

**Comments from the Legal Aid Community  
to the Department of Education re:  
Administrative Capability and Ability to Benefit**

**Docket ID: ED-2023-OPE-0089**

**June 20, 2023**

These comments, submitted on behalf of organizations across the country that provide free legal assistance to low-income student loan borrowers, address the Department's proposed regulations regarding financial aid eligibility based on a student's ability to benefit, institutional administrative capability, and program participation agreements. Our comments are informed by our work as legal aid practitioners.

The proposed regulations we discuss in this comment are of critical importance to the borrowers we represent and to millions of low-income borrowers across the country who do not have access to legal assistance. The populations we serve come from communities that have historically not had an equal voice in government policymaking, including immigrants, single mothers, veterans, and people of color. Our clients are often the first in their family to pursue higher education and rely on student loans to access education and career training. For too many of our clients, the loans meant to build a bridge to economic stability or mobility do the reverse, trapping them and their families in snowballing debt. Many of the people we serve were subject to unscrupulous conduct from the schools they attended, ranging from the falsification of federal aid eligibility to the use of misrepresentations and aggressive recruitment to induce them to enroll. While we cannot speak for them, we aim to share our experiences working with them and the important perspectives they bring to student aid policy in this comment.

We have represented hundreds of borrowers who never should have owed student loans in the first place because they did not have a high school diploma or GED when they enrolled, and their for-profit schools did not properly certify their ability to benefit (ATB). We have helped numerous students submit loan discharge applications after their school falsely certified their eligibility for federal aid based on fake high school diplomas that the school instructed the student to obtain or by falsifying students' FAFSA applications to state they have a high school diploma when they do not without the students' knowledge. Before these borrowers come to us for assistance, their student loans have wreaked havoc on their lives; they are often in default and have been subject to damaged credit, wage garnishment, tax refund offset, and the offset of other federal benefits.

Over the years, we have seen for-profit schools game the eligibility requirements for these students, adapting their illegal practices in order to ensure they will continue to receive revenue from ATB students whenever the eligibility requirements change. These practices have continued to today; we have seen some schools exploit the Higher Education Act's eligible

career pathway program (ECP program) requirement by partnering with inexperienced, non-accredited for-profit “high schools.” These so-called high school programs rarely provide the individualized, hands-on literacy and numeracy training envisioned by Congress when it passed the ECP Program requirements, nor do they provide valid high school diplomas. The proposed regulations take needed steps towards ensuring that the Department exercises oversight of ECP Programs to ensure they are a worthwhile investment for students.

The students we serve are also frequently harmed by other forms of school misconduct that are addressed by the proposed regulations. For example, some for-profit schools enroll students who are ineligible for federal aid by relying on high school diplomas they know are false or by otherwise falsifying FAFSA applications. Schools also lure students into enrolling with promises of lifetime career placement services or promises that they will place students in a clinic or externship required for graduation—but then fail to deliver, leaving students in the lurch. Other schools fail to provide students with timely payments of the federal financial aid funds that exceed the tuition and other school fees, failures that have disastrous consequences for low-income students. Such students depend on these payments to pay for their living expenses—and often the expenses of their children—so they can succeed in school. In addition, we have submitted numerous borrower defense applications on behalf of borrowers who were subject to misrepresentations and/or aggressive and deceptive recruitment tactics. Colleges that engage in these practices pose a high financial risk to the students, the taxpayers, and the Title IV program.

Our comment first explains why we support for the Department’s proposed Eligible Career Pathway Program regulation (34 C.F.R. § 668.157). It then explains why we support the Department’s proposed Administrative Capability requirements at 34 C.F.R. §§ 668.16(p) through (u). Finally, our comment explains why we support of the Department’s proposal to require that all schools follow state consumer protection laws, but suggests that the Department expand the laws captured by this regulation to ensure that all student loan borrowers benefit from important state consumer protections and are protected from schools’ withholding of necessary documents to collect on any type of debt. (34 C.F.R. §§ 668.14(b)(32) and (33)). Because the proposed regulations have the potential to prevent some of these harms and provide additional law enforcement tools against institutions that engage in these abuses, we urge the Department to finalize the proposed regulations as described below.

