

September 9, 2010

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

Re: ED-2010-OPE-0012: Notice of Proposed Rulemaking: Program Integrity: Gainful Employment

Dear Ms. Finkel,

I greatly appreciate the opportunity to comment on this proposed rule. The Department's goals of working to ensure taxpayer monies in support of Higher Education are effectively spent and student debt is minimized are admirable. All educators should align in support of that effort.

I hope that my comments are constructive to the process, as I have committed 32 years to career education, starting as a student and thereafter a teacher. I believe that we have a unique opportunity to work together among all sectors of higher education to build a stronger and increasingly more accessible, effective and stable mosaic of schools if we proceed with due care and mutual respect.

That mutual respect and cooperation among sectors has sometimes been hard to come by in Higher Education. But today, it is more important than ever. With the pressures created by our new economic realities, the simultaneous increase in demand for higher education and the significant changes and innovations being wrought throughout it, there is much room for sweeping positive change. There is also corresponding risk that the consequences of even small missteps will be greatly magnified.

Caution, diligence and rational, deep, thoughtful analysis of meaningful data should be the watchwords.

With respect, I believe more analysis and discussion of the proposed rule is in order, because as currently crafted I see in it the possibility for significant negative consequences which will hurt the very students it proposes to help. I have confidence that the Secretary and staff at the Department will take a thoughtful, balanced approach to this process. I would ask that you and they carefully consider my, and others, comments and delay implementation of Gainful Employment to take the time necessary to thoroughly evaluate the rule and its effects. My comments follow.

General Comments

1. If a Gainful Employment rule can be crafted which truly achieves its objectives, it must be applied to all institutions to protect more students

Students who take career oriented majors¹ at every institution, not just at career colleges, have an expectation of an economic benefit from their education and are entitled to the protections and benefits of "Gainful Employment," however ultimately defined. The rule has implied or stated objectives of:

- Ensuring that students expecting an occupational outcome from their postsecondary education are enrolling in program that in fact lead to gainful employment
- Ensuring that taxpayer support does not go to programs which overburden students with debt (in the context of their likely earnings)
- Ensuring that students do not take on excessive debt that exposes them to financial hardship and costs and consequences of default, and taxpayers to costs of default
- Ensuring that students are well informed about the factors that are necessary to make a sound choice of postsecondary educational program.

None of these objectives are applicable only to students attending for-profit institutions or non-degree programs at other institutions. Students at all institutions deserve adequate disclosure to enable them to make well informed enrollment decisions. Likewise, if it is possible to create appropriate protections, students at all institutions deserve whatever protections are available to students at any institution to guard against mistaken financial or academic choices. It would be

Modifications and comments to increase student protection

- **Apply Gainful Employment to all undergraduate (only) Career and Technical Education programs at all institutions.** It should apply to all programs currently proposed at the undergraduate level and, regardless of institutional control, to all postsecondary programs which fit the category the NCES classification of 'Career Education' ² at the undergraduate level. Presumably, students enrolling in graduate or other programs requiring a bachelors degree have sufficient prior postsecondary experience to diligently evaluate their choice. Adjust the definition of "eligible program" to accomplish this, if necessary. Given that the Department

¹ As defined in Exhibit 1.2, Levesque, K., Laird, J., Hensley, E., Choy, S.P., Cataldi, E.F., and Hudson, L. (2008). *Career and Technical Education in the United States: 1990 to 2005* (NCES 2008-035). National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education. Washington, DC.

² Ibid

believes it's acting within its authority by further defining the two words 'gainful employment' via the proposed regulation, it would seem plausible to further define 'eligible program' as well.

- **Require a highly visible disclosure ("Outcomes Disclosure") signed by enrollees prior to completion of their financial aid process and prior to starting any program at any institution, in addition to publishing such data on the school's website.** Include: completion rates; placement rates; licensure or certification exam pass rates; debt information (amounts, relationship to either, and at the institution's choice, the BLS 25th percentile and median wage or actual graduate starting wages) and, possibly, independently surveyed student, graduate and employer satisfaction rates; and any other relevant data. If required by other entities already, data provided by virtue of meeting their requirements will meet this requirement.

