

# Proposed Rules Issued by the Department on Education

## *Summary* (Updated 6/8/23)

The Department of Education issued proposed rules amending regulations pertaining to gainful employment, financial responsibility, administrative capability, certification procedures, and ability to benefit. The rules, if finalized and released by November 1, 2023, would go into effect on July 1, 2024. Below is a summary of the proposed rules:

### **Gainful Employment (GE) and Financial Value Transparency for all Institutions**

#### **Department Proposals**

- *Re-establish a GE rule in the regulations.* The gainful employment rule first came about in 2011 under the Obama administration but was reissued in 2014. The rule was established to hold programs accountable that were created to lead to gainful employment as indicated in the HEA. All programs at for-profit institutions and all non-degree programs at public and private, non-profit institutions are considered GE programs. In 2019, the Trump administration rescinded the GE rule and now the Department is proposing to re-establish the rule. The new proposed rule includes the following highlights:
  - Applies the rule to a two-year and four-year cohort of at least 30 students;
  - Establishes a debt-to-earning (D/E) rate metric to determine the eligibility of GE programs;
  - Establishes an earnings premium based on an earnings threshold using data from the Census Bureau; and
  - Bases a GE program on the six-digit Classification of Instructional Programs (CIP) code.
- *Create a new section on financial value transparency.* All institutions of higher education will be required to report on D/E rates and earnings premiums for all programs as long as the program has a cohort size of at least 30 students over a maximum of four years who complete the program and there is available data from a federal agency on earnings for those students. Institutions will have to retroactively report data on all programs and students who were enrolled in those programs by July 31<sup>st</sup> after the implementation date of July 1, 2024. Institutions would have to backdate this information to all students who were enrolled in the prior second through the seventh award years (with one additional year for medical and dental students). If institutions are reporting on non-GE programs, then they can opt to only report data on the previous two award years with the calculation of transitional D/E rates and an earnings premium calculated on each program.
- *Limit an institution's ability to appeal the GE data.* The 2014 GE rule allowed an institution to appeal the GE data every step of the way. This included the list of students completing the program, the earnings data, and the student loan debt data. This new proposal limits appeals to when the institution is seeking to terminate the GE program and only when the

program has been deemed ineligible by the Department. However, an institution is given the opportunity to correct the list of students used to determine the metrics.

- *Prohibit a transitional period.* An institution would not have the ability to have a transitional period for complying with the new rule once it goes into effect.
- *Require institutions to report data for all programs.* Institutions are required to retroactively report certain data on each student that is enrolled in a program to include when a student withdrew, the date the student initially enrolled in the program, and any information as prescribed by the Secretary in the Federal Register.
- *Require institutions to certify GE programs.* The most senior executive officer at each institution must certify that their GE programs are approved by a recognized accrediting agency or are included in the institution's accreditation by its recognized accrediting agency.
- *Create a disclosure website.* The Department proposes to impose additional reporting requirements for all programs at all institutions through a website created by the Department. The intended audience for this website will be currently enrolled and prospective students. The exact information to be disclosed on this website will be articulated in a Federal Register notice. An institution must provide a permanent link to the website.
- *Add performance measures for approving an institution's program participation agreement.* In determining whether or not to approve an institution's program participation agreement (PPA), recertify a PPA, or place a PPA on provisional status, the Department is proposing to consider the following information:
  - Withdrawal rates;
  - Debt-to-earnings rates on all programs;
  - Earnings premium rates on all programs;
  - Educational spending; and
  - Licensure pass rates.
- *Require institutions to provide students with either a warning or an acknowledgement if the program is failing the D/E rates. A failing earnings premium rate in a GE program would also trigger a warning.* A student enrolled in a program is not allowed to use federal financial aid for a failing program until they indicate that they have reviewed the acknowledgement or warning from the institution through the new disclosure website created by the Department of Education.

