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Advancing Fairness in the Marketplace for All

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National Consumer Law Center
Comments on
Program Integrity: Gainful Employment
Proposed Rule
Docket ID ED-2010-OPE-0012

Introduction

On behalf of our low-income clients, the National Consumer Law Center (NCLC)[1] is responding to the Department of Education's proposed gainful employment rule, published on July 26, 2010 (75 Fed. Reg. 43616).

We strongly support the Department's efforts to curb abuses in the proprietary school sector. Setting a "gainful employment" standard is a critical part of these efforts.

At the National Consumer Law Center, we see first-hand the harm caused by abusive proprietary school practices. A large percentage of our low-income clients attended proprietary schools. Most are in default on federal and private student loans. All of the clients we represent live in Massachusetts and are eligible for free legal services. We also work with lawyers across the country representing student loan borrowers. In addition, a large percentage of the complaints we get through our Student Loan Borrower Assistance web site involve proprietary schools.

Among the hundreds of clients we have represented over the years who have enrolled in proprietary schools, not a single individual has reported finding a job in the field related to the supposed training course. A large part of the blame clearly lies with schools that aggressively recruit students with false promises of job placement and employment, but fail to deliver. We believe that the proposed rule, particularly if it is strengthened as recommended below, can go a long way toward eliminating the worst programs and giving borrowers a real chance to succeed.

To participate in the federal aid programs, federal law requires career education programs to "prepare students for gainful employment in a recognized occupation." The proposed rule is essential because it defines this standard so that it can be enforced and so that the government has a consistent

[1] The National Consumer Law Center, Inc. is a nonprofit Massachusetts corporation, founded in 1969, specializing in consumer issues, with an emphasis on consumer credit. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises and annual supplements on consumer credit laws, including *Student Loan Law* (3d ed. 2006 and Supp.), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC's Student Loan Borrower Assistance Project provides information about student loan rights and responsibilities to borrowers and advocates. See www.studentloanborrowerassistance.org.

measurement to use in holding schools accountable. Most important, this will help ensure that borrowers have a reasonable expectation that they are in fact attending programs that are likely to lead to gainful employment.

This rule will be most effective if it is part of a comprehensive strategy to challenge fraud and abuse. We urge the Department of Education to work cooperatively with other federal agencies, including the FTC and the new Consumer Financial Protection Bureau, to challenge persistent problems and legal violations in this sector.[2] It is also critical to ensure that borrowers have tools to privately enforce these rules.

Comprehensive and aggressive enforcement is essential at all times, but we urge particular vigilance during the implementation period for this new "gainful employment" system. Enforcement is necessary to reduce the rampant fraud and abuse in the proprietary school sector and ensure that federal dollars are spent productively and efficiently.

Our comments on the proposed rule are not based on a belief that there should be just one particular model of education. As lawyers for low-income clients, we agree that there is a need to offer educational programs that meet the needs of many low-income and "non-traditional" students. Most of our clients are older than "traditional" students, often with their own children. They are looking for flexible schedules and in some cases on-line courses. Many do not have high school diplomas or G.E.Ds. These rules are essential to help ensure that these individuals will be given a real opportunity to succeed if they choose to pursue career training.

The Proposed Standards Must be Stronger <u>and</u> Provide Relief for Student Borrowers

The proposed rule is long overdue in setting a definition of gainful employment. We generally support the framework in the proposed rule, which requires schools to meet a repayment or debt/income standard to remain eligible for federal aid. However, as described in greater detail below, we believe that the thresholds are too weak. We believe that the Department went too far in listening to industry complaints that they would lose business if the rules were too strong. The Department of Education should be first and foremost concerned about the needs of borrowers and taxpayers and the rule should reflect these priorities.

It is shocking that the proposed rule would allow programs to continue to profit from federal student aid when a majority of their former students with loans cannot afford to pay down loan principal. As the Department documents in the NPRM and other sources, many schools, both non-profit and for-profit, have been able to stay in business with higher repayment rates. It is not only possible, but essential to set a high bar. Otherwise, the rule will allow the current race to the bottom to continue.

