

Comments to the Department of Education on Proposed Institutional Eligibility Regulations

(Submitted October 7, 2002)

Introduction

On behalf of our low-income clients, the National Consumer Law Center (NCLC)¹ is responding to the Department of Education's proposed rules to amend institutional eligibility provisions under the Higher Education Act (HEA). These comments are also submitted on behalf of Community Legal Services of Philadelphia and The Legal Aid Foundation of Los Angeles.

1. Program Participation Agreement/"Incentive Compensation" (§668.14)

The Existing Incentive Compensation Provisions Help Prevent Fraud

NCLC objects to the proposed changes to the "incentive compensation" regulations. We are very concerned that the proposed regulations will gut existing bans on the payment of commissions to vocational school recruiters. These rules were passed in 1992 as part of a package of legislation aimed at stopping the abusive practices of scam vocational school operators.

We object to the proposed rules on both procedural and substantive grounds. Procedurally, we are concerned that the Department chose to make this change despite a failure to achieve consensus at negotiated rulemaking sessions. Further, the Department has not provided a satisfactory rationale for the change. Negotiators including the Department failed to provide concrete examples explaining how the current regulation poses problems for legitimate schools. In contrast, there is ample evidence, including numerous recent Inspector General investigations, indicating that violations of the "incentive compensation" rules still occur and that the regulations are necessary to help prevent abusive and deceptive recruiting activity.

Congress passed the ban on commissions, bonuses and other incentive payments, 20 U.S. C. §1094(a)(20), in response to serious abuses, mainly by many for-profit vocational schools during the 1980's and early 1990's. These abuses are well documented, particularly in the report of the U.S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, "Abuses in Federal Student Aid Programs", Report #102-58, May 17, 1991 (The "Nunn Report.").

The Senate investigators and others uncovered the rampant abuses that naturally followed from tying an employee's compensation to numbers of students enrolled. Many recruiters' compensation was based not just on the numbers of students enrolled, but also on the numbers of students eligible for maximum federal aid. Compensation, in many cases, was

also connected to the length of time the student stayed in school. Enrollment contracts at these schools charged a disproportionate amount for the early parts of the program with the expectation that many students would fail to complete the program. Recruiters therefore had strong incentives to lure low-income students in, regardless of the student's ability to complete the program or even benefit at all from the program.

This competitive "drag anyone in the door" admissions system was a disgrace. Federal financial assistance should go only to those students who can benefit from higher education and only then to attend institutions that meet their needs.

The incentive compensation regulations passed in 1992 helped curb these abuses. The ban has benefited borrowers as well as legitimate schools working to provide accurate and helpful information to prospective students. There is simply no need to amend the current regulations.

The Proposed Regulations Improperly Rewrite the HEA Statute

The proposed regulations should not be finalized because they conflict with the statutory directive at 20 U.S.C. §1094(a)(20). This provision states clearly that institutions will not be eligible to participate in the financial aid programs if they provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.

The proposed rules discussed below are of particular concern:

a) §668.14(b)(22)(ii)(A) would exempt from the "incentive compensation" prohibition payment of fixed compensation (such as a fixed salary) as long as that compensation is not adjusted up or down more than twice during any twelve month period.

This provision would for the first time exempt "salary" compensation from the commission ban if adjusted no more frequently than every six months. This provision would invite schools and recruiters to game the system. For example, they could hire recruiters, pay them salaries, and then adjust salaries (upward or downward) depending on the numbers of students enrolled in the last six months. This merely delays the payment of commissions and also encourages last-minute recruiting as employees approach the six month salary adjustment period.

(b) §668.14(b)(22)(ii)(B) would exempt from the "incentive compensation" prohibition compensation to recruiters based upon their recruitment of students who enroll only in non-Title IV programs.

This provision threatens to open the door to abuses by schools luring students in to private loan products that they cannot afford. Serious problems might also arise if students, once enrolled, are then encouraged to sign up for title-IV programs.

(c) §668.14(b)(22)(E) would exempt from the “incentive compensation” prohibition compensation based upon students successfully completing the educational program.