I. **We Strongly Support the Department’s Proposed Requirements for Eligible Career Pathway Programs (34 C.F.R. § 668.157)**

From the 1980s through July 1, 2012, many for-profit institutions attempted to maximize their Title IV revenues by engaging in deceptive schemes to falsely certify thousands of students’ ability to benefit from their programs, even though the students did not earn high school diplomas. The Department has extensive evidence of common fraudulent schemes, which

involved faking ATB test results, providing test answers to students, or permitting students to retake a test multiple times until they pass.<sup>1</sup> After July 1, 2012, when Congress repealed the ATB eligibility provision, many institutions found fraudulent means to continue to falsely certify these students. They often falsely stated on students' electronic FAFSAs (without the student's knowledge) that the student had a high school diploma or GED or they directed students to obtain invalid high school diplomas while falsely representing that these diplomas were valid to both the government and the students.<sup>2</sup>

The Higher Education Act's ATB provision went back into effect in modified form on July 1, 2014. In addition to the requirement that a student without a high school diploma or GED must pass an ATB test, the modified provision of the HEA requires that ATB students be concurrently enrolled in narrowly defined "eligible career pathway programs" (ECP Programs). These programs must enable an individual to attain a secondary school diploma or its recognized equivalent and at least one recognized postsecondary credential, in addition to other requirements.<sup>3</sup> Despite the well-documented history demonstrating for-profit institutions' propensity to adapt their fraudulent ATB schemes to changing legal requirements, the Department has allowed institutions to offer ECP Programs with no oversight or minimum standards for over eight years. As a result, legal aid organizations are starting to see abuses, particularly in the for-profit sector. The new ECP Program regulations proposed by the Department are essential to ending these abuses and ensuring that student and taxpayer dollars are well spent.

Ernesto Alvarez's<sup>4</sup> experience is representative of what many ATB students are experiencing. Mr. Alvarez, a legal aid client in Los Angeles, never finished high school or earned a GED. He attempted on two separate occasions, in 2011 and 2014, to earn his high school diploma through adult education programs offered by his public school district, but dropped out of both programs because the classes were too difficult. Then, in 2016, Mr. Alvarez searched online for an education program that could lead to a new career and better life for himself and his family. He came across an advertisement for a for-profit college chain and entered his contact information. Almost immediately, he began receiving calls from the college

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<sup>1</sup> In 2017, for example, the Department agreed to group false certification discharges for as many as 36,000 students who attended the Wilfred Academy of Hair and Beauty Culture and Robert Fiance between 1986 and 1994, based on ATB abuses. Patricia Cohen & Emily Rueb, [U.S. To Help Remove Debt Burden for Student Defrauded by For-Profit Chain](#), NEW YORK TIMES (Aug. 9, 2017).

<sup>2</sup> In 2016, for example, the Department cut off financial aid to 23 campuses of the Marinello Schools of Beauty after determining that the school had engaged in a scheme to procure invalid high school diplomas for students who were otherwise ineligible for federal financial aid. Samantha Masunaga & Chris Kirkham, [Marinello Schools of Beauty abruptly shut down after federal allegations](#), LOS ANGELES TIMES (Feb. 5, 2016). As another example, in 2015, the Department of Justice indicted the owners of FastTrain College in Miami for allegedly obtaining federal financial aid by misrepresenting to the government that 1,300 students were high school graduates. See [Second Superseding Indictment](#), *U.S. v. Amor*, U.S. Dist. Ct., S. Dist. of Fla., Case No. 14-20750-CR-LENARD (Sept. 29, 2015).

<sup>3</sup> 20 USC § 1091(d)(2)(f).

<sup>4</sup> This name has been changed to protect the privacy of the borrower.

and eventually visited the campus.

During the campus tour, the recruiter pitched an 8-month dental assistant program. Mr. Alvarez told the recruiter that he was worried about his ability to successfully complete such a program. He shared that he did not have a high school diploma and had dropped out of two adult diploma programs because they were too difficult for him. He also explained his impression that only “smart people” could be dental assistants. The recruiter and at least four other college staff assured Mr. Alvarez that he was smart enough to succeed in the dental assistant program. Mr. Alvarez felt like these recruiters, and their school, understood his needs and was impressed with the dental facilities, the promises of hands-on training and lab time, and the promises that he would have no problem getting a job as a registered dental assistant upon graduating. After he took an ATB exam, which the college told him he passed, he enrolled immediately. He was proud because he had finally made it to college.

The college enrolled Mr. Alvarez in an ECP Program. The school required him to successfully complete an online GED program offered by a separate business, called C4L Academy, while attending dental assistant classes. According to public records, C4L Academy is a for-profit sole proprietorship established in 2015. It is not accredited by a regional accrediting agency recognized by the U.S. Department of Education. Because it is not regionally accredited, it is unclear whether C4L Academy diplomas are recognized as valid by public school districts or colleges.

