

Questions for the Record from Senator Elizabeth Warren

1. Are Title IV dollars taxpayer dollars? Describe your view on the Department of Education (ED)'s responsibilities when it comes to the use of taxpayer dollars, including dollars distributed under Title IV of the Higher Education Act?

Yes, title IV dollars are taxpayer dollars; however, it would not be appropriate at this time for me to comment on matters relating to what the Department's responsibilities are in this or any other matter, other than to say that the Department must follow the law. Should I be confirmed, I will, in my role as General Counsel, provide advice and counsel on matters of legal interpretation and will not be in a policy development role.

2. Under what circumstance would you recommend the Secretary take administrative action against an institution of higher education?

The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case are the bases on which I will make a decision as to how best to advise the Secretary.

3. Under what circumstances would you recommend the Secretary withhold or cease Title IV funding from an institution of higher education?

- a. Would such circumstances include:

- Northwestern Polytechnic University: Operated as a Potemkin college that changed failing grades by hand and faked classes when it was visited by regulators.¹
- FastTrain College: A college whose owner used exotic dancers to recruit students and was sent to jail for committing fraud in the federal aid programs.²
- American Commercial College: A college sued by the Department of Justice for lying about the percentage of its revenue received from the U.S. Department of Education. Following the suit, the college's owner was sentenced to 24 months in prison and ordered to repay \$975,000 after pleading guilty to theft of federal financial aid.³
- Anamarc College: A college that was raided by the FBI in 2014 after an abrupt closure. Family members of the college's owners were later sued and settled a lawsuit for stealing more than \$450,000 from the school.⁴
- Computer Systems Institute: A college that was denied re-certification to participate in federal student aid programs in 2016 for falsifying job placement rates.⁵

¹ https://www.buzzfeed.com/mollyhensleyclancy/inside-the-school-that-abolished-the-f-and-raked-in-the-cash?utm_term=.dejq5OZW#.mrPb62WEy

² <http://www.miamiherald.com/news/local/education/article46253760.html>

³ <https://www.justice.gov/usao-ndtx/pr/american-commercial-colleges-inc-and-its-president-plead-guilty-federal-charges>

⁴ <http://www.elpasotimes.com/story/news/2015/10/23/anamarc-embezzlement-lawsuit-bankruptcy-college/74485836/>

⁵ <https://studentaid.ed.gov/sa/sites/default/files/csi-denial-letter.pdf>

The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case are the bases on which I will make a decision as to how best to advise the Secretary.

4. Are there examples where the previous Administration took administrative action or withheld Title IV funding where you believe that the actions were unjustified or exceeded appropriate authority? If so, please list those examples.

It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

5. Are there examples where the previous Administration took such action, and you believe that doing so was justified and where you would recommend taking similar action? If so, please list those examples (2 - 3 examples).

It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

6. Do you have any examples of instances when the previous Administration should have taken action, but didn't? If so, please list them.

It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

7. Based on what you know in the public record, how would you evaluate how the previous Administration handled Corinthian?

It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

8. Based on what you know in the public record, how would you evaluate how the previous Administration handled ITT Technical Institute?

It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

9. How would you advise the Secretary if your office received clear evidence that a school had violated the Higher Education Act or its Program Participation Agreement?

If the General Counsel's office were to receive any such information, I would first bring it to the attention of the unit within the Department responsible for regulating the institution at issue. My legal advice would necessarily depend on the law, regulations, policies, contract or other authority applicable to the facts and circumstances at issue.

10. How would you advise the Secretary if your office had or received clear evidence that a school made material and substantial misrepresentations to students?

If the General Counsel's office were to receive any such information, I would first bring it to the attention of the unit within the Department responsible for regulating the institution at issue. My legal advice would necessarily depend on the law, regulations, policies, contract or other authority applicable to the facts and circumstances at issue.

11. Can you provide an example of a substantial misrepresentations from a college that would constitute fraud in your legal opinion?

One example of substantial misrepresentation that comes to mind is presented in the Fasttrain Corporation case. I have attached key documents in that case for easy reference.

12. What penalties do you believe are appropriate for an institution of higher education is deliberately misleading students with inaccurate statistics or marketing?

The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case are the bases on which I will make a decision as to how best to advise the Secretary.

13. What is your view of the *Administrative Procedures Act* (APA)? Once a regulation has been promulgated through the proper APA notice and comment process (and negotiated rulemaking, when appropriate), is that regulation considered law?

