AMERICAN COUNCIL ON EDUCATION

OFFICE OF THE PRESIDENT

August 2, 2010

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street NW, Room 8031
Washington, DC 20006-8502

Dear Ms. Finkel:

On behalf of over 70 higher education associations and accrediting agencies listed below, I write to offer comments on the Notice of Proposed Rulemaking (NPRM) posted in the *Federal Register* on June 18, Docket ID-2010-OPE-0004. While our comments address six specific topics included in the NPRM, we also would like to offer some general observations about the proposed regulations.

I. General Observations

First, we commend the Secretary for initiating the process of negotiations and proposing rules designed to bolster the integrity of Title IV student financial aid programs. Exercising diligent oversight of these programs is an essential component of the Department's obligation to ensure that federal funds are being well spent. This is particularly important as resources become scarcer and access to higher education grows more critical. We are highly supportive of efforts to enhance the integrity of federal programs, and we applaud the Department for attempting to further curtail fraud and abuse.

Second, we are pleased that the Department has maintained a number of the tentative agreements made during negotiated rulemaking—notably section 668.16(p) and section 668.2—as well as provided a number of thoughtful protections in Subpart J–Ability to Benefit (ATB). We agree with the Department that the activities of diploma mills should be stopped and students with bogus high school diplomas should not receive Title IV assistance. We commend the Department for choosing to go forward with the agreement reached to establish a single high school database and require federal aid applicants to include the name of their high school and the state in which it is located on the Free Application for Federal Student Aid (FAFSA). We anticipate the guidance for institutional follow-up will provide a simple and clear method of determining if a diploma is fraudulent. We also applaud the Department for maintaining the negotiated rulemaking agreement that would allow a full-time student to repeat course work in a term-based program although the student would not receive credit for the course, recognizing an institution's difficulty in separately identifying such courses. We also feel

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the Department has done a good job in writing proposed ATB rules that address problems with the test, as well as with its administration and publication.

Although we support many of the Department's proposed regulations, we also wish to offer a note of caution about their breadth and the heavy compliance burdens they will impose on colleges, universities and accrediting agencies. In too many instances, the sweep of the proposed regulations and the increase in administrative workloads that would affect all institutions does not seem justified to stop a relatively small number of schools from engaging in some fraudulent or unlawful activities. For example, a single anecdote is the basis for the Department's proposal to require 6,000 institutions to accept a federal definition of "credit hour" and require all recognized accrediting agencies to assume a greatly enhanced role in policing institutional procedures pertaining to the award of credit. Likewise, a temporary hiatus in a single state's oversight of postsecondary institutions has prompted the Department to propose regulations that appear to overrule state law and require legislatures to revise state statutes.

We also are concerned about the inconsistent and ambiguous language that pervades the NPRM. This lack of precision will directly correlate to increases in institutional compliance burdens. It will start a never-ending regulatory cycle as institutions are repeatedly forced to seek interpretive advice from the Department, which in turn will prompt round after round of sub-regulatory guidance to which institutions must adhere. In addition, we note that compliance burdens will increase dramatically as a result of the increased number of campus officials required to implement the proposed regulations, including student financial aid administrators, bursars, admissions officers, provosts and graduate school deans, marketing personnel, and others. Before finalizing the regulations, we urge the Department to take a fresh look at their impact on administrative burden and their potential to generate the need for sub-regulatory guidance.

II. Credit-Hour Definition

We reiterate our strong support for efforts to curb abuse in federal student aid programs. However, we believe the Department's proposal on credit hour in sections 600.2 and 602.24 is misguided and could have serious unintended consequences. This proposal would impose a federal definition of credit hour and place new requirements on accreditors related to the review of institutional polices for determining credit hours consistent with the federal definition. As drafted, the proposal threatens to impose a rigid, one-size-fits-all federal definition on institutions and puts in place a structure that invites inappropriate federal intrusion into areas of academic decision-making.

We noted at the start that the Department's proposal in this area is largely in response to a single incident involving one program at one school, where in fact, the problem was discovered by the accreditor and promptly corrected by the institution. All of this occurred under the current regulatory framework and *without* the presence of a federal definition of a credit hour. Imposition of a new federal definition for credit hour based on a single anecdote is totally unwarranted.

