

State Attorneys General

**A Communication from the Chief Legal Officers
Of the Following States**

Connecticut * Illinois * Iowa * Kentucky * Maryland * Nevada * New Mexico * Oregon

May 27, 2014

Ms. Ashley Higgins
U.S. Department of Education
1990 K Street NW
Washington, DC 20006-8502

RE: State Attorneys General Comments on the Program Integrity: Gainful Employment
Proposed Rule

We are pleased the Department has proposed regulations to identify programs that are not preparing students for gainful employment (“GE”). State Attorneys General across the country hear complaints from graduates of GE programs that they are drowning in debt because they have huge student loans and cannot get a job with sufficient wages to pay down the debt. Consumers attend GE programs so that they can get a better job and better wages, which is the promise made by many for-profit colleges, but all too often these consumers are left in a financial position far worse than when they enrolled in the program. We appreciate the Department’s detailed analysis and exposition of the proposed rules and this opportunity to comment on the Department’s proposed GE rules, 79 Federal Register 57 (March 25, 2014).

Comment Re: Proposed Rule 34 CFR § 668.412(a)(8), Job Placement Rates

Proposed Rule § 668.412(a)(8) governs the disclosure requirements for GE programs and with respect to job placement rates, provides:

(a) *Disclosure template.* An institution must use the disclosure template provided by the Secretary to disclose information about each of its GE programs to enrolled and prospective students. The Secretary will conduct consumer testing to determine how to make the disclosure template as meaningful as possible. The Secretary identifies the information that must be included in the template in a notice published in the Federal Register. That information may include, but is not limited to:

...

(8) The placement rate for the program, if the institution is required by its accrediting agency or State to calculate a placement rate.

In the explanations and stated purposes of the proposed rules issued on March 25, 2014, the Department said about the information to be provided by institutions in the disclosure template specifically, “[t]he proposed disclosure requirements would help ensure students, prospective students, and their families, the public, taxpayers, and the Government, and institutions have access to meaningful and comparable information related to student outcomes and overall performance of GE programs.” 79 FR 57 (March 25, 2014) 16428 The Department further opined in its explanatory summary that,

[W]ithout reliable information, students, prospective 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. Furthermore, without accurate and comparable information, the public, taxpayers, and the Government are in the dark as to the performance of these programs and the return on the Federal investment in these programs. Although we do not seek to impose requirements through this rulemaking that specifically address all of these allegations of abuse, the proposed regulations would help ensure, among other things, that students, prospective students, and their families and the public, taxpayers, and the Government are provided with reliable and comparable information about the student outcomes of GE programs.

Id. 16436

While the undersigned are encouraged by the Department’s recognition that consumers, the Government and the market will benefit from institutions disclosing GE program student outcomes to prospective students, we are disappointed that the Department has not proposed a rule requiring all GE programs to calculate a job placement rate according to a standardized methodology prescribed by the Department. The Department says it “remains concerned that students seeking to enroll in these [GE] programs do not have access to reliable information that will enable them to compare programs in order to make informed decisions about where to invest their time and limited educational funding.” Id. at 16435 Requiring all GE programs to disclose job placement rates according to a single, standardized calculation would fulfill the Department’s stated purpose of providing critical information to prospective students and allowing the student outcomes of GE programs to be compared by interested persons, including prospective students and the Government.

The most important piece of information to a prospective student other than cost is whether the program will lead to a good job. See Gallup Politics June 28, 2013, *Americans Say*

Graduates' Job Status Key to College Choice. According to one survey, “81% of students and recent graduates felt that a school’s placement rate was ‘important’ or ‘very important’ in deciding” where to attend school. See Young Invincibles White Paper November 2012, *The Student Perspective on Federal Financial Aid Reform*. Further, after investigating several of the largest for-profit institutions, the Senate HELP Committee specifically called for establishing “a uniform and accurate methodology for calculating job placement rates” for GE programs. See HELP Committee *Executive Summary*, p. 9.

The undersigned disagree with the Department’s statement that “limitations in available data preclude the development of a national placement rate methodology that is consistent across all GE programs.” 79 FR 57 (16477) In fact, in proposed rule 34 CFR § 668.513, the Department itself has offered a standard methodology for calculating job placement rates. Under proposed § 668.513, if a program loses eligibility to participate in title IV due to its program Cohort Default Rate, the institution may appeal, if among other requirements, the “program is not an associate, baccalaureate, graduate, or professional degree and the placement rate, as defined in paragraph (e) of this section for the program is 44 percent or more.” *Id.* 16523 For purposes of that section, the Department defines placement rate as follows:

- (e) *Placement rate.* (1) Except as provided in paragraph (e)(2), for purposes of this subpart the placement rate for a GE program is the percentage of students enrolled in the program, as described in paragraphs (e)(3) and (e)(4) of this section, who—
 - (i) Are employed, in an occupation for employment in which the GE program was offered, on the date following 1 year after their last date of attendance at your institution;
 - (ii) Were employed for at least 13 weeks, in the occupation for which the GE program was offered, between the date they enrolled at your institution and the first date that is more than a year after their last date of attendance at your institution; or
 - (iii) Entered active duty in the Armed Forces of the United States within 1 year after their last date of attendance in the GE program.
- (2) For the purposes of this section, a former student is not considered to have been employed based on any employment by your institution.
- (3) The students who are used to determine the placement rate of a GE program include only former students who—
 - (i) Were initially enrolled in the GE program on at least a half-time basis;
 - (ii) Were originally scheduled, at the time of enrollment, to complete the GE program during the same 12-month period used to calculate the low income rate; and
 - (iii) Remained in the GE program beyond the point at which a student would have received a 100 percent tuition refund from you.
- (4) A student is not included in the calculation of the placement rate of a GE program if that student, on the date that is 1 year after the student's originally

scheduled completion date, remains enrolled in the same program and is making satisfactory progress.

(f) *Scheduled to complete*. In calculating a completion or placement rate under this section, the date on which a student is originally scheduled to complete a GE program is based on—

(1) For a student who is initially enrolled full-time, the amount of time specified in your enrollment contract, catalog, or other materials for completion of the GE program by a full-time student; or

(2) For a student who is initially enrolled less than full-time, the amount of time that it would take the student to complete the GE program if the student remained at that level of enrollment throughout the program.

Id. 16524.

Negotiators on the Committee also provided a detailed draft rule for calculating job placement rates for all GE programs, and it includes a standardized definition and provides the reliable means for obtaining the data. It also required the rates to be audited. If the Department will not adopt a comprehensive methodology like that proposed by the negotiators, then the undersigned urge the Department to at least require GE programs to calculate a placement rate using standards similar to the definition proposed by the Department in § 668.513, to wit: job placement rate is the percentage of students who, on the date following 1 year after their date of completing the program, were employed for at least 13 weeks in an occupation for employment in which the GE program was offered or entered active duty in the Armed Forces of the United States within 1 year after completing the GE program. An institution shall substantiate the calculation of its placement rates by having the certified public accountant who prepares its audit report required under §668.23 report on the institution’s calculation based on performing an attestation engagement in accordance with the Statements on Standards for Attestation Engagements of the American Institute of Certified Public Accountants (AICPA).

If the Department is concerned about the additional burden on programs unaccustomed to calculating job placement rates, the Department at least should require programs that calculate job placement rates for accreditors and states, which rates must be disclosed on the Disclosure Template, also to disclose a job placement rate calculated according to the Department’s methodology. Interested parties will be able to see the rates as calculated by various accreditors and states in relation to the rates as defined by the Department. Having at least one rate in common would improve the comparability and meaningfulness of all the job placement rates for prospective students and the Government.

Comment in response to Department’s specific request for comment on job placement rates

Finally, the Department requested comment on the best way to “handle cases where an institution must calculate more than one placement rate to satisfy the requirements of multiple entities, e.g. multiple States or multiple accreditors. The current template allows institutions to disclose placement rate information for up to one State and up to one accrediting agency, though the template also provides institutions with a way to disclose additional calculated rates.” Id.

16477 The undersigned urge the Department to modify the template so that institutions must include placement rate information required by any additional entities, including multiple accrediting bodies, multiple states, and the Department's rate, if promulgated. Disclosing in one template the job placement rates as calculated by various entities provides prospective students and the Government with a more comprehensive picture of the program's student outcomes.

Comment Re: Proposed Rule 34 CFR § 668.412(a)(14) and (15), Disclosures Regarding Professional Licensure and Programmatic Accreditation

Under proposed rule 34 CFR § 668.412(a)(14) and (15), institutions would also be required to state in the Disclosure Template:

(14) With respect to the occupations for which the program prepares students as disclosed by the institution under paragraph (a)(1) of this section, whether completion of the program satisfies any applicable educational prerequisites for professional licensure in the State in which the institution is located and in any other State included in the institution's Metropolitan Statistical Area.

(15) If applicable, whether the program holds the programmatic accreditation necessary for an individual to obtain employment in the occupation for which the program prepares the student.

Id. 16512.

Pursuant to this proposed rule, an institution can disclose to a prospective student that the GE program does not prepare the individual to sit for professional licensure exams or does not have the accreditation necessary to obtain employment in the relevant occupation **but** still receive that student's title IV funds for the GE program. This does not appear to be the Department's intended outcome. A disclosure to prospective students about *whether* a program prepares a student to sit for a licensure exam or has the programmatic accreditation necessary for employment does not adequately address the Department's stated interest in making sure that GE programs prepare students to obtain employment with sufficient earnings to pay back their student loan debts. Id. 16426, 16525 While a disclosure will deter some prospective students from enrolling in the program, which would reduce the use of title IV funds for such program, the Department has recognized that a more direct and effective manner for reducing spending on programs that will not prepare the students for gainful employment in a recognized occupation is to not authorize these programs to receive Title IV funds.

