NASFAA
NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS

August 23, 2024

U.S. Department of Education
400 Maryland Ave., SW, 5th Floor
Washington, DC 20202

Docket ID ED–2024–OPE–0050

To whom it may concern:

On behalf of the National Association of Student Financial Aid Administrators (NASFAA) and our 3,000 member institutions, we respectfully submit to the U.S. Department of Education (ED) our comments on Program Integrity and Institutional Quality: Distance Education, Return of Title IV, HEA Funds, and Federal TRIO Programs (Docket ID ED–2024–OPE–0050).

NASFAA represents nearly 29,000 financial aid professionals who serve 16 million students each year at colleges and universities in all sectors throughout the country. NASFAA member institutions serve nine out of every 10 undergraduates in the U.S.

NASFAA appreciates ED's interest in simplifying and improving the Return of Title IV Funds (R2T4) process, especially in areas that make the process more student-friendly. However, R2T4 needs a complete overhaul, not the minor changes we've seen proposed here and in recent years. Financial aid administrators devote significant time and energy complying with R2T4 rules, and yet, R2T4 still consistently falls in ED's top 10 audit and program review findings because the regulations are simply too complex. The overly complicated R2T4 rules are a detriment to compliance in other areas of Title IV aid administration, as well as to service to students. While ED's stated intention with this rulemaking was to simplify R2T4, some proposals do not achieve that goal, and may make it even more difficult to administer.

We understand ED's desire for more data on students enrolled in distance education, especially as this modality assumes a more prominent role in postsecondary education. Whether student outcomes vary by educational modality is a valid question. However, we do not believe ED has accounted for the many variations in educational modality to allow institutions to accurately identify and report students enrolled in distance education. We also have concerns about ED's authority to require such student-level reporting.

NASFAA appreciates ED's proposed expansion to eligiblity for certain TRIO programs to include students who are enrolled in or who seek to enroll in a high school in the United States, its territories, or the Freely Associated States. We agree with ED's rationale for the changes and were pleased to see consensus reached on this topic.

We offer specific feedback on the proposed rules below.

Return of Title IV Funds

NASFAA appreciates proposed changes to 668.21 allowing students who withdraw before beginning attendance but have received a loan disbursement to repay the loan according to the promissory note terms. We agree with ED's assertion that these students likely assumed start-up costs associated with their planned enrollment that they may be unable to recoup. Requiring those funds to be repaid immediately could jeopardize such students' enrollment in a future term. Allowing repayment according to the promissory note terms balances fairness to borrowers while still protecting taxpayers.

We applaud ED's proposal in 668.22(a)(2)(ii)(A)(6) that would reward institutions with generous refund policies and incentivize other institutions to adopt such policies by exempting them from having to perform the R2T4 calculation. Providing regulatory relief in exchange for student-friendly practices is sound policy. We are especially pleased with ED's decision to make this provision optional for schools, in acknowledgment of the fact that such policies are out of reach for many schools due to financial constraints.

We have concerns about ED's proposal in 668.22(b)(3)(ii) to require all distance education courses to take attendance for purposes of establishing the last date of attendance (LDA) for R2T4 purposes.

While FSA officials during negotiated rulemaking stated that the LDA for online courses would only apply when the student is enrolled completely in distance education courses, the proposed regulatory text and preamble do not appear to reflect that. The addition of 668.22(b)(3)(ii) appears to implicate the conditions under which an institution is considered required to take attendance for all courses under 668.22(b)(3)(i)(C): *"The institution or an outside entity has a requirement that can only be met by taking attendance or a comparable process, including, but not limited to, requiring that students in a program demonstrate attendance in the classes of that program, or a portion of that program."*

If an institution were to be considered an attendance-taking institution solely by nature of offering any distance education courses, they would be subject to proposed 668.22(b)(2) requiring attendance-taking institutions to document students' withdrawal dates within 14 days of the last date of attendance. We do not believe this was ED's intention.

We ask ED to clarify the regulatory text to avoid confusion. Our suggested regulatory text is: 668.22(b)(3)(i)(C) *"The institution or an outside entity has a requirement that can only be met by taking attendance or a comparable process, including, but not limited to, requiring that students in a program demonstrate attendance in the classes of that program, or a portion of that program, unless the institution is only required to take attendance for distance education courses in accordance with 668.22(b)(3)(ii)."*

We believe negotiators made a compelling argument for excluding direct assessment programs — whose very nature involves a significant amount of coursework taking place outside of the traditional classroom

— from this attendance-taking requirement, and we encourage ED to continue to consider this exclusion considering the unique nature of such programs.

We appreciate ED's attempt in 668.22(d)(1)(vii) to minimize harm to students enrolled in Prison Education Programs (PEP) who experience involuntary transfers to different carceral facilities that interrupt their studies and force the R2T4 process to be initiated. While an exemption to R2T4 would be ideal for this population, we understand ED's position that it lacks statutory authority to do so. We appreciate ED's efforts to allow students to take advantage of an approved leave of absence (LOA) and to return to their studies at a different point in their PEP. Still, this solution is not ideal for PEP students because involuntary transfers often come with little to no warning, giving students no opportunity to request the LOA in advance. While the exemption to advance notice of an LOA request would likely apply if school policy permitted it, students transferred to another carceral facility would also lose access to school officials who could advise them of the availability of a retroactive LOA request. Further, schools would likely struggle with the requirement for granting an LOA that there is a reasonable expectation the student will return from the LOA, making it unlikely many requests would be approved. While we recognize that ED's options are limited, we encourage ED to continue to seek better solutions for this population.

