

PROGRESS REPORT



**U.S. Department of Education's
Implementation of Recommendations from
2015 Report of Task Force on Federal Regulation of
Higher Education**

January 31, 2019

This report provides an update on the Department of Education's (Department's) progress in meeting the recommendations found in the 2015 report of the Task Force on Federal Regulation of Higher Education (Task Force). The Department is engaged in substantial efforts to simplify the regulations as requested by the Task Force and to meet the requirements of President Trump's Executive Order 13777, which calls upon all agencies to reduce unnecessary regulatory burden. We are proud of our progress but recognize that we have more work to do in the coming year. We would like to thank Senator Lamar Alexander as well as Senators Richard Burr and Michael Bennet, and former Senator Barbara Mikulski for their work in convening such an esteemed group of higher education experts to develop these recommendations.

Outlined below are the actions we have taken or plan to take in support of major findings of the Task Force.

Reducing the Cost and Complexity of Federal Regulations

The Department agrees with the Task Force's finding that our many Dear Colleague Letters, manuals and handbooks - including the *Federal Student Aid Handbook*, the *Handbook for Campus Safety and Security Reporting*, and the Department's *Guidelines for Preparing/Reviewing Petitions and Compliance Reports* – are overly burdensome to institutions and a sign that the title IV requirements are too complex. Hundreds of pages of regulations should not result in hundreds of additional pages of subregulatory guidance in order for institutions to understand what is expected of them.

Return to Title IV

In some instances, the Department cannot remedy the complexity of its regulations because statutory changes would be required to accomplish that goal. For example, the Department recognizes that the current Return to Title IV (R2T4) regulations are difficult to apply, especially when students stop attending classes but do not notify the institution or when students stop attending some, but not all, classes. Given that R2T4 errors are among the top findings during Federal Student Aid (FSA) program reviews, it is time to rethink how title IV funds are delivered and how they must be returned when a student stops attending. The Department is addressing some targeted R2T4 issues specific to subscription-based programs in its current negotiated rulemaking proceedings, but even a lengthy negotiated rulemaking process focused entirely on R2T4 would not address many fundamental problems because we do not have the statutory authority to fully address those problems. To address the root of the issue, Congress needs to act. The Department would be pleased to provide technical assistance where requested.

In another vein, the Department is working to rescind or amend other unnecessarily complex or overly-prescriptive regulations and subregulatory guidance, including through revisions of the Borrower Defense to Repayment (BD) regulations and the Gainful Employment (GE) regulations.

Borrower Defense to Repayment

To finalize the rulemaking that the Department started in 2017, we plan to publish a new BD notice of proposed rulemaking (NPRM) in early 2019 as the baseline for proposed changes. We intend to publish a final regulation by November 1, 2019.

Gainful Employment

Last year, the Department engaged in negotiated rulemaking and published an NPRM in which the Department proposed to repeal the GE regulations. The Task Force highlighted GE as a 950-page example of regulatory overreach that goes well beyond congressional intent. As stated by the Task Force, the GE regulations allowed the prior Administration to “use the regulatory process to set its own policy agenda in the absence of any direction from Congress, and in the face of clear opposition of that policy from one house of Congress.”¹ The Department is currently reviewing the nearly 19,000 public comments received in response to the GE NPRM and plans to publish final GE regulations in 2019.

Subregulatory Guidance Documents

The Department has also comprehensively reviewed our expansive higher education library of more than 1,500 Dear Colleague Letters and other documents containing subregulatory guidance. Based on that review, we have determined that more than 1,200 such documents are outdated or do not reflect current policies or best practices and therefore should be retained only for historical purposes. The Department will withdraw these documents in the upcoming year, which will result in a reduction of nearly 80 percent of higher education subregulatory guidance documents. We are also limiting the publication of new Dear Colleague Letters to those that are absolutely required to reduce unnecessary burden or provide greater clarity requested by the higher education community.