Given the focus on doing what is best for students, we also urge the Department to ensure that greater relief is provided to borrowers harmed by abusive school practices.

Our recommendations are presented in detail below.

1. The Repayment Rate Formula: 34 C.F.R. § 668.7(a)(1)(i) and Definition of Repayment Rate in § 668.7(b)

[2] See, e.g NCLC, PIRG and Public Advocates, Comments to the FTC, "Vocational School Guides Review" (Oct. 16, 2009), available at: http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/policy_briefs/FTCguides1009.pdf.

General

We agree with the Department's decision to consider only payments that reduce principal as "repayment" for these purposes. However, we are concerned that this concept will drift into other areas where payments will be considered "real" only if they reduce principal. We urge the Department to clarify that this definition of repayment is relevant only for these purposes.

Although it is far from ideal, many borrowers have no choice but to use repayment plans, such as IBR, that create negative amortization. These types of plans are often the only solutions we can find for our low-income clients, many of whom attended rip-off proprietary schools.

The current Higher Education Act statutory discharges provide relief for only a small subset of borrowers harmed by abusive and deceptive proprietary school practices.[3] Bankruptcy is rarely available for these borrowers given the heightened dischargeability standard. If a discharge is not available, these borrowers must look elsewhere to get out of default, in many cases so that they can go back to school.

We often assist our clients in getting out of default and then selecting affordable repayment plans. Many of our clients live on public assistance incomes as low as $300 or $400 monthly. They have $0 payment plans under IBR, which are clearly not making a dent in principal. The hope is that these clients can get back to work and repay principal at some point, but the reality is that many never reach this goal. They should not be stigmatized or penalized in these circumstances. The income-based repayment options are extremely important tools that should not be seen in any way as "lesser" payment plans.

We also agree with including completers and non-completers in the repayment formula. Studies of default rates consistently show that withdrawal from school is a key cause of default. These borrowers must be tracked to give an honest picture of school performance and to ensure that schools do not attempt to artificially keep students in school as a way of evading the gainful employment standards.

The Thresholds are Too Low

The Department found that the number of institutions in its analysis with very low loan repayment rates, particularly in the for-profit sector, was "alarmingly high." (NPRM p. 43619). We agree. For some reason, the Department then set a low bar, allowing programs with loan repayment rates as low as 35% to remain eligible for federal aid. The Department seems to be setting a low bar because of the expected impact. This is hardly an objective rationale. In other discussions in the NPRM, the Department focuses on the tremendous costs to borrowers and taxpayers of low repayment rates. Given these discussions, it is hard to understand how a rate of 35% could be considered acceptable.

While it is likely that the initial impact of a strong rule will lead to disqualification of numerous programs, this is a good thing if it means that schools that cannot meet the thresholds will drop out and that others will improve their programs. The Department is not doing any favors to borrowers by allowing programs with poor outcome measures to linger.

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[3] See generally National Consumer Law Center, "No Way Out": Student Loans, Financial Distress and the Need for Policy Reform" (June 2006), available at: http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/nowayout.pdf.

The Department's thresholds are even lower than they may appear due to the exclusion of private loans and parent PLUS loans. In 2008-09, these two forms of debt accounted for 20% of all postsecondary education loans.[4] This highlights the need to increase the repayment rate thresholds and also the need to include private loans in the debt/income measure.

The Department also requested comment on whether there is a repayment rate threshold so low that no programs falling below it should remain eligible for federal aid, regardless of their debt-income ratios. We believe that programs with a calculated repayment rate of 35% or less should no longer be eligible to receive student aid.

The Loans Paid in Full (LPF) Category

We agree that the loans paid in full category (LPF) should not include consolidation loans unless the consolidation loans are paid off. This is reflected in the current regulations. Without this provision, schools could try to "game" the system by encouraging or pressuring borrowers to consolidate their loans. This was an issue particularly during the 90's when collection agencies and loan holders often consolidated loans without borrower consent.

