

July 1, 2021

Dr. Michelle Asha Cooper
Acting Assistant Secretary for Postsecondary Education
and Deputy Assistant Secretary for Higher Education Programs
United States Department of Education
400 Maryland Avenue, SW
Room 2C179
Washington, DC 20202

Dear Dr. Cooper:

Thank you for the opportunity to provide input on topics for negotiated rulemaking. These comments respond to the May 24, 2021, Federal Register notice of negotiated rulemaking (Docket ID ED-2021-OPE-0077) for programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA).

We represent a broad coalition of organizations working on behalf of students, veterans, faculty and staff, civil rights advocates, researchers, and other stakeholders concerned about institutions receiving Title IV funds that rely on deceptive and fraudulent tactics to lure students into programs that provide little or no value. A lack of oversight particularly endangers low-income students, students of color, women, and veterans, who are disproportionately targeted by predatory for-profit schools.

Nine out of 10 Black and Latina/o students who graduated from a for-profit undergraduate degree program had to borrow, and [they borrowed at least \\$10,000 more](#), on average, than those attending public colleges. Black students attending for-profit colleges are more than twice as likely—and Latina/o students more than four times as likely—to take out private loans as their peers at other types of colleges. These data, coupled with the lived experiences of so many students and borrowers, make it critical for the Department of Education (ED) to revive and strengthen protections through negotiated rulemaking.

Below, we provide a set of priorities for the upcoming negotiated rulemaking focused on better protecting students by addressing predatory practices and holding colleges accountable. We also firmly support and encourage efforts by the Department to take immediate steps to implement programs, issue guidance, and use existing authorities to address pressing issues; we believe that much can be done outside the regulatory process.

We also recommend prioritizing improvements to the student loan repayment process, including needed improvements to income-driven repayment. Millions of student borrowers continue to face challenges with loan repayment, and resolving these issues deserves the Department's full attention and authority. The Department should consider the accountability recommendations below as complements to, not replacements for, urgently needed reforms that lead to a simpler loan repayment system that lifts the burden of student debt from as many borrowers as possible, as soon as possible.

Composition of the Negotiated Rulemaking Tables

The best outcomes from negotiated rulemaking proceedings occur when the right constituencies and areas of expertise are represented at the table. Vendors and the entities regulated by the results of these proceedings have been disproportionately represented on previous committees, at the expense of student, borrower, veteran, consumer, and public interest groups. This rulemaking process offers the Department an opportunity to address undue industry influence and re-orient ED's regulations by ensuring that at least as many seats are available to groups representing the interests of the intended beneficiaries of the regulations as those offered to vendors and their affiliated associations. As numerous speakers noted throughout oral testimony in June, the negotiations must include substantial representation of students and borrowers most affected by the resulting regulations. Student and borrower negotiators must reflect the diverse population of today's students, including students with disabilities, student veterans, and Black and Latina/o borrowers who disproportionately shoulder the heaviest student debt burdens.

Priority Issues

Considering the previous Administration's efforts to rescind or weaken regulations that protect student and taxpayer interests, we urge prompt attention to a set of issues that would reestablish regulatory frameworks and strengthen oversight and enforcement for the future.

Gainful Employment. The 2014 Gainful Employment (GE) Rule—the result of extensive expert input and analysis, negotiated rulemaking, and public comment—was a critical safeguard that drove improvement by colleges including reductions in tuition rates, increased use of scholarships, and debt-free trials that likely prevented hundreds of thousands of students from taking on debts they were unlikely to be able to repay. To meet the GE rule's threshold requirement, debt payments of a program's typical graduate could not be both greater than 8 percent of their earnings and 20 percent of their discretionary earnings. Any new GE rule should apply to career education programs at public, nonprofit, and for-profit colleges; provide for disclosure of key information on program costs and outcomes; and require programs that consistently leave students with debts they cannot repay to improve outcomes or lose access to federal funding.

