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June 20, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Secretary Cardona,

We write in response to the Notice of Proposed Rulemaking (NPRM) regarding Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Certification Procedures, Administrative Capability, and Ability to Benefit. Despite the lack of adequate time to comment on this NPRM and your unwillingness to provide an extension despite calls from the higher education community and Congress, we are expressing our concerns and views on what is indisputably a sweeping regulatory package with substantial implications for students, institutions, and taxpayers.

There is no doubt that accountability in postsecondary education is sorely needed. For decades, colleges and universities, irrespective of profit status, have charged far too much for degrees with little to no financial value, leaving students with debt they cannot repay and thus forcing taxpayers to foot the bill. When it comes to matters such as the need for transparency about the price of degree programs and establishing guardrails that ensure students and taxpayers receive a return on their investment, Republicans and Democrats agree that the status quo regarding the costs and outcomes of postsecondary education is not working.

Yet, despite commitments you have made to work with Congress on robust accountability for all institutions of higher education (IHEs), your Department has reverted to using a mere few words in statute as an excuse to create hundreds of pages in regulations primarily targeting IHEs who do not share your preferred tax status. In doing so, the Department proposes using flawed,¹ arbitrary metrics to determine whether programs leave students and taxpayers better off for investing in them.² In addition, the NPRM ignores the thousands of dollars students pay

¹ For instance, Cooper (2022) finds that the discretionary earnings rate has a very weak correlation with the lifetime return on investment of a given program, and also finds that the GE measure fails hundreds of programs which produce positive lifetime returns. <https://freopp.org/accountable-or-not-evaluating-the-biden-administrations-proposed-gainful-employment-framework-a49231683263>

² For instance, in announcing its proposed income-driven repayment plan, the Department defines discretionary income – that is, the income that can reasonably be assessed for purposes of calculating an affordable monthly payment – as income exceeding 225 percent of the federal poverty line; yet, it contradicts itself by using 150 percent as the threshold for defining repayment affordability under its discretionary debt-to-earnings (D/E) rate resurrected from the 2014 GE rule. One can only assume that this means the Department has either made the rational decision to revise or withdraw its radical IDR proposal or that the repayment affordability is an arbitrary determination made by the Department based on political convenience.

out-of-pocket or with their Pell Grants to attend high-tuition, low-return programs at public and private non-profit colleges.³

Further, while we agree that transparency about financial value should be required of all IHEs – and that all IHEs should be held financially accountable when their programs fail to deliver such value to students and taxpayers – the Department continues to ignore, bend, and interpret the law in ways that are clearly beyond what Congress intended.⁴ Again, it is puzzling why the Department refuses to work with the legislative branch when there is clearly bipartisan agreement on these issues and instead chooses to operate by executive fiat.

Moreover, in doing so, the Department is issuing overly burdensome and unnecessary requirements for IHEs that cut against the shared goal of lowering college costs and improving student outcomes. For example, the Department unreasonably requires IHEs to comply with reporting requirements in as little as 10 days and, if an institution does not comply within that time frame, the institution can be declared financially irresponsible even if the IHE simply takes an additional day to ensure the accuracy of its information. This is ironic given that the Department itself regularly fails to meet deadlines for responding to Congressional inquiries, is several months behind its implementation timeline for the FAFSA, and is unable to produce the documentation necessary to receive a financial audit. The Department should vastly simplify the proposed financial responsibility framework to avoid creating an extreme and unnecessary administrative burden.

Further, the Department proposes two harmful changes to certification procedures. One proposed change requires institutions to disclose whether a program meets state occupational licensure requirements, while the second proposed change requires institutions to meet state requirements independently to provide distance education. Both changes will harm students and create unnecessary burdens for institutions.

First, occupational licensing requirements inherently limit employment opportunities with little benefit.⁵ This proposed regulation would further entrench state licensing requirements at a time when federal policymaking should be encouraging states to reverse the proliferation and increase the alignment of licensing standards. Similar to actions by the Trump administration, through the Executive Order on Promoting Competition in the American Economy, the Biden administration called for “banning or limiting...cumbersome occupational licensing requirements that impede economic mobility.”⁶ There are better proxies for program quality than whether or not a program meets state licensing standards, and as states reconsider licensing standards⁷ and transparency about those standards, the Department should not impede that progress.