Above all, the process of defining and awarding academic credit is a fundamental function of each U.S. college and university, making our system unique in the world. The federal government's imposition of a definition on institutions and/or accreditors would profoundly undermine the American system of higher education while reducing its flexibility, diversity and innovation.

A. Strike the "credit hour" definition from 600.2

While we have concerns regarding several aspects of the Department's credit-hour proposal, we are most troubled by the inclusion of a federal definition of credit hour in section 600.2. We believe the Department's attempt to define this term in federal regulations is misguided and deeply flawed, and we urge its removal from the final rule.

A "credit hour" has always been a flexible term of art used to provide an approximation of academic workload. The assignment of credit hours reflects the collective professional judgment of faculty and other campus academic officers in relation to the level of course offering, expected workload, intensity of the work and other factors. As a result, determinations of academic credit do not involve a single standard that can be applied to all academic programs at all institutions in the way the Department proposes. A few examples will illustrate this variation: The physics department expects homework outside of lab courses and the chemistry department does not; the nursing program expects student commitment far beyond the credit hours that would be awarded for clinical practice using the traditional formula.

By attempting to impose a single definition for credit hour, the Department would be inserting itself in academic judgments made at the departmental and institutional level. Federal law prohibits the Department from interfering in academic decisions without explicit Congressional authorization.[1] Indeed, this principle is so fundamental that a prohibition on this type of interference has been included in every version of the Higher Education Act since its inception in 1965.

With the diversity of courses and programs offered at any single institution, the measure of a credit hour within that institution understandably varies. Thus, if a federal definition were included in the regulations, all institutions would need to review the credit hour assignments of all of their courses to determine whether they fall within the confines of that definition. The difficulty of this task would be compounded by the uncertainty over what the Department would determine to be equivalent. Moreover, the federal definition may set an expectation where the minimum becomes a maximum: If the federal definition is applied, would institutions be expected to award additional credit beyond what they now calculate? As discussed further below, this process is better left between the accreditor and the institution.

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[1] "No provision of a program administered by the Secretary or any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution …."20 U.S.C. § 3403.

The inclusion of subparagraph (3) in the definition reflects an attempt to address the inflexibility inherent in any fixed definition in federal law. Unfortunately, this language makes an already unworkable definition even more problematic. By requiring "reasonable equivalencies" to seat time, "verified by evidence of student achievement," this subparagraph would undoubtedly be subject to varied interpretations, which would invite yet further definition through sub-regulatory rulings by the Department. The resulting confusion over these requirements is likely to limit responsible innovation in this area.

The strength and value of flexibility in assigning credit hours is that each institution, and each program within an institution, is treated as individual and unique. Given the enormous diversity in American higher education, it is important that accreditors have the flexibility to examine each school on its own terms. Indeed, the rapid growth of distance and online learning in recent years has only been possible because accreditors have had the flexibility to look at each institution and program separately. With a one-size-fits-all definition, the federal government will unavoidably guide and limit innovation in higher education.

Maintaining and deepening academic quality is of paramount importance to our member institutions, and preserving this bedrock value has been the hallmark of our voluntary system of accreditation. We believe this system has played a vital role in developing the rich and diverse array of colleges and universities that distinguishes the U.S. higher education landscape. Unfortunately, this proposal threatens to undermine this valuable system.

The problems inherent in a federal definition of credit hour were discussed extensively during negotiated rulemaking. At that time, the federal and non-federal negotiators agreed that the inclusion of a federal definition of credit hour was both unwise and unnecessary. It remains a singularly bad idea. We strongly urge the Department to remove the definition completely from section 600.2.

B. Revise section 602.24

The Department's credit-hour proposal would, for the first time, impose federal requirements on accreditors and institutions related to the review of institutional credit-hour policies. Specifically, the proposal calls for the addition of a new subsection (f) in section 602.24 that sets forth a detailed description of accreditors' responsibilities for reviewing institutional policies and practices on credit hour. As the Department aptly notes in its own explanatory statement, accreditors are *already required* under existing law to evaluate program length and the amount of credit an institution or program grants for course work. Yet, once again, despite the lack of evidence of widespread problems in this area, the Department's proposal threatens to impose a significant burden and cost on every accrediting agency and institution of higher education.

