

115TH CONGRESS
1ST SESSION

S. 1784

To amend the Higher Education Act of 1965 to improve the determination of cohort default rates and provide for enhanced civil penalties, to ensure personal liability of owners, officers, and executives of institutions of higher education, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 11, 2017

Mr. MURPHY (for himself, Mr. BLUMENTHAL, Mr. BROWN, Mr. DURBIN, Mr. FRANKEN, Ms. HARRIS, and Ms. WARREN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Higher Education Act of 1965 to improve the determination of cohort default rates and provide for enhanced civil penalties, to ensure personal liability of owners, officers, and executives of institutions of higher education, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Students Before Prof-
5 its Act of 2017”.

1 **SEC. 2. IMPROVED DETERMINATION OF COHORT DEFAULT**
2 **RATES.**

3 Section 435 (20 U.S.C. 1085) is amended—

4 (1) in subsection (a)(2), by adding at the end
5 the following:

6 “(E)(i) In any case where the Secretary has de-
7 termined that the institution has engaged in default
8 manipulation, the Secretary—

9 “(I) shall recalculate the cohort default
10 rate for the institution under this section using
11 corrected data and information, for all fiscal
12 years for which the default manipulation has
13 occurred; and

14 “(II) using the recalculated cohort default
15 rate, shall redetermine whether the institution
16 is ineligible to participate in a program under
17 this title.

18 “(ii) In this section, the term ‘default manipu-
19 lation’ means engaging in a device or practice, such
20 as branching, consolidation of campuses, consolida-
21 tion or manipulation of the identification codes used
22 by the Office of Postsecondary Education to des-
23 ignate campuses and institutions, change of owner-
24 ship or control, serial forbearance, or any similar de-
25 vice or practice (as determined by the Secretary)
26 when, but for the device or practice, one or more

1 campuses of an institution of higher education would
 2 be at risk of cohort default rate sanctions under this
 3 section or student default risk sanctions under sec-
 4 tion 489A.”; and

5 (2) in subsection (m)(3), by striking “through
 6 the use of” and all that follows through the period
 7 at the end and inserting “through default manipula-
 8 tion.”.

9 **SEC. 3. CIVIL PENALTIES.**

10 (a) IN GENERAL.—Part G of title IV of the Higher
 11 Education Act of 1965 (20 U.S.C. 1088 et seq.) is amend-
 12 ed by inserting after section 489 the following:

13 **“SEC. 489A. CIVIL PENALTIES AND OTHER REMEDIES.**

14 “(a) DEFINITIONS.—In this section:

15 “(1) OFFICER OF AN INSTITUTION OF HIGHER
 16 EDUCATION.—The term ‘officer of an institution of
 17 higher education’ includes the president, chief execu-
 18 tive officer, and chief financial officer of an institu-
 19 tion of higher education or their equivalents.

20 “(2) STUDENT DEFAULT RISK.—The term ‘stu-
 21 dent default risk’ means a risk that is reflected as
 22 a percentage that is calculated by taking an institu-
 23 tion’s 3-year cohort default rate, as defined in sec-
 24 tion 435(m), for the most recent fiscal year avail-
 25 able, and multiplying it by the percentage of stu-

1 dents enrolled at such institution receiving a Federal
2 student loan authorized under this title during the
3 previous academic year.

4 “(3) SUBSTANTIAL MISREPRESENTATION OR
5 OTHER SERIOUS VIOLATION.—The term ‘substantial
6 misrepresentation or other serious violation’ means
7 either of the following:

8 “(A) A substantial misrepresentation re-
9 garding—

10 “(i) the nature of the educational pro-
11 gram of an institution of higher education;

12 “(ii) the financial charges of the insti-
13 tution;

14 “(iii) the space availability in a pro-
15 gram of the institution for which a student
16 is considering enrollment;

17 “(iv) the admission requirements of
18 the institution;

19 “(v) the transferability of credits from
20 the institution;

21 “(vi) whether a program of the insti-
22 tution meets the necessary standards to
23 qualify students to sit for licensing exami-
24 nations, or obtain certification required as

1 a precondition for employment, in the
2 State in which the students reside;

3 “(vii) the passage rates of students at
4 the institution in obtaining certification re-
5 quirements;

6 “(viii) the passage rates of students
7 who sit for licensing examinations; or

8 “(ix) the employability of the grad-
9 uates of the institution.