The college provided a computer room where he and other ECP Program students could drop in at any time, login to the GED program, and work through 19 different modules. They were required to pass a final test once a week for each module before moving onto the next one. Because the online sessions were limited to one hour, Mr. Alvarez never had enough time to finish the computer assignments, which he often could not understand. Neither the college nor C4L Academy offered him much content-based assistance with his GED program. Instead, one college employee was responsible for making sure that the ECP Program students signed in at the GED computer room and occasionally helped students when she could. Because this employee was overwhelmed by the number of students she had to attend to, she rarely helped Mr. Alvarez. Although he met occasionally with an advisor, the advisor focused on his attendance, punctuality, and the modules he still needed to complete in order to graduate, rather than on helping him learn from and successfully complete his online modules.

Although Mr. Alvarez was told that he had failed some modules, Mr. Alvarez passed his GED classes according to a transcript for the GED program.<sup>5</sup> Despite this, neither the college nor C4L Academy gave him a GED or high school diploma.

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<sup>5</sup> A copy of the C4L Academy transcript for Mr. Alvarez, along with a disclosure regarding the ECP Program from the college, is attached hereto as Exhibit A.

Mr. Alvarez graduated even though he found the dental assisting classes extremely difficult. He submitted over 20 applications for dental assistant positions at dental offices. Although he was hired for three trial period jobs, all three fired him because he lacked the skills necessary for the job. Other than this, Mr. Alvarez has never worked as a dental assistant. Mr. Alvarez is unemployed and struggling to pay down his student loan debt, which amounts to over \$16,000 in federal student loans and a \$3,100 private student loan.

As another example, dozens of ATB students at now-shuttered for-profit ASA College (ASA) have contacted a legal service organization after the loss of accreditation and closure of the school. Based on these students' reports, they did not appear to have any specific instruction for the ECP Program component of their program at all; rather, they were placed into the regular introductory classes, which would supposedly count towards earning a GED. After the school's closure, many of these students are stuck. Without having earned their GEDs from ASA, they are ineligible to obtain federal aid from other legitimate schools to continue their degrees. These students cannot even obtain federal aid to complete the teach-outs offered by ASA; one student who attempted to do so is now being collected on for the full balance of the teach-out semester, since her federal aid was not approved due to her lack of high school diploma. The difficulties faced by ATB students surrounding precipitous closures and loss of accreditation underscore the importance of having the proposed regulatory requirements, which provide important student protections.

The ECP Program described in the examples above was not the kind of program that Congress intended for ATB students. As described in David Socolow's proposal memo submitted the negotiated rulemaking,<sup>6</sup> Congress intended ECP Programs to be narrowly construed as intensive, hands-on integrated education and training programs designed to provide adult education and literacy activities together with workforce preparation and training for very specific occupations, along with other workforce preparation activities that are often the first step on low-wage, low literacy workers' career pathways.

The programs offered to Mr. Alvarez and via ASA College likely did not meet the definition of an ECP Program under the Higher Education Act. It is unlikely the college did research that led to a determination that the dental care industry in California or the regional economy was in need of, and unable to find, sufficient numbers of skilled dental assistants.<sup>7</sup> While the college provided some counseling, it did not provide the counseling most needed by Mr. Alvarez – tutoring to help him master his on-line high school and dental assistant classes and counseling to help him achieve his career goals.<sup>8</sup> Neither the dental assistant program, nor the GED program offered by C4L Academy, were “organize[d] . . . to meet the particular needs of

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<sup>6</sup> The memo is attached as Exhibit A.

<sup>7</sup> 20 U.S.C. § 1091(d)(2)(A).

<sup>8</sup> 20 U.S.C. § 1091(d)(2)(C).

[Mr. Alvarez] in a manner that accelerates the educational and career advancement”<sup>9</sup> of Mr. Alvarez. Mr. Alvarez received no special tutoring. Neither the college nor 4CL Academy evaluated his literacy or potential learning challenges to craft a specialized joint high school diploma and dental assisting program that would allow him to succeed in his programs and as a dental assistant. Indeed, Mr. Alvarez’s C4L transcript lists courses such as “Introduction to Literature,” “World History and Geography,” “Earth and Space Science,” and “Physical Education” – none of which addressed Mr. Alvarez’s history of difficulty understanding adult high school diploma courses or helped him to attain the knowledge necessary to successfully stay in a dental assisting job.<sup>10</sup>

High-quality integrated education and training (IET) programs help adult learners without a high school diploma or equivalency gain college credits and improve basic skills through dual enrollment that allows them to achieve gains faster than if they separately enroll in traditional adult education programs and Title IV-eligible postsecondary education. As explained in by the Department in its IET Training Guide:

IET is a service approach that provides adult education and literacy activities concurrently and contextually with workforce preparation activities and workforce training for a specific occupation or occupational cluster for the purpose of educational and career advancement (34 CFR §463.35). An IET program must include the following three components: adult education and literacy activities, workforce preparation activities, and workforce training (§ 463.36). In addition, as part of a career pathway (§ 463.37), the design of an IET program should support the local and state workforce development board plans as required under the Workforce Innovation and Opportunity Act (WIOA).<sup>11</sup>

The Department of Education’s Institute for Education Science (IES) What Works Clearinghouse (WWC) confirmed IET as an evidence-based practice with gold standard research in three random control trial studies that meet the WWC criteria. This analysis documented impacts for tens of thousands of students in nine states, with positive effects on industry-recognized credential, certificate, or license completion, and short-term employment gains.<sup>12</sup> As noted in a Department-sponsored publication,

[c]entral to a successful IET is [adult education] AE programs’ development of well-defined partnerships with service providers who can assist in delivering required IET program services. Successful IET programs also have explicit

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<sup>9</sup> 20 U.S.C. § 1091(d)(2)(E).

<sup>10</sup> See Exhibit B.

<sup>11</sup> U.S. Dep’t of Educ., Office of Career, Tech. and Adult Educ., [“Integrated Education and Training \(IET\) Guide.”](#)

<sup>12</sup> Inst. of Educ. Sciences, Nat’l Center for Educ. Evaluation, What Works Clearinghouse, [Designing and Delivering Career Pathways at Community College: A Practice Guide for Educators](#) (Mar. 2021).

processes for determining adult learners' skills, interests, and abilities and for matching those learners to technical training that aligns with their skills, interests, and abilities. Successful programs also connect adult learners with professional development and technical assistance. The OCTAE-supported Integrated Education and Training Program Design Toolkit provides guidance on all phases of IET program planning, design, implementation, and evaluation.<sup>13</sup>

Proposed 34 C.F.R. § 668.157, which is the product of committee consensus, will better protect vulnerable ATB students from fraud and help ensure that their investments in ECP Programs will pay off for themselves and taxpayers. It will help ensure that top-notch educational entities provide the high school diploma or GED component of ECP Programs. The proposed provision does this by essentially requiring that ECP Programs be IET programs. All ECP programs would be required to provide adult education and literacy under WIOA, including workforce preparation activities. The proposed regulations further requires that ECP Programs demonstrate and provide value to students by requiring that:

- (1) the institution provide documented research that demonstrates that the ECP Program aligns with the skill needs of industries in the state or regional labor market in which the school is located;
- (2) that the skill needs identified through research align with the coursework and credential provided by the institution;
- (3) that the institution provide academic and career counseling to students;
- (4) that the education is offered through an agreement or other evidence of alignment of postsecondary and adult education providers; and
- (5) the program lead to a valid high school diploma. Equally important, if ECP Programs are not offered through a state process, the ECP Program's eligibility for Title IV funds must be verified by the Department.

For these reasons, we strongly support proposed 34 C.F.R. § 668.157. It is absolutely essential to protect vulnerable students from ECP Program fraud and ensure that such programs actually provide quality hands-on education to ensure that students have the skills necessary to obtain employment in in-demand occupations.

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<sup>13</sup> J.A. Alamprese. & I-F. Cheng, [\*Compendium of innovative practices: Adult education bridge programs and integrated education and training \(IET\) programs\*](#) (Dec. 2020). See also U.S. Dep't of Educ. Office of Career, Tech., and Adult Educ., [\*"Integrated Education and Training Design Toolkit"\*](#) (Oct. 2021).

## II. **We Support the Department’s Proposed Administrative Capability Requirements at 34 C.F.R. §§ 668.16(p) through (u).**

Based on the many for-profit school abuses that our clients routinely experience, we support many of the proposed additional minimum standards that schools must meet to demonstrate administrative capability to administer the Title IV programs. In our experience, a schools’ failure to meet these standards that is a strong indicator that the school is not capable of providing the education promised or responsibly managing Title IV funds. Instead, these failures indicate a high risk that the school is providing a substandard education and worthless credentials, imperiling the large financial investment made by the Department, taxpayers, and the students themselves.