The Administrative Procedure Act provides the relevant definition of the term "rule" in section 551, and prescribes the process for agencies to follow in issuing such rules in section 553. If I am confirmed as General Counsel, I will advise the Secretary to follow the provisions of the APA and other relevant laws in promulgating and implementing Department regulations.

14. In your legal opinion, does a Secretary have the legal authority to not enforce a regulation that has been properly promulgated? If so, in what specific circumstances is this legal?

It would not be appropriate for me to opine on an enforcement issue without knowing all of the facts and circumstances.

15. Can the Secretary unilaterally delay implementation of an entire regulation that has been properly promulgated?

It would not be appropriate for me to opine on an implementation issue without knowing all of the facts and circumstances.

- a. Parts of a regulation?

It would not be appropriate for me to opine on an implementation issue without knowing all of the facts and circumstances.

- b. Under what circumstances can the Secretary delay the implementation of an entire regulation?

It would not be appropriate for me to opine on an implementation issue without knowing all of the facts and circumstances.

16. In negotiated rulemaking, if 90% of the rulemaking committee agrees on 90% of the rule, but failed to reach consensus, in your legal view, how should the Department take that into consideration as it drafts the rule?

It would not be inappropriate for me to comment on this matter without knowing the specific facts and circumstances.

- a. When drafting a rule after a failed negotiated rulemaking session, is it legally appropriate for the Department to diverge from the consensus view of particular provisions that may have emerged during negotiated rulemaking?

It is my understanding that the Department conducts negotiated rulemaking pursuant to relevant statutory requirements, and I would advise the Secretary to follow such requirements, including those pertaining to consensus agreements reached by the negotiators and the issuance of proposed rules.

17. What action would you recommend the Secretary take if you discovered that an employee of the Department violated federal ethics laws?

Without knowing the nature of the violation, the specific facts, and any relevant precedents, it is not possible to state in advance what my advice to the Secretary would be in such circumstances.

18. What is your understanding of “particular matter” versus a “particular matter involving specific parties” in federal ethics law?

In the absence of a formal ethics briefing by the Department’s Designated Agency Ethics Official, I respectfully decline to speculate on the legal meaning and definition of those terms.

19. What constitutes, in your legal opinion, “the appearance of impropriety”?

If confirmed, I will seek guidance from the Department’s Designated Agency Ethics Official to determine how that legal term is defined under any applicable law, regulation, or policy.

20. How would you advise Department officials to avoid “the appearance of impropriety”?

If confirmed, I will advise Department officials to seek out and follow guidance from the Department's Designated Agency Ethics Official concerning appearances of impropriety.

21. Beyond what may be required by law, what specific recusals will you commit to avoid "the appearance of impropriety"?

If confirmed, I will follow the federal ethics laws and the guidance provided by the Department's Designated Agency Ethics Official pertaining to any appearance of impropriety.

22. Do you believe that your involvement at the Department on those matters of policy that affect CEC could create "the appearance of impropriety"?

If confirmed, I will follow the federal ethics laws and guidance provided by the Department's Designated Agency Ethics Official that address appearances of impropriety.

23. Pursuant to President Trump's "Ethics Commitment by Executive Branch Appointees" Executive Order, you pledged to, for a period of two years, refrain from participating "in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."⁶ Do you commit to recusing yourself from any matter, "including regulations and contracts," that is "directly and substantially" related to your former client Career Education Corporation (CEC)?

If confirmed, I will abide by the requirement of the my ethics pledge, follow the guidance provided by the Designated Agency Ethics Official, including recusals, and work with the Designated Agency Ethics Official on an ongoing basis to ensure I am in compliance with all ethics rules and laws.

24. What is your understanding of the meaning of phrase "directly and substantially" in this context?

In the absence of a formal ethics briefing from the Department's Designated Agency Ethics Official, I respectfully decline to speculate on the legal meaning and definition of this term.

25. Please list any other former employers or clients, besides CEC, that provide educational services or own companies that provide educational services.

My education-related clients at McGuireWoods have been Florida State University, the University of Florida, Career Education Corp., McGraw-Hill Education, and ACT. My work for McGraw-Hill and for ACT was minimal (less than three hours for each client), took place entirely in 2014, and did not involve the U.S. Department of Education. The

⁶ <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>

McGraw-Hill matter involved Oklahoma state government, and the ACT matter involved Florida state government.