## **Financial Responsibility**

### **Department Proposals**

- *Add additional requirements for determining an institution's ability to meet its financial or administrative obligations.* The Department proposes to add the following to determine whether or not an institution meets its financial or administrative obligations:
  - If Title IV credit balances are paid;
  - If an institution fails to make a payment regarding an undisputed financial obligation for more than 90 days;
  - If an institution fails to satisfy payroll obligations in accordance with its published payroll schedule; and

- If an institution borrows funds from retirement plans or restricted funds without authorization.
- *Add additional mandatory triggers.* In an effort to address fraud and abuse by institutions, the following are added as additional mandatory triggering events that would automatically deem an institution to not be financially responsible:
  - The submission of a teach out plan or agreement;
  - The inability to meet state licensing requirements and the state agency notifies the institution that it will withdraw its licensure or authorization;
  - If 50 percent of Title IV revenue is received from failing GE programs;
  - If a proprietary institution does not derive at least 10 percent of its revenue from sources other than federal funds;
  - The two most recent cohort default rates are 30 percent or greater;
  - If there is a failure to file an SEC report on time;
  - If there has been a loss in eligibility to participate in another federal educational assistance program;
  - If there was a distribution of funds in the first two quarters of a fiscal year after a contribution received in the final quarter of the previous fiscal year that resulted in a recalculated composite score of less than 1.0; and
  - If, as a result of an action taken by the Department, the institution is subject to a default or other adverse condition.
- *Add additional discretionary triggers.* Much like mandatory triggering events, discretionary triggering events can determine if an institution is financial responsible; however, the Department has the discretion to determine whether or not there is a material adverse effect before deciding that an institution is not financial responsible. The following new triggering events have been added:
  - High annual dropout rates;
  - Fluctuations in student aid funds from year to year;
  - Indicators of a change in financial conditions;
  - Pending borrower defense claims;
  - A discontinuation of a significant share of academic programs affecting at least 25 percent of enrolled students;
  - The closure of most institutional locations; and
  - The inability to meet state licensing requirements.
- *Allow institutions to submit audited financial statements of the two most recent fiscal years to determine financial responsibility.* If an institution is determined to not be financially responsible due to a mandatory or discretionary trigger, it will be required to provide financial protection. Financial protection goes beyond letters of credit to also include options for cash collateral and other means. This financial protection can be released if the institution submits the audited financial statements of the two most recent fiscal years that show the financial situation at the institution has improved such that the institution would no longer meet the triggers.
- *Create requirements for institutions that go through a change of ownership.* In an effort to specifically address the financial responsibility of institutions that undergo a change in ownership, the Department establishes requirements for institutions to meet to include the submission of audited financial statements, same day balance sheets, and the need to have

positive net assets without donor restrictions the day after the change in ownership for private, nonprofit institutions.

- *Require institutions to include a footnote on their audited financial statements regarding money spent on marketing, recruiting, etc.* It is proposed that all institutions of higher education will have to include, on their audited financial statements, a footnote detailing and funds spent on recruiting activities, advertising, and other pre-enrollment expenditures.
- *Increase accountability for public institutions.* Public institutions are now required to submit a letter confirming that the institution is a public institution backed by the full faith and credit of the supporting government entity at any point the Department requests and it does not meet the conditions of either a mandatory or discretionary trigger.
- *Allow the Secretary to override the documentation on audited financial statements.* The Secretary is allowed to make a determination that diminished liquidity, ability to continue operations, or ability to continue as a going concern has not been alleviated, even if the financial audit indicates otherwise.

## **Administrative Capability**

### **Department Proposals**

- *Add additional requirements for institutions to prove their administrative capability.* The Department proposes to add the following additional actions that institutions must take to prove that they are capable of administering programs in Title IV of the HEA:
  - Regarding financial aid counseling, ensure that students and families accept the most beneficial types of aid to them and include information on cost of attendance, net price, and the type of aid offered, among other things;
  - Provide adequate career services to students, which would include the number and distribution of staff, the services the institution has promised to its students, and the presence of partnerships with recruiters and employers who regularly hire graduates;
  - Provide students with accessible clinical or externship opportunities that are related to, and required by, the program that the students are enrolled in;
  - Disburse funds to students in a timely manner consistent with the needs of the students;
  - Ensure that at least half of the Title IV revenue received by an institution is not from programs that fail the gainful employment (GE) rule and ensure that at least half of the full-time students that are receiving Title IV funds are not enrolled in failing GE programs;
  - Not be subject to any significant negative action by a state, federal, or accrediting agency and has not lost eligibility to participate in another federal educational assistance program;
  - Not have any principal or affiliate of the institution, or any individual who exercises substantial control of the institution be convicted of a fraud, crime, or have liabilities to the federal government in excess of five percent of Title IV funds due to misconduct; and
  - Does not lack the ability to administer Title IV aid competently.

