CRA Charles River Associates

November 22, 2010

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Tony Miller
Deputy Secretary, U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Re: Docket ID ED-2010-OPE-0012, Gainful Employment (follow-up comment)

Dear Mr. Miller:

During our meeting on October 25, 2010 to discuss our public comment you asked a question regarding assumptions about the number of students who would find an alternative program if the program they would have attended became ineligible due to the gainful employment regulations. You referred to this movement as "share shifting". We addressed that issue briefly in our public comment, but in response to your request we have further analyzed data to provide more detail on the share shifting assumptions that were made in the July 26, 2010 Notice of Proposed Rulemaking ("NPRM"), and on those in our own public comment. What follows is our response to your inquiry and a clarification of what we submitted in our public comment on September 9, 2010.

As we discussed, an estimate of the potential impact on student access to higher education is crucial to any analysis of the proposed "gainful employment" rule. In both the NPRM that outlined the rule, and in our own public comment in response to that NPRM, estimates of the rule's likely effect on student access to postsecondary schooling were presented. Whereas the Department of Education estimated the gainful employment rule would deter between 118,000 and 237,000 students from higher education over the next 10 years, we estimated that between 1 and 2 million fewer students would enter postsecondary schooling as a result of the rule. This difference is at the heart of the debate about the "unintended consequences" of the gainful employment rule, which our analysis suggests could be extensive.

This report identifies and analyzes the differences in assumptions that led the Department of Education's estimate of student impact to be so much smaller than the one we submitted in our public comment. Both estimates depend on two things: the fraction of programs estimated to be deemed ineligible and restricted, and assumptions about the fraction of potentially displaced students who will find another program and shift their enrollment rather than leave education altogether. Our estimates of the former fractions are similar to those presented in the NPRM (and we note that the Department now agrees with our analysis that the proposed gainful employment rule would lead to the closure of large numbers of programs, as opposed to only affecting "outliers").

The Availability of Alternative Programs for Students Displaced by Gainful Employment: Testing Assumptions Crucial to Estimates of the Impact of Gainful Employment on Students

Jonathan Guryan, Northwestern University
Matthew Thompson, Charles River Associates

November 22, 2010

Introduction

On July 26, 2010 the Department of Education released a Notice of Proposed Rulemaking ("NPRM") in which it outlined a proposed "gainful employment" rule. That rule would make for-profit postsecondary education programs' eligibility to receive Title IV aid dependent on a formula based on a debt-to-earnings ratio and a repayment rate defined by the Department in that same NPRM.

Of central importance to any analysis of the proposed gainful employment rule is its impact on students – its effect on the number of students who will receive postsecondary education. This is not the only question important to an assessment of the wisdom of the proposed rule. Whether the rule identifies programs that are and are not imparting benefits to its students is of first-order importance as well. But, the potential impact on students' access to postsecondary education—often referred to as "unintended consequences"—should be central to any assessment of the proposed gainful employment rule. "Intended" or "unintended," the result will be the same—fewer student postsecondary educational opportunities and graduates.

On September 9, 2010, we submitted a public comment in response to the July 26, 2010 NPRM regarding gainful employment. In that public comment, we presented an analysis in which we estimated the number of students who would not go to college over the next decade as a result of the gainful employment rule if it were implemented. The predictions from that analysis were based on our estimates of the fraction of programs that would be deemed ineligible or restricted by the proposed rule if programs did not adjust to the rule, and on various alternative assumptions we made about the fraction of students who would find a way to attend a program if the program for which they were destined was deemed ineligible or restricted.[1] The scenarios we present in our public comment that we consider likely involve anywhere from 25 to 50 percent of students in ineligible and restricted programs finding a different program to attend.

In the NPRM, the Department of Education presents a similar analysis of the impact the rule might have on student access to postsecondary education. The Department's estimates of the fraction of programs that are likely to be deemed ineligible and restricted are similar to our own, if slightly higher. However, the Department's assumption regarding the fraction of potentially impacted students who find a different program to attend (which

[1] Throughout, when we refer to students who would have attended restricted programs, we mean the students whose attendance is denied because of the restrictions on enrollment growth.

- Third, it is not clear that the existing similar programs would be willing or able to increase capacity to accept the students who would have attended the ineligible program. The closed program is ineligible at least in part because of the characteristics and choices of the students it served. Accepting students with high debt amounts and low measured repayment rates may cause the alternative program to become ineligible itself.

- Fourth, it is unreasonable to expect new programs to open specifically to absorb the displaced students. A program offered by a different institution in the same labor market and area of study, and which served the same students as the ineligible program, would itself be at high risk to be deemed ineligible according to the gainful employment rule. We expect that other schools would see the failure of a competitor and avoid replicating that program.

Estimating the availability of substitute postsecondary programs

We use data from the 2009 IPEDS to identify the number of potential substitutes for each for-profit program. The IPEDS collects information, including data on enrollment and awards granted, at all postsecondary institutions in the U.S. that receive Title IV federal aid. The IPEDS also includes the address of each school, including the zip code. We define a program based on the full (i.e., 6-digit) Classification of Instructional Programs (CIP) code and program length, crossed with a unit identifier, which in practice is typically a campus location. In other words, if at a particular campus a school offers a one-year certificate program, a two-year Associate's degree program, and a 4-year Bachelor's degree program, all with in the same CIP area of study, these are considered three different programs. When we consider alternatives to that program, we include programs from a wider range of CIP codes, as described below, but not programs of different lengths. With regard to the latter, we believe it is unreasonable to expect restrictions on a student's choices to induce attendance at a longer program (i.e. to induce more schooling), and for many students shorter programs would not offer the credentials required by the profession that would have drawn him or her to postsecondary education.

Given the limitations of the fields included in the IPEDS data, the analysis that follows relies on definitions of alternative programs that are tied to the physical location of the program and does not consider programs that are entirely online (i.e., have no requirements that students come to a physical location). Our analysis does consider the existence of programs that combine on-location classes with online classes. While entirely online programs would in theory always be an alternative for a student, it is unclear whether these programs would be offered in all subject areas, and whether these programs would be considered by students who do not have ready access to a computer or reliable internet service. Also, given the differences we find between the assumptions in the NPRM and the estimates using IPEDS, it seems unlikely that entirely online programs are prevalent enough to explain anything but a fraction of the necessary availability of alternative programs.

For our analysis, we constructed a data set of every program listed in the 2009 IPEDS, regardless of sector (i.e., including private for-profit, private not-for profit, and public) or program length. From these data, we focus our analysis on the subset of programs that are at for-profit institutions. This group includes 7,827 programs that are less than 2 years in length, 5,060 2-year programs, and 2,225 4-year programs. For each of

These projections assume that all students with available substitutes will attend one of the substitutes. If students are not able or willing to attend an available substitute then these impacted estimates should be adjusted upward. Therefore, the impacted projections presented here can be considered a lower bound on the number of students impacted through 2020.

Table 1
Percent of Students at For-Profit Programs with at Least One Alternative
(Program within the Same Full CIP Code and 5-digit ZIP)

Program Length	Total Number of Programs	Students with Alternatives at the Same School (1)	Percent of Students with For-Profit Outside Alternatives (2)	Percent of Students with Community College Alternatives (3)	Percent of Students with Any Outside Alternatives (4)	Percent of Students with Any For-Profit Alternatives (5)	Percent of Students with Any Alternatives (6)
Less than 2 Years	7,827	0.0%	7.4%	1.7%	9.5%	7.4%	9.5%
2 Year	5,060	0.0%	1.7%	4.6%	7.4%	1.7%	7.4%
4 Year	2,225	0.0%	1.3%	0.0%	3.9%	1.3%	3.9%
Overall	15,112	0.0%	4.6%	2.4%	8.0%	4.6%	8.0%
NPRM Assumptions (New Students):							
Scenario 1		40.0%	43.7%	4.7%	55.0%	95.0%	95.0%
Scenario 2		50.0%	31.8%	3.4%	40.0%	90.0%	90.0%
Scenario 3		25.0%	55.6%	6.0%	70.0%	95.0%	95.0%

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS.

Table 1 shows the percent of students at for-profit programs for which there is at least one substitute of various types. The table restricts attention to programs with the same full 6-digit CIP code and that are in the same 5-digit zip code. The first three rows of the table each correspond to a different program length: less than 2-year, 2-year, and 4-year programs. The overall line is calculated as the weighted average of the program length estimates.

- Column 1 shows the fraction of students at programs with alternatives at the same school. Because this table only considers programs to be similar if they are categorized with the same full CIP code, by definition there are no alternatives within the same school.

- Column 2 shows the percent of students at programs for which there is an alternative at a different for-profit college in the same 5-digit zip code. Among for-profit certificate programs, only 7.4 percent of students are in programs for which there is at least one other for-profit college that offers a program in the exact area of study and in the same 5-digit zip code. For 2- and 4-year programs, less than 2

Putting the estimates into perspective:
Comparing with assumptions in the NPRM

The row labeled "overall" in Table 1 presents an estimate of the proportion of students in programs with available substitutes regardless of program length. These values are directly comparable to the assumptions made in the NPRM. Based on the availability of substitutes at the full CIP code and 5-digit zip code level, **the assumptions made in the NPRM are in many cases over ten times higher than the estimated number of reasonable substitutes we find using IPEDS data.**

Overall, this translates to a difference in projected student impact through 2020 of around 2,000,000 students (see the Summary table at the end of this report) that the Department assumes will remain in education, but for which we find no evidence of reasonable alternatives in the same program and 5-digit zip code.

Broadening the definition of "similar" programs

In tables 2 and 3, we progressively broaden the set of programs that we consider to be close enough in subject matter that displaced students might still be willing to switch rather than drop out of higher education.

