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U.S. Department of Education
Office of Postsecondary Education
400 Maryland Ave, S.W., 5th Floor
Washington, D.C. 20202

June 20, 2023

Re: NPRM – Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB)

Docket ID ED–2023-OPE-0089

Dear Secretary Cardona & Under Secretary Kvaal,

The National Student Legal Defense Network ("Student Defense")[1] writes in response to the request for comments regarding the Notice of Proposed Rulemaking ("NPRM") published in the *Federal Register* on May 19, 2023.[2] The NPRM addresses many issues facing student loan borrowers and the Department's oversight of the programs authorized by Title IV of the Higher Education Act ("HEA"). Pub. L. No. 89-329, § 401 *et seq.*, 79 Stat. 1219, 1232 (codified as amended at 20 U.S.C. § 1070 *et seq.*). In this comment, we focus specifically on the proposed "Gainful Employment" regulations ("GE Rule"). We are commenting separately on the Department's proposals, statements, and actions regarding Financial Responsibility and Administrative Capability for institutions participating in Title IV.

The proposed GE Rule is an important step to bringing accountability back to career programs, and we believe this comment can help the Department improve the proposal in several critical ways.

I. Several Disclosures Should Be Required and Provided Directly to Students

a. The proposed regulations do not actually require any of the listed items to appear on the new disclosure website.

The Department notes that the "proposed GE rule would subject for-profit degree programs to the proposed transparency framework in 34 C.F.R. § 668.43, the transparency framework in subpart Q, and the GE program-specific eligibility requirements in subpart S." 88 Fed. Reg. 32,404. We strongly support mandating the disclosures to prospective students, including those listed for the disclosure website maintained by the Department under 34 C.F.R. § 668.43(d). However, the proposed 34 C.F.R. § 668.43(d) will (perhaps inadvertently) bless a future Secretary's decision to not

[1] Student Defense is a non-partisan organization, recognized as non-profit under section 501(c)(3) of the Internal Revenue Code, that works, through litigation and advocacy, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.
[2] Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB), 88 Fed. Reg. 32,300 (May 19, 2023).

to require any programmatic disclosures at all, aside from a separate state licensure disclosure. The proposed text states that:

> An institution must provide such information about the institution and educational programs it offers as the Secretary prescribes through a notice published in the **Federal Register** for disclosure to prospective students and enrolled students through a website established and maintained by the Secretary. 34 C.F.R. § 668.43(d)(1).

The proposed regulation goes on to list several important disclosures for this website but prefaces them by stating that:

> "The Secretary ***may include*** on the website the following items, among others:" 34 C.F.R. § 668.43(d)(1).

Courts have held that such language would not require a Secretary to include any of the listed items on the proposed disclosure website.[3] Because no disclosures are mandatory, a future Secretary could effectively gut the proposed disclosure regime without a rulemaking to rescind the disclosure provisions.

The failure to mandate particular disclosures is also impossible to square with the Department's statement in the preamble that these regulations will "require disclosures."

> Second, we propose to calculate ***and require disclosures of key information about the financial consequences of enrolling in higher education programs for almost all eligible programs at all institutions***. As we elaborate below and in the RIA, we believe this will help students understand differences in the costs, borrowing levels, and labor market outcomes of more of the postsecondary options they might be considering. It is particularly important for students who are considering or attending a program that may carry a risk of adverse financial outcomes to have access to comparable information across all sectors so they can explore other options for enrollment and potentially pursue a program that is a better financial value. 88 Fed. Reg. 32,308.

In raising this issue, we are also cognizant that mandating specific disclosures has consequences for the Department. Specifically, by providing students a regulatory *right* to information (as opposed to a right to a website, without any particular content), the Department would clarify that—should it later opt to rescind the disclosure regime—students will suffer an Article III injury-in-fact sufficient to confer standing. *See, e.g.*, *Nat'l Educ. Ass'n v. DeVos*, 345 F.Supp.3d 1127, 1141 (N.D. Cal. 2018) (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998)).