We recommend reinstating the 2014 GE rule with modifications. To the extent possible, regulations should clarify that states and consumer groups have standing to ensure the rule is implemented and challenge its repeal. The Administration may also wish to consider additional quality assurance metrics designed to ensure that students are deriving value from programs at colleges receiving Title IV funds and consider protections for students enrolled in programs that lose eligibility.

Borrower Defense to Repayment. The borrower defense (BD) regulation is a critical tool for the Department to both protect borrowers from having to repay debt that should be discharged and to deter prospective school misconduct. Unfortunately, ED adopted a new borrower defense rule in 2019 that makes it [virtually impossible](#) for defrauded students to have their loans discharged. This rule

followed one put in place in 2016 that already presented significant challenges to effective resolution of borrower claims.

Rather than strengthening the 2016 rule, the previous Administration made it all but impossible for students to successfully pursue a defense to repayment claim. By the Department's own estimate, [97 percent of loans of students who are connected to a school's illegal conduct will not be forgiven](#). The rule will hold colleges responsible for only 1 percent of loans made based on misconduct.

Because the 2019 rule effectively eliminates the path to borrower defense for most borrowers—while providing no incentive for schools to curb misconduct—the Administration must re-regulate. Guiding principles should create a borrower defense process that:

- Makes BD easier to understand and more accessible for borrowers;
- Allows stakeholders who could include borrower advocates, state attorneys general, and consumer protection agencies to file on behalf of similarly situated borrowers;
- Facilitates collection and review of evidence for resolving claims;
- Makes it easier for ED to provide relief to groups of borrowers, when appropriate;
- Ensures claims are processed transparently, expeditiously, and fairly;
- Deters future misconduct by institutions;
- Provides automatic discharges after one year for students whose institutions closed before they could complete;
- Provides strong financial responsibility safeguards to mitigate the risk of sudden institutional collapses; and
- Restores the provision of the 2016 rule that addressed borrower discharge in instances of schools falsely certifying student eligibility to borrow through federal loan programs.

Re-regulation is critical, but the Department should also take immediate steps to provide relief to borrowers. For example, ED should provide automatic closed school discharges to more students who attended schools that collapsed by extending the eligibility (or look-back) periods. The Department should comprehensively address the unfair and unlawful borrower defense process used by ED during the previous Administration, including reinstating the cursorily denied claims of students who have already been waiting excessively long for relief.

Oversight and Enforcement. The Department has a critical role to play in enforcing additional accountability and protection measures, and we support regulations that better ensure that the Department can effectively protect students and oversee institutions, including:

Certification for Participation and Loan Origination. Each institution that participates in the federal financial aid programs signs a program participation agreement (PPA) committing to comply with the laws and the regulations governing those programs. This agreement creates an obligation between the institution and ED, providing ED with broad enforcement authority—including the ability to set conditions. To date, the Department has not vigorously exercised its authority to enforce PPA provisions and address noncompliance, allowing schools to remain on provisional or even “temporary” status for

unacceptably long periods of time, often without coming into compliance. At the same time, penalties have not always matched the scope of wrongdoing. We urge ED to exercise its existing authority more fully, as it simultaneously explores rules to enhance its ability to oversee institutions more effectively.

Arbitration. As a condition for enrollment, many for-profit colleges [include a requirement](#) in enrollment contracts that students waive their rights to pursue litigation to recoup losses sustained as a result of misconduct by the colleges. Defrauded students are instead forced into arbitration, a private resolution process through which colleges enjoy insulation from public legal action and public scrutiny. Meanwhile, students have access to limited recourse and are prevented from joining in class action cases, keeping similar claims of misconduct hidden from public view. The Department should move to restore the ban on forced arbitration agreements and class action waivers and prohibit non-disclosure requirements. These steps will protect the full rights of defrauded borrowers and help illuminate illegal conduct by schools.

