the institute for
college access & success

405 14th Street
11th floor
Oakland, CA 94612
510.318.7900 phone
510.318.7918 fax
www.ticas.org

August 2, 2010

Jessica Finkel
U.S. Department of Education
1990 K Street, NW, Room 8031
Washington, DC 20006-8502

Dear Ms. Finkel:

I am writing to comment on the draft program integrity regulations in response to the *Federal Register* Notice of Proposed Rule Making (NPRM) published on June 18, 2010, Docket ID ED-2010-OPE-0004.

An independent, nonprofit organization, the Institute for College Access & Success works to make higher education more available and affordable for people of all backgrounds. By conducting and supporting nonpartisan research, analysis, and advocacy, the Institute aims to improve the processes and public policies that can pave the way to successful educational outcomes for students and for society.

We applaud the efforts of the Department to ensure the integrity of the federal Title IV financial aid programs. The draft regulations take substantial steps towards protecting the investment of students and taxpayers, and ensuring that aid dollars are used appropriately.

We have limited our specific comments to six areas in which we have particular expertise and the stakes for students and families are particularly high: incentive compensation; gainful employment reporting and disclosures; verification; disbursement; State authorization; and misrepresentation.

Incentive Compensation: § 668.14(b)(22)

We commend the Department for changing the incentive compensation regulations to comply with the statute. The changes in these regulations are among the most significant in the NPRM. We agree that the prior “safe harbors” were clearly contrary to the law, emboldened schools to engage in illegal and inappropriate activities, and made it extremely difficult, expensive, and time-consuming to enforce the statutory prohibition on incentive compensation. The elimination of these loopholes will help prevent the recruiter’s financial interest from superseding the student’s interest.

Prohibition of payments based on program completion: § 668.14(b)(22)(iii)(B)
We strongly agree with the Department that the statute prohibits payments based on student completions, because students cannot complete if they do not enroll. The preamble makes clear that incentive compensation based on student completions or completion rates is not allowed, and we recommend making this explicit in the regulation as well. This could be achieved by modifying the regulatory definition of "securing enrollments," so that "including through completion" follows the words "for any period of time."

Frequent changes in compensation: § 668.14(b)(22)(ii)
We share Margaret Reiter's concern that some schools will continue to use various techniques to make incentive compensation look like merit-based pay, making enforcement expensive and time-consuming. To prevent this kind of evasion or abuse, we recommend the Department set a *prima facie* threshold, so that frequent changes in pay (e.g., more than two a year) are presumed to be incentive compensation unless the institution can demonstrate otherwise. In effect, this would shift the burden to the institution to demonstrate legitimate reasons for frequent changes in pay.

Clarifications
We recommend making a few changes in the preamble and the regulation to make sure no one can argue these provisions mean something other than what the law requires and the Department intended. For example, sometimes the preamble refers to "securing enrollments" and other times to "securing enrollments or financial aid," when the provisions in question apply to both enrollments and financial aid. We recommend making the language consistent throughout to avoid attempts to evade the regulation or enforcement.

We also believe that the current rule and explanatory language should be tightened to clarify that any and all compensation based either directly *or* indirectly on securing enrollments or financial aid is prohibited.

- The preamble explanatory language related to shared services (p.34819) should be tightened to eliminate a possible, unintended loophole that could swallow the entire prohibition on incentive compensation. The language should make absolutely clear that payments for any shared services cannot be "directly or indirectly" related to success in securing enrollments or financial aid. This would make it clearer that schools may not evade the law by, for example, outsourcing whole functions and paying a base rate for a service and a higher rate for the same service if the relevant student applies, enrolls or receives aid.

- The preamble language on Internet "clicks" (p.34819) is intended to explain that an incentive payment based on the number of people who click on a link may be allowed, but not if it is based on any further conduct that is directly or indirectly related to success in securing enrollments or financial aid awards.

However, the explanation should be tightened to avoid an argument that additional activities beyond a click are allowed even if they are “directly or indirectly” related to enrollment or the awarding of aid.

- This same issue arises related to payments for contact information in both the preamble (p. 34819-20) and in the regulation itself in §668.14 (b)(22)(iii)(B)(2). We recommend the language in the preamble and regulation be tightened to make explicit that payments based on any additional activities beyond provision of a list are not allowed if they are “directly or indirectly” based on enrollment or the awarding of aid.

Gainful Employment Program Reporting and Disclosures: §668.6

In the next year alone, taxpayers will likely underwrite more than $30 billion in loans to students attending programs that are required by law to prepare them for gainful employment. We are pleased that the Department intends to begin collecting additional information to help assess the outcomes of these programs (§668.6(a), reporting requirements), and to require institutions to provide outcome data to prospective students to allow them to make more informed decisions about going to and paying for college (§668.6(b), disclosures). Better student outcome data will help to ensure that the taxpayer investment is well spent, and that students are protected from programs that over-charge and under-deliver.