2. The rule should make direct program quality metrics a gateway to exemption

While repayment rates and debt loads may be indirect indicators of program quality, as they are defined in the NPRM, and within almost any conceivable alternate definition, both are significantly affected by individual student and graduate decisions and varying economic conditions. There are other metrics which more clearly indicate if a program is achieving its goals of preparing a student for employment.

Modifications to increase more direct quality metric use

- **Define a metric for complete or partial exemption.** Define a metric based upon recent data (perhaps from the prior fiscal or award year) reflecting completion and placement rates as calculated under established accrediting agency standards, or a prescribed standard in the absence of accrediting standards. Such a metric could be combined with student loan default rates or other indicators of financial efficacy. Exempt institutions with adequate performance under this metric from any aspect of Gainful Employment other than the disclosure requirements in item 1 above, or
 - Define a metric based solely upon completion and placement rates which if passed would replace the repayment metric. This would allow institutions which meet the proposed metric and the debt threshold to be fully eligible.
- **Ensure the exemption metric assures students of program quality.** Ensure that the definitions of the outcomes metrics above are appropriate via a collaborative effort between representatives of all affected sectors, the Department and any other appropriate participants.

3. The proposed rule does not accurately assess the burden or economic impact of its adoption

I believe that the entire burden analysis and economic impact analysis is materially inaccurate. Attached to these comments, and incorporated herein by reference, is a detailed explanation of my reasoning. I have also submitted this explanation under separate cover to The Office of Management and Budget.

4. The proposed rule should account for economic conditions

With due respect, the proposed rule is almost inexplicably blind to the realities of current economic conditions. Graduates of elite universities are struggling to find jobs and, but for family support, would be destitute. A review of the number and quantity of articles, blog posts and other communications regarding this would be a daunting task. Institutions should not be held accountable for major economic changes - nationally or regionally - at least in the shorter term. Otherwise, educational infrastructure which otherwise has performed effectively, will be eliminated, only to have to be rebuilt - likely with taxpayer funds- as economic recovery occurs. Provision should be made in the rule to withhold sanctions based upon economic conditions.

Specific Comments Relating to the Requirements and Metrics of Gainful Employment

1. Make metrics and thresholds more appropriately aligned with actual circumstances, more transparent and less discriminatory

Repayment rates

Modifications and comments to increase alignment with the facts

- **34 CFR 668.7(b)(3) – Repayment Calculations Should Include Payments On Loans That Are Subject To Interest-Only And Income-Based Repayment Plans** The current calculation of repayment rates excludes students who opt for interest only or, in many cases, IBR. Yet the Department promotes the use of those plans. In fact, the Department's rationale for such plans is to enable borrowers to more easily remain in good standing, out of default, and to ultimately repay their loans. Either that logic is correct or flawed. Presumably, the Department stands behind its view that the availability of such options results in a performing portfolio of loans and a borrower experience that is consonant with his/her desired outcome from his/her investment in education. Furthermore, borrowers will choose these options for a variety of reasons. For example, sophisticated borrowers may choose interest only plans because they are attempting to align their outflows for education loans more closely with their inflows from their occupation which typically increase over time. This is not a negative choice. Likewise, many women may qualify for IBR because they are working part-time,

possibly as a second income - a choice which women make more frequently than men due to family or other responsibilities.³ Many women choose careers in healthcare fields specifically for this reason. This choice is a societal and personal positive in many cases, and should not be used to penalize the institution.

- **34 CFR 668.7(b)(4) - All permitted deferments and forbearances should be excluded from the repayment calculation** Or at minimum, include all deferment and forbearance loans as repaying if prior principal reduction on them has ever taken place. It is incongruous and unfair for the Department to simultaneously promote student use of deferment, forbearance and penalize institutions based upon students choosing these options. This puts the institution in a position where it has a conflict of interest when counseling borrowers between institutionally beneficial choices and borrower beneficial choices. While institutions would likely make the right choice, it is unfair and contrary to sound public policy to create such a conflict.