This provision does not eliminate the types of problems that have occurred in the past. Tying commission to completion rather than enrollment will just as easily lead to abuses, particularly by schools with inferior educational services. In these cases, a student's completion of the program is not a measure of success and should not be considered as such for incentive compensation purposes.

In contrast with the 1980's and early 1990's, vocational schools are increasingly recruiting high school graduates who are more likely to complete the programs even if they are dissatisfied. In many cases, they are told they will still owe the full amount on their loans even if they withdraw. Unscrupulous vocational school operators often defraud these students even though many complete the programs. They are left in most cases without job prospects and with unmanageable student loan debt burdens.

This provision would encourage recruiters and other school personnel to make misrepresentations to enrolled students so that they will complete the programs. The school will then collect the tuition and the recruiter will collect his commission. Under these circumstances, the recruiters and other employees have a monetary incentive to make misrepresentations in order to keep dissatisfied students in school. As with the other provisions discussed in these comments, this situation would undermine the power of the incentive compensation ban and encourage fraud.

(d) §668.14(b)(22)(F) would exempt from the “incentive compensation” prohibition compensation for “pre-enrollment” activities.

Allowing commissions to be paid for these activities is a bad idea. It merely encourages the same types of aggressive and deceptive advertising practices that have caused problems in the past.

(e) §668.14(b)(22)(G) would exempt compensation to managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting.

This provision would provide an end-run around paying commissions to those directly involved in recruitment. It would also be very difficult for the Department to enforce. In most cases, determining whether commissions were paid to a school's managers or supervisors as opposed to employees will require detailed investigations of the school's internal personnel structures.

The Proposed Regulations Will Be Difficult To Enforce

The proposed regulations not only open the door to future abuse, but also pose serious compliance problems. The current statute and regulation is straightforward. The proposed rules muddy the waters considerably, adding a list of exceptions that gut the rule. In many instances, they would also require the Department to engage in intensive fact finding to

police these regulations.

There is no valid policy reason to open this floodgate again. Even if there was a problem, the proper and most equitable way to address it is through the legislative process. The Department, in fact, previously acknowledged that changes to incentive compensation could only be made through new legislation.² They should be held to their word.

2. Definition of Academic Year-“12 Hour Rule” (Sections 668.2, 668.3, 668.8)

NCLC objects to the Department’s proposal to eliminate the “12 hour rule.” The rule is one of the few quantitative standards designed to assess the quality of a school’s educational programs. It is not perfect, but it has been effective in curbing abuses.

NCLC believes in innovative programs that will help low-income borrowers gain access to higher education. If in fact the 12 hour rule is an impediment to greater education access, we are interested in working with others to figure out useful alternatives. However, instead of working collaboratively to develop alternatives, the Department has simply replaced the 12 hour rule with the “one day rule” for all institutions.

The “one day” standard is not appropriate for all schools and particularly not for those for-profit vocational schools that try to limit the amount of coursework as much as possible in order to make the highest profits. The elimination of the 12 hour rule will allow unscrupulous for-profit school operators to shorten their courses significantly, yet still charge the same tuition to financial-aid eligible students. This sends the wrong signal to these schools—that they can make the most money by offering the least amount of classroom time.

In its rationale for the elimination of the 12 hour rule, the Department states that the clock hour/credit hour conversion regulations, 34 C.F.R. §668.8(k) and (l), provide adequate safeguards. It is questionable whether this is the case since schools develop ways to get around the conversion standard. Further, this admittedly minimum amount of protection does not even apply to programs that are at least two academic years and where a degree is provided. 34 C.F.R. §668.8(k)(1),(2). Chain schools are increasingly offering these “degree” courses where quality of instruction is often inferior.

We understand that there may be some need to allow certain institutions greater flexibility in providing distance education courses or other types of “flexible” courses particularly for working students. This need to innovate, however, should be discussed in Congress with full participation of representatives from the higher education and student community.

¹ The National Consumer Law Center, Inc. is a nonprofit Massachusetts corporation, founded in 1969, specializing in consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises and annual

supplements on consumer credit laws, including Student Loan Law (2001), Unfair and Deceptive Acts and Practices (5th ed. 2001 and Supp.), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers.

2 "The Power of the Internet for Learning: Final Report of the Web-Based Education Commission", December 2000.