

*A federal judge in California on Monday said she was considering whether to hold the Education Department and Secretary Betsy DeVos in contempt or impose sanctions for violating her order to stop collecting the loans of students who attended Corinthian Colleges.*

*Following is the transcript of the hearing on Monday in San Francisco between U.S. Magistrate Judge Sallie Kim; Joshua Rovenger, an attorney at Harvard Law School's Project on Predatory Student Lending, which represents the Corinthian students; and Charlie Merritt, a Justice Department attorney who represents the Education Department and DeVos.*

**Joshua Rovenger:** Good morning, Your Honor. Josh Rovenger for the plaintiffs. With me at counsel's table: Eileen Connor, Natalie Lyons, Joe Jaramillo, and on the phone is Toby Merrill.

**Charlie Merritt:** Good morning, Your Honor, Charlie Merritt for the defendants from the Department of Justice. With me I have Kevin Hancock, also from the Department of Justice, and Caroline Hong, from the Department of Education.

**Magistrate Judge Sallie Kim:** Thank you. So. Thank you for showing up in person. I think it's actually better to be — have this particular conference in person. I will tell you that I read the report that the government filed and I was extremely disturbed to say it, put it lightly.

Let me say that I'm not sure that this is contempt or sanctions. But let me tell you what my concerns are. First of all, I feel like there have to be some consequences for the violation of my order 16,000 times. And part of the reason that we have consequences is to deter future violations. That's just the practical reality of the world.

The second concern I have is, as a practical matter, of making sure we have systems in place to prevent these violations from occurring in the future.

And the third concern I have is help or compensation for the students who have been harmed because of the violation of the order — because they've had their wages garnished, or have had an adverse credit reporting. And so I saw that the report did deal with some of these issues. But those are the three broad categories of concerns that I — that I have.

And so let me just tell you what I'm thinking about. In category three — helping the students — I'm concerned that there hasn't been enough education or outreach to the students who are affected who are in the in the class by the Department of Education.

And I saw the notices that were attached as exhibits to the report. And they don't seem clear or prominent to me. I looked at them and I thought, "they seem really opaque and confusing."

And so couple things I'm thinking about. One is that the website should be really updated and beefed up, so that it's clear when someone goes onto the DOE website, they can get automatically to a page that tells them what is going on and what their rights are right now.

The second thing I was thinking about is maybe even having some kind of hotline, a phone hotline, where students could call and get a dedicated person or group of people who know what — how to help them and deal with them.

And then the third thinking — the third thing I'm thinking about is maybe a special master to make sure that there's someone to oversee this process to make sure that students who are in this protected class — this potential class are actually getting the relief they need in a — in a timely manner because—. Those are my concerns with regard to helping the students.

So — and I know I'm throwing these, kind of, out here now because what I want to do is have some briefing and on this issue of — either whether it's contempt or whether it's sanctions, I'm going to entertain them. But I want both sides to have a chance to weigh in. I did read the plaintiffs' submission. I'm not sending anyone to jail yet. But it's good to know I have that ability.

But I do feel that I'm most concerned with helping the people who were harmed by this — this problem that the government created. And I'm really, really disturbed that from my reading of what the government did in terms of trying to comply with the order, there wasn't a lot of action. Sending a couple of emails seems really minor in terms of making sure that there's compliance with an order of this magnitude.

And I'm astounded, really just really astounded. But I will tell you candidly, what I'm worried about in terms of making the government take more action is that I don't want to divert more resources from the Department of Education to solving the problem. In other words, they created a problem but they also my ordering them to take additional steps might then take away resources that will be helping the people who need to be have. So I'm sort of balancing those concerns in my head.

And I'm not trying to be punitive, I just want to make sure that the students are helped. And I'm—I'm not impressed at all with what the government has done in the past. At best, it is gross negligence. At worst, it's intentional flouting of my order. I doubt that it's intentional flouting of my order. But it's almost gross negligence of the magnitude of, "we don't care about the order, therefore, we're going to do the minimal amount of effort we need, take the minimal amount of steps we need to take in order to comply with the order."

Those are my concerns so—. Ok, I've done a lot of talking. Let me hear from Mr. Merritt then I'll hear from Mr. Rovenger.

**Merritt:** Your Honor, we share your concerns about what's happened. At this point I can say the department was surprised to learn the extent of the non-compliance issues once it kind of dug into this issue further in response to the last order. It definitely has become aware of the need to have better oversight of its servicers going forward. It's been an eye-opening experience — definitely take responsibility and understand that the buck stops with the department.

