CECU | Career Education Colleges and Universities

November 3, 2021

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Comments of Career Education Colleges and Universities on the Intent to Establish a Negotiated Rulemaking Committee (Docket ID ED-2021-OPE-0077-1311)

Dear Secretary Cardona:

We write to comment on the U.S. Department of Education ("Department") announcement on October 4, 2021, that it intends to establish a negotiated rulemaking committee to make changes to the revenue requirement rule for proprietary institutions (Docket ID ED-2021-OPE-0077-1311).

CECU represents over 650 campuses across the country that play a vital role in the pluralistic American higher education system, serving approximately 600,000 students annually. Our institutions provide career-focused programs leading to associate, baccalaureate, master's, and doctoral degrees as well as certificate and diploma programs.

The Higher Education Amendments of 1992 created the requirement that proprietary institutions of higher education derive at least 15 percent of their revenue from sources other than Title IV programs in order to be eligible to participate in the Title IV federal student aid programs.[1] The Higher Education Amendments of 1998 changed the ratio, requiring institutions to derive at least 10 percent of their revenue from sources other than Title IV programs.[2] The Higher Education Opportunity Act of 2008 moved the statutory location of the rule to section 487(a)(24) of the Higher Education Act of 1965 (20 U.S.C. §1094(a)(24)) and created statutory revenue calculation rules, which supplanted rules formally adopted by the Department for calculating revenue.[3] Any proprietary institution that fails to meet this requirement for two consecutive institutional fiscal years is ineligible to participate in federal student aid programs for at least two institutional fiscal years.[4] This rule is colloquially referred to as the "90/10 Rule."

[1] Higher Education Amendments of 1992, Pub. L. No. 102-325, §481(b), 106 Stat. 448.
[2] Higher Education Amendments of 1998, Pub. L. No. 105-244, §102(b)(1)(F), 112 Stat. 1581.
[3] Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, §493, 112 Stat. 3078.
[4] *Id.*

On March 11, 2021, the American Rescue Plan Act of 2021 ("ARP") was signed into law by President Biden.[5] The ARP was enacted under the Congressional procedures governing budget reconciliation.

Section 2013 of the ARP amended the 90/10 Rule by changing how the numerator in the equation is calculated. Specifically, the ARP provides for institutional fiscal years starting on or after January 1, 2023, that institutions shall derive not less than 10 percent of revenue from "Federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution" which are later referred to as "Federal education assistance funds." Neither of these phrases are defined in the statute.

Congress specified that changes made under Section 2013 of the ARP will apply to institutional fiscal years beginning on or after January 1, 2023. Congress also prohibited the Department from commencing the negotiated rulemaking process earlier than October 1, 2021. Consistent with this Congressional directive, the Department began the negotiated rulemaking process by publishing the aforementioned Federal Register notice on October 4, 2021.

CECU believes the 90/10 Rule is an antiquated and poorly constructed input test that is divorced from educational quality and student outcomes. The 90/10 Rule is only concerned with what sources an institution derives its revenue from. Institutional revenue is primarily derivative of the socioeconomic status of the student population that is served. Middle and low-income students tend to rely on federal student aid to finance their education, while high-income individuals tend to pay cash for direct institutional expenses. Thus, if a high proportion of an institution's student population is middle or low-income, those institutions will tend to derive more of their revenue from federal student aid sources. Institutions that serve students well and have great student outcomes may also have a high 90/10 ratios.

CECU recognizes that this policy argument against the 90/10 Rule is beyond the scope of this rulemaking effort. We acknowledge that Congress has established the 90/10 Rule as an eligibility requirement for participation in federal student aid programs and the Department must implement that requirement, notwithstanding the arbitrary nature of its design. However, we urge the Department to take these arguments into consideration and use it as a basis to justify a narrow reading of Section 2013 of the ARP. Broadly construing the ARP amendments will hurt high-quality institutions, reduce student choices, and disincentivize institutions from serving low-income and minority students.

I. <u>The Department Should Establish a Standalone Rulemaking Committee to Negotiate the ARP Amendments</u>

CECU believes that the Department should establish a standalone negotiated rulemaking committee to implement the ARP amendments. Any institution that fails the 90/10 rule for successive fiscal years loses eligibility to participate in federal student aid programs, which makes it challenging for any institution to continue operations. Given the magnitude of these

[5] American Rescue Plan Act of 2021, Pub. L. No. 117-2, §2013, 135 Stat. 4.

consequences, we believe a standalone committee is appropriate so negotiators can carefully consider each element of the proposed rule.

