



July 12, 2017

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400 Maryland Ave. SW.  
Room 6C111  
Washington, DC 20202

**RE: Negotiated Rulemaking Committee [ED-2017-OPE-0076-0001]**

To Whom It May Concern:

Thank you for the opportunity to comment on the Department's recently published Federal Register notice detailing its "intent to establish negotiated rulemaking committees" [ED-2017-OPE-0076-0001]. I write to express my concern that the Department's rulemaking process has been undertaken hastily, with minimal consideration of the risks and benefits presented to students and taxpayers in particular for delaying or weakening these rules, and without consideration for the effectiveness and utility of the existing regulations. In short, this rulemaking will draw Department resources away from its essential work to a premature, unnecessary, and potentially damaging process, and I urge the Department to reconsider its approach to these rules.

Key Department officials have spoken extensively about the need to reduce regulatory burden on institutions. However, all federal regulations must consider multiple facets of the costs and benefits of undertaking a regulatory process and promulgating a rule. In particular, the Department must take into account the risks that the actors within their jurisdiction present<sup>1</sup> -- including the risks to students and taxpayers of institutions that offer federally financed career-oriented programs of little or no value in the labor market, or that misrepresent the opportunities they present to students.

Those risks, in the case of higher education and in the context of these rules in particular, are substantial. The gainful employment data released in January revealed hundreds of programs across the country at which students were taking on unmanageable amounts of student debt and earning less than the minimum wage for a full-time employee. The implications of those programs are significant, both for students who enroll in programs of high costs and minimal value and waste their time and money doing so, and for taxpayers who will ultimately bear the costs of those poor-quality programs in higher default rates, income-driven repayment and other loan repayment subsidies, and wasted Pell Grant

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<sup>1</sup> E.O. 12866, §1(b)(4)

dollars. Students themselves identify better opportunities for employment as the biggest reason they enroll in college, and the costs of enrolling as one of their primary concerns in selecting a college.<sup>2</sup> Yet eliminating the gainful employment rules would serve only to reduce the amount of information students have available to make decisions, while keeping poor-performing programs in the higher education marketplace. Students have the right to better data and stronger safeguards to inform their choices, and taxpayers shouldn't have to bankroll low-quality programs--period. Moreover, if the Department takes seriously its obligation to provide relief to defrauded borrowers, failing to adequately regulate misrepresentations and other risky behaviors within the higher education industry could mean billions of dollars in additional taxpayer liabilities.

Neither the gainful employment nor the borrower defense rule has been in place long enough to have reliable conclusions about the ways in which they are working, or necessary improvements. Initial evidence, however, suggests that many of the lowest-quality gainful employment programs have been eliminated or altered by their institutions, likely in response to the looming accountability mechanisms put forth in the rule.<sup>3</sup> Just months after the release of the first round of official data, such results offer a promising indication that, where efforts at transparency and self-policing have failed, true accountability may achieve demonstrable results.

The borrower defense rule was delayed indefinitely before it even took effect, and its provisions slated for early implementation have yet to be acted upon. Given that over 64,000 claims remain in the backlog, and the Department of Education acknowledged recently that it has not approved a single claim since the new Administration came in on January 20, it seems clear that a better borrower defense process is an urgency--not one that can wait another two years.<sup>4</sup> Moreover, while the regulation is delayed, borrowers at many institutions will be obligated to enter into closed-door arbitration agreements, rather than being allowed their day in court. And institutions will be exempt from their obligation to provide financial protection to cover possible closed school or borrower defense liabilities, even when they trip up key warning signs like owing debts due to federal lawsuits; being required to submit a teach-out agreement by their accrediting agencies; or reporting excessively and consistently high cohort default rates.

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<sup>2</sup> Fishman, Rachel. "College Decisions Survey: Deciding to Go to College." *EdCentral*. May 28, 2015: <https://www.newamerica.org/education-policy/edcentral/collegedecisions/>.

<sup>3</sup> Carey, Kevin. "DeVos Is Discarding College Policies That New Evidence Shows Are Effective." *New York Times*. June 30, 2017: [https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html?\\_r=0](https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html?_r=0).

<sup>4</sup> Hensley-Clancy, Molly. "18 States Are Suing Betsy DeVos Over For-Profit College Rules." *Buzzfeed*. July 6, 2017: [https://www.buzzfeed.com/mollyhensleyclancy/19-states-are-suing-betsy-devos?utm\\_term=.kb3JAXl4eG&bftwnews#.gwyd10xKo5](https://www.buzzfeed.com/mollyhensleyclancy/19-states-are-suing-betsy-devos?utm_term=.kb3JAXl4eG&bftwnews#.gwyd10xKo5); and Stratford, Michael. "Morning Education." *Politico*. June 27, 2017: <http://www.politico.com/tipsheets/morning-education/2017/06/27/an-outside-review-of-state-essa-plans-221057>.

