

May 30, 2019

Ms. Diane Jones
Principal Deputy Under Secretary
U.S. Department of Education
Washington, D.C. 20202

Dear Ms. Jones:

We write to request that the Department of Education make explicitly clear that certain reporting requirements associated with the Borrower Defense to Repayment regulation do not apply to public institutions. Applying these reporting requirements to public institutions would be contrary to the regulations and needlessly burdensome for both the Department and institutions, as the information would not be used to determine public institutions' financial responsibility given the inapplicability of the provision to them.

As you are aware, the rule was published on November 1, 2016 in the *Federal Register* (81 *Fed. Reg.* 75926), but its effective date of July 1, 2017 was delayed by the Department pending a new round of negotiated rulemaking. While that rulemaking was ongoing, the regulation was the subject of litigation in *Bauer et al. v DeVos*, Civil Action No. 17-1330 (RDM). The district court ruled in the plaintiffs' favor on September 12, 2018. On October 16, 2018, the district court refused to block the rules. As a result, the 2016 borrower defense regulations went into effect on that date.

On March 15, 2019, the Department electronically published new guidance concerning revisions to the Department's regulations in 34 CFR 171, which addresses the standards institutions must meet to be deemed financially responsible for purposes of eligibility to participate in federal student aid programs. The reporting requirements in question are intended to provide information about events, actions, or conditions that could adversely affect the Department's assessment of participating institutions' financial responsibility.

Because the black letter of the statutory language in HEA 498 (c)(3)(B) clearly defines public institutions as institutions whose liabilities are backed by the full faith and credit of a State or its equivalent, it has been widely expected that the new reporting requirements would not apply to public institutions. These schools do not represent themselves in litigation, nor pay their own settlements, which would make such public institutions' knowledge of their own litigation and settlements less than accurate. Generally, the responsibility for litigation defense and settlement of lawsuits falls to the Attorney General of that state. Furthermore, the Paperwork Reduction Act compliance notice of the 2016 regulation made no mention of any reporting burden for public institutions (81 *Fed. Reg.* 76064) while explicitly estimating burden on 169 private institutions and 392 proprietary institutions. In addition, we received verbal assurances that the March guidance, which had a May 14 deadline, would not apply to public institutions.

The Department's own final rule explicitly noted public institutions' exemption:

Discussion: We rely, and have for nearly 20 years relied, on the full-faith and credit of the State to cover any debts and liabilities that a public institution may incur in participating in the title IV, HEA programs. Under the current regulations in § 668.171(b) and (c), a public institution is not subject to the general standards of financial responsibility and is considered financially responsible as long as it does not violate any past performance provision in § 668.174. The Department has on occasion placed public institutions on heightened cash monitoring for failing to file required audits in a timely manner, but even then has never required a public institution to prove financial protection of any type because we already have it in the form of full-faith and credit. We would like to clarify that we are not changing long-standing public policy for public institutions with these final regulations. In other words, the triggering events in § 668.171(c) through (g) of these regulations do not apply to public institutions (emphasis added).¹

Paragraph (h), which outlines the reporting requirements in question, further states: “(1) In accordance with procedures established by the Secretary, **an institution must notify the Secretary of any of the following actions or events identified in paragraphs (c) through (g) of this section...**(emphasis added).”² It would logically follow, due to the explicit statement in paragraph (h) above, that public institutions are exempt from the reporting requirements because they do not trigger any of the events in (c) through (g), since public institutions are exempt from such triggering events, as stated in the Department's own Final Rule.

We hoped the Department would explicitly state this position in writing to prevent unnecessary and non-actionable compliance paperwork (for institutions and for itself) associated with a regulation that it intends to significantly alter. Regrettably, the Department followed the March 15 notice with another notice, posted last week, that fails to clearly communicate the application of the reporting requirements, and has instead led to greater confusion within the higher education community as to exactly which institutions it affects.

We understand the Department is working on an FAQ-type document to clarify confusion in the field relative to the application of financial responsibility reporting requirements. We urge you to clearly articulate the public institution exemption from the reporting requirements in question as defined in the statute and the Department's own regulations in 34 CFR 668.15. The information in question is intended to enable the Department to modify the financial responsibility ratios it calculates for non-public institutions. Therefore, it clearly makes little sense to apply such requirements to public institutions and was not the intention of the regulation. It would be needlessly unproductive to collect such information for public institutions that have no such ratios to be modified with the data that is demanded.

¹ Borrower Defense Rule, 81 Fed. Reg. at 76,006.

² Borrower Defense Rule, 34 C.F.R. § 668.171(h) (2016).

We thank you in advance for your assistance. Please do not hesitate to reach out to [Barmak Nassirian](#) and [Craig Lindwarm](#) of the AASCU and APLU staffs with any questions.

Sincerely,



Mildred García, Ed.D.
President
American Association of State Colleges and
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Peter McPherson
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