Table 2
Percent of Students at For-Profit Programs with at Least One Alternative
(Program within the Same 4-digit CIP Code and 5-digit ZIP)

Program Length	Total Number of Programs	Students with Alternatives at the Same School	Percent of Students with For-Profit Outside Alternatives	Percent of Students with Community College Alternatives	Percent of Students with Any Outside Alternatives	Percent of Students with Any For-Profit Alternatives	Percent of Students with Any Alternatives
		(1)	(2)	(3)	(4)	(5)	(6)
Less than 2 Years	7,827	30.2%	11.6%	3.7%	15.9%	38.2%	41.4%
2 Year	5,060	15.7%	4.3%	8.1%	14.1%	18.7%	25.8%
4 Year	2,225	18.6%	1.6%	0.0%	6.4%	18.2%	22.1%
Overall	15,112	23.4%	7.7%	4.6%	13.9%	28.7%	33.3%
NPRM Assumptions (New Students):							
Scenario 1		40.0%	43.7%	4.7%	55.0%	95.0%	95.0%
Scenario 2		50.0%	31.8%	3.4%	40.0%	90.0%	90.0%
Scenario 3		25.0%	55.6%	6.0%	70.0%	95.0%	95.0%

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for Institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS

In table 2, we consider the fraction of for-profit students for which there are alternative programs within the same 4-digit CIP code:

Table 3 considers the availability of programs within the same 2-digit CIP code, a far broader definition of similarity in subject matter. Defined this broadly, the fraction of students for which there is an alternative program within the same school is more in line with the assumptions in the NPRM.

It is notable that the NPRM assumes that students will choose to switch subject matter so broadly – across 4-digit CIP codes, but within the same 2-digit CIP code. However, even with this very broad 2-digit CIP code definition of subject matter similarity, far fewer students have alternatives at other for-profit schools than the NPRM assumes.

The 2-digit "Health Professions and Clinical Related Sciences" CIP (51) illustrates the breadth of the programs at the associate's level contained therein, including: dietician assistant, massage therapist, medical illustrator, medical insurance coder, surgical technician, EMT, mental health counselor, medical transcription, occupational therapist, optometric technician, licensed practical nurse, and medical radiologic technician programs.

Table 3
Percent of Students at For-Profit Programs with at Least One Alternative
(Program within the Same 2-digit CIP Code and 5-digit ZIP)

Program Length	Total Number of Programs	Students with Alternatives at the Same School	Percent of Students with For-Profit Outside Alternatives	Percent of Students with Community College Alternatives	Percent of Students with Any Outside Alternatives	Percent of Students with Any For-Profit Alternatives	Percent of Students with Any Alternatives
		(1)	(2)	(3)	(4)	(5)	(6)
Less than 2 Years	7,827	61.2%	17.3%	7.2%	25.4%	66.9%	69.9%
2 Year	5,060	38.3%	8.4%	12.9%	24.9%	43.1%	49.9%
4 Year	2,225	46.1%	3.9%	0.0%	12.7%	48.6%	53.4%
Overall	15,112	51.3%	12.3%	8.0%	23.4%	56.2%	60.8%
NPRM Assumptions (New Students):							
Scenario 1		40.0%	43.7%	4.7%	55.0%	95.0%	95.0%
Scenario 2		50.0%	31.8%	3.4%	40.0%	90.0%	90.0%
Scenario 3		25.0%	55.6%	6.0%	70.0%	95.0%	95.0%

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for Institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS.

Column 2 shows that even with this broad definition of subject matter similarity, there are far fewer for profit substitutes available than the NPRM assumes. Only approximately 12.3 percent of for-profit students have a program at a different for-profit college in the same 2-digit CIP and in the same zip code. The same is true for 17.3 percent of certificate students, for fewer than 9 percent of for-profit Associate's degree students, and for fewer than 4 percent of for-profit Bachelor's degree students. These numbers can be compared with the fraction of displaced students assumed in the NPRM to transfer to a

Table 4
Percent of Students at For-Profit Programs with at Least One Alternative
(Program within the Same Full CIP Code and 3-digit ZIP)

Program Length	Total Number of Programs	Students with Alternatives at the Same School	Percent of Students with For-Profit Outside Alternatives	Percent of Students with Community College Alternatives	Percent of Students with Any Outside Alternatives	Percent of Students with Any For-Profit Alternatives	Percent of Students with Any Alternatives
		(1)	(2)	(3)	(4)	(5)	(6)
Less than 2 Years	7,827	0.0%	38.8%	29.0%	56.2%	38.8%	56.2%
2 Year	5,060	0.0%	16.7%	29.0%	45.1%	16.7%	45.1%
4 Year	2,225	0.0%	21.3%	0.0%	47.3%	21.3%	47.3%
Overall	15,112	0.0%	28.8%	24.7%	51.2%	28.8%	51.2%
NPRM Assumptions (New Students):							
Scenario 1		40.0%	43.7%	4.7%	55.0%	95.0%	95.0%
Scenario 2		50.0%	31.8%	3.4%	40.0%	90.0%	90.0%
Scenario 3		25.0%	55.6%	6.0%	70.0%	95.0%	95.0%

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for Institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS.

Table 5
Percent of Students at For-Profit Programs with at Least One Alternative
(Program within the Same 4-digit CIP Code and 3-digit ZIP)

Program Length	Total Number of Programs	Students with Alternatives at the Same School	Percent of Students with For-Profit Outside Alternatives	Percent of Students with Community College Alternatives	Percent of Students with Any Outside Alternatives	Percent of Students with Any For-Profit Alternatives	Percent of Students with Any Alternatives
		(1)	(2)	(3)	(4)	(5)	(6)
Less than 2 Years	7,827	30.2%	50.7%	49.9%	75.6%	62.1%	81.0%
2 Year	5,060	15.7%	32.0%	55.6%	72.4%	40.8%	75.5%
4 Year	2,225	16.6%	29.4%	0.0%	62.3%	40.8%	64.7%
Overall	15,112	23.4%	41.3%	44.5%	72.6%	51.9%	76.8%
NPRM Assumptions (New Students):							
Scenario 1		40.0%	43.7%	4.7%	55.0%	95.0%	95.0%
Scenario 2		50.0%	31.8%	3.4%	40.0%	90.0%	90.0%
Scenario 3		25.0%	55.6%	6.0%	70.0%	95.0%	95.0%

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for Institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS.

Table 6
Percent of Students at For-Profit Programs with at Least One Alternative
(Program within the Same 2-digit CIP Code and 3-digit ZIP)

Program Length	Total Number of Programs	Students with Alternatives at the Same School	Percent of Students with For-Profit Outside Alternatives	Percent of Students with Community College Alternatives	Percent of Students with Any Outside Alternatives	Percent of Students with Any For-Profit Alternatives	Percent of Students with Any Alternatives
		(1)	(2)	(3)	(4)	(5)	(6)
Less than 2 Years	7,827	61.2%	64.6%	74.4%	90.2%	82.1%	94.4%
2 Year	5,060	38.3%	47.7%	75.9%	89.2%	65.8%	92.3%
4 Year	2,225	46.1%	41.3%	0.0%	82.3%	67.9%	89.8%
Overall	15,112	51.3%	55.5%	63.9%	88.7%	74.6%	93.0%
NPRM Assumptions (New Students):							
Scenario 1		40.0%	43.7%	4.7%	55.0%	95.3%	95.0%
Scenario 2		50.0%	31.8%	3.4%	40.0%	90.0%	90.0%
Scenario 3		25.0%	55.6%	6.0%	70.0%	95.0%	95.0%

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS.

Even with this overly broad definition, only about 75 percent of students overall, and about two-thirds of students in 2- and 4-year for-profit programs have any for-profit alternative. It is only when this broad definition is used and community colleges, 4-year public and private not-for-profit colleges are considered viable alternatives are the estimates in line with the assumptions in the NPRM. Perhaps in recognition of the capacity and resource constraints facing the nation's community colleges in the coming years, and of the difference in admissions standards at public and private non-profit 4-year programs, the NPRM does not rely as heavily on schools from these sectors to absorb displaced for-profit students as the estimates in column 6 do. For example, whereas the NPRM assumes that between 3.4 and 6.0 percent of students would shift to community colleges, the estimates in column 6 rely in part on the existence of community college alternatives for 63.9 percent of students. Without relying on schools from other sectors, the estimates in table 6 show a significantly smaller prevalence of substitute programs (74.6 percent in column 5) than the NPRM assumes (90 to 95 percent).

Summary Table
Projected Number of Students Displaced by the Gainful Employment Rule Under Various Scenarios

Alternative Program Definition	Number of Students with no Alternatives at the Same School	Number of Students with no For-Profit Outside Alternatives	Number of Students with no Community College Alternatives	Number of Students with no Outside Alternatives	Number of Students with no For-Profit Alternatives	Number of Students with no Alternatives
	(1)	(2)	(3)	(4)	(5)	(6)
Table 1 - Full CIP Code, 5-Digit Zip Code	2,368,426	2,259,550	2,311,016	2,179,331	2,259,550	2,179,331
Table 2 - 4-Digit CIP Code, 5-Digit Zip Code	1,814,771	2,186,819	2,258,859	2,039,104	1,688,209	1,579,684
Table 3 - 2-Digit CIP Code, 5-Digit Zip Code	1,152,656	2,076,054	2,178,721	1,814,386	1,037,399	929,199
Table 4 - Full CIP Code, 3-Digit Zip Code	2,368,426	1,686,552	1,782,966	1,156,578	1,686,552	1,156,578
Table 5 - 4-Digit CIP Code, 3-Digit Zip Code	1,814,771	1,390,265	1,313,480	649,631	1,140,133	550,345
Table 6 - 2-Digit CIP Code, 3-Digit Zip Code	1,152,656	1,054,258	854,051	267,451	602,351	165,830
NPRM Assumptions (New Students):						
Scenario 1	1,421,056	1,333,424	2,257,110	1,065,792	118,421	118,421
Scenario 2	1,184,213	1,615,267	2,287,900	1,421,056	236,843	236,843
Scenario 3	1,776,320	1,651,581	2,226,320	710,528	118,421	118,421

Source: 2009 IPEDS.