We have questions, however, about how the Department will track the underlying loans in consolidation loans. A consolidation loan could be comprised of loans from a number of different programs. Yet the repayment rate is set program by program. We raise this point to ensure that the Department will have a way to track this information.

The Reduced Principal Loan (RPL) Category

We agree with the Department's goals in including loans in the repayment (RPL) category for borrowers whose payments during that year qualify for the public service loan forgiveness program (PSLF). However, we are concerned about a number of possible negative unintended consequences from this provision. We are also concerned that the regulation does not address the way other discharges will be handled.

With respect to PSLF, we agree that creating disincentives to participate in PSLF would not be a good outcome. However, it is unclear what it means to "qualify" for PSLF. Currently, there is no system in place for borrowers to qualify year to year. We assume that the Department intends to create a process so that borrowers can submit information about their employers and receive some confirmation that they "qualify" for PSLF for that year. NCLC and many other groups have advocated this system for some time.

In creating this system, the Department should be clear whether confirmation of PSLF for these purposes will be determinative if the borrower later applies for PSLF. If so, the borrower should have to submit information not only about the employer, but also evidence that she is working full-time. Only full-time employees are eligible for PSLF.

We recommend that the annual "qualification" should be determinative if the borrower later applies for PSLF. It must also be rigorous enough so that schools do not try to game the

[4] Calculations by the Institute for College Access & Success on data from College Board, *Trends in Student Aid, 2009,* Tables 2a and 2b (2008-09 loan volume data is preliminary).

system by encouraging borrowers to claim that they are seeking PSLF when they clearly would not qualify. The Department should be alert to abuses in this area. For example, a high number of borrowers in PSLF status from cosmetology schools or other schools where students are unlikely to find jobs with public service employers should be a warning sign of rule evasion.

The Department should also be clear about when it will measure PSLF. Is a loan considered to be in PSLF status if it held that status the entire year, a majority of the year, or just a few months? Depending on how the Department implements this provision, there are different concerns to be considered, each with specific implications.

The Department should also clarify that borrowers can continue to self-certify their intent to participate in PSLF for purposes of consolidating with Direct Loans.[5]

The regulations are silent about how other discharges will be treated in the formula. We recommend that:

A. Loans where a borrower has received a school-related discharge (closed school, false certification, and unpaid refund) should not be counted as paid in full. This would be rewarding schools for their own transgressions. These loans should be considered as outstanding loans (OOPB) for the entire period.
B. Discharges related to personal circumstances such as disability or death should be counted as paid in full. These discharges are difficult to obtain. There should therefore be little concern that schools will pressure borrowers to apply. Borrowers or their survivors should also not be discouraged from applying for these discharges by schools concerned about the impact on their repayment rates.
C. Other profession-related discharges, such as Perkins discharges, should be treated similarly as PSLF as long as there is some system to check whether borrowers qualify.

Potential Problems with Rule Evasion

We have other concerns about potential gaming of the repayment rate. The recommendations above should help address this prospect, but it is impossible to plan for all ways in which unscrupulous school operators will seek to evade penalties. Therefore, we strongly recommend that the Department conduct regular audits of the gainful employment system, looking for abuses.

The Department should be alert not just to low LPF rates but also to consistently high LPF rates. In general, few schools should show high rates of loans paid in full during the relatively short period of time that repayment is tracked. Those that do exhibit high rates may be abusing the system by encouraging discharges as described above. They may also be paying off their students' federal loan debts, then seeking to collect separately as debts owed to the school. We know this can happen because it has happened in the past and is allegedly happening now as schools seek to avoid default rate sanctions. Another sign to look for is high rates of private student loan borrowing at particular schools. This may signal that schools are pressuring borrowers to take out private instead of federal loans. As discussed below, the schools may not accurately count private loans as part of the debt to income measure. Yet even with high rates of

[5] Se 34 C.F.R. § 685.220(d)(1)(i)(B)(3).

private loan borrowing, they could retain eligibility through the repayment standard, which does not account for private loan debt.