In 2009 and 2010, while in private practice at Bancroft Associates, I performed legal work for Strayer University, a client of the firm.

In 2003-2005, while in private practice at GrayRobinson, I performed legal work for the Florida Department of Education, a client of the firm.

26. If you are confirmed, the Department's agency ethics official will report to you. What steps will you take to ensure that the ethics official's decisions are and appear to be independent and are not and do not appear to be conflicted with your personal interests or those of the Secretary?

If confirmed, I will work with the Department's Designated Ethics Official to handle any potential ethics violations by employees of the Department in the same manner I would for any other rule violation by an employee of the Department, and I commit to following the proscribed procedures and protocols for handling such matters.

I will encourage Department employees to seek guidance from the Department's ethics officials regarding federal ethics rules and for conflict of interest matters.

27. Would you ever overrule a decision or recommendation made by the agency ethics official regarding the recusal of a Department employee?

- a. If so, under what circumstances would this be appropriate, and what would you do to avoid the appearance of impropriety in such circumstances?

In the absence of formal ethics briefing from the Department's Designated Agency Ethics Official, it is not possible to speculate or predict my decision on future and unknown legal matters that may be brought to my attention for review. If confirmed, I will work with the Department's Designated Ethics Official to address these matters in the same manner I would for any other brought to my attention for review, and I commit to following the proscribed procedures and protocols for handling such matters.

28. Do you believe that the Higher Education Act provides defrauded students the right to have their entire loan discharged?

Under the Higher Education Act, student loan borrowers may be eligible for borrower defense to repayment forgiveness of federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain state laws.

29. In your hearing, in a response to a question from Senator Hassan, you stated that "depending on the specific case, arbitration may or may not be beneficial" for defrauded

students seeking relief. If this is true, do you believe that schools should be permitted to force students into arbitration?

If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I would defer to policymakers on that point.

30. Do you believe that defrauded students should have the choice to arbitrate or attempt litigation? If not, why not?

If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. On policy issues, I would defer to the policymakers.

31. Do you believe the Department has the legal authority to prohibit intuitions of higher education from forcing students into pre-dispute arbitration agreements?

If I am confirmed as General Counsel, I intend to review this and other legal issues relating to borrower defenses to repayment of student loans closely. At this time, I have not formed an opinion.

32. If two borrowers are similarly situated—they attended the same program at the same time, and they both allege that their school broke the law, and the Department has clear evidence to corroborate the borrowers' allegations that the school engaged in unlawful activity, should both borrowers receive a discharge? Should the discharge be the same? If no, then why not? Under what circumstances would it be appropriate for these borrower to not receive the same relief?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

33. Consider the two borrowers in question 34: if borrower A received a borrower defense discharge, is borrower B legally entitled to the same relief? Why or why not?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

34. Consider the two borrowers in question 34: If Borrower A obtained a well-paying job, but Borrower B did not, are they still entitled to the same relief for the fraudulent loans?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

35. Does the employment outcome of the borrower matter if they both paid for the same fraudulent product?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

36. Is it legally appropriate for the Department to collect loans for which the Department has clear evidence that such loans were fraudulently made?

Under the law, student loan borrowers may be eligible for borrower defense to repayment forgiveness of federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain state laws.

37. Is it legal for the Department to treat borrowers differently based on race? Gender? National origin? Religion?

Section 421(a)(2) of the Higher Education Act bans discrimination on the basis of race, national origin, religion, sex, marital status, age, or handicapped status.

38. Under what specific circumstances is it legally appropriate for the Department to treat defrauded borrower A differently from defrauded borrower B? Under what specific circumstances specific circumstances is it legally appropriate for the Department grant borrowers A and B unequal protection under the law?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

39. Can you please explain Attorney General Bondi's decision not to investigate Trump University?

- a. Were you involved in that decision?
i. If not, were you aware that it was being made?
ii. To your knowledge, who was involved?

Consistent with office practice for a matter of this nature, career consumer protection staff determined how to respond to any complaints involving Trump University, including whether to open an investigation. I first learned from a media inquiry in August 2013 that the New York attorney general had sued Trump University. It was only as a result of the media inquiry that I learned of the existence of Trump University and of the Florida Attorney General's office's handling of any complaints involving that entity or any other Trump-related entity. Based on the facts and circumstances, I believed in 2013 that the office's handling of the matter was appropriate, and I continue to believe that today.