**We support proposed 34 C.F.R. § 668.16(p)**, which requires schools to develop and follow adequate procedures to evaluate the validity of students’ high school diplomas in some circumstances. Over the last 20 years, we have seen a growing number of clients who did not have a high school diploma or GED and whose eligibility for financial aid was falsely certified in one of three ways. First, some schools fraudulently partnered with fake high schools to provide an invalid high school education/diploma to students. For example, Marinello Schools of Beauty (Marinello) partnered with Parkridge High School to create the appearance that they were providing a valid high school education and diplomas to students, when in fact they provided fake high school diplomas to illegally obtain federal financial aid revenue for which they were not eligible.<sup>14</sup> Second, some schools refer students to online high school diploma mills that provide fake high school diplomas.<sup>15</sup> Third, some schools falsify students’ electronic FAFSA applications to state that they have a high school diploma, when in fact they do not, without the students’ knowledge or consent. The Legal Aid Foundation of Los Angeles has seen this happen at many large for-profit chains, including Corinthian Colleges and, most recently, UEI College.

This type of fraud has proliferated because the Department’s current regulations and procedures do not require schools to obtain and validate students’ high school diplomas. This has allowed institutions to engage in high school diploma fraud for many years before the Department detects the fraud and takes appropriate action. For example, Marinello Schools of Beauty engaged in its high school diploma scheme for at least 3 years before the Department took action.<sup>16</sup> As result, students and taxpayers suffered enormous financial losses. Adding an administrative capability standard that requires schools to develop and implement a validation procedure for circumstances when it or the Department has reason to believe that a high school

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<sup>14</sup> See, e.g., Letters from Susan D. Crimm, U.S. Dep’t of Educ., to Rashad Elyas, Marinello Schools of Beauty (Feb. 1, 2016) (five letters denying recertification to 23 Marinello campuses based on high school diploma fraud), available at <https://studentaid.gov/announcements-events/marinello>.

<sup>15</sup> See e.g., Fed. Trade Comm’n, Press Release, [FTC Action Halts Online High School Diploma Mill That Made \\$11 Million Selling Worthless Diplomas to Students](#) (Sept. 19, 2014).

<sup>16</sup> See fn 13, *supra*.

diploma is not valid or was not obtained from an entity that provides secondary education is an important first step toward reducing schools' high school diploma fraud.

**We also support 34 C.F.R. §§ 668.16(q), (r), (s) and (u).** Collectively, we have helped hundreds of for-profit school students submit borrower defense discharge application based on the following common deceptive business practices for schools that eventually failed, leaving students with debts they cannot pay and losing taxpayer millions, if not billions, of dollars.

- For-profit schools routinely promise borrowers that their school has a career services staff that will help them find a job after graduation. They also often claim that they have industry connections and partnerships that graduates can use to obtain employment. Upon graduation, many borrowers discover that the school has few or no career services staff, has no industry connections, and that the only career service assistance provided is postings of job announcements from Craigslist and other public websites.
- For-profit schools that offer occupational programs that require students to complete clinic or externship hours before graduating often promise that they will find prospective students a placement for their mandatory clinic or externship. However, after the students complete their coursework, many schools refuse to find the students a clinic or externship placement. In these cases, students are forced to find their own clinics or externships and risk either non-completion or delaying their graduation – and paying higher tuition fees – if they cannot do so.
- Students are often only able to obtain a higher education if a portion of their federal financial aid is available to pay their living expenses after the school deducts tuition and other fees. Students' timely access to their credit balance funds on a timely basis is essential so that they can pay non-institutional costs like housing and transportation while attending school. However, some schools illegally delay paying these amounts to students, causing them hardship and increasing the likelihood that they will not complete their programs. As an example, LAFLA has two clients who attended a beauty school that delayed paying them their financial aid for over two school terms, then demanded that the students cash their financial aid checks at the school's bank and return and pay the cash back to the school. This impacted their ability to attend their classes while juggling work and childcare, causing both students to incur additional debt for classes they were required to retake due to absences or late attendance.

Each of these business practices, along with substantial misrepresentations and aggressive and deceptive recruitment tactics, indicate that a school is not administratively capable of administering Title IV funds. Schools that engage in any of these practices pose a high financial risk to the Department, taxpayers and the student themselves, as these borrowers

are more likely to default on their federal student loans and/or seek to have their loans discharged. We therefore support proposed 34 C.F.R. §§ 668.16(q), (r), (s) and (u).

III. **We Support the Department’s Proposal to Require That All Schools Comply with State Consumer Protection Laws, Proposed 34 C.F.R. § 668.14(b)(32), But Recommend that the Department Expand the Types of Consumer Laws Included.**

We strongly support the Department’s proposal to require that all schools agree to comply with state consumer protection laws related to closure, recruitment, and misrepresentations, including those specific to educational institutions, as well as the provisions relating to licensure and programmatic accreditation.