Note: Programs are defined as a campus, CIP Code, and program length. NPRM assumptions are for institutions with Multiple Programs. Transfer assumptions to Community Colleges were calculated using a weighted average of 4-year, 2-year, and less than 2-year programs weighted by degrees granted from IPEDS.

CRA Charles River Associates

September 9, 2010

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1545 Raymond Diehl Road
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The Honorable Arne Duncan
Secretary, U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Re: Docket ID ED-2010-OPE-0012, Gainful Employment

Dear Secretary Duncan:

We thank you for the opportunity to publicly comment on the proposed rule regarding gainful employment that was described in the NPRM dated July 26, 2010. We were retained by the Career College Association to conduct an independent analysis of the rule. Over the past several months, we have collected data relevant to the rule's impact and formulated an assessment of the rule. We describe our findings and recommendations below.

We hope our comments are helpful to the Department as it works to develop rules and policies that are in the best interest of students.

Sincerely,

Jonathan Guryan, Ph. D
Associate Professor of Human Development and Social Policy and of Economics
Northwestern University

Matthew Thompson, Ph. D
Vice-President
Charles River Associates

There is also considerable variation in the difference between the two measures, in part due to the smaller sample sizes in the Missouri data. To the extent that our earnings estimates are higher than what would be used in practice, our estimates understate the likely impact on for-profit programs and students, possibly significantly.

Our most conservative estimates suggest that nearly 1.2 million fewer students would enter postsecondary schooling over the next decade as a result of the proposed rule. This would include more than 700,000 female students, more than 200,000 non-Hispanic black students, and nearly 200,000 Hispanic students. If less conservative but reasonable assumptions are used, the impact on students could be significantly higher. For example, one reasonable set of assumptions yields estimates suggesting that more than 2 million fewer students would enter postsecondary schooling over the next decade as a result of the proposed rule. This would include more than 1.3 million female students, more than 360,000 non-Hispanic black students, and more than 330,000 Hispanic students. Furthermore, if the Department's own estimate of the fraction of programs and students in ineligible and restricted programs is correct, each of our estimates of the number of students impacted should be increased by 25 percent.

In this second part, we also discuss our concern that the rule may generate a discriminatory incentive for schools to avoid serving low-income students. We hope that all of these effects on students will be viewed in light of the President's commendable call to produce 8 million more college graduates over the next decade, the increased importance of postsecondary education for economic well-being, and the vast current undersupply of education capacity at the postsecondary level.

In the third part, we discuss concerns we have regarding specific details of the way in which the rule would likely be implemented. These include problems related to the treatment of small programs – which are more common than one might think – and related to the use of social security or IRS earnings records.

We conclude with some specific suggestions for how the rule – if one resembling the proposed rule were implemented – might be changed to address some of the concerns we raise. Though we offer these specific suggestions, they should not be interpreted as fully addressing the conceptual problems we raise throughout our comment.

Based on our review and analyses, we are most concerned that the current proposal has the potential to greatly restrict access to individuals who have traditionally had limited access to postsecondary education when the consensus among top researchers in this area is that the returns to education might be quite high. More research should be done before taking action that has the potential to restrict access to many of the types of students that tend to benefit the most from additional schooling.

the interest paid on savings accounts or the expected return on personal investments as the discount rate.

Now consider the education choice of two students: one who has enough personal or family wealth to pay tuition costs out of savings, the other who must borrow to finance the tuition costs.

For someone who would pay tuition costs out of savings, the decision comes down to comparing the present value of increased lifetime earnings (the benefits) to the foregone earnings while in school and the tuition (the costs).[2] If the benefits are greater than the costs, then the student should continue in her schooling. If the costs are larger than the benefits, she should end her schooling and begin working.[3]

Compare this decision with someone who must borrow to pay the tuition costs. This student must consider as costs the additional interest payments associated with the loan. Those payments must be paid in the future. If the interest rate on the loan were equal to the interest rate used for discounting (in this case the interest paid on savings), then the decision would be the same for both students. Since the unsubsidized interest rate charged on student loans is typically higher than the interest rate paid on savings accounts, the cost of furthering education is higher for this student.

In short, because borrowing interest rates are higher than savings interest rates, the cost of schooling is higher for those who must borrow to pay for higher education. Because these students almost by definition come from poorer families, this problem creates access differences that relate to wealth, socioeconomic status, and race. Subsidies for student loans are meant to narrow the difference between borrowing and saving interest rates so that the costs of education are less related to family wealth.

Therefore, any restriction of access to debt financing for higher education will have the effect of decreasing access more for poor and minority students. This is completely at odds with the intent and spirit of the Higher Education Act.

The proposal's focus on the ability of students to pay back their loans quickly leads it to focus on the level of earnings. This will have the effect of differentially punishing students with poor labor market prospects and who would gain the most from higher education. Students with poor labor market prospects would have low earnings, and likely high unemployment rates, without any higher education. Among these students, the ones who would benefit greatly from additional focused

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[2] Note the cost of education does not necessarily include living expenses while attending school. Many of these expenses, particularly for financially independent students, would be incurred regardless of the education decision. However, students will often take loans to cover part, or all, of their living expenses.

[3] While it is necessary to consider as a cost the interest she does not earn on the money she takes out of saving to pay tuition, these interest payments are discounted because they would have happened in the future. If we use the savings account interest rate as the discount rate, the discounting eliminates this from consideration.

and they should recognize the fact that because earnings tend to grow in the early working years it makes sense to borrow more in these years than in later years.

Second, the calculation of annual debt payments should be based on the repayment amounts that students have the option to choose. The proposed rule calculates annual loan payments assuming a 10-year repayment period. However, all students with Title IV loans have the options either of extending the repayment period to between 12 and 30 years through the choice of an "extended repayment", or of reducing the payments they must make in the early years after school completion through the choice of a "graduated repayment". Calculations reported to us by Mark Kantrowitz, the publisher of FinAid.org, indicate that the average repayment length chosen by students for Title IV loans is at least 15 years, and possibly close to 19 years.

In addition, students with low earnings, the ones that the proposed gainful employment rule is meant to protect, have the option of reducing their Title IV payments to a lower percentage of their earnings through the choice of "income-based repayment". For many students, and particularly for those with lower than average earnings in the years for which earnings are measured for the gainful employment rule, it is advisable to choose one of these options.

If the goal of the proposed gainful employment rule is truly to ensure that students can afford their loan payments upon completing schooling, the rule should compare their earnings to the amounts they are required to pay. If students choose to pay back their loans over a shorter period than they have to, it cannot be argued that those students are unable to afford the payments. The correct test, absent measuring the gains resulting from, or quality of the program, is whether students finish school with required debt payments – the lowest ones available to them given their options – that are too high relative to their earnings.

If it were logistically difficult for the Department of Education to determine which of these repayment options offers the lowest annual payment for each borrower, a simple adjustment to the rule would be to extend the repayment length used in the formula to 15 or 20 years. The allowable repayment period varies between 12 and 30 years and depends on the total amount of the Title IV loan. At a minimum, this modification would reflect a more realistic loan payment amount that an individual would be required to make on a student loan.

Another fundamental flaw in the proposed rule that should be addressed is that it does not focus on program quality. Standard economic analysis clearly indicates that good schooling decisions should be based on a comparison of the costs of education to their benefits. Students should think very differently about taking on a given amount of debt if it is to pay for a program that is likely to add to their earnings than if it is to pay for a program that is not. In other words, if the goal of the proposed regulation is to help students, the focus should be on program quality – the benefits that the program gives to students in terms of increased earnings and improved employment likelihood – and not so directly on debt

increase most sharply in the early years after school completion, it is optimal to do more borrowing in those years than in later years. They explain:

> "To the extent that they are grounded in empirical analysis, the ratios [*which were used to determine the 8 percent rule*] reflect the default experience of all homeowners, not the experience of young people who have recently left school. The life-cycle model suggests that the ability and willingness of young people to maintain any given debt-service ratio is greater than that of older cohorts. The front-end and back-end ratios, based on current income, do not take into account the higher future income of some borrowers and especially of student loan borrowers." (Baum and Schwartz, 2006, p.3)

We suggest that the Department not use the Baum and Schwartz study to support the choice of an 8 percent threshold, when in fact that study concludes that the general use of such a rule is a bad idea.

Baum and Schwartz argue that the 8 percent rule that was commonly used at one time by home mortgage underwriters (but, which they point out is not commonly used now) is not appropriate for all student borrowers. This leads us back to the fact that the 8 percent number was originally taken from home mortgage standards. Baum and Schwartz explain that this number appears to come from guidelines for the fraction of annual earnings that should be devoted to non-housing debt for the average homebuyer.

However, borrowing for schooling costs is different. Borrowing for schooling costs is different because schooling tends to cause earnings to increase. A rule limiting the ratio of student debt payments to annual earnings that does not take into account the fact that additional schooling can increase those very earnings has the potential to hurt, not protect, borrowers.

C. The benefits of education and its relevance for the proposed gainful employment rule

It is informative to describe what the vast set of studies by academic researchers has found regarding the benefits of postsecondary schooling. There are dozens, if not hundreds, of studies of this sort that have published in peer-reviewed academic journals. Education is widely recognized as a source of social mobility. Though the United States is regarded as a "land of opportunity," correlations in earnings between fathers and sons are actually quite high. To understand how much social mobility there is in the U.S., consider a family of four right at the poverty threshold. Based on the best current estimates, it would on average take the descendants 5 or 6 generations before their income is within 5 percent of the national average.[5]

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[5] Mazumder, Bhashkar, "Fortunate Sons: New Estimates of Intergenerational Mobility in the United States Using Social Security Earnings Data," Review of Economics and Statistics 2005.

programs is similar to, and on some dimensions better than open enrollment public and not-for-profit programs. Consider, for example, a comparison of graduation rates from the Integrated Postsecondary Education Data System (IPEDS), the official graduation rates reported by the Department of Education.