It's clear, then that a new rulemaking process for either of these regulations seems premature and ill-advised. I strongly urge the Department of Education to:

1. Implement both the gainful employment and borrower defense rules during renegotiations, as a demonstration of its good-faith negotiations and to uphold its commitment to borrowers;
2. Ensure students and their representatives are fairly included in the renegotiations of these rules, and are given equivalent footing to the higher education institutions that have strong financial interests in deregulation; and
3. Undertake careful and reasoned consideration of these concepts prior to negotiations, including conducting all of the necessary quantitative and qualitative analyses to drive the conversation forward. Some recommended analyses are listed below in a non-exhaustive series.

Thank you for taking the time to consider these comments; a full set of comments on each regulation is outlined below. This work must be undertaken carefully, comprehensively, and with due consideration for the gravity of their implications for students and taxpayers. Please contact me if you have questions or would like to discuss these comments further at (202) 847-4778 or [mccann@newamerica.org](mailto:mccann@newamerica.org).

Sincerely,

Clare McCann  
Deputy Director for Federal Policy  
New America | Higher Education Initiative

## Comments on Gainful Employment Rule:

The Department of Education launched its gainful employment rulemaking process to address concerns among experts in the field that tens of thousands of students were enrolled in career-focused (vocational) programs at which, even if they graduated with a degree or certificate, borrowers would have taken on more debt than they could pay back given the low value of their credentials in the labor market. Although higher education should increase a student's chances of economic mobility—and certainly does on average—these poor-performing programs have left millions of students worse off than they would have been had they not gone to college at all. They have also had significant implications for taxpayers, who are often left footing the bill for higher loan defaults and other financial aid costs. Students have had especially poor outcomes at for-profit institutions and in certificate and associate degree programs; according to Department of Education data, more than one out of every six students in a less-than-four-year program defaults on his loans.<sup>5</sup> And at for-profit institutions, the costs to students are much higher: tuition at a two-year for-profit program is more than four times that of a public two-year program.<sup>6</sup> All told, for-profit institutions produced more than 35 percent of all defaulters, despite enrolling only about 10 percent of students in the higher education system.<sup>7</sup>

After negotiating, and renegotiating, the rule, with the input of experts in the field and over 90,000 public comments, the Department published the first iteration of official debt-to-earnings rates in January 2017. While no institutions lose access to federal student aid, the data revealed over 800 programs failed the first year of the test, with graduates owing loan payments that exceeded 12 percent of their total earnings and 30 percent of their discretionary income--a relatively low bar for programs to meet.

There is evidence that the current rule is having promising results. A survey of failing programs that did not appeal their results showed that many of those programs have been discontinued by their institutions, or the institution has closed altogether.<sup>8</sup> Thanks to these actions taken by institutions, thousands of students can choose from among programs and institutions that will offer them

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<sup>5</sup> Cohort Default Rates by Institution Type. Office of Federal Student Aid.  
<https://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>.

<sup>6</sup> U.S. Department of Education, National Center for Education Statistics, Projections of Education Statistics to 1986-87; Higher Education General Information Survey (HEGIS), "Institutional Characteristics of Colleges and Universities" surveys, 1969-70 through 1985-86; "Fall Enrollment in Institutions of Higher Education" surveys, 1963 through 1985; Integrated Postsecondary Education Data System (IPEDS), "Fall Enrollment Survey" (IPEDS-EF:86-99) and "Institutional Characteristics Survey" (IPEDS-IC:86-99); IPEDS Spring 2001 through Spring 2016, Fall Enrollment component; and IPEDS Fall 2000 through Fall 2015, Institutional Characteristics component. (This table was prepared November 2016.)  
[https://nces.ed.gov/programs/digest/d16/tables/dt16\\_330.10.asp?current=yes](https://nces.ed.gov/programs/digest/d16/tables/dt16_330.10.asp?current=yes).

<sup>7</sup> Cohort Default Rates by Institution Type. Office of Federal Student Aid.  
<https://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>; and U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education Data System (IPEDS), Fall 2013 and Fall 2014, 12-Month Enrollment component. (This table was prepared April 2016.)  
[https://nces.ed.gov/programs/digest/d15/tables/dt15\\_308.10.asp?current=yes](https://nces.ed.gov/programs/digest/d15/tables/dt15_308.10.asp?current=yes).

