July 6, 2017

Wendy Macias  
U.S. Department of Education  
400 Maryland Ave. SW  
Room 6C111  
Washington, DC 20202

Dear Ms. Macias:

On behalf of the institutions listed on this letterhead that are members of the Consortium of Universities of the Washington Metropolitan Area, I write to offer comments on the U.S. Department of Education’s (DOE) Intent to Establish Negotiated Rulemaking Committees (Docket ID ED-2017-OPE-0076) to develop proposed regulations to revise the regulations on borrower defenses to repayment of federal student loans and other matters, published November 1, 2016 (FR 2016-25448) published on June 16, 2017. This comment letter addresses certain areas of concern we have related to the current regulations on borrower defenses to repayment we wish to see specifically addressed in the proposed rulemaking process.

Overview

We wish to state two principles that guide our comments regarding borrower defenses to repayment at the outset.

First, we believe it is essential that students have a clearly articulated and consistent process to receive relief when they have been defrauded or otherwise harmed by an institution they attended that closes abruptly and leaves the student no other means of redress. We appreciate that all sectors of higher education are under various levels of financial pressure, and that sudden closures can occur across many types of institutions. The current regulations provide for removal of unscrupulous providers who should not be allowed to participate in Title IV federal financial aid programs. As we will discuss further, the key aspect of this protection is that the circumstances under which fraud and harm occur must be spelled out in detail.
Relatedly, we are concerned that the pathways to discharge of loans not be so enticing as to provide an easy and tempting option for students to claim misrepresentation simply to relieve themselves of debt. Again, the need is for clear definitions, as will be discussed later.

Second, it is necessary that the process governing the discharge of student loans be fair to both parties. Students must have the right to argue the fraud and harm they believe they have experienced. Likewise, institutions must have the right to defend themselves against such claims. The federal government must assure both parties that these processes are impartial.

These guiding principles are the bases on which we believe the current regulations regarding borrower defenses to repayment should be revised. We strongly believe that institutions that are shown to engage in fraudulent practices must be held accountable, with the ultimate penalty of loss of the privilege of participating in Title IV federal financial aid programs. The remainder of our comments focus on areas in which we believe the regulations could benefit from additional clarity. In the end, we believe revised regulations should provide a clear path for students who were the victims of fraudulent practices to obtain relief.

**Definition of Misrepresentation**

The entire set of regulations relating to borrower defenses to payment hinge on the student’s ability to show that an institution engaged in misrepresentation in how the college or university promoted its educational programs, financial charges, and/or the employability of graduates. Because cases brought under these regulations are filed claiming misrepresentation, and because institutions must defend themselves based on the lack of such misrepresentation, it is vital to provide a clear and unambiguous definition of what constitutes “misrepresentation.” The regulations greatly broadened the concept of misrepresentation well beyond what is typically meant.

During the comment period, numerous organizations raised concerns about the overly broad characterization of misrepresentation. However, in promulgating the final regulations on November 1, 2016, the DOE argued that it would use a “reasonableness” standard, and take contextual factors into account. The DOE explicitly rejected calls for the use of federal or state statutory and case law standards to provide specific definitions of “misrepresentation.” Additionally, DOE rejected calls for the incorporation of an “intent” standard on the grounds it was unnecessary. In short, DOE rejected any modification or context-setting for its meaning of misrepresentation.

We disagree with the DOE position. We argue strongly that, given the potential of very serious and costly penalties to institutions, the conditions under which a determination of misrepresentation or fraud are likely must be specified in detail. How this would affect normal
activities such as financial aid counseling, for instance, is quite unclear, in terms of the kinds and amounts of information that would be sufficient or reflect accurate information from DOE’s perspective. For example, given the high percentage of students who change majors, if there is a cost differential across programs, the line between misunderstanding on the part of the student the fact that the costs of different programs differ, and misrepresentation of that fact by institutions is unclear in the current regulations. We strongly urge a reconsideration of the scope of the term “misrepresentation” in the upcoming rulemaking process.

Additionally, the DOE rejected calls for inclusion of intent as a necessary condition for misrepresentation to be determined. We disagree with this position, and call for consideration of intent in future regulations. There is a clear distinction between the inadvertent provision of information that is incorrect due to, for instance, inadvertent errors in distributing updated information, and deliberate provision of information known to be inaccurate with the intent to overpromise or upsell a student. Ideally, the rulemaking process should discuss the more appropriate position that any “misrepresentation” must be “material and substantial.”

**Additional Areas of Concern**

Many respondents to the previous draft noted the lack of a statute of limitations on student complaints. Clearly, it makes no sense to permit a student to make a claim many years, even a decade or more after completing a course of study, especially in the context of fuzzy definitions of misrepresentation. No program of study, frozen in time, can fully prepare anyone for job duties years hence. Effectively, the lack of a statute of limitations places every academic program at every college and university in the country at imminent risk. We strongly urge that a reasonable time limit be included in any revised regulations. Otherwise, we do not see how the federal government can guarantee a fair process for institutions.

As noted by DOE, numerous comments were received that focused on specific aspects of the financial triggers, financial responsibility indicators, courses of action, and due process matters. Much comment on the earlier draft focused on the group discharge option; among the many concerns was the fact that within a group, individual situations are highly likely to vary considerably, so whether the group is truly reflective of identical experiences and treatment remains doubtful. We leave it to others to comment about specific financial aspects of the regulations. There are some points we wish to raise about due process.

A particular area of concern for us is the protection of the institution’s rights to defend against the claim of fraud or misrepresentation, and the right of the institution to appeal a negative finding. We strongly urge that the rulemaking bear in mind that just as the student’s rights need to and must be protected, so too must the institution’s right be protected.
Conclusion

The Consortium fully supports the need to provide relief for students who are the victims of true fraud and misrepresentation, leaving them without a degree, without a degree that is legitimate, and in debt with student loans. We also recognize the federal government’s responsibility to taxpayers to hold fraudulent institutions accountable and to recoup funds whenever possible. As you prepare for the rulemaking process, we urge you to consider out comments, and to require that the process consider the issues we raise. Improved regulations will serve students, institutions, and taxpayers better.

Thank you for the opportunity to comment on this process and for your attention.

Sincerely,

John C. Cavanaugh, Ph.D.
President & CEO