With respect to the provision regarding state consumer protection laws, the Department’s proposal is important because it will ensure that *all* Title IV students are covered by important state consumer protections that are specific to higher education. While many state laws have strong consumer protections that target common and specific higher education abuses, 49 states have signed onto a state authorization reciprocity agreement that requires them to waive their higher education specific consumer protections for out-of-state schools covered by the agreement. At a minimum, all students who receive federal financial aid—including online students who enroll at out-of-state institutions—should be protected by the important consumer protections their states’ higher education laws provide related to closure, recruitment, and misrepresentations. However, this is the minimum of what should be provided; we suggest that this list be expanded.

Millions of students receive Title IV funding for online programs offered by schools that are physically located outside their states. Given the federal government’s willingness to provide financial aid to these schools, most students reasonably assume that these schools are well vetted and that federal and state laws protect them from fraudulent and deceptive schools to the same extent as brick-and-mortar students in their state. As described below, the “state authorization” requirement of the Higher Education Act (“HEA”) is a means of ensuring that states provide consumer protections for students. As part of their state authorization regimes, many states have enacted education-specific laws that provide, among other protections, refund rights for students who withdraw, cancellation rights, and prohibitions on deceptive practices commonly used by unscrupulous schools. Many states have also established student protection funds that reimburse students’ financial losses when a school abruptly closes.<sup>17</sup>

In reality, the federal government provides Title IV funding to most of these schools

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<sup>17</sup> Robyn Smith and Joanna Darcus, *How States Can Protect Students Harmed by Higher Education Fraud*, Nat’l Consumer Law Ctr. (Jan. 12, 2021), available at <https://www.nclc.org/resources/how-states-can-help-students-harmed-by-higher-education-fraud/>.

while leaving online students unprotected. Under the current federal regulation, 34 C.F.R. § 600.9(c)(1)(ii), a school need only be covered by a “state authorization reciprocity agreement” to be eligible to obtain Title IV funding for distance education offered in a state in which it lacks a physical presence, as long as the distant state is a member of the reciprocity agreement. This means that if an out-of-state institution that exclusively offers distance education is approved by one state – typically the home state where the institution is headquartered – it is automatically authorized to offer distance education in any distant states that are members of the reciprocity agreement.

The federal regulation, however, does not include *any* requirements to ensure that the state authorization process and standards provided for in a reciprocity agreement comply with the state authorization requirement of the HEA. As one example, the regulation lacks any requirement to ensure that online students at out-of-state schools are covered by the same state education-specific consumer protections as their brick-and-mortar brethren. The current definition of “state authorization reciprocity agreement” allows agreements that prohibit states from enforcing their education-specific consumer protection laws against member schools.<sup>18</sup> As a result, the regulation has permitted 49 states to join an agreement administered by the National Council for State Authorization Reciprocity Agreements (“NC-SARA”) that prohibits member states from applying or enforcing their education-specific consumer protections to member out-of-state schools.<sup>19</sup> Thus, the current federal regulation has permitted the creation of an unfair two-tier system that leaves millions of online students unprotected by state law and vulnerable to fraud and financial ruin.

Indeed, the existing bare-bones regulation has created the risk that NC-SARA schools may not in fact be eligible to receive Title IV funding because NC-SARA’s agreement does not fulfill the letter or purpose of the HEA’s state authorization requirement. The HEA provides for the regulation of postsecondary institutions through three different entities – the federal government, accrediting agencies, and states.<sup>20</sup> The HEA envisions complementary purposes for each member of this triad. While the Department is responsible for “protecting the administrative and fiscal integrity of the federal student aid programs” and accrediting agencies are responsible for assuring academic quality, primary responsibility for overseeing schools and protecting

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<sup>18</sup> 34 C.F.R. § 600.2 (defining state authorization reciprocity agreement as one that does not “prohibit any member State . . . from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education.”).

<sup>19</sup> See *Wake-up Call to State Governments: Protect Online Education Students From For-Profit School Fraud* Nat’l Consumer Law Ctr. (Dec. 2015); *Going the Distance: Consumer Protection for Students Who Attend College Online*, The Inst. for Coll. Access & Success (Aug. 28, 2018) available at <https://ticas.org/accountability/going-distance/#:~:text=provided%20to%20residents,-.Going%20the%20Distance%3A%20Consumer%20Protection%20for%20Students%20Who%20Attend%20College,from%20poor%2Dquality%20online%20colleges>.

