A Union of Professionals

Comments of the American Federation of Teachers Regarding Intent to Establish Negotiated Rulemaking Committee

Docket ID: ED-2013-OPE-0008

On behalf of the 1.5 million members of the American Federation of Teachers (AFT), including more than 200,000 higher education professionals, we are pleased to support the April 16, 2013, *Federal Register* announcement of the U.S. Department of Education's intent to establish a negotiated rulemaking committee.

The AFT believes that a rigorous, diverse and affordable system of higher education is critical to the economic and social health of the nation—both to ensure that students reach their fullest potential, and to enable the United States to continue to develop as an engine of economic opportunity and a vibrant democracy offering opportunity to all. High-quality higher education should be accessible to all students and should enhance their economic and social opportunities. Federal grants and loans, funded by taxpayer dollars, ought to be used to provide meaningful opportunities to all Americans who seek higher education.

The Department of Education is uniquely positioned to act as the arbiter of high-quality education. Other departments, including the Department of Defense, and even Congress defer to the Department of Education on issues of quality. Therefore, we feel the four public hearings and the approaching rulemaking process are appropriate and well within the scope of the department's mission. The AFT believes it is unwise and unproductive, given the urgency of the topics to be addressed, to delay this process in anticipation of future congressional action.

One quality of the United States' higher education system that has been critical to its success is its diversity, from one-year certificate programs to research-intensive doctoral universities. We must protect that diversity to match the diversity of our students and, at the same time, must ensure there is integrity at every level of this system. That is why we believe this negotiated rulemaking is so important and is worth the time and effort it entails. We thank the Department of Education for considering the following recommendations:

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Gainful Employment

The AFT has consistently advocated for strong regulations to prevent fraud and abuse of federal student aid programs, particularly in the for-profit sector (see Docket IDs ED-2010-OPE-0012 and ED-2010-OPE-0004). We again call for much-needed oversight of career college programs that have consistently left students with burdensome loan debt that is excessive when measured against their future earning capacity. A strong gainful employment rule is needed to divide programs that meet the statutory requirement of preparing students for gainful employment from programs that are deficient.

As a part of the program integrity negotiated rulemaking that began in 2009, the department issued gainful employment regulations after intense opposition and lobbying by the for-profit sector. While a federal district judge vacated the 2011 gainful employment regulations, the Department of Education's authority to issue such regulations was upheld. Importantly, the judge noted, "The Department has set out to address a serious policy problem, regulating pursuant to a reasonable interpretation of its statutory authority. … Concerned about inadequate programs and unscrupulous institutions, the Department has gone looking for rats in ratholes—as the statute empowers it to do."[i] The now-vacated "nine strikes and you're out" rule the department issued in 2011 was not sufficient, and we urge the department to consider stronger fraud protections for students and taxpayers. The reporting portions of the earlier gainful employment regulations have remained in place, and the information available through the Federal Student Aid Data Center shows 5 percent of all vocational programs fail all three minimum standards: (1) a federal student loan repayment rate of at least 35 percent; (2) a debt-to-income ratio of less than 12 percent; and (3) a debt-to-discretionary-income ratio of less than 30 percent.[ii]

