

August 26, 2022

Nasser Paydar, Ph.D.
Assistant Secretary for Postsecondary Education
United States Department of Education
400 Maryland Avenue, SW
Room 2C179
Washington, DC 20202

Dear Dr. Paydar:

Thank you for the opportunity to provide comments on the Notice of Proposed Rulemaking issued July 28, 2022 ([Docket ID ED-2021-OPE-0062](#)). We represent a broad coalition of organizations working on behalf of students, veterans, faculty and staff, civil rights advocates, researchers, and other stakeholders concerned about institutions receiving Title IV funds that rely on deceptive and fraudulent tactics to lure students into programs that provide little or no value.

Below, we provide further backing for strong measures to protect students and taxpayers' investment in federal financial aid programs. We also provide recommendations on improvements to the proposed regulations. By incorporating these recommendations, the Department can add further assurance to students and taxpayers that their investments in higher education will be to their benefit, as well as to the benefit of our broader citizenry and economy.

Prison Education Programs. Prior to passage of the 1994 Crime Bill that stripped people who were incarcerated of Pell Grant eligibility, approximately 772 prison education programs operated across 1,287 correctional facilities nationwide. By 1997, fewer than ten prison education programs remained in operation.¹ The change in federal law restoring Pell Grant eligibility for students who are incarcerated represents a milestone advance in equitable access and affordability; we welcome this change and look forward to the expected growth in prison education programs.

Congress wisely excluded for-profit colleges from eligible providers. Far too often, institutions in this sector have misled students about their program offerings, defrauded students and federal financial aid programs, and left taxpayers with bills and students with credentials of little or no value. Excluding for-profit colleges provides a safeguard for a uniquely marginalized student population.

Although we welcome the for-profit college exclusion, we are concerned by the potential for institutions from other sectors to move quickly into the prison education space without sufficient attention to the needs of students who are incarcerated or the environments in which they learn. To ensure students who are incarcerated have not just access to higher education through federal aid, but equitable learning experiences in high-quality programs, we offer this set of recommendations:

- Prevent institutions and oversight entities from adding student eligibility restrictions. Research shows beneficial effects both for students and communities that go beyond reduced recidivism

¹ Robinson, G. & English, E. (2017). *The Second Chance Pell Pilot Program: A Historical Overview*. American Enterprise Institute. <https://www.aei.org/wp-content/uploads/2017/09/The-Second-Chance-Pell-Pilot-Program.pdf#page=2>.

rates.² Accordingly, Congress did not place restrictions on Pell eligibility associated with sentences, parole eligibility, or types of crimes. The Department should give guidance to correctional entities and institutions not to place such restrictions on program access.

- Develop an appeals process for oversight entity decisions. Without a process for institutions to appeal Bureau of Prisons/corrections department decisions, oversight entities may unfairly reject programs; institutions of higher education would have no other recourse than to reapply. The Department should keep the ability to reapply in the final rule, as well.
- Require institutions to disclose third-party vendors. Potentially predatory online program management companies may stand to profit from incarcerated students' Pell Grant funding. As part of any program approval process, the Department should require institutions to disclose to accreditors, oversight entities, the Department, and students the use of any third-party vendors involved in the development, management, maintenance, and provision of programs—as well as involvement in marketing, recruitment, and enrollment management of programs.
- Remove institutions' ability to deny admission to formerly incarcerated applicants. The Department should not give permission to institutions to deny admission to applicants based on criminal history. When determining best interest, oversight entities should be concerned about any college that would enroll a person in a prison education program, but not enroll them on the college's campus. The Department should delete the "barring exceptional circumstances surrounding the student's conviction" provision and language from §668.241.

We add two notes for consideration by oversight entities of students' best interest. First, we encourage the Department to keep recidivism rates as optional metrics for such determinations, as allowed by statute. Requiring this metric for consideration could unduly limit opportunities for students currently incarcerated. Second, we support language encouraging maximum transferability of academic credits for students participating in programs in federal prisons. Broad credit transferability should be considered as a positive factor when evaluating whether a program is acting in the best interests of students.

For additional technical improvements to the proposed regulations, we refer you to a letter submitted by Dr. Bradley Custer on behalf of the Center for American Progress.

Closing 90/10 Loophole. Since its original enactment as part of the 1992 reauthorization of the Higher Education Act, the 90/10 Rule has required for-profit institutions to receive at least 10 percent of their tuition revenue from sources other than student financial assistance programs. Because the rule did not apply to funds from federal agencies other than the Education Department, it inadvertently created a loophole for unscrupulous schools to target veterans and military-connected students. Every dollar of their GI Bill and Tuition Assistance benefits enabled such schools to collect nine dollars in Title IV funds. The negotiated rulemaking committee heard from multiple veterans about the effects of the high-pressure sales tactics and the misrepresentation some schools used to recruit veterans and circumvent the intent of the rule.

After more than a decade of advocacy by veterans service organizations, Congress finally closed the 90/10 loophole last year and instructed the Department to develop enabling regulations. We welcome

² Binda, H., Weinberg, J., Maetzener, N., & Rubin, C. L. (2020). "You're almost in this place that doesn't exist:" The Impact of College in Prison as Understood by Formerly Incarcerated Students from the Northeastern United States. *Journal of Prison Education & Re-Entry*, 6(2), 242-263. Retrieved from <https://files.eric.ed.gov/fulltext/EJ1265662.pdf>.

the consensus reached by members of the negotiated rulemaking committee on proposed 90/10 regulations to fulfill Congress' directive. We are pleased to support the proposed rule, and we urge the Department to vigilantly monitor institutional compliance to ensure schools do not create ways to game the new rule.

