via www.regulations.gov - ED Docket ID ED-2017-OS-0074  
  
September 20, 2017

Ms. Hilary Malawer  
U.S. Department of Education  
400 Maryland Avenue SW - Room 6E231  
Washington, D.C. 20202

Re: Comment to Evaluation of Existing Regulations

Dear Ms. Malawer:

On behalf of the *ad hoc* Aveda Institute Coalition (below, “AI Coalition” or “the Coalition”), this provides a response to the June 22, 2017, request by the U.S. Department of Education (below, “ED” or “the Department”) for public comment on federal regulations that may be appropriate to evaluate for potential reform. See 82 FR 28431. The Department issued the request in accordance with Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” which directs each federal agency to evaluate and implement measures to lower regulatory burden.

The AI Coalition’s recommendations, below, are intended to advance two important policy goals: (1) fairness, meaning that Title IV regulations promulgated to protect students or taxpayers should apply equally to all Title IV participating institutions, without regard to organizational type (public, private nonprofit or proprietary) and (2) practicality, meaning that Title IV regulations and related guidance should seek to, when possible, be responsive to the practical administrative needs of higher education institutions and the welfare of students. We have taken the liberty in this comment to include recommendations for improving the manner in which the Department interacts with Title IV participating institutions that would benefit both regulated institutions and the students who attend.

I. The Aveda Institute (AI) Coalition

The AI Coalition is an *ad hoc* (informal) group of Aveda Institutes that offer cosmetology, esthiology/skin care and massage therapy programs. The Institutes are located in Alabama, Arizona, California, Colorado, D.C., Florida, Georgia, Iowa, Idaho, Illinois, Indiana Maryland, Maine, Michigan, Minnesota, North Carolina, New Jersey, New Mexico, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington State and Wisconsin. They are small businesses that have a big impact in the local communities in which they operate. Graduates of the Aveda Institutes go on to work in the acclaimed Aveda salon/spa network, other salons and spas, or operate as independent business owners to support the ever growing consumer demand for high quality beauty and wellness services.

II. Recommendations

*A. Consumer Disclosures – Need for More Uniformity in Key Outcomes Measures*

There is a fundamental problem in advancing institutional accountability and consumer protection in that the public does not understand the difference between key outcome metrics that are required to be presented to them, such as *graduation*, *completion* and *placement*, due to differing definitions for these very important terms among and between the Department, accrediting agencies and states (the so-called triad of higher education regulation in the United States). For example, the Department’s Gainful Employment (“GE”) disclosure template requires institutions to report *completion* rates for each GE program – which includes all students whether or not a student satisfied the institution’s specific academic requirements (which for Institutes includes a student completing the total clock hours required for the program and for occupational licensing, and not failing any segment of that program). However, accrediting agencies require Institutes to report *graduation* rates, which means that a student needs to satisfy an Institute’s published graduation requirements. Institutes set these graduation requirements, which include specific attendance, clock hour, grade point average (GPA), satisfaction of financial obligations, and other obligations before a student is considered eligible for graduation. The public is unaware that “graduating” is a different standard than “completing,” causing consumer confusion in these disclosures. To add onto this, Title IV regulations also require schools to disclose Student Right to Know graduation rates, which must be calculated pursuant to a separate set of definitions. See 34 C.F.R. § 668.45.

The same problem occurs for placement rates. Our various state regulatory agencies and accrediting agencies use dramatically different definitions to determine what constitutes a student as “placed” in a job. Each year, these agencies heighten standards for what a student must provide or what must be demonstrated by an institution to prove that a student has been placed in employment. If a student does not respond to an inquiry from the school, or if the student fails give the school all of the required information to support categorizing that student as placed, he or she must be excluded as placed and counts against the institution’s placement rate even if the student is working in the field for which their education prepared them. Accrediting agency placement rate calculation instructions and limitations grow lengthier each year, and increasingly we have situations where we know someone is working, but the placement does not fall under the rules through the prescribed method and they must be excluded from the rate.

At the state level, as an example one state is now requiring that a student provide the institution the number of hours he or she works per week in order to constitute them as placed. Many students are happy to tell us where they worked. However, to obtain the number of hours worked, how long they were working at a location, and other detail about their job is much more difficult to obtain from a graduate. That level of detail requires follow up emails/communication, and students often do not like to respond to the follow up communication. Burden on institutions could be relieved considerably, while also protecting accountability of institutions for outcomes, by having a more uniform definition of the meaning of completion, graduation and placement.

