



★ FROM THE OFFICE OF THE PRESIDENT ★

September 9, 2010

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

RE: **Docket ID ED-2010-OPE-0012; Program Integrity: Gainful Employment**

Dear Ms. Finkel:

On behalf of the National Association of Student Financial Aid Administrators (NASFAA), please accept the following comments on the Program Integrity: Gainful Employment Notice of Proposed Rulemaking published on July 26, 2010. NASFAA represents more than 18,000 financial aid professionals who serve 16 million students each year at 2,800 colleges and universities of all types throughout the country.

We appreciate the Department's efforts to resolve a number of major objections raised during negotiated rulemaking. While we believe the Department has worked hard to make an honest and sincere attempt to rectify a disservice to students, we still have concerns about the proposed solution. We do not challenge the concepts behind the two proposed tests outlined in the NPRM, or the proposed thresholds within the tests, but we believe there is sufficient uncertainty about the details and the consequences to warrant great care in finalizing and implementing these proposed rules.

If you have any questions on any of the following comments, please do not hesitate to contact me or NASFAA's Director of Legislative and Regulatory Analysis, Joan Berkes at berkesj@nasfaa.org or 202.785.6970.

Sincerely,

Justin Draeger
President

General Observations

In general, we are concerned with the following issues:

- How do we protect students and taxpayers from low-quality educational programs that sink students into crippling or unpayable debt, **without** crippling innovation and the ability to anticipate needs for new skills, the ability to respond quickly to developing technologies and jobs, and the ability to maintain training for jobs that may only be temporarily depressed due to economic conditions but will re-emerge with the need for trained workers?
- How do we identify programs of insufficient worth to warrant use of public funds, **without** casting so wide a net that it also captures reasonably-priced programs that prepare students for needed but low-paying jobs?
- How do we differentiate programs that train students for a trade or career from programs that prepare students for a subspecialty or area of special expertise in a larger field, that are neither degree programs nor true training programs and for which gainful employment tests do not make sense?
- How can we be sure the data needed to conduct the proposed tests - especially with regard to the debt-to-income measures – is available and reliable? For example, use of Social Security records is one step removed from a primary source like the IRS (which is apparently not available to ED). Using a source that is one-step removed from the IRS introduces opportunity for error. Zero incomes are ambiguous, as they may indicate unemployment due to poor training, or a personal choice by a program graduate to stay home to raise a family rather than working, or a host of other situations including death or disability. Low income might reflect part-time employment, which could be underemployment due to underpreparation, or, again, a personal choice. Low income across a set of program graduates might be indicative of an economic downturn in just one geographic area or a temporary reversal of need for a particular career field due to general economic conditions.

There are a host of difficulties with actual implementation of the debt-to-income measures. Short of asking the individual directly why he or she had no earnings in a given year, myriad assumptions will have to be made.

Further, experiences that institutions have with the confusion of records for students with the same names, identifying students with name changes, and Social Security number issues make us very nervous about the data. We appreciate that the Department is attempting to use actual earnings to address some of the concerns raised in reaction to the original proposal to use BLS figures, and we agree it would be a more accurate assessment to do so. But we encourage the Department to make allowances for the difficulties that come up with derivation of actual data, especially without IRS cooperation and especially if institutions are not afforded access and the opportunity to verify the data used to calculate average actual earnings.

Applicability on a Program Level

Perhaps the most disconcerting aspect of the Department's initial proposal was the use of all of a student's loans, even those taken for unrelated study at another school, to assess an academic program's viability. The NPRM proposes two tests, a loan repayment rate and a debt measure. The debt measure description in proposed section 668.7(b) specifically excludes loans made at other schools, both before and after the student attended the program under assessment. The proposed rule language does not contain that same exclusion language in the description of the loan repayment rate under proposed section 668.7(c).

It is our understanding that both of the tests proposed in the NPRM—the loan repayment rate as well as the debt measures—are intended to use only loans made for attendance in the program under assessment, with an exception for attendance at another institution under the same ownership or control. We regard this as a pivotal point. If our understanding of the Department's intent is incorrect and the Department cannot or will not separate out and disregard loans made at other schools for the loan repayment test as well as the debt measures, we would not be able to support the use of that test as a measure of gainful employment.

The proposed rule language implies that loans made for attendance *at the institution* will be counted, rather than restricting loans to those made for attendance in the specific program under assessment. We would like clarification on these points:

- Does the Department plan to isolate loans down to the program level, or just to the school level?
- Will the Department be able to separate programs at the same institution with a common CIP code?

