State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

June 20, 2023

Submitted via Federal eRulemaking Portal

The Honorable Miguel Cardona
Secretary
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Docket ID ED–2023–OPE–0089

Dear Secretary Cardona:

We, the undersigned Attorneys General of California, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and Wisconsin, write to share our views on the U.S. Department of Education's (ED) notice of proposed rulemaking seeking to make improvements in the areas of gainful employment (GE) and certification procedures, among others. 88 Fed. Reg. 32,300. ED's proposed regulations establish critical and much-needed protections for students and taxpayers. Our Offices have seen firsthand how inadequate safeguards allow for-profit schools to offer worthless programs that leave vulnerable students with mountains of debt and poor job prospects. ED's proposed regulations have the potential to go a long way to curbing these abhorrent abuses, providing equitable and transparent protections for student-borrowers while promoting efficiency and regulatory clarity.

We first commend ED for adopting the position advanced by the negotiators representing State Attorneys General, as well as other negotiators—that ED's well-considered and highly effective GE regulations issued in 2014, 79 Fed. Reg. 64,889, should serve as a baseline for any new GE regulations. The 2014 GE regulations were the result of a thorough and deliberative rulemaking process; withstood multiple legal challenges, *see Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332 (S.D.N.Y. 2015); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176 (D.D.C. 2015); *Ass'n of Private Sector Colls. & Univs. v. Duncan,* 640 Fed. App'x 5, 9 (D.C. Cir. 2016); and—until their improper repeal in 2019—were working

as intended to identify programs with poor student outcomes in relation to graduates' ability to repay their loans in furtherance of ED's duties under the Higher Education Act, 20 U.S.C. §§ 1070-1099d.

We also express our strong support for ED's proposals to build on the important accomplishment of the 2014 GE regulations by taking steps to strengthen key aspects of GE. These steps include the addition of an "earnings premium" metric, which will protect students from GE programs that fail to provide borrowers with earnings beyond those available to students with a high-school education. As ED has acknowledged, career-training programs eligible for Title IV funding are, by definition, intended to provide students who have already obtained a high-school education or its equivalent with training necessary to "prepare students for gainful employment in a recognized occupation." 20 U.S.C. § 1002(b)(1)(A), (c)(1)(A). A program that fails to provide high-school graduates with an earnings benefit would be entirely inconsistent with this goal. As such, ED's incorporation of an "earnings premium" metric is a logical protective measure under the statute, and ED's incorporation of state-level income data in this metric will allow ED to account for geographic variation in earnings.

We further commend ED's proposed expansion of disclosure requirements to all eligible programs and institutions through the proposed ED website to make this information publicly available. These measures will ensure that all students have the benefit of access to accurate and highly relevant information. This information is crucial to students and their families who are seeking to make informed decisions about whether and where to invest their time and resources. We expect that these improvements and others will go a long way toward fulfilling ED's promise of ensuring that all higher-education investments are justified through positive repayment and earnings outcomes for graduates.

In response to ED's invitation for public comment concerning the possibility of decreased GE-earnings thresholds for programs serving students in economically disadvantaged locales, 88 Fed. Reg. 32,333, we are concerned that this may provide a means for unscrupulous schools to evade GE requirements. Enhanced access to post-secondary education in economically disadvantaged locales is a laudable goal; however, ED should carefully circumscribe any relaxation in GE regulatory requirements to avoid institutional abuse. Further, to the extent that ED ultimately reduces earnings metrics in particular locales, it is critical that ED ensure that online programs, which can provide instruction to students outside a particular locale, will not be subject to any such reductions.

In addition to supporting ED's efforts to establish robust GE regulations, we applaud ED for proposing strengthened certification procedures. We agree with ED that its proposed regulations will improve ED's ability to impose conditions on problematic institutions, thereby mitigating the risk that they pose to students and taxpayers. We are particularly heartened by ED's recognition that students are entitled to the protection of state consumer-protection laws, whether they attend a school located in their home state or choose to attend on an online program offered by an out-of-state institution. However, we encourage ED to both expand and clarify its proposed requirements regarding institutional compliance with state consumer-protection laws.

As drafted, ED's proposed certification procedures would require institutions to determine that each Title IV program complies with state consumer-protection laws related to closure, recruitment, and misrepresentations, including education-specific state laws. Mandating compliance with these education-specific state laws is an important improvement that will offer critical protections to students. Notably, however, ED's proposed regulations appear to omit a requirement that schools demonstrate compliance with education-specific state laws beyond these three enumerated categories. While ED explains that this limitation is intended to avoid impeding the purpose of state-authorization reciprocity agreements, we believe that this concern is misplaced. Requiring schools that offer programs in multiple states to comply with all state consumer-protection laws in each state where the school enrolls students would not impede the purpose of reciprocity agreements, which seek to reduce the cost and burden of compliance with multiple states-authorization requirements. Schools can be required to comply with all applicable consumer-protection laws, while still being exempt from compliance with state-*authorization* requirements, including, for example, requirements to submit an application or pay a fee to a state-authorizing agency. In the absence of this requirement, distance-education students may be deprived of protections that are available to students at brick-and-mortar schools.

Additionally, we urge ED to clarify its proposed regulatory language to ensure that it cannot mistakenly be read as limiting protections that are currently available to students. As drafted, § 668.14(b)(32) would require institutions to ensure that every Title IV program "complies with all State consumer protection laws related to closure, recruitment, and misrepresentations, including both generally applicable State laws and those specific to educational institutions." Crucially, at present, schools are obligated to comply with "generally applicable" state consumer-protection laws. ED's phrasing runs the risk of inadvertently suggesting—for the first time—that Title IV schools are not required to comply with generally applicable state consumer-protection laws. No such exemption exists and, notably, state-authorization reciprocity agreements do not exempt institutions offering distance-education from compliance with such "generally applicable" laws. We propose that ED clarify this language to prevent any possible misinterpretation.[1]

Beyond ED's proposed requirements regarding institutional compliance with state law, we are encouraged by the enhanced role that states would have in the proposed certification procedures. Among other things, this includes requirements that institutions have the necessary programmatic accreditations to meet their state's requirements for the programs they offer and expressly adding state attorneys general to the list of entities with which ED will share information concerning institutional misconduct or a school's ability to participate in Title IV.

[1] For example, if ED chooses not to expand the scope of education-specific laws subject to this section, ED could redraft § 668.14(b)(32)(iii) to state as follows: "Complies with all generally applicable State consumer protection laws and all State consumer protection laws related to closure, recruitment, and misrepresentations, including both generally applicable State laws and those specific to educational institutions."

In conclusion, we believe that ED's proposed regulations will improve the lives of borrowers while restoring institutional accountability. We appreciate the care with which ED has undertaken this critical rulemaking endeavor and look forward to continuing to work as partners in supporting and protecting students.

Sincerely,

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