TOPcast Episode #138: “The Department Knew What It Meant:”
DCL + OPM + TPS = OMG!

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(Intro Music)

Kelvin: From the University of Louisville's Delphi Center for Teaching and Learning.

Tom: And the University of Central Florida's Center for Distributed Learning.

Kelvin: I'm Kelvin Thompson.

Tom: And I'm Tom Cavanagh.

Kelvin: And you are listening to TOPcast, the Teaching Online Podcast. Hey, Tom.

Tom: Hey, Kelvin. Did you know, and I think you did because you're the one that told me this, that we are number one? [Laughter] Yeah, it's cool. So, Every Learner Everywhere has a little ranking that recently came out, and I want to thank them for recognizing TOPcast as one of the top, if not the top podcast in teaching and learning to just check out. So, little shameless self-promotional plug right there.

Kelvin: Yeah, it was nice. I checked first to make sure it wasn't alphabetical, and it wasn't. So, there's that. [Laughter]

Tom: Cool. All right, Kelvin, let's get right to it. What is in the thermos?

Kelvin: Well, Tom, no thermos today. I brewed this single cup of coffee just a few minutes ago since I'm remote this afternoon. The exigent circumstances of high spectator traffic around the University of Louisville due to Derby prep at nearby Churchill Downs sends us scurrying away from the campus. So, in my cup is a gift from UofL colleague Lauren Bae, who brought me a bag of “Taste of Austin” Coffee Blend from HEB's “Cafe Olé” brand. And looking at my coffee records, that might sound familiar, because it's a repeat because our colleague, Dr. Susan Wegmann sent us a bag of this coffee a few years ago when you and I were drinking coffee in
the same physical room. So, I find it tasty. I wonder if you can find a connection in my cup to today's episode topic.

Tom: I don't think it has anything to do with horse racing or the Kentucky Derby, so I don't know. I'm going to punt, Kelvin.

Kelvin: Well, I was leaning into the exigent circumstance, and the suddenness, and the recentness of coming home remotely, making the cup of coffee right now, as opposed to in preparation before and our normal appropriate process. I was going with all that stuff.

Tom: Got you. All right, that makes sense now. I get it, because we are talking about some emerging, rapidly changing, exigent circumstance kinds of things today.

Kelvin: Yes. And to that point, Tom, you've recently interviewed Jarret Cummings, who serves as Senior Advisor for Policy and Government Relations at EDUCAUSE. And you tapped Jarret's expertise in discussing, as you say, a timely topic, which is the early 2023 guidance still developing as we record this episode from the US Department of Education related to third-party services or, for the enlightened, TPS, if you prefer. Anything you want to say about the interview before we cut to it?

Tom: Maybe I'll just add a couple more acronyms just in case. So, TPS, third-party servicers, there's also DCL, which is “Dear Colleague.” There's OPM, which is online program management companies. There's like 2U, which is a company that is an OPM. I don't know, there's probably others, but if you hear us lapse into jargon, that's what some of those mean.

Kelvin: All right. Well, through the modern technological marvel that is podcast time travel, here is your interview with Jarret Cummings.

(Transition Music)

Tom: Well, Jarret, thank you so much for being on TOPcast.

Jarret Cummings: Thanks for having me. I really appreciate it.

Tom: Sure. So, as we were setting up this interview, we did have some late breaking news about the whole “Dear Colleague” saga. Before we give some of the history, I wonder if you can just recap basically what happened as the time of this recording last week?
Jarret: Absolutely, yes. It was just short of a week ago when the Department of Education surprised everyone in a blog post. So, we're continuing the pattern of not doing things through the regulatory process. But in a blog post under Secretary Kvaal, acknowledged that the department had received over 1,000 comments on its guidance letter. My guess is that the overwhelming majority of those were not supportive of what the department had done. And given the need to review all of those comments, and also in recognition of a point that EDUCAUSE among many others raised, which is that given the expansive nature of the guidance and the scope of the institutional contractual relationships with third-party providers, that the institutions would need to go through in order to determine which of those relationships constitute a TPS and which don't.

