

Comments on Department of Education Proposed Regulations on Gainful Employment Measures Should Protect Low-Income Students While Supporting Program Innovation and Student Access and Success

The following comments were submitted to the Department of Education in response to the July 26, 2010 Notice of Proposed Rulemaking and prepared by Amy Ellen Duke-Benfield, Senior Policy Analyst, CLASP.

We appreciate the opportunity to offer comments on the Notice of Proposed Rulemaking (NPRM) posted in the Federal Register on July 26, 2010, Docket ID ED-2010-OPE-0012. The Center for Law and Social Policy (CLASP) develops and advocates for policies at the federal, state and local levels that improve the lives of low-income people. In particular, we focus on policies that strengthen families and create pathways to education and work. We approach these proposed regulations through the lens of improving postsecondary outcomes for low-income adults and disadvantaged youth. We strongly support the Department's efforts to protect low-income students from accumulating unmanageable debt and from failing to secure a good job after completing a program that should lead to one. At the same time, we think it is critical for federal action in this area to allow for program innovation that supports increased student access and success to degree pathways. We believe a federal measure of gainful employment can accommodate both of these goals.

Our comments on these rules draw from our experience as the primary technical assistance providers to the Shifting Gears project. The Joyce Foundation launched the Shifting Gears initiative in 2006 to help six Midwest states address this fact: jobs requiring some postsecondary education are expected to grow faster than average during the next decade, yet too many workers lack the skills and credentials for these twenty-first century jobs. These states—Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin—are re-engineering adult education, workforce development, and postsecondary education policies to support economic growth and expand job opportunities for low-skilled workers in the Midwest. They seek to strengthen the links between postsecondary education and training and quality jobs and to make postsecondary services more responsive to the needs of low-income adults.

In our work with the Shifting Gears states and other states around the country, we find that many of them are helping local postsecondary institutions create more flexible pathways to credentials. These pathways often include shorter certificate and diploma programs that are embedded within degree programs. We do not interpret the Department's proposed "gainful employment" rules as opposing this kind of innovation or as requiring a more traditional, particular model of education. Rather, we believe the rules, if properly crafted, can help ensure that these types of occupational certificates and diplomas are a means to connecting more nontraditional students to postsecondary education and training and to good jobs—whether it be at high-quality proprietary institutions, public technical institutions, or community colleges. However, we suggest some changes in this letter to try to reduce any potential negative impact.

We realize the complicated nature of devising a test for gainful employment and understand the Department may view use of the debt-to-income ratio and repayment rate as the most straightforward method. Yet, we believe the gainful employment test can be strengthened by including some minimum standard for program completion (and ideally job placement rates, as well). At the moment, the proposed "gainful employment" regulations treat completers and non-completers of programs the same in the debt repayment measure—as long as the latter are

repaying their debt, the program will remain acceptable. We understand the difficulty of setting program completion minimum standards given differences between programs and students served, but not having any completion floor raises the question: Is there no completion rate that is too low? The higher education world rightly has an increasing focus on improving student outcomes. We encourage the Department to support that movement by orienting student financial aid generally more toward persistence and completion rates for all students, particularly the most disadvantaged. The Department could take an important first step toward that end by including a program completion floor in these proposed regulations.

One concern we have about new rules in this area is the capacity of local institutions in the public sector to comply with new reporting requirements to implement the rules, especially given significant state and local budget cuts in recent years. While this concern does not override our overall support for a gainful employment measure, we urge the Department to alleviate this burden as much as possible by allowing institutions to use existing data sources to the maximum extent feasible. This might include public sources such as the federal wage record database, or private sources, such as the National Student Clearinghouse.

We are also concerned about the thousands of low-income students who will initially lose access to postsecondary education and training due to attending a program that becomes ineligible due to these regulations. Rather than weaken the developed framework in response to such concerns, we suggest the Department consider ways to incentivize institutions with programs in good standing to enroll the students who have been displaced due to the new regulations. Potentially, the Department could provide incentives to programs in good standing in a particular area that will enroll larger numbers of displaced students. Such incentives can help high-quality institutions overcome their capacity challenges which have contributed to more students attending questionable programs.

In sum, we want to thank the Secretary and the Department of Education for addressing the need to protect low-income students from being taken advantage of by unscrupulous institutions and strengthen the integrity of the Title IV student financial aid programs. We appreciate the Department's efforts to limit fraud and abuse in Title IV programs, particularly because low-income students are the most likely to be exploited and eliminating programs with a weak link to gainful employment will ensure more students will succeed in the long run. Our suggestions below on the proposed rule are intended to strengthen them by keeping their focus on problematic programs. Our recommendations cover the following areas:

- the debt-to-income ratio and repayment rate formula, specifically excluding certificates and diplomas that are part of degree programs, refining the discretionary income calculation, and reflecting differences in wage levels between metropolitan and non-metropolitan areas;
- the new program approval process;
- the restricted program eligibility status and related requirements, including time limiting the restricted eligibility status and strengthening employer attestation of demand and disclosure requirements;
- the requirement that various programs provide employer affirmations and attestations of demand;
- the disclosure requirements; and

- protecting students who are displaced.

