United States Senate

WASHINGTON, DC 20510

July 1, 2021

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

Docket ID ED-2021-OPE-0077

Dear Secretary Cardona:

We write to provide input on topics regarding the U.S. Department of Education's ("Department") negotiated rulemaking related to improving program integrity, oversight accountability, and consumer protection for institutions of higher education that receive taxpayer-funded federal financial aid.

For-profit colleges enroll just eight percent of all postsecondary students but account for more than 30 percent of all student loan defaults.[1] By definition, they have a distinct governance structure that prioritizes profit over value for students. Multiple provisions in the Higher Education Act reflect Congress' longstanding concerns with poor outcomes at these institutions. Unfortunately, the widespread deregulation efforts of the previous Administration largely favored the interests of corporate executives and private equity owners over the interests of students. We hope your Department will strongly consider the concepts outlined in this letter in its upcoming negotiated rulemaking, with the primary goal of strengthening regulations to protect students and taxpayers from the risks and costs of predatory for-profit colleges. These rules also provide a critical opportunity to strengthen accountability at all institutions of higher education.

The regulatory status quo governing the for-profit college industry has troubling racial and equity implications that must be addressed. For far too long, students of color, veteran, women, and low-income students have been the targets of widespread fraud and abuse by these institutions. This behavior has led to widening disparities in educational and financial outcomes that are already present in our higher education system. For example, Black students seeking a bachelor's degree at for-profit institutions graduate at a rate that is less than one-third that of Black students at public and private non-profit institutions.[2] Black and Latino students who attend for-profit colleges borrow $10,000 more in loans, on average, than those who borrow to attend public colleges.[3] For-profit colleges also cost more than twice as much as public two-year colleges.[4]

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[1] https://ticas.org/accountability/cohort-default-rates/ticas-analysis-of-official-three-year-cohort-default-rates-fy17/
[2] The Leadership Conference Education Fund, "Gainful Employment: A Civil Rights Perspective," October 17, 2019, http://civilrightsdocs.info/pdf/education/Gainful-Employment-Brief-Final.pdf
[3] Ibid.
[4] Ibid.

Altogether, students attending for-profit colleges, including tens of thousands of veterans, are more likely to pay higher tuition and fees, take on more debt, earn lower wages, and eventually are less likely to graduate and are more likely to default on their student loans.[5]

Predatory actors leave students worse off than if students had never enrolled and should face real consequences. The Department must act swiftly to ensure that for-profit colleges prove their value to students and taxpayers or lose Title IV eligibility. That is especially true given the data showing that, in the wake of the coronavirus pandemic, enrollment at for-profit colleges increased from fall 2019 to fall 2020.[6]

For these reasons, we strongly support the Department's regulation of issues addressing accountability and program integrity. Below, we outline overarching priorities for negotiated rulemaking. At the same time, we urge the Department not to wait for these new rules in order to begin protecting students and taxpayers. The Department must immediately and aggressively use its current oversight and enforcement authorities to hold institutions accountable for unlawful, unfair, deceptive, or abusive acts or practices.

Issue Priorities for Rulemaking

Gainful Employment (GE). The 2014 GE rule was a critical safeguard that ensured career training programs produced graduates who find jobs with incomes that are sufficient to repay their student loans. If programs had failing debt-to-earnings outcomes, they lost access to Title IV dollars. At the time, the Department estimated that 99 percent of those programs expected to fail were at for-profit colleges.[7] Unfortunately, the rule's rescission by the previous Administration has meant that many low-quality programs are without proper oversight and the students they enroll are at risk of earning a degree that cannot help them earn the income necessary to pay back the debt they accrued.

A strong gainful employment rule should restore the 2014 standards related to debt-to-earnings and go further to protect consumers. For example, the rule should establish protections for students who drop out or leave their programs, such as thresholds for programmatic loan repayment or cohort default rates. The rule should also include protections against tuition gouging for programs that cost far more than the median for similar programs. And, the Department should establish an earnings threshold for all program completers.

A new GE rule should also improve transparency by requiring public disclosure of key information related to program cost and student outcomes—including the total cost of attendance, percent of students who borrow, and average earnings and debt compared to similar programs. Students should receive multiple written warnings requiring acknowledgement if they

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[5] Ibid.

[6] Stephanie R. Cellini, "The Alarming Rise in For-Profit College Enrollment," *The Brookings Institute,* November 2, 2020, https://www.brookings.edu/blog/brown-center-chalkboard/2020/11/02/the-alarming-rise-in-for-profit-college-enrollment/

[7] Richard Pérez-Peña, "New Federal Standard for Aid to For-Profit Colleges Draws Criticism," *The New York Times*, October 30, 2014, https://www.nytimes.com/2014/10/31/us/new-federal-standard-for-aid-to-for-profit-colleges-draws-criticism.html

enroll in a program that is not on track to meet requirements, and these students should have a required "cooling off" period, prior to enrollment, to consider such information. A stronger rule would also address previous implementation challenges—including better codifying the linkage for the available earnings data source and providing protections for students enrolled in programs that lose eligibility.