Alternatively, if the Department decides not to form a separate 90/10 committee, we recommend the formation of a 90/10 subcommittee. This will enable the Department to appoint individuals that are experts in calculating the 90/10 Rule to advise the Department on the implications of various interpretations.

The 90/10 Rule applies exclusively to proprietary institutions, so we believe that proprietary institutions should be well represented at the negotiating table. Accordingly, we recommend the Department appoint several negotiators from proprietary institutions to the committee, such as those who represent large and small institutions, campuses located in urban and rural areas, institutions near military bases, institutions that serve a high portion of low-income students, and accounting professionals that provide 90/10 compliance services to proprietary institutions.

We also request that the Department publish a list of funding streams it proposes would be included within the meaning of the phrase "Federal education assistance funds" before the first rulemaking session, so that stakeholders have adequate time to consider the proposal.

II. Section 2013 of the ARP Does Not Capture GI Bill Housing Benefits as Revenue

The U.S. Department of Veterans Affairs ("VA") operates six active education programs: (1) Post-9/11 Educational Assistance (Post-9/11 GI Bill); (2) All-Volunteer Force Educational Assistance Program (Montgomery GI Bill-Active Duty or MGIB-AD); (3) Educational Assistance for Members of the Selected Reserve (Montgomery GI Bill-Selected Reserve or MGIB-SR); (4) Survivors' and Dependents' Educational Assistance (Dependents' Educational Assistance - DEA); (5) Post-Vietnam Era Veterans Educational Assistance Program (VEAP); and (6) Reserve Educational Assistance Program (REAP).[6]

When servicemembers join the military, they are automatically enrolled into the MGIB-AD or MGIB-SR that requires them to contribute $100 each month for 12 months to participate, or $1,200 total. Servicemembers may opt-out of MGIB and select to participate in the Post-9/11 GI Bill or at a later date transfer their MGIB benefits to participate in Post-9/11 GI Bill instead. For servicemembers who attend school full-time under MGIB, the VA sends payments directly to the student for up to 36 months. As of 2017, 70 percent of servicemembers were auto-enrolled in MGIB.[7] In FY 2019, the VA paid roughly $325 million in combined MGIB payments to students, which amounts to roughly 2.7 percent of all VA education benefits.[8]

Survivors' and Dependents' Educational Assistance (DEA) provides education benefits to the children and spouses of a servicemember who has died in the line of duty, are missing in action,

[6] Dep't of Vet. Affairs, Benefits for Veterans Education FY 2019, https://www.benefits.va.gov/REPORTS/abr/docs/2019-education.pdf
[7] CFPB, What does the Coast Guard know about the GI Bill that the other services do not?, (Dec. 12, 2017), https://www.consumerfinance.gov/about-us/blog/what-does-coast-guard-know-about-gi-bill-other-services-do-not/
[8] VA Report, *supra* note 6, at 10.

were detained by force by a foreign government or power during the line of duty, or if the servicemember has a permanent and total disability resulting from his or her service. Children and spouses of servicemembers that have died in the line of duty may elect to enroll in the Fry Scholarship program instead of participating in DEA, which has benefits that are very similar to Post-9/11 GI. Such persons cannot receive both DEA and Fry Scholarship benefits and must pick between the programs. DEA recipients receive direct payments of $1,224 per month for up to 36 months. In FY 2019, $861 million in benefits were paid out from this program that amounted to roughly 7.2 percent of all education benefits paid by the VA.[9]

Post-9/11 GI Bill, unlike MGIB, requires the VA to make direct payments to institutions for tuition and fees. The Post-9/11 GI Bill will cover full resident tuition at a public institution, and up to $26,042 at a non-profit or proprietary institution, with certain exceptions.[10] The payments made to institutions under the Post-9/11 GI Bill also pays a housing allowance and a book stipend directly to students (BAH). In FY 2019, $10.75 billion in benefits were paid out from this program representing just under 90 percent of all education benefits paid by the VA.[11]

20 U.S.C. § 1094(a)(24), as amended by Section 2013 of the ARP, provides that proprietary institutions of higher education shall "derive not less than ten percent of such institution's revenues from sources other than Federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution (referred to in this paragraph and subsection (d) as "Federal education assistance funds"), as calculated in accordance with subsection (d)(1)."

The VA operates all of the aforementioned education benefit programs. Each program disburses education assistance funds to or on behalf of students to enable them to attend institutions of higher education. The VA is clearly a federal agency, and thus funds disbursed by the agency directly to institutions to cover tuition, fees, and other institutional charges are captured on the '90' side of the equation under the ARP amendments.