Timing of Repayment Period and Look Back Period

We are concerned about the short look back period in the repayment rate formula. Many studies show that default rates grow consistently over time. A recent study by the Texas Guaranty Agency analyzed data beyond the cohort default period to address whether common assumptions about default causes hold true over the long term. [6] The agency found, consistent with other studies, that borrowers who withdraw from school are more likely to default soon after departure. However, they also found that although borrowers who graduate avoid defaulting longer, they also begin defaulting in significant numbers beyond the cohort default window.[7]

The longer the period, the less likely the school will be able to manipulate the data. We believe that repayment should be tracked over a longer period of time, possibly six years, to provide a more accurate picture of the borrower experience and to encourage schools to lower tuition and reduce borrowing rates. Borrowers who become totally disabled or die during this time can have loans discharged and their loans will no longer be in repayment.

We recognize that setting too long of a look back period at the outset will delay implementation. This rule is critical and should be in place as soon as possible. We therefore recommend that the longer look back period be phased in over time.

The Repayment Category Must Not Include Borrowers in Deferment, Forbearances, Default or Delinquency

Another huge area of concern is that the reduced principal payment category (RPL) could arguably include all borrowers who made any payments that reduced principal during the last fiscal year regardless of their current repayment status. We recommend that the repayment rate measure BOTH whether there was a reduction in principal during the fiscal year and whether the loan is actively being repaid. The preamble language suggests that this was the Department's intent, but the proposed regulation appears to measure only whether the principal has been reduced.

The proposed regulation at § 668.7(b)(3) describes the RPL as including loans where payments made by a borrower during the most recently completed FFY reduced the outstanding principal balance of that loan from the beginning of that FFY. Although the regulations refer to payments rather than payment, it is conceivable that a borrower could make two payments that reduce principal, become delinquent, even go into default, but still be placed in the repayment category (RPL). These borrowers could even presumably make two payments and then go into deferment or forbearance. Yet the Department states in the introduction that no borrower in

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[6] Texas Guaranteed Student Loan Corporation, "White Paper: Crisis Averted or Merely Postponed?: Examining Long-term Cohort Default Rates, Resolving Defaults, and Curing Delinquencies" (July 2010), available at: http://www.tgslc.org/pdf/crisis_averted.pdf.

[7] Id. at 7.

deferment or forbearance (other than in-school or military) will be counted as in repayment. (NPRM p. 43619).

The Department could address this concern by first gathering information about all borrowers who reduced their principal through repayment and then excluding anyone in forbearance, deferment (other than in-school or military) or default at the end of the period. The formula would then take into account not only whether there was a reduction in principal at the end of the fiscal year, but also whether the borrower is in a current repayment status at that time. This should at a minimum be done at the end of the fiscal year. However, this is still only a snapshot in time and does not account for borrowers who later become delinquent, get a forbearance or deferment or are otherwise not in active repayment. Regardless, the Department should clarify when the determination of loan status will be made.

We strongly recommend that in addition to deferment, forbearance and certain discharge categories as discussed above, the Department also exclude from repayment (RPL) loans in which the borrower has been in delinquency status for more than 45 days. The 45 day allowance is so that borrowers that missed only one payment, but are back in repayment, are included in the RPL category.

The Department should be attuned to schools that may try to discourage students from choosing options that work best for the borrowers, but may adversely affect the school's repayment rate. Deferments, for example, are critically important options for many borrowers. Other than in-school and military deferments, which are included in the RPL rate, most other deferments are available only for unemployed borrowers and those facing severe economic hardship. Borrowers in these categories should not be counted in the RPL formula.

Consider Only Reductions of Principal Due to Voluntary Payments

A reduction of principal due to involuntary payments should not be considered in the RPL category. Most borrowers that default during the fiscal year are unlikely to see a reduction in their principal balances at the end of the year given the fees and collection costs that are added to these borrowers' accounts. However, if the formula takes into account large involuntary payments, such as seizure of an earned income tax credit, the account could show a reduction in principal even if the borrower did not make any voluntary payments.

