November 8, 2021

The Honorable James Kvaal
Under Secretary
Department of Education
401 Maryland Avenue, SW
Washington, DC 20202

Dear Under Secretary Kvaal,

On behalf of the Coalition of Higher Education Assistance Organizations (COHEAO), we write to request the Department of Education rescind an August 27, 2021 electronic announcement posted on the FSA Partners website. The August 27 announcement is in direct contrast with Congressional intent for Perkins Loans, potentially violates Section 463(a) of the Higher Education Act, and contradicts current regulation.

Assignment of Federal Perkins Loans has been an ongoing discussion throughout the years between COHEAO and the Department going back to the early 2000's. Much of that discussion focused on when is the proper time for institutions to assign their loans to the Department as institutional funds are at stake and are forfeited upon assignment. The Department has historically disregarded this perspective, arguing that taxpayer interest is more important than the institutions' interest.

Utilizing historical collection data, COHEAO has taken the position that assignment at 10 years past due is a fair timeframe for both the school and the Department. In fact, COHEAO has presented data demonstrating that recoveries often increase starting 5 years after a borrower enters default status – data the Department has seemingly ignored in its recent policy announcements. Attached to this letter is updated data illustrating the timing of the resumption of payments on defaulted Perkins Loans.

In fact, timing was central to the discussion during negotiated rulemaking in 2007, when the Department attempted to negotiate mandatory assignment of Perkins loans. During those negotiations, the Department proposed language to both Section 674.8 and 674.50 adding that loans were to be assigned after 5 years. However, in the subsequent NPRM, the Department dropped the additional language in 674.50, while keeping the language in 674.8. In addition, the Department lengthened the initially proposed 5-year assignment threshold to a 7-year threshold. In the discussion accompanying the final regulation, issued November 1, 2007, the Department pointed out that this closely aligned with FFEL mandatory assignment of FFEL loans in default held by Guaranty Agencies.

Also, in the discussion of the final regulations, some commenters questioned whether the Department had the authority to mandate assignment. The Department noted that section 463(a) provided the authority for the Secretary to issue the regulations, similar to the Department's recent citations; however, the subparagraph citation used was a reference to

subparagraph (9). The Department's response notes the Secretary may add provisions to the Program Participation Agreement (PPA) that "protect the United States from unreasonable risk."

Less than one-year later Congress passed, and the President signed, HR 4137, The Higher Education Opportunity Act, into law on August 14, 2008. This bill amended section 463(a)(9) with "except that nothing in this paragraph shall be construed to permit the Secretary to require the assignment of loans to the Secretary other than as is provided for in paragraphs (4) and (5)". The provision was added in reaction to the Department's discussion in the November 1, 2007 final rule. The heading to this insertion was entitled "REVISE AUTHORITY TO PRESCRIBE ADDITIONAL FISCAL CONTROLS," which provides further insight into the intent of Congress for adding this language. This language essentially removed the flexible authority previously granted to the Secretary by narrowing that authority to only the authority provided under subparagraphs (4) and (5).

More importantly, the report language associated with this amended language offers further insight into Congressional intent, not only for the additional language, but for the entirety of subsection 463(a). The report language states "The Conferees intend to prohibit administrative measures that would weaken the program…. For this reason, the Conferees agreed to provisions clarifying that the Secretary is only permitted to require the assignment of defaulted Perkins Loans to the Secretary when an institution of higher education has knowingly failed to maintain collection records. **The fact that a loan has been in default for any period of time does not mean that the institution has failed to perform *due diligence in its collection* and is not grounds for the Secretary to require the assignment of the loan** (emphasis added)." Clearly Congress sent a strong message that the Secretary no longer had authority to create conditions for assignment, but more importantly, indicated that the intent of subsection 463(a) was about maintaining proper records and not whether a loan was in default.

