August 21, 2024

Dr. Miguel A. Cardona
Secretary, U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

RE: Docket ID ED–2024–OPE–0050

Dear Secretary Cardona:

This is a comment on the Department of Education's ("department's") proposed rule with regard to regulations involving distance education, return of Title IV funds ("R2T4"), and certain Federal TRIO programs, Docket ID ED–2024–OPE–0050 ("NPRM").

(1) Definition of "Additional Location" under 34 CFR 600.2.

We agree that when an institution, in addition to its physical location(s), offers 100 percent of an education program through distance education or correspondence courses, it is providing a distinct educational opportunity that should be treated as a distinct additional location. Yet, the proposed definition of "additional location" under paragraph (3) is arbitrary and capricious.

Neither the proposed "100 percent" standard nor the proposed "90 days or less" exception for on-campus or residential periods is explained in the NPRM. Furthermore, the NPRM does not show any consideration of alternatives to 100 percent of a program or to a 90-day residential exception.

Paragraph (1) of the definition is content with "50 percent" of an educational program for a physical location to count as an additional location, yet the proposed new definition requires 100 percent of a program to be virtual. At the same time, 90 days may be a very large proportion, or even the majority, of a program. The definition of "educational program" in 34 CFR 600.2 includes certificate programs and programs that provide a recognized educational credential. Such programs, especially if "(very) short-term Pell" eligibility becomes law, can extend to quite short programs. The residential exception could easily swallow the rule.

The residential exception also introduces ambiguity. For one, the proposed definition is unclear regarding whether *each* virtual education program entails being its own additional location, or if an institution's overall set of online programs counts as a single additional location. Indeed, it is unclear, when a single virtual program ends, whether or not a student can easily switch to a different one at the institution or should, instead, be treated as a student whose location has closed.

Another ambiguity: If a short educational program is designed to be residential but includes *any* distance education component, it may be caught up in the new definition as an additional virtual location. This scenario defeats some of the purposes of the new definition, which are to

distinguish truly virtual programs from residential ones for the purposes of data tracking and handling closed locations.

To achieve its stated purposes, the department should have considered, or in the NPRM should have demonstrated any consideration, of alternatives. First, the department should consider as an additional location a program in which 50–100 percent of the program(s) is provided as distance education or correspondence courses. On the analogy of additional physical locations, the department should show why an "at least 50 percent" or "more than 50 percent" standard is not suitable. Second, the department should consider a percentage-basis standard for the residential exception rather than a 90-day standard that takes no account of the different lengths of educational programs. The percentage-basis standard for the residential exception should, at least, ensure that when at least 50 percent of a program is residential, the program will be deemed part of a physical location and not part of an additional virtual location.

(2) Definition of "Clock Hour" under 34 CFR 600.2.

The consensus language that emerged during negotiated rulemaking in 2020 recognized that the definition of "clock hour" should include asynchronous learning activities. This point was intended to make the definition reflect "student learning rather than seat time and [be] flexible enough to account for innovations in the delivery models used by institutions,"[1] especially in light of the rapid innovation required to meet the challenges of responding to COVID-19 restrictions. Since then, the need to recognize innovations has only grown as more students take more courses online.

The department has chosen to go backwards instead of forwards by removing asynchronous learning activities from the definition. The department's negotiated rulemaking, this time, did not reach consensus, yet the department has chosen to change the consensus language from 2020. We appreciate the department's concern regarding asynchronous activities that do not provide much learning. Yet, to catch some bad actors, the department here proposes to take innovation away from all actors. This is an error.

For this reason, the department should not remove any regulatory language regarding asynchronous educational activities. Accordingly, wherever the department includes a requirement for attendance records, the department should consider that a student has "attended" an asynchronous activity whenever the student has demonstrated substantial progress in the activity, determined in the sole discretion of the institution.

In the alternative, if the department chooses to persist with removing asynchronous activities, we note that the department has invited comment on its cost estimates to help ensure that they reflect realistic assumptions. It appears that the department has not made any effort to

[1] 85 FR 54754, Sept. 2, 2020, https://www.govinfo.gov/content/pkg/FR-2020-09-02/pdf/FR-2020-09-02.pdf.

determine the proportion of asynchronous learning activities that meet the department's standards vs. the proportion that do not. (Besides, it is far from clear that the department has authority to determine that a mode of learning is inherently not up to the department's standards.)

This effort would have produced an estimate of the cost to students and institutions of removing asynchronous learning activities from the definition of "clock hour," to be weighed against any benefit from doing so. Failing to make such an estimate is arbitrary and capricious. When the department publishes its final rule, it should account for the estimated harms and benefits based on the department's estimation of what proportion of asynchronous educational activities are valuable vs. a waste of federal dollars.

We note here that such a burden lies on the department, not on the commenters. It would be incorrect and inappropriate for the department to avoid a necessary calculation simply because the commenters have not offered their own calculation. Nevertheless, we estimate that at least 75 percent of asynchronous educational activities would not count under the proposed rule but are of sufficient quality to deserve equal treatment with synchronous activities, and excluding such asynchronous activities from the definition entails a cost that the department should calculate.

Furthermore, as online learning continues to benefit from innovation, this percentage will rise over time, and the costs of the department's proposed definition also will continue to rise. Failing to account for such improvements means that the department will increasingly privilege physical locations against the facts.

(3) Noncitizen Eligibility in Certain TRIO Programs (34 CFR Parts 643, 644, and 645).