Under section 600.2, institutions would be required to review the credit-hour assignments of their courses to determine whether these assignments meet the federal definition of a credit hour. In addition, under section 602.24(f)(1)(B)(ii), they would be

required to determine whether the institutional assignment of credit meets "commonly accepted practice in higher education." These two provisions are internally inconsistent. Asking the accrediting agency to make a determination of whether the institution's assignment of credit hours is consistent with commonly accepted practice is a more appropriate approach.

For these reasons, we have serious reservations about the proposed language in section 602.24. We believe that current regulations and accreditation review practices are more than sufficient to ensure proper review of institutional credit-hour policies and detect discrepancies (as demonstrated by the American Intercontinental University/Higher Learning Commission case). However, if the Department is determined to regulate on this specific issue, it should confine itself to section 602.24 with the following important modifications:

1. We oppose the inclusion of any language in section 602.24 linking the review of credit-hour policies to any federal definition of credit hour, as well as the inclusion of a definition in section 600.2.

2. The Department should clarify the language in section 602.24(f)(2) to explicitly recognize that the determination of proper sampling or other methods for reviewing credit-hour assignments will be left to accreditors. Without this clarification, the language in (f)(2) creates an opening for inappropriate federal intrusion.

3. We recommend that language be included to reaffirm the current understanding about the roles of accreditors and institutions in dealing with student achievement, as these general principles are applicable as well to credit hour determinations.

4. We urge that the proposed notification language in section 602.24(f)(4) be revised to make it consistent with existing requirements for notification to the Department. Accreditors are already required to notify the Secretary in cases of suspected fraud or a failure to meet Title IV responsibilities. As currently drafted, any evidence of a credit hour problem—no matter how easily corrected or trivial—would have to be reported. In addition, the proposed language raises serious due process concerns and will undermine efforts by accreditors to seek immediate corrections.

5. We ask the Department to add language making explicit that nothing in this subsection will be interpreted to permit interference in campus academic affairs. This clarification is essential to ensure that federal officials and program reviewers undertaking institutional program audits do not use this subsection to insert themselves into the academic decision-making of institutions.

Based on these considerations, we propose the following revised regulatory language for section 602.24:

(f) Credit-hour policies. The accrediting agency, as part of its review of an institution for initial accreditation or pre-accreditation or renewal of accreditation, must conduct an effective review and evaluation of the reliability and accuracy of the institution's assignment of credit hours, consistent with the provisions of §602.16(f).

(1) The accrediting agency meets this requirement if it—
(A) Reviews the institution's application of the institution's policies and procedures to its programs and coursework; and
(B) Determines whether the institution's assignment of credit hours is consistent with commonly accepted practice in higher education.

(2) The accrediting agency may use sampling or other methods selected by the agency in the review.

(3) The accrediting agency must take such actions that it deems appropriate to address any deficiencies that it identifies at an institution as part of its review and determination under paragraph (1), as it does in relation to other deficiencies it may identify, subject to the requirements of this part.

(4) If, following the institutional review process under paragraph (f), the agency has reason to believe the institution is failing to meet its title IV, HEA program responsibilities or is engaged in fraud or abuse, the agency must notify the Department, as required by the provisions of §602.27(a)(6).

(5) Nothing in this section shall be construed to permit the Secretary to establish any criteria that specifies, defines, or prescribes the procedures that accrediting agencies or associations shall use to assess any institution's credit hour policies or procedures.

III. <u>State Authorization</u>

The Department's proposal to alter state authorization requirements is unclear, unnecessary and undesirable. In negotiated rulemaking, the Department only cited the lapse of California's Bureau for Private and Postsecondary and Vocational Education as justification for altering long-standing federal policy in this area. We believe that federal regulation based on anecdote is a very bad practice. Rather than pursuing a targeted response in light of a single incident, the proposed regulations would open a Pandora's box of potential challenges to the well established and carefully considered approaches that various states have chosen to meet their obligation under the Higher Education Act. Given the lack of evidence of a problem, we believe the proposed expansion is completely gratuitous. We urge the Department to reconsider moving forward in this area.