The regulations state that only payments "made by a borrower" are counted in the RPL category. Arguably, involuntary payments are not "made by a borrower." We recommend that the Department make this clear by specifying that only voluntary payments made by a borrower are counted in the RPL formula.

2. **Debt/Income Category: 34 C.F.R. § 668.7(a)(1)(ii), (iii) and Definitions in § 668.7(c)**

The Debt/Income Thresholds Are Too High

The Department justifies the 8% of average annual earnings standard by pointing to its use by mortgage lenders and other creditors. (NPRM p. 43620). However, this standard is usually intended to cover all non-mortgage debt, including car payments, credit cards and other debts. The threshold for student loans should be lower since most borrowers with student loans are also struggling to pay other essential debts and expenses. This is certainly true of most of our clients. We recommend a threshold of 5% as a more realistic standard if the prior three year period data is used and 8% only for the rate using the three year period data.

The rates based on discretionary income are also too high. The Department states that a debt-to-discretionary income ratio of 30% or higher is clearly excessive. This conclusion is based largely on research by Sandy Baum and Saul Schwartz.[8] However, it does not accurately reflect the research. Baum and Schwartz concluded that the percentage of income borrowers can reasonably be expected to devote to student loan repayment increases with income. They noted that borrowers with incomes near the median should not devote more than about 10% of their incomes to education debt repayment and that the payment-to-income ratio should never exceed 18 to 20%.

We therefore recommend that the Department lower the proposed 30% threshold to an amount more in line with the research, possibly 20% for rates calculated using the three year period data and prior three year period data.

Accurately Track Private Loan and Institutional Financing Debt

The regulations at 34 C.F.R. § 668.7(c)(2) define loan debt as including any private educational loans or debt obligations arising from institutional financing plans. This provision could easily be ignored by schools claiming to have no knowledge of these loans. The regulations should require inclusion of private loans that the school knew or should have reasonably known about.

The definition should also be clarified to ensure that all types of private loans and financing are included. This must include a definition of "institutional financing plan", which is not currently defined in the regulations. The definition should be broad enough to include all types of institutional financing, whether closed-end or open-end credit plans.

It is also important to note that all loan amounts reported for program completers, whether federal, private or institutional, are assumed to have the same interest rate as federal unsubsidized loans for the purposes of calculating annual debt service (6.8%). This is considerably less than most private variable rate loans, particularly loans for borrowers with lower credit scores. The private loans we see from our clients often have rates of at least 13 or 14% and in some cases more than 20%.[9] As a result, the use of the unsubsidized federal loan interest rate will significantly understate the debt burden for most private loan borrowers.

Tie the Discretionary Income Standard to Family Size

The discretionary income standard should be tied to family size. The concept of discretionary income recognizes that borrowers with higher incomes can afford to devote a larger

[8] Sandy Baum and Saul Schwartz, "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt" (2006).

[9] See generally, National Consumer Law Center, "Paying the Price: The High Cost of Private Student Loans and the Dangers for Student Borrowers" (March 2008), available at: http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/Report_PrivateLoans.pdf.

share of their income to loan repayment. This makes sense as long as the formula accounts for the higher expenses of those with larger families.

3. Strengthen The Restricted Status Category: 34 C.F.R. 668.7(a)(2) and § 668.7(e)

We are particularly concerned that the restricted status category is no more than a slap on the wrist. We recommend a number of ways to strengthen this category.

Based on the current thresholds, which are too weak as we discuss above, only schools with very poor performance data will fall into a restricted status. Yet the only consequences are required employer affirmations to be provided to the Secretary each year, debt warning disclosures, and limits on the number of enrollees.

At a minimum, we recommend the following changes:

A. **Set a time limit on restricted status.** The lack of a time limit could be a huge crutch for schools that recognize the relatively weak consequences of restricted status. They may choose to continue in this status indefinitely. There should be a time limit of no more than three consecutive years of restricted status. Schools should be able to get out of this status only by showing significant improvement. In addition, repeated periods of restricted status should lead to full ineligibility.