<sup>8</sup> Carey, Kevin. "DeVos Is Discarding College Policies That New Evidence Shows Are Effective." *New York Times*. June 30, 2017: [https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html?\\_r=0](https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html?_r=0).

opportunities to improve their lots in life, rather than being funneled into poor-performing programs.

Given this early indication of success, we urge the Department to ensure that any new regulation of gainful employment retain two key pillars:

1. **Transparency:** Students have the right to accurate, comprehensive, and program-specific information. While the metrics might differ depending on the type of credential, all students want answers to critical questions like how much they can expect to borrow for the program; whether they can expect to find a well-paying job; and whether they can expect to comfortably repay their loans. Moreover, the statute clearly notes that vocational programs must lead to gainful employment, requiring the Department to take labor market outcomes into consideration as it evaluates whether or not career college programs meet a minimum bar for inclusion in the federal financial aid programs.
2. **Accountability:** Transparency is not enough to ensure institutions take action. Institutions already have access to information about high debt levels among their students, yet have typically not taken action on those programs. While the Gainful Employment rule has provided far better information about the labor market outcomes of career college programs, institutions have often failed to make needed improvements that would better align their programs with the realities of the labor market, absent real sanctions from the Department and other oversight bodies.

In approaching this regulatory process, the Department must carefully consider available data, conduct robust analyses, and share that information with the public. Below is a non-exhaustive list of recommended analyses.

- **Study programs and institutions.** The for-profit college sector has called for the gainful employment rules to be applied to all institutions. While that would be a violation of the law, which applies GE rules only to vocational programs, it is worth considering what transparency measures should be applied more broadly. To that end, the Department should:
  - *Study program-level information for each sector and type of institutions.* This information will provide critical insights to help the Department determine which metrics are most relevant to students and which provide the clearest differentiation of quality across programs.
  - *Study credential types to identify similarities and differences between certificate, associate, bachelor, master, and professional degree programs.* This information will provide a valuable exploration of credential levels and help the Department to identify which metrics are most appropriate for each credential type.

- *Reduce burden and focus accountability efforts by better targeting poor-performing and problematic institutions based on data.* Analyze differences between for-profit institutions, public institutions, and private nonprofit institutions. The Department should evaluate, within each sector, past incidences of certain behaviors that present significant risks to students and taxpayers, including: unfair or aggressive recruitment practices; reliance on Title IV revenue; overspending on recruitment activities relative to instructional activities; use of arbitration clauses; and sudden closure.
- **Study earnings and employment outcomes.** The use of the term “gainful employment” clearly indicates that labor market outcomes are central to its definition. The first round of mean and median earnings under gainful employment, released in December 2016, gave the public useful and informative data about labor market outcomes at particular programs at particular institutions; and the College Scorecard also presented helpful information about institution-wide earnings (though these data fail to capture the significant variation within institutions, across different programs). If the Department plans to depart from those approaches, it must carefully evaluate, and present data-driven analyses of, any new earnings information. At a minimum, the Department should:
  - *Assess the proper timeframe for measuring post-college earnings across different credential types.* For instance, short-term programs should be expected to have a reasonably quicker (albeit smaller) payoff than long-term ones, given the relatively shorter investment of time.
  - *Measure program-specific earnings rather than average regional earnings.* Some have called for the use of regional Bureau of Labor Statistics data in place of program-specific earnings. However, such suggestions fundamentally ignore the key benefit of program-specific earnings, which can identify programs that are failing to meet either regional averages in the field or the earnings of comparable programs. New America found, for instance, that chefs in the Chicago metropolitan area earn nearly \$49,000 per year; but the actual GE-reported earnings outcomes for all related fields at schools in Chicago are far below the BLS average, ranging from \$21,647 to \$37,236.<sup>9</sup> Relying on BLS data would be an unfair, misleading, and irresponsible approach to measuring labor market outcomes of particular programs. Students looking to compare programs in Chicago would have no way of knowing the real, significant differences in labor market outcomes between schools--and taxpayers could be on the hook for loans that borrowers can't repay as a result of those high costs and low earnings.
- **Study information on debt and repayment.** Institutions often argue that earnings fall outside of their control. Given the divergent outcomes of comparable students in comparable

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<sup>9</sup> Dancy, Kim. “Averages Aren’t Enough: Why Students Deserve Program-Level Outcomes Information.” *Ed Central*. July 9, 2017: <https://www.newamerica.org/education-policy/edcentral/averages-arent-enough-students-deserve-program-level-outcome-data/>.