The Department has also a long history of taking the position that institutions should provide disclosures directly to students. The 2014 GE Rule mandated that institutions provide the items

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[3] *See* Order Granting In Part And Denying In Part Defendants' Motion to Dismiss, Dkt. 29 at 16, *Baltezar v. DeVos*, No. 5:20-cv-00455-EJD. (N.D.Cal.); Finding that similar language in the 2014 GE Rule did not require the Department or Secretary DeVos to collect specific information. "To the contrary, the regulation is clear that 'the Secretary identifies the information that must be included in the template.' Thus, the type of information collected is within the Secretary's discretion."

listed by the Secretary in the disclosure template directly to prospective students by hand or email before the individual enrolls or commits to the institution, and to retain an achknowledgment of the disclosure.[4] Given the Department's proffesed difficulties[5] in managing a relatively simple template that was provided to institutions under the 2014 rule, we encourage the Department to consider whether institutions providing these disclosures directly to students will be more efficient than creating a new website.[6]

b. Student Defense strongly supports the separate requirement that eligibility for state licensure is disclosed to prospective students.

Student Defense strongly supports the inclusion in the final rule of the "License/certification disclosure provision" proposed under 34 C.F.R. § 668.43(a)(5), which is to be disclosed separately from the proposed website. The Department notes this provision would:

> "Require all programs that are designed to meet educational requirements for a specific professional license or certification for employment in an occupation list all States where the institution is aware the program does and does not meet such requirements." 88 Fed. Reg. 32,408.

The absence of such a current requirement is hurting students across the country who were recruited by career programs that do not meet requirements for graduates to sit for state licensure exams. For example, the failure to disclose such information led to countless students taking out Direct Loans and using Pell Grants to spend several years completing criminal justice programs at Westwood College, only to learn after enrolling and often after completing the programs, that they were not eligible to be licensed to work as a police officer and use the credential in their state. The Department eventually had to discharge $1.5 billion to Westwood students.[7]

c. The Department provided strong support for why some disclosures such as repayment rates and licensure exam passage rates should be mandatory.

Requiring specific disclosures is critical to support and complement the purpose of the GE regulations to "increase the quality and availability of information provided directly to students." 88 Fed. Reg. 32,306. Certain disclosures, such as repayment rates, are particularly important to GE and institutions should be required to disclose such rates. "Repayment rate provides students who are interested in enrolling in low-earnings programs important information. For example, low-earnings programs that are not categorized as high debt-burden still have very high rates of student loan default and low repayment rates." 88 Fed. Reg. 32,327-8.

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4 83 Fed. Reg. at 40,173.

5 *See* Pl.'s Opp'n to Mot. to Remand, Dkt. 50, *Baltezar v. DeVos*, No. 5:20-cv-00455-EJD at 15 n.11. (N.D.Cal. Nov. 11, 2022).

6 As the Department noted in the 2014 GE Rule, requiring disclosures by the institutions with student acknowledgment "does not impose a significant burden on institutions or prospective students yet provides adequate assurance that a prospective student has received important information about the program." 79 Fed. Reg. 64,984.

7 Press Release, U.S. Dep't of Educ., Education Department Approves $1.5 Billion in Debt Relief for 79,000 Borrowers Who Attended Westwood College (Aug. 30, 2022), https://www.ed.gov/news/press-releases/education-department-approves-15-billion-debt-relief-79000-borrowers-who-attended-westwood-college.

Other disclosures such as licensure passage rates or residency placement rates are necessary to mitigate against deceptive recruitment tactics. As the Department correctly notes in its proposal, over the years schools have misrepresented career outcomes during enrollment, resulting in a substantial number of borrower defense claims being approved. 88 Fed. Reg. 32,339. Without reliable information "students and their families are vulnerable to inaccurate or misleading information when they make critical decisions about their educational investments and, based on that information, may enroll in poorly performing programs." 79 Fed. Reg. 16,426, 16,436 and 16,435 (Proposed Rules, Mar. 25, 2014) (citing to various sources including state attorneys general lawsuits against for-profit colleges and a 2012 HELP Committee investigation).

d. Rather than omit job placement rates from disclosures, the Department should require them to be disclosed and regulate how they are calculated.