<sup>20</sup> 20 U.S.C. § 1001(a).

students from abusive for-profit school practices is left to the states.<sup>21</sup> The HEA established this state consumer protection role by requiring that schools be “legally authorized” by states to provide programs of postsecondary education.<sup>22</sup>

The current regulation significantly weakens states’ role within the triad and renders the HEA’s state authorization requirement meaningless with respect to online schools authorized through a state reciprocity agreement. It allows states to waive their education-specific consumer protection laws, enacted by state legislatures, as well as cede their approval and oversight authority to another state. The other state where the school is physically headquartered is limited by the terms of their reciprocity agreement and may only impose weak standards and limited consumer protections, if any. This is exactly what has happened with NC-SARA’s agreement.

In 2016, the Department itself indicated concern about this issue by defining state authorization reciprocity agreements acceptable for Title IV purposes as those that do not “prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.”<sup>23</sup> In 2019, the Department initially proposed retaining this definition based on the negotiated rulemaking committee’s consensus.<sup>24</sup> However, the Department departed from this decision, overruling the consensus, by publishing a final regulation that amended the definition to allow reciprocity agreements that prohibit states from enforcing higher-education specific consumer protection laws.<sup>25</sup> The Department provided minimal and insufficient justification for removing the portion of the definition prohibiting reciprocity agreements from requiring states to waive their education-specific consumer laws with respect to member schools.

The proposal to require all institutions to agree to comply with higher education specific consumer protections related to closure, recruitment, and misrepresentations—regardless of whether they are subject to a state reciprocity agreement—goes part of the way to alleviate this problem. We are concerned that these substantive areas do not fully encompass the scope of state higher education laws that provide important protections to students. We propose that the Department expand this list to include other important state higher education specific consumer protection laws related to the following:

- **Enrollment Cancellations:** Laws that provide students with a right to cancel their enrollment agreements and receive a 100% refund within some specified time period

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<sup>21</sup> Rebecca Skinner, *Institutional Eligibility in Title IV Student Aid Programs Under the Higher Education Act: Background and Reauthorization Issues*, Cong. Rsch. Serv., RL33909 at CRS-11 (Mar. 9, 2007).

<sup>22</sup> 20 U.S.C. § 1001(a)(2).

<sup>23</sup> 81 Fed. Reg. 92,232 (Dec. 19, 2016) (codified at 34 C.F.R. § 600.2 (in effect until July 1, 2020)).

<sup>24</sup> 84 Fed. Reg. 27,404, 27,411 (June 12, 2019).

<sup>25</sup> 84 Fed. Reg. 58,834 (Nov. 1, 2019). The Department claimed that the proposed definition amendment was unintentionally omitted. 84 Fed. Reg. at 58,841.

- after first attending a class;
- **Refunds:** Laws that require a school to provide a refund in the event a student withdraws;
  - **Enrollment Agreements:** Laws that require specific terms in enrollment agreements (for example, that the school must itemize all fees and charges that they student will be required to pay to complete their program; the expected date of completion; etc.);
  - **Incentive Compensation:** Laws that prohibit the payment of incentive compensation, bonuses, commissions to recruiters;
  - **Program Delivery or Schedule:** Laws prohibiting changing the manner of program delivery or the schedule of classes;
  - **Licensure:** Laws prohibiting enrolling students who are ineligible for employment in professions for which they are training or enrolling students in a program that is represented to lead to licensure for a profession, when the program will not in fact qualify them for licensure;
  - **Private Causes of Action:** Laws that create private causes of action for the violation of education-specific consumer protection laws, to ensure that students are able to seek redress for harm;
  - **Criminal Penalties:** Laws creating criminal liability for violations of education-specific laws;
  - **Non-Government Loans:** Laws governing schools' acceptance of loan proceeds, origination of loans, or collection or servicing of debts;
  - **Independent Recruiters/Agents:** Laws governing the licensure of independent recruiters/agents and liability of institutions for their illegal conduct.
  - **Disclosures:** Laws that require disclosures, including disclosures of graduate placement rates, licensure rates, and completion rates;
  - **School Ownership:** Laws that bar the authorization of schools owned or operated by anyone who has been convicted of specified criminal violations, who failed to pay a fine or judgment to the state or to students, who owned or operated a school that closed with unpaid liabilities, or similar provisions;
  - **Record Retention:** Laws requiring that a school retain student records;
  - **Substantive Changes:** Laws that require pre-approval of substantive changes, including change of ownership or control, change of organizational business type, merging of programs or classes, or adding new programs; and
  - **Minimum Standards:** Laws that impose minimum bright line standards, such as minimum completion, placement, or licensure rates and minimum financial responsibility requirements.