programs, this seems to be, on its face, largely untrue. Putting that aside, however, debt is squarely within the control of an institution, particularly because the gainful employment rule considers median debt only up to tuition and fees--tuition and fees that are set by the institutions.<sup>10</sup> And repayment presents an important function of both debt taken on and value of the degree earned. The Department should study data on debt and repayment and provide new findings to the public and to negotiators. Specifically, the Department should:

- *Evaluate repayment behavior of those who graduated career college programs.* The landscape of student loan repayment is shifting rapidly. While the overall number of defaulters continues to rise, fewer students are defaulting or becoming delinquent for the first time; and one likely explanation is the rapidly increasing ranks of students enrolled in income-driven repayment.<sup>11</sup> These changes have implications for the best ways to measure debt and repayment, as well as the potential costs of poor-performing programs in ultimate loan forgiveness.<sup>12</sup> The Department should calculate and publish program- and institution-specific information on default rates, delinquency rates, IDR enrollment rates, and forbearance or deferment use.
- *Assess use of Parent PLUS and Grad PLUS loans, not just Stafford loans.* Too often, the Department's efforts focus solely on Stafford loan borrowing. However, if accountability or transparency mechanisms create incentives for institutions to promote PLUS loan borrowing, we must also be prepared to understand those consequences. Specifically, the Department should produce institution-wide Parent PLUS default rates, delinquency rates, and use of forbearance and deferment. For graduate students, Grad PLUS may represent the bulk of their loan debt; so the Department should produce information on Grad PLUS borrowing by program, as well as program- and institution-level information on default rates, delinquency rates, IDR enrollment rates, and forbearance or deferment use.
- **Assess the best ways to incent improvement.** One of the challenges of the federal financial aid program is that there are few opportunities to sanction institutions for their poor outcomes for students. Should the Department decide to depart from the parallel "quality improvement" and "accountability" mechanisms of the current gainful employment rule, it must produce a robust analysis assessing how a new rule will continue to correct the institutional shortcomings that exist.

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<sup>10</sup> Barrett, Ben. "How Much Would It Cost For-Profit Colleges to Pass Gainful Employment?" *Ed Central*. June 15, 2017: <https://www.newamerica.org/education-policy/edcentral/how-much-would-it-cost-profit-colleges-pass-gainful-employment/>.

<sup>11</sup> "Education Department Posts Quarterly Student Aid Data Updates and Releases Preliminary Report on the Federal Student Aid Feedback System." U.S. Department of Education. December 20, 2016: <https://www.ed.gov/news/press-releases/education-department-posts-quarterly-student-aid-data-updates-and-releases-preliminary-report-federal-student-aid-feedback-system>.

<sup>12</sup> Libassi, CJ and Ben Miller. "How Gainful Employment Reduces the Government's Loan Forgiveness Costs." Center for American Progress. June 8, 2017: <https://www.americanprogress.org/issues/education/reports/2017/06/08/433531/gainful-employment-reduces-governments-loan-forgiveness-costs/>.

- *Analyze the behaviors of gainful employment programs under the current rule.* For instance, evaluate whether institutions have reported ceasing to provide programs, losing program eligibility, or changing the program's name, CIP code, or credential level, pursuant to 34 CFR 600.21(11)(iii)-(v). For each, evaluate whether or not the program in question was failing, zone, or passing; and assess which programs were discontinued prior to the publication of earnings data under GE and which were discontinued after. These data would provide an important assessment of how institutions reacted to the threat of loss of Title IV eligibility for their current programs.
- *Assess existing market failures.* Given the rapidly changing higher education system, the Department should produce an updated analysis of the numbers of institutions, programs, and students enrolled in vocational programs, as well as how many of those programs (and their students) have poor labor market outcomes and high costs. Additionally, assess whether programs with more failing GE programs or lower earnings have closed in recent years than programs with better outcomes.
- *Consider whether there are appropriate ways to impose sanctions short of loss of Title IV eligibility to incent improvement.* If there are appropriate interim actions that can be taken to provide more incentives for institutions to improve their outcomes, the Department should assess the efficacy of such actions and share the information with the public and with policymakers on Capitol Hill. In doing so, the Department should review actions taken in recent years by states and the federal government to review instances of actions taken and the ultimate outcome for those institutions.

### Comments on Borrower Defense Rule:

In 1994, Congress added to the Higher Education Act a provision directing the Secretary of Education to establish rules to allow students who were misled by their colleges to present a defense against repayment. While it was largely dormant for many years, the collapse of Corinthian Colleges sparked an influx of many borrower defense claims. The Department lacked the infrastructure to process and resolve them in a fair and timely manner, so developed the borrower defense rule to streamline the process of resolving claims.