As previously noted, GI Bill programs are designed to cover expenses beyond tuition, fees, and institutional charges. And Congress has directed VA to send payments under the MGIB, DEA, and Post-9/11 BAH programs directly to students, giving students the option to use the funds to cover direct charges or to cover living expenses. If federal funds that are used by students to cover off-campus living were counted as revenue, institutions would report funds on the '90' side that were never realized as actual revenue, creating an intolerable legal fiction where an institution's '90' revenue is artificially inflated. Thus, to avoid inadvertently considering non-revenue as revenue under the 90/10 rule, the Department should narrowly craft its rule to ensure that VA education funds that are used by students to cover off-campus living expenses are never considered revenue.

[9] *Id.*
[10] Dep't of Vet. Affairs, Post-9/11 GI Bill (Chapter 33), (last visited Nov. 1, 2021), https://www.va.gov/education/about-gi-bill-benefits/post-9-11/
[11] *Id.*

III. Funds Provided under Title I of the Workforce Innovation and Opportunity Act are Not Federal Education Assistance Funds

When an agency decides to promulgate informal rules to interpret statutes that it administers, review of the agency's interpretation of a statute is governed by the Administrative Procedure Act and by *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a court will review "whether Congress has directly spoken to the precise question at issue."[12] When statutory language is plain, the text of the statute must be enforced "according to its terms."[13] But if the text of the statute is ambiguous and "Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible."[14]

When determining whether the text of the statute is ambiguous, the interpretative task should not be confined "to examining a particular statutory provision in isolation" as the "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[15] Indeed, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.[16] Statutes must be read "as a symmetrical and coherent regulatory scheme."[17] Agencies must ensure that their construction of the statute operates harmoniously in context of the broader statute, as the "text should be interpreted in a way that renders [the statutory provisions] compatible, not contradictory."[18]

When read in isolation, Section 2013 of the ARP appears to provide the Department significant deference to define what programs should be included within the meaning of the phrase "Federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution" which are later referred to as "Federal education assistance funds." However, when read in context of the broader statute that the Act amends, the agency's discretion is significantly limited as the meaning of those phrases "become evident when placed in context."[19]

Title I of the Workforce Innovation and Opportunity Act ("WIOA") requires the U.S. Department of Labor to provide funding for states and local governments to provide job training to low-income individuals.[20] States and localities have flexibility in designing programs to support job training. These governmental entities can use the funds to contract directly with eligible training providers, or they can fund individual training accounts established on behalf of eligible students. The method in which these funds are distributed is important because 20 U.S.C.

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[12] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
[13] *King v. Burwell*, 576 U.S. 473, 486 (2015).
[14] *FDA v. Brown & Williamson Tobacco Corp.*. 529 U.S. 120, 132 (2000).
[15] *Id.*
[16] *Davis v. Mich. Dep't of the Treas.*, 489 U.S. 803, 809 (1989).
[17] *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).
[18] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (1st ed. 2012)
[19] Brown, 529 U.S. at 132.
[20] Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425.

§1094(c)(i)-(ii) provides instructive context that must be taken into consideration when construing the statute. Indeed, when properly read, 20 U.S.C. §1094(c)(i)-(ii) requires Title I WIOA funds not to be considered "federal education assistance funds."

A. WIOA Job Training Contracts with Institutions Are Exempt under 20 U.S.C. §1094(d)(1)(c)(ii)

20 U.S.C. § 1094(d)(1)(c), as amended by the ARP, provides that when calculating the 90/10 ratio, proprietary institutions of higher education shall "presume that any Federal education assistance funds that are disbursed or delivered to or on behalf of a student will be used to pay the student's tuition, fees, or other institutional charges, regardless of whether the institution credits those funds to the student's account or pays those funds directly to the student." This creates a rule where institutions must presume that federal education funds are revenue, and thus are recorded on the '90' side of the equation, even if those funds are not applied to a student's ledger balance with the institution.

The presumption under 20 U.S.C. § 1094(d)(1)(c) is expressly limited by Congress to "federal education assistance funds" that are not "funds provided under a contractual arrangement with a Federal, State, or local government agency for the purpose of providing job training to low-income individuals who are in need of that training."[21] So, in order to qualify as being exempt, the funds must: (1) be provided to an institution under a contract with a Federal, State, or local government agency; (2) be used to provide job training; and (3) the recipients of the job training benefits must be "low-income individuals" and "who are in need of that training," which is referred to in this comment as the "Three-Part Exclusion Test."

Part 1 of the Three-Part Exclusion Test—Local governments are clearly permitted to contract with a proprietary institution of higher education under Title I of WIOA. All such contracts are covered under the first part of the three-part test under 20 U.S.C. §1094(d)(1)(c)(ii) because such contracts are between an institution and a State or local government agency.