Financial Responsibility. We support an overhaul of the financial responsibility system in a manner that provides transparent, forward-looking assessments by trained financial analysts. These assessments should ensure institutions have adequate assets and financial holdings commensurate with the volume of federal and student dollars they put at risk. Financial responsibility standards should ensure that institutions have the resources to provide the educational services they promise, and to cover losses and liabilities if they fail. The intent of these standards should be to identify harmful practices and predatory institutions before crises arise, not to penalize institutions—especially those that are under-resourced but showing evident commitment to serving students.

The 2016 Borrower Defense to Repayment rule contained important triggers or early warning events that could result in risky schools losing certification or providing increased collateral to cover liabilities, including closure-related costs. We support restoring this early warning approach, but also note that a backward-looking, opaque system will continue to fail to identify risks until it is too late for meaningful action. In addition to financial responsibility standards, the Department should explore cash management regulations and fiduciary responsibility obligations to protect Title IV payments from waste, abuse, and financial loss.

Correctly account for federal funds among institutional revenues (90/10). Earlier this year, Congress acted to close the 90/10 loophole that has allowed hundreds of for-profit colleges to [skirt the Department's 90/10 requirements](#) by counting military and veteran student benefits as non-federal revenue, thereby incentivizing the schools to aggressively target veterans and military-connected students with deceptive and fraudulent recruiting and enrollment practices. The statute sets October 1, 2021, as the earliest date to begin rulemaking. We urge action on or near that date to complete implementation as quickly as allowed by the rulemaking process.

Standards of Administrative Capability. While the Department acted in 2010 to clarify that recruiters and financial aid staff may not be compensated based on the number of students they enroll, the Department has taken few, if any, steps to enforce these provisions or otherwise protect against predatory recruiting. Meanwhile, the use of third-party recruiting and payment of [“lead generation”](#)

[companies](#) has expanded dramatically across all sectors of higher education. The comprehensive regulatory process offers an opportunity for the Department, in conjunction with the Office of the Inspector General, to create a secret shopper-type enforcement program that better ensures compliance with the ban on incentive compensation and the use of predatory recruiting tactics.

Additional Accountability Issues Requiring Negotiated Rulemaking

The kind of comprehensive review the Department has signaled for this round of negotiated rulemaking must account not only for updates to federal oversight but should also ensure that states and accreditors—two of the three arms of the program integrity triad—do their part to promote positive outcomes for students and taxpayers. The topics below are among a set of critical issues not articulated in the Federal Register notice, but that nonetheless deserve concerted attention.

State Authorization. For many years, state authorization requirements have meant too little. With significant variation in capacity, will, and knowledge to conduct oversight, some states have virtually no requirements for obtaining authorization. Moreover, with the rise of distance education, both the risks to students and the challenges of state oversight have grown substantially. Students enrolled exclusively online represent nearly [half](#) (47 percent) of all for-profit college enrollment, with 83 percent of these students enrolled at schools outside of their home states.

Today, 49 states (excluding California), the District of Columbia, and several territories have joined the National Council for State Authorization Reciprocity Agreements (NC-SARA), through which member states fully delegate their role in approving and overseeing colleges to the state in which a college is located. By making it easier for a college to attain authorization in each state it operates, reciprocity agreements help institutions expand and enroll students across state lines. Unfortunately, the terms of NC-SARA's agreement makes it difficult for states to adequately protect their own students. The terms exacerbate this difficulty by allowing states with the lowest requirements to set the standard and by inappropriately limiting the ability of consumer regulators to enforce their own state higher education laws and safeguards.

Negotiated rulemaking should:

- Lift the floor for state authorization processes and capacity;
- Ensure programs lead to licensure, if applicable;
- Improve oversight of distance education programs through regulation;
- Ensure that states may fully enforce their own laws to protect students; and
- Require a robust, transparent, and independent complaint system to ensure that patterns and practices of misconduct can easily be identified and addressed.

