ED-2023-OPE-0089

June 13, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Via https://www.federalregister.gov

Dear Secretary Cardona:

This is a comment on the U.S. Department of Education's proposed regulations under the title, "Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB)," Docket ID ED-2023-OPE-0089.

Targeting proprietary institutions is not the way to improve sector-wide outcomes in postsecondary education. For-profit colleges are finding success because they are helping a segment of students who have historically been underserved by traditional colleges. The real problem afflicting higher education today is the vast amount of taxpayer subsidies being poured into the system. That is the issue that deserves oversight, rather than singling out a sector that is meeting the needs of students in ways in which the traditional system has failed.

Nevertheless, as described below, the Department of Education ("Department") has persisted in targeting this sector in its proposed regulations.

(1) Regarding the fundamental authority for the "gainful employment" regulations:

(a) Section 101(b)(1) of the Higher Education Act (HEA) merely uses the clause "prepare students for gainful employment in a recognized occupation" to describe certain *institutions*. As the Department acknowledges, Congress has declined to further specify its intent to define an institution. Instead, the Department now issues a 212-page explanation of onerous regulations (on this and other subjects) using one clause as a wedge to impose the Department's desires. Congress has defined institutions that the Department now proposes to un-define on the basis of the Department's own "eligibility" criteria. The statute does not limit Congress's definition by a *proportion* of students who are *successfully* prepared for gainful employment.

Additionally, the statute's definition does not permit the Department to redefine institutional eligibility as a *partial* eligibility on the basis of successful preparation by an institution's individual programs. The statute defines institutions, but the proposed regulations would effectively create a new kind of entity, a *partial* institution, as though an "institution" consists only of those programs deemed acceptable by the Department. While program-level eligibility may be a desirable improvement over institution-level eligibility, the proposed regulations' redefinition is unsupportable under the statute and is therefore arbitrary and capricious.

Besides, it is not the proper role of the Department to determine whether an institution provides a level of preparation that the Department deems "acceptable." If Congress had wanted to make certain institutions ineligible, it could have done so. It has not. By redefining institutions out of Congress's explicit definition, the Department defies Congress and acts arbitrarily and capriciously.

(b) Additionally, to the extent that the proposed regulation elects to make individual *programs* within institutions ineligible, such authority is nowhere to be found in the HEA. The Department should not attempt to rely on broad, cross-cutting authority to enable the Department to circumvent a statutory definition.

(c) Furthermore, the reading of "prepare" that makes the most sense in context is "*aims* to prepare," not "*successfully* prepares." This reading is underscored by the fact that outcome measures are not delineated in statute. Very many non-career, nonprofit and public institutions educate students for degrees yet fail to graduate more than half of their students. Low graduation rates do not make such institutions ineligible for Title IV, HEA programs because it is enough that such institutions *aim* to provide an education. By only applying a criterion of success to career institutions instead of all institutions, the proposed regulations are arbitrary and capricious.

(2) The proposed regulation fails to equally protect students at different kinds of institutions. By the proposed standards alone—not considering graduation rates, default rates, or other outcomes that would suggest the fundamental failure of a nonprofit or public institution to be definable as a legitimate institution of higher education—the Department estimates that more than 1,600 programs would fail.[1] The Department estimates that 6.8 percent of students are in programs at nonprofit institutions that would fail the proposed standards. Instead of proposing that these students be given the same purported "protection" of losing federal financial aid, as they would if they were at for-profit institutions, the Department merely would require that they receive an informational warning. Failing to hold institutions with similar outcomes to a similar standard is arbitrary and capricious.

(3) The proposed regulation reeks of government central planning. Government cannot reasonably determine an "acceptable" salary expectation for each job category in the dynamic American economy. Yet this is what the proposed regulation does. Determining a salary expectation by program, a certain number of years after graduation, is arbitrary and capricious, since each industry has its own peaks and valleys on its own timelines, including unique short-term and long-term compensation patterns, as the Department acknowledges. Individuals have similar peaks and valleys in their earnings' lifetime.

Data also lags reality (a most recent year's debt-to-earnings rates "necessarily involve the earnings and debt levels of individuals completing at least five or six years earlier," 88 FR 32340). Programs that attempt to be ahead of the curve economically may show poor results based on an economy from years earlier, even though the graduates of those programs may do very well in later years. Likewise, programs in dying fields may be bad bets even if they look good on the basis of an economy from years earlier. Ignoring such factors but instead comparing data to high school graduates in the same occupation is likely to mislead rather than help students making decisions about with regard to rising or declining occupations, and ignoring such factors is arbitrary and capricious.