The department suspended the effective date it had given for its guidance of September 1st. It did not replace that effective date. It left that issue to be determined at a later time. And it stated that whenever it did issue a new effective date for its guidance, which it will ostensibly review and revise, that that effective date would be at least six months from the publication of a new guidance letter. So, that takes a lot of the immediate pressure off of institutions, which otherwise would be scrambling pretty hard to try to figure out all the various ways this TPS guidance would affect them.

Tom: Also, if my memory serves from reading that blog post, it defines what's not included in some areas, like study abroad, or some of the other areas where I know there were a lot of comments, correct?

Jarret: Exactly. And in fact, what really sets up that part of the discussion is that the blog post makes clear that whenever new guidance around third-party servicers is issued, that it will not include the ban on foreign owned or located providers serving as TPSs. So, one of the main problems with the guidance letter that was originally issued back in mid-February, is that you take a very broad, almost undefined set of activities that could make a company that serves colleges and universities in the United States a third-party servicer. And then you combine it with a ban on foreign owned or located firms serving as third-party servicers, which was pulled from prior guidance that was meant for financial aid servicers. You pull that forward and all of a sudden one of the things we talked about is how that would essentially take one of the major learning management system companies serving institutions in the United States out of play.

But then for our colleagues at institution, or excuse me, at associations for study abroad programs, the recruitment of international students and so forth, they pointed out, given the unbounded nature of the activities that you've said constitute a TPS, how are we going to hire firms in overseas countries to support our study abroad programs? How are we supposed to
handle the recruitment of international students that aren't participating in student financial aid in the United States in the first place, but still are covered by some of these categories? So, that was I think another significant aspect of that update, is acknowledging that one of the opening statements of the original guidance letter, is that virtually any aspect of a contractual relationship that might impact the administration of a Title IV program would be considered a TPS. And so, that listing of activities that clearly are not considered TPSs by the Department of Education, it's an acknowledgement that that sweeping opening statement swept up much more than the department ever counted on.

Tom: Yeah, yeah. Well, it's the proverbial dolphin in the tuna net in many ways. So, we've talked briefly, and we can come back to it if we want, what the latest news is, which is significant. But you alluded to the original guidance that came out in the “Dear Colleague Letter” back in February. I wonder if we can just jump back to the original letter, which actually had a May deadline, which got moved to September. But what was the department, what's the intent behind this? Why did they issue this letter and stuck the stick in the hornets' nest and got all of us worried and concerned? But the Department of Education had a reason for doing this, and whether we can argue about the execution of how they did it, but I wonder if you can touch on some of the intention behind it?

Jarret: Sure. Actually, the most interesting problem from the original guidance letter, is that technically the guidance letter that was initially released on February 15th was supposed to take effect immediately, although they delayed, to your point, the reporting responsibilities for institutions and affected firms, to May. But technically, that compliance was supposed to have been in effect from the moment that guidance letter was issued with all of these expensive problems associated with it. Fortunately, the Higher Education Association community led by our colleagues at the American Council on Education, within record time submitted a request to the department for pushing back those dates. Well, they pushed the comment deadline for their guidance letter. Because the original comment deadline was supposed to be March 17th, and they pushed that to March 30th. Then they pushed the overall effective date for that guidance to September 1st, creating still problems that we'll talk about. But in answer to your direct question, you can almost look at that original guidance letter in two parts. So, the first part is an opening narrative where the department discusses its longstanding concerns about online program management companies, and sites a government accountability office report on the potential problems with online program management companies, and the department's lack of oversight for those relationships as a significant concern. So, the department has this whole narrative that implies rather strongly that it's concerned primarily about
OPMs. This is consistent with what it has discussed in other areas about the negotiated rulemaking process that it is in the process of launching, that is among other things going to address OPMs, or third-party servicers.