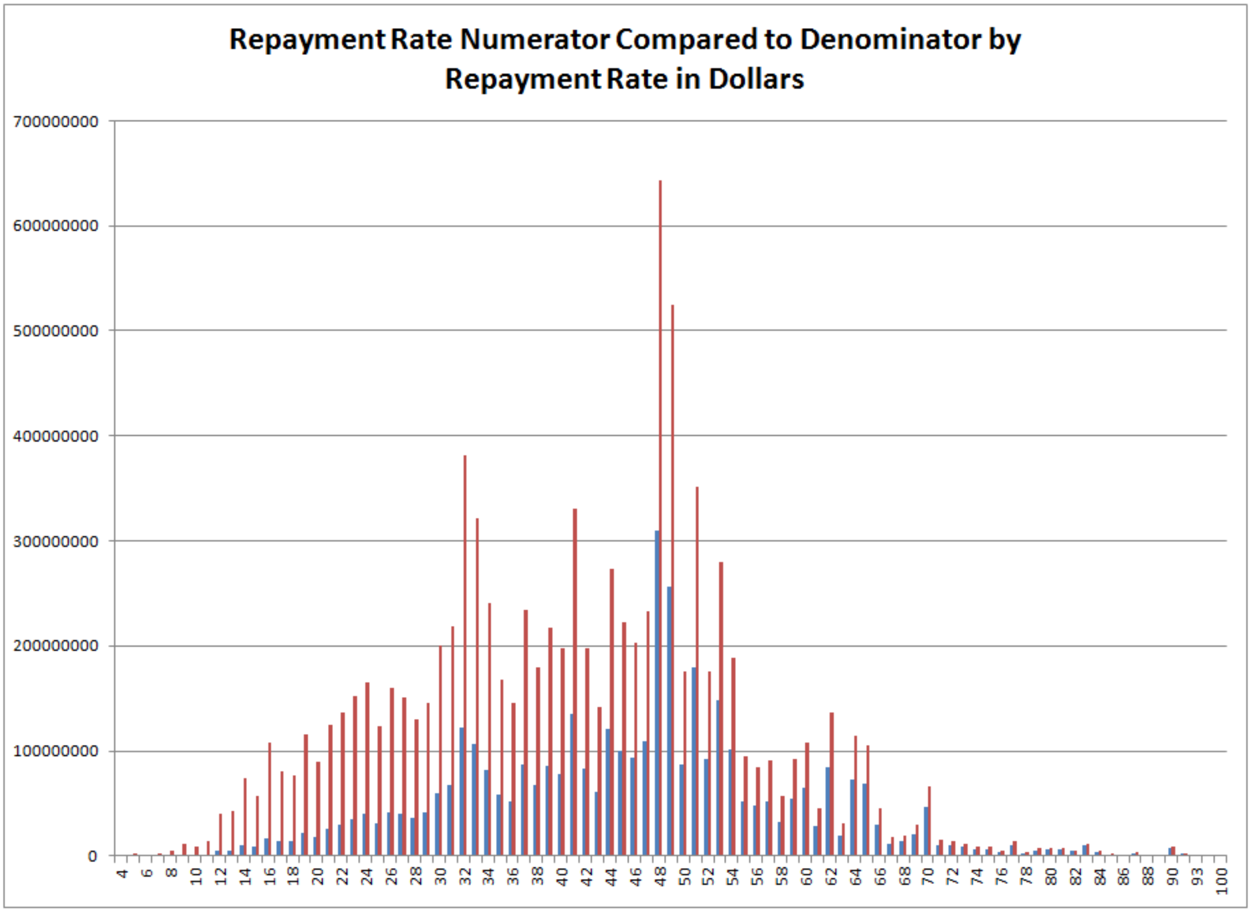
All of those programs were at for-profit colleges. These programs are the worst of the worst, and are unfortunately just the tip of the iceberg. There are tens of thousands of students attending programs that have failed two of the three minimum standards, and even more students attending programs just barely meeting minimum standards. Weak gainful employment regulations, or worse, an absence of gainful employment regulations, could lead to the expansion of these programs of dubious quality.

We encourage the department to set the standard for loan repayment rates at 50 percent for programs to remain fully eligible, to better protect current and prospective students. We also believe that a program with a repayment rate under 35 percent should lose Title IV Higher Education Act (HEA) funds eligibility, regardless of performance on other measures, since a program in which two-thirds of students are unable to pay down the principal on their student loans is clearly not meeting the intent of the statute.

