UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

September 9, 2013

The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Miller:

Thank you for your letter of August 13, 2013, requesting that the U.S. Department of Education (Department) Office of Inspector General (OIG) review H.R. 2637, the "Supporting Academic Freedom through Regulatory Relief Act." Your letter requested that OIG review the legislation and, based on our work and our review of the Department's justification for the program rules affected by the legislation, determine whether the legislation would weaken the Department's ability to effectively: (1) reduce student loan defaults, (2) create controls to root out wasteful spending or other abuses, (3) protect the consumer interests of student borrowers and grant recipients, and (4) strengthen the overall accountability of the nation's higher education programs. Attached you will find the results of our review.

If you have any questions or need additional information, please do not hesitate to contact me directly at (202) 245-6900, or have a member of your staff contact our Congressional Liaison, Catherine Grant at (202) 245-7023.

Sincerely,

Kathleen S. Tighe
Inspector General

Attachment

cc: The Honorable John Kline, Chairman, Committee on Education and the Workforce, U.S. House of Representatives

The Honorable Gabriella Gomez, Assistant Secretary, Office of Legislation and Congressional Affairs, U.S. Department of Education

U.S. Department of Education Office of Inspector General Review of H.R. 2637, "Supporting Academic Freedom through Regulatory Relief Act"

On August 13, 2013, Representative George Miller, Ranking Member of the Committee on Education and the Workforce, U.S. House of Representatives, requested that the U.S. Department of Education (Department) Office of Inspector General (OIG) review H.R. 2637, the "Supporting Academic Freedom through Regulatory Relief Act." Representative Miller asked OIG to review the legislation and, based on our work and our review of the Department's justification for the program rules affected by the legislation, determine whether the legislation would weaken the Department's ability to effectively: (1) reduce student loan defaults, (2) create controls to root out wasteful spending or other abuses, (3) protect the consumer interests of student borrowers and grant recipients, and (4) strengthen the overall accountability of the nation's higher education programs. In responding to this request, we relied on our audit and inspections reports and investigations, our Congressional testimony, and our review of and comments on the proposed and final program integrity regulations in accordance with our responsibilities under the Inspector General Act of 1978.

Published in 2010 and 2011, the Department's program integrity regulations went into effect in July 2011, and the gainful employment regulations in July 2012. The regulations included changes that OIG had previously recommended to the Department through our audit, inspection, and investigative work. As I testified before the U.S. Senate Committee on Health, Education, Labor, and Pensions in March 2010, we believe the changes embodied in the new regulations—including changes in the areas of a credit hour definition, gainful employment, State authorization, and incentive compensation—will improve protections for students and taxpayers.

Definition of a Credit Hour

A credit hour is a unit of measure that gives value to the level of instruction, academic rigor, and time requirements for a course taken at an educational institution. Although a credit hour is a concept widely recognized in academic environments, prior to the 2010 program integrity regulations, a credit hour had never been defined in either statute or regulation. In the program integrity regulations, the Department for the first time established such a definition. Section 2(a) of H.R. 2637 repeals this definition and Section 2(c) of the bill prohibits the Secretary of Education from promulgating or enforcing any regulation or rule with respect to the definition of the term `credit hour' for any purpose under the Higher Education Act of 1965, as amended (HEA).

Prior to the changes contained in the program integrity regulations, the general assumption had always been that accrediting agencies defined what constituted a credit hour and evaluated the assignment of credit hours to particular courses and programs. Our work has shown that this general assumption was not valid. Our work in 2002 and 2003 identified that the two regional accrediting agencies we reviewed did not have minimum requirements for the assignment of credit hours. Although the two national accrediting agencies we reviewed defined a credit hour, it was a somewhat limited definition. As a result of this work, in 2004, we recommended that Congress establish a statutory definition of a credit hour in the HEA stating: "For programs that are not offered in clock-hours, credit hours are the basis for determining the amount of aid students are eligible for. Absent a definition of a credit hour there are no measures in the [HEA] or regulations to ensure comparable funding across different types of educational programs." Our recommendation was not included in the HEA reauthorization. Our most recent work on credit hours at the three largest regional accrediting agencies from 2009 and 2010 showed that none of the accrediting agencies defined a credit hour and none provided guidance on the minimum requirements for the assignment of credit hours. Because the accrediting agencies did not develop their own minimum standards in this area, we supported the Department's efforts to develop a definition of a credit hour in the program integrity regulations.

