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Director of the Information Collection Clearance
U.S. Department of Education
400 Maryland Avenue SW
LBJ, Room 224-84
Washington, DC 20202-4537

Docket ID ED–2023–OPE–0089

To whom it may concern:

On behalf of the National Association of Student Financial Aid Administrators (NASFAA), we respectfully submit to the U.S. Department of Education (ED) our comments on ED’s proposed rules for Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, and Ability to Benefit (ATB) (Docket ID Docket ID ED–2023–OPE–0089).

NASFAA’s membership consists of more than 29,000 financial aid professionals at nearly 3,000 colleges, universities, and career schools across the country. NASFAA member institutions serve nine out of every 10 undergraduates in the United States.

While the benefits of postsecondary education have been well documented through decades of research, the value of a college degree has been challenged in recent years by some, potentially deterring prospective students from pursuing higher education. Accountability and transparency are some of the best defenses against arguments that college is not worth the significant investment of time or money. Students deserve to know their postsecondary institution offers a quality education that will help them reach their goals, whatever those may be.

NASFAA supports equipping ED with the tools it needs to hold institutions accountable and offering more transparency to help students understand the many benefits of postsecondary education. When done properly, these efforts guide prospective students to the programs that best suit their needs and stop the flow of federal dollars to programs that don’t provide acceptable returns to students and taxpayers. However, when done poorly, such initiatives can have serious unintended consequences.

Negotiated rulemaking exists so affected stakeholders can identify those unintended consequences and advise the Department on how to achieve its goals in the most effective and least harmful way. We are

concerned about the number of proposals in this draft rule that were not discussed during negotiations. Had stakeholders been consulted, we are certain ED would have amended or removed much of the new language proposed here.

We offer the following comments, in the order proposed, to ED for consideration.

Certification Procedures

As noted later under the Financial Value Transparency heading, we have serious concerns about the addition of GE metrics to supplementary performance measures ED could use to certify an institution's participation in the Title IV student aid programs.

ED has repeatedly stated it has no intention, nor authority, to apply the GE framework to non-GE programs. Yet, this proposed language — which was not discussed during negotiations for non-GE programs — could condition institutional eligibility on GE metrics for both GE and non-GE programs.

Program Participation Agreement

We appreciate ED's revision to proposed language at 668.14(a)(26) related to program length and a state's entry-level requirements to enter a recognized occupation. Understanding ED's concerns about the variation among states' requirements for the same professions, ED's original proposal placed undue hardship on students, who could lose Title IV student aid eligibility prior to completing their program due to circumstances outside their control.

As discussed later in the Financial Value Transparency section of our comments, several areas of the proposed regulations were not given adequate time for negotiators to consider. One of those areas is state authorization reciprocity and ED's proposal at 668.14(b)(32)(iii) regarding applicability of and compliance with state consumer protection laws. Given that ED did not announce this topic when it proposed to conduct negotiated rulemaking on institutional and programmatic accountability last summer, and that ED has proposed to include it in its next round of rulemaking, we believe ED should abandon this attempt and properly negotiate this topic in upcoming rulemaking sessions, including representatives of The National Council for State Authorization Reciprocity Agreements (NC-SARA) at the negotiating table.

We agree with the Department that institutions should not offer programs that do not satisfy state licensure or certification requirements, when applicable. A training program is of little value if there is no opportunity for graduates to work in the field they studied in. However, the requirement that institutions determine their programs meet such requirements necessitates collection of documentation to that effect. Ideally, licensure boards would post requirements on an easy-to-find website, or would provide documentation upon request for institutions to prove their compliance. In reality, state licensure boards do not reliably make their requirements accessible and — in some cases — do not apply standards uniformly, making it impossible for institutions to determine if their program meets state requirements.

Naturally, institutions can choose not to offer programs or not offer financial aid for programs in states or to students located in states whose licensure requirements are unclear or unavailable. However, this limits options and opportunities for students, especially those whose plans involve seeking licensure or certification in a state other than where they live or the institution is located. Similar to ED's original proposal for program length, ED is attempting to use federal student aid policy to address state-level inadequacies or failures, which places students in the middle of a battle they have no power to influence.