Title IX Overreach

The Department agrees with the Task Force that it was inappropriate for the Department to rely almost entirely on subregulatory guidance to expand the meaning and requirements of Title IX. Instead, the Department should have engaged in notice-and-comment rulemaking to address Title IX compliance issues. To that end, on November 29, 2018, the Department published a Title IX NPRM to require that schools respond meaningfully to every report of sexual harassment and to ensure that due process protections are in place for all students. We are in the process of receiving and reviewing public comments on the NPRM.

Clery Act

The Department agrees that its implementation of the Clery Act has created an ever-growing set of reporting mandates that are communicated through a subregulatory handbook. We wish to highlight the recent changes made by FSA to ensure greater consistency in the use of terminology with that used by other law enforcement agencies, such as the Department of Justice. It is also time for the Department to consider how these reporting requirements can help inform students without creating reporting traps that increase institutional risk and that do not make campuses any safer for students. Although the Department will not consider the Clery Act at its 2019 negotiated rulemaking sessions, we would like to work with the field to

¹ Page H 1149; see amendment numbered 214 offered by Chairman John Kline on February 18, 2011 to H.R. 1. <https://www.congress.gov/crec/2011/02/17/CREC-2011-02-17-pt1-PgH1081.pdf>

reduce confusion and compliance burdens in the future through changes to the Clery handbook. We stand ready to provide technical assistance to Congress for any statutory changes that it may wish to consider.

Creating Smarter, More Meaningful Accountability FSA Program Reviews

The Department agrees that it has not always acted in a timely fashion to complete program reviews of institutions participating in the title IV programs. Delayed program review findings can be inordinately costly to institutions, as the longer the Department delays a report, the more likely the costs associated with negative findings will escalate. It is in the best interest of all parties, including students, for the Department to provide quick program review findings so that institutions can take immediate corrective action.

We are discussing whether, when a program review reveals problems that require more in-depth investigation, the program review should be closed, and FSA should instead launch a separate investigation to address those specific issues.

Similarly, when recertification applications are not processed in a timely manner, institutions are put on temporary Program Participation Agreements (PPAs) that enable their participation in title IV on a month-to-month basis. Not only does this create uncertainty for institutions and students, but in many cases it also prevents institutions from making significant program modifications or adding new programs, both of which may be necessary to meet workforce demands. The Department commits to completing recertification reviews and communicating decisions in a timely manner so that institutions can make needed changes to their institutions and programs.

The Department is now working to eliminate the backlog of program reviews and certifications by focusing new program reviews on the greatest need and the highest risk; this will allow current and outstanding program reviews to be completed in a timely manner. In the upcoming negotiated rulemaking, we have proposed ensuring prompt action is taken on program reviews.

The Department is also working diligently to ensure that it does not create new policy through FSA program reviews and enforcement actions. We believe there must be consistency in decision-making, regardless of which institution is requesting a determination and which FSA office is making it. In a continued attempt to achieve these goals and resolve confusion caused by past inconsistency, the Department's policymaking offices will continue to work with FSA to provide predictable, fair, and clear directions to the field.

Reducing Barriers to Innovation Credit Hour

The Task Force identified a number of examples of regulatory overreach on the part of the Department that have limited or deterred innovation. For example, the Department's definition of Credit Hour, which was added through the 2010 Program Integrity regulations, relies on "seat time" to measure student progress and disburse title IV aid, despite the fact that new pedagogical methods and technologies support innovative delivery and assessment methods that may be superior to traditional seat time measurements.

We appreciate the concerns raised by the Task Force, and therefore, in our current negotiated rulemaking sessions, we are proposing to amend the definition of the term “Credit Hour” to return flexibility to institutions, with oversight from accreditors. The Department has also requested that negotiators submit feedback about how to create Credit Hour standards and guidelines that ensure quality, protect taxpayers, and do not limit innovation.

State Authorization of Distance Education and Program Length

The Task Force identified as “controversial and burdensome” the State Authorization of Distance Education regulations, which the Department issued on December 19, 2016 (the 2016 final regulations), and partially delayed until July 1, 2020. The Task Force urged Congress to clarify that the Federal requirements for State Authorization apply only to the State in which an institution is physically located. It also asked Congress to prohibit the Department from publishing regulations on this issue. Furthermore, the requirements of some States are so onerous that some institutions have stopped enrolling students who reside in those States or have ceased placing students in or allowing students to complete internships, externships, or clinical rotations in those States.