Table 1
Graduation Rates by Cohort and Type of Institution

Year	Public Institutions			Not-For-Profit Institutions			For-Profit Institutions		
	Total	Male	Female	Total	Male	Female	Total	Male	Female
Percent Completing Bachelor's Degrees Within 4 Years After Start									
1996 Cohort	26.0	20.8	30.3	48.6	43.6	52.6	21.8	22.3	21.1
1997 Cohort	26.4	21.1	30.7	48.9	44.4	52.5	19.1	20.9	16.6
1998 Cohort	26.8	21.4	31.2	49.8	44.9	53.8	19.9	22.2	17.5
1999 Cohort	27.9	22.5	32.4	50.2	45.4	54.0	22.1	23.3	20.4
2000 Cohort	29.0	23.6	33.5	50.3	46.0	53.7	25.7	30.1	20.7
2001 Cohort	29.4	24.0	33.9	50.9	45.8	55.0	18.6	21.8	15.2
Percent Completing Bachelor's Degrees Within 6 Years After Start									
1996 Cohort	51.7	48.1	54.7	63.1	60.4	65.4	28.0	28.0	27.9
1997 Cohort	52.8	49.3	55.7	63.0	60.4	65.1	24.0	25.4	22.2
1998 Cohort	53.2	49.8	56.1	63.7	60.8	66.0	24.5	26.4	22.5
1999 Cohort	54.1	50.5	57.0	64.0	61.3	66.3	29.1	29.5	28.6
2000 Cohort	54.8	51.3	57.7	64.5	61.7	66.7	32.6	35.5	29.1
2001 Cohort	55.0	51.7	57.8	64.4	61.4	66.7	24.5	27.6	21.1
2001 Open Admissions	31.2	27.4	34.4	34.9	32.8	36.8	24.5	27.6	21.1
Percent Completing Certificates or Associate's Degrees Within 150 Percent of Normal Time									
1999 Cohort	22.9	21.6	24.2	44.7	43.6	45.7	61.0	63.2	59.1
2000 Cohort	23.6	22.2	24.8	50.1	49.5	50.7	59.1	59.3	58.9
2001 Cohort	22.9	21.7	24.0	54.6	57.0	51.9	58.7	58.9	58.5
2002 Cohort	21.9	20.9	22.8	49.1	51.1	47.3	57.1	56.6	57.4
2003 Cohort	21.5	20.8	22.2	49.0	49.6	48.5	57.2	58.0	56.8
2004 Cohort	20.3	19.6	21.0	44.4	43.2	45.4	58.2	58.1	58.3

Source: National Center for Education Statistics

It has also been reported publicly that repayment rates are lower among for-profit students than among public or private not-for-profit students. The data released by the Department of Education show repayment rates of 36, 56 and 54, respectively for these groups of students. However, virtually all of the difference between for-profit and public colleges is explained by the fact that for-profit college students are more likely to receive Pell grants. Receipt of Pell grants is income-dependent, and so Pell receipt is a strong predictor of having low family income and low family wealth.

If one splits all schools into two groups – those where more than 50 percent of the students receive Pell grants, and those where less than 50 percent of the students receive Pell grants – and then compare for-profit and public colleges, there are not large differences in repayment rates. Among 2-year schools, in the high-Pell group, the repayment rate at for-profits is 33.0 percent, compared with 36.2 percent at publics. Among 2-year schools, in the low-Pell group, the repayment at for-profits is 46.5 percent, compared with 43.3 percent at publics. Turning to 4-year or above

profit colleges are more likely to be the first in their family to attend college, more likely to be working adults, more likely to be female and more likely to be racial and ethnic minorities. As many of these are groups that have historically been denied access to higher education, it would be a mistake to punish these schools solely for serving these students.[7] Once again, it is clear that the focus of policymakers should be on ensuring these students attend programs that are high quality and that benefit students. Unfortunately, neither the measure of debt nor the repayment rate as defined is a measure of program quality.

E. Research on the economic returns to education

[In a separate comment submitted in response to the same NPRM, Dr. Anthony Carnevale criticized our earlier writings on this topic. Simply put, we believe Dr. Carnevale is incorrect with respect to the economics of the problem, and that he mischaracterizes the academic research on the topic. A response to his criticism can be found in Appendix A at the end of this comment.]

By focusing primarily on the cost side of the education investment decision, the proposed rule does not account properly for the benefits of education. There is a large and well-established literature in economics documenting the large benefits of education (see e.g. David Card, 1999 and Claudia Goldin and Lawrence Katz, 2008 for discussions). Economic studies typically find that each additional year of schooling on average raises a student's annual earnings by between 8 and 15 percent. These studies vary in the level of education they examine, but the general finding is that the returns are fairly similar for different levels of education. For example, one prominent study focuses on the benefits of staying in high school for an extra year among students who drop out of high school at the earliest date allowable by compulsory schooling laws (Joshua Angrist and Alan Krueger, 1991). This study finds earnings increases for these high school dropouts of about 10 percent per year of schooling in 1980, a point in time when the returns to schooling were significantly lower than they are today.

The highest-quality study that examines the returns to community college education is by Tom Kane and Cecilia Rouse (1995). Using data that follow students who completed high school in 1972, they find that the returns per credit at 2-year colleges is no different than the return per credit at 4-year colleges; this is true both for students who completed Associate's degree programs and for those who only completed a semester or two's worth of classes. On a per year basis, they find

[7] There are several equally important questions that we believe the Department should be raising in light of these enrollment trends. For example, are there ways for-profit colleges have designed their programs that students find attractive, more convenient and more accessible? Why have traditional public universities and community colleges failed to grow to meet the increased demand for postsecondary education? What can be done to encourage public and not-for-profit colleges to attract the students for-profits are serving? What can be done to encourage public and not-for-profit colleges to increase availability of on-line courses, flexible class schedules, and flexible academic calendars?

financial resources. These are precisely the students that Title IV funding is meant to encourage to continue their schooling. What evidence exists suggest that the benefits of further education for these students is, if anything, higher than for the students who can more easily afford college tuition.

We suggest that the Department of Education encourage direct experimental or quasi-experimental studies of the returns from for-profit colleges, though we suspect the results from all of the studies described above, as well as those referenced by Goldin and Katz and Card, are informative. Whether the use of Title IV aid to attend for-profit colleges is beneficial to students depends crucially on what these earnings returns are. As the results from Kane and Rouse (1995) and the summary of the literature from Goldin and Katz (2008) show, the quality studies that do exist do not suggest that the returns to education are similar at different levels of schooling (i.e. high school versus college) and that the returns are if anything higher for students who might be discouraged from attending college because of high costs. We therefore think the large base of academic research suggests that the return to for-profit colleges for students receiving Title IV aid are likely to be in line with the returns estimated for other types of schooling. However, there is likely to be a good deal of variation in returns across programs, just as there is variation in quality of public and not-for-profit colleges.

We are aware of a small group of top academic economists who are currently conducting studies of the return to education at for-profit colleges. One of these researchers, Stephanie Cellini Assistant Professor of Public Policy and Economics at George Washington University's Trachtenberg School of Public Policy & Public Administration, has published a number of articles on for-profit colleges. Along with Latika Chaudhary, of Scripps College, she is currently working on a study of the return to education at private and public 2-year or less colleges. She is able to make before-after comparisons of earnings, hours worked, employment, and hourly wages for the same individuals before and after they complete 1- and 2-year certificate and Associate's programs. Her preliminary results show no evidence of smaller returns at private (the majority of which are for-profit) colleges. Her preliminary results also suggest increases in weekly earnings resulting from education at private (again, the majority of which are for-profit) 2-year or less colleges that are around the low end of the returns typically found for most other schooling, and that are as high or higher than the returns we assume in our example calculation described in section I.C., above. In addition to these weekly earnings benefits, her preliminary results suggest large increases in the likelihood of employment associated with completing a certificate or 2-year degree program. Any increase in employment would of course be a benefit that is above and beyond the increase in earnings among those with jobs.

increased. In light of the very high returns we describe above, it is a terrible mistake that funding for community colleges in particular is not increasing to allow for the increases in capacity necessary to educate all students who would benefit.

Unfortunately, the argument that protecting taxpayer dollars means monitoring what fraction of them are repaid implies precisely the wrong policy with respect to community colleges. For this reason, we believe default rates should be viewed primarily from the standpoint of the student, not the taxpayer. To the extent that default rates are informative of the benefits students are receiving from a program relative to its costs, they should be examined. Without reference to other measures of benefits to students default rates are not a good measure of the returns to taxpayer spending. Many government expenditures on education are never repaid, but are important and good uses of taxpayer dollars.

From the standpoint of the taxpayer the expenditures devoted to schooling includes both those devoted to student loans and those that come in the form of direct spending. While for-profit colleges receive more Title IV dollars per student, public colleges and universities receive significantly more direct government funding, particularly from state and local governments. These direct subsidies are one important reason that community colleges are able to charge tuition that is significantly lower than their costs.

The true costs to taxpayers are different across these two types of expenditures. Direct subsidies are not returned, and so they must all be financed through tax revenues or deficits.[8] Some portion of student loan disbursements must also be financed through tax revenues or deficits. However, despite defaults, a large portion of those loans is eventually repaid. The government must finance the portion that is not repaid and the interest on the loan amount during the time it is awaiting repayment.

Based on the public discussion surrounding the Department's proposal, there exists the belief that the cost of educating students at for-profit schools is greater than at other institutions. However, when direct subsidies paid by the federal, state and local governments are considered, the per-student costs of education are similar at for-profit and public institutions, both of which are considerably less than at private not-for-profit institutions. The difference between the for-profit and public institutions is who bears the burden of this cost, taxpayers or students.