But want to emphasize that we share a lot of the concerns that you say and are committed to working with you and with opposing counsel to making sure that compliance is — that we bring ourselves into full compliance, that the department brings itself into full compliance and stays that way going forward.

I did want to mention, I have some updates from since the compliance report as to some of the kind of issues left unaddressed and kind of outstanding, some of which is new even since the case management statement we filed. So I thought it might be useful to run — run through some of those.

**Kim:** Okay.

**Merritt:** We did report this part in the case management statement but going to the issue of the 1,808 borrowers who were subject to involuntary collection efforts through wage garnishment and Treasury offset, we can now report that the department has requested refunds for all such borrowers. That is a little bit of a process whereby the department has to request that refund from the servicers, the servicers then need to make the request of Treasury through an intermediary at Treasury. So it can take probably a few weeks from now. As we represented, the department did request that be taken — that this be completed by October 22. And I can report this since then there's been a high level communication between the chief of staff at the Department of Education to a deputy secretary at Treasury to expedite the processing of these refunds to the extent possible on their end. These will be processed on a rolling basis. As we represented, 10 have been completed so far. We're hoping that this can kind — the refunds can continue to be issued on a rolling basis, but given the volume involved expect that it might take a few weeks.

I also have new information regarding — so in the report it was represented that 16,034 borrowers had received incorrect notices of repayment. And I would just note — I mean, this is stated in the report but — that's somewhat of an over-inclusive number because the department is tracking information for kind of all Corinthian borrowers, not just members of the class.

But those numbers that ED had — the Department of Education — have previously reported that 14,887 had been corrected — placed back into the correct repayment status. We can now report that the department has requested that the servicers place the remaining 1,147 borrowers into the correct repayment status. The servicers — excuse me — the servicers are supposed to complete that process by Friday of this week. And we anticipate sending out individualized communications to affected borrowers letting them know that the issue has been resolved one week from today.

But, you know, if Your Honor has — has expressed concern about the nature of the proposed notifications, we are certainly amenable to altering those in ways you deem appropriate.

I can also represent with respect to the issue of refunds to people who made payments, and I should specify non-defaulted borrowers who made payments. Just want to clear up something that wasn't quite crystal clear in the compliance report. 3,289 borrowers reported as having made a payment during the periods since Your Honor's injunction first issued.

We also — the department also referenced a separate set of 991 borrowers that were specific to the servicer FedLoan Servicing, and it looked from the report that that was included within the 3,289. But I — we now have learned that it is not. That's an additional 991. So, if I may, just speak to what's been done with those two different sets of borrowers: For the 991 borrowers specific to FedLoan, that issue arose out of — or the department's work with FedLoan arose out of the — what was called a glitch in the report from July 2019 that — that led to several thousand borrowers' forbearance lapsing on July 4, 2019. So department worked with FedLoan to identify 991 borrowers affected by that glitch and potentially others — they had made payments during — during the time period of the injunction. The department has requested from its servicers that refunds be issued to all 991, so that — it's currently in the process of the servicers working on it and sending communications to Treasury. And we also anticipate having further — the department anticipates having further communications with Treasury to expedite as possible this process. For the remaining 3,289, the department has also— can now report that it has requested refunds for all 3,289.

And so that, again, that's now in the process of — of the servicers processing the refunds. And hope — these will — the refunds, similar to what I said earlier will go out in a rolling basis. The department hopes that the entire process is completed such that all affected borrowers have checks in hand within 45 days—and similarly, is anticipating sending communications once the servicers have completed their part of this, send it to Treasury, and are, again, amenable to working or — altering those communications to be more effective.

**Kim:** Let me see about this, Mr. Merritt, with regard to the ongoing activities. I'm going to have the Department of Education—. One of the things I'm contemplating is having a monthly report submitted to me — what you're doing to remedy the problem, what the status is, are there any problems popping up that we're not aware of.

So, you know, I am going to issue some kind of order after today about different scheduling things. But, I want to tell you right now, I'm going to have a monthly report from the Department of Education. And I want the plaintiffs also to weigh in and submit if they hear something or find something that's different. Because the plaintiffs are the one who alerted us to this problem to begin with. But I appreciate this update. It's a lot of information ... taking in ... so in writing is usually better for me.

One of the things that I wanted to ask you, Mr. Merritt, is: I understand that these servicers are nine different companies that have contracts with the government. Do we need to sue them and bring them into court here?

In other words, do you have enough control over them that you can actually make sure that this — does the Department of Education have enough control over these servicers that compliance with the order will be appropriate?

