for Summary Judgment, and Motion to Decertify Class,” at 1, *Sweet v. Cardona*, Case No. 3:19-cv-03674-WHA (filed Jun. 23, 2022) (citing *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016-17 (9th Cir. 2012)).

over 150 listed schools.⁵ This settlement will require automatic discharge of student loans for approximately 200,000 borrowers and amount to \$6 billion.⁶

The Department's position in *Sweet v. Cardona* is very concerning and raises questions about whether it was improperly influenced by political considerations and conflicts of interest. Given the Supreme Court is likely to declare unlawful the Biden administration's student debt transfer scheme to discharge up to \$20,000 of loans for most borrowers,⁷ the Department appears to be seeking legally dubious alternative avenues to make good on President Biden's campaign promise to cancel federal student debt.⁸ Overall, the administration has approved BDR loan discharges of roughly \$14.5 billion and without due consideration to all requirements of the law.⁹ For example, nowhere in the Higher Education Act text does it refer to BDR group or class action-type claims.¹⁰ Further, we are concerned about the potential coordination between the Department and plaintiffs in *Sweet v. Cardona* to engineer a mutually desired outcome at the expense of taxpayers and institutions of higher education. Courts should endeavor to resolve actual controversies between truly adversarial parties, rather than serve as unwitting tools to advance a political agenda.

Yet, close analysis of the parties in *Sweet v. Cardona* reinforces our concerns that the Biden administration is hijacking the court system to enact a radical student loan cancellation agenda. For example, Toby Merrill, a Biden political appointee who joined the Department in 2021 as Deputy General Counsel for Postsecondary Education, "founded and directed the Project on Predatory Student Lending [PPSL] at the Legal Services Center of Harvard Law School" whose attorneys represented the *Sweet v. Cardona* plaintiffs.¹¹

Ms. Merrill's current responsibilities at the Department closely align with her past responsibilities as founder and director of PPSL, as well as with the current mission of PPSL. As Deputy General Counsel for Postsecondary Education, Ms. Merrill oversees a division that is responsible for: (1) legal services in connection with court litigation, including development of litigation positions; preparation of documents for submission in court, and explanations of cases to the Department of Justice; (2) formal and informal advice to various units of the Office of the Secretary and the Office of Postsecondary Education; (3) the drafting and review of legislation,

⁵ Announcements: *Sweet v. Cardona* Settlement, U.S. DEPT. OF EDUC.—FEDERAL STUDENT AID, available at <https://studentaid.gov/announcements-events/sweet-settlement> (accessed April 26, 2023).

⁶ Danielle Douglas-Gabriel, *Education Dept. begins forgiving some student loans after \$6B settlement*, WASH. POST (Mar. 3, 2023).

⁷ Annie Nova, *Supreme Court will rule against Biden's student loan forgiveness plan, legal experts predict*, CNBC (Apr. 22, 2023).

⁸ See e.g., Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt"*, FORBES (Oct. 7, 2020).

⁹ "Joint Response to Nov. 4, 2022 Order" at 2, *Sweet v. Cardona*, No. 3:19-cv-0367-WHA (N.D. Cal.); Press Releases, *U.S. Department of Education Approved \$42 Billion in Public Service Loan Forgiveness for More than 615,000 Borrowers Since October 2021*, U.S. DEPT. OF EDUC. (May 8, 2023), <https://www.ed.gov/news/press-releases/us-department-education-announces-42-billion-approved-public-service-loan-forgiveness-more-615000-borrowers-october-2021>.

¹⁰ See generally, the Higher Education Act of 1965 (20 U.S.C. § 1001 et. seq) and § 455(h) of the Higher Education Act (20 U.S.C. § 1087e(h)).

¹¹ Toby Merrill, U.S. DEPT. OF EDUC.—OFFICE OF THE GENERAL COUNSEL (June 14, 2022), available at <https://www2.ed.gov/about/offices/list/ogc/merrill.html> (accessed April 26, 2023); see also *supra* note 3 at 56.

regulations, preambles, responses to public comment, and participation in public hearings necessary for the development of regulations for the Department; (4) legal services related to the conduct of administrative proceedings (e.g., audit appeals and limitation, suspension, and termination proceedings), including the presentation of cases before the Administrative Law Judges or other responsible presiding officers; and (5) legal advice on student loan default cases and bankruptcy cases.¹² It is not clear to what extent Ms. Merrill's appointment as Deputy General Counsel for Postsecondary Education has influenced the Department's litigation positions in *Sweet v. Cardona*, or whether she recused herself from this matter. The Department's failure to provide clarity suggests a serious conflict of interest.¹³

To assist the Committees in conducting oversight of the Department's efforts to bail out student loans through various means, we request the following documents and information, covering the period January 20, 2021, through the date of your response, no later than two weeks from the date of this letter:

1. All documents and communications regarding the Department's decision to agree to the *Sweet v. Cardona* settlement agreement, including but not limited to any communications between the Department and other federal agencies or third parties related to the settlement agreement.
2. All documents and communications between the White House and the Department regarding the Department's legal and policy positions in *Sweet v. Cardona*.
3. All documents and communications regarding the Department's handling of BDR claims outside of the *Sweet v. Cardona* settlement agreement, including but not limited to any communications between the Department and other federal agencies or third parties related to the handling of BDR claims.
4. All documents and communications between the White House and the Department regarding the Department's handling of BDR claims outside of the *Sweet v. Cardona* settlement agreement.
5. All ethics pledges, ethics pledge waivers, ethics agreements, and any outside activity requests pertaining to Department officials who performed work on the *Sweet v. Cardona* settlement agreement or BDR matters, including but not limited to those pertaining to Deputy General Counsel for Postsecondary Education Toby Merrill.
6. All documents and communications regarding any decision by any Department official to recuse or decline to recuse such official from work related to the *Sweet v. Cardona* case or BDR matters, including any such decision by Deputy General Counsel for Postsecondary Education Toby Merrill.

¹² Principal Office Functional Statement, Office of the General Counsel, U.S. DEPT. OF EDUC., <https://www2.ed.gov/about/offices/or/fs/ogc/prs.html> (accessed May 8, 2023).

¹³ With the announcement of Ms. Merrill's appointment on July 6, 2021, the Department has had more than 22 months to bring clarity to this matter.

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7. All documents and communications regarding any outside activity request of Toby Merrill.

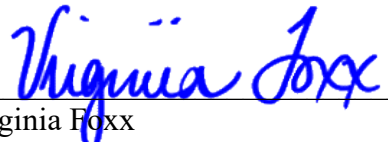
To arrange for the delivery of responsive documents or ask any related follow-up questions, please contact the Committee on Oversight and Accountability at (202) 225-5074 or the Committee on Education and the Workforce at (202) 225-4527. Attached are instructions for producing the documents and information to the Committees.

The Committee on Oversight and Accountability is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate “any matter” at “any time” under House Rule X. Further, the Committee on Education and the Workforce has legislative and oversight jurisdiction over the “organization, administration, and general management of the Department of Education” as well as over education matters described in the Rules of the Committee on Education and the Workforce and the Rules of the House of Representatives, 118th Congress.

Sincerely,



James Comer
Chairman
Committee on Oversight and Accountability



Virginia Foxx
Chairwoman
Committee on Education and the
Workforce

cc: The Honorable Jamie Raskin, Ranking Member
Committee on Oversight and Accountability

The Honorable Robert “Bobby” Scott, Ranking Member
Committee on Education and the Workforce