A second economic concept that has been confused in the public discussion surrounding the proposed gainful employment rule is the cost of education to the student. It is often pointed out that for-profit Associate's degree programs have significantly higher tuition than community college Associate's degree programs.

[8] As the available tax revenue has decreased there has been upward pressure on tuition charges at public universities and community colleges. This trend, in addition to capacity constraints, might be expected to continue as funding sources become less available.

affected by insufficient growth in the higher education sector are from groups that have historically had low access, and who may have very high returns (see the discussion of Goldin and Katz, 2008 and Card, 1999 above).

Table 3
Enrollment growth by type of institution through 2007:
5, 10, 20 and 30 years

	Total	Public	Private Not-for-profit	Private For-profit
Total percent growth in enrollment:				
30 years	62.06%	53.55%	48.28%	1700.87%
20 years	39.78%	32.80%	33.60%	438.23%
10 years	25.79%	21.10%	18.80%	225.60%
5 years	9.85%	5.80%	9.40%	99.60%
Average annual growth rate:				
30 years	1.62%	1.44%	1.32%	10.12%
20 years	1.70%	1.40%	1.50%	8.80%
10 years	2.30%	1.90%	1.80%	13.70%
5 years	1.90%	1.10%	1.80%	14.80%

Source: Digest of Education Statistics.

And, during this time of remarkable increases in the returns to higher education, and of changes in the U.S. economy that have made high-level skills more and more valuable, there has not been commensurate growth in the nation's capacity to educate students beyond high school. Consider the annual growth rates in enrollment in different sectors of postsecondary education, shown in the table above. Over the past 30 years, according to data collected by the Department of Education, the annual average enrollment growth rate in public and private not-for-profit postsecondary schools has been 1.4 and 1.3 percent, respectively. Recall that this is during a period when the economic returns to a college education have possibly doubled (see e.g. Goldin and Katz, 2008). The lack of expansion in postsecondary education is part of the reason for the U.S. falling behind in the fraction of population that are college graduates, what the President points to as motivation for his call to increase the number of college completers.

Contrast these numbers with the annual enrollment growth rate at for-profit postsecondary institutions. The comparable average annual growth rate at these schools has been 10.1 percent over the past 30 years. Only this small portion of postsecondary schooling has grown as the demand for college education has increased. We emphasize that the question of quality is the key. If for-profit colleges are providing students with education and skills that lead to positive economic benefits after accounting for costs, then this growth in education capacity is an important positive development that should be encouraged for the good of students and of the economy. If not, then this growth is something to be concerned about. In that case, we need to learn more about why the high-quality programs are not expanding to meet the needs of the many students who would benefit from them.

ineligible and restricted. After describing the baseline results, we discuss school and student responses to the rule that might affect the number of students affected. We then describe some criticisms of the Department's analysis of school and student responses to the rule, which we believe are too optimistic. After this discussion, we present our estimates of how many fewer students would enter postsecondary schooling over the next decade as a result of the proposed rule. We conclude the section with a discussion of the possible unintended discriminatory incentives that we worry could be created by the proposed rule.

A. Description of the data collected to conduct the analysis

To assess the possible impact of the proposed gainful employment rule, we collected data from for-profit colleges. In February 2010, we sent out a request to all members of the Career College Association to share their 2006-2008 Cohort Default Rate (CDR) loan-level files, as well as several other data elements that we expected schools might have on their individual student records.

We received responses from 308 schools (identified by OPEID's), representing approximately 450 campuses, including information on approximately 10,000 programs and more than 600,000 students. While there is no way to tell for sure that the sample is perfectly representative, the coverage is remarkably large, accounting for more than one-fifth of all students in for-profit colleges. The size of the sample relative to the population we wish to measure suggests the results are likely to be quite informative of students in the for-profit postsecondary sector. These data include loan amounts and repayment status – including whether loans are repaid in full, in deferment or forbearance – as well as whether the student completed her program, and for most students a total loan amount inclusive of federal, other governmental and institutional loans. For students for which we only observe federal loans, we inflate the loan amount by 1.47, the ratio of total loans to federal loans among students at for-profit colleges who took out federal loans, as reported in the 2008 NPSAS.[9]

These data allow us to calculate most elements of the proposed gainful employment rule fairly precisely. In some cases, we can calculate inputs into the formula more correctly than was done in the Department's own analysis. For example, we are able to calculate repayment rates at the program level, rather than the institution level as the Department was forced to do. As we discuss below, this detail may cause the Department's analysis to underestimate the fraction of programs with low repayment rates in each year.

In two ways our data are less than ideal. First, though we have very detailed data on individual Title IV loans, there is some detail we are missing that would be used to calculate repayment rates exactly as specified in the NPRM. We observe

[9] Source: NPSAS, 2008.

respective fractions of students in each program have zero loans.[10] We calculate the annual loan payment for a loan of that amount with a 6.8 percent annual interest rate and a 10-year repayment length. We then compute the ratio of this amount to the annual early career earnings we estimate for the program from the CPS data.

To calculate repayment rates we use the individual loan data from the CDR files. For each loan we observe the loan amount and its status. Loans amounts reported as paid in full and in repayment are counted in the numerator. These loan amounts plus those reported as in deferment, forbearance and consolidated but not paid in full are counted in the denominator. As we describe above, loans reported as being in "repayment" in the CDR include loans that are delinquent and/or for which principal is not being paid down yet. For this reason we overestimate repayment rates. To address this problem with our data, we compare our average repayment rate with the average repayment rate reported by the Department of Education for for-profit schools. Because the Department's average is 86 percent as large as our average, we conduct separate analyses after multiplying each program's repayment rate by 0.86.

B. Baseline results

Our first set of baseline results is shown in Table 4. We estimate that 7.1 percent of programs in our data would be in the ineligible category if the proposed rule were applied. An additional 11.3 percent of programs would be restricted. The programs in our data are of varying sizes such that the fraction of programs in each category is not equal to the fraction of students in failing or restricted programs. If we count the number of students in programs in each category, we find that 7.5 percent of students in the for-profit programs in our data are in programs that would fail the proposed test. An additional 19.6 percent of students would be in restricted programs.

[10] In the NPRM, the Department discusses the importance of measuring median debt including all graduates, not just those who have debt. However, in the Department's analysis of the rule's impact, only those with debt appear to be counted. It is important that if a rule based on median debt were adopted all graduates are in fact included in the calculation of the median.

Table 5

Impact of Gainful Employment Proposed Regulations - Adjusted Repayment Rates					
Programs					
	Debt-To-Income				
Total Number of Programs Subject to the Proposed Regulation: 11,304	Using 3YP: Above 12% of Annual Earnings AND Above 30% of Discretionary Income - Using P3YP: Above 8% of Annual Earnings AND Above 20% of Discretionary Income	Using 3YP: Between 8% and not more than 12% of Annual Earnings OR Between 20% and not more than 30% of Discretionary Income - Using P3YP: Not Applicable	Using 3YP OR P3YP: 8% or less of Annual Earnings OR 20% or less of Discretionary Income	Missing	Total
At least 45%	3.0%	3.8%	19.4%	0.2%	27.2%
At least 35% and Less Than 45%	3.9%	3.1%	8.7%	0.1%	15.7%
Below 35%	8.8%	6.9%	37.6%	0.4%	53.7%
Missing	0.4%	0.3%	1.6%	1.1%	3.4%
Total	16.9%	14.1%	67.3%	1.7%	100.0%

Percent Ineligible	8.8%
Percent Restricted	13.8%
Percent Eligible	73.4%
Percent Not Able to Determine	4.0%

Impact of Gainful Employment Proposed Regulations - Adjusted Repayment Rates					
Students					
	Debt-To-Income				
Total Number of Students Enrolled in Programs Subject to the Proposed Regulation: 664,971	Using 3YP: Above 12% of Annual Earnings AND Above 30% of Discretionary Income - Using P3YP: Above 8% of Annual Earnings AND Above 20% of Discretionary Income	Using 3YP: Between 8% and not more than 12% of Annual Earnings OR Between 20% and not more than 30% of Discretionary Income - Using P3YP: Not Applicable	Using 3YP OR P3YP: 8% or less of Annual Earnings OR 20% or less of Discretionary Income	Missing	Total
At least 45%	3.7%	5.8%	13.3%	0.0%	22.8%
At least 35% and Less Than 45%	9.4%	7.2%	15.4%	0.0%	32.0%
Below 35%	13.0%	7.0%	24.5%	0.2%	44.7%
Missing	0.0%	0.0%	0.5%	0.0%	0.5%
Total	26.1%	20.0%	53.7%	0.3%	100.0%

Percent Ineligible	13.0%
Percent Restricted	23.6%
Percent Eligible	62.7%
Percent Not Able to Determine	0.8%

While the Department's analysis reported in the NPRM shows a 5 percent failure rate of programs, this analysis is not based on a sample of for-profit programs. In fact, more than half of the programs analyzed by the Department of Education are not for-profit programs. As the Department of Education recognizes that most of the impact of the rule will fall on for-profit colleges, the inclusion of so many not-for-profit schools in the analysis is puzzling. The resulting estimate of a 5 percent failure rate is misleading.

The Department has subsequently reported that the failure rate among for-profit programs in their data is 16 percent, though we think this number refers to the fraction of students, not programs.[11] Because our analysis focuses on for-profit schools and scales the effect by the population of students in for-profit programs, this 16 percent failure rate is the relevant one. Alarmingly, if one calculates the failure rate using the data on Missouri programs that the Department made public, 26 percent of for-profit programs fail the test, and an additional 30 percent of

[11] See: http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/ge-faq.pdf. The Department later clarified that this is 16 percent of students.

There is also a question of what effect restricted status would have on the ability of a program to attract students. It seems at least possible that having such a label on a program could discourage enrollment. If this was to happen and restricted programs were to shrink or even close as a result, our estimates could be too low.

