COMMITTEE ON
EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 20, 2024

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

Dear Secretary Cardona:

As the Department of Education (Department) is well aware, the Committee on Education and the Workforce (Committee) served subpoenas on five student loan servicers on August 29, 2024, with compliance deadlines of September 5, 2024.[1] The subpoenas sought documents and communications associated with loan servicing conducted for the Office of Federal Student Aid related to the Department's Notice of Proposed Rulemaking on Student Debt Relief, 89 Fed. Reg. 27564 (Apr. 17, 2024), and any related final regulation arising from it.[2] The Department has repeatedly sought to interfere with the Committee's efforts to obtain documents and communications in a timely manner from the loan servicers.[3] Not only has the Department interfered with the Committee's ability to conduct oversight, but it has also failed to answer the Committee's prior inquiry of August 14, 2024 seeking information about the timing of the Department's regulation promoting additional student debt relief.

The Committee received a letter from Lisa Brown, the Department's General Counsel, on September 5, 2024, contending that the loan servicers' responses to the subpoenas "must receive

[1] Letters, Subpoenas, Proofs of Service, Schedules of Documents, and Instructions for Responding to a Subpoena from Chairwoman Virginia Foxx of the Committee on Education and the Workforce to student loan servicers Central Research, Inc., EdFinancial Services, Maximum dba Aidvantage, Missouri Higher Education Loan Authority, and Nelnet Servicing, LLC. (Aug. 29, 2024) (on file with Committee).
[2] *Id.*
[3] *See* Article I of the U.S. Constitution; *Watkins v. United States*, 354 U.S. 178, 187 (1957) (The "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (The "scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); Rule 3, Rules for the Committee on Education and the Workforce, Comm. Prt. 118-A, 118th Cong., at 2 (Jan. 31, 2023); and Rule X, Clause 2, Rules of the U.S. House of Representatives, 118th Congr., at 7 (Jan. 10, 2023).

prior approval from the Department's contracting officer (or his or her designee)."[4] The letter cited a term in the loan servicers' contracts with the Department as its legal authority to review and approve all responses prior to submission to Congress.[5] However, a contract term does not override Article I of the U.S. Constitution, nor does a contract provide legal authority to interfere with or otherwise delay a third party's mandatory response to a lawfully issued congressional subpoena.[6] Under threats being leveled by the Department, the loan servicers did provide responsive documents to the Department for its review prior to the subpoena deadline of September 5, 2024, but none of these documents were "approved" by the subpoena deadline. Now, fully 15 days later, still only a minimal number of documents or data have received "approval" by the Department for the servicers' submission to the Committee. This is unacceptable and contrary to General Counsel Brown's commitment to "expedite responses to the subpoenas."[7]

In addition to Brown's letter, Committee staff had at least three conference calls (September 9, 11, and 13) with the Department's staff to resolve the documents impasse. Committee staff repeatedly pressed the Department's staff for the Department's legal authority to delay the servicers' timely response. Initially, no such authority was provided other than a reference to the general accommodations process. However, such process is not applicable to a lawful congressional subpoena served on private parties.[8] It was not until September 12, 2024 that the Department cited cases or legal opinions in an attempt to justify its delay: *U.S. v. American Telephone & Telegraph Co. (AT&T)*, 567 F. 2d 121 (D.C. Cir., 1977); *Trump v. Mazars*, 591 U.S. 848, 868 (2020); 13 Op. O.L.C. 153, 157 (1989); and 45 Op. O.L.C. ___ at n.17 (Jan. 8, 2021).

None of the cited authorities support the accommodations process under the current loan servicer subpoenas. In *AT&T*, the Department of Justice sued AT&T to prevent it from complying with a subcommittee's subpoena in its investigation into warrantless national security wiretaps.[9] The concern of the executive was that public disclosure of warrantless wiretapping data may endanger national security. Nothing akin to national security is at stake here. The Committee simply seeks loan servicing change order requests, contract modifications, certain aggregate loan volume dollar amounts, aggregate borrower numbers, and documents and communications related to the foregoing.

In *Mazars*, the president in his personal capacity sought declaratory and injunctive relief against an accounting firm, contending the firm was not required to comply with a subpoena issued by the House of Representatives seeking financial records relating to the firm's work for the

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[4] Letter from Department General Counsel Lisa Brown to Chairwoman Virginia Foxx (Sept. 5, 2024) (on file with Committee).
[5] USDS Requirement 17007.040 ("The contractor shall send all requests received from external parties (e.g. advocacy, government, media, etc.) regarding information related to the U.S. Department of Education's programs, products, services, operations, or customers to a mailbox to be identified later. The contractor shall not provide responses to any such requests without approval from the Contracting Officer or his or her designee.").
[6] *See* Article VI, Clause 2 of the U.S. Constitution (Supremacy Clause).
[7] *Supra,* note 4.
[8] The accommodations process may be applicable only where the Executive Branch has specifically delineated interests, none of which apply in the present case. *See,* e.g., 13 Op. O.L.C. 153, 157 (1989).
[9] 567 F.2d 121-124.

president and his businesses before and after he took office.[10] The case is distinguishable on its facts: *Mazars* involved the president in his individual capacity seeking to prohibit the disclosure of personal and business accounting records. It had nothing to do with the operations of a program serviced by third parties. Though the *Mazars* court stated, "separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties," the court clearly noted the subject of the subpoena was the "President's information" such as might be stored in presidential archives or at schools.[11] Clearly, such is not the case with loan servicer documents.

In 13 Op. O.L.C. 153, 157 (1989), the opinion discusses executive privilege in the context of senior executive branch or White House officials who advise a president. The context relates to the president and the invocation of executive privilege. In no sense does the opinion or its tenor extend to subpoenas for routine documents in the hands of third parties, such as loan servicers, who contract with a federal agency.

The January 8, 2021, Office of Legal Counsel opinion at footnote 17 is similarly unpersuasive. The discussion in the footnote is of a different issue—whether a lawsuit involving a congressional subpoena would be justiciable. That is not the issue at hand.

This letter serves as a final warning – the Department must release the loan servicers' documents to the Committee by 12:00 p.m. on September 24. Should you have any questions, please feel free to reach out to Gabriella Pistone at Gabriella.Pistone@mail.house.gov or 202-225-4527.

Sincerely,

Virginia Foxx

Virginia Foxx
Chairwoman
U.S. House Committee on Education
& the Workforce

[10] 591 U.S. 848.
[11] 591 U.S. 848, 868.