Part 2 of the Three-Part Exclusion Test—When a local government contracts with an institution under Title I of WIOA, the funds provided must be used to provide "training services" which are defined in statute and include: (1) occupational skills training, including training for nontraditional employment; (2) on-the-job training; (3) incumbent worker training …; (4) programs that combine workplace training with related instruction, which may include cooperative education programs; (5) training programs operated by the private sector; (6) skill upgrading and retraining; (7) entrepreneurial training; (8) transitional jobs which are designed, among other things, to "develop the skills that lead to entry into and retention in unsubsidized employment;"[22](9) job readiness training provided in combination with other services, (10) adult education and literacy activities; and (11) customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of the training. All of the aforementioned allowable uses satisfy the second part of the three-part test

[21] 20 U.S.C. § 1094(d)(1)(c)(ii).
[22] 29 U.S.C. § 3174(d)(5).

under 20 U.S.C. §1094(d)(1)(c)(ii) because all of the allowable uses are focused on providing job training.

Part 3 of the Three-Part Exclusion Test—When a local government contracts with an institution under Title I of WIOA, the funds must be used to benefit an individual who is: (1) unlikely or unable to obtain or retain employment, that leads to economic self-sufficiency or wages comparable to or higher than wages from previous employment; (2) in need of training services to obtain or retain employment that leads to economic self-sufficiency or wages comparable to or higher than wages from previous employment; and (3) have the skills and qualifications to successfully participate in the selected program of training services. To meet the third part of a test under 20 U.S.C. §1094(d)(1)(c)(ii), an individual must be "low-income" which is not defined. Here, in order to qualify for WIOA funds, the individual must be "unlikely or unable to obtain or retain employment, that leads to economic self-sufficiency." Individuals that are not economically self-sufficient are generally considered to be low-income.

Additionally, individuals can be eligible for WIOA if they are training for programs that will lead to wages that are "comparable to or higher than wages from previous employment." This could provide almost limitless meaning in that any individual that could be eligible so long as they have the potential for increased wages after completing a training program; however, this interpretation would be inconsistent with the best reading of the statute.

The interpretative canon *noscitur a sociis* provides that "the meaning of an unclear word or phrase, especially one in a list, should be determined by the words immediately surrounding it."[23] Here, the surrounding context makes it clear that training funds should only be used to train persons for occupations that increase an individual's wages, even if the occupation will not lead to economic self-sufficiency. Congress provided this language to ensure that training programs that could help individuals make marginal income gains could still be considered an eligible program, so long as the individual realized income gains. In turn, this means that funding under WIOA is limited to low-income individuals, including those employed in positions that do not lead to economic self-sufficiency, which satisfies the requirement under 20 U.S.C. §1094(d)(1)(c)(ii).

Lastly, in order to qualify for the exception under 20 U.S.C. §1094(d)(1)(c)(ii), the funds must be used to train individuals that "are in need of that training." WIOA includes the same criteria and requires a determination that individuals are "in need of training services," thus satisfying the last element in the three-part test.

B. WIOA Individual Training Accounts Are Exempt under 20 U.S.C. §1094(d)(1)(c)(i)

As previously mentioned, states and local governments may, in lieu of contracting for job training services, establish individual training accounts ("ITAs") to enable eligible individuals to choose what training services fit their needs. ITAs are funded directly by the state or locality using Title I, WIOA funds. Funds may only be used for training services offered by approved

[23] SCALIA, *supra* note 18, at 434-35.

providers. States and local governments work together to establish performance criteria and approve training providers. After an eligible individual has selected a training program, ITA funds can be used to pay for training programs.

20 U.S.C. §1094(d)(1)(c)(i) excludes any funds from the presumption under 20 U.S.C. §1094(d)(1)(c) that are "grant funds provided by non-Federal public agencies . . ." So, in order to qualify for the exclusion under this provision the funds must (1) be grants, and (2) be provided by non-Federal public agencies. Grants are sources of financial aid that are used to pay for educational services and do not have to be repaid.[24] Because ITA funds are used for educational services and do not need to be repaid, they are grant funds.[25]

ITA funds are provided by states and local government entities. These governmental entities administer the ITA, transfer funds into the ITA, and monitor compliance among eligible training providers. The Department of Labor is not involved in this process, and the agency does not *provide* funding to students or institutions, because that function is performed by states and local governments. Thus, these ITA funds are best understood as coming from either the state or local government, which are "non-Federal public agencies." Therefore, the best reading of this provision is that ITA WIOA funds are excluded from the presumption by way of 20 U.S.C. §1094(d)(1)(c)(i) because they are grants provided by non-Federal public agencies.