10 “(B) A violation as follows that is deter-
11 mined to constitute an unfair, deceptive, or
12 abusive act or practice:

13 “(i) A violation of section 487(a)(20).

14 “(ii) A violation of the default manip-
15 ulation regulations promulgated by the
16 Secretary under section 435(m)(3).

17 “(iii) Failure to comply with the pro-
18 gram review process described in section
19 498A.

20 “(iv) A violation of the program integ-
21 rity regulations promulgated by the Sec-
22 retary under this Act.

23 “(v) A violation of this Act that the
24 Secretary has determined, by regulation, to

1 be a serious violation for purposes of this
2 section.

3 “(b) SANCTIONS FOR SUBSTANTIAL MISREPRESENTATIONS OR SERIOUS VIOLATIONS.—

4 “(1) CIVIL PENALTIES.—

5 “(A) IN GENERAL.—The Secretary may
6 impose a civil penalty upon an eligible institu-
7 tion upon making a determination, after reason-
8 able notice and opportunity for a hearing, that
9 an eligible institution has engaged in a substan-
10 tial misrepresentation or other serious violation.

11 “(B) AMOUNT OF CIVIL PENALTIES.—A
12 civil penalty imposed for a violation under sub-
13 paragraph (A) shall be not less than \$100,000
14 or—

15 “(i) in the case of a first violation, an
16 amount equal to the product of \$1,000,000
17 multiplied by the institution’s student de-
18 fault risk, whichever is larger;

19 “(ii) in the case of a second violation,
20 an amount equal to the product of
21 \$2,000,000 multiplied by the institution’s
22 student default risk, whichever is larger;
23 and
24 and

1 “(iii) in the case of a third or subse-
2 quent violation, an amount equal to the
3 product of \$3,000,000 multiplied by the in-
4 stitution’s student default risk, whichever
5 is larger.

6 “(C) TREATMENT OF MULTIPLE INSTITU-
7 TIONS.—For the purpose of determining the
8 number of violations under subparagraph (B),
9 any violation by a particular institution will ac-
10 crue against all identification codes used by the
11 Office of Postsecondary Education to designate
12 campuses and institutions affiliated with the in-
13 stitution, and within the period of participation
14 for the institution, as defined in section
15 668.13(b) of title 34, Code of Federal Regula-
16 tions, or any successor regulation.

17 “(c) SANCTIONS FOR OTHER VIOLATIONS OF THIS
18 TITLE.—Upon determination, after reasonable notice and
19 opportunity for a hearing, that an eligible institution has
20 engaged in a violation of any other provision of this title,
21 including the failure to carry out any provision of this
22 title, that is not a significant misrepresentation or other
23 serious violation, the Secretary may impose a civil penalty
24 upon such institution of not more than \$100,000 (subject

1 to such adjustments for inflation as may be prescribed in
 2 regulation) for each such violation.

3 “(d) CIVIL PENALTIES AND SANCTIONS FOR OFFI-
 4 CERS OF INSTITUTIONS.—Upon determination, after rea-
 5 sonable notice and an opportunity for a hearing, that an
 6 officer of an institution of higher education that partici-
 7 pates in a program under this title has knowingly and will-
 8 fully, or with gross negligence, violated a provision of this
 9 title, the Secretary may sanction the officer. Such sanc-
 10 tions may include the following:

11 “(1) Prohibiting the institution of higher edu-
 12 cation that has employed the officer of an institution
 13 of higher education and that participates in a pro-
 14 gram under this title, or any other institution of
 15 higher education that participates in a program
 16 under this title, from employing the officer, except
 17 that any such prohibition under this subsection shall
 18 not be for a period of more than 5 years from the
 19 date of the determination of the violation.

20 “(2) Assessing a civil penalty against an officer
 21 of an institution of higher education who has know-
 22 ingly and willfully, or with gross negligence, violated
 23 a provision of this title, except that any such civil
 24 penalty under this subsection shall not be greater
 25 than the amount of the officer’s compensation for

1 each year for which the violations are determined to
2 have occurred. For purposes of this paragraph, an
3 officer's compensation shall include proceeds of any
4 sales of stock and any incentive-based compensation
5 (including stock options awarded as compensation)
6 based on information required to be reported to the
7 Secretary or any other Federal agency during the
8 period in which the violations are determined to have
9 occurred.