Accreditation. Accrediting agencies serve as gatekeepers for institutions to access federal funds. But recent and dramatic failures of institutional oversight demonstrate the need for clearer guidelines around how accreditors should treat institutions that fall short of quality control expectations and requirements. For example, weak oversight by the Accrediting Commission of Career Schools and Colleges over the schools operated by the Center for Excellence in Higher Education led to years of

waste, fraud, and abuse. This lax oversight resulted in excessive costs to taxpayers when fraudulent colleges suddenly shuttered and to students taking on a collective [\\$1.8 billion in federal student loans](#) they were poorly situated to repay. The previous Administration's actions to weaken accreditation recognition requirements related to failing schools only worsened this failure of oversight. To protect students and shore up the quality of institutions accessing federal financial aid, the Department should include accreditation within this negotiated rulemaking process.

Action Needed without Rulemaking

Although the issues above collectively constitute a robust accountability agenda for negotiated rulemaking, the Department should also move forward on other issues that can benefit students, prospective students, and borrowers. In addition to actions addressing outstanding borrower defense claims noted above, ED's immediate next steps that do not require changes to regulations via the negotiated rulemaking should include:

Rein In "Bundled Services" Tuition-Sharing. The HEA statute and regulations prohibit the use of commissioned sales practices at Title IV institutions. Yet the Department has failed to enforce this provision in the case of some for-profit online program management firms (OPMs) that frequently are paid upwards of 50 percent of tuition for services that include recruiting. The Department should withdraw the 2011 guidance that OPM companies say permits colleges to pay them a tuition share for bundled services that include recruiting.

Discharge Debts of Borrowers with Total and Permanent Disabilities. Recent data shows that more than [517,000 borrowers](#) are known to qualify for student debt discharge because of total and permanent disability but have not yet received loan cancellation. The Department should provide automatic relief to these borrowers.

Pell Grant Eligibility for Incarcerated Students. The Department should also implement full eligibility for Pell Grants to incarcerated students as soon as possible, with a commitment to ensuring the quality of programs that will provide access to degree-granting coursework. While quality controls are essential to the success of these programs, existing authorities and policy guidance should be fully explored as options for implementation.

The need for stronger accountability measures in higher education, particularly to protect students against predatory and fraudulent for-profit institutions, is clear. Student borrowers who attended one of the nation's nearly 700 for-profit colleges—collectively just 8 percent of all enrolled postsecondary students—account for [nearly one-third of student loan defaults](#). Measures such as the gainful employment rule, when implemented with fidelity, establish critical guardrails to identify and shut down low-quality and fraudulent programs and institutions. They position students for academic and financial success while protecting the investment taxpayers make in college financial aid programs.

Thank you for the opportunity to provide comments on behalf of our coalition, as well as for your work to serve the interests of students and student loan borrowers. We look forward to the process and actions ahead to strengthen protections against waste, fraud, and abuse. These measures will ensure accountability provisions are in place to advance the interests of students and borrowers, rather than the institutions that too often take advantage of them.

Sincerely,

American Association of University Professors
American Association of University Women (AAUW)
American Federation of State, County and Municipal Employees
American Federation of Teachers
Americans for Financial Reform Education Fund
Center for American Progress
Center for Law and Social Policy (CLASP)
Center for Public Interest Law, University of San Diego School of Law
Center for Responsible Lending
Clearinghouse on Women's Issues
Consumer Action
CWA Local 1081
Education Reform Now
Feminist Majority Foundation
Generation Progress
Housing and Economic Rights Advocates
Maryland Consumer Rights Coalition
National Association for College Admission Counseling
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
New America's Higher Education Program
Project on Predatory Student Lending
Public Citizen
Public Counsel
Public Law Center
Service Employees International Union (SEIU)
Student Borrower Protection Center
Student Defense
Student Veterans of America
The Education Trust
The Institute for College Access & Success
UnidosUS
Veterans Education Success
Veterans for Common Sense
Young Invincibles
Stephanie Hall, The Century Foundation
David Halperin, Attorney