In the NPRM, the Department concludes that job placement rates should not be included in the list of disclosures because the metric is "unreliable" and inconsistent across institutions. The Department explains:

> The 2019 Prior Rule also raised concerns about the inclusion of potentially unreliable metrics. We agree with this conclusion with respect to job placement and thus do not propose including job placement rates among the proposed disclosures required from institutions. Because inconsistencies in how institutions calculate job placement rates limit their usefulness to students and the public in comparing institutions and programs, until we find a meaningful and comparable measure, the Department does not rely upon job placement rates in this proposed rule. 88 Fed. Reg. at 32,309.

While there is undoubtedly inconsistency and confusion in how institutions calculate placement rates we do not agree with the Department's passive approach to the problem. The Department need look no further than the collapse of Corinthian to recall the extent to which institutions will go to mislead the public about placement rates. Rather than observe from the sidelines as institutions deceive the public with misleading rates, the Department should draw upon its authority and experience and: (i) root out inconsistencies by defining how schools must calculate placement rates (as discussed below, the Department ignores the fact that it has already done so); and (ii) require disclosure of those more standardized rates.

The problem of inconsistent and deceptive placement rates has long been known to the Department, so we need not recite it here. *See, e.g.,* 76 Fed. Reg. 34,492 (Final Rule, June 13, 2011) ("Placement rates are not comparable across institutions because they are calculated in different ways."); 79 Fed. Reg. 16,434 (NPRM, Mar. 25, 2014) ("There is growing evidence of troubling practices at many of these institutions, such as some proprietary institutions overstating job placement rates."); 84 Fed. Reg. 49,806 (Sept. 23, 2019) ("Since at least 2011, the Department had evidence that job placement rate determinations are highly subjective and unreliable.").

Until this NPRM, the Department was at least trying to take action to solve, or at least limit, the damage caused by deceptive placement rates. On October 29, 2010, the Department published final program integrity regulations (75 Fed. Reg. 66,832) requiring institutions with programs that prepare students for gainful employment in a recognized occupation to disclose key performance information on their website and in promotional materials to prospective students, including job placement rates.

This issue was raised again in the 2014, when some negotiators "strongly urged the Department to develop a national placement rate methodology for the purpose of the placement rate disclosure." 79 Fed. Reg. 16,476. The Department "agree[d] that comparable placement rate information would be valuable for prospective students" but noted that "limitations in available data preclude the development of a national placement rate methodology that is consistent across all GE programs." *Id.* In support of this finding, the Department cited a 2011 technical review panel that "determined that a single job placement rate methodology could not be developed without further study because of limitations in data systems and available data. The TRP suggested requiring greater transparency about how rates are currently calculated as an interim step for institutions disclosing these rates." *Id.*[8] In the NPRM, the Department fails to reference this study, let alone discuss whether it should be updated or mention any advances in the data systems over the last *twelve years* that would allow for increased transparency and/or standardization in how the rates are calculated.

The NPRM also fails to recognize that there are regulations in effect today that govern the manner in which certain institutions are to calculate placement rates and that the Higher Education Act requires job placement rate disclosures in many circumstances. *See* 20 § U.S.C. 1092(a)(1)(R). Since 1992, the HEA has also required "eligible programs" that are at least 300 but less than 600 clock hours of instruction to meet a "verified placement rate . . . as determined in accordance with the regulations of the Secretary." 20 USC § 1088(b)(2)(A)(i). Pursuant to this requirement, the Secretary promulgated regulations governing how such institutions "shall calculate [their] placement rate[s]." *See* 34 CFR § 668.8(g). The NPRM does not discuss why its policies or guidance on the calculations of placement rates under this regulation should not apply, or even reference that the regulation exists.

In sum, while the Department is correct to note that placement rate deception remains an issue, it can and must do more. The Department should root out placement rate inconsistencies by defining how schools must calculate the rates and requiring disclosure of those more standardized rates.

e. Courts have consistently recognized the Department's disclosure authority and the benefits of disclosures to students.