However, to allow for better assessment and more meaningful disclosure of student outcomes, we make the recommendations below.

Capture student loan amounts for program non-completers, as well as those who complete: §§668.6(a) and (b)(5)

A low completion rate is one of the ways schools can fail to prepare students for gainful employment. Students who borrow but do not complete are often left carrying substantial debt without the increased earning power that should come from a completed degree or certificate. Any measure of program outcomes must include the outcomes of students who do not complete the programs. At for-profit institutions, where 88 percent of students took out federal student loans and 42 percent took out private student loans in 2007-08, students who fail to complete still need to repay these loans without the benefit of increased earnings from a credential.

Students considering enrolling in a program should know what share of students complete it. It is one thing for students to be told that 40 percent of students graduate with $20,000 in student loan debt; it is another for them to understand that the majority of students who do not complete have $15,000 in student loan debt to repay. As required for disclosure in §668(b)(5), median loan debt should be calculated separately for program completers and non-completers. Separating them would enable better comparisons between programs, and would not create the appearance of low median debt for programs with low completion rates.

To minimize the burden on programs in which only a small percentage of students take out loans, it may be appropriate to limit this collection of loan amounts to programs in which a significant share of students borrow. The goal is to ensure that potential students and the Department know when a program has high student borrowing rates and low completion rates.

Private student loans: §668.6(a)(4)
With 42 percent of students at for-profit colleges taking out private student loans in the most recent year for which data are available, it is critical that any measure of student debt include all student loans, federal and private. We anticipate that some schools may provide incomplete information about private loans, contending they do not know what private loans their students have. However, some schools package private loans, have risk-sharing agreements with private lenders, and/or provide private loans directly to their own students. Requiring schools to include any private loans about which they "know or should reasonably know" would clarify that schools cannot avoid this disclosure by feigned ignorance.

Method of disclosure: §668.6(b)
The Department specifically requested feedback on whether a Web-based approach to disclosures is the best way to provide prospective students with the intended information. We believe that the Internet is an important, but by no means exclusive, means by which prospective students gather information about college options. Many prospective students may never visit a school's Web site, or only do so after they have enrolled.

Whether disclosures have any impact *depends heavily on the medium, content <u>and</u> timing of the disclosures.* We therefore recommend the following language for the Web-based disclosure in §668.6(b): "For each program offered by an institution under this section, the institution must place the following information on its Web site in a prominent, clear, and conspicuous manner." This language gives schools flexibility in designing their Web sites, but not to bury the information on their site. The language is sufficiently commonly used to have a sound legal basis for its meaning.

In addition, we recommend the Department also require that this information be included "in a prominent, clear and conspicuous location in the first promotional materials conveyed to prospective students," and that institutions be required to provide this information to students upon first contact with the institution, and when specific programs are mentioned, whether the contact is by Internet, phone, in person or otherwise.

Required disclosures on program costs: §668.6(b)(3)
As noted in the preamble language, institutions are already required under §668.43 to disclose information about costs to current and prospective students upon request. However, students may not know to request this information and even when they do, they are frequently thwarted, or the information is provided in such a way as to obscure the program's total cost. Attachment A includes an example of a publicly traded for-profit college that does not put this information on its Web site and will not provide it to

prospective students online, even when they specifically request it. Prospective and current students need to have good information about the costs they can expect to incur.

In §668.6(b)(3), we recommend that the phrase "institutional costs" be replaced with "costs of attendance." We are concerned that "institutional costs" may be interpreted only as those costs payable to the institution, and not as the broadly used definition of college costs in the Higher Education Act. In addition, many schools report costs only by credit hour, rather than by semester, year or for the whole program, making it difficult for prospective students to compare costs at different institutions or to assess the full cost of a program. Therefore, we strongly recommend that institutions be required to provide the cost of attendance in a format that is easily comparable across institutions.

Calculation of placement rates for the purposes of required disclosure: §668.6(b)(4)
The proposed regulatory language would require all programs preparing students for gainful employment to calculate and disclose a placement rate, as defined in §668.10(g)). However, this definition of placement rate is insufficient. Some for-profit colleges have been found to have willfully manipulated their placement rates to create the appearance of unrealistically favorable student outcomes, and we are concerned that the current proposal will not prevent such abuses in the future.