- b. To your knowledge, what factors were considered in the decision not to investigate Trump University?

To my knowledge, the office's handling of this matter was based primarily on the following factors: the small number of complaints received by the office (the office receives at least 70,000 consumer complaints in a typical year); the fact that Trump University had ceased operating in Florida in 2010; and the fact that the New York lawsuit was seeking relief for all allegedly harmed consumers, regardless of their state of residence.

- c. When that decision was made, were you aware of Donald Trump's campaign contributions to AG Bondi?⁷

To the best of my recollection, I learned of the political contribution when it was first reported in the press in September or October 2013. To the best of my recollection, the career consumer protection staff had already determined how to handle the Trump University matter before the political contribution was reported in the press.

- d. To your knowledge, was anyone else in the office aware of those contributions?

I cannot speak to what others in the office might have known about the political contribution or when they knew it

- e. To your knowledge, were those contributions discussed in the decision making process?

To my knowledge, no.

40. Given your role in AG Bondi's office at the time of the decision not to investigate Trump University and Bridgepoint, do you believe that your involvement in matters of policy that materially and substantially affect those organizations could create the appearance of impropriety? If not, why not?

To be clear, I am not aware of anyone in the Florida Attorney General's office deliberating whether to investigate Bridgepoint Education/Ashford University during my tenure in that office. Given the limited nature of my involvement in anything having to do with Trump University or Bridgepoint Education, I do not believe that my "involvement in matters of policy that materially and substantially affect those organizations could create the appearance of impropriety." That said, if confirmed, I will seek and follow the advice of the Department's Designated Agency Ethics Official regarding any ethics issues, including issues involving an appearance of impropriety.

41. Please discuss your views on the role of Congress in conducting oversight of the Department of Education.

I fully appreciate and respect the oversight responsibilities of members of Congress, and in particular, the oversight role of the Department's Committees of jurisdiction and

⁷ <https://www.nytimes.com/2016/09/15/us/politics/pam-bondi-donald-trump-foundation.html>

their corresponding need for information to fulfill their legislative duties. If confirmed I will, in my role, work with staff to ensure responsiveness to oversight requests.

42. In your confirmation hearing, you noted that you were unfamiliar with certain law enforcement matters by the Department of Justice, the Federal Trade Commission, and the Consumer Financial Protection Bureau where one of the Education Department's contracts was found to be engaged in misconduct. In 2014, the Federal Deposit Insurance Corporation and the Department of Justice found that Navient had violated the Servicemember Civil Relief Act, overcharging 78,000 members of the military.⁸ The violations implicated private, FFEL, and Direct Loans. In a letter from the Department to the CFPB terminating certain law enforcement-related information sharing agreements, the Department wrote: "The Department has full oversight responsibility for federal student loans."⁹

In your confirmation hearing, you stated that you would respect the rights of federal and state agencies to exercise their respective enforcement authorities. Do you disagree with the Department's assertion that it has "full oversight responsibility," since it does not enforce all laws that companies like Navient must comply with?

It would not be appropriate for me to comment on positions taken by the Department while I am not aware of all of the facts and circumstances.

43. In the past, ED's Office of General Counsel (OGC) attorneys have worked closely with other law enforcement agencies to enforce laws where ED has no jurisdiction, like federal unfair, deceptive, abusive acts and practices laws, the False Claims Act, or the Servicemember Civil Relief Act, for example. Will you commit to recommending the Secretary maintain information and evidence sharing relationships with those agencies responsible for enforcing federal laws for which they have jurisdiction—particularly when alleged violations involve an ED contractor or a Title IV participating institution of higher education?
- a. Under what circumstances would you recommend referring evidence to the Department of Justice?
 - b. The Consumer Financial Protection Bureau (CFPB)?
 - c. The Federal Trade Commission?

If I am confirmed as General Counsel, I will recommend that the Department continue its practice of sharing information and evidence as appropriate with federal agencies responsible for law enforcement.

⁸ <https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging>

⁹ https://edworkforce.house.gov/uploadedfiles/2017-09-01_signed_letter_to_cfpb.pdf

44. Does the CFPB, in your legal opinion, have the authority to enforce federal consumer protection laws (including *The Dodd–Frank Wall Street Reform and Consumer Protection Act* and *Fair Debt Collection Practices Act*) on federal student loan servicers and contractors?

