



August 26, 2022

U.S. Department of Education  
Office of Postsecondary Education  
400 Maryland Avenue SW, 2nd Floor  
Washington, DC 20202

Docket ID: ED-2022-OPE-0062-0001

To whom it may concern:

On behalf of the National Association of Student Financial Aid Administrators (NASFAA) and our 3,000 member institutions, we respectfully submit to the U.S. Department of Education (ED) our comments on the Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program Notice of Proposed Rulemaking (Docket No.: ED-2022-OPE-0062-0001) addressing Federal Pell Grants for Prison Education Programs (PEPs), the Title IV Revenue and Non-Federal Education Assistance Funds regulations, and Changes in Ownership and Control.

NASFAA represents nearly 20,000 financial aid professionals who serve 16 million students each year at colleges and universities in all sectors throughout the country. NASFAA member institutions serve nine out of every ten undergraduates in the U.S.

### **Prison Education Programs**

We commend ED and the non federal negotiators for reaching consensus on this important topic. Lifting the ban on Pell grants for confined or incarcerated individuals was a major step toward expanding postsecondary education and the long-term benefits realized by both individuals and society as a whole. However, restoring Pell grant eligibility for this population is only the first step. Even the best policy intentions are for naught if they can not be implemented successfully. The details of how Pell grants for PEPs are implemented will ultimately determine the success of this legislation.

We appreciate that ED recognizes many postsecondary institutions will be offering programs in carceral spaces for the first time. We commend ED's commitment to create an optional template to guide schools in submitting their PEP applications to ED, and urge ED to release the template as soon as possible since the planning process for creating PEPs will likely take place over

several months before the regulations become final, and at many institutions is already underway.

We are concerned that the burden of ED's requirement that institutions enter into data sharing agreements with carceral facilities in order to obtain and report Pell grant recipient transfer and release dates will ward off many schools from participating in this program.

We agree with the importance of collecting data on Pell grant recipients who have been released from incarceration in order to evaluate the value PEPs offer. However, requiring each institution to enter into a data sharing agreement with each carceral facility where they offer a PEP is significantly more work for institutions than ED entering into data sharing agreements directly with the facilities where PEPs are offered. Using institutions as an intermediary for this data is inefficient and places an unnecessary burden on institutions that would otherwise want to participate in this valuable program. This is especially troubling because ED defers the burden calculation to a future point when it releases the application to participate in PEPs, meaning that the public is expected to comment now on a provision whose burden is unknown.

During negotiations, ED expressed a willingness to modify the National Student Loan Data System (NSLDS) to allow corrections facilities to provide transfer and release data. We ask that ED seriously explore that option or other options that would provide for direct transfer of release data from correctional facilities to ED.

We agree with ED's decision to use the *Federal Register* to post PEP reporting requirements to allow for maximum flexibility instead of establishing a rigid set of reporting requirements in regulation. However, we stress that ED must make timely and clear announcements about reporting requirements so institutions have time to ensure they will be able to meet those requirements. Past experience from administering the Higher Education Emergency Relief Fund (HEERF) program demonstrates the difficulty of reporting when the data elements to be reported are not communicated with adequate clarity and advance notice<sup>1</sup>.

We agree with the provision to grandfather students who are incarcerated and are currently receiving Pell grants to continue to receive them until 2029 or until they reach the maximum timeframe for completion or exhaust their Pell lifetime eligibility. The consequence of expanded access to Pell grants for some students should not be loss of Pell grants for others. The benefit of continuing these students' Pell grants to allow them to complete their programs outweighs the risk that they are not enrolled in new PEPs with the new associated accountability provisions.

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<sup>1</sup> [https://www.nasfaa.org/cares\\_evaluation\\_report](https://www.nasfaa.org/cares_evaluation_report)

We ask for clarification in 600.7(c)(4)(i)(B), which establishes enrollment cap waiver limitations. The draft language indicates that, following the initial 5-year waiver in 600.7(c)(4)(i)(A) permitting up to 50% incarcerated student enrollment, an institution could enroll up to 75% incarcerated students for another five years. However, it is unclear what happens after that second five year period has elapsed. Would ED automatically extend the waiver provided it had no reason to limit or terminate the waiver under 600.7(c)(5)? If so, what is the rationale for limiting the 75% enrollment cap to five years when ED has the authority to limit or terminate the waiver at any point that it determines the institution doesn't meet waiver requirements? Or, would institutions have no incarcerated student enrollment cap after the second five year cap elapsed?