The criteria for placement rate determinations should include the following:

- Count as placements only employment in an occupation (SOC code) identified by the institution as one for which it prepares students. Schools should not be permitted to call a low-paying job at a hospital for which no training is required a "related" comparable job if its program was intended to prepare students for a skilled job, such as an x-ray technician.
- Include a minimum threshold for employment, including not only the number of weeks employed but also a minimum number of hours worked per week (e.g., 32 hours per week for 13 weeks). For 19 years in California, this standard was 32 hours per week.
- Require use of a State-sponsored workforce data system in States that have one. If a State-sponsored system is not available, the institution's placement rates must meet similar standards and be verified by an independent auditor. However, requiring "an attestation engagement" alone is not sufficiently specific as attestations may vary greatly, with some simply relying on information provided by the client institution with little outside verification.[1]

Median loan debt: §668.6(b)(5)
The debt information required to be disclosed should conform to the debt information the Department proposed on July 26 be used in defining gainful employment. In particular, the loan debt disclosed should include all debt from institutions under common ownership or control or otherwise related. As discussed earlier, median loan debt should be disclosed for those who complete the program separately from those who do not.

[1] The requirement for placement rate calculations to be audited already exists in §668.10(e) in relation to the calculation defined in §668.10(g), and it should be explicit that this requirement applies to all placement rate determinations made by the institution.

Verification: Subpart E of §668

The Department has proposed significant changes to verification regulations in a variety of areas. We applaud the Department's efforts to better align verification regulations with the goal of simplifying the federal financial aid application process. We particularly appreciate the Department's eliminating the need to verify data that students and parents electronically transfer from the Internal Revenue Service (IRS) to the Free Application for Federal Student Aid (FAFSA) (§668.57).

However, we have significant concerns about one aspect of the proposal in particular, which we believe will have the unintended and unnecessary consequence of *increasing* the verification burdens for low-income students and the schools that serve them. This issue is the removal of the 30 percent cap on the number of applicants colleges are required to verify (§668.54(a)). In the preamble to the NPRM, the Department explains that removing this cap will increase the number of students subject to verification, but that selected students will generally have fewer items required for verification. The preamble indicates that the Department expects these changes— the increase in the number of students to be verified and the decrease in the number of items to be verified—to offset each other in terms of the administrative burden on schools and students. However, for several reasons explained below, this is unlikely to be the case for at least several years.

The preamble states that fewer items per student will require verification due, at least in part, to proposed changes to align the regulations with the FAFSA's new IRS Data Retrieval process. In its current pilot state, this process allows some aid applicants to draw their own income data directly from the IRS, and then electronically transfer it into the FAFSA. We have long advocated for this promising approach to FAFSA simplification, but we are concerned that it is not yet available widely enough to result in a substantial decrease in verification burdens. For the 2010-11 FAFSA, IRS Data Retrieval will only be an option for students who both apply for aid after September 11, 2010 *and* filed a federal income tax return for 2009 (some other restrictions also apply).

In addition, currently only data from the 1040, 1040A, or 1040EZ tax forms can be transferred to applicants' FAFSAs. However, most Pell-eligible applicants – the vast majority of those required to undergo verification – are not required to file these tax forms because they do not earn enough to owe federal income tax. As a result, the removal of the requirement to verify transferred IRS data will not reduce the verification burdens on these students or the schools that serve them.

Our recent research documents how the verification process can keep students from getting the aid they need and would otherwise qualify for.[2] We very much appreciate the need to ensure funds are spent appropriately, and we understand that the verification

[2] The Institute for College Access & Success. 2010. *After the FAFSA: How Red Tape Can Prevent Eligible Students from Receiving Financial Aid*. Oakland, CA: TICAS. Included as Attachment B and available online at http://ticas.org/files/pub/AfterFAFSA.pdf.

selection process has been developed over time and is a risk-based approach involving rigorous data analysis. At the 13 community colleges we analyzed, most students who were selected for and completed verification had no change in their Expected Family Contribution (EFC), and only two percent became ineligible for Pell Grants. However, students selected for verification were notably less likely to receive grants than those who were not selected. This indicates that the verification process itself may be limiting access to aid in unintended ways, and the changes under consideration may exacerbate such unintended consequences. The internal analysis of another college outside of our sample reinforces that the current verification process has substantial costs for students and schools, with relatively little change in students' eligibility. (A copy of this college's internal report, stripped of identifiers, is included as Attachment C.)

We therefore strongly recommend retaining a modified cap on the number of applicants that colleges must verify, at least until such time as all or nearly all applicants are able to electronically transfer their IRS income data into their FAFSA. One possible approach would be to set the cap at 60 percent of all recipients of federally subsidized aid at a given school. Further, we recommend that the Department codify the risk-based approach to verification selection to protect against future sub-regulatory changes to verification policy that could adversely affect eligible students.

The Department has also suggested a need for greater flexibility in the selection of information that applicants may be required to verify, and has proposed publishing a list of potential verification requirements in the Federal Register in advance of each award year (§668.56(a)). In the interest of transparency and accountability, we recommend that there be opportunity for public comment on Federal Register notices outlining the information that may be required for verification.