Proponents of the 2016 final regulations contend that requiring institutions to state explicitly where a credential is earned will benefit students by providing clarity regarding a State’s licensure requirements. This is a legitimate concern; however, those opposed to the regulations, including the Task Force, argue that this requirement imposes steep compliance costs on institutions and may reduce program options available to students.

There is ample evidence that the ever-changing State licensure requirements create significant barriers to employment for many individuals. Particularly impacted are those who cannot afford to complete costly credentialing programs and those who are required to relocate often, such as military spouses.² The Department encourages States to reduce credentialing barriers or at least establish reciprocity agreements in order to enable worker mobility, support competition, and protect equality of opportunity.

The Department understands the Task Force’s concerns and is proposing changes to the 2016 State Authorization and the reasonable program length rule in the current negotiated rulemaking process. The Department looks forward to hearing the views of the negotiators and to receiving feedback from them and the public as we move to a final regulation.

Creating Smarter, More Meaningful Accountability

The Task Force also noted the bottleneck created by the Department’s inability to approve new programs in a timely manner, even after State and accreditor approvals. This prevents institutions from responding to education and workforce needs, and it also adds to the cost of developing new programs because many accreditors require institutions to start enrolling students within a certain period of time after they approve the program. In fact, the accreditor’s or the State’s approval, or both, may expire before the Department processes the new program, thus requiring the institution to start over again, pay additional fees, submit new applications, and pay costs associated with accreditor site visits. The Department must work to

² https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf

process new program applications as efficiently as possible, yet also closely scrutinize those cases in which institutions are proposing to create new programs that may result in or enable unnecessary credential inflation.

Finally, the Department has encouraged innovative educational models, such as distance learning, direct assessment, and competency-based learning. Some institutions that believed they were operating consistent with the Department’s regulations – and that even received bipartisan accolades from Congress, governors, and education experts for implementing innovative practices – have faced recommendations for severe enforcement actions regarding their practices by Department staff. The Department plans to use the negotiated rulemaking process to develop clear, consistent, and fair regulations for distance learning, direct assessment, and subscription-based delivery models and has proposed to require accreditors to evaluate educational innovations and to determine their credibility and effectiveness. This negotiated rulemaking will encourage stakeholders to think of ways to encourage innovation and to help institutions explore new pedagogies.

Calculating the Burden Imposed by the Department Regulatory Impact Analyses

The Department is not indifferent to the burdens noted by the Task Force that it imposes when promulgating new regulations and acknowledges that its regulatory impact analyses rely on models that include a number of future projections and assumptions. To the extent that the Department can rely on data to build those models, it does so in close collaboration with the Office of Management and Budget. However, we often find ourselves unable to access the data required to formulate a precise burden determination. For this reason, the Department relies upon public comments submitted in response to NPRMs to gather more data or consider additional models for improving our estimates of regulatory cost and burden. We need institutions and organizations to recommend more precise models rather than making broad statements that disagree with our projections but fail to offer alternative methodologies or solutions.

Reducing Regulatory Burden to Better Serve Students Verification

The Task Force highlighted the Free Application for Federal Student Aid (FAFSA®) verification process as a source of confusion and frustration for institutions and students. The Task Force recommended a more streamlined process that aligned verification with “a targeted student-by-student approach” and that based aid eligibility on “prior-prior” year financial information. The Department understands these concerns and has taken a number of steps to reduce verification burden.

Working with Congress, the Department has adopted “prior-prior” year tax information for use in determining title IV eligibility. In addition, the Department has worked with the Internal Revenue Service (IRS) to create a Data Retrieval Tool (DRT) that enables students and parents to upload information directly from their tax returns to the FAFSA®, thus reducing the burden of completing the FAFSA®. A data security vulnerability required the IRS to take its DRT offline for seven months, but it is once again available to students and parents.