We also appreciate ED's attempt to simplify the R2T4 calculation in 668.22(l)(9) for programs offered in modules by removing regulatory language that causes institutions to have to use a "freeze date" to determine the number of days a student was scheduled to attend and instead counting modules as part of a student's scheduled days only when the student begins attendance in the module.

Distance Education

We ask ED for clarification on the intent of proposed changes to the academic year definition in 668.3(b)(2)(ii)(B) and the clock-hour definition in 600.2 with respect to programs' ability to offer asynchronous instruction via distance education. The proposed regulatory text consistently refers to eliminating asynchronous instruction only for clock-hour programs offered by distance education. However, preamble language in several places refers to ED eliminating asynchronous instruction for clock-hour programs without specifying that the elimination would be limited to only those programs offered by distance education, causing confusion as to whether ED intends to eliminate asynchronous instruction for all clock-hour programs or just for those offered via distance education. We ask that ED clarify in the preamble that the proposed elimination of asynchronous instruction for clock-hour programs applies only to such programs offered by distance education to match ED's stated intention during negotiations and the proposed regulatory text.

If ED intends, as we believe it does, to eliminate institutions' ability to offer asynchronous instruction in clock-hour distance education programs, we disagree with this proposal. ED's rationale is that some programs have not complied with the requirement to monitor student engagement when clock-hour programs are offered by distance education using asynchronous instruction. However, some institutions

have invested significant money, time, and human resources into developing such monitoring systems, which they have only been able to use for four years since ED first permitted this educational modality. The asynchronous option allows many students who would otherwise be unable to enroll in these programs to earn credentials that improve their lives, a premise upon which ED relied just four years ago to allow this instructional method.

ED should exercise its authority by using precision — imposing sanctions on programs that are not complying with the asynchronous instruction monitoring requirements — instead of brute force by eliminating this instructional modality altogether. ED's quick reversal harms those institutions and the students they serve, and its rationale does not adequately justify the change.

Reporting and Disclosure of Information

NASFAA has concerns about the new requirement in 668.41 for institutions to report student-level enrollment data by educational delivery modality. As noted previously in our comments[1] on the Gainful Employment and Financial Value Transparency rules, we believe such reporting is prohibited by the student unit record ban in the Higher Education Act. While NASFAA supports[2] the College Transparency Act that would lift the student unit record ban, if that legislation were to pass, we would expect the Department to abide by the law and follow established negotiated rulemaking procedures in creating new institutional data reporting requirements.

Further, while we appreciate ED's desire to examine student outcomes by learning modality, we fear ED lacks a full enough data set to be able to consider all of the relevant variables that could contribute to student outcomes in different modalities. Students self-select into different learning modalities for a variety of reasons, many of which may impact outcomes as much or even more so than their learning modality. While ED has or will soon have student-level data on race, ethnicity, gender, completion rates, and post-completion earnings, it does not have data on other important factors that may have contributed to their decision to choose one modality over another, such as whether they are working while attending school. Simply put, we fear that the more data ED collects, the more it will decide it needs, placing more and more reporting burden on institutions, and putting the department further at odds with the statutory student unit record ban.

Setting legal and philosophical concerns aside, practically speaking, institutions are unlikely to be able to accurately report individual students as enrolled in distance education, in-person, or in a hybrid format. While programs and even courses may be classified in such categories, enrollment can vary by students within the same course and not be tracked at all. Take, for instance, an in-person course where the instructor permits students to participate remotely. Some students may attend exclusively in person, others may attend exclusively online, and others may attend in some combination of both, but that activity is not tracked in any way. For institutions to accurately report such student-level data, they would have to require instructors to take attendance by modality for each class session.

[1] https://www.nasfaa.org/uploads/documents/NASFAA_Comments_Gainful_Employment.pdf
[2] https://www.nasfaa.org/uploads/documents/NASFAA_Compiled_HEA_Reauthorization_Recommendations.pdf

We urge ED to carefully consider the potential unintended consequences of requiring institutions to report their distance education programs as additional virtual programs. While outside of our area of expertise, we wish to ensure the burden imposed on institutions is clearly articulated in the regulations and is commensurate with the potential associated benefits. While we believe it is ED's intent for a single additional virtual location to be created to contain all distance education programs, the regulatory text is not clear. The burden to institutions will vary significantly depending on how ED envisions these additional virtual locations.

We were persuaded by ED's argument that creating an additional virtual location encompassing all online program offerings could permit them to offer closed school discharges to students when a school closes only its online or only its in-person programs but remains open otherwise. However, we are not aware of how often such events occur and would not want to see institutions assuming a significant burden if it would provide only limited benefits, especially when there are other ways students can seek a closed school discharge.

We appreciate the opportunity to comment on this proposed rule. If you have any questions regarding these comments, please contact us or NASFAA's Director of Policy Analysis Jill Desjean at desjeanj@nasfaa.org.

Regards,

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