VETERANS EDUCATION SUCCESS®

June 20, 2023

The Honorable Nasser H. Paydar, Ph.D.
Assistant Secretary for Postsecondary Education
U.S. Department of Education

Re: Docket ID ED–2023–OPE–0089

Dear Assistant Secretary Paydar,

I write to submit comments on behalf of Veterans Education Success in response to the Department of Education's (the Department) Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on May 19, 2023. Veterans Education Success is a nonprofit research, policy, and student veteran advocacy organization. We work on a bipartisan basis to advance higher education success for veterans, service members, and military families, and to protect the integrity and promise of the GI Bill® and other federal postsecondary education programs.

We thank the Department for considering our comments as it proceeds to promulgate final regulations and for having selected us to serve on the Institutional and Programmatic Eligibility Committee (the Committee) it convened in the negotiated rulemaking phase of developing the NPRM. The issues addressed in this NPRM are especially consequential for the constituency we represent. Veterans and military-connected students are affected by these regulations as participants in student financial assistance programs authorized in Title IV of the Higher Education Act (HEA). In addition, they also rely on educational programs administered by the Departments of Defense (DOD) and Veterans Affairs (VA) whose eligibility requirements depend on program integrity safeguards under the Department of Education's jurisdiction.

Before addressing specific issues in the NPRM, we would like to offer three general observations about the proposed regulations:

First, this regulatory proposal represents a significant improvement over current rules by providing better information to consumers, protecting students and taxpayers, and preventing predatory institutional practices. We strongly support the Department's approach, and urge you not to weaken the proposed regulations as you move to finalize the rule.

Second, while a laudable step in the right direction, this regulatory package does not go far enough in safeguarding federal higher education dollars and protecting students. As we contended in Committee discussions, many of the provisions in the NPRM should have been more stringent. We specifically encourage the Department to strengthen the proposed regulations and to adopt a more robust approach to its administration and enforcement of certification and program participation agreements with institutions.

Finally, we urge the Department to resist the predictable efforts of institutional interests to weaken or further delay these rules. Institutions participating in federal programs understandably prefer unfettered access to public dollars with as little oversight as possible. The Department's history of lax oversight has accustomed institutions to the absence of meaningful consequences for adverse outcomes they may produce for students and taxpayers. These regulations represent a modest step away from the decades-long system of institutional impunity and frame a reasonable approach to higher education accountability. They should be expeditiously finalized. We specifically caution the Department to resist efforts to delay these regulations on the pretext that they are too extensive or novel for institutions to comment on or analyze. The Department has conducted a transparent rulemaking that began some 18 months ago, and every policy topic addressed in this NPRM was extensively and publicly discussed during the negotiations. The gainful employment provisions, furthermore, have been 12 years in the making. Stakeholders have been afforded ample time to understand and anticipate the impact of every regulatory proposal in the NPRM.

Financial Value Transparency and Gainful Employment

As stated above, the proposed gainful employment provisions represent the evolution of a federal rulemaking that dates back to 2011. We strongly support the Department's adoption of the well-established and familiar debt-to-earnings and debt-to-discretionary-earnings metrics and specifically endorse their respective research-based thresholds of 8 percent and 20 percent. Furthermore, we believe that the addition of the common-sense requirement that gainful employment programs generate earnings above those of similarly situated high school graduates significantly improves protections for students—most notably, veterans and military-connected students—who do not always borrow to finance their postsecondary education. In addition, the accelerating proliferation of graduate degree and certificate programs makes it critical that the earning premium be adjusted upward for post-baccalaureate gainful employment programs. The earning threshold used for such graduate and post-baccalaureate certificate programs could be indexed to the median earnings of similarly situated baccalaureate degree holders or be set at a reasonable multiple of high school earnings. We realize that there may be localized economic circumstances in particular regions of some states that could create extreme and enduring disparities between regional and statewide earnings. We would support reasonable Secretarial modifications, but not complete waivers, of the earning premium requirements in such cases.