For individuals who do not file tax returns; however, verification is particularly difficult because the IRS will not have tax data for those individuals. The Department's verification process was previously modified to require the use of tax transcripts and not tax returns to perform the verification function, even though the Department's regulations provide for flexibility in this area. While the Department wishes to combat improper payments, this reduced flexibility can pose extra difficulties for students and parents, especially in the event that a parent is estranged or the IRS has no record of individuals filing taxes.

The Department believes that the best way to reduce the verification burden is to allow the Department to verify information directly with the IRS. If allowed to perform this verification directly, neither institutions nor students would be asked to provide additional documentation to complete the verification of many data elements. In order for the Department to establish such a direct verification system, a statutory change is required in order to waive the prohibitions on data sharing described in Section 6103 of the Internal Revenue Code. The Department appreciates the efforts of Senators Alexander, Murray, Whitehouse, and Gardner to improve data sharing, and looks forward to supporting bipartisan and bicameral legislation to streamline data sharing in order to reduce burden to students and institutions.

In the meantime, the Department has agreed to allow the use of both tax returns and tax transcripts as a means of completing verifications. We will also allow the use of attestations to affirm family size, non-filing, and other data elements where other supporting evidence is not available. The Department is conducting an analysis in order to understand better how many students who are flagged for verification do not, as a result, enroll or remain enrolled in school. We also seek to determine more accurately how heightened verification is successful or unsuccessful in reducing improper payments.

Financial Responsibility Standards

The Department agrees that financial responsibility standards for title IV institutions are in need of significant update and revision. Negotiated rulemaking on financial responsibility standards is a costly and labor-intensive undertaking, however. In addition, in order to fully update the financial responsibility standards to take into account contemporary accounting practice, statutory changes may be necessary.

In the 2018 Borrower Defense to Repayment (BD) Notice of Proposed Rulemaking (NPRM), the Department included an adjustment to our methodology to take into account a recent change in Financial Accounting Standards Board (FASB) standards related to the treatment of lease liabilities. However, we recognize that other concerns remain, especially regarding the treatment of endowment holdings and earnings, and that more work must be done. The Department is committed to addressing this FASB change in the new BD NPRM to be published later this year, but understands that this will solve only one of many problems that make the composite score methodology an incomplete test for many institutions.

Institutional Accreditation

The Department agrees with the Task Force that the process by which it recognizes accrediting agencies has allowed the Department to intrude too far into the accreditation process. We also agree that the recognition process has become burdened by minutia and that it fails to distinguish between mundane paperwork and the evaluation of student learning and academic quality in assessing compliance and applying sanctions or corrective action requirements.

In December, the Department released two white papers outlining our principles and priorities for rethinking higher education generally and accreditation specifically.³ In these documents, we propose taking a multifaceted approach to restoring accreditor autonomy and ensuring that accreditors' primary role is the evaluation of academic programs and services rather than administrative functions, governance, paperwork and processes. Specifically, the Department is –

- Revising the *Guidelines for Preparing/Reviewing Accreditation Petitions and Compliance Reports* handbook, which is currently almost 90 pages long, to better explain exactly which documents should be included in an agency's petition for recognition.
- Adding site visits to the Department's recognition review procedures to conduct a more comprehensive review of the agency's records, interview staff, and observe the agency in action. This allows the Department to randomly select files to review, rather than relying on what the agency chooses to submit along with its petition for initial or renewal of recognition.
- Returning to a "substantial compliance" standard to allow institutions and agencies that need to make minor changes to written documents, but are otherwise compliant in practice, to receive recognition or accreditation but be required to submit monitoring reports as needed.
- Clarifying that evidence of effectiveness for the purposes of Department review includes evidence that the agency has applied its standards correctly and consistently, but also recognizing that an agency is not out of compliance simply because it has not had the need or opportunity to apply each policy or standard during the most recent recognition review period.
- Expanding the timeline of the recognition review process to provide greater opportunity for staff to review agency practices in order to promote continuous agency improvement and for agencies to make minor corrections to policies or documents prior to the final recommendation by Department staff.
- Engaging in negotiated rulemaking on the accreditor recognition regulations to reduce unnecessary burden and support responsible and carefully monitored innovation.