With the explosion of on-line postsecondary education, increase in accelerated programs, and the beginning of direct assessment programs, the value of a credit hour as the basis for the amount of Federal student aid (Title IV) a student can receive becomes increasingly important. Defining a credit hour protects students and taxpayers from inflated credit hours, improper designation of full-time student status, the over-awarding of Title IV funds and excessive borrowing by students. Having a definition of a credit hour as is contained in the program integrity regulations provides increased assurance that a credit hour has the necessary educational content to support the amounts of Federal funds that are awarded to participants in the Title IV programs and that students at different institutions are treated equitably in the awarding of those funds.

The definition of a credit hour contained in the regulations does not limit an institution's ability to innovate on the delivery of postsecondary education; rather, its emphasis is that a full-time student should be academically engaged on a full-time basis as determined by the institution. To protect students and ensure that the taxpayers' investment in education provides value, we believe that a definition of a credit hour is needed to provide meaning to the law and the regulations.

Gainful Employment

The HEA has long required eligible proprietary institutions and postsecondary vocational institutions to prepare students for gainful employment.[1] Prior to the final regulations published by the Department in June 2011, there was no statutory or regulatory definition of what constituted gainful employment. During the 1998 HEA reauthorization, we recommended that Congress amend the statute to require institutions preparing students for gainful employment have a 70 percent graduation rate and a 70 percent placement rate. This recommendation was not included in the final bill. As such, we supported the Department's efforts to define this concept in the program integrity regulations. In those regulations, the Department developed a test that focuses on the debt-to-income ratio for students in specific programs.

[1]The statute does provide an exception for proprietary schools providing a baccalaureate degree in liberal arts prior to January 1, 2009.

Section 2(a) of H.R. 2637 repeals the gainful employment regulation and Section 2(b) of the bill prohibits the Secretary of Education from promulgating or enforcing any rule or regulation related to gainful employment until the date of enactment of a law that extends one or more programs authorized under the HEA.

Although proprietary schools are not the only sector subject to the gainful employment regulation, they are the largest. That sector has seen rapid growth, increases in loan debt, and escalating default problems. In 2009, proprietary schools made up about 13 percent of the student population receiving Title IV funding, but represented 47 percent of the defaulted loans. Students who are not gainfully employed and cannot afford to repay their loans face very serious challenges. Discharging Federal student loans in bankruptcy is very rare. The common consequences of default include large fees—collection costs that can add 25 percent to the outstanding loan balance—and interest charges; struggles to rent or buy a home, buy a car, or get a job; collection agency actions, including lawsuits and garnishment of wages; and the loss of tax refunds and even Social Security benefits. Moreover, borrowers in default are no longer entitled to any deferments or forbearances and may be ineligible for any additional student aid until they have reestablished a good payment history. The Department's goal in promulgating these regulations was to identify the poorest performing programs to ensure that (1) students who enroll in these programs do not have to face these difficult challenges, because they are not prepared to secure gainful employment rather than being left with unaffordable debts and poor employment prospects, and (2) the Federal investment in Title IV is well spent.

If a program is required to prepare a student for gainful employment in a recognized occupation, the expectation that the student should have the ability to repay any loans after completing the program does not seem unreasonable. In the OIG's view, while there are many ways that the statutory requirement for gainful employment could be given meaning, without some criteria for what gainful employment is, schools cannot be held accountable, students can be harmed by not being able to pay loan debt which results in default, and taxpayers will bear the burden of increasing default rates.