The Secretary's disclosure authority was contested by APSCU in the lawsuits challenging the 2011 and 2014 GE regulations, with the courts upholding the GE disclosure requirements and noting the Secretary's broad authority, in general, to regulate disclosures. *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 199 (D.D.C. 2015), *aff'd*, 640 F. App'x 5 (D.C. Cir. 2016); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012) [*APSCU II* and *APSCU I*, respectively].

In *APSCU II*, the court noted that the disclosure provisions of the GE regulations were designed to give the public " 'access to meaningful and comparable information about student outcomes and the

8 *See* Report and Suggestions from IPEDS Technical Review Panel #34 Calculating Job Placement Rates at 1 (June 20, 2011), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/ipeds-summary91013.pdf.

overall performance of ['gainful employment'] programs,'" 79 Fed. Reg. at 64,891—a goal that surely advances the purposes of both the Higher Education Act and Title IV (i.e., a statute and programs "administered" and "manage[d]" by the Department)." *APSCU II*, 110 F. Supp. 3d at 199.

The Department's authority to regulate *how* schools calculate and disclose program-level data also survived legal challenge. The court in *APSCU II* ultimately held that the Department's program-level disclosures were not unlawful, rejecting the argument, among others, that the disclosures conflicted with the Higher Education Act that already requires disclosures of certain institution-level information. Instead, the court found that the Department acted reasonably to fill a gap in the HEA, which did not require program-level disclosures. *APSCU II*, 110 F. Supp. 3d at 199.

II. There is Strong Support for the Proposed Eligibility Metrics

The proposed debt-to-earnings metrics are necessary to ensure that graduates of for profit and career college programs earn enough to be able to afford to repay their loans. The metrics also provide institutions with critical information to ensure that institutions are offering programs that prepare students for gainful employment in a recognized occupation. As the Department said in 2014, "we expect students, prospective students, taxpayers, and the Federal Government to receive a better return on the title IV, HEA program funds" with an eligibility framework measuring program performance.[9] Similarly, the proposed earnings premium metric will ensure that completers of gainful employment programs are better off than they were before entering the program.

a. The Baum and Schwartz study, along with additional research, supports setting discretionary income rates at 20 percent.

The Department largely relies on the same evidence as it did in the 2014 GE Rule for setting discretionary income rates at 20 percent, a 2006 study by economists Sandy Baum and Saul Schwartz.[10] The proposal notes that "Baum and Schwartz proposed benchmarks for manageable debt levels at 20 percent of discretionary income and concluded that there are virtually no circumstances under which higher debt-service ratios would be reasonable."[11] We encourage the Department to further explain why this research remains applicable and to cite to additional support for an even stricter discretionary earnings benchmark. Additional research such as a 2021 study by economist Doug Webber further supports the Department using its discretion to set a benchmark of 20 percent and suggests they could even go further and set a standard as low as 11-12 percent for a discretionary earnings metric.[12]

b. The Final Rule should cite to studies and guidelines that apply the commonly applied 8 percent mortgage standards as support for setting the annual debt-to-earnings rate.

9 79 Fed. Reg. at 64,891-92.

10 88 Fed. Reg. 32,326; citing Sandy Baum and Saul Schwartz, *How Much Debt is Too Much? Defining Benchmarks for Managing Student Debt*, The Coll. Bd. (2006), https://files.eric.ed.gov/fulltext/ED562688.pdf.

11 *Id.*

12 Douglas Webber, *When Do Students and Taxpayers See a Return? Optimal Accountability Thresholds in Higher Education*, Postsecondary Equity & Econs. Rsch. Project (Dec. 1, 2021), https://www.peerresearchproject.org/peer/research/body/2022.1.12-Webber-Paper.pdf.

The annual debt-to-earnings benchmark that the Department has proposed and asked for comment on remains 8 percent, also the same as the 2014 GE Rule. The Department's proposal notes that the "acceptable threshold of 8 percent for the annual D/E rate used in the proposed regulations has been a reasonably common mortgage- underwriting standard, as many lenders typically recommend that all non-mortgage loan installments not exceed 8 percent of the borrower's pretaxed income. Studies of student debt have accepted the 8 percent standard and some State agencies have established guidelines based on this limit."

