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Comments to the Department of Education on Proposed Negotiated Rulemaking Agenda

Third Way Education

Third Way submitted the following comments to the Department of Education on behalf of Lanae Erickson, Senior Vice President for Social Policy & Politics:

Thank you for the opportunity to provide comments on the U.S. Department of Education's (Department's) intent to establish rulemaking committees to develop regulatory changes for programs authorized by Title IV of the *Higher Education Act of 1965* (HEA).

With 14 far-reaching topics proposed for potential rulemaking committees, the Department will need to prioritize those areas requiring its most immediate attention. We feel strongly that gainful employment, borrower defense to repayment, and financial responsibility for participating institutions of higher education must be among the Department's primary areas of focus in negotiated rulemaking.

The uncertainty of the past year across all aspects of American life has reinforced the value of a postsecondary credential and heightened the expectations held by students and taxpayers for a strong return on their education investment. Even in a challenging economy during the COVID-19 pandemic, data from the Bureau of Labor Statistics showed that those with a college degree had consistently lower unemployment rates than those with less education. [1] In order for all students to experience the meaningful income security and socioeconomic mobility benefits postsecondary education can offer, the Department must deliver on its obligation to ensure that all institutions provide students with quality education and training for the labor market.

Through upcoming negotiated rulemaking sessions, the Department has an opportunity to advance a regulatory agenda that will ensure students can access high-quality postsecondary opportunities and hold colleges and universities accountable for their student outcomes. In moving forward with this agenda, we encourage the Department to prioritize three key topics—the gainful employment rule, borrower defense to repayment, and financial responsibility for participating institutions—for negotiated rulemaking. We also urge the Department to commit to including substantial representation of students and borrowers among selected negotiators.

Student and Borrower Representation Among Negotiators

A critical component in effective negotiated rulemaking proceedings is ensuring that the interests of the constituencies who will be affected by the regulations are well represented at the table. As many speakers noted in their comments at the Department's public hearings in June, these negotiations must include substantial representation of students and borrowers who will be most impacted by the regulations and should also reflect the broad diversity of that population—including student veterans, students with disabilities, and borrowers of color, who hold disproportionately greater amounts of student loan debt.

In constituting rulemaking tables, we ask that the Department commit to centering the interests of students and borrowers and ensure that at least as many seats are made available to groups representing consumers as are provided to vendors, institutions, and the entities subject to the resulting regulations.

Gainful Employment (formerly located in 34 CFR subpart Q)

Higher education has long been known as an engine of socioeconomic mobility. And the good news is that most institutions continue to deliver on that promise. For example, 63% of higher education institutions allow their students to earn enough of an economic premium to recoup their educational costs in five years or less. [2] However, attending a low-quality institution or college program can have the opposite effect, leaving students worse off by merely attending in the first place.

Looking at the new program-level data released by the Department truly illuminates how important an improved gainful employment rule can be. When examining nearly all undergraduate programs with earnings data available that would fall under the definition of gainful employment, we can see that over 2,100 leave their graduates earning even less than someone with no college experience whatsoever. Over 215,000 students graduated from these programs in a single year. [3] When students pay to attend these low-performing programs, whether that be out-of-pocket or through student loans, they will have lost their time and money in doing so. And, unfortunately, they may be left with unmanageable debt that they will never be able to repay.

An improved gainful employment rule can alleviate these problems, offering students better college choices and saving taxpayers billions of dollars over the next decade. It doesn't mean an entire institution will shut down. And it doesn't mean that every program at an institution is bad. Instead, it helps ensure that students are only offered quality postsecondary options while targeting taxpayer dollars efficiently to equip students with the skills to succeed in the 21st century economy. If the Department doesn't strengthen the rule, too many low-performing postsecondary programs will continue to enroll students, leaving them with inadequate preparation to compete in today's economy.

Borrower Defense to Repayment (34 CFR §682.410, §682.411, §685.206, §685.222)

When predatory institutions engage in illegal recruiting practices, mismanage finances, or commit acts of fraud and misconduct, they often leave students with significant amounts of student loan debt and little to show for it in the way of a valuable labor market credential. Borrower defense to repayment exists in the HEA to offer a policy remedy for students who have been subject to misconduct by the institution of higher education they paid to attend, entitling them to have their federal student loans cancelled. National polling by New America has shown that borrower defense has widespread, bipartisan support, with 78% of Americans—including 87% of Democrats and 71% of Republicans—agreeing that federal student loan debt should be cleared for students whose colleges provided misleading information about their program offerings or their student outcomes. [4]

The borrower defense to repayment rule has been regulated under the two prior administrations and remains the subject of significant debate. Congress rebuked the most recent 2019 rewrite of the rule, with both the House and the Senate voting on a bipartisan basis last spring to pass a *Congressional Review Act* resolution overturning it. That vote sent a resoundingly clear message to the Department that it must go back to the drawing board and determine a better way to do right by borrowers who have experienced harm due to the misconduct of their institution. Further heightening the urgency of addressing borrower defense is the backlog of more than 100,000 pending applications that has resulted from the prior administration's delay in processing claims—a delay that is detrimental to borrowers facing financial hardship who are entitled to a clear process of review and relief. [5] Recent actions by the Biden Administration have led to a streamlined application review process and the discharge of $1.5 billion in loans for 90,000 borrowers to date, including 100% forgiveness for 18,000 former enrollees of ITT Technical Institute. [6] These actions are important and welcomed steps to aid defrauded borrowers, including large populations of student veterans and borrowers of color who were targeted by predatory institutions. However, they are only initial steps, and regulatory action is needed urgently to address limitations in the prior and existing borrower defense standards.

We ask that the Department promptly pursue negotiated rulemaking on borrower defense to repayment to determine a reasonable, timely, and compassionate process for reviewing applications and establish a clear pathway to relief for struggling borrowers who are legally entitled to it going forward.

Financial Responsibility for Participating Institutions of Higher Education (34 CFR subpart L)

Financial responsibility composite scores are an important diagnostic tool the Department uses to assess the monetary health of our nation's colleges and universities. The use of these scores attempts to hold institutions accountable for their finances as an imperfect but critical indicator of whether a college is financially stable, a metric that is especially important now given the upheavals to college finances as a result of the pandemic. We encourage the Department to strengthen financial responsibility measures through rulemaking to ensure students are able to complete the quality education they signed up for, protect taxpayer dollars, and safeguard against sudden college closures resulting from mismanagement.

Financial responsibility scores provide an early warning sign indicating if an institution is likely to close. The impact of college closures can be devastating—at least 30 institutions over the last seven years announced their closures with no warning. [7] Some students went to class only to find a note on the door that the college had closed, having received no information on what to do next. Despite their important role, financial responsibility scores have failed to predict nearly half of all college closures over the last decade, and most colleges are considered "financially responsible" until the day they close. This is due, in part, to the backward-looking nature of the financial responsibility scores, which consider older financial statements that do not fully capture the present-day financial health of institutions. These scores also use outdated accounting practices, such as recording the purchase cost of land and buildings rather than the current market value. This gives us an imperfect picture of institutions' financial well-being, especially given the fluctuations college finances are facing in a post-COVID environment that can lead to heightened financial risk.

College budgets have been hit hard by state responses to the pandemic, with many cutting costs where possible, and around a dozen having permanently closed since the start of the pandemic.

This makes the financial health of institutions a critical metric to assess, and we urge the Department to take prompt and strong regulatory action to strengthen financial responsibility scores. This will help ensure that students have the best information possible when making decisions on where to attend college and that taxpayer dollars are prevented from flowing to colleges that are on the precipice of closure. Given the instability of the last academic year and the urgency that students are facing, it’s necessary that the Department protects students from additional sudden closures at the hands of fiscally unstable institutions and the havoc these closures wreak both educationally and financially.

As the higher education system rebuilds following the COVID-19 pandemic, the Department and its forthcoming rulemaking process have a critical role to play in maintaining critical student protections and ensuring that institutions are held accountable for providing quality education. We look forward to the work of the rulemaking committees in strengthening these provisions of the HEA to operate more clearly and effectively for students, borrowers, and taxpayers.

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ENDNOTES

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2. Michael Itzkowitz. "Price-to-Earnings Premium: A New Way of Measuring Return on Investment in Higher Ed." Third Way, 1 Apr. 2020, https://www.thirdway.org/report/price-to-earnings-premium-a-new-way-of-measuring-return-on-investment-in-higher-ed.

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