The Department stated with respect to its rule conditioning a program's eligibility for title IV funds:

As part of the accountability framework, to determine whether a program provides training that prepares students for gainful employment as required by the HEA, we propose procedures to establish a program's eligibility and to measure its outcomes on a continuing basis. **To establish a program's eligibility, an**

institution would be required to certify that each of its GE programs meets all applicable accreditation and licensure requirements necessary for a student to obtain employment in the occupation for which the program provides training. This certification would be incorporated into the institution's program participation agreement. (Emphasis added)

Id. 16437 Therefore, to make the disclosure provisions of subsections 14 and 15 consistent with the Department's rule that a program is only eligible for title IV funds if it prepares students to sit for an applicable professional licensure exam and has the necessary accreditation for employment, *see* 34 CFR § 668.414(d)(2) and (3), institutions will need to make an additional disclosure on the template when applicable. They will need to disclose that as a consequence of the program not meeting the educational requirements necessary for professional licensure or of not having the necessary accreditation for employment, individuals will not be able to use title IV funds to pay for the costs of attending that program. Otherwise, prospective students may not fully understand the financial consequences of the program not meeting these prerequisites.

Additionally, the proposed disclosure rule in 668.412(a)(14) is dependent upon the *institution's* location, when the important factor for gainful employment is the *student's* location since it is the student who must obtain employment with sufficient wages to pay back loans. Thus, institutions offering a GE program must be required to make disclosures about whether the program satisfies "any applicable educational prerequisites for professional licensure in the State in which the prospective student is located."

Comment Re: Proposed Rule 34 CFR § 668.414(d), Certification of Program Eligibility

The preceding Comment assumes that the Department intended to condition eligibility of title IV funds on the program preparing students to sit for state licensure exams and on the program having the necessary accreditation for employment. While it seems clear from the Department's proposal that a program is not eligible to receive title IV funds if it does not qualify a student to sit for any professional licensure exam, § 668.414(d)(3), it is not entirely clear from the rule as drafted by the Department that it intends to condition eligibility on the program having the accreditation necessary for employment. The undersigned urge the Department to require GE programs to satisfy the educational prerequisites for professional licensure and certification and to have the accreditations required by potential employers in the state.

Proposed § 668.414 provides:

(a) *Transitional certification for existing programs.* (1) Except as provided in paragraph (a)(2) of this section, an institution must provide to the Secretary no later than December 31 of the year in which this regulation takes effect, in accordance with procedures established by the Secretary, a certification signed by its most senior executive officer that each of its currently eligible GE programs

meets the requirements of paragraph (d) of this section. The Secretary accepts the certification as an addendum to the institution's program participation agreement (PPA).

(2) If an institution makes the certification in its PPA pursuant to paragraph (b) of this section between July 1 and December 31 of the year in which this regulation takes effect, it is not required to provide the transitional certification under this paragraph.

(b) *PPA certification.* As a condition of its continued participation in the title IV, HEA programs, an institution must certify in its PPA with the Secretary under § 668.14 that each of its currently eligible GE programs meets the requirements of paragraph (d) of this section.

(c) *Establishing eligibility and disbursing funds.* (1) An institution establishes the eligibility for title IV, HEA program funds of a GE program by updating the list of the institution's eligible programs maintained by the Department to include that program, as provided under 34 CFR 600.21(a)(11)(i). By updating the list of the institution's eligible programs, the institution affirms that the program satisfies the certification requirements in paragraph (d) of this section. Except as provided in paragraph (c)(2) of this section, after the institution updates its list of eligible programs, the institution may disburse title IV, HEA program funds to students enrolled in that program.

(2) An institution may not update its list of eligible programs to include a GE program, or a substantially similar program, that was subject to the three-year loss of eligibility under § 668.410(b)(2), until that three-year period expires.

(d) *GE program eligibility certifications.* An institution certifies, at the time and in the form specified in this section, that:

(1) Each eligible GE program it offers is approved by a recognized accrediting agency or is otherwise included in the institution's accreditation by its recognized accrediting agency, or, if the institution is a public postsecondary vocational institution, the program is approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation;

(2) Each eligible GE program it offers is programmatically accredited, if such accreditation is required by a Federal governmental entity or by a governmental entity in the State in which the institution is located or by any State within the institution's MSA; and

(3) For the State in which the institution is located and in all other States within the institution's MSA, each eligible program it offers satisfies the licensure or certification requirements of those States so that a student who completes the program and seeks employment in those States qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.