The total potential impact of the proposal is difficult to estimate, due to the ambiguities and contradictions in the text and accompanying explanatory statement. We are troubled by the Department's admission that it did not examine the impact of this proposal before it was put forward. In fact, the full effect of the proposed changes is still not known. What is clear is that attempts to implement the proposal would be chaotic as each state brings its own interpretation of the regulation to the table.

Clearly, this is an area where a one-size-fits-all approach simply does not work. States have chosen a variety of ways in which to authorize institutions to provide programs beyond secondary education within their borders. Within any given state, this authority may take different forms for different institutions or groups of institutions. These authorizations are spelled out in state statutes—with careful attention given to the form of this authority. The discussion of the provision in the proposed regulation, however, suggests that such state documents might be inadequate because they do not provide for "oversight." The nature and extent of what such "oversight" might entail is not explained. The preamble discussion of the California example seems to suggest the need for an "oversight agency" in order to comply with the proposed regulations. This reference goes far beyond later descriptions that "oversight" means an authorization is subject to adverse action and that there is an ability to act on complaints.

In addition to the lack of clarity about the proposal and its impact, we believe it represents an inappropriate intrusion by the federal government into state responsibilities and prerogatives. For example, many states have decided that a determination by an accrediting body may serve as the basis for state authorization or for follow-up monitoring after the state has granted authorization. The federal government should not second-guess states' decisions in this regard.

The proposal also fails to address the issue of reciprocity. A state is in the best position to determine for itself whether authorization provided by another state is sufficient for its own purposes. For example, University of Maryland University College's online programs enroll approximately 40,000 students from all 50 states. Discussions during negotiated rulemaking suggested that the Department does not intend to change its current practices on reciprocity. We ask the Department to include a statement to that effect in the preamble of the final rule.

The Department also has failed to fully recognize the issue of tribal sovereignty in the case of tribal colleges and universities in meeting the proposed requirements. While the proposed rule recognizes that an institution would be considered legally authorized in a state if the institution is authorized by an Indian tribe, it does not make it clear that oversight and monitoring are responsibilities of the relevant Indian tribe and not the state. If the Department is intent on moving forward with the state authorization proposal, it is very important that recognition of tribal authority be clarified throughout the rule.

Finally, the Department admits it has no mechanism in place or plan to enforce these new requirements, and moreover, enforcement of the regulation would conflict with principles of sovereign immunity. There would be no way for the Department to force a state into compliance with these requirements, leaving students' ability to qualify for federal financial aid subject to the whims of state legislative action. If the Department has

no means of enforcing changes in this area, we fail to see how these changes will improve the integrity of Title IV programs.

This proposal appears to be a solution looking for a problem, and we urge its elimination from the final rule. We firmly believe states should continue to make their own determinations regarding the requirements for state authorization and monitor established institutions within their jurisdiction.

IV. Misrepresentation

We strongly support efforts to protect students from misrepresentation in higher education. We believe the proposal will give students important additional protections against deceptive and overly aggressive advertising and marketing tactics. However, we wish to call your attention to several areas where the proposal would benefit from further changes.

First, we believe the inclusion of a new definition for "misleading statement" is unnecessary. The proposed definition is overbroad, ambiguous and unlikely to provide any useful guidance to institutions. The new definition includes any statement with a "capacity, likelihood, or tendency to deceive or confuse." Using three nouns and two verbs to define a single concept confuses rather than clarifies and does not provide operational guidance. Institutions routinely provide—and are often required to provide—information on a variety of complex and confusing subjects such as financial aid, "net-price," graduation rates, degree requirements, and state licensing requirements. Providing accurate information should not be the basis of a misrepresentation claim simply because an individual is confused about the information conveyed.