This, too, is a pivotal point. Tests of gainful employment must be applicable to an individual academic program. Whether "stackable" programs *ought* to be cumulative in terms of accrued debt is a separate question; to have a viable rule, the Department must be able to measure gainful employment for individual academic programs.

Collateral Damage, Other Existing Measures, and Hierarchies

As we read the proposed rule, and based on what we have heard from our members and others, it will be likely that various low cost community college programs with few borrowers and low levels of overall indebtedness would be subject to issuing debt warnings and disclosures. A program might have median debt of 0, but, based on the repayment rate test results, still be required to issue debt warnings and disclosures. That is nonsensical, especially when cohort default rate measures have been well within tolerances, because it could turn students away from the low-cost options we would want students to take advantage of.

We believe a hierarchal approach would be worth considering:

- If a training program has a low percentage of borrowers or a low median loan amount, no further action should be required with regard to gainful employment.
- If a short training program meets current requirements under 668.8(d)(3) and (e) regarding completion and placement rates, further questions regarding gainful employment seem misplaced.
- If an institution's 3-year cohort default rate meets an acceptable threshold, no further action should be required with regard to gainful employment. This could be modified so that a default rate for individual training programs is established and used in place of the institutional rate.
- If none of the above applies, the repayment rate would be established and if some "platinum" standard is met, no further analysis would be required. Other thresholds could still be used to determine when warnings and disclosures are necessary or when restrictions are imposed.
- If the repayment rate is not satisfactory, then look at the debt-to-income ratios. This is the measure that we believe has the most inherent questionability with regard to reliable and verifiable (by the institution) data.

Appeals

One of the most significant deficiencies in the proposed rule is the absence of any recourse on the institution's part for examining and challenging the accuracy of data used to determine program eligibility. A protocol similar to that used for ensuring the accuracy of all data used to calculate cohort default rates, including loan repayment information, should be established for both of the tests proposed in this NPRM. Appeals of loss of program eligibility should be established that parallel those available for CDR penalties, such as the participation rate index and low numbers of borrowers.

If the repayment rate excludes any consideration of former attendees who are in an in-school deferment, an appeal should be allowed based on the program's track record with regard to transfer to a higher level or more specialized program. That is, if a significant number of borrowers are not taken into account in the repayment rate because the training or education they received has qualified them to continue their education along a track that improves their employability or earnings potential, the repayment rate may be skewed because the remaining borrowers used to calculate it are not representative of the program's success.

A basis for appeal should also be established that takes into account temporary economic downturns that adversely affect certain training programs but do not fairly reflect the value of those programs. A poor economy, whether localized or widespread, should not be responsible for rendering programs ineligible. It would be short-sighted to lose programs for which a need will re-emerge when the

economy improves. The Bureau of Labor Statistics (BLS) collects and publishes the average annual unemployment rate; a review of BLS data for the past sixty years shows the median average unemployment rate to be 5.5 percent. A higher rate could be used to trigger either modification of the regulation or exclusion of years with high unemployment from the retrospective data used, or activation of a specific appeal process. For example, a trigger could be set for any year in which the average unemployment rate is at or above 6.7 percent. This figure is derived by looking at sixty years of BLS data and instead of using the 5.5 percent median rate, changing the “median” point to a 75 percent figure. This means 75 percent of those data points are below (45 years) and 25 percent are above (15 years) the 75 percent data point, which is 6.7 percent.

Effective Date and Form of Regulations

Schools need to be given sufficient time to review their CIP code assignments.

If the intent of the proposed rule is to reign in the debt incurred by students, a longer phase-in period of restrictions and ineligibility may be warranted to enable schools to get programs “into shape.” If the intent is to immediately weed out certain programs, then the proposed implementation schedule is probably effective.

In either event, however, the proposed tests are so novel to the evaluation of postsecondary programs and rife with the potential for unintended consequences that we urge ED to proceed carefully. If significant changes are made to the proposed rule, a new NPRM should be considered in place of final rules. If final rules are issued, they should be interim final rules with a specific date set for a second look, based on comments from schools on actual implementation.

Comments on Proposed Rule Language by Section

668.7(a) Gainful employment in a recognized occupation

We support the concept of two thresholds, one which sets a higher bar for the possibility of unconditional eligibility, a lower minimum bar that preserves eligibility but imposes some caveats. This approach allows institutions an opportunity to bring borderline programs up to a higher performance level.