We are interested in the effect of the rule not just on current programs and students, but also on access for students going forward. To predict the number of students affected over the next decade, we calculate the number of students entering for-profit programs nationally each year. We then apply the average annual enrollment growth rate over the past 20 years for the for-profit sector to this number. It is then necessary to apply the estimated fraction of for-profit students affected by the gainful employment rule. The preceding discussion points out that an estimate is needed for the effect of school and student responses.

D. Some specific criticisms of the department's analyses regarding student responses to the rule

The Department presents several scenarios of the projected impact of the NPRM on students. These scenarios are based on assumptions about the choices and ability of students in affected programs to complete, switch programs, transfer, or leave education. Since no regulation of this type has ever been implemented it is difficult to predict what type of response students will have, but there are several assumptions that the Department makes that do not seem plausible.

The Department assumes in most scenarios that only around 10% of students in impacted programs will leave education. All other students are assumed to either complete programs, transfer, or switch programs. Given the fact that the student has chosen a particular program in a particular location in which to enroll, the Department's transfer rates implicitly assume several factors about the student and available programs. First, this assumes that students are able to find a comparable program in the same field at either the same institution or a different institution. Second, since it is unlikely that the same institution has a comparable program in the same field of study, this implicitly assumes that there are other institutions where the student could enroll that are equally as convenient for the student to attend. Third, this assumes that the student will be accepted into the transfer program if that program does not have open enrollment. Fourth, if comparable programs in the same field are unavailable this assumes that students are willing to change their field of study when their program fails and can therefore transfer to any other program that remains eligible.

Given that students have considered their options for education and employment before choosing a program, it seems reasonable to believe that most students would like to continue in their chosen field, especially in the for-profit sector where many students are currently working in their chosen field while attending school. However, the Department assumes up to 50% of students will choose to switch programs. It also seems unlikely that most students will have

Table 6
Estimated Number of Students Impacted by 2020
Median Loan Based on Graduates
CPS Average Earnings by CIP and Program Length

Year	Total Number of Students Impacted	Number of Female Students Impacted	Number of Non-Hispanic Black Students Impacted	Number of Hispanic Students Impacted	Number of Asian Students Impacted
Assumes - No Program Replacement for Ineligible Programs and No Growth for Restricted Programs					
2011	126,721	85,335	21,963	20,691	5,997
2012	173,609	115,774	30,888	28,580	7,759
2013	188,887	125,962	33,606	31,095	8,442
2014	205,509	137,047	36,564	33,831	9,185
2015	223,593	149,107	39,781	36,808	9,993
2016	243,270	162,229	43,282	40,047	10,873
2017	264,677	176,505	47,091	43,571	11,829
2018	287,969	192,037	51,235	47,406	12,870
2019	313,310	208,937	55,744	51,577	14,003
2020	340,882	227,323	60,649	56,116	15,235
Total Students Impacted	2,368,426	1,580,257	420,803	389,723	106,188
Total Students Impacted - Assume 25% Continue in Education	1,776,319	1,185,193	315,602	292,292	79,641
Total Students Impacted - Assume 50% Continue in Education	1,184,213	790,129	210,402	194,861	53,094

Note: The number of impacted students assumes that the CCA data is representative of all for-profit schools, that for-profit schools will continue to grow at 8.8% per year (the growth rate over the last 20 years), and the relative student composition does not change during this period.

The estimated numbers of students who would not receive postsecondary education over the next decade are shown in Table 6. Our most conservative estimate, which assumes half of the potentially affected students attend college, is that more than 1.1 million students will be restricted access because of the proposed rule. Because female, Non-Hispanic Black, and Hispanic students are disproportionately represented at for-profit colleges, the numbers are particularly large among these groups. The estimates from this scenario imply approximately 790,000 fewer female students, more than 210,000 fewer Non-Hispanic Black students, and more than 190,000 fewer Hispanic students may attend college as a result of the rule.

If 25 percent of potentially affected students attend college despite the effects of the rule, the numbers are larger, of course. In that case, we estimate that more than 1.7 million students' college enrollment would be impacted, including more than 1.1 million female students, approximately 315,000 Non-Hispanic Black students, and more than 290,000 Hispanic students.

If there were no net effect of school or student responses, the number of students affected would of course be even larger. These estimates imply upwards of

Table 7
Estimated Number of Students Impacted by 2020
Median Loan Based on Graduates
CPS Average Earnings by CIP and Program Length

Year	Total Number of Students Impacted	Number of Female Students Impacted	Number of Non-Hispanic Black Students Impacted	Number of Hispanic Students Impacted	Number of Asian Students Impacted
Assumes - No Program Replacement for Ineligible Programs and No Growth for Restricted Programs					
Total Students Impacted - Assume 0% of Students in Impacted Programs Continue in Education					
Assume 0% Restricted Programs Shut Down	2,368,426	1,580,257	420,803	389,723	106,188
Assume 10% Restricted Programs Shut Down	2,694,434	1,773,670	488,299	448,564	117,424
Assume 25% Restricted Programs Shut Down	3,183,445	2,063,788	589,542	536,827	134,278
Assume 50% Restricted Programs Shut Down	3,998,465	2,547,318	758,282	683,930	162,369
Assume 75% Restricted Programs Shut Down	4,813,484	3,030,849	927,021	831,034	190,460
Assume 100% Restricted Programs Shut Down	5,628,504	3,514,379	1,095,761	978,138	218,550
Total Students Impacted - Assume 25% of Students in Impacted Programs Continue in Education					
Assume 0% Restricted Programs Shut Down	1,776,319	1,185,193	315,602	292,292	79,641
Assume 10% Restricted Programs Shut Down	2,020,825	1,330,252	366,224	336,423	88,068
Assume 25% Restricted Programs Shut Down	2,387,584	1,547,841	442,157	402,620	100,709
Assume 50% Restricted Programs Shut Down	2,998,849	1,910,489	568,711	512,948	121,777
Assume 75% Restricted Programs Shut Down	3,610,113	2,273,136	695,266	623,276	142,845
Assume 100% Restricted Programs Shut Down	4,221,378	2,635,784	821,820	733,603	163,913
Total Students Impacted - Assume 50% of Students in Impacted Programs Continue in Education					
Assume 0% Restricted Programs Shut Down	1,184,213	790,129	210,402	194,861	53,094
Assume 10% Restricted Programs Shut Down	1,347,217	886,835	244,149	224,282	58,712
Assume 25% Restricted Programs Shut Down	1,591,723	1,031,894	294,771	268,413	67,139
Assume 50% Restricted Programs Shut Down	1,999,232	1,273,659	379,141	341,965	81,184
Assume 75% Restricted Programs Shut Down	2,406,742	1,515,424	463,511	415,517	95,230
Assume 100% Restricted Programs Shut Down	2,814,252	1,757,190	547,880	489,069	109,275

Note: The number of impacted students assumes that the CCA data is representative of all for-profit schools, that for-profit schools will continue to grow at 8.8% per year (the growth rate over the last 20 years), and the relative student composition does not change during this period.

To show how important this question is, above we present estimates of the reduction in students going on to college over the next decade under different assumptions of the fraction of restricted programs that shut down. The table reports estimates based on the three different assumptions about the percent of potentially affected students that attend college (zero, 25, and 50 percent).

Beginning with the assumption that 50 percent of potentially affected students attend college, if 10 percent of restricted programs shut down each year, our estimate of the number of students affected over the next decade increases from 1,184,213 to 1,347,217. If 25 percent of restricted programs shut down each year, we estimate that almost 1.6 million fewer students will attend college over the next decade as a result of the proposed rule. If we assume that 50 percent of restricted programs shut down each year, we estimate that nearly 2 million fewer students will attend college over the next decade as a result of the proposed rule. Finally, if 75 percent of restricted programs shut down each year, we estimate that

attract. If this were to occur, it is possible that there could be a disproportionately large decline in enrollment among racial and ethnic minority students.

Returning to a theme we have emphasized throughout our comment, whether a reduction in enrollment is good or bad depends not on whether those students would have had to borrow large amounts to attend school. (If this were the case, it would always be good policy to discourage low-income students from attending college.) Rather, it depends directly on whether the students in question would have gained more from the education than the costs. We hope that if a rule resembling the one proposed is implemented, special attention is paid to the net effects on access and enrollment by low-income students.

Part III. Concerns about the implementation of the rule

In this section, we describe a number of concerns we have regarding the implementation of the proposed rule. The concerns we describe are not exhaustive. A major concern relates to the way small sample sizes are likely to have important effects on the metrics in the formula. As we describe, many programs are quite small, leading us to worry that debt to earnings ratios and repayment rates will be calculated from small samples. Another set of concerns relates to the use of social security or IRS earnings data from the graduates of programs. In addition to the small sample problem just mentioned, the use of these data to measure earnings introduces a number of measurement concerns. Other concerns include the way in which the Department assumes the rule will affect tuition levels, the way repayment rates are measured, and the effect of macroeconomic conditions on the debt to earnings ratio and repayment rates.

A. Concerns regarding small programs and small sample sizes

One particular concern we have regards the treatment of small programs. Because the rule is based on statistics measured from the students enrolled in or completing a program, the repayment rates and debt to earnings ratios are likely to vary significantly from year-to-year in programs with low numbers of students or graduates. Such fluctuations are unlikely to be related to the quality or actions of the program; the choices or luck of a few students could cause these ratios to change significantly.

