**INITIAL COMMENTS AND CONCERNS OF PROPRIETARY SCHOOLS**
**GAINFUL EMPLOYMENT**
**ROUND 2 | FEBRUARY 14 - 18, 2022 | SUBMITTED BY BRAD ADAMS**

The purpose of this document is to set forth initial comments and concerns of the proprietary school sector relating to the Department's proposal for a new "gainful employment" rule. These positions respond to the Department's draft regulatory text that was released in advance of the second round of negotiated rulemaking. These comments and concerns are not exhaustive, and only represent select, initial thoughts regarding the proposal. We anticipate providing a redline of the Department's proposal that incorporates the recommendations below and, where possible, addresses the noted concerns.

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## Global Comments

- <u>Insufficient time to negotiate</u>. We are deeply concerned that the time afforded to review and discuss the Department's gainful employment proposal is insufficient. The gainful employment framework is lengthy, the calculations are complex, and the stakes for proprietary institutions, in particular, are very high. It imposes a significant administrative burden, and could result in the loss of program eligibility. For institutions with only one or two programs, it could result in the closure of a school. In the past, entire rulemakings have been dedicated to this rule. In this instance, we will have two weeks at best to discuss this new proposal, which differs materially from the 2014 regulation. During that time, we must also negotiate many other complex and important proposals. Consequently, we anticipate that only a handful of days will be available to discuss this critical proposal.
- <u>Degradation of process and data quality</u>. While the Department's proposal resembles the 2014 rule promulgated by the Obama administration, this new 2022 proposal differs in many, significant ways. Most notably, this draft 2022 rule systematically omits critical mechanisms that were present in the 2014 rule and that were designed to ensure fair process and the use of the best possible data, including the "zone" for debt-to-earning (D/E) rates, the use of the lesser of the mean or median when calculating debt loads, the inclusion of transitional D/E rates for the years immediately following the implementation of the rule, the process for reviewing draft D/E rates, and the opportunity to file alternate earnings appeals. The Obama administration endorsed these mechanisms because they improved the quality and fairness of the D/E rate calculations and the implementation of the rule. We are dismayed that they have been methodically removed from this proposal, despite the agreement of the negotiators that we would begin negotiations with the 2014 rule, and despite the important purposes they served.
- <u>Application of accountability framework to all institutions and programs</u>. We previously have stated our view that all students in all programs would benefit from the D/E rate information required to be calculated under this rule, and that the eligibility of all programs should be judged under the same accountability framework. The Department has argued that it lacks the statutory authority to require degree programs at institutions of higher education (as defined at 20 U.S.C. § 1002) to comply with the "gainful employment" rule. As we repeatedly have observed, the Department has the authority to require all programs at all institutions to demonstrate compliance with D/E rate thresholds (and other metrics) under its statutory, quality assurance authority at 20 U.S.C. § 1087(d)(a)(4). There is no need to attach the Department's accountability framework to the "gainful employment" concept. Indeed, as the Department concedes, it is inherently limiting.
- <u>Requiring informational D/E rates for all programs at all institutions under 34 CFR 668.43</u>.
    - Even if the Department declines to use its statutory, quality assurance authority to extend its accountability framework to all institutions, it still can and should require <u>all</u> institutions to calculate and disclose D/E rates for informational purposes. Under 20 U.S.C. § 1092, the Department is authorized to require the calculation and disclosure of a wide range of institutional and financial assistance data. The professional licensure disclosures now required under 668.43 are based on this authority, as are the new disclosures the Department proposes to include in 668.43 in its draft proposal. Using this authority, the agency can and should move the entire D/E rate calculation and disclosure framework under 668.43, requiring <u>all</u> institutions to calculate and disclose informational D/E rates for their programs.
    - We emphasize that the Department can require <u>all</u> institutions to calculate and disclose D/E rates for informational purposes under a new and expanded 668.43, while still only using the D/E rates to determine eligibility for "gainful employment" programs under its proposed Subpart Q. The calculation and disclosure

of D/E rates for all institutions is authorized under 20 U.S.C. § 1092, while the authority to use the D/E rates to determine the eligibility of gainful employment programs, per the Department, is authorized under 20 U.S.C. § 1002.