Id. 16517

The undersigned commend the Department for proposing rules that will require institutions to engage in some due diligence to assure the Department and prospective students

that educational prerequisites for professional licensure and employment are met by the GE program. We are generally supportive of subsections (d)(2) and (3) but suggest that as drafted these provisions may be more narrow than intended by the Department. Specifically, these provisions do not seem to account for the requirements of potential employers, and yet the inability of graduates to get a job because the program lacked the necessary accreditation for employment has largely animated the discussion of this rule.

For instance, in connection with this proposed rule, the Department noted cases “where students were misled to believe that they would be able to obtain a position in their field of study upon completion but later learned that the program didn’t have the proper programmatic accreditation to allow them to sit for a licensing exam needed to practice in the field or to obtain a certification generally preferred by employers.” *Id.* 16478 The Department also stated that “institutions must certify through their program participation agreements that their GE programs meet all applicable accreditation and State and Federal licensing requirements to be eligible for title IV, HEA program funds.... A program that cannot meet the basic certification requirements cannot be said to be preparing students for gainful employment in a recognized occupation. We believe that any student attending such a program would have a difficult time or be unable to secure employment in the occupation for which he or she received training and, consequently, would likely struggle to repay the debt incurred for enrolling in that program. The certification requirements are intended to help prevent such outcomes and are an appropriate condition that programs must meet to qualify for title IV, HEA program funds as they squarely address the debt repayment concerns underlying the gainful employment eligibility provisions of the HEA....” *Id.* 16441-16442

In light of the negotiator’s concerns and the Department’s stated purpose for the rule, subsection (d)(3) should be revised to require institutions to certify that “each eligible program it offers satisfies the accreditation, licensure or certification requirements of those States and of employers in those States so that a student who completes the program and seeks employment in those States qualifies for the employment or qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.”

Finally, as with the proposed disclosure rule in 668.412(a)(14), section 668.414(d) is dependent upon the *institution’s* location, when the important factor for gainful employment is the *student’s* location since it is the student who must obtain employment with sufficient wages to pay back loans. Thus, institutions offering a GE program must make the required certifications with respect to any state where the program is offered.

Comment in Response to Department’s Specific Request for Comment on 34 CFR § 668.404, the inclusion of books, supplies and equipment in the cap in calculating the D/E rates.

The Department proposes “to cap loan debt for the D/E rates calculations at the total costs assessed to each student for enrollment in a GE program because institutions can exercise control over this portion of the amount that a student may borrow.” *Id.* 16453 The Department explained that,

Initially, [it] did not propose a cap. Many of the institutional negotiators, however, argued in favor of this cap because, under the HEA, institutions may not generally limit the amount an otherwise eligible student may borrow up to the cost of attendance or annual and aggregate loan limits under the HEA. These negotiators noted that students often borrow to cover costs other than those directly related to the program, such as for living expenses, over which institutions have little, if any, control. They argued that institutions have no ability to prevent a student from borrowing the maximum amount permissible, even if the cost of the program is much lower. These negotiators suggested that institutions should not be held accountable for those portions of student debt that are unrelated to the cost of the program.

Some of the committee members suggested including in the loan cap calculation not only the amount of tuition and fees assessed the student, but also the total cost of books, supplies, and equipment that a student would incur in completing the program. The negotiators reasoned that, like tuition and fees, an institution controlled these costs, either directly by providing the books, supplies, and equipment to a student or indirectly by requiring the student to purchase the materials. We agree and propose that, in the determination of a borrower's loan debt, we would use the lower of:

- The amount of the student's loan debt attributed to enrollment in the program; and
- The total of the student's assessed tuition and fees, and the student's allowance for books, supplies, and equipment included in the cost of attendance disclosed under proposed § 668.412, or the actual amount charged each student in any sale of books, supplies, and equipment, if higher.

The undersigned support the inclusion of the costs of books, supplies and equipment in the cap for the reasons provided by the Department. Additionally, the undersigned would be concerned that not including books, supplies, and equipment in the cap could result in the strange circumstances of institutions being paid title IV funds for books, supplies and equipment but such funds would not be included in the D/E rate calculation. Similarly, while the Department’s comments suggest that institutions providing GE programs do not provide room and board to students, the undersigned encourage the Department to go ahead and include such possibility in the rules now. Thus, in addition to tuition, fees, books, supplies, and equipment, costs associated

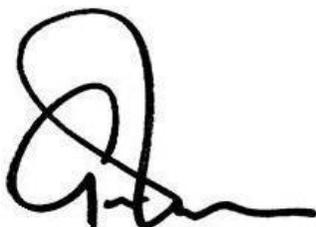
with room and board if supplied or under the control of the institutions should be included in the D/E rates calculations.



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