Debt-to-Income Ratio and Repayment Rate Formula (§668.7 (a))

Overall, we support the Department’s effort to develop a definition for the “gainful employment” rule that will protect low-income students. As discussed earlier, we would prefer that the test also include program completion and job placement rates. We also agree that completers and non-completers should be included 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 in order to build a true picture of school performance and ensure that schools do not attempt to artificially keep students in school as a way of evading the new standards.

Should the Department decide to adopt the debt-to-income ratio and debt repayment framework, we recommend the Department consider excluding interim credentials and diplomas that are part of degree programs, adjusting the discretionary income measure to reflect actual family size, and distinguishing wage levels between metropolitan and non-metropolitan areas.

Exclude Interim Credentials and Diplomas that are Part of Degree Programs (§668.7 (a))

We recommend the Department exclude from the “gainful employment” measure one-year and less-than-one-year certificate and diploma programs that are wholly contained within AA or AAS degrees at public institutions. While such certificates and diplomas are not common, they are part of some of the most innovative articulation and transfer work being done by postsecondary institutions. Graduates of these programs are encouraged to build on this first step by continuing on toward a degree, a goal they may not have seen within their reach when first enrolling in postsecondary education. Consequently, they may not have earnings for some time as they continue with their postsecondary education, even though pursuit of a degree is a successful outcome. We believe it is essential that the Department incentivize more institutions to build such interim “stackable credentials” along degree pathways. If we are to reach President Obama’s goal of leading the world in college degrees, it will be necessary for institutions to be more intentional about embedding for-credit certificate and diploma programs in degree programs and improving retention and completion rates. This also supports the Congress’ and Department’s goal to strengthen articulation of coursework and programs in a targeted, responsible manner.

Adjust Discretionary Income Measure to Reflect Actual Family Size (§668.7(a)(3)(vi))

The Department’s proposed “gainful employment” proposal measures the debt-to-income ratio for program completers assuming a family size of one. While we support the inclusion of discretionary income and the usage of 150 percent of poverty in the measure, we do not support the measure including only a family size of one. The Department’s usage of discretionary income in the debt-to-income measure, assumes all borrowers are single with no children by defining discretionary income as “the difference between average annual earnings and 150 percent of the most current Poverty Guidelines for a single person in the continental U.S.”

As currently calculated, this measure is inadequate because it dramatically overstates the amount of discretionary income of many students. Roughly half of all undergraduates at for-profit institutions have dependent children, and more than one in four have at least two children. As family size increases, so does the cost of covering the family's basic needs, leaving less discretionary income available to cover other expenses.

The Department's current proposal assumes that anyone who earned \$32,990 last year had a discretionary income of \$16,745, regardless of family size. Twenty percent of discretionary income – a key threshold in the Department's current metrics – would amount to \$3,349. This level of debt service, however, is *triple* the amount that should be considered manageable for the many students with at least two dependent children and a minimum family size of three. We recommend the Department develop a measure that recognizes differences in students' family sizes, just as it does in the need analysis for student financial aid.

Distinguish Wage Levels in Metro and Non-metro Areas (§668.7(c))

In the regulations, the Department notes that when wage data is unavailable from the Social Security Administration, it will rely on another federal department for aggregate wage data for particular occupations. We recommend the Department utilize data from both the Bureau of Labor Statistics (U.S. Department of Labor) and the Economic Research Service (ERS) (U.S. Department of Agriculture). The Department needs to make a distinction between the wages paid in metropolitan and non-metropolitan labor markets because the wages in metropolitan areas can be significantly higher for the same occupation. The ERS has such data.

Limit Proposed New Program Approval Process to Title IV Restricted and Ineligible Programs Only (§668.7(g))

While we appreciate the Department's desire to ensure new programs are well-designed and will lead to gainful employment, the current proposal outlined in section 668.7(g) that requires any new gainful employment programs to apply to the Department for pre-approval in order to be eligible for Title IV funding is simply too cumbersome and, we fear, will lead to fewer good programs being developed. Many programs, particularly those at community colleges, already have rigorous approval processes. And, part of the challenge for public community colleges in developing programs responsive to the local labor market and expanding capacity in such new programs has been the often lengthy approval process. As we emerge from this recession and continue to experience changing skill demands for jobs, it is essential that the Department encourage the development of new, innovative, lower-cost programs in a timely fashion, instead of slowing this process down. Therefore, we recommend the new program approval process only be required for institutions with programs that are in restricted or ineligible status.