We agree that the authorizing statute is silent regarding the eligibility of non-citizens for Federal TRIO program benefits. But the department acknowledges that national policy is to discourage illegal immigration and acknowledges that the availability of public benefits is an incentive to illegal immigration (8 USC 1601(6)). The department should further acknowledge 8 USC 1601(2):

> It continues to be the immigration policy of the United States that—
>
> > (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
> >
> > (B) the availability of public benefits not constitute an incentive for immigration to the United States.

The department's proposal to make all aliens eligible for Federal TRIO programs under 34 Parts 643, 644, and 645, simply because they are enrolled or seeking to enroll in a U.S. high school, is

in complete contrast with federal immigration policy—for legal and illegal aliens alike. It is not only monetary benefits that provide an incentive for immigration, but also the specific educational benefits of the TRIO programs (such as they may be, in the absence of any randomized-controlled study of the possible benefits of each program).

Accordingly, being violations of explicit U.S. immigration policy, none of the changes to 34 CFR Parts 643, 644, and 645 are warranted. The department should abandon these changes.

We also note that making these TRIO programs less palatable to Congress means that it will become easier for Congress to decide to end them, which we would support.

(4) R2T4, 34 CFR 668.21 and 668.22.

(a) We appreciate that an institution may avoid a R2T4 calculation for a student who never really started a period of enrollment, if the institution makes the student whole as though the student had never intended to enroll (34 CFR 668.22(a)(6)). But while an institution may give such students a mulligan, the Federal government may not. The department does not have the authority to convert a non-student into a student and treat the non-student as though he or she has a "student" loan. The non-student has broken his or her vow to his or her lender, and the lender should not be forced to maintain this broken contract as though "the terms of their promissory note" for a student (34 CFR 668.21(a)(2)(ii)) remain in force for the non-student.

In particular, this means that the department should not amend 34 CFR 668.21(a)(2)(ii) as proposed.

There is a second, we think determinative, reason for not amending 34 CFR 668.21(a)(2)(ii): the strong incentive to defraud the government. A person may very easily perceive that he or she can score a student loan, including full cost of attendance—housing and meals—and then withdraw upon receiving money for housing and meals. Then, many such non-student scammers would qualify for one of the department's new loan "forgiveness" schemes. Even worse, if the SAVE plan's zero-dollar-payment scheme manages to survive legal challenges, many non-student scammers will be able to reenact the scam every year, receive Federal funds for housing and meals, and pay $0 per month in return. This scenario is easily predictable, and it represents massive waste, fraud, and abuse of the department's undue generosity.

In any case, the department does not know the cost of such a scenario because it has not considered this scenario, or has shown no evidence of having done so. Furthermore, it is quite unclear which, if any, of the department's loan "forgiveness" schemes will survive legal scrutiny. Accordingly, there is great uncertainty regarding the cost of the amendment to 34 CFR 668.21(a)(2)(ii). At the least, the department's calculations for the NPRM are no longer valid or likely, since the SAVE plan is likely to continue to fail in court. If the department persists in amending 34 CFR 668.21(a)(2)(ii), it must recalculate the costs. (Without SAVE scammers, the costs are likely to decrease. Again, we note that this burden of calculation lies with the

department and not the commenters; it would be inappropriate for the department to avoid this burden simply because it has received no financial analysis from the commenters.)

(b) The department proposes to amend 34 CFR 668.22(b)(2) to require that an institution must document a student's withdraw "within 14 days of a student's last date of attendance." This is a very unreasonable deadline. A course might meet for three hours once a week. Missing a single class would mean the clock potentially is already at seven days, triggering a flurry of checks of all of the student's courses to see if the student has missed all classes over the seven days. Even then, the student—especially an online student—may simply have been sick and plans to return the following week, but may be hard to reach. As the 14-day deadline nears, the institution will need to make a decision with incomplete information.

This is not an unreasonable scenario. For online students, it is common—even for classes that meet twice a week. Online courses have the great advantage of flexibility for students and institutions, permitting innovations in how students and institutions interact and demonstrate academic progress. The proposed amendment, however, creates bureaucratic hurdles that ultimately hurt students.

A much more reasonable deadline is 28 days. It is unclear that such a deadline would produce any harm whatsoever to Federal interests. And unlike Federal agencies, we can expect an institution of higher education to be able to meet a reasonable deadline.

(5) The Public Comment Period Is Insufficient and Inhibits Meaningful Public Participation in the Rulemaking Process.

Finally, we request an extension of the public comment period. A public comment period of only 30 days is insufficient for the public and interested parties appropriately, sufficiently, and meaningfully to participate in the rulemaking process. The range of topics included in the NPRM demands that the public and interested parties receive a longer period to submit substantive and comprehensive comments.

Moreover, Executive Orders ("EOs") 12866 and 13563 support our contention. EO 13563, "Improving Regulation and Regulatory Review," states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[2] EO 12866 includes similar language: "[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."[3] Best practice mandates that the agency allow a reasonable extension of the comment period—an additional 30 days, for a total of 60 days—for interested parties and

[2] *See* EO 13563, § 2(b).

[3] *See* EO 12866, § 6(a)(1).

members of the public to submit comments on the NPRM. Accordingly, we request an additional 30 days to provide a full opportunity to respond to the NPRM.

Thank you for the opportunity to comment. We would be delighted to answer any questions about our comment.

/s/

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