We agree with ED's addition of stakeholders such as representatives of incarcerated students to provide feedback to oversight entities in approving PEPs. Given that oversight of PEPs is a new role to carceral facilities, it is critical that their determination of whether a PEP meets students' best interests include feedback from any and all experts.

We appreciate ED's consideration of negotiators' concerns about treatment of all PEPs, regardless of modality, as additional locations and the implications for institutions with respect to regulatory requirements associated with additional locations such as Clery Act campus crime reporting. ED committed during negotiations to clarify this issue through guidance, and we urge the Department to issue that guidance as soon as possible.

While outside the scope of the proposed regulations, we remind ED that another crucial step in implementing Pell grants for PEPs is ensuring that applicants who are incarcerated can apply for Pell grants with the fewest possible barriers. As ED continues to draft the 2022-23 Incarcerated Applicant Form, we urge the Department to take NASFAA's joint comments<sup>2</sup> with the Vera Institute of Justice into account.

### **90/10 Rule**

ED and non federal negotiators are to be applauded for their flexibility and willingness to collaborate to develop language that all parties found acceptable, especially considering strongly held opinions about the rule itself.

In 668.28(c)(4), what does ED consider "immediate" notification that the institution had identified additional information that would lead to failing the 90/10 calculation after 45 days past the fiscal year end date? We advise ED to add a timeframe with a specific number of business days in place of "immediate" to avoid any confusion.

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<sup>2</sup> [https://www.nasfaa.org/uploads/documents/2023-24IncarceratedApplicantFormcommentsjointw\\_Vera-4.pdf](https://www.nasfaa.org/uploads/documents/2023-24IncarceratedApplicantFormcommentsjointw_Vera-4.pdf)

We suggest that ED add clarifying language to 668.28(c)(5) as to when institutions must repay Title IV federal student aid funds after they lose eligibility due to failure to meet the 90/10 revenue threshold for two consecutive years. Currently, it reads that funds disbursed “...after the fiscal year it becomes ineligible to participate...” must be returned. Does ED consider the fiscal year a school became ineligible to be the second fiscal year in which it fails the 90/10 revenue threshold, or the fiscal year immediately following the second fiscal year in which it fails the 90/10 threshold? If the former, the language should read, “...after the *last day of the* fiscal year it becomes ineligible to participate...” If the latter, it should read, “...on or after the *first day of the* fiscal year it becomes ineligible to participate...”

### **Definitions and Change in Ownership**

We appreciate ED’s addition of a definition for an institution’s main campus. Given references to the main campus throughout the regulations, it is necessary to ensure that ED and institutions have the same understanding of what constitutes the main campus.

We have questions about the new definition of additional location 600.2. ED changes the current language referring to “a facility” to “a physical facility.” This is especially confusing—even with the exception for PEPs in the revised distance education definition—considering that all PEPs (including those offered exclusively through distance education) will be considered additional locations. What is ED’s rationale behind the addition of the word “physical”, and how does it add clarity to the existing language? Does this provision conflict with the separate provision that PEPs are to be considered additional locations?

In the same definition and also in the revised definition of branch campus, ED removes language specifying that an additional location is “geographically apart” from the main campus and replaces it with “separate” from the main campus. Again, we seek ED’s rationale as to why they believe the language change is necessary, especially since “geographically apart” appears to be a more precise term than “separate.”

NASFAA agrees that, as transactions changing ownership of postsecondary institutions become increasingly complex, regulations need to be updated to anticipate ways that such transactions could potentially harm students or taxpayers.

Regarding ED’s change to the definition of nonprofit institution and its request for feedback as to whether it should ban all revenue-based and other agreements with former owners rather than carving out an exception for arrangements ED determines to fall within reasonable market value, we urge ED to make a decision that centers the best interests of students and institutions. We believe ED could benefit from reframing the discussion to consider not whether such

arrangements with former owners are appropriate but whether they are necessary. If arrangements are determined to be fair, it is because they are compared to alternatives, meaning that alternatives exist. If students and institutions do not stand to lose anything by banning such arrangements, ED would certainly benefit by being relieved of the burden to make determinations of reasonable market value. As an added benefit, any appearance of impropriety would be removed if all arrangements of this type with former owners were banned.

We appreciate the opportunity to comment on this proposed rule. If you have any questions regarding these comments, please contact us or NASFAA Senior Policy Analyst Jill Desjean at [desjeanj@nasfaa.org](mailto:desjeanj@nasfaa.org).

Regards,



Justin Draeger, President & CEO



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