We recommend ED retain current regulations that require institutions to advise students whether programs meet or do not meet state licensure or certification requirements but allows for the opportunity to disclose that the institution is unable to determine whether a program meets a states' requirements. We also recommend that ED reinstate the individual acknowledgement for students to complete when programs did not meet or it could not be determined whether they met state requirements. Students would still be protected from enrolling in programs that didn't meet their needs, but would have the option to enroll if they planned to seek employment in a state other than the one the school is located or where they live while enrolled.

With respect to transcript withholding, NASFAA supports the *2022 Joint Statement from AACRAO and NACUBO on the Use of Administrative-Process and Student-Success-Related Holds*.¹ Students should not be prevented from enrolling or re-enrolling in school because of small balances due to the institution. However, in the case of larger balances, institutions have limited alternatives to collect past-due debts and, without transcript withholding as an option, might resort to using collection agencies with more negative impacts on students than transcript withholding.

We agree schools should not withhold transcripts when students owe balances as a result of the institution's error, fraud, or misconduct. We have concerns, however, about prohibiting schools from withholding transcripts as a result of Return to Title IV Funds (R2T4) calculations. The Higher Education Act denies federal student aid to students who owe overpayments on grants — including balances of more than \$50 resulting from the Return to Title IV Funds calculation — until the student repays those funds. Institutions frequently repay ED for balances owed by the student as a result of the R2T4 calculation instead of reporting an overpayment to ED, leaving the liability on the school's books instead of the Department's.

It is inconsistent for ED to maintain such a strict policy for overpayments while holding schools to a different standard when students owe balances of Title IV funds as a result of the R2T4 calculation. Should this provision stay in the regulations, institutions would presumably alter their practices and begin reporting overpayments to ED instead of repaying them on the student's behalf, potentially leaving students worse off if they owed small balances.

¹<https://www.nacubo.org/Press-Releases/2022/2022-Joint-Statement-from-AACRAO-and-NACUBO-on-the-Use-of-Holds>

Administrative Capability

We agree with ED's new requirements for financial aid offers. Cost of attendance broken down into individual components and designation as direct or indirect costs; financial aid sources broken down by classification as a grant, loan, or work-study program; and net price are all part of NASFAA's long-standing code of conduct² and we appreciate ED's effort to incorporate these standards into regulations to allow ED to enforce noncompliance.

We urge ED to update the College Financing Plan (CFP) to add items listed in the proposed regulations that do not currently appear on the CFP so institutions using the template can be assured they are in compliance with ED's rules. It is critical that ED at minimum announce as soon as possible whether it will update the CFP by the time the new regulations become effective so institutions have adequate time to plan if they need to abandon the CFP or develop a supplemental document to accompany it in order to comply with the new regulations. We also recommend that ED engage with the financial aid community to improve the CFP in other ways to encourage more institutions to use it.

We ask ED to clarify or reconsider new proposed language related to aid offers requiring institutions to advise students and families to accept the most beneficial types of financial assistance available to them. Financial aid administrators counsel students every day about which aid sources they should take advantage of first, directing them to the most beneficial types of aid based on their individual circumstances.

This is not especially difficult in the context of a conversation where students share their unique situations and concerns. However, it would be very difficult to apply broadly with a one-size-fits-all notice on the aid offer because the most beneficial aid type is highly student specific. Outside of individual counseling sessions — which financial aid administrators have less and less time for as they comply with ever more burdensome regulations and face historic staffing shortages — financial aid administrators have neither the specific individual information nor the financial and/or tax planning training to be able to determine what types of aid are best for each and every student.