Or should the plaintiffs actually name them as defendants or bring them in, and they're—then they're going to be under my jurisdiction. And that's one thing I thought about because it occurred to me when I read the report that a lot of the problems are—even if you tell a company to do something, they're not doing it. So the only way I can get control over them is to bring them in as parties. So I don't know if, Mr. Rovenger, we've thought about that. But I don't know what the contracts are like, I don't know what they say, I don't know what kind of hammer you have over them. If they don't do what you tell them. I just don't have enough information about that. But it occurred to me that if that's really the problem, then we need to solve the problem by getting them in front of me.

**Merritt:** Well, I will admit at the outset, I haven't looked into this issue very deeply. I do know that, you know, the Department of Education is subjects to your injunction and to the extent that involves other servicers who are third-party servicers who are involved in the servicing of contracts, I believe that would be under your court's jurisdiction to follow, to the extent they're kind of working on the Department of Education's loans.

You know, as we noted in the compliance report, the department has been concerned by the behaviors by the servicers and is definitely looking more into possible ways to impose corrective actions upon the servicers. We noted a letter was sent to FedLoan Servicing.

**Kim:** So a letter doesn't actually strike me as being a very strong action because the emails alone didn't work. Sending a letter is sort of, like, doesn't seem to be effective in getting their attention.

I think the Department of Education has to get these companies' attention, as in there is a — I don't know what the contract says. Is there some kind of clause that allows the government to get damages from the companies if they don't do what the Department of Education—? That's what I'm thinking about. In other words, this does not seem to be an effective process.

**Rovenger:** I don't think the department should be let off the hook here, and it should just go to the servicers, as I know Your Honor isn't saying. But particularly with respect to defaulted borrowers, at the time of the injunction, the department admits that it was responsible for inputting information about those borrowers. And so it's not clear why they weren't put into indefinite stop-collection status and decertified for TOP.

**Kim:** I'm not letting Department of Education off the hook. It's just that I'm thinking practically about if part of the problem, at least, is that the servicers are not responding or that the communications are not strong enough to the servicers, how do we make sure that they are in compliance? Because I think that I've got the Department of Education's attention. But I can

imagine the servicers getting a letter from Department of Education. They don't have any — they're not going to be hauled into jail if you fail to comply with— right now as it is,

**Rovenger:** So I believe as an agent of the department, they are also subject to the injunction and so can be held to account for their non-compliance. What I would say, though, is the department plainly did not take all reasonable steps necessary to oversee the loan servicers.

**Kim:** I'm inclined to agree with you, but I don't know what—when you say that they are subject to the injunction, I don't know if that's—I've never looked at it. I haven't seen the contracts, I haven't seen the law. I don't know what the — that's what I'm ask—why am I asking the question. You might want to address that if we brief this.

And Your Honor, I would just going to note that we are certainly open — the department is definitely — has gotten across — looking into this more and is certainly open to looking into that more. And if Your Honor is inclined, as you said, to order more briefing — would certainly address that in more detail.

Okay. So, go ahead.

**Rovenger:** Could I just speak on the general contempt sanctions question?

**Kim:** Sure. I'm going to ask for a briefing schedule. I want you both to brief this issue for me because I don't know if it's contempt. I don't know if its sanctions. I don't know what kinds of remedies. It did get my attention that jail was a process. But I think the government has an opp— should have an opportunity to respond as well.

**Rovenger:** So I just want to say two quick things to that, Your Honor. The first is with respect to timing here, timing is of the essence, obviously,

**Kim:** Well I'm going to lift the stay, that's the other news I have for you. We're going to go forward. I don't have any trust that the government is going to be able to—I'm so concerned about this violation of the order that I think the stay is gone. And also because the 9th Circuit hasn't ruled and I'm not gonna wait around for them any longer. So the stay is going to be lifted. We're going to have the schedule, we're going to go forward. We're going to do everything full speed ahead from this point forward.

**Rovenger:** Great. Thank you, Your Honor. With an additional respect to timing, though, we reached out to the government about these noncompliance issues in March and didn't get the court involved initially, because they were making the same representation then that they are now. And so we really do think on the issue of coercing their compliance, it's essential to get the court involved sooner rather than later. On the question of whether what they've done here is contempt and whether they have an opportunity to respond, I would just note that what the court already asked of the department and what the department put forward in response was the equivalent of a show cause order except in name only. The whole purpose of

a show cause order is to allow a party that's being challenged with contempt to come forward with the facts that show that they are actually in compliance or that they took all reasonable steps. And I think the department's report has all of the facts necessary for the court to make the factual judgment that they didn't take all reasonable steps and at absolute best they were in gross negligence of Your Honor's order.