State Authorizations

The HEA requires institutions of higher education to have approval from the States where they operate to provide postsecondary educational programs. Prior to the 2010 program integrity rule change to the State authorization requirement, the regulations did not define the existing statutory requirement that an institution of higher education had to be legally authorized in a State. As such, an institution of higher education could be considered authorized by the State simply by obtaining a business license. The State did not need to recognize that the institution was providing educational services. State oversight through an institution of higher education having to obtain approval to offer postsecondary education and by State regulatory agency ongoing activities plays an important role in protecting students, although there may be a lot of variation in how those responsibilities are exercised. As the Department has noted, one indicator of the importance of State oversight has been seen in the movement of substandard institutions and diploma mills from State to State in response to changing State requirements. Providing a definition to the State authorization requirement is also critical considering the explosion of on-line education to assure legal authorization is obtained by an institution from each State where its education services are provided to students.

Although OIG has not issued an audit specifically on State authorization of educational institutions, we did issue a report in September 2000 on management controls for on-line education at State agencies and accrediting agencies. The report discussed several accountability recommendations that State agencies themselves had made for Federal action that would enhance licensing/approval and accreditation procedures in order to better protect students and ensure the quality of programs and courses that are offered primarily through on-line education. State agencies' recommendations included a call for States to strengthen on-line education laws, and asked the Federal Government to issue regulations for institutions offering programs using on-line education methods when the institution operates in a State that does not provide sufficient regulation of educational programs.[2]

The Department's coverage of State authorization in the program integrity regulations did not go as far as a number of recommendations made by States and discussed in our 2000 report. The 2010 program integrity regulations require that the State authorization specifically recognize institutions as providing education beyond the secondary level rather than just requiring a business license. They also require that States identify where students may go with complaints about an institution, although it did not require the creation of any new complaint mechanism. The final requirement is that an institution needs to be in compliance with the State laws where it is providing postsecondary education to be eligible to participate in the Title IV programs.[3] This is not a new requirement, but one with which some institutions were not complying.

Section 2(a) of H.R. 2637 repeals the State authorization regulation and Section 2(b) of the bill prohibits the Secretary of Education from promulgating or enforcing any rule or regulation related to State authorization until the date of enactment of a law that extends one or more programs authorized under the HEA.

In the OIG's view, the States' oversight role over institutions of higher education, as exercised through the State authorization process, is as important as the role of the other two members of the program integrity triad—the Department and the accrediting agencies. Requiring the States to recognize that an institution is providing postsecondary education rather than only requiring a business license, providing a mechanism for students to report fraud and abuse, and expecting postsecondary institutions to comply with the laws of the States in which they operate serve only to strengthen this important State role.

[2]Audit Report ED-OIG/A0990030, page 20

[3]On July 12, 2011, the U.S. District Court for the District of Columbia struck down this provision on the grounds that the Department did not provide adequate opportunity in the Negotiated Rulemaking Process for institutions to comment on this provision. Institutions, however, still have the obligation to comply with State laws as it is a condition for Title IV eligibility.

Incentive Compensation

Prior to 1992, the HEA contained a prohibition on the use of incentive compensation based on success in securing enrollments or financial aid in the program eligibility section for the Federal Family Education Loan program. In the 1992 amendments to the HEA, Congress expanded the prohibition to all Title IV programs and placed it under the Program Participation Agreement section of the HEA. The prohibition was designed to protect students from the high pressure tactics used by recruiters to enroll students in programs for which they may not have been prepared or did not want. The students were saddled with unwanted debt, at increased cost to the taxpayers. In 2002, the Department modified the regulations prohibiting incentive compensation to add 12 safe harbors for institutions. By 2010, when the Department proposed the removal of the 12 safe harbors through the program integrity regulations, the Department had recognized that the same bad behaviors that the ban on incentive compensation was meant to prevent were occurring and protected under the safe harbors.