10 “(e) LIMITATION, SUSPENSION, OR TERMINATION OF
11 ELIGIBILITY STATUS.—

12 “(1) IN GENERAL.—Upon determination, after
13 reasonable notice and opportunity for a hearing, that
14 an eligible institution has engaged in a violation of
15 any provision of this title (including the failure to
16 carry out any provision of this title or any regulation
17 prescribed under such provision) or a violation of
18 any applicable special arrangement, agreement, or
19 limitation, the Secretary may limit, suspend, or ter-
20minate the participation in any program under this
21title of an eligible institution, subject to the require-
22ments of paragraph (2).

23 “(2) SUSPENSION PROCEDURES.—No period of
24 suspension under this section shall exceed 60 days
25 unless the institution and the Secretary agree to an

1 extension or unless limitation or termination pro-
2 ceedings are initiated by the Secretary within that
3 period of time.

4 “(f) EMERGENCY ACTION.—

5 “(1) IN GENERAL.—The Secretary may take an
6 emergency action against an institution, under which
7 the Secretary shall, effective on the date on which a
8 notice and statement of the basis of the action is
9 mailed to the institution (by registered mail, return
10 receipt requested), withhold funds from the institu-
11 tion or its students and withdraw the institution’s
12 authority to obligate funds under any program
13 under this title, if the Secretary—

14 “(A) receives information, determined by
15 the Secretary to be reliable, that the institution
16 is violating any provision of this title, any regu-
17 lation prescribed under this title, or any appli-
18 cable special arrangement, agreement, or limita-
19 tion;

20 “(B) determines that immediate action is
21 necessary to prevent misuse of Federal funds;
22 and

23 “(C) determines that the likelihood of loss
24 outweighs the importance of the procedures pre-

1 scribed in subsection (e) for limitation, suspen-
2 sion, or termination.

3 “(2) TIME LIMITATION.—An emergency action
4 described in paragraph (1) shall not exceed 30 days
5 unless limitation, suspension, or termination pro-
6 ceedings are initiated by the Secretary against the
7 institution within that period of time.

8 “(3) OPPORTUNITY TO SHOW CAUSE.—The Sec-
9 retary shall provide an institution that is the subject
10 of an emergency action under this subsection an op-
11 portunity to show cause, if the institution so re-
12 quests, that the emergency action is unwarranted
13 and should be lifted.

14 “(g) LIFTING OF SANCTIONS.—Notwithstanding any
15 other provision of this title, an institution of higher edu-
16 cation that has been sanctioned by the Secretary under
17 this section or any other provision of this title may not
18 have such sanctions lifted until the Secretary has con-
19 ducted a subsequent program review under section 498A
20 and has found the institution to be in compliance with this
21 title.

22 “(h) SINGLE COURSE OF CONDUCT; COMPROMISE
23 AUTHORITY.—

24 “(1) SAME COURSE OF CONDUCT.—For pur-
25 poses of this section, acts and omissions relating to

1 a single course of conduct shall be treated as a sin-
 2 gle violation.

3 “(2) COMPROMISE AUTHORITY.—Any civil pen-
 4 alty under this section may be compromised by the
 5 Secretary. In determining the amount of such pen-
 6 alty, or the amount agreed upon in compromise, the
 7 Secretary shall consider—

8 “(A) the appropriateness of the penalty to
 9 the size of the institution of higher education
 10 subject to the determination; and

11 “(B) the gravity of the violation, failure, or
 12 misrepresentation.

13 “(i) COLLECTION OF PENALTY.—The amount of any
 14 penalty under this section may be deducted from any sums
 15 owing by the United States to the institution charged.

16 “(j) DISPOSITION OF AMOUNTS RECOVERED.—

17 “(1) USE FOR STUDENT RELIEF FUND.—For
 18 each fiscal year, an amount equal to 100 percent of
 19 the amounts recovered or collected under this section
 20 shall be deposited into the Student Relief Fund es-
 21 tablished under subsection (k).

22 “(2) REPORT.—The Secretary shall regularly
 23 publish, on the website of the Department, a de-
 24 tailed description that includes the amount of funds

1 that were used for the Student Relief Fund under
2 paragraph (1).