- In clause (a)(1)(i), to what period of time does the “annual” loan repayment rate apply? Is it a fiscal year rate? An award year rate? When will the calculation be performed?
- Clauses (a)(1)(ii) and (a)(1)(iii) are inconsistent: should the thresholds be equal to or less than the specified percentage—as in (ii)—or less than the specified percentage—as in (iii)?

- In clause (3)(i), we believe the definition of affected program with regard to 668.8(c)(3) should exclude any certificate program for which a prior degree is required for admission (see also the response from the American Council on Education—ACE). The definition of eligible programs in Section 481(b) of the Higher Education Act allows this distinction, in that it refers to gainful employment in a recognized occupation only with regard to programs described in clause (1)(A), which admit students who do not have the equivalent of an associate degree. Programs described in clause (1)(B), which include undergraduate programs that require the equivalent of an associate degree for admissions and graduate or professional programs, are not required to result in a degree and are not saddled with a gainful employment caveat. Regulations governing the definitions of institution of higher education and eligible program would need conforming revision.

A further argument in support of excluding programs for which a degree is a prerequisite is one of simple common sense. Non-degree programs that enable an individual to refine expertise in his or her field of endeavor or that recognize a subspecialty or line of specialization may be associated with a recognized occupation, but the intent of the program is not necessarily training to move the individual *into* the job market or basic career field. A student who has a degree is most likely deriving income commensurate with the degree; the subsequent certificate might enhance the degree recipient's chances for promotion within the broader field, but is not in and of itself directly responsible for the employment. Rather, the certificate is more of an extension of the degree program.

Some certificates imbedded in a degree program also exist as stand-alone programs apart from the degree program, others do not. In these cases, are students enrolled in the degree program or in the certificate program? Is gainful employment applicable to imbedded certificates?

- In clause (a)(3)(vii), if CIP codes are used to match students to programs, how will ED distinguish between programs at the institution with the same CIP code? Use of CIP codes concerns us further because of the long cycle between updating of that database. How will ED improve the responsiveness of CIP codes to the need for new training programs in developing technologies?

668.7(b) Loan repayment rate

When would the repayment rate be calculated, and when would the determination of ineligibility based on the rate be made? Please give an example of the timeline applicable to the repayment rate test. For example, when will the 2012 repayment rate be calculated, what years will be used for data collection, when would ineligibility based on that rate begin (and, for future years, when would a new acceptable rate allow a program to regain eligibility), etc.

We have a fundamental concern about disregarding loans that are in a valid repayment plan, on which the borrower is meeting the obligations of the plan. The income-based and income-contingent plans were established in recognition that for some borrowers, an income pattern that is lower in early years

of repayment but increases over time should result in a corresponding sliding repayment scale, even if that means no repayment of principal might occur at first. Capturing repayment in only one year for four years' worth of borrowers entering repayment will result in inequitable treatment of borrowers on these repayment plans. By the time a borrower is in the third or fourth year of repayment, principal may be reduced, whereas if the year for which repayment is measured is the borrower's first year of repayment, no reduction of principal has yet occurred. If the Department is concerned that some schools might encourage IBR election for the wrong reason, we would hate to see the pendulum swing too far the other direction where some schools would be incentivized to discourage students from using IBR when performing loan counseling because of gainful employment calculations.

We disagree that certain deferments should not be taken into account. For example, temporary disability should not be treated any differently from the proposed public service deferments. Some of the older deferments still in effect for outstanding loans should also fall into this category, such as pregnancy or newborn child care. NCHelp's and TGs comments with regard to deferments are well taken.

- In paragraph (1), clause (i) should specify that only loans borrowed to attend the program under evaluation are included. We understand this paragraph to mean only student loans will be used, not parent loans taken on behalf of the student; is this correct? How will the Department distinguish between parent PLUS loans and graduate/professional PLUS loans, if graduate and professional programs remain subject to gainful employment requirements?
- Also in clause (1)(i), please explain why capitalized interest is included in the amount borrowed. The payment vs. capitalization of interest is a borrower choice and reflects the borrower's circumstances before and during enrollment in the program.
- Does clause (1)(ii) refer only to the denominator of the ratio, given the phrase "of all loans?" If so (or if it refers to the numerator as well, as one would expect), that should be made clearer.
- Paragraph (2) excludes loans paid in full through consolidation, but paragraph (3) does not explain how to treat consolidation loans that are in repayment, and how to treat such loans that include underlying loans made for other study.
- Also in paragraphs (2) and (3), how are loans treated that have been fully or partially satisfied as a result of discharge or cancellation (e.g., for permanent total disability)?
- In paragraph (3), is the most recently completed fiscal year the one where you stop counting who went into repayment by March 31, or the fiscal year before that where you are using the whole year? Either way, it should be made clearer.