Interestingly, the Federal Trade Commission (FTC), whose principal mission is consumer protection, does not attempt to define the term "misleading statement" in its regulations, but rather requires determinations to be made on a case-by-case basis. We believe the Department should follow the FTC model and drop the specific definition from its proposal.

Second, the proposal would make institutions responsible for misrepresentations made by anyone with whom the institution has an agreement. Colleges and universities have a myriad of contracting agreements, and institutions should not be held liable for all statements made by those contractors. We urge the Department to incorporate traditional agency principles into the final rule and clarify that the institution is responsible only for those statements made by individuals who have representative authority for the institution.

Third, the proposal eliminates language authorizing the Department to seek a correction in the case of a minor and readily correctable misrepresentation. Given the expanded scope of the regulations, inadvertent and minor misrepresentations may well occur, and we believe that institutions should be provided an opportunity to correct minor infractions. Furthermore, the proposed regulation suggests that this provision was eliminated because it was underutilized by the Department. We strongly encourage the

Department to maintain this language and increase its efforts to seek corrections where appropriate.

Finally, we are concerned by changes that would eliminate due process protections for institutions in the case of a substantial misrepresentation. Under the proposal, the Secretary is permitted, based solely on his or her determination, to (1) revoke an institution's program participation agreement; (2) impose limitations on Title IV participation; or (3) deny participation applications made on behalf of the institution—all without providing notice, hearing or appeal to the institution. We urge the inclusion of language that would require the Secretary to proceed through the current due process procedures outlined in Subpart G, which is now the default. Section 668.83 of Subpart G provides the Secretary with "emergency powers" to take immediate action against institutions for a serious misrepresentation if necessary to prevent misuse and loss of Title IV funds.

V. Incentive Compensation

We strongly support the Department's efforts to strengthen the ban on incentive compensation and, in particular, we support the elimination of the 12 safe harbors currently in the law. Rather than providing increased clarity and guidance on the scope of the prohibition, these safe harbors increasingly have been exploited by unscrupulous actors to circumvent the ban. Students need to approach the decision to attend college thoughtfully so they can choose the institution that will best suit their educational and career goals.

While we fully support the proposed changes, the elimination of the safe harbors has injected some degree of uncertainty for institutions that previously relied on them to ensure compliance. As a threshold issue, we believe it would be helpful for the Department to clarify in the preamble that elimination of the safe harbors does not necessarily mean that all of the activities previously permitted under the safe harbors are now prohibited. While many payment arrangements previously allowed are now prohibited, others will continue to be appropriate because they are not based on success in securing enrollments or financial aid awards.

We provide examples below of several situations that were previously protected under a safe harbor. Because these involve commonly applicable situations, we would appreciate the Department clarifying these issues in the preamble of the final rule.

A. Bonuses for graduation

Some athletic coaching contracts include bonuses for the coach if his or her team meets or exceeds certain graduation rates or academic progress rates (APR). The elimination of the fifth safe harbor, coupled with comments in the explanatory text (e.g., finding no difference between the category of students who "complete" and category of students who "enroll"), raises concerns about an institution's ability to reward coaches whose student athletes stay in school and graduate.

Given the increased focus by the Obama Administration on improving retention and completion rates at colleges and universities, prohibiting merit pay in this context appears counterproductive. While we share the Department's concern that completion not become a proxy for enrollment, we believe this example is distinct because although the coach is paid based on completion, the bonus is not based directly or indirectly on success in securing enrollments. We ask the Department to clarify that the ban on incentive compensation would not apply to bonuses paid to coaches based on completion of a degree.

B. Aggregators

Some nonprofit institutions use aggregators to assist with their outreach efforts to non-traditional students. The aggregator identifies potential students, provides them counseling and information regarding various institutions, and encourages them to apply directly to the institution. Once the student contacts the institution, the institution decides if the student meets its admissions criteria, and if so, enrollment is handled by the institution. Here, the aggregator is typically paid by the institution on the basis of whether the student is retained at the school for a significant period of time (i.e., longer than a matter of weeks), not on the basis of whether the student enrolls.