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[1] Default rates among students at community colleges are comparable to those at career colleges, despite the fact the students leave community colleges with less debt on average. (Daniel J. Bennett, "Gainful Employment Rules Play Favorites," *New York Times*, June 5, 2011, https://www.nytimes.com/roomfordebate/2011/06/05/how-to-regulate-for-profit-colleges/gainful-employment-rules-play-favorites (accessed June 9, 2023).)

Indeed, any attempt to account for all relevant factors entails a government decision about what a correct, "acceptable" minimum salary should be for each government-recognized occupation in America. That is socialist planning and should not be anywhere near a federal regulation in our market economy.

For example, the Department seeks to account for institutions "serving students in economically disadvantaged locales," yet it is unclear whether to use a snapshot in time or an amount of time the student/alumnus lived in the area. Data lags reality, and various areas change their relative economic status. Salary comparisons at the level of a state are hard enough (considering, for instance, the vast diversity of California or Texas). Whether or not state-level salaries are modified to take account of local conditions, even a "data-informed" decision would be hopelessly arbitrary and capricious. There is simply no reasonable argument for the government of a free society to declare what salary is appropriate for the country's extremely diverse range of graduates of a postsecondary program leading to an occupation.

(4) Comparing the income from a "typical" holder of a certain postsecondary credential to the income of a "typical" high school graduate in the same profession also fails to account for individual differences and school differences as well as economic and other differences at the borders between states. As Matthew Denhart notes:

> [I]n a program in which [the] median figure falls just short of the threshold, nearly half of the program's students would indeed qualify if the requirements were applied individually instead of across an entire program. Yet these students would be barred from the program, not because they are in serious danger of incurring overly burdensome debt, but because bureaucratic regulations demand it. Thus, the very regulations that are intended to save students from themselves by capping debt loads, would likely severely limit the potential of many deserving students.[2]

Furthermore, states differ considerably in the career preparation available to high school students, and different kinds of students take advantage of career education at different ages. A postsecondary program that specializes in helping unskilled students who barely graduated is working with students who are likely to have characteristics that made them need extra help in the first place. A postsecondary program that specializes in students with intellectual disabilities (other than a comprehensive transition and postsecondary (CTP) program, which the Department exempts) will be all but hopeless in meeting a modal statewide salary, yet may have a large value for those particular students. Institutions with many students who have double or triple majors (for instance, gender studies and biology) may score well for one of a given student's majors but not for another (scoring well relative to gender studies but poorly relative to biology), despite such students being happily and gainfully employed.

Additionally, some students intend to work only part-time, which likely differs by career. The typical age of a worker receiving a high school diploma vs. a postsecondary credential differs, meaning that workers are in different life situations—which again varies by career, especially among careers that are

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[2] Matthew Denhart, "Federal Overreach into American Higher Education," The Heritage Foundation, November 4, 2010 (accessed June 9, 2023).

not balanced by sex—and there is no question that men and women experience different earning patterns throughout their careers.

In sum, there is no reasonable way the government can treat all or even most occupations and programs fairly by the same standard, and doing so in the proposed regulations is arbitrary and capricious.

(5) The existence of income-based or income-driven repayment programs (IBR or IDR programs) means that, by definition, all student loans are affordable. An alumnus merely needs to enter such a program to ensure affordable loans, regardless of the total loan amount. As a result, so long as such repayment programs exist, there is effectively no limit that matters to a student on the debt side of a debt-to-earnings (D/E) calculation, and therefore any such calculation is unnecessary to determine the financial future of a program's alumni. The "20 percent of discretionary income" standard based on just one research paper is therefore irrelevant for millions of borrowers in a repayment program based on income, which can include many years of $0 "payments." Using this "20 percent" standard and "the 8 percent standard" from other, inapt sources and then using D/E to determine eligibility is therefore arbitrary and capricious.[3] (To the extent that using D/E is intended to protect the taxpayer rather than the borrower, the Department has undermined that perspective by dramatically changing IBR terms in favor of borrowers in a separate proposal.)

(6) The department's use of debt as a factor in the gainful employment calculation is arbitrary and capricious because debt is only a proxy for the actual amount a student paid. The calculation is not an accurate measure of a college's return on investment for a student, since the formula does not consider grant aid or out-of-pocket payments, rendering the formula an overly narrow indicator of return on investment.