Debt Burden Test

Modifications and comments to increase visibility and reduce differential effects based on population served

- **34 CFR 668.7(c)(3) - Average Annual Earnings**

The proposed rule uses Social Security Administration (SSA) wage data in the debt test. This data is inaccessible to schools, and will have varying impacts on the test (and program eligibility) based on personal choice - unrelated to program quality - as indicated below. To the extent institutions wish to access SSA data for assessment purposes, the Department should facilitate that if possible, but should use BLS wage data instead for the debt test for the reasons explained below.

- **Use BLS median wage instead of Social Security Administration actual wages to increase visibility to the institution and promote improvement.** Institutions can only plan against and adjust performance to what they can access or forecast accurately. SSA data is neither. The Department should use BLS data which is accessible to all institutions. Institutions that can see the target and measure how program's debt loads *will* relate to the target can plan and adjust accordingly. Accordingly, institutions that may underperform will know so in advance and be able to adjust by either eliminating programs or changing their structure so as to meet the standard. Using SSA data, institutions will only know if they have 'failed' the test after the fact - no improvement is possible. Furthermore, it

³ See GAO Report to Congressional Requesters, *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings*, October 2003

creates instability via uncertainty in the postsecondary education landscape. Such instability is counter to the public interest.

- **Use BLS median wage instead of Social Security Administration actual wages to minimize the detrimental differential (and possibly legally discriminatory) effect on women specifically** Mathematically, all else being equal, programs which serve a higher percentage of women will be significantly more likely to be eliminated than those serving lower percentages of women. Women's actual wages in comparable positions differ from men's wages. According to the GAO⁴, such women earn approximately 80% of their male counterparts. The GAO states that this is due to work pattern choices made by women. Women enter and exit the workforce more often and choose part-time employment more often, often to carry out family responsibilities. Using actual wage data will disadvantage programs that serve women, disadvantaging the women themselves. **There is no practical threshold at which this is untrue.** A small difference between two programs can trigger a debt test failure where there would have been a success. Using BLS data will negate that.

- **Use BLS median wage instead of Social Security Administration actual wages to minimize detrimental differential (and possibly legally discriminatory) effects based upon populations served generally** This approach also embeds some consideration the population served by allowing the program to be measured against a fixed, federally determined target wage, reducing or eliminating the impact of population based effects. For-profit sector enrollment is comprised of a higher percentage of students that are nontraditional and women than other sectors. Many are considered high risk as well. Using actual SSA data instead of BLS data will disproportionately negatively affect the programs that serve the greatest percentage of such students while leaving intact those that do not. This would seem diametrically opposed to the public interest of broadening access to and benefit from education for these populations.

- **Use BLS median instead of the originally proposed 25th percentile wage to better reflect the earnings in any given occupation** The return for earning a credential and entering a profession is realized over a long term and employees advance in salary during that time. While the 25th percentile is likely a good reflection of employed graduate starting salaries in an occupation, loan repayment takes place over 10, 20 or more years. Consequently, assuming that the average amount available to the

⁴ See GAO Report to Congressional Requesters, *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings*, October 2003

typical employed graduate during the timeframe would approximate the BLS median wage seems reasonable.

Modifications to align with actual facts and increase institutional ability to perform

- **34 CFR 668.7(c)(2) - Annual Loan Payment**
 - **Use average repayment term (or 15 years as a) for the debt tests.** The repayment term for the debt threshold should be the average term of the cohort in question's loans, not 10 years. This more closely reflects the true terms of loans issued and hence true debt burdens of graduates. It also is a mechanism for accounting for different student population characteristics, as different types of students opt for different loan durations.
 - **Exclude debt incurred for non-institutional charges or give institutions discretion to limit such debt.** Institutions are currently precluded by Department sub-regulatory guidance and otherwise limited by law from limiting student borrowing to institutional charges only. While traditional students have many non-institutional costs which are nearly universal among categories of students - such as on campus housing for resident students and commuting expense for non-resident students among other things, non-traditional students have very different and often highly variable individual circumstances, some of which require borrowing beyond tuition and some of which do not. Despite institutional advice, some students whose economic circumstances are unchanged as a result of attending school 'over-borrow.' Institutions should be at minimum given the ability to use Professional Judgment to limit borrowing beyond the amount necessary to pay tuition, fees and other institutional charges, This limitation should be based upon an analysis of the individual need of each student.