However, then we get to the second part of the letter, which is the actual guidance. How is the department actually reinterpreting the third-party servicer regulations that have been in place for a long time to encompass these new activities, such as software and services, instructional content, student recruitment and retention? When you get to that second part, which is the bulk of the letter, it doesn't pull through any of the references to online program management companies and the narrative. So, you're left with this very expansive review of activities that the department is now saying constitutes third-party servicers. And yet, the original target was seemingly supposed to be OPMs. But in the absence of something scoping those subsequent categories specifically to OPMs, now we're in a world where an institution has to say, "Well, it looks like you're telling me any digital contract provider contract I have, that firm is now a TPS, and I've got to go through this whole process with that firm to assess that, and then determine what responsibilities we both have in relation to the relationship to that."

But oh, by the way, if that digital content provider is a foreign firm, either foreign owned or foreign located, I'm not going to be able to use them anymore. Or if they utilize foreign subcontractors, say we're talking about a digital content provider that is US owned and located, but involves foreign subcontractors in the development, delivery, or support of that digital content, well, now they can't continue to be a third-party servicer to my institution, unless they divest themselves of those foreign relationships and find US based subcontractors.

So, to my mind, the way I've been putting it, is this is one of those situations where the department knew what it meant. And because it knew what it meant, it left to assumption and implication, things that should have been clearly demarcated in the guidance itself, so that there was no confusion about how the guidance actually applied. But because they started with Part A but didn't pull that through to Part B, we have this very amorphous situation, which was creating a lot of confusion and a lot of concern at our institutions.

Tom: Yeah, thank you. That's helpful, a lot, I think not just for me, but for a lot of our listeners because it does seem to ground on the concerns about OPMs. There is for those who don't work with OPMs, or even maybe those who do, there's some guidance around you can't pay a commission on bringing in students to an institution, and you say, "But yeah, but isn't that what rev share is with tuition?" But there's a loophole, if you will, around that with OPMs, where if they provide other value-added services,
that they aren't necessarily as bound to some of those pay for play anti-fraud provisions. And it seems like the “Dear Colleague Letter” was getting at some of that as well. I mean, there's been a lot of discussion outside of the “Dear Colleague Letter” in the Congress about that. I know several senators have asked for some information about OPMs, but are these two things tied together?

Jarret: Yes. I mean, the department under the Biden administration has been very clear for quite a while now, that it is concerned about what's known as the bundled services exception. That stems from some guidance that was issued in 2011, which basically allows for these revenue share agreements as part of the overall package of services that a company may provide to an institution to support its educational programs, or in the area that we're most concerned about, its online learning programs. So, there's been this ongoing debate, as you say, regarding whether or not revenue share agreements essentially constitute incentive compensation, which has long been banned under federal student aid regulations, and whether or not as a result there are incentives for OPMs to essentially hijack the educational programs of their partner institutions to recruit students to these programs.

That perhaps cannot benefit from them or perhaps are not qualified or where they may be trying to recruit them to programs that are not of sufficient quality for the students to actually take whatever learning they achieve and apply it in the marketplace. There's an ongoing debate about that set of issues. So, with the guidance letter, it seems that the department wanted to use very expansive definitions of relevant activities that would be part of a bundled services agreement, to make sure that it captured every possible online program management company. Therefore, it could start to understand the range of relationships that might fall under that category, and get more information, and better understanding of how those activities relate to revenue share agreements.

Again, as a result, by not, as I say, pulling through the guidance, the focus, and the definition around online program management companies, you're left with this very expansive set of activity definitions that take companies that otherwise would never be considered third-party servicers and suddenly mix them so, with all of the problems that go along.