- Also in paragraph (3), how will ED determine that a borrower's payments qualify for public service forgiveness?
- In paragraph (4), when must the borrower be in deferment to be excluded, at the time of calculation (i.e., a snapshot approach), or throughout the entire most recent FFY? Likewise, when does a forbearance or hardship deferment apply, at the time of calculation or throughout the entire recent year? This is particularly important as there are periods, sometimes brief, when mandatory forbearances are imposed. The NCHelp response gives good information on this point.

668.7(c) Debt measures

- In clauses (1)(i) and (ii), the cross-references are incorrect.
- In paragraph (c)(1), the language compares dollar amounts: the annual loan payment is less than the product of the applicable threshold times the annual earnings or discretionary income. In 668.7(a)(1)(ii) and (iii), the language uses percentages: e.g., the annual loan payment is 30% or less of discretionary income. 668.7(d) also uses percentages. This is confusing; either percentages or dollar amounts should be used throughout.
- In paragraph (2), the language concerning exclusion of loans from prior or subsequent institutions should be repeated under 668.7(b), applicable to repayment rates.
- In paragraph (2), the rule needs to articulate more clearly when and how schools are expected to "know" about private loans. Even if a school certified a private loan application, it cannot know whether or how much loan funds were actually received by the student if the proceeds do not come through the school. Are institutional loans included in the term "private educational loan?" Also, "institutional financing plans" needs further explanation in the regulation. For example, would they be regarded as debt only if an open balance remains after the student has completed the program? Does it matter whether interest is charged?
- In paragraph (3), the proposed rule language does not specify what constitutes "annual earnings." Comments on p. 43629 indicate wages are used, and comments on p. 43620 indicate the debt measure for discretionary income is modeled on the IBR, which uses AGI. For purposes of clarity, it would be helpful if the rule explained what constitutes annual earnings.

668.7(d) Debt warning disclosure

- There appears to be an error in the introductory language; with regard to the debt measures, should "at least" be "less than" or "equal to or less than?"

- In paragraph (2), institutions should be allowed to add context and explanations, such as the percentage of borrowers in a given program of study. Build in BIG fines for misrepresentation.

668.7(e) Restricted programs

- There needs to be a bright line between reasonable regulation and violation of an institution's academic purview. Section 103 of the Department of Education Organization Act and its implementing regulations found at section 3403 of Title 20 Chapter 48 Subchapter 1, as well as GEPA regulations found in section 1232(a) of Title 20 Chapter 31 Subchapter III Part 2, speak to this line. The statute prohibits the Department from exercising "...any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system...". Proposed 668.7(e), (f), and (g) blur this line and intrude on institutional purview by providing other entities (employers) with what amounts to the power to approve or disapprove curriculum, which in turn obviates the role of accrediting agencies.

668.7(g) Additional programs

- Requirements for adding new programs should be explained in section 600.10(c) to avoid confusion. For example, during some community meetings the cross-reference to 600.10(c)(1) was interpreted in conflicting ways. Section 600.10(c)(1) itself cross-references (c)(2) for exceptions, where a program that prepares students for gainful employment may be added without prior approval if it is similar to an existing eligible program. The NPRM does not amend that exception. Our understanding is that ED intends to eliminate that exception. We recommend retaining it as long as the existing program upon which the exception is based is not in a restricted status and is not subject to the debt warning.
- Projecting enrollment for five years is impracticable. Federal budget forecasting and persistent shortfalls in Pell funding have clearly demonstrated our inability to accurately predict college enrollments and use of the federal student aid programs.

668.13 Certification Procedures

- Rather than a single program causing an institution to be provisionally certified, we would like to see some consideration of the relationship between the number of programs subject to gainful employment sanctions and the total number of programs offered, or perhaps the average past enrollment in sanctioned programs versus the enrollment in all eligible programs. We understand that an institution that has a significant number of programs in danger of folding could be considered in a weakened financial status, and steps to protect federal funds may be warranted. However, if the program(s) under sanction do not threaten the institution's viability, provisional certification seems to be an unnecessary consequence to the institution as a whole.