As a related matter, we are also concerned that the gainful employment disclosure template, 34 C.F.R. § 668.412(a), forces misleading rates that can confuse the public. Specifically, the Department requires clock hour schools to calculate a GE program’s completion rate by determining how many students completed school during the published length of the program. See 34 CFR § 668.413(b). The published length of the GE program is determined by how the program is listed on the institution’s Eligibility and Certification Approval Report (“ECAR”). Under ECAR, a clock hour school must determine that length by dividing the total clock hours in a program by the hours per week in a program. For example, a 1000 clock hour program offered at 35 hours per week equals 29 total weeks of program length for GE purposes. However, the Department’s disclosure template does not allow the school to add allotted federal holidays, snow days, or sick time into that published length. As a result, many students do not finish within the published length timeframe, which misrepresents the actual completion rate. The school adds those dates into the enrollment agreement end dates and if the Department also used that date, many institutions would have higher completion rates on the GE disclosure form.

**Recommendation**: The Department could reduce regulatory burden while promoting consumer choice by supporting the standardization of key outcome terms such as c*ompletion*, *graduation*, and *placement* among states, accrediting agencies and the Department where possible. That goal would require accrediting agencies, states and the Department to work together collaboratively to determine and decide together what outcomes are appropriate for regulated institutions.

B. *Credit Mobility*

All schools accredited by the same accrediting agency should be required to accept transfer of credits for similar or identical programs. Cost to students from having to re-take courses after transferring to or continuing education at another institution of higher education is a major contributor to student debt. More could also be done to promote transfer of credit between and among institutions accredited by national and regional accrediting agencies.

**Recommendation**: The Department should support and incentivize, where possible, efforts to ease transfer of credit between schools accredited by the same agency and/or between nationally or regionally accredited institutions to promote student mobility and reduce student debt.

C. *Financial Aid – Allow Institutions Greater Flexibility When Packaging Loans*

Although the HEA allows institutions to reduce the amount of loans it originates for students based on the exercise of “professional judgment,” that process can be challenged by the Department and institutions are not permitted as a matter of course to originate loans that are limited to tuition, fees, books, and supplies. Also, institutions are rarely successful in defending the exercise of professional judgment when the Department is in disagreement. Despite limited authority to control student borrowing, institutions are the responsible parties when it comes to bearing the regulatory consequences of excessive student loan default (via cohort default rates) and failing GE debt to earnings rates. All too often, institutions experience on a daily basis that students borrow up to or close to the total amounts for which they are eligible, which is significantly more than they need to fund their education.

**Recommendation**: We support the Department in providing more flexibility to institutions to limit student loan amounts to the amount of tuition, fees, books, and supplies, such as for instances in cases where an institution does not offer on-campus housing and meal services. In addition, institutions and students could benefit from more authority for students to receive one on one financial counseling prior to packaging aid to inform them of the consequences of over borrowing.

D. *Title IX/VAWA*

Title IX and Clery Act compliance is extremely important to all Institutes, but also very burdensome for small schools like ours that have staff performing multiple functions. We als do not have on-campus housing or social organizations that contribute to increase incidents of Title IX and Clery Act issues. Current law provides, however, that without regard to size or type, all institutions must meet the same standard including providing intensive student and employee training. At one Institute, this amounts to over $10,000 each year – a portion of which could likely be better spent on academic and student related services.

The requirements of Title IX and VAWA are extremely complex procedurally, and require our school staff, such as Student Services or Directors, to become deeply engaged on very sensitive issues like rape or sexual harassment while performing other roles at a small institution. Because Title IX Coordinators often do not have a legal background, schools often require the assistance of outside counsel, which again is costly. Schools fear that if they make a wrong move, they will be penalized either by a lawsuit or Department of Education action. That is not an overblown concern. Further, small schools also do not have professional psychologists, and so when a student lets staff know that they have a Title IX situation, staff can be frustrated because he or she cannot act and assist as a professional counselor would with the same degree of confidentiality. There is room for improvement to serve institutions and students in smaller, non-residential learning environments.

**Recommendation**: We support the Department in its current efforts to evaluate its Title IX guidance to identify areas where the standards and process can be improved. We encourage the Department to evaluate whether a “one size fits all” standard makes sense for small, non-residential trade schools that could likely meet the same student protection objectives with less onerous requirements, such as through regional Title IX consortiums or other means to share the burden between and among smaller institutions.

E. *Single Definition*

Within the HEA, institutions of higher education are defined differently in two separate parts of the statute. See 20 U.S.C. § 1001(a) and § 1002(a). We recommend that the Department consider supporting an amendment to HEA to establish one, single definition to be used for all institutions of higher education to ensure that students and institutions are subject to similar rights and obligations regardless of the type of institution.

For purposes of Title IV programs, Section 102 of the HEA defines institution of higher education to include public, nonprofit, and for-profit institutions.[[1]](#footnote-1) Each category of institution included in Section 102 may participate in federal programs administered under Title IV. However, Section 101 of the HEA narrowly defines institution of higher education for purposes of non-Title IV programs to exclude for-profit institutions.[[2]](#footnote-2) As a result, students attending for-profit institutions may not participate in a variety of non-Title IV government grants and aid.