Tom: So, as an institution where I work, or for others that are members of EDUCAUSE, or elsewhere, what advice do you have for us as we navigate this continually evolving landscape of the guidance letter, and the change in dates, and now the pause that's been put on it? How should we be reacting now? Should we be doing anything in preparation for eventual decisions that might be made down the pike? Just curious, how can we best get ourselves organized now?
Jarret: Well, I think it is probably still a good idea for institutions now without having that September 1st effective date hanging over their heads, to take a look at their third-party provider relationships in the areas identified in the guidance letter. Specifically, around software systems, services, and content, to just understand what's there, what the nature of the existing contractual relationships are relative to the guidance as it has been stated, as yet to be revised. We have good indication that's going to be revised, but hasn't been revised yet. So, I think it's worthwhile to continue that evaluation on a more thoughtful and paced timeframe, just to make sure that the institution understands what the range of possible exposure might be if this guidance isn't revised in the way that at least the update implies.

So, for example, the update implies that the department is going to take a look at clarifying and narrowing the scope of the activities around instructional content, student retention, software, and services. So, that what the actual boundaries of the affected relationships are, is probably much more closely tied to the OPM issue that the department is concerned about. But until we see that, we can't know that it's going to be sufficiently clarified and narrowed to provide the relief that we think institutions should have on that issue. So, it's probably a matter of, out of an abundance of caution, I think an institution should continue to evaluate how the existing guidance affects its current posture, so it'll be in a better position to adapt to whatever the department does in this space.

Secondly, I think it's very important to watch for the notes of proposed rulemaking that will come out later this year from the department around its negotiated rulemaking process, which is going to cover a number of issues. But the third-party servicer issue is clearly one of the issues that's going to be addressed in that negotiated rulemaking process. They know so proposed rulemaking in relation to that issue is going to give us a much better sense of what the department actually cares about and is trying to regulate. And so, hopefully, that will give us some more indication of what an institution may or may not need to worry about in terms of additional future guidance from the department on third-party servicers.

Tom: Cool. Well, thank you. Is there anything else that we haven't covered that you think we should address before we wrap up?

Jarret: One of the things I think has gone under assessed so far in terms of this guidance, is that the regulations around third-party servicers require contracts between institutions and those providers to address certain elements. So, it's probably a good idea to take a look, and it's spelled out in the guidance letter. So, if you just go to the guidance letter, they give you the citation on where those contextual requirements are. It's probably worthwhile to take a look at that. And again, as you're assessing what relationships the institution has, that could conceivably be redefined as a
TPS, making sure you're clear on what those TPSs contract requirements are so you can assess, if we had to go back and adjust these contracts to include these requirements, what would that entail?

Tom: Great. That is good advice. So, more to come, Jarret, I'm sure. Job security for everybody who's doing policy analysis these days. Thank you so much for your insight, and for your advice, and your wisdom. I think it's a real benefit for our audience. So, on behalf of Kelvin and myself, thank you so much for being on TOPcast.

Jarret: Oh, thank you. Appreciate the opportunity.

(Transition Music)

Kelvin: Well, Tom, that was your interview with Jarret Cummings.

Tom: Yeah, I really appreciated the conversation. Jarret's a really smart guy. Any time I have a policy question, he's one of two people I go to. It's Jarret Cummings or Russ Pullen. I know I'm going to get the answer, and I usually get the same answer. So, yeah, thanks to Jarret for breaking that down for us there. He did make a reference to the number of responses that the department got to this when they published this “Dear Colleague Letter.” I want to give a shout-out to Phil Hill and Glenda Morgan on the Phil “On EdTech” blog. If you don't read that, that's another one you should be paying attention to because they've done some really good analyses of this.

They did a bit of an examination of the total number of comments, and the total number of comments that were positive, in favor of this action by the department. And there were overall 1,100, I think, comments. It was like fewer than 1% of those who commented were in favor of this Dear Colleague Letter's actions from the department. So, it was really overwhelming, and a lot of people were anxious about it. And the department clearly heard that with the recent response that they've had to just put everything on pause.