- There is no sound policy justification for denying D/E rate information to students in degree programs at institutions of higher education. If D/E rates are deemed important and useful information, they are important and useful for all students. In fact, there is greater need among students of public and private, non-profit institutions. According to the Department's own data, in the fourth quarter of FY 2021, 5.3 million graduates of public institutions, 3.1 million graduates of private, non-profit institutions, and 2.7 million graduates of proprietary institutions are participating in Income-Driven Repayment plans. These are graduates who have represented to the Department that they are not presently able to afford their student loan debt based on their income and family size, and 8.4 million of them (76%) attended programs outside the proprietary sector.
- Finally, we stress that because both Republican and Democrat administrations appear to support the disclosure of meaningful metrics to all students (*e.g.*, professional licensure disclosures), we believe requiring the disclosure of informational D/E rates for all students is an approach that is far more likely to be supported by all future administrations, while an accountability framework that excludes the vast majority of programs and students is not.

➢ Sanctions based on pre-rule data. The Department should not impose sanctions for metrics calculated using data from years that precede the effective date of the rule. It is fundamentally unfair to sanction institutions based on program and pricing decisions that were made prior to the effective date of the rule, and that even now cannot be reversed. We also believe it would be extraordinarily inappropriate to hold institutions accountable for earnings data generated during calendar years 2020 and 2021, when the COVID-19 pandemic caused significant disruptions to employment for millions of Americans, including graduates. And D/E rates calculated using data from years that precede the effective date of the proposed rule should be for informational purposes only.

➢ Record Retention Issues. The Department should not impose sanctions for metrics calculated using data from years that exceed required record retention periods, or at least not until schools have been afforded an opportunity to adjust their policies to ensure that such records are being maintained. In almost all cases, institutions are not required to maintain student finance and financial aid records beyond five years following a student's graduation. Moreover, federal and state agencies are consistently encouraging institutions to destroy records after record retention periods have expired in order to prevent data breaches. In some cases, the proposed rule would require institutions to produce data for the sixth, seventh, eight, and ninth award years preceding the award year for which the D/E rates are being calculated.

➢ Exclusion of Graduate Programs. D/E rates calculated for graduate degree programs, including those offered by proprietary institutions, should be strictly for informational purposes. D/E rates are not an appropriate measure of "gainful employment" for graduate degree programs. Graduate students already have completed undergraduate degrees, and in many cases have significant employment experience prior to beginning their graduate program. Their future earnings will be significantly impacted by these factors, and cannot be fairly and consistently attributed to their graduate degree program. We also believe that graduate students are sophisticated and able to evaluate the costs and benefits of graduate degree programs. Finally, we are confident that when Congress created the statutory definition of proprietary institution of higher education decades ago, it did not contemplate that proprietary institutions would offer graduate degree programs in medicine, education, management, and other fields. We are unaware of evidence to suggest that Congress intended to apply a "gainful employment" framework to graduate programs.

**Definitions (668.402)**

➢ Use of 6-digit (CIP) code. The Department should use the full 6-digit CIP code to distinguish individual gainful employment programs, consistent with the design of the CIP taxonomic scheme.

- Pursuant to the CIP scheme, individual programs are assigned and distinguished by <u>6</u>-digit codes, not the first 4 digits. The first 4 digits merely signal "program groupings," which may include many different, individual programs. For example, the 4-digit program grouping 51.38 includes 23 different types of nursing programs, from Emergency Room/Trauma Nursing to Nurse Midwife. Requiring institutions to combine these many different programs when performing D/E rate calculations reduces and confuses the value of the resulting metric and related disclosures.
- We also emphasize that it is the 6-digit CIP code, not the 4-digit program grouping, that is tied to specific "recognized occupations" and should be used with any measure of gainful employment. The statutory language at 20 U.S.C. § 1002 requires proprietary institutions to offer programs that "prepare students for gainful employment in a <u>recognized occupation</u>." Per 34 CFR 600.2, a "recognized occupation" is "[i]dentified by a Standard Occupational Classification (SOC) code established by the Office of Management and Budget (OMB) or an Occupational Information Network O*Net-SOC code established by the Department of Labor." The federal government's CIP-SOC Crosswalk matches 6-digit CIP codes with 6-digit SOC codes based on their descriptions. The underlying principle is that the academic program represented by the 6-digit CIP code needs to provide the skills and knowledge required to perform in the associated, recognized occupation, represented by the 6-digit SOC code.
- Finally, we observe that the Department already has the full 6-digit CIP code in its data systems, and, in fact, already uses the full 6-digit code to distinguish programs in those systems (*e.g.*, ECAR, NSLDS).