Again, given the elimination of the fifth safe harbor and the discussion in the explanatory statement, we ask you to clarify whether these common practices for compensating aggregators are permitted under the revised regulation. As previously mentioned, the Administration has supported policies to encourage retention and completion as well as efforts to encourage more non-traditional students to attend college in order to meet its 2020 goal. We do not believe the Department intends to put regulations in place that would undermine this goal.

C. Shared services

Some public and private nonprofit institutions use third party servicers to compete in the online marketplace. In some cases, institutions finance these activities through tuition-sharing arrangements, which allow them to participate without having to pay the money up front. This allows institutions to be competitive even during difficult economic times because they are allowed to pay for services out of future revenue.

We recommend that the Department clarify whether the elimination of the twelfth safe harbor (payments to third parties for recruitment activities) prevents schools from utilizing tuition-sharing arrangements with third parties to secure services that include student recruitment. In the NPRM, the Department states that shared services for financial aid purposes where payments are "volume-driven" would not necessarily be prohibited under the proposed regulations. We would appreciate clarification on whether the situation involving tuition-sharing arrangements is sufficiently analogous such that these arrangements are not necessarily prohibited under the regulations.

D. Click-through payments

We appreciate the Department's explanation in the NPRM that the proposed language would not prohibit "click-through" payments, where a third party is paid based on those who "click" and not on the number of students who enroll. We ask that this clarifying language be included in the final rule.

E. Guidance

As a final point, while the Department will no longer provide private guidance letters regarding particular compensation structures, we understand it will continue to provide guidance on broadly applicable principles. We thank the Department for its willingness to provide this type of guidance, and we ask the Department to reaffirm its intentions in the final rule. We believe this guidance will be a useful tool in ensuring a common understanding among institutions, auditors and department officials about the scope of this regulation.

VI. Gainful Employment – Reporting and Disclosures

We support efforts to ensure that gainful employment programs are meeting the requirements for Title IV participation and believe such efforts are crucial to protecting taxpayer investments in student aid programs and providing consumers with better, more accurate data to evaluate these programs. However, as an initial matter, we wish to raise two concerns regarding the process.

First, we are concerned by the Department's decision to bifurcate its proposal on gainful employment into two separate NPRMs. This hampers our ability to comment fully on the regulations and forces us to comment on the merit of various disclosures at a time when we are still examining the Department's proposal for making use of the information. This sets a bad precedent, and we urge the Department to extend the deadline for accepting comments on both sections until Sept. 9 so that we may more fully comment on the interaction between these two sections.

Second, we note that while the regulations in this area stem largely from concerns related to for-profit institutions, the impact of these regulations will be felt across all sectors. Community colleges awarded nearly 140,000 one-year certificates last year, and, under the proposed regulations, they will need to report information for each of these students. Public and private nonprofit institutions of higher education and graduate and professional schools that offer one-year post-baccalaureate and graduate certificate programs will also need to comply with these regulations. The final rule should be acutely sensitive to the burden these regulations will place on public and nonprofit institutions and ensure this burden is outweighed by the benefits that will stem from the regulation.

We continue to support appropriate disclosures to ensure gainful employment programs meet the requirements for Title IV participation. However, we believe it is

critical that these requirements are reasonable and capable of being implemented in a consistent manner. Therefore, we offer the following recommendations to bring greater precision and clarity to the requirements of this section:

A. Subsection 668.6(a) reporting requirements

Subsection (a) requires institutions to report to the Secretary specified information for students who complete gainful employment programs. However, the proposed regulation does not indicate a timeframe for institutional reporting. We believe the final rule should set a timeframe for reporting that provides an adequate amount of time for institutions to collect and prepare the necessary information that is consistent with the timetable for reporting similar data.

We do not believe the information to be reported to the Department under this section should be provided on an individual basis. In fact, we believe that this proposed requirement is in violation of Section 134 of the Higher Education Act, which prohibits the Department from creating a federal database with personally identifiable student information. Therefore, it should be specified that aggregate information should be provided for all individuals who complete a particular covered program within a given timeframe.

Subsection (a) also would require institutions to submit the date the student completed a gainful employment program. The Department has not explained why the specific date of program completion is relevant and therefore, we recommend eliminating this requirement from the final proposal.