These thresholds are justified by the federal rule requiring job-placement rates of 70 percent for short-term career education programs.[iii] Given the nature and length of these programs, 70 percent of graduates should be able to repay their student loans without issue. Though we realize that this rule does not cover all programs subject to gainful employment regulation, it serves as an example of the appropriately high standards of integrity the department should require. Half of this number, 35 percent, is so unambiguously low that it should trigger a consequence as serious as the loss of Title IV HEA funds eligibility. Furthermore, the Institute for Higher Education Policy report “Delinquency: The Untold Story of Student Loan Borrowing” shows that 37 percent of borrowers in all sectors were repaying their loans “without event” in the first few years of repayment; of the rest, 15 percent had defaulted, 23 percent had used deferments or forbearances, and 26 percent had become delinquent at some point.[iv] If a career education program fails to meet even this rather low average, even though some programs are required to place twice that percentage of students into jobs in designated or related fields of employment, that program’s ability to provide gainful employment is so seriously in doubt it should lose Title IV eligibility.

For those programs with repayment rates between 35 and 50 percent, we urge the department to establish a probationary zone. While still eligible for Title IV funds, programs with a loan repayment rate below 50 percent should be subject to additional disclosure rules and requirements to work with area employers to ensure the program is preparing students for gainful employment. We urge the department to set clear guidelines and timetables for these programs to show improvement. We also suggest that the department consider setting stricter enrollment guidelines for programs in this zone to limit the potentially negative impact of the program on students until the school can demonstrate the program is improving. This would allow troubled programs to focus on how they could strengthen the quality of their education and best serve students. We encourage the department to seek other ways to provide incentives to improve repayment rates when they fall below 50 percent, including eventual loss of Title IV HEA eligibility.

It is reasonable to expect a majority of student loan borrowers to be able to repay their loans. Yet according to the department’s 2011 Gainful Employment Spreadsheet, programs with repayment rates between 35 and 50 percent represent a huge share of Title IV dollars. The total denominator for this cohort (or the amount of original outstanding loan balances) is $6,169,272,332. This alone should compel the department, as a steward of federal funds, to bring some level of scrutiny to the quality of those 1,469 programs. Some of these programs may be leading to gainful employment for some students, but we believe any program where fewer than half of the former students are not able to pay down the principal on their loans runs counter to the intent of the regulation.



The repayment rate denominator, in red, shows the original outstanding principal loan balances of all of the Title IV loans taken by all students for attendance in the GE Program in the cohort period, including portions of consolidation loans that are attributed to the student's attendance in the GE Program. The repayment rate numerator, in blue, shows the amount of the original outstanding principal balances of the loans in the repayment rate denominator, where the borrower has (1) paid the loan in full, (2) reduced the principal balance by at least a dollar in the most recently completed fiscal year, or (3) met another standard of the regulations at 34 CFR 668.7(b)(3). Comparing the two shows the amount of Title IV money flowing to these programs along with the progress attendees have made in debt reduction.

For more on definitions see the Gainful Employment Glossary available here: http://studentaid.ed.gov/about/data-center/school/ge/data

The AFT supports the use of multiple measures in determining Title IV HEA funds eligibility, including a discretionary-income-to-debt ratio. But the threshold for such a measure should be set at a reasonable level no higher than 20 percent. In "How Much Debt Is Too Much? Defining Benchmarks for Manageable Student Debt," which the department has cited as a resource for gainful employment regulations, Sandy Baum and Saul Schwartz argue that "[t]he percentage of income that borrowers can reasonably be expected to devote to student debt repayment increases with income. Individuals with incomes near the median should not devote more than about 10 percent of their incomes to education debt repayment, and the payment-to-income ratio should never exceed 18 to 20 percent."[v] Baum and Schwartz continue: "Our suggestion is *not* that 20 percent of income is a reasonable debt-service ratio for typical borrowers. Rather, it is that there are virtually no circumstances under which higher debt-service ratios would be reasonable."[vi] While we appreciate the department's desire to use multiple measures and to establish those measures at an unambiguous threshold, based on the Baum/Schwartz analysis, we are concerned that a debt-to-discretionary-income threshold any higher than 20 percent will lead to an unmanageable debt-service ratio and not serve to protect students as is the intent of the rule.