Disbursing Funds: §668.164(i)

While many colleges currently disburse Title IV credit balances to students before or within the first few days of classes, some wait weeks into the term before giving students the aid they need to buy books and supplies and start classes prepared. We applaud the Department's efforts to ensure that Pell Grant recipients receive credit balances in time to purchase books and supplies – an important purpose of federal student aid. Still, we outline some concerns and suggestions below.

The regulation allows colleges to provide funds for books and supplies via campus bookstore vouchers, which may not be the most affordable option for students. According to current guidance, colleges that provide bookstore vouchers in lieu of cash refunds are required to demonstrate that they provide students a "real and reasonable opportunity" to obtain materials from other vendors. Otherwise, they must consider the bookstore voucher as an institutional charge in any subsequent calculations of Return to Title IV.

The Department should clarify that colleges must provide students with alternative ways of purchasing books and supplies from a "convenient unaffiliated source" within the seven-day period. If colleges are unwilling or unable to do so, they should retain full liability for funds restricted to use in the campus bookstore.

<u>State Authorization: §600.9</u>

We strongly support the Department's view that State approval to offer postsecondary educational programs is a "substantive requirement," and we share the Department's concerns about the extent to which some States are deferring some or all of these responsibilities to other entities, typically accrediting agencies. Existing law makes clear that institutional eligibility for federal financial aid is based on three separate requirements: accreditation, state authorization, and compliance with federal requirements for administrative capability and financial responsibility. Approval from accrediting agencies, states and the federal government constitutes the "triad" of eligibility for federal financial aid, and allowing one of these three entities to shirk its responsibilities results in diminished oversight and protections for students and taxpayers.

The extent to which States may rely on accrediting agencies should be clear and limited. Accrediting agencies should never be allowed to grant authorization to operate in a state, or to review and appropriately act on complaints in lieu of the state. The preamble specifies that the regulations do not prohibit States from "relying in part upon an accrediting agency," but we believe further clarifications about the ways in which accrediting agencies may substitute for State agencies would be prudent.

Further, the extent to which States may rely on other States must also be clear. Just as the law does not allow a State to turn over its duties to an accrediting agency, so too, does the law circumscribe the extent to which States may turn over their duties to another State. States should only be allowed to rely on another State's determination if the school has no physical presence in the State and the other State's laws, authority and oversight are at least as protective of students and taxpayers. While States should be able to rely on information from other States, each State in which an institution offers programs must have independent authority to take adverse actions, including revoking authority, and to carry out its own reviews of complaints and violations of law, not just mail complaints to another State.

Because public colleges are by their very nature authorized to provide postsecondary education in a State, and they have not been the source of widespread complaints about fraud and abuse, public colleges may not need to be subject to this rule. Requiring States to reexamine their State authorization for public colleges might use precious resources that could better be used ensuring adequate oversight where it is currently most lacking and sorely needed.

<u>Misrepresentation: Subpart F of §668</u>

We support generally the revisions to the section on misrepresentation. The changes provide much needed updates, and the remedies give the Department needed flexibility. We identify below two specific changes needed to the definition of misrepresentation.

Definition of misrepresentation: §668.71(c)

The definition of misrepresentation needs to explicitly address the role of omissions in the potential misrepresentation of programs and institutions. Before the Senate Health, Education, Labor and Pensions Committee on June 24, 2010, former Sanford-Brown Institute student Yasmine Issa testified to how the institution gave her information that was false, but also withheld important information about the value of her credential and future employability. By omitting key information about her program – that the program was not accredited by the proper agency so she would not be eligible to sit for the professional exam, and that she was unlikely to find work without passing the exam – Sanford-Brown Institute substantially misrepresented the program to Ms. Issa.

The definition of misrepresentation should make clear that omission of important information constitutes misrepresentation, if such omission is likely to lead someone to make incorrect assumptions. Any such roadblocks standing between program graduates and employment in their field of preparation should be required disclosures to all prospective students, or constitute misrepresentation if they are omitted.

Testimonials required by the institution or provided under duress are rightly considered misrepresentation under the current definition, and we believe that the rule should go further. Current and prospective students who are merely requested to provide testimonials or endorsements may feel compelled to do so to remain in the good graces of the institution, and those offered an incentive to do so may not feel free to speak honestly. We recommend the following language for the last sentence of the misrepresentation definition: "Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress, in exchange for an incentive or reward, or because the institution required or requested the student to make such an endorsement or testimonial as part of the student's program."

Thank you again for your efforts in improving the integrity of the federal financial aid programs, and increasing protections for students and taxpayers. If you have any questions about our comments, please contact Debbie Cochrane at (510) 318-7900 or dcochrane@ticas.org.

Sincerely,

Lauren Asher
President

Attachment A: Screenshot of interaction on cost of a Sanford-Brown Institute program.
Attachment B: TICAS Report, *After the FAFSA: How Red Tape Can Prevent Eligible Students from Receiving Financial Aid*
Attachment C: School X Verification Research Study Project Final Report