Financial Responsibility. In recent years, large for-profit college chains like Corinthian Colleges and ITT Tech recklessly disregarded regulators, misled their students, and eventually ran out of money.[8] Title IV financial responsibility standards should be a strong disincentive to misconduct, financially risky behavior, and should mitigate the impact of sudden college closures and bankruptcies. We support identifying better, earlier indicators of risky financial statuses or liabilities (such as state and federal investigations or lawsuits) that might reduce cash flow or force a school to close. We support the concept of triggers or early warning indicators, like those in the 2016 Borrower Defense to Repayment rule, which are an important way identify risky schools and patterns of misconduct. The requirements for cash reserves of institutions that rely on risky financial backing, such as private equity, should be increased. Institutions that fail these standards must cover their losses and liabilities, so that the burden does not fall on taxpayers. And, a financial oversight system must broadly be transparent and timely so that corrective action can be taken before it is too late. Finally, consideration must be made for the unique circumstances facing Historically Black Colleges and Universities (HBCUs) as well as other minority-serving institutions (MSIs) in developing financial responsibility standards because some HBCUs and MSIs have been shown to serve students well, even with fewer resources. It is important that financial responsibility standards are carefully designed to identify risky and predatory behavior without having unintended consequences for HBCUs and MSIs.

Title IV Certification Procedures and Standards of Administrative Capability. Since the creation of the federal financial aid programs, far too many colleges have failed to serve their students while they continue to draw down taxpayer funds. When colleges do not meet financial health or administrative capability standards, they should not be certified by the Department to participate in Title IV programs—and should swiftly lose access to federal financial aid. We support the Department's effort to significantly improve the federal role in the accountability triad. The Department has broad authority to include new requirements related to Title IV certification, program participation agreements, and standards of administrative capability under Sections 487 and 498 of the *Higher Education Act*.[9]

Several urgent issues must be addressed by this rulemaking. To reduce the chance that for-profit colleges seek to evade accountability requirements by converting to non-profit status, the Department should require all such conversions be provisionally certified for the statutory maximum of three years and be subject to enhanced student and taxpayer protections and monitoring. The Department should also strengthen requirements for approval of new or consolidated branch campuses—tactics that can be used to game program integrity rules or requirements such as 90/10 or cohort default rate thresholds. Finally, the Department should not

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[8] Stacy Cowley, "For-Profit College Chain Closes, Shutting Out Nearly 20,000 Students," *The New York Times,* December 6, 2018, https://www.nytimes.com/2018/12/06/business/education-corporation-of-america-closing.html

[9] Note: Specific authorities relevant to program participation agreements include: HEA 487(a)(21), HEA §487(c)(1) and 34 C.F.R. §668.14(b).

provisionally certify bad actors for an extended period of time without holding them accountable for their predatory practices.

Change of Ownership. According to a recent GAO report, 59 for-profit college conversions occurred over a 10 year period—all but two of which involved the college's sale to a non-profit tax-exempt organization.[10] In more than a third of the cases, former owners of the previously for-profit college were insiders to the conversion.[11] Some for-profit college executives have found ways to masquerade as non-profit institutions and in some cases, have financial interests in the sale.[12] We support the Department's efforts to apply scrutiny to changes of ownership or changes of control of colleges. The Department should improve these efforts by meticulously undertaking pre-acquisition reviews and applying additional conditions on changes in ownership. The Department must also provide regulatory standards for how and when a converted former for-profit college can advertise its new status to students. The Department should also better identify changes in control and closely monitor arrangements with online program managers (OPMs) as some have been known to engage in predatory recruiting practices and skirt incentive compensation rules.

Ability to Benefit. Students who did not receive their high school diploma (or equivalent) may be eligible for Pell Grants if they are enrolled in eligible career pathway programs. This important financial aid eligibility provision gives more students a chance to attend higher education, but the Department should take action to protect such students from low-quality institutions or predatory behavior. The Department should prohibit institutions that are not meeting gainful employment standards from being approved to participate under "ability to benefit" provisions, and the rules should specify appropriate limitations on institutions' use of tests to determine student eligibility that do not allow institutions to flout the intent of the law. The regulations should also provide greater clarity on the requirements of career pathway programs.