Other Protections Against Fraud and Abuse

In the short time gainful employment regulations were in place, some institutions and programs made significant changes in order to meet the new guidelines. However, these changes were not always improvements to the quality of education offered. The Institute for College Access and Success (TICAS) has written a memo presenting evidence of three widely used tactics to manipulate the calculation of cohort default rates and evade gainful employment regulations.[vii] We therefore encourage the department to include cohort default rate manipulation as an additional topic for regulation and suggest the recommend actions in TICAS' memo as a model for those regulations.

Additionally, the AFT recommends regulation supporting the intent of the "90/10" regulation under Section 487(d)(4) of the Higher Education Act, which requires that no more than 90 percent of each institution's revenues come from Title IV sources.[viii] To further protect taxpayers and promote high-quality higher education, the AFT believes this regulation ought to be refined so that all federal sources of revenue are considered a part of the 90 percent maximum. One of the most pressing issues is that current interpretation allows institutions to count Department of Defense Tuition Assistance and GI Bill benefits as a part of the "10" and not part of the "90." Though not a part of Title IV, DOD Tuition Assistance and GI Bill benefits are funded by taxpayers and intended to provide a high-quality education. Furthermore, military education funds have made service members targets of aggressive and sometimes misleading recruitment tactics by career education programs—many times, the same programs that would lose eligibility to Title IV funding under a strong gainful employment rule.[ix] The AFT urges the department to refine the 90/10 regulation to include DOD Tuition Assistance and GI Bill education funds as part of the "90" along with Title IV funds.

Cash Management

The AFT believes students ought to have a greater role in deciding to accept debit cards or other banking services provided through an institutionally controlled process or contracted provider. The U.S. PIRG Education Fund's report "The Campus Debit Card Trap: Are Bank Partnerships Fair to Students?" has identified a number of fees, "including per-swipe fees, inactivity fees, overdraft fees and more," that are borne by the student while the institution receives cost savings from outsourcing the production of student ID cards and debit or credit cards linked to student aid disbursement.[x] Under the guise of convenience to students, institutions receive millions of dollars while students receive poor-quality, costly service. The licensing of school mascots and logos to these banks and aggressive on-campus marketing constitute an endorsement of these banking services by the institution that is misleading to students.

When negotiating banking agreements, institutions should see that fees are as low as possible for student users. We endorse the list of fees U.S. PIRG recommends be eliminated in Appendix I of its report.[xi] We also recommend that the department look to the Credit Card Accountability Responsibility and Disclosure (Credit CARD) Act of 2009 for guidance on how to further regulate the financial institutions to protect students. Because of the Credit CARD Act, issuers like U.S. Bank and Wells Fargo are no longer allowed to offer t-shirts or other freebies to students to induce them to open credit cards, but nothing prevents them from using such tactics on the nearly 4 million students they have access to through their debit card agreements.

We believe students should have an unbiased choice in student aid disbursement. Institutions should be required to offer multiple disbursement options, which must include the ability to receive a check or to use an existing bank account. Financial aid is meant to be a good deal for students, not a profit center for banks.

State Authorization

The AFT believes that state borders should not be a barrier to receiving high-quality education. In cases where online or correspondence programs are associated with physical campuses in one state but may attract students from another state, those programs should be subject to multiple states' authorization when the out-of-state student population reaches a significant percentage of enrollees. Any program enrolling a significant percentage of students from another state in online-exclusive or majority-online programs should seek authorization from the state(s) in which any student resides. The department should exempt institutions and programs of higher education from state authorization when only a small minority of students enrolled in their programs reside in another state, especially if those students attend both in person and online throughout the duration of the program.