I have not reviewed the CFPB's legal authorities with respect to federal student loan servicers and contractors but am looking forward to reviewing these issues if I am confirmed as General Counsel.

45. What is your view on enforcement of the *False Claims Act* (FCA)? What would you do if your office had evidence that an institution of higher education had violated the FCA in order to receive Title IV funds?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

46. The Consumer Financial Protection Bureau, the Illinois Attorney General, and the Washington Attorney General have all sued Navient for a wide range of violations. Courts have rejected Navient's motions to dismiss. Can you clearly state that the CFPB and the states are well within their rights to bring enforcement actions under laws delegated to them by Congress and their state legislatures? Will you commit to ensuring that the Department will not seek to undermine investigations by federal and state agencies?

States have the responsibility of enforcing their own consumer protection laws in higher education, except to the extent those laws are pre-empted by federal education laws. If I am confirmed as General Counsel, I will recommend that the Department continue its practice of sharing information and evidence as appropriate with federal agencies responsible for law enforcement.

47. When the Department conducts oversight and prepares reports on schools and financial institutions, do you acknowledge that it is well within the bounds of the law for this information to be shared with other federal and state agencies, especially when potential wrongdoing is detected?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

48. Earlier this year, Secretary DeVos revoked memoranda that instructed procurement officials to closely consider the past performance, including regulatory infractions, when selecting contractors. How will you ensure that the Department is properly guarding against hiring of contracts with a history of breaking the law?

It would not be appropriate for me to comment on positions taken by the Department while I am not aware of all of the facts and circumstances.

49. In 2009, the Education Department's Inspector General found that a subsidiary of Sallie Mae (now Navient) overcharged the Department by \$22.3 million. Subsequently, the Department's staff concurred with this finding. Nearly 8 years later, the matter has still been unresolved. Why was Navient granted numerous appeals in this matter?

As I do not work at the Department, I cannot comment on this matter.

50. If confirmed, will you commit in your first 90 days to recommending that Secretary issue a final order, offset other payments to Navient, or pursue payment in litigation?

It would not be appropriate for me to comment on a matter that is currently the subject of pending litigation.

51. Navient recently announced the purchase of a large portfolio of loans owned by Wells Fargo, increasing its dominant share in the FFEL loan market. Do you believe the Department has the authority to block sales of FFEL loans?

It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

52. In February 2015, the Department announced that it found violations of law by several student loan debt collectors. Many of these collectors sued the Department. As General Counsel, will you commit to vigorously defending the Department's right to wind down contracts due to poor performance or violation of law?

In my capacity as General Counsel, I will advise the Department to take all legally necessary actions, and I will do my part to vigorously defend the Department as necessary in all legal matters.

53. As General Counsel, will you commit to personally providing regular briefings to the HELP Committee or any interested member office on ensuring compliance with Department contracts, especially those related to the Office of Federal Student Aid?

If confirmed, I will work with my colleagues in the Office of Legislation and Congressional Affairs to be responsive to any briefing requests from members of the HELP committee or other Congressional offices, whenever participation by the Office of General Counsel is requested or appropriate.

54. In your legal opinion, does an agency have the authority to promulgate non-regulatory guidance to clarify its thinking on an issue?

Yes.

55. What is your opinion on negotiated rulemaking vs. traditional notice and comment rulemaking? What are the advantages and disadvantages of both?

I believe that both negotiated rulemaking and traditional notice-and-comment rulemaking are valuable for obtaining public input on the development of regulations, and I look forward to advising the Department with regard to both processes should I be confirmed.

56. Do you believe that under the Higher Education Act, institutions of higher education that are currently unaccredited or seeking accreditation, which were previously accredited by ACICS, have only 18 months to find a new accreditor or lose access to Title IV dollars?

It would not be appropriate for me to provide my opinion on a matter before my potential future client. If confirmed, I look forward to working with the Secretary on these issues.

57. Do you commit to recommending to the Secretary that the Department of Education follow the law and halt Title IV dollars to institutions (discussed in question 56) that are unable to find another accreditor by the end of the 18 month period?

If confirmed, in my position as General Counsel I will provide advice and counsel on matters of legal interpretation. As I said during my confirmation hearing, the basis for my activity is following the rule of law. I have and will continue to advise my clients as such.

If you have any questions, then please contact Josh Delaney in my office at (202) 224 – 4543.