Consumer Information

The Task Force identified the enormous amount of information institutions are required to report to the agency as a source of significant burden and expense. We agree that the Department must reduce the amount of data institutions are required to report and find new ways to display the most important and useful data to the public so that it can be used to make

³ <https://www2.ed.gov/admins/finaid/accred/rethinking-higher-education-accreditation-reform.pdf> and <https://www2.ed.gov/admins/finaid/accred/rethinking-higher-education.pdf>

informed enrollment decisions. For example, the Department plans to update the College Scorecard to include program-level data, such as the median earnings and median debt of recent completers, which will better inform student choice and encourage more responsible borrowing.

The Department removed references to national averages or medians from the College Scorecard. Such national medians are irrelevant and misleading because they do not differentiate between institutions with different missions or serving different student populations. Instead, the Department will revise the College Scorecard to allow students to compare institutions and to help them understand how to view those outcomes in the context of each institution's mission, academic programs, and students served.

The Department has revised what was formerly called the College Shopping Sheet to take into account the recommendations of the National Association of Student Financial Aid Administrators (NASFAA) and to make the document more useful and understandable to students. We have also changed the name of the form to the College Financing Plan to reflect the increasing reliance on loans to pay for a college education. The changes to the College Financing Plan will be implemented on a voluntary basis over the next year as the Department tests its efficacy with students and, working with the financial aid community, solicits additional feedback from the field.

The Department is retiring terms that refer to loans as “aid” or “awards” because these terms may be misleading to students and may result in uninformed and in some cases accidental borrowing. We also support restoration of the annual promissory note to ensure that students understand that they are taking loans rather than receiving grants when they approve the release of Federal Direct Loans. The Department's Next-Gen Financial Aid initiative will provide for more regular contact between the Department and borrowers to improve borrower education, including regarding loan products and loan repayment options.

The Department is also reviewing potential flexibilities within our statutory authority to allow institutions to establish borrowing limits to prevent students from taking on debt they are unlikely to be able to repay. If regulatory flexibility is insufficient, we would support statutory changes to give institutions the tools they need to reduce over-borrowing.

Improving the regulatory process

For the negotiated rulemaking sessions that recently started, the Department has made several procedural changes to be responsive to the recommendations of the Task Force. For example, in response to concerns about the Department grouping too many disparate topics into a single rulemaking effort, the Department has added subcommittees to bring additional experts to the conversations that can make informed recommendations to the negotiators as they develop and discuss proposed changes. Although subcommittee members will not have a vote on final consensus, we believe that their expert advice will ensure the process considers all viewpoints on each topic with a greater likelihood of reaching consensus. We have also started the process by presenting our proposals as marked-up regulations, rather than more generalized issue papers, to initiate more concrete and focused conversations at the start of the negotiating sessions.

In addition, we are working to develop risk-based, risk-adjusted, and risk-informed models to target our regulatory oversight efforts, to provide more meaningful and relevant data to students and parents, and to differentiate between institutional quality and institutional selectivity.

We appreciate the work of the Task Force and its carefully developed recommendations for reducing unnecessary regulatory burden. We recognize that we have significant additional work to do to address all of the recommendations of the Task Force, but we are proud of the progress we have made so far and believe that our accomplishments will bring regulatory relief to all institutions.

The Department sees as its first priority the enforcement of regulations that reasonably protect students and that safeguard student and taxpayer investments in postsecondary education. It is imperative that the Department's rules and actions preserve student choice, honor institutional mission, and recognize that adults engaged in lifelong learning bring a variety of goals and expectations to the classroom that may be different than those brought by traditional students.

We look forward to continuing to work with Congress to reduce unnecessary regulatory burdens and to restoring autonomy of mission and academic programming to the colleges and universities who know best how to serve their students. We would also be pleased to work with Congress on a reauthorization of the Higher Education Act, as amended, to address the issues raised by the Task Force on Federal Regulation of Higher Education.