**Kim:** Let me tell you what I'm focusing on – on the briefing. Because I do want people to have a chance to brief this. I want both sides to address: What is the legal authority for either contempt or sanctions that I have? Because I don't want to exceed my legal authority.

And second, what kind of remedy do you think would be appropriate? In other words, even if I find that contempt or sanctions are appropriate what specific remedies should I put in place and, again, what's the legal authority for that? That's what I don't — the part of the puzzle that I don't have. I think I have a clear picture of what happened with the Department of Education. I do understand how that arose. And I draw my own conclusions about whether I think it falls on the — based on the law — whether I think it falls under contempt or sanctionable conduct. But I'm concerned about, "Okay, what do I do next?" That's what I want people to focus on. But you can also make your case for, under the law, it wasn't contempt. You know, it's not subject to contempt or sanctions. And you can make your case under the law that you think it is. I'm open to that. I will look at it. I will read it. I will obviously use my own judgment. But I'm very concerned about, if that is the case, what do I do?

**Rovenger:** If that's the case, Your Honor, then we'd ask for an extraordinarily expedited briefing schedule on that.

**Kim:** I agree.

**Rovenger:** And then, the other thing I would notice. Just one of the sanctions orders that we asked for in the case management statement is just a list of names and contact information for anyone affected by the department's non-compliance? My understanding is that, subject to a court order, the department is on board with that.

**Kim:** For privacy reasons, which would be ironic, if, you know, you violate that. So I would definitely entertain that.

**Rovenger:** Given the department's consent to that, would Your Honor, be willing to issue that in order, in addition to the monthly reports, just so we can get start talking to these individuals immediately.

**Kim:** Okay, so we're taking those seriously. So, yes, I will— I will do that. So that's —that's the kind of thing that I'm thinking about. That level of granularity, what specific actions would be helpful going forward.

I mean, I came up with the website, or the special master or the hotline. I don't— I don't know what I think would be —would solve the problem. But I am concerned that there are people out there who don't know that they're in this class, that don't realize that they're subject to this and are affected and don't even know to call someone to find out about it. So those are the kinds of things I'm thinking about. I can include something, but you also can talk to each other about, for example, talk to other plaintiffs about whether you think— I don't know if you looked at the website and think it's appropriate or sufficient? I don't think it is. I looked at it and I was very confused.

**Rovenger:** Definitely not, Your Honor. And we've been waiting for the department to notify all the borrowers since March and April when they told us they were going to.

**Kim:** And so those are the kinds of things I'm concerned about, Mr. Merritt. You can meet and confer. I would highly recommend it. I'm not going to order you to do it. But if you can come up with some proposals or some plans and at least narrow what you can do, that would be helpful to me. And if you've already talked about it, and it hasn't worked out, then let me know that as well.

**Rovenger:** We haven't talked through all the possible sanctions. I will say, we think a contempt finding is ultimately going to be appropriate in this case, if only for the expressive function to let the department and Secretary DeVos and other litigants and agencies know that this conduct is unacceptable.

**Merritt:** I would just note we are open to meeting and conferring. We have reviewed some of the proposals the plaintiffs proposed for sanctions and are certainly amenable to working with them for some of these, like, reporting type requirements and other requirements that would help bring — bring the department into full compliance as expeditiously as possible. So I do think it would be useful to have a meet and confer.

**Kim:** At a minimum, I am going to order that you've produced the names and the addresses to the plaintiff's counsel. And I'm also ordering that you provide the monthly reports. So I will put that in a written order. But I'm telling you, those are things that, no matter what, I'm mandating.

**Merritt:** May I just be heard on one point on the monthly reports? So we are certainly are willing and will report on most of the issues. But I'm just going on what places had proposed in the case management statement. If I just might make one point on that. They have requested the reporting be on a number of different topics, none of which we oppose, except I did just want to note. One of the topics they point out is on page six of the — of our filing, ECF number 115. Requested reporting on the status of notices to all class members regarding this non-compliance.

**Kim:** Okay.



**Merritt:** I did just want to note that, for reasons of avoiding confusion, the department had not been previously planning on notifying all class members, other than the information that's already on the website. And again, we can discuss making that information better, but I thought it might be most efficient to target the communications to those actually affected. And to put, kind of, more broadened information to the public as a whole, on the website, as opposed to notifying individually each class member.