➢ <u>Cohort Period</u>.

- The Department's proposal would measure a student's ability to repay their debt using graduate earnings as little as 18 months following graduation. For many programs across many institutions, it is often the case that graduates will not be able to fully manage their loan debt in the years immediately following their graduation. The Department's Income-Drive Repayment Plans were designed specifically with this issue in mind, permitting students to set their "monthly student loan payment at an amount that is intended to be affordable based on [the student's] income." Placing the initial measurement four years following graduation will afford graduates additional time to establish normal earning levels and, thus, better capture whether typical earnings for the program are reasonable relative to typical debt burden. This would involve revising the Department's proposal so that the two- and four-year cohort periods would begin with the fifth award year prior to the award year for which the D/E rates are calculated.
- Medical and dental programs are not the only programs with required internship or residency periods. The Department should include a similar extended cohort period for any graduate healthcare or other program with a similar internship or residency component that extends the time needed for a graduate to enter the workforce and achieve representative earnings.

**Gainful Employment Framework (668.403)**

➢ <u>D/E rate thresholds</u>. We are deeply concerned that with each iteration of the D/E rates, the Department arbitrarily changes the D/E rate thresholds for programs, in each case making it more difficult for programs to remain eligible. Under the 2011 rule, a program was only deemed failing if its annual earnings rate exceeded 12% <u>and</u> its discretionary income rate exceeded 30%. Under the 2014 rule, a program was deemed failing if its annual earnings rate exceeded 8% and its discretionary income rate exceeded 20%. However, the Department created a "zone" concept, allowing a program additional time to come into compliance if its annual earnings rate was between 8% and 12% or its discretionary income rate was between 20% and 30%. In this most recent proposal, the thresholds remain at 8% and 20% and the zone concept has been removed. This is an alarming and material deviation from the 2014 framework, and would appear to highlight the arbitrary nature of these thresholds. We are strongly opposed to this change and, at a minimum, believe the 2011 thresholds should be reinstated. We also request to see the impartial, non-partisan, peer-reviewed research supporting the Department's determination that these rate thresholds, along with the associated cohort and earnings periods, are an appropriate means by which to measure a graduate's ability to service his or her debt.

- Timeframe for loss of eligibility. Under the Department's proposal, a program would lose eligibility if it fails two out of three consecutive award years. It also is required to make significant student warnings if it fails only a single year. We emphasize here that we believe these warnings will cause irreparable harm to programs, making it impossible to recruit future students and leading to program teach-out. The current proposal affords institutions virtually no opportunity to adjust for market shifts or other unforeseen events – like a global pandemic – that negatively impact earnings for one or more years. A program that consistently prepares students for gainful employment might fail in a year like 2020 when unemployment increased dramatically. Under the Department's proposal, the program would be required to make the required warnings due to this single-year anomaly, which we believe would likely force it to close precisely when it is most needed (*i.e*., during an economic downturn when individuals are looking to retrain). We propose a program would only lose eligibility if it fails three out of four consecutive award years. This affords institutions a reasonable opportunity to adjust for market shifts or other unforeseen events. In addition, we propose the new rule specify that the Secretary has the discretion to waive sanctions for any program training students to be essential workers or to enter professions experiencing critical national job shortages.