3 “(k) STUDENT RELIEF FUND.—

4 “(1) ESTABLISHMENT.—The Secretary shall es-
5 tablish a Student Relief Fund (referred to in this
6 subsection as the ‘Fund’) that shall be used, subject
7 to the availability of funds, to provide financial relief
8 to any student enrolled in an institution of higher
9 education that—

10 “(A) has failed to comply with an eligi-
11 bility requirement under section 101 or 102 or
12 an obligation incurred under the terms of the
13 program participation agreement under section
14 487; or

15 “(B) has been sanctioned under subsection
16 (b) or (c).

17 “(2) TREATMENT AND AVAILABILITY OF
18 FUNDS.—

19 “(A) FUNDS THAT ARE NOT GOVERNMENT
20 FUNDS.—Funds obtained by or transferred to
21 the Fund shall not be construed to be Govern-
22 ment funds or appropriated monies.

23 “(B) AMOUNTS NOT SUBJECT TO APPOR-
24 TIONMENT.—Notwithstanding any other provi-
25 sion of law, amounts in the Fund shall not be

1 subject to apportionment for purposes of chap-
2 ter 15 of title 31, United States Code, or under
3 any other authority.

4 “(C) NO FISCAL YEAR LIMITATION.—Sums
5 deposited in the Fund shall remain in the Fund
6 and be available for expenditure under this sub-
7 section without fiscal year limitation.

8 “(3) INVESTMENTS.—

9 “(A) AMOUNTS IN FUND MAY BE IN-
10 VESTED.—The Secretary of Education may re-
11 quest the Secretary of the Treasury to invest
12 the portion of the Fund that is not, in the dis-
13 cretion of the Secretary of Education, required
14 to meet the current needs of the Fund.

15 “(B) ELIGIBLE INVESTMENTS.—Invest-
16 ments shall be made by the Secretary of the
17 Treasury in obligations of the United States or
18 obligations that are guaranteed as to principal
19 and interest by the United States, with matu-
20 rities suitable to the needs of the Fund as de-
21 termined by the Secretary on the record.

22 “(C) INTEREST AND PROCEEDS CRED-
23 ITED.—The interest on, and the proceeds from
24 the sale or redemption of, any obligations held
25 in the Fund shall be credited to the Fund.

1 “(4) REGULATIONS.—The Secretary shall pre-
2 scribe regulations to implement the requirements of
3 this section within 1 year after the date of enact-
4 ment of the Students Before Profits Act of 2017.

5 “(5) AUTHORIZATION OF APPROPRIATIONS.—In
6 addition to funds derived from financial penalties as-
7 sessed pursuant to subsection (j), there are author-
8 ized to be appropriated such sums as may be nec-
9 essary to carry out this subsection for fiscal year
10 2018 and each of the 5 succeeding fiscal years.

11 “(l) STATE ENFORCEMENT.—

12 “(1) IN GENERAL.—Any violation of subsection
13 (b), including the regulations promulgated under
14 such subsection, shall be a cause of action enforce-
15 able by the State, through the attorney general (or
16 the equivalent thereof) of the State, in any district
17 court of the United States in that State or in a
18 State court that is located in that State and that
19 has jurisdiction over the defendant. The State may
20 seek any relief provided under paragraph (4)(B) for
21 such violation, or any remedies otherwise provided
22 under law.

23 “(2) NOTICE REQUIRED.—

24 “(A) IN GENERAL.—Before initiating any
25 action in a court or other administrative or reg-

1 ulatory proceeding against any institution of
2 higher education as authorized by paragraph
3 (1) to enforce any provision of this subsection,
4 including any regulation promulgated by the
5 Secretary under this subsection, a State attor-
6 ney general shall timely provide a copy of the
7 complete complaint to be filed and written no-
8 tice describing such action or proceeding to the
9 Secretary, except as provided in subparagraph
10 (B).

11 “(B) EMERGENCY ACTION.—If prior notice
12 is not practicable, the State attorney general
13 shall provide a copy of the complete complaint
14 and the notice to the Secretary immediately
15 upon instituting the action or proceeding.

16 “(C) CONTENTS OF NOTICE.—The notifi-
17 cation required under this paragraph shall, at a
18 minimum, describe—

19 “(i) the identity of the parties;

20 “(ii) the alleged facts underlying the
21 proceeding; and

22 “(iii) whether there may be a need to
23 coordinate the prosecution of the pro-
24 ceeding so as not to interfere with any ac-
25 tion, including any rulemaking, undertaken

1 by the Secretary or another Federal agen-
 2 cy.