To illustrate this point, the table below shows the fraction of programs with very high and very low repayment rates, separately for programs with 10 or fewer students and for programs with more than 10 students. Among larger programs, 0.1 percent have repayment rates of 90 percent or above, while 1.2 percent have repayment rates of 10 percent or below. The fraction of programs with very high or very low repayment rates is much larger among small programs. Among programs with 10 or fewer students, 21.9 percent have repayment rates of 90 percent or

For this analysis, and unless otherwise noted throughout the comment, we define a program to be a specific 6-digit CIP code at a particular campus of a school (defined by OPEID) and of a particular length (less than 2-year, 2-year, 4-year, greater than 4-year). As the table shows, more than half of programs have 5 or fewer students exiting over this three-year period. Nearly two-thirds have 10 or fewer students that would appear in the calculations. While the Department may mean to define a program more broadly, we suggest that the definition be made clearer. The possible impact of the rule, and how many programs are arbitrarily deemed ineligible or restricted, will depend on how programs are defined.

While we think actual programs are likely not this small, these are the sample sizes that would be relevant for the rule if a program is defined at the 6-digit CIP level as the Department has indicated. We suspect that one reason there are so many small programs defined this way is that the 6-digit CIP code is detailed enough that students taking most classes together but with different concentrations are listed as being in different detailed areas of study.[13]

We suggest that the Department address the problem of small sample sizes, and specify precisely the way in which programs are defined. As programs are currently defined, small sample sizes have the potential to cause programs to fail or be restricted arbitrarily.

B. Concerns regarding the use of social security or IRS earnings data

We believe that the use of social security earnings, on its own, will be problematic. First, all of the problems described above related to the small sample sizes and small programs will affect the earnings measure calculated from actual earnings data. Averages or medians calculated from small samples are likely to vary widely from year to year. This year-to-year variation is unlikely to be related to the quality of the program from which the students graduated, but can cause programs to move from eligible to restricted or ineligible according to the rule.

A second fundamental problem is that, to our knowledge, neither social security nor other IRS earnings data include information about the number of hours or weeks worked by the individual. In contrast, the Current Population Survey, the source data for the Bureau of Labor Statistics (BLS) earnings statistics, collects information about the number of weeks each person worked during the year, and about the usual number of hours each person works per week. Without information on weeks or hours worked, it is not possible to tell the difference between someone who got a job halfway through the year that pays $1,000 per week and someone who worked for the whole year at a job that pays $500 per week. The total annual earnings for both workers would be reported in the social security earnings data as the same amounts. However, the former worker is likely significantly more skilled,

[13] If programs were not divided by campus, the cumulative distribution of program sizes is as follows: 1-5: 48.5%; 6-10: 55.6%; 11-25: 65.2%; 26-50: 73%; 51-100: 80.7%; 101-250: 90.9%; 251-500: 96.1%; >500: 100%.

reductions in student loans. In addition, for institutions for which the 90/10 rule is binding it may not be possible to reduce tuition without increasing tuition for some other program.

We are concerned that instead the rule could lead schools to end open enrollment policies. In place of open enrollment, the rule could lead schools to restrict enrollment to those students who can fund the education through their personal resources, or who have individual characteristics that have been shown to be highly correlated with labor market success and loan repayment. In this way the proposal carries the strong possibility of limiting access to those students whom the Title IV program was intended to assist.

D. Concerns with the loan measurement and implementation

Throughout the NPRM the Department underscores its concern that students are taking on too much debt. However, nothing in the proposal addresses students' access to Title IV loans. The rule focuses primarily on the part of the problem that schools cannot control (i.e. how much students borrow, and the choices they make about how to structure their loans), and not enough on the parts over which they can have some control (i.e. the increases in earnings their students experience after completing their programs, graduation rates, and employment rates after graduation).

In addition to this general criticism of the rule, we point out here some specific ways in which details of the rule may have unintended consequences. First, the introduction of numerous ineligible and restricted programs may result in students taking on more debt rather than less. While the department has made some provisions for those students who are currently enrolled in a program deemed "ineligible", it seems likely that many of those students will choose not to remain in those programs. In fact, the Department's own estimate of the impact of the proposed gainful employment rules anticipates students will transfer to other programs. It is reasonable to expect that when students change programs, particularly if they enroll in a new institution, the length of time they spend in school will increase, thereby increasing the debt a student incurs.

Furthermore, how the Department treats the debt of those students who transfer programs is not the same for all students. It appears that based on the current rules students who transfer to a different program within the same institution would carry, from the institution's perspective, the existing debt with them. In contrast, students who transfer to a different program at a different institution would, from the new institution's perspective, come with a "clean slate" with respect to the measurement of her debt at the institution. It is possible that this inconsistent treatment of prior loans could result in institutions restricting access of those wishing to move from a restricted or ineligible program, to an eligible program within the same institution. This possible denial of access would not benefit the student or lead to lower loan burdens.

Table 10
Average Repayment Rate
by Pell Category

Percent Pell Category	Average of Estimated Repayment Rate	Number of OPEID Observations
0-20%	61.5%	649
20-40%	53.0%	1,617
40-60%	43.5%	1,332
60-80%	34.3%	975
80-100%	31.6%	676

As previously discussed, for-profit institutions tend to serve students who have traditionally been denied access to postsecondary education, including Pell-eligible students. Given the high percentage of low-income and low-wealth students at for-profit schools, it is not surprising to find lower repayment rates within these institutions. For an institution, one method of increasing repayment rates is to limit the number of at-risk students they enroll. We are concerned that an unintended consequence of the rule could be for schools to cease open enrollment policies, and to avoid admitting students likely to borrow large amounts. As we have emphasized throughout our comment, if these students would have attended a program that would have offered them large returns, restricting them from attending is not in the students' interest.

E. The proposed rule does not account for macroeconomic conditions, which are likely to influence the indicators in the formula

When evaluating a particular program it should be the quality of the program that should be measured, not the cost or short-term post-completion earnings. As we initially stated, the cost of a program for an individual is only "too" high when the costs exceed the lifetime benefits for the individual. The department's attempt to measure quality based on repayment rates and debt-to-income ratios is too highly correlated with the broader economy for which no institution can predict or control. Simply based on changes in macroeconomic conditions a program can move from eligible to ineligible, with no change in the quality of service being provided. When the economy is "booming" there may be poor-quality programs that meet the thresholds recommended by the department, and when the economy is in a recession high-quality programs will fail to meet the thresholds recommended by the department.

F. New programs may face significant barriers, limiting the potential for growth of the education sector

According to the NPRM, institutions would have to apply for approval of new programs if the program wishes to be eligible to receive Title IV aid. Approval

If such a calculation were logistically difficult, an alternative would be to calculate debt payments assuming a 15- or 20-year repayment period. All students have the option of choosing to extend the loan period of Title IV loans, to different lengths that depend on the size of the loan. The allowed length that corresponds to each student's loan size could be used, or the average allowed length could be used.

2. The option of using publicly available data to compute earnings, in addition to a measure of actual earnings, should be brought back to the proposal.

The rule that was proposed in January of 2010 included a measure of earnings that was based on Bureau of Labor Statistics estimated earnings, as well as the option for schools to submit their own data on actual earnings of their graduates. We applaud the Department of Education in their attempt to improve the measure of earnings through the use of administratively collected individual earnings for the students that attended each program. Unfortunately, as we describe above, these data also have shortcomings (e.g. the inability to distinguish between full-year and part-year workers, small samples from which to estimate averages or medians, possible underreporting of earnings by self-employed workers).

While we were critical of particular details regarding the BLS earnings estimates that were proposed in January 2010, the use of a publicly available data source has some advantages relative to what is currently proposed. Because the two methods have different strengths and weaknesses, we suggest the Department of Education considers basing their estimate of earnings on both sources of data. One possibility would be to allow schools to choose which of the two methods to use each year. This would protect, for example, against the year-to-year fluctuations in the actual earnings measure that are likely to occur for small programs in particular.

3. The allowable debt to earnings ratio should relate to the length of the program.

In theory, actual earnings should be higher for students who complete longer programs. Given the small size of many programs, we are concerned that the small samples from which averages or medians are calculated will not appropriately capture the true relationship between program length and earnings. For this reason, we suggest that the Department of Education consider adopting different debt to earnings ratio standards for different length programs.

In addition, if the Department of Education elects to use a measure of earnings based on the BLS data, as it proposed in January of 2010, we suggest that adjustments be made to those numbers to account for the fact that on average students who complete more years of college earn more.

repayment rate moves dramatically from high to low because it is based on the experiences of a small number of students. It would be misleading to prospective students to tell them that this program has a low repayment rate, without informing them what this assessment is based on (i.e. that it is based on a small sample and that two years ago the repayment rate was high).

References

Angrist, Joshua D. and Alan B. Krueger. 1991. "Does Compulsory School Attendance Affect Schooling and Earnings?" *Quarterly Journal of Economics* 106 (4): 979-1014.

Card, David. 1999. "The Causal Effect of Education on Earnings," in *Handbook of Labor Economics, Volume 3A* edited by Orley C. Ashenfelter and David Card. New York: Elsevier.

Goldin, Claudia and Lawrence F. Katz. 2008. *The Race Between Education and Technology.* Cambridge, Massachusetts: The Belknap Press.

Kane, Thomas J. and Cecilia E. Rouse. 1995. "Labor-Market Returns to Two- and Four-Year College," *American Economic Review* 85 (3): 600-614.

Katz, Lawrence F. and Kevin M. Murphy. 1992. "Changes in Relative Wages, 1963-1987: Supply and Demand Factors," *Quarterly Journal of Economics* 107 (1): 35-78.

> One possibility is that some young people might *not* actually benefit from going to college. The rate of return we have estimated may not be applicable to some young people who do not currently attend or complete college. The average wage gap between college and high school workers may, therefore, overstate the returns to those on the margin of going to college. But that possibility appears not to be the case.
>
> Recent estimates of the rate of return to a year of schooling have used "natural experiments" from policies that have increased access to college, changed college tuition subsidies or merit aid, and altered compulsory schooling laws. These carefully executed studies using plausibly exogenous variation in educational attainment find high rates of return to further schooling. Because these returns would accrue to the marginal youth affected by such policy interventions, often an individual of modest means, they reinforce our conclusion that returns could be extremely high for many individuals currently not finishing college or even not finishing high school. (Goldin and Katz, 2008, p. 336.)