Strengthen Restricted Program Eligibility Status and Related Requirements (§668.7(e))

Time Limiting Restricted Eligibility Status (§668.7(e))

The Department should set a time limit for programs to remain in restricted eligibility status. The lack of such a time limit could allow weak programs to continue operating indefinitely, leading to greater numbers of students attending schools programs that fail to lead to gainful employment. Therefore, we recommend a time limit of no more than three years for programs in the restricted eligibility status. In addition, repeated periods of restricted status should lead to full ineligibility.

Employer Affirmations and Attestation of Demand (§668.7(e)(1))

Please see comments below in Section 4 regarding the requirement that programs in the restricted status acquire employer affirmations and attestation of demand.

Disclosure (§668.7(e)(2))

Please see comments below in Section 5 regarding disclosure requirements.

Maintain Employer Affirmation and Attestation of Demand Requirements (§668.7(e)(1), (f)(2)(ii)(B), and (g)(1)(iii))

We support the Department's proposed requirement that various programs, including those in restricted status, those initially deemed ineligible, and those institutions seeking to introduce a new program, illustrate employer attestation of demand, but believe this affirmation requirement can be strengthened. The proposed regulation requires programs in restricted status, deemed ineligible, or newly developed provide documentation from employers unaffiliated with the institution that the program curriculum aligns with occupations at those employers' businesses and that there is projected demand for those jobs at those businesses. While we understand criticism that employer affirmations and attestations are often pro forma, we support the regulation because seeking such affirmations and attestations of demand will provide institutions with programs in various statuses an opening for a conversation with employers that can lead to a closer connection to employer demand. We recommend the Department also request that institutions include in their affirmations how many of the program's students and what percentage of completers that employer has hired.

We also recommend that the Department clarify what an employer not affiliated with an institution means. There are a variety of affiliations between institutions and employers, including, but not limited to the employer's employees serving as professors at the institution, the employer sending its employees for training at the institution, and the employer serving on a program advisory committee at the institution. Therefore, we caution the Department from developing a definition that is so broad that institutions are unable to find employers who meet the Department's criteria. For instance, those affiliated with the institution and not eligible to provide affirmations could include those employers with a direct financial or fiduciary interest in the institution, whether as trustees, operating officers, or stockholders. Those allowed to provide affirmations could include those employers that allow employees to serve as faculty, that hire trainees, and that serve on program advisory boards.

Disclosure (§668.7(d), (e)(2), (f)(2)(ii)(C), and (g))

We support the Department’s requirement that schools with programs in restricted and ineligible status warn students of their potential difficulty in repaying loans and disclose actual repayment and debt-to-income ratios, but believe the Department should broaden the scope of this requirement. All institutions receiving Title IV aid, regardless of their status, should be required to disclose the information the Department has identified in the proposed regulations, including debt-to-income ratios and loan repayment rates, as well as graduation rates (as calculated under “Student Right to Know” requirements) and employer support. We discussed our support for the disclosure of such elements in our comments on the Notice of Proposed Rulemaking (NPRM) posted in the Federal Register on June 18, 2010, Docket ID ED-2010-OPE-0004. Increased transparency helps ensure consumers have the information they need to make well-informed decisions. The Department also needs to be explicit regarding what data elements should be disclosed, beyond instructing institutions to provide a simple statement alerting students about difficulties with loan repayment. Additionally, we recommend the Department define the term “prominent” in reference to how this information should be disclosed. We also recommend additional language that would require institutions to provide alternatives to English-language disclosures for those students for whom English is not their first language and alternatives to written disclosures for students with lower literacy levels.

Protecting Students Who are Displaced (§668.7(f))

As mentioned earlier, we are concerned about the students who will be negatively impacted by these regulations due to being enrolled in programs that are in the restricted or ineligible statuses. We recommend that the Department require institutions inform its students enrolled in ineligible programs about other programs at other public and private institutions in good standing in their same occupational area within the region. The Department may also want to consider requiring ineligible programs in their transition year to closure to provide career counseling to help students transition to a program in good standing at a different institution in the same occupational area and region and help students identify which classes will articulate to other institutions. As mentioned above, we recommend also providing incentives to institutions and programs in good standing in the region to enroll displaced students in order to mitigate the negative effects on these students.

Enforcement and Evaluation of the Gainful Employment Rule

Once these new regulations are implemented, we strongly encourage the Department to ensure they are actively enforced and to regularly evaluate their impact. As recent governmental and non-governmental reports and Congressional hearings show, many of the current rules that were designed to protect students and prevent fraud in the student aid system are being regularly abused by unscrupulous proprietary institutions. We are concerned about the lack of enforcement that led to an environment in which so many rules could be violated. Therefore, we urge the Department to consider how it will increase its resources to properly enforce current and new rules. In addition,

we encourage the Department to continue to collect the data necessary to conduct analyses such as that included in these proposed regulations as a means to looking at the impact of the proposed regulations on students and institutions. This will be helpful in determining if the regulations have achieved their intended outcome and continue to remain relevant as institutions and students change their behavior in response to regulations.

We thank the Department for developing a thoughtful proposal for the gainful employment definition and for their consideration of our comments.