Finally, subsection (a) requires institutions to provide the amounts students receive from private educational loans and institutional financing plans. We urge the Department to make two clarifications regarding this collection. First, the regulation should specify that this reporting is limited to information that an institution knows or should reasonably be expected to know. Second, the regulation should specify that institutions need only report the amounts of debt incurred by the student for gainful employment programs at their particular institution.

B. Subsection 668.6(b) disclosures

Subsection 668.6(b)(2) of the proposed regulation would require institutions to disclose, on their websites, an "on-time graduation rate." This term has no reference in existing law or regulation.[2] Consequently, to provide reliable, commonly used and understood information, as well as to minimize institutional burden, we propose that the current graduation rate calculation used to comply with the "Student Right to Know" requirements (34 C.F.R. 668.45) be employed for this purpose.

[2] We note that 34 C.F.R. 668.8(f) defines the term "completion rate" but that definition appears unrelated to the term used here.

Subsection 668.6(b)(4) of the proposed regulation would require institutions to disclose, on their websites, placement rates for each program falling under the "gainful employment" definition. While placement rates represent useful consumer information, the Department should not unilaterally impose this enormous regulatory burden on institutions without the explicit authorization of Congress, which historically has delineated desired consumer information disclosures through requirements in the HEA.

Traditional colleges and universities, especially community colleges, will have substantial difficulty generating the required information, and many of them simply will be unable to do so. Only a handful of states have a "workforce data system" structured to capture this information—a variety of legal, bureaucratic and political constraints stand in the way. In fact, many community colleges have declined to participate in Workforce Investment Act (WIA) programs because of the requirement that this information be supplied in order for programs to be eligible. Therefore, many institutions will be required to gather this information on an individual basis.

If the Department is determined to require placement rates, we urge the data to be required if—and only if—it can be generated by matching student records with a "State-sponsored workforce data system," as specified in the June 18 NPRM.

Subsection 668.6(b)(5) requires institutions to disclose, on their websites, the median loan debt incurred by students who completed the program during the preceding three years, including separate amounts for Title IV programs as well as private educational loans and institutional financing plans. As explained in the NPRM, the Department would provide these median loan amounts to the institution based on information reported by the institution itself under subsection 668.6(a). In reporting data to the Department, institutions should be granted some flexibility to ensure they can appropriately deal with occasional data irregularities. We recommend adding language requiring institutions to provide required data only "to the maximum extent practicable." We also recommend that institutions be required to report only the loan amounts connected to gainful employment programs.

VII. Return of Title IV Funds: Taking Attendance

The Department of Education proposes to revise the rules pertaining to the return of Title IV funds (R2T4) by changing the definition of what constitutes "required to take attendance." The distinction between schools that are required to take attendance and those that are not is established in statute. The meaning of this term directly impacts determination of a student's withdrawal date.

- Institutions that are required to take attendance must use the last date of attendance according to attendance records, whether the student withdrew officially or unofficially. No other alternatives are available.

- Institutions that are not required to take attendance use the date the student officially withdrew. If the student dropped out without notifying the school (unofficial withdrawal), the institution may use the midpoint of the payment period as the withdrawal date or may choose to establish an earlier or later withdrawal date by documenting a last date of academic-related activity.

Since R2T4 was first written into the law, the phrase “required to take attendance” has been interpreted to mean a requirement imposed on an institution by an outside agency, as determined by that agency. This phrase has never encompassed an internal institutional policy requiring faculty to take attendance. Nor has the phrase encompassed an agency that requires confirmation of attendance but maintains that its requirement does not necessarily translate to establishing attendance records.

Despite the fact that there has been no change to the law, the Department proposes to redefine “an institution that is required to take attendance” to include an institution that takes attendance voluntarily, for limited periods of time, for certain sub-populations, or that is presumed to do so in order to meet some other requirement. This would add an unprecedented layer of complexity to the R2T4 regulations (which already require more than 150 pages of explanation in the FSA Handbook) requiring institutions to follow one set of rules for certain periods of time or for some groups of students, and a different set of rules at other times or for other groups. This is confusing and impractical and raises numerous questions about when and how institutions would be expected to calculate R2T4. For example, it does not take into account a situation where a student does not drop out of all classes but does skip the one class where attendance is taken.