**Calculating D/E Rates (668.404)**

- Annual Earnings Issues. The D/E rates calculated by the Department are only as good as the data upon which they are based. If the underlying data is flawed or incomplete, the rates not only fail to serve their purpose, they can be harmful. Students may be dissuaded from attending good programs and persuaded to attend poor ones. A single program institution could erroneously be forced into closure. To our great disappointment, the Department does not appear to have addressed a number of the issues that previously have been raised with the earnings data used for the calculation of the D/E rates.
  - It is entirely unclear which agency will supply the Department with the earnings data, with the result that we cannot evaluate whether that data would be routinely and accurately supplied, complete, or appropriate for the purposes of a D/E rate calculation.
  - The Department offers no mechanism to account for the impact of wage discrimination on reported earnings. It is well established that women, minorities, and groups bearing other socioeconomic characteristics are subjected to wage discrimination in the United States. At many career schools, enrollments in certain types of programs skew significantly toward one gender or another. For example, allied health and cosmetology programs tend to favor women, while automotive and trades programs tend to favor men. Minority populations at career schools in certain markets also can be very high by virtue of their location and the communities they serve. Without any mechanism to accommodate for the impact of wage discrimination on the earnings of the graduates of these programs and schools, there is a material possibility that they will produce less favorable D/E rates, and will be systematically eliminated. Proprietary schools would be encouraged to develop programs, and to locate them in markets, that will attract students who are unlikely to be subject to wage discrimination.
  - The Department offers no means by which to accommodate market events that negatively impact earnings for graduates. Events like the Great Recession and COVID-19 pandemic can result in widespread unemployment and depressed earnings. At the time an event of this nature occurs, institutions have no ability to alter the debt and cost data that would be used in a D/E rate, as it is fixed well in advance of the event occurring. As consequence, many graduates might suffer a multi-year decline in earnings performance. Under the Department's proposal, a single failing D/E rate would require warning disclosures, which would likely lead to the termination of the program. And no replacement program could be introduced for years.
  - The Department offers no solution to the problem of unreported income. As the Department is well aware, on June 28, 2017, the D.C. District Court issued an opinion and order in the matter of the American Association of Cosmetology Schools ("AACS") v. the U.S. Department of Education. In its opinion, the

District Court largely agreed with AACS, finding that the Department did not adequately address how underreported income would be treated when calculating the D/E ratios for programs like cosmetology.

- Inexplicably, the Department also has removed the critical opportunity, present in the 2014 rule, for institutions to file an alternate earnings appeal. In the AACS litigation, the Department actually leaned into the alternate earnings appeal, arguing that the availability of an "alternate earnings appeal process" justified the use of the SSA earnings, as it affords schools an opportunity to address the problem of underreported income by using alternate earnings data collected from a state data system or through a survey. With the appeal process removed, the Department would appear to have no mechanism whatsoever for addressing the unreported income issue. We also believe the appeal process represents sound policy insofar as it is a mechanism designed to improve the accuracy of the earnings information.
- In both the 2011 and 2014 gainful employment rules, the Department used the higher of the mean or median of the earnings cohort as the denominator when calculating D/E rates, on the belief that this approach best and most fairly represented the earnings for the cohort. Here the Department proposes only to use the median.
- The earnings data would appear to potentially exclude critical components, including unearned income and self-employment income. With regard to the former, many career school graduates, in particular, start their own businesses following graduation (*e.g.*, cosmetology, HVAC). In the initial years, these entrepreneurs may not have significant earned income, but would potentially have unearned income that should be captured in the calculation. With regard to the latter, self-employment earnings, captured on IRS form 1040 schedule SE, would not appear to be included in a graduate's SSA reported income.

- <u>Exclusion of Direct PLUS Loans</u>. The Department proposes to include Direct PLUS loans made to parents of dependent students when determining the debt load for the students. The D/E rate is intended to measure the ability of a student to service his or her debt. To do so, it compares the student's debt load to his or her earnings. A Direct PLUS loan is not part of the student's debt load. It is the obligation of the parent. Including it in the D/E rate calculation is illogical and wholly inappropriate. If the Department intends to include parental debt in the numerator, it must also include the earnings of the parent in the denominator.

- <u>Total Debt should exclude federal and state grant funds</u>. Students are able to borrow funds to cover living, housing, and related expenses even when they have received federal or state grant funds that cover most or all of their tuition and fees. Under the Department's proposed rule, these funds borrowed for living, housing, and related expenses are not deducted from the debt total included in the D/E rate. To ensure that institutions are not held accountable for funds borrowed in excess of what is required to pay for tuition and fees, the Department should reduce the total debt number by the amount of any federal or state grant funds that the student received and used to pay tuition and fee costs.

- <u>Assessed tuition should exclude institutional grants</u>. The Department proposes to use the total amount of tuition and fees assessed the student for his or her enrollment in the program when calculating the numerator of the D/E rate. The regulation should specify that the total amount assessed the student will be reduced by the amount of any institutional scholarships or grants the student received to attend the program. The D/E rate calculation is a student-by-student calculation that is intended to capture each student's actual total cost or debt load. Accordingly, the cost assessed should be reduced by any scholarships or grants the student received. This approach is consistent with the rule, provides more accurate data, and is particularly important given the prevalence of tuition discounting and institutional aid in higher education. Indeed, many public and private, non-profit institutions offer athletic, academic, and merit-based scholarships. And they heavily discount tuition, with some reports suggesting an average discount of as much as 50%. This approach also incentivizes institutions to grant institutional aid in order to bring programs into compliance with acceptable D/E rate thresholds, and gives them the tool to do so.

