



July 1, 2021

Vanessa Gomez
U.S. Department of Education
400 Maryland Avenue, SW.
Room 2C179
Washington, DC 20202

Dear Ms. Gomez:

On behalf of the undersigned organizations, we write to offer written comments on the topics suggested by the Department, as well as additional topics that should be considered, as part of the Department's stated intention to pursue negotiated rulemaking on programs under Title IV of the Higher Education Act, as detailed in Docket ID ED-2021-OPE-0077.

Before offering comments on topics to be considered in negotiated rulemaking, we'd offer the following principles that we believe should guide the Department and the negotiators when promulgating or revising regulations.

First, the goal of any effort to revise regulations should be promoting opportunity for all students and enhancing institutional efforts, while preventing harm to students, institutions, and taxpayers.

Second, to the greatest extent possible, regulations should produce processes that are driven by data, transparent to the public, and targeted to the issues they are meant to address.

Third, that students, taxpayers, stakeholders, and the Department are best served by employing risk-based oversight and enforcement wherever practicable. Given the limited resources available to the Department, focusing efforts to ensure compliance in areas or on institutions where the risks to students and taxpayers are highest will provide the greatest possible benefit.

Keeping those principles in mind, we will address the topics in the order they were listed in the Federal Register notice.

Topic #1 - Change of ownership and change in control of institutions of higher education under 34 CFR 600.31

The Department of Education is required to consistently apply the accountability and

oversight responsibilities entrusted to the Department in law. Given that the Higher Education Act appropriately recognizes distinctions between nonprofit and proprietary institutions, and applies different measures of accountability to each, it is important that any college or university that seeks to change their ownership or tax status undergoes heightened scrutiny.

This scrutiny could reasonably include a fixed period of time in which institutions converting to nonprofit status would remain subject to the same accountability measures as proprietary institutions, as well as heightened standards under existing accountability measures.

Topic #2 - Certification procedures for participation in Title IV, HEA programs under 34 CFR 668.13

While we support efforts to tighten oversight of institutions and limit their access to Title IV funds, appropriate caution must be taken to ensure that any effort to weed out bad actors through tightened certification procedures or an expansion of qualifying elements for provisional certification must be appropriately balanced against the possible harm to quality institutions and their students as a result of the impact of the COVID-19 pandemic or other exceptional circumstances.

Topic #3 - Standards of administrative capability under 34 CFR 668.16

This section affects internal institutional procedures and changes in this area would have an enormous impact on institutional operations. While we have no specific comment on the inclusion of this section on the agenda, as our members are significantly affected by any changes the Department may be contemplating, we will closely follow the possible inclusion of this section as topic for negotiated rulemaking.

Topic #4 - Ability to benefit under 34 CFR 668.156

We have no comments to offer.

Topic #5 - Borrower defense to repayment under 34 CFR 682.410, 682.411, 685.206, and 685.222

Borrower defense to repayment is provided in statute as a tool to ensure that students who have been harmed as a result of fraud or abuse by an institution do not have this harm compounded by having to repay loans taken as a result of this fraud. In addition, borrowers should have their eligibility for aid restored, to ensure they are able to pursue their educations.

As noted in our 2016 and 2018 comment letters, our members strongly support a clear and transparent process that provides timely determinations for borrowers seeking to

assert a defense to repayment. This will have the effect of not only providing relief to the victims of fraud and abuse but will also serve as deterrent to predatory institutions.

Such a process should have clearly defined standards and allow all relevant parties to participate; allow for both affirmative and defensive claims; allow for individuals or groups of borrowers to assert their claims; provide reasonable statutes of limitations that can be reopened upon the discovery of new, relevant information; and provide for full discharge of loans and the complete restoration of any aid eligibility that may have derived from fraud or abuse on the part of an institution.

Topic #6 - Discharges for borrowers with a total and permanent disability under 34 CFR 674.61, 682.402, and 685.213

We strongly support implementation of an expedited and non-burdensome process for handling the full discharge of any federal student loan obligations for these borrowers.

Combined with recent legislative action to waive the tax obligations for forgiven federal loans, the Department should proactively discharge these loans for the borrowers it already knows would qualify for such relief, rather than requiring them to affirmatively request it.

