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Macias, Wendy

From: [redacted]
Sent: Friday, June 19, 2009 8:07 PM
To: negreg09
Subject: Public Advocates Comments Submitted for Negotiated Rulemaking for Higher Education
Attachments: Public Advocates - US Ed Neg Reg Prop School Letter.pdf

Please see attached.

[redacted]
Staff Attorney
Public Advocates, Inc.
[redacted]

PUBLIC ADVOCATES
MAKING RIGHTS REAL

[redacted]

June 19, 2009

Wendy Macias
U.S. Department of Education
P.O. Box 33076
Washington, D.C. 20033-2076

RE: DEVELOPMENT OF PROPOSED REGULATIONS TO IMPROVE PROGRAM INTEGRITY IN TITLE IV, HEA PROGRAMS

Dear Ms. Macias:

On behalf of Public Advocates Inc., I am pleased to respond to the Department's May 26, 2009 *Federal Register* invitation for comments on the development of proposed regulations through negotiated rulemaking, particularly with respect to improving program integrity in the Title IV, HEA programs.

Public Advocates Inc. is a non-profit law firm and policy advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. As part of our advocacy for education equity and opportunity to learn for students at every level, we have been involved in many issues related to college opportunity and quality on behalf of low income students, including issues of access to basic academic resources; academic standards and testing; high school curriculum, and expansion of early access to financial aid and academic performance information to help students prepare for college entry. Public Advocates was an active proponent of federal policy changes to provide for increased and more rational safety net and flexibility provisions for low-income borrowers who faced financial problems affecting their ability to repay students loans, and for improvements in income contingent repayment provisions, both of which the Department has adopted.

We applaud the Department for raising serious and timely questions about possible improvements to the program integrity provisions, which have been dangerously weakened since their adoption (look simply at the 90-10 and 50% rules, for example), and encourage the Department to use this occasion for a broad look at ways to protect students and the federal investment in postsecondary education.

There are many substantial interests at play that justify this in-depth look. The federal government invests billions in student aid funds and students invest their own precious financial resources. In addition, students invest their time, their hopes, and enormous opportunity costs. They deserve some assurance of basic value and quality of occupational programs so they can weigh how to spend their time and money, choosing among effective programs, on the job training, and work, and avoid the risk of spending those assets on low-potential programs. Confidence in government program management and ease of enforcement and predictability are also significant values.

On the most fundamental level, we urge the Department and the negotiators to be open to tailoring regulatory approaches and standards to the specific goals and problems they are trying to achieve. Too often regulators, often compelled by statute, have been forced to lump together institutions very different in purpose, governance, incentives, oversight, and track record. Under those circumstances sensible solutions to specific problems may not be feasible without excessive burden on the overbroad category of institutions, and so at the end of the day abuses go unchecked.

We respectfully suggest that the Department consider the positive example of its own financial accountability regulations (34 CFR Part 668, adopted November 25, 1997) which construct differing requirements to reflect significant differences among public, private and for-profit postsecondary institutions and their sources of financial stability. Those rules also acknowledge that effective regulation sometimes requires gradations and subtlety, rather than pass/fail or black and white tests. The model of heightened oversight and regulatory requirements for selected institutions based on past performance and warning indicators may be useful in developing rules to address some of the complex issues that we believe should be included in this rulemaking process.

We believe that all of the issues listed by the Department are important and should be included in the scope of the charge to the negotiators, and suggest a few additional matters for inclusion as well.

Specifically, the Department would be wise to look at regulating on:

- **The statutory ban on incentive compensation.** Current regulations provide 12 exceptions to the broad statutory prohibition on payment of incentives to secure enrollments. Nothing in the statutory language or the legislative history of the provision in question suggests that Congress intended these safe harbors. If anything, the legislative history of the ban unambiguously indicates that the prohibition was intended to be absolute, and that commissions and incentive compensation were seen as root causes of waste, fraud and abuse by Congress when it enacted the provision in question [20 U.S.C. § 1094] in 1992.

- **Qualifications for accrediting bodies.** Accreditation is a key element of Title IV gatekeeping, and when that leg is weak the entire edifice is shaky. The too-easy proliferation of accreditors allows for forum-shopping and a bias toward approval. The Department is addressing the integrity of the accreditation process, and its efforts to add

rigor to the processing for approving and recertifying accreditors. Accreditors in turn should bear consequences for approvals of institutions that cannot meet robust program standards.

- **Gainful employment in a recognized occupation:** These terms make clear that Congress intended a higher standard for career education than simply finding a job after completing the program. This issue warrants serious attention, including to such suggestions as whether the standard should be state licensed occupations and the relationship among program expense, debt burden and post-program income. The Department might consider researching student expectations to help understand what prospective students believe they will get from postsecondary career programs.

- **Consumer information and protection:** A number of these issues suggest the possibility of increasing the information that is available in clear, standardized form to prospective students and those who seek to advise them.

    - **Default rate disclosure:** The Department can do more to provide the public with information about cumulative default rates and non-performing loan rates for every school that participates in Title IV, and to consider whether relatively high rates should trigger additional regulatory consequences or notification to prospective students.

    - For example, building on the notion of providing gainful employment in a recognized occupation, students would likely find helpful a breakdown of information about the kinds of jobs that students secure following a course of study with a vocational objective. Providing a ratio of average debt burden to graduates' average salary might vividly convey or at least prompt thoughtful questions about the relationship of cost to value of the program. In addition, schools could be required to indicate what jobs secured by their graduates actually require completion of the program for licensure or employment in those positions.

    - And while there may be challenges inherent in regulating or controlling advertising, it may be both feasible and valuable to require institutions that spend beyond a certain percentage of revenue on marketing to include that figure in reports to the Department and also to the public. That would also allow the Department or third parties to compare marketing expenses.

    - Finally, the Department might consider collaborating with the Federal Trade Commission on disclosure requirements as well as on enforcement for misleading advertising, which is a way to tailor attention very precisely on institutions of concern without burdening other entities.

We know full well the burden and sensitivity of an ambitious rulemaking proceeding, and commend the Department on its openness to addressing critical issues that are likely to be contested and complex in the interests of students and taxpayers. We would be happy to provide additional comment or specifics as the regulatory process moves forward and to assist the Department in any way we can through the negotiated rulemaking.

Sincerely,