**Kim:** And when you say those affected, what do you mean by that?

**Merritt:** So those detailed in the compliance report as having either received a notice of repayment or—.

**Kim:** So I disagree. I think that there's got to be some kind of notice to every single person in the class — whether they were — whether they were the subject of the violation of the order or not. I think there's just a lot of confusion. I bet a lot of people don't even know they're in this class. I think there's this tremendous confusion surrounding these loans and what their rights are and whom they can contact.

My guess is you're going to get inundated with phone calls, but you're prepared for it. So that kind of notice, saying these are the people who are representing you, here's the phone number, call them.

**Rovenger:** That's exactly what I was going to ask for, Your Honor. That our contact information be in there.

**Kim:** I think that we're going to have to do that. I think there's so much confusion. It's clear to me. And I'm very, very worried about future violations, and, I mean, it took, it took the plaintiffs to tell us this because their named plaintiffs were affected. If the named plaintiffs hadn't been affected, we might never have found out even. That's what really terrified me when I read the report. So I think there has to be a direct line of communication for the members of the class to the plaintiffs' counsel. And I will look very closely at what they propose in terms of what I wanted the status report, but in terms of notices and things like that, I mean. What I might do is just send some — have kind of a draft and then have you folks look at it because I'm worried about timing as well. I want things to move along quickly. But on the status report, I'm going to get something each month. And I'm not sure what's going to be included in there, but I will take suggestions from people, including yours.

**Rovenger:** So in the — the case management statement, we list out all the different items we think should be included in there, to the extent that's helpful Your Honor.

**Kim:** Okay, I'll take a look at that. And I understand your position, which—

**Merritt:** Again, we are happy to do that.

**Kim:** Alright, so I am going to lift the stay. We're going to have to put together a schedule for the case. And so here's what I'm going to suggest. There are two schedules we have to put in. One is for the briefing on the contempt slash sanctions issue. And the other one is just on the case as a whole. So with regard to the contempt slash sanctions order, I will let the government respond first, and then I'll have the plaintiffs respond. I'm just going to have one brief from each side. Mr. Merritt, what would you propose as the amount of time that you would want, and I'll take it into consideration, but I'm not necessarily going to give it to you.

**Merritt:** I understand Your Honor's desire for haste, so I would propose one week

**Kim:** And Mr. Rovenger?

**Rovenger:** The end of that week would be fine.

**Kim:** So one week is a holiday. So I'll give the government till October 15. And then I'll give the plaintiffs until October 21 to respond. And if you could focus on those issues that I mentioned that will be most helpful to me. Because I think I understand what happened. So I'm thinking about, with those goals in mind, deterrence and solving the problem for the future.

Okay, so with regard to the overall schedule for the case, I think the parties are going to have to meet and confer on that, because we have class classification — that we have classification. That's right. I granted. So then we have discovery, and then we have, are we going to can have expert discovery in this case?

**Rovenger:** No, so all there is left to do in this case, is the department needs to follow a responsive pleading to the complaint. We filed our motion regarding the administrative record last July, so the department needs to respond to that. And then we'll be on to dispositive briefing.

**Kim:** Okay. All right. So I would, on that one, I would ask you to meet and confer within — by October 15. And then both parties submit a joint statement to me by October 21. I'm trying to keep the dates the same. So, and if you need more time on that, let me know. I mean, I know I'm putting a lot on you in a short period of time.

But if you have different proposals, that's okay. You know, if you disagree, just give me your alternate versions of schedules. And I'll take a look at it and decide what to do. But if you can agree on things and let me know as well. Do you think that — does that schedule sound like you could do that by October 21? Okay. What else do we need to talk about today?

**Rovenger:** The only thing that we would ask is because the discussion about the administrative record between California and the department is likely to have persuasive impact on us — and if we could just have a very brief opportunity to be heard at the end of that argument. Okay. So let me ask you as a practical matter, because I'm going to hear the California motion next.

**Kim:** Do you — what's which each side's position on whether the administrative record that California has received you can have gotten? You can see? Okay, you have. So Mr. Merritt, do you agree that the administrative record would be the same for both California and for the plaintiff class?

**Merritt:** I — I as of this today can't say it will be the same, but it will be very similar.

**Kim:** Okay. Okay. All right. And Mr. Rovenger, do you think it's the same or similar?

**Rovenger:** It will be similar but the documents that California points to that were improperly left out of the administrative record are the same ones that we briefed that need to be included last summer.

**Kim:** Okay. All right, great. Alright, so that's the last thing we need to address on this case. Then let's move to California folks up.