Topic #7 - Closed school discharges under 34 CFR 685.214 and 682.402

In the event of an institution's closure, reasonable precautions must be made to ensure the continuity of students' educations. Where such measures are not in place, students should have the loans taken at that institution discharged. Currently, regulations provide for a discharge for students who withdraw within 180 days of their institution's closure. This period should be extended to a full calendar year, to ensure that students who act proactively upon information of a possible closure are not denied relief they are entitled to.

In addition, the regulations should address circumstances in which the teach-out plan of an institution does not reasonably address a student's educational program or requires a substantive change in the method of instruction (such a shift from wholly in-person to wholly distance or where the other institution is located at a great distance from the closing institution). In such cases, a student should be eligible for discharge of their loans.

Topic #8 - Discharges for false certification of student eligibility under 34 CFR 685.215(a)(1) and 682.402

In situations in which a student provided accurate information to an institution and an institution intentionally falsified that information without the student's knowledge or consent, the student should receive a full discharge of any loans and a full restoration of

eligibility for other forms of federal student aid.

Topic #9 - Loan repayment plans under 34 CFR 682.209, 682.215, 685.208, and 685.209

Given the difficulties many borrowers face in repaying their federal student loans, we believe it is critical that the Department exhaust all options to make the process easily understandable, simple to manage, and centered on producing the best possible outcome for each borrower. We recognize that the Department's options for assisting borrowers are limited by statute, but the Department retains significant authority to improve the situation for borrowers.

At a minimum, student loan borrowers should be able to access and manage their loans in one place through the Department of Education, with clear, consistent and easy-to-understand information and tools. Servicing should be blind to borrowers; the Department's contracts with servicers, including all terms of payment, should be transparent and publicly available; and incentives to servicers should be appropriately targeted to reward acting in the best interests of borrowers.

Topic #10 - The Public Service Loan Forgiveness program under 34 CFR 685.219

While many of the problems with Public Service Loan Forgiveness (PSLF) stem from statutory language that causes confusion and limits the pool of eligible borrowers, the Department has a responsibility to ensure borrowers (through their servicers) have a clear understanding of the current status of their eligibility for forgiveness at any point in repayment; have access to comprehensive assistance to become eligible or maintain their eligibility; and are provided with tools that make it easier to document employment or other information with a minimum of burden to the borrower.

While a number of improvements have been made or are underway, there are still numerous areas where the Department can assist borrowers in meeting the intent of the law. In particular, there should be clear recognition of the eligibility of certain types of employers currently not considered eligible due to technicalities and the Department should implement a clear and consistent process for appealing determinations of eligibility for PSLF.

In addition, the Department should ensure that all payments made by borrowers in good faith to meet their obligations are appropriately counted towards their total of 120 payments. Any payment made that is equivalent to a normal payment under the borrower's repayment plan should be counted towards the required 120 payments, regardless of whether multiple payments are made each month.

Finally, the Department should ensure that servicers are appropriately empowered and

incentivized to assist and counsel all borrowers as to their eligibility for forgiveness under PSLF, and what steps may be necessary to become eligible.

Topic #11 - Mandatory pre-dispute arbitration and prohibition of class action lawsuits provisions in institutions' enrollment agreements (formerly under 34 CFR 685.300) and associated counseling about such arrangements under 34 CFR 685.304

The inclusion of such measures in enrollment agreements is not standard practice across the overwhelming majority of postsecondary institutions. We do not believe that such measures are necessary or appropriate and we support prohibiting the use of such clauses in enrollment agreements.

If such clauses are to be allowed, then it is necessary that students entering into such agreements have a full and complete understanding of the impact of these provisions on their rights to pursue possible legal action against the institution. At a minimum, institutions using them should be required to counsel students as to the provisions, and students should have the opportunity to withhold their consent during this counseling, without impacting their ability to enroll.

Topic #12 - Financial responsibility for participating institutions of higher education under 34 CFR subpart L, such as events that indicate heightened financial risk

At their core, the Financial Responsibility Standards are meant to protect students and taxpayers from precipitous institutional closures. The current system has proven a poor tool toward that end by penalizing many institutions that are healthy while failing to identify those that are not.

It has been nearly 25 years since the current financial responsibility standards were fully revised and those standards no longer reflect the changing nature of higher education finance. Despite changes to some key ratio components, we see new problems emerging. For example, stable institutions have received lowered or failing composite scores because they made the appropriate business decision to refinance outstanding debt to take advantage of historically low interest rates.