We believe the proposed regulation includes important safeguards against potential abuses. These provisions include:

- Counting all federal funds used to pay tuition, fees, and other institutional charges—whether received directly from a federal agency or indirectly from students—as mandatory;
- Preventing institutional circumvention of the rule through timing of cash drawdowns;
- Excluding tuition discounts, grants, and scholarships controlled by the institution or its owners or affiliates;
- Guarding against the inclusion of non-programmatic income, including cash proceeds from sales of receivables and institutional loan assets;
- Treating properly revenues from institutional loan assets held by the school; and
- Incorporating safeguards in the Department's treatment of institutional revenues from private financing schemes such as income-share agreements.

We urge the Department to retain these important protections in the final regulations.

The proposed rule allows institutional revenues from a limited subset of ineligible programs—specifically, programs offered in-person *and* on the premises of an employer—to count toward the 10 percent component of the 90/10 ratio. It will be important for the Department to closely monitor these programs and to ensure that this limited subset of non-Title IV programs does not ultimately serve as the basis for more than a small share of a school's "10 side" revenues. The purpose of the 90/10 statutory and regulatory provisions is to ensure that a school's *eligible* programs can generate revenue from non-federal sources to demonstrate that they have market validation.

The Department will need to actively monitor institutional compliance with the rule. To do so, we urge the Department to track and publish the component of each institution's non-federal revenues derived from its ineligible programs.

Institutional Changes in Ownership. As noted by the Government Accountability Office, former owners or their affiliates were insiders to as many as a third of the nearly 60 for-profit to nonprofit conversions examined in the period from 2010 to 2020. Many owners or affiliates continued to play financial roles in the newly established nonprofits.³ We appreciate the Department's interest in strengthening regulations to guard against the kind of self-dealing that too often characterizes shadow conversions that serve the financial interests of institutional leaders, but not the interests of students or taxpayers through federally funded financial aid programs. However, we also note several concerning risks in the proposed rules, which we note below.

Revenue-sharing arrangements with insiders are particularly high-risk because they create incentives for insiders to maximize profits at the expense of the nonprofit's educational mission. In some conversions,

³ U.S. Government Accountability Office (2020), *IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions*, p. 18. <https://www.gao.gov/assets/gao-21-89.pdf>.

the former owner avoids any possible controversy over asset valuation by “selling” the institution to a nonprofit entity for negligible amounts like \$1, while maintaining a profitable hold on the institution by entering into a long-term revenue-sharing agreement with the converted nonprofit. We appreciate the Department’s proposal, which would prohibit converted nonprofits from entering revenue-sharing arrangements with former owners.

We also support the proposed prohibition of arrangements in which converted institutions owe a debt to an insider and the proposed prohibition on converted nonprofits entering other non-revenue-based contractual arrangements with former owners. This prohibition would protect against high-risk arrangements, such as former owners acting as landlords of converted nonprofits.

Although we note and applaud these strengths of the proposed rule, we urge you to address several critical areas of concern in the final rule:

- Delete carve-outs permitting revenue-sharing and other contractual arrangements with “affiliates” of former owners. The proposed rule appropriately establishes a general prohibition against debt or other contractor relationships with former owners after the conversion of an institution from for-profit to nonprofit. Exceptions to the prohibitions on revenue-sharing and other arrangements are tantamount to a road map for corrupt transactions. Attributing an exception to an “affiliated or related” entity creates an incentive for former owners to establish affiliates to fit the exception. The use of a “market price” measure is particularly inappropriate, inviting manipulation and placing a heavy burden on the Department to conduct and defend myriad valuation analyses.
- Reconsider the proposal to increase the ownership stake threshold for review to 50 percent, and instead keep the existing 25 percent threshold, for limited liability companies and similar types of legal entities. Under the current regulations, these entities experience a change in control subject to Department review when an individual acquires control of at least 25 percent of voting stock and control of the corporation. Raising this ceiling would weaken oversight by limiting the range of transactions subject to Department review.
- Raise letter of credit requirements for owners who cannot demonstrate financial responsibility. The proposed rule provides that where a new owner lacks two years of audited financial statements, the institution would have to provide a letter of credit of at least 10 percent of the prior year’s Title IV funds. In cases where owners cannot produce any documentation of financial responsibility, the proposal would require a letter of credit for 25 percent of the prior year’s Title IV funds. Stronger protection for students and against potential institutional collapse would come from setting these requirements at 25 or 50 percent without two years of audited statements and at least 50 percent with no audited statements, respectively.

We also share the concern noted in comments submitted by The Century Foundation with language in the NPRM’s preamble indicating the Department would consider an institution to meet the definition of a nonprofit if its agreements had been approved by the Department and “those agreements remain largely unchanged since the latest review.” New information often reveals problematic agreements sometime after the agreements have taken effect. The Department should regularly review all converted institutions, given the high-risk nature of these transactions and the risk these institutions pose to students and taxpayers. Further, the Department should state that such institutions should expect more regular reviews as a matter of policy.

Together, these proposed regulations represent welcome steps toward strengthening student protections and institutional accountability, in addition to significantly expanding access for a uniquely marginalized student population. They will also advance racial and economic equity across higher education in this country.

We thank you for this set of proposals and for the opportunity to provide further input for consideration in the final stage of crafting these needed rules. If you have any questions or need any clarification of these comments, please contact Dr. Kyle Southern, Associate Vice President at The Institute for College Access and Success, by email at ksouthern@ticas.org.

Sincerely,

American Federation of Teachers
Americans for Financial Reform Education Fund
Center for American Progress
New America Higher Education Program
The Education Trust
The Institute for College Access & Success
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UnidosUS
Veterans Education Success
Young Invincibles
Carolyn Fast, Senior Fellow, The Century Foundation
David Halperin, Attorney