- *Further clarify the requirements for evaluating a high school diploma.* Current regulations indicate that institutions must follow their own procedures for validating a high school diploma, but the Department proposed to define what those procedures must be to include:
  - Obtaining documentation from the high school that confirms the validity of the high school diploma; and
  - How an institution can verify the validity of a high school diploma.

## **Certification Procedures**

### **Department Proposal**

- *Add additional provisional certification requirements.* An institution's certification becomes provisional if the institution is not financially responsible or any owner or interest holder also owns another institution with fines or liabilities owed to the Department and is not making payments regarding the liability.
- *Allow certain institutions to be provisionally certified for only two years.* Institutions that were placed on provisional certification status for reasons related to substantial liabilities owed to the Department due to borrower defense claims, false certification discharges, or other consumer protection concerns are provisionally certified for no more than two years. Provisional status remains up to three years as it relates to other prior causes such as the result of change in ownership.
- *Clarify who can sign the PPA.* An authorized representative of the institution or any person who is an authorized representative of an entity with direct or indirect ownership of the institution must sign the PPA.
- *Limit Title IV eligibility for GE programs.* For Title IV eligibility purposes, any institution that has GE programs must limit the number of hours for the program to the greater of the minimum number of hours required in the state for training in the recognized occupation or, another state's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student so long as certain requirements are met .
- *Require institutions to meet additional state licensing requirements.* Institutions are required to meet state licensing requirements in the states where the institution is located and where each student is located upon initial enrollment.
- *Require institutions to meet state consumer protection laws related to closures, recruiting and misrepresentation where distance education is offered.* Institutions are required to meet state consumer protection laws in the states where distance education is offered regardless of their participation in NC-SARA.
- *Ban transcript withholding in certain situations.* Institutions are banned from withholding transcripts if they are at risk of closure; if they made an error in administering a Title IV program that resulted in a student owing the institution funds; or if a Return to Title IV calculation creates an account balance.
- *Add additional requirements regarding provisional certification.* If an institution is provisionally certified, the Secretary can do the following:
  - Require a teach out plan or agreement;

- Prohibit the release of holds on transcripts for institutions at risk of closure, closing, or not seen as financially responsible or administratively capable;
- Require a records retention plan;
- Restrict the addition of new programs or locations;
- Restrict the rate of growth or new enrollments in programs;
- Place restrictions on the institution providing a teach out plan on behalf of another institution;
- Restrict the acquisition of another institution;
- Require institutions to report additional information, which may include cash balances, student rosters, and student complaints;
- Place limitations on institutions entering into a written arrangement with another institution; and
- Require institutions to submit marketing and other recruiting materials if they have been engaged in misrepresentations, aggressive recruiting practices, or violated incentive compensation rules.
- *Add additional reporting requirements for new nonprofit institutions.* When nonprofit institutions are initially certified to participate in Title IV programs, or undergo a change in ownership, they are required to submit reports on accreditor agency actions, state authorization agency actions, and any new servicing agreements until the Department has reviewed two complete consecutive financial statements and compliance audits. The institution also has to report on communications from the Internal Revenue Service (IRS) or any state or foreign country related to tax-exempt or nonprofit status as long as the institution participates as a nonprofit institution.
- *Require institutions to share with students whether or not certain programs meet state licensing requirements.* Institutions are required to share with prospective and current students whether their programs that lead to licensure meet, or does not meet, state licensing requirements.

## **Ability to Benefit**

### **Department Proposals**

- *Include the definition and compliance requirements of an eligible career pathway program.* Currently, there is no definition of eligible career pathway program in the regulations, so the Department is proposing to add the definition included in the Higher Education Act of 1965 (HEA). Students are eligible to access student aid funding if they were first enrolled in an ability-to-benefit program prior to July 1, 2012 or in an eligible career pathway program. The proposed regulation also articulates how an institution can demonstrate compliance with the eligible career pathway program requirements.
- *Further clarify the approved state process.* An alternative way for a student to prove that they have the ability to benefit from a postsecondary education is to successfully complete a process created by the state that is approved by the Secretary of Education (Secretary). The Department clarifies the requirements for states that want to offer an ability-to-benefit process for students.