C. If WIOA Funds Were Considered Federal Education Assistance Funds, It Would Create Intolerable Inconsistences with the Presumption under 20 U.S.C. §1094(d)(1)(c)

As explained earlier, when the text of the statute is ambiguous, the interpretative task should not be confined "to examining a particular statutory provision in isolation" as the "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[26] Agencies must ensure that their construction of the statute operates harmoniously in context of the broader statute, as the "text should be interpreted in a way that renders [the statutory provisions] compatible, not contradictory."[27]

Here, if the Department were to interpret Title I WIOA funds as "federal education assistance funds," the exceptions under clauses (i) and (ii) of 20 U.S.C. § 1094(d)(1)(c) would not make sense. If WIOA contract revenue were subjected to the presumption, the following logic would apply: Institutions must presume that any WIOA funds are considered revenue when such funds are disbursed or delivered to or on behalf of a student will be used to pay the student's tuition, fees, or other institutional charges, regardless of whether the institution credits those funds to the student's account or pays those funds directly to the student, *except to the extent that the student's tuition, fees, or other institutional charges are satisfied by WIOA funds*.

[24] Dep't of Educ., Federal grants are money to help pay for college or career school, (last visited Nov. 1, 2021), https://studentaid.gov/understand-aid/types/grants .
[25] 20 C.F.R. § 663.410.
[26] Brown, 529 U.S. at 132.
[27] SCALIA, *supra* note 18, at 430.

Institutions cannot simultaneously presume that WIOA funds are used to pay direct institutional charges, except to the extent that WIOA fees are used to pay direct institutional charges. This would create an intolerable contradiction. Thus, the correct interpretation is that Congress has already spoken to the question of whether Title I WIOA funds should be included within the meaning of "federal education assistance funds" and decided that such funds should not be included. This is the only non-contradictory interpretation, and it is the Department's duty to give effect to the statute "according to its terms."[28]

IV. Training Contracts with the Department of Defense and Other Agencies are Not Federal Education Assistance Funds

Several proprietary institutions of higher education contract directly with the Department of Defense to provide training directly to employees and servicemembers. These contracts are oftentimes competitive, and institutions are selected directly by the agency based upon past performance and ability to provide the requisite services.

Funds received by institutions under these contracts is considered revenue under 20 U.S.C. §1094(d)(1)(B)(iii), as non-Title IV eligible programs that are approved by the state, accreditor, and offer an industry-recognized credential. Currently, institutions count revenue received under these programs on the '10' side of the 90/10 Rule.

Like Title I WIOA funds provided to institutions under contracts, these funds are excluded from the presumption under 20 U.S.C. §1094(d)(1)(c)(ii). As stated previously, any funds provided under a contractual arrangement with a Federal agency "for the purpose of providing job training to low-income individuals who are in need of that training." These contracts are with the federal government and provide job training benefits to individuals who need such training. Here, we urge the Department to take a broad reading of this provision, as some of these contracts certainly will benefit low-income individuals, and other individuals employed by DoD. Under a broad reading, to avoid a contradictory application of the presumption rule, the Department should exclude such contracts from being considered "federal education assistance benefits."

V. SNAP E&T and TANF Employment & Training Program Should Not Be Considered Federal Education Assistance Funds

Like Title I WIOA programs, the Supplemental Nutrition Assistance Program Employment & Training ("SNAP E&T") and the Temporary Assistance for Needy Families Employment and Training ("TANF E&T") programs are run by the states and provide job training benefits to eligible individuals. Although funds for these programs originate from the U.S. Department of Agriculture for SNAP E&T and the U.S. Department of Health and Human Services for TANF E&T, both agencies grant funds directly to the states who administer these programs.

Consistent with the analysis above for Title I of WIOA, both of these programs are excluded from the presumption under clause 20 U.S.C. § 1094(d)(1)(c)(ii). Some states contract directly with institutions to provide training to individuals who are in need of such training. All

[28] Burwell, 576 U.S. at 486.

individuals that participate in these training programs must also be receiving SNAP nutrition benefits or TANF financial assistance. To qualify for SNAP or TANF, an individual must meet a variety of eligibility criteria, including being low-income. Accordingly, these benefits meet the criteria to be excluded from the presumption under 20 U.S.C. § 1094(d)(1)(c)(ii) because the training is provided under a contract to low-income individuals who are in need of such training.

Thank you for the opportunity to submit comments in advance of the Department forming a negotiated rulemaking committee to examine regulatory changes to implement the ARP amendments. We look forward to working collaboratively with the Department in this process.

Sincerely,

Jason Altmire, DBA
President & CEO