**Issuing D/E Rates (668.405)**

- Earnings Adjustment. When determining the mean and median earnings for a cohort group, the federal agency calculating these numbers should exclude any individual who has reported no income, and the Department should exclude from the calculation of the median loan debt the same number of students with the highest loan debts. A report of no income could easily represent a misreporting, an underreporting, a determination by the graduate not to seek employment, or the inability of the graduate to obtain employment due to a disability or some similar issue. It is wholly inappropriate to assume that the sole basis for an individual's reporting of no income is that he or she is unable to find employment and to penalize institutions based on this assumption.

**Determination of the D/E Rates (668.406)**

- D/E rate corrections and appeals. Under both the 2011 and the 2014 rules, the Department provided an institution with the data on which the D/E rates for a gainful employment program would be based and an opportunity to correct the data before issuing draft D/E rates. The Department then issued draft D/E rates, and the institution had the opportunity to challenge the accuracy of the rates. These processes, absent from the Department's present proposal, afforded critical opportunities for institutions to correct data. Corrected data, in turn, made for more accurate D/E rates. The Department's failure to include these processes, like the omission of the alternate earnings appeal, represents a serious degradation of process for institutions and also increases the likelihood that the D/E rates will be inaccurate and misleading.
- The 8-digit OPE ID safe harbor. As part of a reinstated process for appealing draft D/E rates, we propose that the Department perform alternate D/E rate calculations at the level of the 8-digit OPE ID (*i.e.*, individual locations). This would permit the Department to assess, and institutions to demonstrate, that while a D/E rate calculated for a program across all locations and markets might be failing, the D/E rate for programs in specific locations and markets are passing. Critically, this would allow successful programs to avoid becoming collateral damage. Further, calculations and related disclosures that are based on individual locations will be more meaningful to the students attending those locations, as they more accurately reflect the quality of instruction, operational costs, employer demand, and market characteristics of that student's specific campus. We highlight that because the Department already has the ability to gather and calculate data at the 8-digit OPE ID level, there are no system limitations that should inhibit the efficient calculation of location-specific, alternative rates.

**Consequences of the D/E Rates (668.407)**

- Period of ineligibility. Institutions should not be penalized if a program that is being responsibly retired produces failing D/E rates in final years. A program that an institution voluntarily determines to wind down could suffer a decline in D/E rates, particularly if the decision to wind down the program was based in part on market changes. Under the Department's proposal, an institution would be prohibited from reintroducing that program for three years, even if the new version is shorter, less expensive, and redesigned to be more attractive to employers.

- Loss of eligibility for continuing students. Students who have enrolled in or remained enrolled in a program with full knowledge of the program's D/E rates should be permitted to receive Title IV aid until they complete the program. The federal financial aid programs are founded, in part, on the belief that students should have the ability to choose their programs and institutions. Moreover, it is highly likely that if they lose access to aid, many students will be forced to withdraw from the program. Some may determine not to complete their education, others may be unable to find another institution willing to accept them, and others still may be required to retake classes or restart clinicals. These outcomes are all extremely negative for the student and significantly devalue the taxpayer's investment in the student's education. If the Department's aim is to protect students and to promote the successful completion of their education, its gainful employment scheme should avoid forcing mass withdrawals.
- Institutions should not lose Pell eligibility. If a program is subject to a loss of eligibility due to failing D/E rates, it should only lose access to the Direct Loan program. Students attending the institution and choosing to continue in the program should still have the opportunity to access Pell grants.

**Supplementary performance measures (668.409)**

- Performance measure concerns. We are strongly opposed to the various supplementary performance measures introduced in the Department's proposals. Apart from the D/E rates, these measures generally have no clear connection to the notion of "gainful employment," there is no discussion of how they would be calculated or otherwise determined, and there is no discussion of what thresholds would be required for compliance or why they would be appropriate. If the Department desires to require all institutions to gather and disclose additional performance information, any such proposal should be fully formed, and should be placed in 668.43.