B. **Strengthen the employer affirmations.** The employer affirmation requirement is weak and serves no stated purpose. The regulations at § 668.7(g)(1)(iii) require these schools to provide documentation from employers not affiliated with the institution affirming that the curriculum of the program aligns with recognized occupations at those employers' businesses and that there are projected job vacancies or expected demand for those occupations at those businesses. There is nothing in this provision that requires employers to document whether they would hire or have hired students from the particular school's program. Yet this is the crux of the problem. We repeatedly hear from our clients that potential employers tell them that they never hire students from the proprietary schools they attended. Further, the regulations do not state how this information will be used if at all.

The regulation should also be revised to state that the employer must specify the location of the anticipated job vacancies, as well as the employer's location. The Department should also clarify as to what time period the affirmation should apply.

We also recommend that the Department prescribe the form of the affirmations to be used so that they will be uniform and clear. Among other provisions, the employer should be required to certify that s/he is not affiliated in any way with the school.

C. **Provide specifics for warnings and recognize the limited utility of warnings.** Schools in the provisional category are required to include a prominent warning that is designed and intended to alert prospective and currently enrolled students that they may have difficulty repaying loans obtained for attending that program and disclose the program's most recent loan repayment rate and debt measures. Although we do not object to the provision of warnings, we believe that they are unlikely to have much impact, for a number of reasons. First, disclosures and warnings are generally ineffective. As we have stated repeatedly in the context of consumer credit products and other contexts, no amount of disclosure can adequately protect the public from the failure to underwrite for the basic affordability of loans and in this case for the failure to properly admit or educate students in higher education.

The fiction that disclosures are sufficient to regulate markets and impact consumer decision making is especially apparent for illiterate or barely literate consumers. For example, we recently assisted a client who was pressured into signing up for a proprietary school medical assistant program even though she dropped out of school in ninth grade and had only a sixth grade reading level. She did not complete the course, has never found work in the medical assistant field, has been in and out of homelessness and went into default on the student loans.

Individuals with limited English skills are often exploited as well, including a recent client who signed up for a cosmetology course after being told by a Spanish-speaking school representative that the instructors were bilingual.

Further, this regulation is vague as it does not define "prominent" or even specify what must be disclosed other than that it must be a message designed to alert students about difficulties with loan repayment. This is hardly distinguishable from all of the other disclosures borrowers currently get alerting them to the severe consequences of taking out federal or private loans. Many consumer behavior researchers find that there is an optimism bias that affects most decision making. We may hear the warnings, but assume that they do not apply to us. This is especially true when consumers are also facing hard sell tactics that contradict the message in the disclosures.

D. **Expand the Data Disclosure Requirements.** We support requiring schools in the restricted status category to disclose their actual repayment and debt/income rates. We believe that this requirement, however, should not apply only to schools in this category. <u>All schools should be required to disclose this information.</u> Otherwise, schools have an incentive to get close to the line, but do not have to worry as long as they remain above it. The public as well as prospective students should have access to this information.

The Department requested comment on whether schools with very low rates should be deemed ineligible immediately rather than getting a restricted status. Given all of the weaknesses discussed above with the restricted status, we believe not only that the status should be strengthened, but that schools with very low rates in either the repayment or debt-income categories should not get the benefit of a restricted status.

4. Limit Harm from Ineligible Schools: 34 C.F.R. § 668.7(f)(1)

The Department proposes to allow schools deemed ineligible to continue disbursing funds to students who began attending the program before it became ineligible for the remainder of the award year and for the following award year. This is a recipe for disaster, impacting a large number of borrowers.

Borrowers are already being harmed by attending schools that are not preparing them for gainful employment. The sooner they can get out and if possible move on to stronger schools, the better.

Our clients' experiences illustrate the harm done by prolonging an unproductive, debt-ridden school experience. For example, many of our recent clients attended a local for-profit medical assistant program. These clients did not have high school diplomas or G.E.Ds when they signed up for school. They had numerous complaints about the program. When some of the clients raised concerns, they were told that they might as well try to finish because they were going to have to pay back their loans and the school in any case. Although in fact they could have received partial refunds, the students believed these misrepresentations and stayed in school. They tried to find work after completing, but each was told numerous times by prospective employers that they do not hire individuals without high school diplomas. A few of our clients had asked the school staff at the beginning whether this would be a problem. They were reassured that many graduates without high school diplomas find work in the field. Some of our clients were also told by employers that they never hire graduates from this for-profit school in any case.