In the 2014 GE Rule, the Department made similar statements, but cited to studies from Patricia Scherschel and Steven Harrast.[13] The Department said it also considered a study by NCES and "other studies suggested by commenters" and distinguished by the methodologies used in those analyses and the "conclusions the commenters draw from these studies."[14]

The Department was also more specific regarding agency guidelines in the 2014 GE Rule, noting that it relied on estimates of sustainable levels of non-housing debt from ratios set by the FHA and the CFPB.[15] We encourage the Department to cite to these studies or other recent studies of appropriate levels of non-housing and student debt that may be more applicable.

c. Student Defense strongly supports the inclusion of a proposed earnings premium metric in the final regulations.

In addition to a debt-to-earnings metric, we also support the addition of an "Earnings Premium" metric to determine eligibility under the Gainful Employment regulation. An Earnings Premium metric helps respond to the main expectation that students have when pursuing a postsecondary credential: for greater employability and to obtain a financially secure future. While many other tangible aspects of a postsecondary education go beyond economic outcomes, the number one reason why students pursue a postsecondary credential is to increase their employability.[16] In practical terms, this means earning more than they would have if they had not pursued a higher education in the first place.

While the debt-to-earnings metric effectively identifies high-debt programs that leave graduates unable to reasonably pay down their educational loans, it still allows for some very low-performing programs to remain eligible to Title IV funding, even though graduates leave with limited to no economic return whatsoever. For example, through the Gainful Employment data released in 2016, the Department data showed 1,847 programs leaving the majority of their graduates earning below the federal poverty line.[17] Even so, over 1,700 of those programs still passed the Gainful

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[13] 79 Fed. Reg. at 64,919 (citing Scherschel, P. (1998). Student Indebtedness: Are Borrowers Pushing the Limits? USA Group Foundation; Harrast, S.A. (2004). Undergraduate Borrowing: A Study of Debtor Students and their Ability to Retire Undergraduate Loans. NASFAA Journal of Student Financial Aid, 34(1), 21–37; King, T., & Frishberg, I. (2001)).

[14] *Id.*

[15] 79 Fed. Reg. 64,890, 64,922 (Oct. 31, 2014) (internal footnotes and citations omitted).

[16] Ellen Bara Stolzenberg et al., *The American Freshman: National Norms Fall 2019*, Coop. Inst. Rsch. Program at 42 (2020), https://www.heri.ucla.edu/monographs/TheAmericanFreshman2019.pdf.

[17] Michael Itzkowitz et al., *Limiting Federal Funding to Higher Ed Programs that Leave Students in Poverty*, Third Way (June 6, 2018), https://www.thirdway.org/report/limiting-federal-funding-to-higher-ed-programs-that-leave-students-in-poverty.

Employment metric during that time without an earnings premium metric in place to mitigate subpar educational offerings.[18]

Numerous academic researchers and higher educational associations have also begun to use a high school earnings threshold as a minimum earnings economic benchmark to determine whether or not a specific institutions or specific college programs are worth the time and money that students and taxpayers invest.[19] For example, Cellini and Blanchard (2022) used a high school earnings metric—just as is used in the proposed Gainful Employment rule—and determined it as having the potential for a "clear, simple, and intuitive threshold against which to measure the gains from postsecondary education."[20] Similarly, Matsudaira and Turner (2020) also proposed a minimum high school earnings threshold "that programs and institutions should meet in order to qualify for participation in federal student aid programs with the goal of protecting students from financial harm."[21] While we encourage the Department to investigate whether a more nuanced comparison of a relative earnings cohort student in comparison to college graduates is feasible (i.e. using county-wide data for graduates who live in lower-income locals in comparison to state-wide earnings data), we strongly support the use of an earnings premium—in general—to ensure that taxpayer funds are protected and that risk is minimized for student borrowers who enroll in Gainful Employment programs.