While a grant is almost always preferable to a loan, a grant with a service requirement that limits a student's post-graduation employment options or that a student is unlikely to be able to meet might be a worse option than a loan. Working may be a better option than borrowing for many students, but students with demanding course loads might be better off borrowing a loan to allow them to focus more on their studies, especially if their loans would be forgiven in the future. A private loan or institutional loan might offer lower interest rates than a federal loan, while a federal loan's borrower benefits may be better. Parent PLUS loans carry certain deferment and forbearance protections, but carry high interest rates and origination fees. How will an auditor of the Department determine which aid is most beneficial in which circumstances to assess institutional compliance?

² https://www.nasfaa.org/Code_of_Conduct

Dictating what types of aid are the most beneficial could even expose institutions to legal action if a student followed advice provided on the aid offer and later determined accepting another type of aid would have been more beneficial to them. Students should have all of the information they need to make the best-informed decisions about which types of financial aid they accept, but ultimately what is the most beneficial to them is what fits their own personal circumstances. We recommend ED remove this language from the proposed regulations entirely, or, if it decides to keep it, specify how ED would consider a school to be compliant with this requirement so schools can be certain they are protected from liability. The College Financing Plan will need to be updated to comply with the final language as well, and be updated in a timely way *before* schools begin sending out aid offers each year, something ED has struggled with in the past.

We have concerns with ED's proposed procedures for verifying the validity of a student's high school diploma. New proposed language specifying adequate procedures requires postsecondary institutions to determine whether a state, tribal agency, or Bureau of Indian Education oversees or regulates the high school in question and, if so, collect documentation that the high school meets the requirements established by that entity.

This could prove quite burdensome for institutions that might need to locate this information for every U.S. state, but it will be especially difficult to determine that a high school is not regulated (essentially proving a negative) by a state, tribal agency, or Bureau of Indian Education. If a postsecondary institution could not find information about whether a high school was overseen or regulated and mistakenly assumed it was not, they would be out of compliance because of language at 686.16(p)(2)(i) that specifies the conditions under which a high school diploma is not valid. We recommend removing 686.16(p)(1)(ii) and 686.16(p)(2)(i), or leaving just 686.16(p)(1)(ii) as an optional method for validating a high school diploma. As written, postsecondary institutions might be more likely to determine a high school diploma was invalid simply to err on the side of caution, potentially denying Title IV aid to students with valid high school diplomas.

If ED chooses to proceed with prescribing the procedures institutions must follow to ensure high school diploma validity, we recommend clarifying language. First, in place of language referring to a high school being "overseen or regulated" we recommend using, "required to be licensed or registered" to avoid confusion and match language used by ED's Office of Non-Public Education. Language in 686.16(p)(2)(i) would also need to conform to read that a high school diploma is not valid if it "was issued by a high school that did not meet the applicable requirements to be licensed or registered established by the appropriate State agency, Tribal agency, or Bureau of Indian Education..."

Institutions already have procedures for ensuring the validity of a student's high school diploma when they have reason to question its validity. While certainly some disreputable institutions may exploit the lack of prescriptive regulation to accept students with invalid high school diplomas, this is not an area of pervasive fraud and ED already has enforcement authority to cite them for inadequate procedures without imposing prescriptive requirements on the majority of institutions that are already in compliance.

Consumer Information

While NASFAA supports consumer information disclosures broadly as a means of ensuring students have easily accessible and accurate information about the institution they attend or plan to attend, we have concerns about ED requiring disclosure of GE metrics for all programs because, as noted earlier, disclosure of this information was not discussed in negotiations as it should have been. Had it been discussed, we believe stakeholders would have expressed serious concerns about not only the amount of student-level data required to calculate the metrics ED is now proposing schools disclose, but also ED's statutory authority to collect that data.

We are also concerned about the requirement that institutions provide a prominent link to the disclosure website site on any webpage containing academic, cost, financial aid, or admissions information about the program or institution.

Institutional websites can contain thousands of individual pages. Posting this link on every page containing information about a program's or institution's academics, cost, financial aid, or admissions could easily number in the hundreds of pages for large schools. While adding the link to webpages would presumably be a one-time burden, we are concerned that the sheer number of places to be updated would lead institutions to inadvertently neglect to post this link on one or a few pages, placing them out of compliance with the requirement. Institutions are highly motivated to comply with regulations but are frequently stymied by rules that seem designed to set them up for failure. Regulations that place tedious and time-consuming burdens on institutions also divert ED's resources away from truly impactful noncompliance issues.