Without revisiting the details of the algorithms, timelines, and processes proposed in the NPRM, we would note that the Department has extended the benefit of every doubt to institutions in its design of the proposed regulations. The lengthy amortization terms (particularly for certificate programs), the elimination of the cohort records with the highest debt for each missing earnings record, and the selection of 30 students as the minimum cohort size, for example, represent critical concessions to institutions and create loopholes for bad actors to circumvent the intent of the law. While we can and do support the proposed rule as drafted, we would encourage the Department to review these details and consider tightening the requirements through such steps as shortening the amortization terms, dropping the median debt amount for every missing earnings record, and decreasing the minimum cohort size.

We also commend the Department for its proposal to promote greater transparency about outcomes for programs that are not statutorily subject to the gainful employment rule. The escalating costs of attendance and the corresponding repayment burdens that borrowers confront make it imperative that students and families be afforded access to more information about the past performance of programs they may be considering. The disclosure of the gainful employment rule's debt-to-earnings and earning premium metrics for all programs would provide a modicum of real information to prospective students who are currently at the mercy of institutions and their sometimes outlandish and typically unverified claims about the likely financial returns on their investment of money and time in various programs.

Financial Responsibility, Compliance Audits, and Audited Financials

We support stronger financial responsibility standards for all institutions seeking to participate in federal student assistance programs. As a regulator with an unambiguous and non-prescriptive mandate to protect the financial interests of students and the federal government, the Department has historically failed to prevent the precipitous closure of schools that leave their students stranded and the federal government with the financial burden of discharging hundreds of millions of dollars in loans. We are therefore pleased to see the many modest but meaningful improvements to financial responsibility provisions in the NPRM. While we believe that the Department could have gone farther in strengthening these requirements, we support the proposal as a good step in the right direction.

We support proposed 668.23(d)(5), requiring the disclosure of amounts spent on certain pre-enrollment activities in audited institutional financial statements, but would urge the Department to also require the disclosure of instructional expenditures, a key indicator of institutional financial priorities with a direct connection to educational outcomes.

We endorse the proposed expansion and strengthening of both mandatory [668.171(c)] and discretionary triggers [668.171(d)] and believe that their adoption would significantly enhance the financial stability of participating institutions. We encourage the Department to consider providing more explicit thresholds for the discretionary triggers related to fluctuations in Title IV volume [668.171(d)(3)] and high annual dropout rates [668.171(d)(4)].

We support the Department's proposed changes to 668.171(e), which refine and strengthen provisions related to financial changes that necessitate the recalculation of an institution's composite score. The adoption of these changes would prevent many of the documented financial tactics by which institutions manipulate existing financial responsibility metrics.

We support the proposed enhanced reporting requirements and their associated timelines. Timely notification of material facts and events would better enable the Department to exercise its oversight responsibilities. We also believe that the receipt of a civil investigative demand, subpoena, or formal request for documents from a governmental entity, in addition to being a reportable event, should also be included as a discretionary trigger under 668.171(d).

We support the Department's proposed amendment to 668.171(g) which, as a condition of exempting public institutions from producing passing composite scores, requires them instead to provide acceptable documentation that they are in fact backed by the full faith and credit of a governmental entity. This provision is especially needed for domestic public institutions, which are increasingly engaged in opaque and risky financial ventures with various for-profit entities. These ventures could generate significant institutional losses, including potential borrower defense liabilities, that would pose a costly threat to the federal fiscal interest without such documentation. While this sensible requirement is likely to be opposed by public institutions, the production of a letter—which falls well short of requiring governmental entities to formally obligate themselves by signing the program participation agreements of the institutions they back—is the least burdensome assurance that the Department could ask for in exchange for allowing public institutions to sidestep a more detailed analysis of their finances. We would also note that in determining whether the documentation is acceptable to it, the Department should ensure that the financial resources of the entity backing such liabilities comport with the size of the potential costs it may need to absorb. As an additional concession to any public institutions that fail to produce documentation of governmental backing acceptable to the Department, we would support a waiver authority to enable the Secretary to designate such institutions as financially responsible based on their submission of such financial information as the Secretary may deem appropriate.

Finally, we support the provisions of 668.171(h) regarding audit opinions and disclosures.

Certification Issues

We believe the proposed changes to certification and the program participation process will significantly improve institutional integrity provisions and vastly strengthen protections for both students and taxpayers.