The Department invites "public comments concerning the possible use of an established list, such as list of persistent poverty counties compiled by the Economic Development Administration, to identify such locales, along with comments on what specific adjustments, if any, the Department should make to the earnings threshold to accommodate in a fair and data- informed manner programs serving those populations."[22]

The NPRM includes a proposed definition of "earnings threshold" calculated as "median earnings for working adults aged 25–34, who either worked during the year or indicated they were unemployed when interviewed, with only a high school diploma (or recognized equivalent)—(1) In the State in which the institution is located; or (2) Nationally, if fewer than 50 percent of the students in the program are located in the State where the institution is located while enrolled."[23] This definition is used to calculate and determine whether an institution passes the new "earnings premium measure"[24]

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18 Michael Itzkowitz & Clare Bain, *How Low Does The Gainful Employment Bar Go?*, Third Way (Sept. 26, 2017), https://www.thirdway.org/infographic/how-low-does-the-gainful-employment-bar-go.

19 Measuring Value, Postsecondary Value Comm'n (last visited June 20, 2023), https://postsecondaryvalue.org/our-work/measuring-value/; *see also* Michael Itzkowitz, *Which College Programs Give Students the Best Bang for Their Buck?*, The HEA Group (Aug. 13, 2021), https://www.theheagroup.com/blog/which-college-programs-give-students-the-best-bang-for-their-buck.

20 Stephanie Riegg Cellini & Kathryn J. Blanchard, *Using a High School Earnings Benchmark to Measure College Student Success Implications for Accountability and Equity*, Postsecondary Equity & Econs. Rsch. Project (Jan. 2022), https://www.peerresearchproject.org/peer/research/body/2022.1.18-PEER-HSEarnings.pdf.

21 Jordan D. Matsudaira & Lesley J. Turner, *Towards a framework for accountability for federal financial assistance programs in postsecondary education*, The Brookings Inst. (Nov. 2020), https://www.brookings.edu/wp-content/uploads/2020/11/20210603-Mats-Turner.pdf.

22 88 Fed. Reg. 32,300.

23 Proposed Rule: § 668.2, 88 Fed. Reg. 32,506.

24 Proposed Rule: § 668.402(e), 88 Fed. Reg. 32,506 ("(1) A program passes the earnings premium measure if the median annual earnings of the students who completed the program exceed the earnings threshold. (2) A program fails

Notably, the proposed definition focuses on state-level data, where the institution is located. We encourage exploring the use of county-wide data for graduates who live in lower-income locals in comparison to state-wide earnings data, and also support calculating the earnings threshold based on the location where greater than 50% of post-secondary completers live at the time of measurement. Comparing a graduate's earnings to non-college-goers in the county where they *currently live* is more relevant than comparing a graduate's earnings to the entire state where the post-secondary institution is located.

In many cases, the majority of completers may live in the same geographic area where the institution is located. However, there are some instances where this is not the case. For instance, where institutions are predominantly online but target students located in a different area from where the institution is located. This may also be more relevant if using a smaller geographic area than statewide data. If using county-level data, for example, a majority of students who attend an institution located in a less densely populated area may move to the largest nearby county or city against whose residents testing their earnings premium is more relevant.

In sum, we strongly support the inclusion of an earnings premium in the final rule as a means of ensuring programs do not leave students "no better off than if they had never pursued a postsecondary credential."[25]

III. The Final Rule Should Revisit How an Ineligible Program Loses Access to Title IV

In proposed 34 C.F.R. § 668.603(a), the Department is also proposing a process under which a GE program "becomes ineligible and its participation in the title IV, HEA programs ends." 88 Fed. Reg. at 32,509. More specifically, the Department says that a program will lose eligibility upon the earliest of (1) the issuance of a new ECAR that does not include the program; (2) the completion of a Subpart G termination act, if initiated; or (3) a revocation of programmatic eligibility for provisionally certified institutions.