Mandatory Pre-dispute Arbitration and Prohibition of Class Action Lawsuits Provisions in Institutions' Enrollment Agreements. For-profit colleges have a track record —unique compared to other sectors of higher education—of denying students their day in court by requiring them to give up that right—both individually and as part of a class—as a condition of enrollment. Instead, students are forced to resolve disputes through mandatory arbitration proceedings where the deck is typically stacked against them and in favor of the for-profit college.[13] It means that many defrauded students are forced to resolve their disputes behind closed doors where outcomes are often required to be kept secret—effectively hiding predatory practices from the public and regulators, including the Department. In addition, these practices mean that defrauded borrowers often are unable to receive restitution directly from their school —especially if it closes suddenly—and have no other option than to turn to taxpayers for relief in

[10] U.S. Government Accountability Office, "Higher Education: IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions," January 27, 2021, https://www.gao.gov/products/gao-21-89

[11] Ibid.

[12] Robert Shireman, "How For-Profits Masquerade as Nonprofit Colleges," *The Century Foundation,* October, 7, 2020, https://tcf.org/content/report/how-for-profits-masquerade-as-nonprofit-colleges/

[13] Anthony Walsh, "Obama-era Rule Banning Mandatory Arbitration in College Contracts Carries the Day," *The Century Foundation,* December 1, 2020, https://tcf.org/content/commentary/obama-era-rule-banning-mandatory-arbitration-college-contracts-carries-day/

the form of borrower defense discharges. The Department should ensure that students can hold fraudulent institutions accountable directly by restoring the prohibition on mandatory arbitration agreements and class action bans in enrollment agreements.

Pell Grant Eligibility for Prison Education Programs. In order to open Pell to incarcerated students as soon as possible, we urge the Department to implement Pell restoration for students who are incarcerated through guidance instead of through the current negotiated rulemaking process. That guidance should include quality control measures identified by the results of the Second Chance Pell program. The Department must ensure colleges are providing students enrolled in prison education programs with high quality programs and the same academic and support services provided to Pell Grant recipients on college campuses. As the Pell Grant rightfully expands to incarcerated students, it is important to ensure colleges are not simply providing the minimum education or services to students, and that non-profit colleges that have recently converted from for-profit college status and have a history of predatory behavior do not use this as an opportunity to target those students. Additionally, incarcerated students will have specific circumstances and challenges that should be considered as the Department restores Pell eligibility to them. For example, students may experience obstacles in demonstrating residency or gathering the necessary documentation because they are incarcerated. These programs should be required to include articulation agreements and transferability of credits to ensure those students can continue their education after release. Moreover, the cost of the program must not be passed onto students and they should receive the support, assistance, and secure access to the internet they will need to complete the Free Application for Federal Student Aid.

Finally, there are multiple issues outside of the current negotiated rulemaking agenda that would improve accountability and oversight in our higher education system. Each part of the program integrity triad must do their part to protect students and taxpayers from predatory for-profit colleges and to ensure quality. That is, state authorizers and accreditors must improve oversight to ensure students are not being cheated or defrauded by risky colleges. The Department should consider negotiated rulemaking on state authorization and accreditation. On the former, rulemaking should, for example, ensure programs lead to licensure, improve oversight of distance education programs, and ensure enforcement of state laws to protect students. On the latter, there are several concerns with accrediting agencies improving institutional oversight. For example, they should have to undergo a more rigorous process of accreditor recognition, have increased expectations for reviewing, monitoring, and approving when colleges change tax status, and disaggregate student outcome data by race and other important demographic metrics in order for colleges to address disparities in student outcomes. Additionally, we encourage action as soon as possible following the statutory October 1 start date to implement closure of the 90/10 loophole.

The goals outlined above for the rules governing accountability and program integrity will help improve consumer and taxpayer protections and address racial disparities, particularly among those that for-profit colleges exacerbate, such as loan defaults and earnings. But who is at the negotiator's table will also greatly determine progress towards these goals. There must be substantial representation of students and borrowers of color, students and borrowers with disabilities, those from low-income backgrounds and veterans as negotiators during rulemaking.

In addition, State attorneys general—recognizing the important historical role they have played in these matters—must have a seat at the table. We look forward to an equitable and representative rulemaking process and to working with you to ensure these regulatory enhancements are considered.

Sincerely,

Richard J. Durbin
United States Senator

U.S. Senator

Jack Reed
United States Senator

Elizabeth Warren
United States Senator

Sherrod Brown
United States Senator

Chris Van Hollen
United States Senator

Richard Blumenthal
United States Senator

Edward J. Markey
United States Senator

Raphael G. Warnock
United States Senator

Tina Smith
United States Senator

Ron Wyden
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Tammy Baldwin
United States Senator