The challenges to the current system cannot be fixed by simply adjusting ratio components. This is particularly important to students and taxpayers since the current ratio used to establish financial responsibility is an annual snapshot that can change for better or worse fairly quickly after being reported. The process itself must be fixed to include a more holistic look at an institution's overall financial situation before assessing penalties or corrective actions – and allow for an evaluation or appeals process when an institution's finances change.

Topic #13 - Gainful employment (formerly located in 34 CFR subpart Q)

As we consistently maintained in our 2014 and 2018 comments on the Gainful Employment regulation, we believe the Department has an obligation to ensure that students and taxpayers are protected and that gainful employment programs with access to Title IV funds meet reasonable standards to continue accessing federal funds.

As a result, we support implementing rules for gainful employment programs that measure the return on investment for their students and mandate meeting a consistent standard. Given the scope of the 2014 regulation, it was perhaps inevitable that there were numerous problems with implementation, and the Department should be cognizant of that as they consider revising the regulation. We have previously offered a number of measures that would more appropriately narrow the focus of the regulation to areas where problems are most likely to occur, while limiting the challenges of compliance at institutions with demonstrated histories of low risk and solid outcomes for their students, and we would encourage any future regulation in this area include such measures.

Topic #14 - Pell Grant eligibility for prison education programs under 34 CFR part 690

The restoration of Pell Grant eligibility to incarcerated individuals is long overdue, and holds tremendous promise. As the Department begins to oversee this expansion, we would ask that the Department strike the difficult balance between ensuring that Pell eligibility will support an expansion of postsecondary programs for incarcerated individuals, while also protecting this population of students from the possibility of fraud and abuse.

For that reason, we recommend that institutions seeking to serve incarcerated students should first submit an application with detailed information to the Department for review prior to being allowed to serve Pell students; that any institution offering such a program must already be Title IV participating and in good standing; the program must maintain a meaningful physical presence within the facility at which students reside; and that institutions cannot exceed 10% of their total enrollment consisting of incarcerated individuals.

Additional Topics for Consideration

Resumption of Repayment

We strongly urge the Department to prepare for the resumption of repayment at the end of the current national emergency in as expeditious a manner as possible. Beyond simply meeting the statutory obligations regarding notification to borrowers, the Department, alongside their servicers, must prepare for the confusion that will inevitably occur by

establishing measures to ensure that borrowers are not unduly or inappropriately harmed in the transition; that servicers pursue every available measure to assist borrowers in resuming repayment; and that the overall process is as seamless as possible.

Section 117

The Department should consider carrying out negotiated rulemaking around Section 117 to help institutions meet their obligations to report foreign gifts. The Department has never carried out formal rulemaking around Section 117, but has launched close to 20 investigations against institutions regarding this reporting requirement. This provision has come under increasing scrutiny, and lacks meaningful guidance on how to comply, especially given the extraordinary complexity of this area. While we know that the Department is not required to pursue negotiated rulemaking in this area, doing so offers a clear benefit to both ED and stakeholders by helping to fulfill the goals of the statute in promoting transparency regarding foreign funding, while also providing institutions with an understanding of how to appropriately meet their obligations.

TRIO Programs

We request that the Department make regulatory revisions to TRIO programs to promote equity by ensuring the programs are able to serve all students who could benefit; removing regulatory requirements that disadvantage institutions serving large percentages of low-income students; and revising funding criteria that limit the ability of TRIO programs to serve numerous eligible students in secondary schools.

We appreciate the Department's intention to review and revise existing regulations across the range of topics identified above. Each of the topics will require substantive and informed contribution from all stakeholders, and in total represent an ambitious effort to improve the administration of federal programs. As the process of identifying and addressing the topics above moves forward, we look forward to working with the Department and other stakeholders to ensure that any changes made will serve the needs of students, borrowers, educators, and institutions.

Sincerely,



Ted Mitchell
President

On behalf of:

Achieving the Dream
ACPA-College Student Educators International
ACT
American Association of Colleges for Teacher Education
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
Association of Advanced Rabbinical and Talmudic Schools
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities of Rhode Island
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Connecticut Conference of Independent Colleges
Council for Higher Education Accreditation
Council for Opportunity in Education
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
Higher Education Consultants Association
Hispanic Association of Colleges and Universities
Independent Colleges of Indiana, Inc.
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of Colleges and Employers
North Carolina Independent Colleges and Universities
Northwest Commission on Colleges and Universities
SACSCOC
Tennessee Independent Colleges and Universities
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