A comparable example is the requirement in the FAFSA Simplification Act for institutions to disclose all elements of the cost of attendance on any portion of the institution's website that describes tuition and fees. While a seemingly simple requirement, NASFAA's Training and Regulatory Assistance team has received dozens of inquiries on this requirement to date. We recommend ED require institutions to link to this information only on their main website and individual program's main landing pages so institutions can have a reasonable chance for compliance.

Financial Responsibility

We support ED's efforts to enhance its enforcement capabilities in order to more proactively identify institutions at risk of closure. Sudden school closures harm students and taxpayers. It is disheartening to learn of instances where ED knew an institution was failing and did nothing to prevent its precipitous closure. However, we caution ED to take care not to weaken an institution's financial strength if securing financial protection would place the institution in a position where it could not rectify the issue or issues that led to the triggering event.

On ED's proposed discretionary trigger for fluctuations in Title IV volume, ED provides a caveat that this trigger would be applicable only when the fluctuations cannot be accounted for by changes in those programs. In light of recent changes to the federal methodology formula as a result of the FAFSA

Simplification Act and to anticipate future changes through a broader reauthorization or other legislation, we recommend that ED add, “or changes to the eligibility formula or student eligibility changes” to account for legislative changes that may not necessarily make changes to the Title IV programs themselves but could greatly expand student eligibility for those programs and lead to fluctuations in volume.

For the proposed trigger related to high annual dropout rates, we recommend adding a caveat that would consider high rates a financial responsibility trigger only if they cannot be explained by factors external to the institution and outside of its control to account for circumstances like the COVID-19 pandemic or a natural disaster that could lead to high dropout rates.

Financial Value Transparency

As noted in our comments³ on ED’s request for information on low-financial value programs, we continue to disagree with assigning an arbitrary value judgment on programs by highlighting only the financial outcome of postsecondary education. Work cited⁴ in ED’s own justification for the financial value transparency framework indicates making more money is equally important to prospective and new students as getting a good job and improving employment opportunities. Money is not the sole driver behind individuals’ decisions to attend college, and short-term earnings do not adequately reflect the lifetime benefits of many postsecondary programs. Many fulfilling and valuable careers that require postsecondary education offer relatively low pay, particularly in the early years of employment, especially in public service fields.

Advising prospective students that entering such professions is a risky endeavor could have a profound impact on the flow of new practitioners into critical public service fields.

Further, categorizing such programs as having a high debt burden sends mixed messages to prospective students by understating the value of public service on the front end, while at the same time rewarding public service on the back end with loan forgiveness — putting two policy initiatives at odds with one another. Of course we would prefer as a matter of public policy that training and education for public service jobs be subsidized through grants and that pay be commensurate with the profound value they provide our society. However, we are working within the parameters of the statutory framework that exists, not the one we wish we had.

Beyond philosophical differences, we have significant concerns with the Department’s proposed financial value transparency initiative with respect to statutory authority for the significant amount of student-level data collection, and with ED’s failure to engage stakeholders on this new framework through negotiated rulemaking.

³ https://www.nasfaa.org/uploads/documents/Low_Financial_Value_Programs.pdf

⁴ https://static.newamerica.org/attachments/3248-deciding-to-go-to-college/CollegeDecisions_Part1.148dcab30a0e414ea2a52f0d8fb04e7b.pdf

Understanding ED has broad legal authority to issue regulations related to the programs it administers as well as to make data available to the public about those programs, ED is also prohibited in statute from creating a new database of personally identifiable information other than for purposes of operating its programs. NASFAA supports⁵ the College Transparency Act that would lift the student unit record ban, were that legislation to pass we would expect the Department to abide by the law and follow established negotiated rulemaking procedures before creating new institutional data reporting requirements.