These clients are devastated by the time and resources they wasted at this school. Even worse, they are saddled with student loan debts they cannot repay. The most comprehensive remedies, statutory discharges, are available to only a small subset of borrowers suffering harm.

We strongly recommend that the Department stop these programs as soon as possible and provide relief for borrowers. The answer is not to let those schools keep offering those programs, but to ensure that proper relief is provided for the borrowers.

We recommend at a minimum that the regulations be strengthened to provide the following relief:

1. Full loan discharges for any borrower who cannot complete a program due to ineligibility under the gainful employment (GE) process.
2. Full discharges for those who attended a program that lost eligibility due to the GE standard whether the borrowers completed or not as long as they attended within two years of the loss of eligibility.
3. Allow borrowers to raise as a defense to collection that they are in the groups described in #1 or #2 above.

There is authority in current statute and regulations for these types of discharges. The authority for closed school discharges in 20 U.S.C. § 1087(c)(1) states that loans must be canceled if a student is unable to complete the program in which the student is enrolled due to the closure of the institution. This should apply to circumstances in which the borrower's program of study was closed because of ineligibility under the gainful employment standards.

The statute also provides for discharge if the student's eligibility to borrow was falsely certified by the eligible institution. This provision should apply as well since a student would have been falsely certified if the school was not eligible to participate in the federal aid programs due to failure to meet the gainful employment standards. In addition to the statutory discharges, the Department also has general authority to compromise loans.[10] The Department should also seek reimbursement from the schools for discharges granted to borrowers. [11]

Even this level of relief will not be enough for many borrowers. The recommendations above are critical, but in our experience, it will be far from complete because so many borrowers have not only federal loans, but also private loans and institutional debts. We urge the Department to work with other federal agencies to seek solutions for these debt burdens, including supporting bankruptcy relief for these borrowers.

Provide Timely Notice to Students at Schools Deemed Ineligible

The regulation should also specify how borrowers will receive notice when their programs are deemed ineligible. The sooner the borrowers get this information, the better it will be so that they can decide how best to move forward. We recommend that the Department issue notices to borrowers in these circumstances so that the information is standardized and so that the schools do not have the opportunity to soften or otherwise qualify information about impending ineligibility.

We also urge the Department to clarify whether schools may resurrect programs that were ineligible at one time. While it may be reasonable to allow this in certain circumstances, there must be heightened standards for re-starting a program that was previously ineligible.

5. Eliminate the Initial Cap on Ineligible Programs: 34 C.F.R. § 668.7(f)(2)

The Department proposes a transition year during which the number of ineligible programs would be capped. There is a complicated formula proposed to ensure that the programs that are disqualified are the "worst "programs.

The stated reason for limiting the initial disqualifications is to avoid the risk of large and immediate displacement of students. (NPRM p. 43623) We disagree with this reasoning because the borrowers are already being harmed by attending schools that are not preparing them for gainful employment. As discussed above, the sooner they can get out and if possible move on to stronger schools or programs , the better.

Regardless of whether there is a phase-in of this program, there will be borrowers attending programs that will lose eligibility while the students are still enrolled. The answer is not to let those schools keep offering those programs, but to ensure that proper relief is provided for the borrowers, as described above.

6. Limit The Additional Program Requirement: 34 C.F.R. § 668.7(g)

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[10] See, e.g., 20 U.S.C. § 1082(a) (FFEL); 31 U.S.C. § 3711 (General authority to compromise government debts); 34 C.F.R. § 30.70.

[11] For example, for discharges granted under the closed school or false certification authority, the regulations provide that after discharge, the borrower is required to cooperate with the Secretary to recover for amounts discharged. 34 C.F.R. § 682.402(e)(4) (false certification).