In 2006, the United States House of Representatives passed the College Access and Opportunity Act (Act).[[3]](#footnote-3) The Act would have amended the HEA by repealing the two existing definitions and replacing them with a single definition that included public, nonprofit, and for-profit institutions. The single definition would have applied to Title IV funding eligibility and non-Title IV funding eligibility, thereby permitting students access to all higher education government grants and funding, regardless of the type of institution they attend. However, the Senate failed to pass the Act, and the 2008 reauthorization of the HEA maintained the two definition structure.

A single definition of institution of higher education is superior to the current structure for several reasons:

* The distinction between public and nonprofit institutions and for-profit institutions is becoming increasingly ill fitted. In recent years, for-profit institutions have increased program and degree offerings to closely resemble offerings at public and nonprofit institutions, while public and nonprofits have become increasingly career focused in their offerings.
* Like public and nonprofit institutions, for-profit institutions eligible for Title IV funds are monitored by nationally-recognized accrediting agencies and approved by state regulators that require positive student outcomes and good governance.
* A single definition would make public and nonprofit institutions subject to accountability measures in the HEA like gainful employment for degree programs, for the benefit of consumers.

**Recommendation**: We urge the Department to support action by Congress to replace the existing definitions of institution of higher education in the HEA with a single definition that includes public, nonprofit, and for-profit institutions. This definition should be used to determine eligibility for Title IV and non-Title IV government grant and aid programs.

F. *Reasonable Time Frames*

There are time frames established for institutional response to Department actions that have proven over time to create operational challenges for institutions or unfairness. Due to the ever growing complexities of Title IV rules, these time frames should be re-visited to update them to comport with actual demands on institutions to respond to Department actions. There are several areas of Department operations that affect institutions where there are no time frames in the HEA or Title IV regulations for the Department to respond to institutions. As a result, institutions are left with business uncertainty and the assumption of a high degree of regulatory risk or cost in some areas.

Open Program Reviews: With respect to Title IV program reviews conducted by the Office of Federal Student Aid (FSA), there is no time frame for the Department to close out a Title IV program review, whether or not there are findings. There are numerous examples of program reviews staying open for many years. In school sale situations, an unresolved program review creates uncertainty, can reduce valuation, and/or adds due diligence costs. One Institute had a program review in February 2014 but did not receive the Preliminary Program Review Report letter until September 2015. That matter remains open to this day, nearly four years later, with the extent of any liabilities unknown.

ECAR Updates: Schools often regularly update their ECARs with changes to existing programs, school officials, new locations and new programs. In the experience of many schools, after an E-App update is submitted, the ECAR can stay locked or open for more than a year with no feedback as to whether the Department considers the update to have been made successfully even after numerous attempts at contacting the Department to confirm receipt of the update and back up documentation.

This is particularly problematic when going through a recertification process because while that process is pending, a school’s application remains open, so the school does not know if the Department accepted the change. Then if the school needs to make another change, they have to work with the Department representative to reopen the application. The E-App site also has functional issues making it difficult to update, and different regional office of the Department interpret what should be on the ECAR in different ways. For example, right now, varying groups within the Department are giving conflicting information on whether a school needs to list both its full-time and part-time programs on the ECAR.

Technical Assistance: The Department consistently fails to provide technical assistance and guidance to institutions on a timely basis to permit institutions to plan, act and prepare for new regulations or new interpretations of existing regulations. This was particularly true during implementation of the GE rule. Prior to the first due date for GE data, NSLDS provided technical assistance, but if you had a question that related to the regulatory language, schools had to email one email address. The response time lag sometimes took several weeks, and if there was a miscommunication, the back and forth was extended, even though the Department imposed very tight timing for institutions around GE data reporting.

**Recommendation**: Time frames for Department response to regulatory actions should be considered by the Department to support increased operational certainty to institutions, such as by establishing clear time frames for Department resolution of program reviews and/or granting safe harbors where Department action does not meet such time frames. The Department should provide clear technical and guidance resources to institutions well ahead of the effective date of any new or altered guidance (where necessary) and hold institutions harmless from liabilities for periods where assistance or guidance was not available after issuance of a new regulation.

Thank you for the opportunity to submit this comment. Please contact Katherine Brodie at (202) 776-5241 or kdbrodie@duanemorris.com if you have any follow up questions regarding this submission by the *ad hoc* Aveda Institute Coalition.

1. 20 U.S.C. § 1002. [↑](#footnote-ref-1)
2. 20 U.S.C. § 1001. [↑](#footnote-ref-2)
3. College Access and Opportunity Act of 2006, H.R. 609, 109th Cong., § 101. [↑](#footnote-ref-3)