We support the Department's proposed elimination of current 668.13(b)(3) that automatically grants an institution renewal of certification if the Secretary does not grant or deny certification within 12 months of the expiration of its current period of participation. In addition, we believe that provisionally certified institutions with "major consumer protection issues" should be subject to annual recertification. While this runs counter to the Department's history of accommodating the preferences of participating institutions, the appropriate federal posture regarding major consumer protection issues should be that such issues be remedied expeditiously and certainly not require more than a year to resolve.

The new requirement in 668.14(b)(32)(i) for programmatic accreditation and the provision in [668.14(b)(32)(ii)] on satisfaction of other prerequisites when such accreditation or prerequisites are required—including as a condition of employment or licensure in the field for which programs prepare students—will put an end to loopholes that currently allow predatory institutions to offer unaccredited or otherwise non-compliant programs (particularly across state lines) to students who would never qualify to be employed in the fields in which they are led to believe their programs are preparing them to work. We would, however, encourage the Department to modify the requirement in 668.14(b)(32)(ii) by adding "if such prerequisites are available or can be obtained from the State." This language was proposed during the negotiations and would address circumstances under which institutions may be unable to obtain the information necessary to comply with this provision. We would also encourage the Department to allow case-by-case waivers of the requirement for students who knowingly opt to enroll in programs that fail licensure requirements in their state because they plan to move to a state whose licensure requirements are satisfied by the program in question.

Likewise, the requirement that programs should comply with state consumer protection laws, if properly redrafted, would protect students and the federal fiscal interest by prohibiting blanket waivers of certain consumer protection laws through reciprocity agreements. This topic was extensively discussed by the Committee, with consumer advocates and the Department generally supporting the uniform application of all state consumer protection laws to programs regardless of their mode of delivery or the specific mechanism for state authorization across state lines. The proposed 668.14(b)(32)(iii), however, inexplicably limits such state laws to those related to closure, recruitment, or misrepresentation. It could also be misunderstood to limit the application of all state laws to institutions that are physically located in a state or are directly authorized to deliver distance education in a state outside a reciprocity agreement. To avoid loopholes and forum-shopping by institutions seeking to operate across state lines, we believe it is in the Department's and students' interest that all state consumer protection laws apply to all programs based on student location regardless of their mode of delivery or how their institutions obtain authorization to legally operate in each state.

The proposed regulations would provide another enormous improvement over current rules by prohibiting the institutional practice of withholding transcripts in cases of institutional error, misconduct, or return of Title IV funds. These constitute the most prevalent instances of the practice, which puts students in a no-win position due to no fault of their own and frustrates the policy goals of federal aid programs by preventing students from pursuing higher education at other venues. Institutional balances resulting from the return of Title IV funds are typically triggered by the withdrawal of low-income students that institutions knowingly enroll. Such students are disproportionately at risk of dropping or stopping out, and would normally have minimal or no expected family contribution payment at the point of enrollment. Yet, if they withdraw or drop out during the term, they are confronted by entirely unrealistic institutional repayment demands, sometimes for thousands of dollars. While the proposed prohibition in 668.14(b)(33) still allows other institutional collection tactics and does not entirely address the plight of such students, it does provide them with the possibility of pursuing their education and enabling them to pay off their balances.

Standards of Administrative Capability

We strongly support the Department's proposed amendments to 668.16 in their entirety. The proposed provisions represent important and much-needed enhancements to current regulations. Particularly noteworthy are new requirements related to career services, provision of geographically accessible clinical or externship opportunities required for credentialling or licensure, timely disbursement rules, and critical new safeguards against high school diploma mills. We believe the Department has taken an important step in the right direction by requiring better counseling and communication, but would encourage additional changes to further standardize financial aid offer letters and how institutions categorize various forms of federal financing in such offer letters.

Ability to Benefit

The Committee arrived at a consensus on the proposed ability-to-benefit regulation, and as a party to that consensus, we are pleased to support the proposed draft.

We thank you for your consideration of our comments and would like to express our appreciation for the tireless work of the Department's dedicated staff on advancing access to quality educational opportunities.

Sincerely,

Barmak Nassirian
Vice President for Higher Education Policy