In cases where entire educational programs are online-only and provided by an institution with a national enrollment but no physical campus, or a token physical campus, that institution should be required to meet the state requirements in all the states where its students reside, for it to legally offer postsecondary distance education. These institutions, with the majority of their total enrollment online-only and composed of student residing in multiple states, should be the true target of state authorization regulations.

Clock-Hour to Credit-Hour Conversion

While subject competency may not be solely measured by credit or clock hour, the AFT supports guidance that ensures the vital faculty-student interaction that is essential to high-quality higher education in any program, whether measured in clock or credit hour, by competency, or in a "blended" or "flipped" classroom environment. We believe that current regulation provides sufficient flexibility for institutions to use alternative measures for credit while still preserving quality safeguards.

Recommendations for Panel Makeup

When the negotiated rulemaking committee is assembled, it should include a balance between institutional and consumer perspectives. In the past, institutions have been overrepresented, and the full diversity of student and student loan borrower voices were not included. In particular, we urge the department to include the perspectives of college graduates in public services, whose student debt levels may not appear burdensome but actually represent a significant portion of their discretionary income. These teachers, nurses, public employees and other professionals contribute much to the public welfare, and we ask the department to ensure their needs are considered. It would be a tragedy if an unintended consequence of this panel's rules resulted in fewer students pursuing these professions.

In closing, we thank the department for its thoughtful work on these much-needed regulations. For nearly 100 years, the American Federation of Teachers has stood for high-quality, rigorous, faculty-centered postsecondary education that is accessible to all citizens. By regulating financial aid disbursement, addressing clock-hour to credit-hour conversion, strengthening gainful employment regulations, and putting in place other protections against fraud and abuse, the department can protect taxpayer dollars and help ensure high-quality postsecondary education for all Americans who seek it.

[i] Association of Private Sector Colleges and Universities v. Arne Duncan, Civil Action No. 11-1314 (RC) (U.S. District Court, D.C. March 19, 2013). Available here: www.leagle.com/xmlResult.aspx?xmldoc=In%20FDCO%2020130319F26.xml&docbase=CSLWAR3-2007-CURR.

[ii] Information accessed through the Federal Student Aid Data Center, Gainful Employment data page. Available here: http://studentaid.ed.gov/about/data-center/school/ge/data.

[iii] See 34 CFR 668.8(g), available here: www.gpo.gov/fdsys/pkg/CFR-2011-title34-vol3/xml/CFR-2011-title34-vol3-sec668-8.xml.

[iv] Alisa Cunningham and Gregory Kienzl, *Delinquency: The Untold Story of Student Loan Borrowing* (Washington, DC: Institute for Higher Education Policy, 2011), 18. Available here: www.ihep.org/assets/files/publications/a-f/Delinquency-The_Untold_Story_FINAL_March_2011.pdf.

[v] Sandy Baum and Saul Schwartz, *How Much Debt Is Too Much? Defining Benchmarks for Manageable Student Debt* (New York: College Board, 2006), 12. Available here: http://research.collegeboard.org/sites/default/files/publications/2012/9/researchinreview-2006-12-benchmarks-manageable-student-debt.pdf.

[vi] Ibid.

[vii] "Steps the Education Department Should Immediately Take to Curb Default Rate Manipulation," *The Institute for College Access and Success*, August 21, 2012. Available here: http://www.ticas.org/files/pub/TICAS_memo_on_CDR_evasion_082112.pdf.

[viii] Information accessed through the Federal Student Aid Data Center, Proprietary School 90/10 data page. Available here: http://studentaid.ed.gov/about/data-center/school/proprietary.

[ix] Hollister K. Petraeus, "For-Profit Colleges, Vulnerable G.I.'s," *New York Times,* September 21, 2011. Available here: www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html?_r=0.

[x] Rich Williams and Edmund Mierzwinski, *The Campus Debit Card Trap: Are Bank Partnerships Fair to Students?* (Washington, D.C.: U.S. PIRG Education Fund, 2012). Available here: www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf.

[xi] Ibid., 32.