Online out-of-state schools should be able to comply with these types of education-specific consumer protection laws to the same extent that brick-and-mortar schools do. Large chains of for-profit and other types of colleges have operated for decades in multiple states subject to these same consumer protections that differ between states. Online colleges will know

where their students are located—they must provide an address to apply for federal financial aid, among other things. After they establish their online program, schools save money because they do not have the overhead of brick-and-mortar expenses and, if there is a reciprocity agreement, they will not have to undergo an approval process for each distant state in which they offer online programs. There is no reason out-of-state online schools should be exempt from education-specific consumer protection laws that are critical to protecting both students and taxpayers.

Furthermore, some of the laws included in the list above are prohibitions of practices no school should be using in any state. Other laws are self-executing, such as making schools liable to students (and state governments) for violations of the consumer protections or for illegal actions of independent agents, providing criminal penalties for some illegal practices, and barring the authorization of a school controlled or owned by persons who have been convicted of crimes, among other things. Requiring that schools comply with these laws when receiving federal aid will raise the bottom line of what schools must do to receive federal aid; these changes will increase the quality and stability of schools receiving Title IV aid.

Although compliance with the remaining protections impose some costs, those costs are justified; the protections provide extremely important protections to students and taxpayers. All industries that require consumer protections recognize that there must be a balance between reducing burdens on the businesses while protecting consumers. That is no different in higher education. Here, a reciprocity agreement can reduce burdens to schools by removing the costly process of obtaining authorization in distant states. However, there must be a balance. In exchange for allowing schools to bypass state approval in distant states—which is itself a very important consumer protection—schools should be required to comply with the most critical state consumer protection provisions, such as laws creating consumer protection funds, refunds, cancellations, terms of enrollment agreements, record retention, pre-approval of substantive changes, private student debt, disclosures regarding student outcomes, and bright-line minimum standards.

For these reasons, we support proposed 34 C.F.R. § 668.14(b)(32) and urge the Department to consider adding the higher-education specific consumer protections we list above.

IV. **We Support the Department’s Proposal to Require that Schools Agree Not To Withhold Transcripts Because of Unpaid Debts, Proposed 34 C.F.R. §§ 668.14(b)(32), But Recommend Amendments.**

We strongly support the Department’s proposal to require all schools to agree not to “withhold transcripts or take any other negative action against a student related to a balance owed by the student” in certain circumstances, but we urge the Department to require this agreement in all circumstances.

Allowing schools to withhold transcripts or other documents for non-payment of any debt—whether that debt is Title IV-related or not—is contrary to the Department’s financial aid interests in most circumstances. Doing so makes it more difficult for students to find jobs or complete their education at other institutions, increasing the likelihood that they will default on their student loans. Indeed, withholding transcripts, credentials, or documents required for licensure for the collection of *non-governmental* debt means that students with such debts are also likely to default on their federal student loans. It is in the Department’s interest to ensure that students can obtain everything they need from an institution to improve their financial health, thus increasing their ability to repay their loans.

Our clients’ experiences are indicative of how transcript withholding can derail borrowers’ lives. For example, after a legal aid client graduated from a beauty school, the school demanded that the client pay overcharge fees of \$7000, which were not covered by her federal financial aid. Based on the unpaid debt, the school refused to provide a Proof of Completion form—a form that is a pre-requisite for licensure as a cosmetologist in California. Because the client cannot afford to repay this amount, she cannot obtain a cosmetology license necessary for employment, she cannot repay the debt owed to the school, and she will not be able to repay her federal student loans.

For this reason, we urge the Department to modify proposed 34 C.F.R. § 668.14(b)(33) as follows:

It will not withhold transcripts or take any other negative action against a student related to *collect on a* any balance owed by the student *to the school or any other entity* that resulted from an error in the institution’s administration of the title IV, HEA programs, any fraud or misconduct by the institution or its personnel, or returns of title IV, HEA funds required under § 668.22 unless the balance owed was the result of fraud on the part of the student;

V. **Conclusion**

Thank you for your consideration of these comments. If you have any questions about these comments, please contact Robyn Smith (rsmith@lafla.org).

Submitted by:

Community Service Society of New York  
Housing and Economic Rights Advocates  
Legal Aid Foundation of Los Angeles

The Legal Aid Society of Cleveland  
National Consumer Law Center (on behalf of its low-income clients)  
New York Legal Assistance Group  
Project on Predatory Student Lending