2. **Maximize opportunity to positively impact educational infrastructure while minimizing exposure to unanticipated/unintended consequences**

The various cohorts defined look back over 3 to 6 years, sometimes including students who attended as long as 7 to 10 years ago, to make a judgment as to the current efficacy of programs. This is problematic in that institutions can only have a marginal effect on these students. Estimates of the degree of impact of this regulation are imprecise, as data points by program are not easily accessible as of today. Particularly in the present economy, it is in the best interest of all students, taxpayers and the general public to maintain current capacity by maintaining those schools and programs which are acceptable and can come into full compliance with this regulation reasonably quickly.

Modifications and comments to maximize opportunity for improvement and minimize exposure to unintended consequences

- **34 CFR 668.7(d) and (f) – Effective Date**
 - **Extend implementation to 2014 or later.** This will give institutions the opportunity to advise current and future students who will comprise the cohorts against which programs will be judged in ways that will assist in hitting any performance metric. Under the currently proposed implementation scheme, institutions will be judged against a new set of standards applied to a group of students substantially all of which are out of school. This retroactive approach is contrary to any regulatory approach I have seen in the past 3 decades and is counter to public policy for fair regulation. And, it is counter to the Department's stated goal of institutional improvement and providing ongoing access to effective educational programs. The Department should not apply the debt-to-income and repayment rate ratios prior to July 1, 2014. If the Department adopts the proposed rule at the times currently stated, there should be a grace period to institutions, *with no adverse or limiting actions*, that initially fail to comply with the gainful employment regulation.

- **34 CFR 668.7(f)(2) Transition Year**
 - **Extend the annual ineligible programs transition protection cap (5% of students) to the first 2 years of implementation instead of 1 year.** This provides protection and time for Congress and/or Department to react if the regulation has significant unintended consequences. This still allows for weeding out the lowest performers as estimated by the Department (8%) in the 2 year window, so if the Department is correct in its estimate of the effect of this regulation, this should only represent insurance against unintended consequences. I believe it will be very necessary insurance.

- **34 CFR 668.7(e)(3) Restricted Programs**
 - **Limit enrollment levels in "Restricted" but still eligible programs to last award year enrollment level.** Currently, the proposed rule would limit enrollment in these programs to the average of the last 3 award year's enrollments - a reduction. This may have a detrimental affect rather than enabling improvement because institutions will likely have to scale back resources (staff and otherwise) in many programs. By limiting to the most current award year, this drives improvement while in fact limiting growth, but avoids reductions in quality that likely ensue when programs which could meet the thresholds are forced to scale back resources.

3. **Minimize impact on innovation and demand driven change**

The workforce needs more, not fewer, educational programs in high demand occupations. The number of program approvals which the Department estimates the regulation would require - 650 over the first 3 years - is vastly underestimated. Based upon the definition in the regulation, my institutions, which represent less than 1/10th of 1% of all institutions, would have had to submit at least 6 new program applications to the Department had the proposed rule been in effect for the prior three years. This would translate to 6,000 or more approvals during the three year period, an unworkable burden to the Department. The mechanism for approval is inefficient and will thwart innovation and warranted expansion of capacity by institutions that are performing effectively.

Modifications and comments to maintain capability for innovation

- **34 CFR 668.7(g) New Programs**
 - **Do not add a cumbersome approval process for new programs.** Use a different mechanism to address any concern that institutions may attempt to circumvent the rule by renaming existing programs or other means. At minimum, allow institutions to bypass Department approval entirely if:
 - BLS data shows a demand in the region where the new program is intended to be implemented, or
 - the institution is in compliance with the rule (compliance meaning programs not restricted or ineligible) with regard to programs representing 50% or more of its total enrollment or 50% of its enrollment in the same job family, or
 - the state in which the institution intends to implement the program has an approval process which requires a demand assessment

Thank you for the opportunity to comment on this proposed rule. I believe that collaboration can accomplish much and I look forward to working with the Department on this important issue.

Yours,



Randy S. Proto
Chief Executive Officer