We agree that there should be a separate standard that at least some schools should have to meet when seeking to offer new programs. However, the proposed standard creates a very low bar. It may be just enough bureaucracy and paperwork to curb innovation by schools with good performance records, but far too little to prevent schools with poor records from meeting the standard.

We recommend that these provisions apply only to institutions with currently restricted programs or with programs determined in the previous three years to be ineligible for federal aid.

7. Streamline the Appeals Process: 34 C.F.R. § 668.90

We agree that schools should be entitled to due process if they face restricted or full ineligibility. However, we are very concerned about possible abuses, especially given the way the cohort default rate (CDR) sanction process has unfolded over time. In the name of "due process", schools have been successful in getting changes enacted in the CDR program that allow a wide range of appeals for reasons ranging from hardship to mitigating circumstances. In addition to watering down the definition of "default rate" over time, the schools used these appeals to take the teeth out of the CDR process. This should be a cautionary lesson.

The hearings should be limited to appeals about problems with the data. The numbers are either accurate or not. Other factors, such as the composition of the student body or limited financial aid staffing resources, should be irrelevant. We also recommend that the Department clarify how an ALJ should consider alternative evidence to the government's data.

It is also essential to ensure that the arbiters of these hearings are trained administrative law judges with demonstrated neutrality, including no ties or connections to proprietary schools. It is critical to devote sufficient resources so that ALJs are available as needed and can hold prompt hearings and issue timely decisions.

Importance of Auditing and Evaluating the GE Standard

Many of our comments focus on the ways in which unscrupulous school operators may attempt to game the system. Based on experiences in the student loan and other industries, the bad actors will be much more creative in coming up with ways to game the system than anyone else. The government simply cannot plan ahead for all possibilities. This is why it is so critical to require reviews and audits of this system to measure whether it is meeting the intended goals. The Department should specifically look for actions that may seem innocuous at first glance, such as pressuring borrowers to get public service loan forgiveness, that are in reality designed to evade the rules. This is difficult because many federal requirements, such as verbal forbearances and "forced consolidations" are in fact the best options for certain borrowers.

Given the possible loss of participation in federal aid programs due to default rate sanctions, schools have started hiring "default management" companies to track down former students and get them into forbearances or other programs that will not impact the school's default rates and help them avoid sanctions.[12] We urge the Department to work with other

[12] See, e.g., Goldie Blumenstyk, "Business is Up in Keeping Default Rates Down", *The Chronicle of Higher Education* (July 11, 2010).

federal agencies to police this emerging industry as we fully expect a branching out into the "gainful employment" area as well.

We are very mindful of the CDR experience. The number of schools facing sanctions in this program diminished substantially over time. The number of schools subject to sanctions peaked in 1994 at 642 and steadily declined so that by 1999, only six schools were subject to sanctions. The highest number of schools sanctioned each year since the millennium is 4 in 2000. [13] This trend was due in part to improvements in default rates. However, the CDR program was also watered down by regulatory and statutory changes in the rate formula and appeals process.

The gainful employment proposal will likely have a strong impact at first because it is making up for years of neglect in terms of agency enforcement. A trend toward lesser sanctions over time is not intrinsically a negative development. Yet it is also not intrinsically a positive development. Looking behind the numbers is essential in creating a system that will remain meaningful over time.

This concern highlights the danger of over-relying on this new system. It must be strong, but even a strong system will never catch all offenders or hold everyone accountable. In coordination with aggressive public and private enforcement and strong relief provisions for borrowers, it can go a long way toward meeting the goals of federal financial aid and encouraging access to real education.

There is a lot of talk about what is best for the clients we represent. We certainly cannot speak for all low-income borrowers, but we have a good sense of what our clients want and need based on our experiences working with them. We strongly believe that our clients deserve more than the illusion of opportunity. They deserve real opportunities to get ahead. Not everyone will succeed, but many more will if this system is put in place.

We thank the Department for its courage and persistence on this issue and for its consideration of our comments.

[13] U.S. Department of Education, "Schools Subject to Sanctions" (2009).