(7) The Department finds meaning in Table 1.10, which "shows that, among all programs, students that attend those that fall below the proposed debt-to-earnings standard are consistently projected to pay back less on their loans." Mathematically, however, this would be true at a wide variety of D/E standards. Higher debt and lower income should cause alumni to "pay back less on their loans" across most or all of the range of debt and income levels. Accordingly, setting almost any D/E standard could be supported. Without more, setting a standard on the basis of Table 1.10 or any similar table is arbitrary and capricious.

(8) Regarding "warnings": (a) Transparency regarding financial outcomes, in general, will help students and prospective students make better-informed choices regarding institutions and programs. But establishing "acceptable levels of performance" regarding debt and income is not a proper role of government and, moreover, is arbitrary and capricious because the Department is substituting its own judgment of acceptability levels (even if data-informed) for that of a student or prospective student, who may have a very different risk tolerance. Declaring that certain programs or institutions are

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[3] "Mark Kantrowitz asserts that the 8 percent debt-to-income ratio is too strict. His analysis suggests that this requirement 'would preclude for-profit colleges from offering [b]achelor's degree programs … [and] eliminate many [a]ssociate's degree programs at for-profit colleges.' … To comply with the gainful employment regulations, they will be forced to lower tuition levels to reduce the amount of loan money needed. Thus, this proposal indirectly imposes a price ceiling on for-profit and vocational institutions" (Denhart, "Federal Overreach into American Higher Education").

objectively “high-risk,” “low-earning,” or “high-debt-burden” in order to require a “warning” is likely to mislead rather than inform students and prospective students whose risk tolerance differs significantly from the government’s. As a result, some students will rely on the Department’s assessment and be burned because of misplaced trust, while others will forgo valuable opportunities because the Department has scared them off. Students contemplating a program with “no result” due to lack of information also might be misled into believing that the program does not entail significant risk.

(b) A required “warning” is compelled speech that may violate the First Amendment. This concern is exacerbated by requiring specific warning language. As a result, the government would be forcing institutions to carry the government’s speech. The Department is on thin ice when requiring a warning that is based on such arbitrary and capricious calculations as would be used to trigger such a warning.

(9) Using “indicators of risk” or “financial triggers” enables the Department to require onerous, even impossible, financial restrictions (generally, letters of credit) that will force institutions out of business, even when they would have been able to survive and thrive into the long term. Our free society welcomes entrepreneurial risk-taking. Extremely few entrepreneurs can compete with heavily government-subsidized postsecondary education, so there is little choice in postsecondary education but to play by the Department’s market-hostile rules. In this almost socialist environment, government should be willing to take measured risks along with for-profit providers rather than trying to squeeze them out of society at every turn.

(10) Regarding administrative capability, 20 U.S.C. 1099c(d) authorizes the Department to establish administrative capability requirements, including “consideration of past performance of institutions or persons in control of such institutions with respect to student aid programs.” The Department strains the limits of this authorization to propose new requirements for “adequate career services” (§ 668.16(q)) and “clinical or externship opportunities” (§ 668.16(r)), which means that the Department is dictating postsecondary curriculum and student services to an extent far beyond what the statute permits. These additional requirements are not reasonably related to an institution’s administrative ability to process student aid and should be omitted from the final regulation.

(11) Regarding compliance burden: The Department estimates a whopping $240 million and 5.1 million hours of reporting burden on institutions in the first year alone, and then $70 million and 1.5 million hours of reporting burden each following year (88 FR 32442). These numbers constitute billions of dollars of compliance costs per year and are unconscionable. These costs will further pressure tuition upward and student services downward. The concentrated costs to institutions and their students are the price the Department appears willing to pay for the dispersed benefit to taxpayers (and for the small proportion of students who could benefit from the regulations if they were lawful).

(12) The Department’s benefit-cost analysis ignores the costs of the inevitable litigation against the Department that will follow upon the promulgation of the regulations. Since billions (and ultimately trillions) of dollars are at stake, it would be no surprise to see litigation costing tens of millions of dollars.

In conclusion, the goal of higher education financing should be to enable students to pursue options that are the right fit for them, while not exposing taxpayers to large debt burdens. The higher education sector needs improvement across the board. Singling out one type of institution, simply based on tax status, is not the way to get there.

Thank you for your attention to these concerns.

Adam Kissel and Lindsey Burke[4]

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