We are surprised by the extent of student-level data reporting ED proposes institutions provide for non-gainful employment (GE) programs. GE negotiations last year included discussion of only a limited set of program-level data disclosures for non-GE programs. What ED proposes is a significant expansion with serious implications.

ED now seeks to amass a mountain of annual student-level data for both GE and non-GE programs, including each student's cost of attendance; tuition and fees; residency tuition status by state or district; housing and food allowance; institutional grants and scholarships; state, tribal, private grants; and private education loans. On top of that, ED proposes more student-level data — again for both GE and non-GE programs — for the duration of the student's program for students who withdrew from or completed a program, including total private loans; total institutional debt; total tuition and fees; and total books, supplies, and equipment.

Understanding some of this data is necessary to calculate accurate debt-to-earnings (D/E) rates and earnings premiums (EP) for GE programs — which ED now proposes to publish for both GE and non-GE programs alike — it is important to remind the Department that ED officials were clear during negotiations that D/E rates and earnings threshold measures (now the EP measure) would not be calculated for non-GE programs. As such, negotiators had no opportunity to evaluate the burden, raise concerns, or if need be, object to either the calculation of D/E rates and earnings premium measures for non-GE programs or the additional data collection needed to calculate those rates.

Further, when ED proposed during negotiations to use D/E rates and an earnings threshold measure as a supplementary performance measure for evaluating institutional certification, it was again with the understanding that these would not be calculated for non-GE programs and, hence, could not be used as supplementary performance measures for those programs.

ED acknowledges in this most recent proposal its limited authority in the Higher Education Act (HEA) to put institutions on provisional certification status, noting, “Consistent with our statutory authority, this proposed rule limits the linking of debt and earnings outcomes to program eligibility for programs that are defined as preparing students for gainful employment in a recognized occupation rather than a larger set of programs.” However, if D/E rates and an earnings premium measure were now calculated for all

⁵ https://www.nasfaa.org/uploads/documents/NASFAA_Compiled_HEA_Reauthorization_Recommendations.pdf

programs at all institutions and used as a supplementary performance measure, ED would be applying the GE rules to institutional eligibility by using those GE metrics to approve or recertify an institution's program participation agreement (PPA) or place them on provisional approval status, even if the institution had no GE programs, or if only its non-GE programs were failing the GE metrics. If we understand this correctly, it is not only wholly unacceptable and logically unsound, but completely outside of the Department's statutory authority.

Finally, it is inappropriate and illogical to use GE metrics for non-GE programs. Research⁶ shows the return on investment (ROI) of many non-GE programs — including liberal arts degrees — is higher over a lifetime, but has a longer time horizon than other programs. The GE metrics are designed to measure short-term ROI. This is appropriate for programs that provide training in a specific field, but not for a broader education that provides more readily-transferable critical thinking skills necessary to solve problems, adapt, and lead as the world changes. Neither type of education is better, but they are different, as evidenced by the fact that they are defined differently in statute.

ED's stated intention for publishing GE metrics for all programs is to allow for comparison between GE and non-GE programs, but these programs are so fundamentally different with respect to ROI over different timeframes that the comparison has little value. ED understates its influence in this sphere if it expects students to consider financial returns as only one factor among the many benefits of postsecondary education when it chooses to require students to acknowledge only that a program has a high debt burden, even when its long-term earnings potential and other non-pecuniary benefits make that program a superior choice to another without the high debt designation. This is especially problematic because ED offers only a binary distinction, creating a steep cliff where a few dollars' difference in median earnings or debt between programs will label one program high-debt and leave another free of that distinction despite only a nominal difference in the data being compared.

There are equity implications to consider as well. Students with parents who attended college or who have the benefit of high-quality college counseling will be able to balance short-term financial returns against the myriad other benefits of postsecondary education. First-generation students or others without access to quality college advice might be more easily swayed by the financial return data and choose programs with short-term returns, potentially limiting their future career options and keeping them out of careers where they could exercise more influence as leaders. Students and families should pick the options that best work for them. The government should not be tipping the scales and sorting families by socioeconomic status before students make college-going decisions.