3 “(3) REGULATIONS.—The Secretary shall pre-
 4 scribe regulations to implement the requirements of
 5 this subsection and periodically provide guidance in
 6 order to further coordinate actions with the State at-
 7 torneys general.

8 “(4) PRESERVATION OF STATE AUTHORITY.—

9 “(A) STATE CLAIMS.—Nothing in this sub-
 10 section shall be construed as altering, limiting,
 11 or affecting the authority of a State attorney
 12 general or any other regulatory or enforcement
 13 agency or authority to bring an action or other
 14 regulatory proceeding arising solely under the
 15 law in effect in that State.

16 “(B) RELIEF.—

17 “(i) IN GENERAL.—Relief under this
 18 subsection may include, without limita-
 19 tion—

20 “(I) rescission or reformation of
 21 contracts;

22 “(II) refund of moneys or return
 23 of real property;

24 “(III) restitution;

1 “(IV) disgorgement or compensa-
2 tion for unjust enrichment;

3 “(V) payment of damages or
4 other monetary relief;

5 “(VI) public notification regard-
6 ing the violation, including the costs
7 of notification; and

8 “(VII) limits on the activities or
9 functions of the person.

10 “(ii) EXCLUSION.—Relief under this
11 subsection shall not include the ability to
12 suspend or terminate the eligibility status
13 of an institution of higher education for
14 programs under this title.”.

15 (b) PROGRAM REVIEW AND DATA.—Section
16 498A(b)(8) of the Higher Education Act of 1965 (20
17 U.S.C. 1099c–1(b)(8)) is amended by inserting “and to
18 the applicable State Attorney General if the institution is
19 found to have not complied with the program review proc-
20 ess under this section” after “under review”.

21 **SEC. 4. PERSONAL LIABILITY FOR OFFICERS OF INSTITU-**
22 **TIONS.**

23 Section 498(e) of the Higher Education Act of 1965
24 (20 U.S.C. 1099c(e)) is amended—

1 (1) in paragraph (4), by striking “The Sec-
 2 retary” and inserting “Except as provided in para-
 3 graph (7), the Secretary”; and

4 (2) by adding at the end the following:

5 “(7) Notwithstanding paragraph (4), if the Secretary
 6 has taken an enforcement action against a proprietary in-
 7 stitution of higher education (as defined in section
 8 102(b)), (which may include heightened oversight activi-
 9 ties such as heightened cash monitoring, provisional cer-
 10 tification, or requirements to obtain approval for new edu-
 11 cational programs and locations), the Secretary may hold
 12 an executive officer of the institution personally liable for
 13 financial losses related to such action to the Federal Gov-
 14 ernment, student assistance recipients, and other program
 15 participants for funds under this title.”.

16 **SEC. 5. GOVERNMENT CLAIMS FOR DISCHARGE.**

17 (a) FFEL AND DIRECT LOAN PROGRAMS.—Section
 18 437(c)(1) of the Higher Education Act of 1965 (20 U.S.C.
 19 1087(c)(1)) is amended in the first sentence by striking
 20 “against the institution and its affiliates and principals”
 21 and inserting “against the institution, its affiliates and
 22 principals, and any executive officer or board member of
 23 the institution”.

24 (b) FEDERAL PERKINS LOANS.—Section 464(g)(1)
 25 of the Higher Education Act of 1965 (20 U.S.C.

1 1087dd(g)(1)) is amended by striking “against the institu-
2 tion and the institution’s affiliates and principals” and in-
3 serting “against the institution, the institution’s affiliates
4 and principals, and any executive officer or board member
5 of the institution”.

6 **SEC. 6. PROGRAM PARTICIPATION AGREEMENT.**

7 Section 487(a) of the Higher Education Act of 1965
8 (20 U.S.C. 1094(a)) is amended by adding at the end the
9 following:

10 “(30) In the case of a proprietary institution of
11 higher education (as defined in section 102(b)), such
12 institution will prohibit any individual who has been
13 found guilty of defrauding students from being a
14 member of the board of directors, the chief executive
15 officer, or other executive officer of the institution.”.

○