In March 2011, the Department issued guidance that permitted Title IV revenue sharing with entities providing student recruiting along with other services,[4] although this practice had been one of the safe harbors eliminated by the program integrity regulations scheduled to take effect on July 1, 2011. Section 3 of H.R. 2637 would codify such revenue sharing; it would also permit additional payments to recruiters as long as such payments were not "solely" for student recruitment services.

The OIG objected to the Department's March 2011 guidance as contrary to the HEA's ban on incentive compensation[5] and objected to the revenue sharing safe harbor when the Department first proposed it in 2002 as contrary to the HEA.[6] H.R. 2637 would for the first time create Congressional exceptions to the ban on incentive compensation.

In proposing the elimination of the safe harbors in the program integrity regulations, the Department stated that "safe harbors do substantially more harm than good."[7] It also noted that in its experience "unscrupulous actors routinely rely upon [the] safe harbors to circumvent the intent of [Congress's ban on incentive compensation]." In connection with the former safe harbor that permitted compensation schemes that were not "solely" based on the number enrolled, the Department noted that the need to "look behind" documents that ostensibly indicated compliance required "enormous amounts of resources, and has resulted in an inability to adequately determine whether institutions are in compliance with the incentive compensation ban in many cases."[8] We similarly have observed this problem in conducting our oversight work. For example, our audit of Ashford University issued in January 2011, we found that the University had designed a compensation plan for enrollment advisors that provided incentive payments based on

[4]Dear Colleague Letter GEN-11-05, March 17, 2011
[5]Semiannual Report to Congress, No. 45, page 9
[6]Semiannual Report to Congress. No. 62, page 11
[7]75 Fed. Reg. 34818 (June 18, 2010)
[8]75 Fed. Reg. 66872-3 (Oct. 29, 20010)

success in securing enrollment. Although changes to salaries were made only every 6 months, the University provided managers with discretion to adjust salaries within each of the salary ranges and did not document on what basis it adjusted salaries. The University could not demonstrate that its enrollment advisors' salary adjustments were not based solely on success in securing enrollment. Therefore, we could not determine whether the University's compensation plan and practices qualified for the safe harbor for salary adjustments.

The statutory ban on all commission, bonus, or other incentive payments to employees of the institution or outside entities that recruit or provide admissions activities still serves an important purpose in protecting students and taxpayers from improper and misleading recruiting and admissions efforts. We continue to investigate allegations of misrepresentation and improper incentive payments. In August 2011, the U.S. Department of Justice intervened in a Qui Tam whistleblower law suit against Education Management Corporation (EDMC) concerning alleged violations of the incentive compensation ban. In announcing the suit, the Justice Department stated that "[w]orking with the Department of Education, we will protect both students and taxpayers from arrangements that emphasize profits over education." In its press release, the Justice Department explained that the "action against EDMC seeks to recover a portion of the $11 billion in Federal student aid which EDMC allegedly obtained through false statements and which enriched the company, its shareholders and executives at the expense of innocent individuals seeking a quality education."

We are concerned that the change in the statute (as well as the Department's March 2011 guidance) may encourage institutions of higher education to simply outsource recruiting and admissions activities and pay incentives based solely on success in securing enrollments. It is unrealistic to expect that, if an entity is paid a commission, bonus, or other incentive for recruiting or admissions activities based on its success in securing enrollment, its recruiters or admissions personnel will not also be subject to pressures or incentives to improperly recruit and admit students, thereby placing students at risk of the same recruiting practices that Congress sought to prevent in 1992. Under the previous safe harbor allowing institutions to make additional payments to recruiters and admissions personnel that were not based solely on success in securing enrollments, we identified convoluted compensation schemes that appeared on the surface to comply with the safe harbor when they did not. The aggressive sales tactics that result from incentive compensation have a history of harm to students through defaulting on their loans and taxpayers through absorbing the cost of default. In the OIG's view, the ban on incentive compensation should not be weakened.