³ <https://www.urban.org/urban-wire/student-debt-blind-spot-gainful-employment-rule-college-programs>

⁴ For example, the Department points to Section 498 of the HEA as its authority for the newly proposed section in 34 CFR 668.13(e) of the regulations where it is clear no such authority exists.

⁵ https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf

⁶ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

⁷ <https://ij.org/report/license-to-work-3/report/executive-summary/>

Second, the Department's reversal on meeting consumer protection laws for distance education is also deeply concerning. Under current regulations, an institution may offer distance education courses to students across different states without undergoing a separate state authorization process in each state if the institution's state is part of a state authorization reciprocity agreement. Since 2013, the private non-profit National Council for State Authorization Reciprocity Agreements (NC-SARA) has facilitated such reciprocity agreements among states. Consumer protection is well within the standards of NC-SARA's compact, and the effect of these compacts produced by the voluntary partnerships is a market-based approach to strong consumer protection.⁸ Over 2,200 institutes across 49 states meet the standards.⁹ By requiring institutions to meet all state consumer protection laws related to closure, recruitment, and misrepresentations, this proposed regulation will recreate a complex patchwork of consumer protection for distance education, which seems contrary to the Department's presumed goal.

The Department should know that requiring institutions to navigate myriad state laws will increase compliance costs and ultimately prevent institutions from offering distance education for fear of risking the institution's Title IV certification. Even before the pandemic, 7.3 million students in the U.S. were taking at least one distance learning course because they needed flexible education opportunities to fit into their schedules.¹⁰ On June 14, 2023, the Higher Education and Workforce Development Subcommittee held a hearing where a witness stated that distance education provides a unique opportunity for increased access and student completion, particularly for students who have not completed a degree or credential and are returning to postsecondary education.¹¹ Instead of supporting these students, the Department's change to the certification requirements of an institution will eliminate access to online education for students across the nation.

Even more puzzling, there is no reason for the Department to revisit this matter. A wide-ranging group of postsecondary experts achieved consensus and voted to accept the current state authorization standard for distance education during the 2019 negotiated rulemaking session.¹² The postsecondary community recognizes that achieving consensus on a regulatory proposal is a quite a feat. Yet, under Secretary DeVos, the negotiated rulemaking committee did just that. The Department has publicly praised policy proposals that received consensus in the 2021 negotiated rulemaking sessions, so the Department should not be hypocritical by overturning the 2019 consensus regulatory standard.¹³

In conclusion, the Department has failed to provide Congress, IHEs, and stakeholders adequate time to respond to a 1,077-page regulatory package that uses flawed metrics to assess program quality, proposes unnecessary and overly burdensome requirements that will increase college costs, and threatens to dismantle online education entirely at a time when innovation in

⁸ [SARA Policy Manual 22-1 6-27-2022.pdf \(nc-sara.org\)](#)

⁹ <https://www.nc-sara.org/about-nc-sara>

¹⁰ https://pnpi.org/wp-content/uploads/2023/05/OnlineEdPrimer_May23.pdf

¹¹ *Postsecondary Innovation: Preparing Today's Students for Tomorrow's Opportunities*
<https://www.youtube.com/watch?v=VZmogFv4SOg>

¹² <https://www.insidehighered.com/news/2019/11/01/education-department-issues-new-regulations-accreditation-and-state-authorization>

¹³ <https://www.ed.gov/news/press-releases/education-department-releases-proposed-regulations-protect-veterans-and-service-members-increase-college-oversight-and-increase-college-access-incarcerated-individuals>

postsecondary education is sorely needed. Simply put, the Department should listen to all stakeholders and abandon this proposed rule completely.

Sincerely,



Virginia Foxx
Chairwoman
U.S. House Committee on Education and the
Workforce



Burgess Owens
Chairman
Subcommittee on Higher Education and
Workforce Development
U.S. House Committee on Education and the
Workforce