In justifying this proposal, the Department implies that the first and third options (ECAR and revocation for programs at provisionally certified schools), but that the termination option would be used "if none of these other events occur." 88 Fed. Reg. at 32,345. The Department states also that because "a program becoming ineligible for title IV, HEA aid is a form of limitation, the Department believes that subpart G is the appropriate procedure to follow." *Id.*

Student Defense does not see the necessity of using the termination proceeding in this circumstance. Rather, if the Department can proceed under proposed 34 C.F.R. § 668.603(a)(1), what is the need for proposed § 668.603(a)(2) or 688.603(a)(3)?

Nevertheless, if the Department believes that it needs to include a Subpart G option within this section, we strongly urge the Department to modify proposed 34 C.F.R. § 668.603(a)(2) to provide

the earnings premium measure if the median annual earnings of the students who completed the program are equal to or less than the earnings threshold"); § 668.402(e), 88 Fed. Reg. 32,507.

[25] Proposed Rule, Executive Summary, 88 Fed. Reg. 32,301.

for "**The commencement of an Emergency Action or the completion of a termination action of program accountability, if initiated, under Subpart G.**" Such an approach ("modified approach") allows the *immediate* eligibility termination for failing programs, *see* 34 C.F.R. § 668.83(b)(2), which is consistent with the law and Departmental practice.

This modified approach is consistent with the law because a determination by the Department that a program has failed Gainful Employment is a determination that the program *is definitionally ineligible* to participate in the Title IV program. Once that determination has been made, the Department has no statutory authority to allow the institution to continue to operate that program as a Title IV participating program. Accordingly, the program must lose eligibility immediately.

The modified approach is also consistent with Departmental practice in other circumstances (albeit at the institutional level). For example, if an institution loses its accreditation and does not voluntarily end its participation in Title IV, the Department's longstanding practice is to bring *both* an Emergency Action *and* a Termination Action to immediately end the institution's participation in Title IV, the permanence of which is established via the Termination Action. *See, e.g.*, *In re Ward's Corner Beauty Academy*, Dkt. 16-50-EA (Jan. 26, 2017) & *In re Ward's Corner Beauty Academy*, Dkt. 16-51-ST (Feb. 27, 2017); *In re: Tonsorial Academy of Cosmetology & Barber Styling*, Dkt. 13-13-EA & 13-14-ST (Jan. 6, 2014); *In re Health Opportunity Technical Center*, Dkt. 11-14-EA & 11-16-ST (May 5, 2011); *In re Harrison Career Institute*, Dkts. 07-17-EA & 07-18-ST (Aug. 31, 2007).

If the regulations fail to include an Emergency Action, but do contemplate a Termination Action,for programs in these circumstances, it will unnecessarily limit its own authority. It could also allow schools to continue to offer failing GE programs indefinitely, while waiting for (a) the Department to commence a termination proceeding; (b) waiting for the Office of Hearings and Appeals to rule on a termination proceeding; or (c) waiting for the Secretary to rule on an appeal of an OHA decision, before a ruling becomes final.

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The Department's proposed regulation is an important step toward restoring basic rules of the road for Gainful Employment programs. As three federal courts have found, the phrase "gainful employment in a recognized occupation" is ambigous and should be defined by regulation.[26] The statute limits programs covered by this definition to non-degree programs at public and non-profit institutions and nearly all programs at proprietary institutions. The eligibility and disclosure metrics proposed here, along with certification requirements, are appropriate and necessary to fully define the term that Congress left ambiguous. As we saw when the Department released the first rates in 2017 for the 2014 Gainful Employment Rule, more than 800 programs failed the metrics, and 98 percent were at proprietary institutions.

Thank you for your attention to these important issues facing student loan borrowers. For more information, please contact Student Defense President Aaron Ament at aaron@defendstudents.org.

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[26] *See APSCU I,* 870 F. Supp. 2d at 146, 149 (finding that the Gainful Employment Rule was "a reasonable interpretation of that ambiguous statutory command"); *Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332, 359-60, 363 (S.D.N.Y. 2015); *APSCU II*, 110 F. Supp. 3d at 186 (holding that the phrase was "ambiguous" and "leaves a policy gap" for the Department to fill).

Sincerely,

The National Student Legal Defense Network