Kelvin: No, I think that's compelling. I've already told you what my favorite phrase or sentence in the entire interview was, "The department knew what it meant."

Tom: [Laughter] Yeah, that's a good line. Thank you, Jarret. It's almost like that might go be a bumper sticker. The department knew what it meant. It's almost like, "I said what I said,” something like that. But it was also in the context of because the department knew what it meant, it assumed that everybody else knew that this is what it meant in this other area where it was not precise and explicit. And therefore, we had no choice but to
interpret this Part Two guidance in the most broad sweeping way that has the biggest impact, because you run the risk of being out of compliance if you didn't.

Kelvin: Yeah, the inadvertent negative consequences of ambiguity.

Tom: Yeah. Well, we like to say, “It's good to have some comfort with ambiguity.” And in this case, no, we could have all used a little clarity. So, I mean, we've got a bit of a reprieve. That's good. We can have an opportunity for negotiated rule making. The last that I heard was that, and this was said publicly, so I'm not saying anything that's not public. Russ Pullen said this at a conference I attended not that long ago, that WCET is lobbying to put Cheryl on the negotiated rule making body. So, hopefully, that will happen.

Kelvin: That's great. They could do worse. Anything else you want to say about the interview before we wrap up? I know this was a very full one. I guess we never did acknowledge, we should say that I think you referenced the timeframe in the midst of the interview without a specific date, but I think that was, you spoke in mid-April, I want to say. And so, we're recording this in early May. It'll release in mid-May. So, who knows what'll happen next?

Tom: I know, right? It's only been a couple of weeks, and it's really evolving. So, as far as a timeline, I think Jarret did touch on that a little bit. So, it's on pause now. There will be some negotiated rulemaking. And then there will be at some point a new “Dear Colleague Letter” or some official regulation or something that comes out. Then it'll be a minimum of six months before you have to implement that. So, I heard a 2025 date, it's possible. And who knows, if we ended up with a new administration in Washington, then what happens to this? So, just fasten your seat belts, prepare for this at some point, but right now it's not imminent. I'd like to say one other thing though, that I've been asked, what do you think is going to happen with this? And I have no crystal ball. But my prediction, I actually heard come out of Russ Pullen's mouth one time, so I thought, okay, he's a smart guy.

He's much closer to this than I am, so maybe there's something to it. But given what the department meant originally, which was presumably to put their arms a little tighter around OPM practices, and the bundled servicers exception, and to try to close the loophole a little bit, if you considered that a loophole, I think that that's probably what will be the result at the end of the day, that there will be tighter restrictions on OPMs. And OPMs in the market are going to have to respond accordingly, whether they potentially move from a rev share model to more of a fee for service model. I don't think OPMs are going away, but the way they operate may
evolve a little bit based upon what the regulators in Washington DC decide to do.

Kelvin: Yeah. Good comments. Quick plug, if policy, you find that tasty, or if you find it not tasty but nutritious, then we might direct you back to prior policy related episodes like Number 28, “Understanding Policy”, Number 58, “Fun with Regulations,” and Number 112, which was a little time limited, but it's still entertaining, “Breaking News: SARA (and More!) Under Siege.” Go get your policy fix. You want to try to wrap us up and put us on the runway there, Tom?

Tom: Sure, yeah. If policy is your jam. All right. So, I think we would all agree, staying attune to changes, and even potential changes in government regulations, is part of the job in online education. You got to pay attention, whether it's state authorization or it's this kind of stuff. There's always something. Connecting with colleagues and staying actively involved allows us to help influence and be aware of the regulatory landscape.

Kelvin: Yep, that sounds great. Well, wish we were sharing this cup of coffee in person. Glad to give you the from the distance video window, virtual coffee sharing. And until next time, for TOPcast, I'm Kelvin.

(Outro Music)

Tom: And I'm Tom.

Kelvin: See ya.