We understand the committee's failure to reach consensus allows ED to draft its own regulatory language. However, ED did not introduce most of what is contained in the proposed financial value transparency regulations at all during negotiations, nor in its January request for information on low-financial-value programs. We believe ED has greatly overstepped the spirit if not the letter of its authority in not allowing

⁶ <https://cew.georgetown.edu/wp-content/uploads/Liberal-Arts-ROI.pdf>

for stakeholder feedback on these significant proposed changes, especially considering the sizable burden related to reporting — over 100 hours by ED’s own estimate — it will place on institutions.

Gainful Employment

NASFAA appreciates ED’s decision to abandon the concept of small program rates from the GE regulations. Small program rates were unlikely to reveal meaningful data students could use to decide which institution to attend or program to enroll in. We also appreciate ED’s choice to exclude parent PLUS loans from loan debt used to calculate debt-to-earnings (D/E) rates. Understanding the many issues with parent PLUS loans, including the fact that an institution might steer a parent to borrow instead of the student in order to improve its D/E ratio, there are many instances where parents willingly choose to assume debt to relieve their children of that burden. It is not reasonable to hold institutions accountable for those choices.

We have concerns about the earnings premium measure calculation and the comparability of the high school graduate earnings to program completers. ED proposes to use median earnings of high school graduates aged 25 to 34 based on the fact that the typical age of postsecondary program completers’ earnings measurement would be 30 years old. Using a comparison based on age could potentially compare the earnings of someone who has been in the workforce for 16 years against someone who has been working for three years. Time in the workforce seems a far better comparison point than age and, as such, using the 20 to 24 age range would be a more appropriate comparison point. We also believe ED must account for earnings disparities within states in calculating the earnings premium to assure appropriate comparisons are made.

We are also concerned about the impacts of the COVID-19 pandemic on the debt-to-earnings calculation. The first years of the new GE rule’s implementation will include pandemic-impacted years when unemployment rates were high, but student loan payments were paused. To characterize a program as failing based on pandemic-era wages when borrowers were not required to make payments seems unnecessarily punitive. ED proposes to make accommodations for the COVID-19 pandemic in the proposed ability to benefit regulations; we recommend that ED also account for it in the GE regulations.

Many gainful employment programs, especially at community colleges, do not offer student loans. They are subject to reporting seven prior years of institutional data in order for ED to calculate D/E rates that will never affect their Title IV eligibility. We recommend ED add GE programs that do not offer loans to the transitional reporting period regulations at 668.408(c)(1) which allow non-GE programs to report only two years of prior data.

Conclusion

We recognize ED’s desire to strengthen its enforcement authority to weed out poor quality programs from postsecondary education. Students should be able to trust that if their program qualifies to offer Title IV student aid, that it meets some basic standards of quality and will deliver on its promise to prepare them for a fulfilling career. However, the vast landscape of postsecondary education makes the task easier said than done because of the lack of common metrics to compare among different programs. ED must pause

to consider whether it is doing more harm than good in attempting to compare wildly different programs using the same metrics.

ED must also abandon areas of the new regulations that go beyond its statutory authority. Past experience shows lawsuits challenging new regulations lead to wasted time for financial aid administrators, who must prepare to implement new rules as if they will become effective, only to drop those plans once plaintiffs prevail.

Finally, ED must conduct proper negotiated rulemaking if it wishes to establish a financial value transparency framework. While we wholeheartedly support transparency efforts, these too are subject to legal action if proper procedures are not followed. There are several other issues noted in the above comments that should also have been addressed during rulemaking sessions, and we recommend ED table those regulations until it has negotiated those topics.

We appreciate the opportunity to comment on this proposed rule. If you have any questions regarding these comments, please contact me or NASFAA Senior Policy Analyst Jill Desjean at desjeanj@nasfaa.org.

Regards,



Justin Draeger, President & CEO



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