Given the substantial backlog of outstanding claims--and the fact that the Department has failed to process a single new claim since the Administration change in January 2017--it's clear that the Department needs such a streamlined process to speed its process of adjudicating claims quickly. Meanwhile, the Department needs to balance the fact that borrowers are owed this relief when they have been misled by their institutions with the reality that taxpayers will bear the brunt of the cost. To ensure a responsible, reasonable rule, any new regulation needs to retain three key pillars:

1. **Streamlined Process:** Any standard, process, and calculation of relief for borrowers must ensure the Department is able to manage the logistics of processing claims in a fair and timely

manner. Without such a process, there is no way to handle the outstanding backlog of more than 64,000 outstanding claims, or the impending claims from many more institutions that are sure to follow.

2. **Taxpayer Protections:** Taxpayers should not be left holding the bag for cases of misrepresentation, breach of contract, or state court judgments. Any new regulation should account for the best ways to ensure institutions are held responsible for their poor behavior, including requiring financial protection as soon as risky behaviors are detected and collecting funds for paid-out borrower defense claims.
3. **Protect Students' Right to Obtain Relief in Court:** Students cannot receive a fair opportunity to hold colleges responsible for their illegal acts if they are required to enter into arbitration proceedings, where colleges have the upper hand, when complaints arise. Nor can the Department effectively oversee the institutions within their jurisdiction unless they have access to information about the problems students are reporting in a timely manner. Arbitration is a necessary protection to ensure effective monitoring and provide borrowers with the right to have their day in court.

In approaching this regulatory process, the Department must carefully consider available data, conduct robust analyses, and share that information with the public. Below is a non-exhaustive list of recommended analyses.

- **Assess the nature of borrower defense claims.** The borrower defense claims received thus far present some of the best evidence the Department has on what it can expect to be required to deal with in the coming years under any new rule.
  - *Study the nature of the current backlog of borrower defense claims, and of those already approved.* The Department should analyze and publish the number of claims received per school; the number of schools with claims currently or previously on record; the manner in which claims are received (i.e., through individual applications or grouped by outside parties, such as legal aid entities); and the quality of information provided on applications. The Department must make good use of the expertise within the Department, including providing presentation and question-and-answer periods during negotiations with members of the Federal Student Aid office obligated to handle and process claims. This information will help guide negotiators within and outside the Department as they work to quickly process claims.
- **Evaluate the nature of closed schools and financial protection.** To ensure the Department is carefully considering taxpayer implications of borrower defense claims, it should measure and analyze institutional records and behaviors.
  - *Measure the factors most likely to lead to closed schools.* Once institutions have closed, recovering funds becomes virtually impossible. The Department should assess

factors that have led to school closure, including measuring the impact of lawsuits; findings from the Department, states, accreditors, and other federal agencies; poor outcomes, such as failing gainful employment debt-to-earnings rates and high cohort default rates; and fluctuations in Title IV revenue from year to year. Items most closely related to risk of school closure (or, despite the Department's limited experience, to risk of borrower defense claims) should require financial protection.

- *Measure taxpayer liabilities for closed schools.* In many cases, borrowers who are eligible for a closed school discharge fail to take advantage of that benefit; and evidence from the 2016 prior borrower defense rule showed it was not because those students re-enrolled and transferred their credits. The Department should evaluate underuse of this benefit to students, as well as the actual and potential costs to taxpayers from closed schools. If these data show high actual and potential costs to taxpayers, they would suggest a greater need for financial protection from institutions upfront.

### Comments on Collection Fees:

The Department has also suggested it plans to revisit regulations that prohibit collection fees on FFEL borrowers who enter repayment agreements within 60 days of defaulting on their federal student loans. Added fees can cause a defaulted borrower's loans to balloon far past what he originally owed, and make it more difficult for the borrower to return his loans to good standing. Current regulations create important and reasonable protections for borrowers; and regulatory changes allowing guaranty agencies to charge higher fees would be a mistake. Before engaging in a regulatory process on this provision, the Department should:

- **Study collection fees to evaluate the implications for borrowers and for taxpayers.** Specifically, it should examine the amounts of collection fees collected by the Department and by guaranty agencies in recent years, and the number of borrowers affected. The Department should provide data to negotiators and the public on the total amount of fees collected; the amount collected in the first 60 days following default; and the amount of fees collected through wage garnishment, the Treasury Offset Program, voluntary payments, consolidations, and rehabilitations. The Department should also assess and publish the number of borrowers who, within the first 60 days after default, rehabilitate; consolidate; or enter into a satisfactory repayment arrangement.