The Department’s proposal is contrary to both the letter and spirit of the law. The HEA recognizes that attendance requirements fall under an institution’s academic purview unless the nature of their program subjects them to such a requirement as a condition of some outside authority’s approval to operate. The law was deliberate in allowing schools to use the midpoint of the payment period, or a later documented date, for students who simply leave, recognizing that schools have incurred costs as a result of the student’s failure to officially withdraw. If Congress had intended such a broad interpretation, it would simply have referred to “institutions that take attendance” rather than those that are “required to” do so.

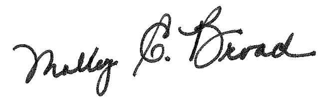
We do not object to continuing the current regulatory requirement that if only some students at the institution are subject to required attendance protocols, those students are subject to the last date of attendance rules applicable to institutions that are required to take attendance. However, that condition should be understood to apply only when attendance is required for the entire payment period, for all classes the student enrolls in, and only when imposed by an outside entity.

We object to considering an institution that voluntarily takes attendance as one that is required to take attendance, and we strenuously object to considering any form of attendance confirmation during a limited period of time as subjecting the school to rules applicable to institutions that are required to take attendance.

VIII. Conclusion

Thank you for the opportunity to comment on this NPRM. We look forward to continuing to work closely with the Department on efforts to bolster the integrity of Title IV student financial aid programs and to ensure students and institutions are well served by these programs.

Sincerely,



Molly Corbett Broad
President

MCB/ldw

On behalf of:

Higher Education Associations
ACPA - College Student Educators International
American Association of Colleges of Nursing
American Association of Colleges of Osteopathic Medicine
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
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APPA: Leadership in Educational Facilities
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Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Council for Christian Colleges and Universities
Council for Higher Education Accreditation
Council for Opportunity in Education
Council of Graduate Schools
Council of Independent Colleges
Distance Education and Training Council
EDUCAUSE

Hispanic Association of Colleges and Universities
Lutheran Educational Conference of North America
NASPA – Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
National Collegiate Athletic Association
Women's College Coalition

Accreditation Organizations
Accreditation Commission for Audiology Education
Accreditation Council for Pharmacy Education
Accreditation Council for Psychoanalytic Education, Inc.
Accreditation Review Commission on Education for the Physician Assistant
Accrediting Commission of Career Schools and Colleges
Accrediting Commission of Continuing Education and Training
American Board for Accreditation in Psychoanalysis, Inc.
American Board of Funeral Service Education
American Council for Construction Education
American Dental Association Commission on Dental Accreditation
American Library Association Office for Accreditation
American Occupational Therapy Association
American Osteopathic Association
American Psychological Association
American Veterinary Medical Association
Association for Biblical Higher Education, Commission on Accreditation
Association of Advanced Rabbinical and Talmudic Schools
Association of Specialized and Professional Accreditors
Commission on Accreditation for Marriage and Family Therapy Education
Commission on Accreditation in Physical Therapy Education / American Physical Therapy Association
Commission on Collegiate Nursing Education
Council of Arts Accrediting Associations, including:
  National Association of Schools of Art and Design
  National Association of Schools of Dance
  National Association of Schools of Music
  National Association of Schools of Theatre
Council on Accreditation of Nurse Anesthesia Educational Programs
Council on Education for Public Health
Joint Review Committee on Educational Programs in Nuclear Medicine Technology
Montessori Accreditation Council for Teacher Education
National Accrediting Agency for Clinical Laboratory Sciences
National Council for Accreditation of Teacher Education
National League for Nursing Accrediting Commission
New England Association of Schools and Colleges, Commission on Institutions of Higher Education
Northwest Commission on Colleges and Universities

Southern Association of Colleges and Schools Commission on Colleges
Teacher Education Accreditation Council
The Higher Learning Commission of the North Central Association of Colleges and Schools
The Middle States Commission on Higher Education
Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges
Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities