



January 13, 2022

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

Dear Secretary Cardona:

Next week, the U.S. Department of Education will commence negotiated rulemaking on a series of topics regarding Institutional and Programmatic Eligibility for programs under Title IV of the Higher Education Act (“HEA”). More specifically, the Department has indicated that it will be considering regulations surrounding the 90/10 Rule, institutional certification procedures, change in ownership, financial responsibility, gainful employment, and administrative capability. *See generally* 86 Fed. Reg. 69,607 (Dec. 8, 2021). We appreciate the Department’s commitment to all of these topics and to protecting students and taxpayers from higher education institutions and programs that lack value. As organizations that represent student borrowers, we know that failures in accountability are consequential, and create long-term effects for students and their families.

Under the HEA, Negotiated Rulemaking—and indeed the entire rulemaking process under the Administrative Procedure Act—is designed to include “public involvement in the development of proposed regulations.” Indeed, the Department is required to “obtain[] the advice and recommendations” from members of the public, including from students and groups that represent students.

Effective comment and public participation require facts. Unfortunately, under the prior administration and continuing in the past year, the Department has allowed its release of facts and data to become woefully outdated.¹ We recognize that COVID may have increased operational challenges, but by way of example only, looking at the Department’s Federal Student Aid Data Center:²

¹ This is not the first time that student-focused organizations have encouraged you to increase transparency around issues of accountability in higher education. *See generally* Ltr. to Secretary Cardona from 15 Signatories (March 2, 2021), *available at*: <https://www.nacacnet.org/globalassets/documents/advocacy-and-ethics/gr/advocacy-letters/2021/ed-ltr-transparency-2021.pdf>

² U.S. Dep’t of Educ., Federal Student Aid Data Center, *available at*: <https://studentaid.gov/data-center>

1. The most recent financial responsibility composite score data publicly released is from 2018-19;
2. The most recent letter of credit information publicly released is from AY 2019;
3. The most recent 90/10 scores publicly released are from 2018-19;
4. The most recent update to the “Title IV Institutions Reporting Cash Management Contracts” is from June 2018.
5. The most recent earnings data in the College Scorecard is from 2017-18.

Other issues plague the Department’s public data sources, when considering the upcoming rulemaking. For example, the most recent earnings data in the College Scorecard is from 2017–18. With respect to Borrower Defense—which is a component of key institutional Financial Responsibility triggers the Department proposes, *see* Session 1 Issue Paper #4—public data is listed by the residence of the borrower, with no information identifying the institutions which are the subject of pending claims. Nor does the Department provide detailed, easy-to-use information regarding institutional certification status (PPAs) and expiration dates.

The Department’s failure to provide more recent data will not only hinder the public’s ability to provide input and comment effectively but could lead some to contend that the Department did not examine or consider relevant data within its possession. *See, e.g., Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (“If an agency fails to examine the relevant data—which examination could reveal, *inter alia*, that the figures being used are erroneous—it has failed to comply with the APA.”).

We therefore urge the Department to ensure that it is both (i) using most recently available data and facts relevant to the rulemaking; and (ii) making all such information publicly accessible in a timely manner. We would be pleased to discuss this matter at your convenience.

Sincerely,



Daniel Zibel
Vice President & Chief Counsel
Student Defense



Eileen Connor
Director
Project on Predatory Student Lending