In response to COHEAO questions recently posed about the August 27th announcement, the Department again cited that subparagraph 463(a)(4)(A) provides authority to the Secretary to determine the conditions for loans where an institution knowingly is failing to maintain an acceptable collection record. The Department goes on to argue that the interpretation means that a Perkins loan in a non-payment status for more than two years meets this condition. The Department is confusing, or purposely misinterpreting, "collection *record"* with a collection or payment. The statute clearly states "collection record," and the 2008 Higher Education Opportunity Act report language makes clear that merely being in default does not in fact meet the condition of knowingly failing to maintain an acceptable collection record.

The Department also has issued the August 27th announcement with disregard for the Higher Education Act and current regulations. 463(a)(4)(A) allows the Secretary to determine these conditions "in accordance with criteria **established by regulation** (emphasis added)." The announcement issued on August 27th is sub-regulatory guidance that clearly does not qualify as regulation. The Department has historically recognized these announcement as such.

In addition, as mentioned earlier, the Secretary issued final regulations on November 1, 2007 that still exist today. 34 CFR 674.8 outlines the requirements of the program participation agreement between the Department and institutions participating in the Perkins Loan program. Specifically, (d)(3) outlines that an institution shall assign a Perkins Loan under the condition outlined in (ii), which states "The loan has been in default, as defined in Sec. 674.5(c)(1), for seven or more years."

Further, paragraph (9) of 463(a) still exists in its modified state which allows the Secretary to include other reasonable provisions such that are agreed to by the Secretary **and** the institution. COHEAO is not aware of any institution that has agreed with this policy. Thus, the Department's recent announcements requiring institutions to assign loans that are more than two years in default through sub-regulatory guidance technically have no force of law and have been issued in violation of the subparagraph of the Higher Education Act cited as authority by the Department, as well as an additional subparagraph in section 463.

The efforts by the Department to force institutions to assign Perkins Loans that are more than two years in default ignores industry data, misinterprets the Higher Education Act, ignores Congressional intent and the history associated with the cited section of that law. Any enforcement of this policy on institutions could lead to a violation of the Administrative Procedure Act, as well as the Higher Education Act. Further, should the Department continue to pursue this policy, the mandated taking of institutional funds without receiving just compensation may lead to a conclusion that the Department is in violation of the 5th Amendment Takings Clause. For all of these reasons, COHEAO requests that the Department immediately rescind the August 27 announcement and any other associated guidance, and suspend efforts to pursue the corresponding policy. Further, the Department should consider establishing a process for institutions that have already been forced to assign loans through this policy to seek remuneration of the institutional portion of their forfeited funds.

Thank you for your prompt attention to this matter. Should you have any questions or points of discussion, please feel free to contact Bob Moran, Executive Director of COHEAO, at rmoran@bosepublicaffairs.com or 202-539-6488.

Cordially,

Lori Hartung
President

Robert Moran
Executive Director

Examples of loan recovery data by institutions after Perkins loans have been in default for more than two years.

Example 1 (Sevicer/Collector)

Recovery by years after default date	Recovery by $	Recovery by #	% recovered of total $	% recovered of total #
3 years	$5,574,214.94	1868	29.7%	40.1%
4 years	$3,233,471.25	1319	25.9%	39.9%
5 years	$2,110,697.96	840	21.1%	31.6%
6 years	$1,632,678.64	542	17.9%	23.6%
7 years	$1,038,610.12	381	14.5%	22.1%
8 years	$843,498.87	342	13.4%	23.6%
9 years	$713,680.24	243	13.3%	20.6%
10+ years	$2,498,127.81	1216	5.3%	11.2%

Example 2 (Servicer/Collector)

Number of accounts more than 2 years in default: 6,157

Number of accounts recovered: 2,771

Percent of accounts recovered: 45%

Volume of loans more than 2 years in default: $24,440,002

Volume of recovered loans: $5,632,332

Percent of volume recovered: 23%

Example 3 (Large institution)

Volume recovered of loans more than 2 years in default – AY ’19-‘20:	$338,895
Volume recovered of loans more than 2 years in default – AY ’20-’21:	$270,578