Dr. Carnevale also suggests that it does not make sense to base educational investment decisions on lifetime earnings for older students. Again, this is incorrect. It is true that the lifetime benefit from education that will accrue to an older student is smaller because there are fewer years before retirement in which they will get benefits. However, these students should still compare the future lifetime earnings gains, properly discounted, to the discounted costs of education. For these students, as for any others, basing educational investment decisions on expected earnings in the few years following completion of the schooling would lead to suboptimal decisions.

Furthermore, this point does not affect the simplest argument we make relating the return to education to advisable debt limits. If it is the case that a two year college education causes annual earnings to rise by 10 percent *per year*, a student spending 8 percent of his annual earnings on student loan payments is 2 percent better off for the 10 years he repays the loan, plus the full 10 percent better off for all remaining years after the loan is repaid. This is true regardless of the age of the student, so long as the return per year is the same. There is no research of which we are aware showing that the returns to education, on an annual basis, are lower for older students.

Dr. Carnevale also puzzlingly argues that "lifetime earnings should not be taken into account because it is unreasonable to ask individuals to be burdened by student debt over their lives; there should be a point where the student reaps the gains." If a student takes on student loan payments that are less than the total annual return to the education those loans support (e.g. 8 percent per year of schooling, and two years of college implies a 16 percent per year increase in earnings), that student reaps the gains in every year. This is true to a lesser extent

Comments of the Career College Association

Docket ED-2010-OPE-0012

September 9, 2010

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Part One: The Department Lacks Authority To Promulgate The Proposed Regulations, Which Are Not Authorized By The HEA, Conflict With The HEA, Violate Due Process, And Are Arbitrary And Capricious

I. Summary Of Legal Arguments

The Career College Association (CCA) strongly believes that the Department of Education lacks authority to promulgate the "gainful employment" regulations proposed in the notice of proposed rulemaking (NPRM) issued on July 26, 2010. *See* 75 Fed. Reg. 43616 (July 26, 2010). The proposed regulations are invalid—and thus beyond the Department's authority—for four independent reasons:

First, the proposed regulations are not authorized by the Higher Education Act (HEA) and conflict with the Act. The Department proposes to enact a new set of Title IV financial assistance eligibility requirements for proprietary institutions and certain vocational institutions. The proposed regulations would impose new limits on student debt in the form of maximum debt-to-income ratios and required loan repayment rates for recent graduates of programs at those institutions. By regulating debt levels, the proposed regulations would also have the effect of regulating tuition costs, a primary factor in determining debt levels. But Congress has neither imposed these debt and tuition limits nor authorized the Department to adopt them unilaterally. In the HEA, Congress has carefully and comprehensively addressed the Title IV financial aid eligibility requirements for institutions, programs, and students. It has specifically addressed maximum student debt levels and institutional loan default rates. But Congress has declined to impose the new requirements the Department proposes, and it has not granted the Department the authority to override—or even augment—the existing requirements by regulation. Implicitly recognizing that it is acting beyond any express congressional authorization, the Department purports to impose its new eligibility requirements as part of a convoluted "definition" of the term "gainful employment." But the Department's approach cannot be squared with the plain meaning of that term. Whether a job itself is "gainful" has no relation to student debt levels and loan default rates. "Gainful" employment is simply employment that pays. The new definition of "gainful employment" that the Department proposes is thus contrary not only to the entire scheme of the HEA but also to the plain language of the statutory provision on which the Department relies.

Second, the proposed regulations violate due process because they do not permit regulated institutions to access the data underlying the Department's determinations. Although the regulations allow the Department to terminate a program's eligibility for federal loans if its graduates' debt-to-income ratio is above a certain limit, the Department is forbidden from sharing with programs the critical data supporting such a determination. Specifically, the primary information that the Department uses to calculate debt-to-income ratios is the average annual earnings of a program's graduates. Yet, the Department will not provide programs with the individual earnings data used to calculate that average. The Department's failure to do so would deprive programs of a meaningful opportunity to contest adverse determinations by the Department.

Third, the proposed regulations are arbitrary and capricious and contrary to law because they impose new consequences based on past decisions by institutions. Although Congress has

> (A) *provides an eligible program of training to prepare students for gainful employment in a recognized occupation*;
>
> (B) meets the requirements of paragraphs (1) and (2) of section 1001(a) of this title;
>
> (C) does not meet the requirement of paragraph (4) of section 1001(a) of this title;
>
> (D) is accredited by a nationally recognized accrediting agency or association recognized by the Secretary pursuant to part G of [Title] IV of this chapter; and
>
> (E) has been in existence for at least 2 years.

Id. § 1002(b)(1) (emphasis added).

Of principal importance for present purposes is the highlighted language above: "*provides an eligible program of training to prepare students for gainful employment in a recognized occupation.*" 20 U.S.C. § 1002(b)(1)(A) (emphasis added). This is the statutory basis for the Department's proposed gainful employment regulation. That language also appears in § 1002(c)(1)(A), which defines a "postsecondary vocational" institution, and in § 1001(b)(1), which defines certain public or nonprofit institutions of higher learning that do not offer a bachelor's degree (nor provide at least two years of credit toward a bachelor's degree) but do offer a program of not less than one year.

Once a school has qualified as an institution of higher education, it must adhere to numerous requirements imposed on participating institutions. *See infra* § III(A). Additionally, each program at the school must satisfy a separate set of congressionally mandated criteria. These criteria consist primarily of clock hour and weeks of instruction requirements based on the level of instruction (associate degree, graduate, or professional degree). *See* 20 U.S.C. § 1088(b).

B. The Proposed Regulations

In the NPRM, the Department announced potential new program requirements that for-profit (and certain nonprofit and public) postsecondary institutions must meet before students in the affected programs can access federal student financial aid. *See* 75 Fed. Reg. 43616. In the NPRM, the Department acknowledged the critical role of these institutions. "For-profit postsecondary education, along with occupationally specific training at other institutions, has long played an important role in the nation's system of postsecondary education and training. Many of the institutions offering these programs have recently pioneered new approaches to enrolling, teaching, and graduating students." *Id.* at 43617. Indeed, these programs "support[] President Obama's goal of leading the world in the percentage of college graduates by 2020," and that goal "cannot be achieved without a healthy and productive higher education for-profit sector." *Id.* Nonetheless, the NPRM singled out these institutions for onerous requirements that will substantially affect the circumstances under which their students can obtain federal aid.

> borrower (1) made loan payments during the most recent fiscal year that reduced the outstanding principal balance, (2) made qualifying payments on the loan under the Public Service Loan Forgiveness Program, as provided in 34 CFR 685.219(c), or (3) paid the loan in full. Other borrowers who are meeting their legal obligations but are not actively repaying their loans, such as those in deferment or forbearance, are not considered to be in repayment.

75 Fed. Reg. at 43619; *see also* 34 C.F.R. § 668.7(b). The repayment rate considers all students who have enrolled in a program in the last four years, not just those who graduated. *Id.*

2. The Benchmarks For "Gainful Employment"

As a general matter, a program fulfills the "gainful employment" requirement if it satisfies one of the three following criteria: (1) it has a repayment rate of at least 35 percent; (2) it has a debt-to-income ratio of 12 percent or less (under the income measure) or 30 percent or less (under the discretionary income measure) for 3YP; or (3) it has a debt-to-income ratio of 8 percent or less (under the income measure) or 20 percent or less (under the discretionary income measure) for P3YP. 34 C.F.R. § 668.7(a). A program is "ineligible" if it fails to meet these criteria. *Id.* § 668.7(f). In that case, it "may not disburse any title IV, HEA program funds to students who begin attending that program after [the program has been deemed ineligible]." *Id.*

A program is placed on "restricted" status if it has a repayment rate of less than 45 percent and a debt-to-income ratio of more than 8 percent (under the income measure) or more than 20 percent (under the discretionary income measure). *Id.* § 668.7(a)(2). If a program is "restricted," it must [1] "provide annually to the Secretary" documentation from employers that its curriculum "aligns with recognized occupations at those employers' businesses" and that "there are projected job vacancies or expected demand for those occupations at those businesses," [2] make certain public disclosures about its students' debt levels, and, most importantly, [3] limit "HEA program recipients in that program to the average number enrolled during the prior three award years." *Id.* § 668.7(e).

3. Regulation Of Tuition Prices

The proposed regulations thus impose two new types of eligibility requirements related to student debt levels. Those debt limitations, however, are also effectively limitations on tuition prices. A principal factor in determining student debt levels is the cost of tuition. That factor, moreover, is the only one within the direct control of institutions. An institution that does not meet the new debt requirements has only one option: lower tuition in an attempt to lower student debt levels. As a result, the proposed regulations would have the effect of regulating tuition prices.

4. Regulation Of Additional Programs

Finally, under the proposed regulations, when an institution seeks to "offer[] an additional program that is subject to" the gainful-employment rules, the institution must submit an application for the Secretary's approval. 34 C.F.R. § 668.7(g)(1). The application must provide (1) documentation of approval from an accrediting agency if the new program entails a

> that event, an agency decision to ban grapefruits would be contrary to Congress' specific intent.

Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir. 1989).

These principles apply here because Congress has enacted a comprehensive statutory scheme governing financial aid eligibility but has declined to impose the requirements the Department seeks to put in place.

1. General Requirements For Institutions

There are numerous requirements that an institution must meet in order to ensure that its students are eligible for federal financial assistance. For a proprietary institution of higher education to qualify for participation, it must admit only students who have graduated from a secondary school (or the equivalent). 20 U.S.C. § 1001(a)(1). The institution also must be authorized as a matter of state law to provide a program of education in the state where it is located. *Id.* § 1001(a)(2). The institution must also be accredited by a nationally recognized accrediting agency, *id.* § 1002(b)(1)(D), and have been in existence for at least two years, *id.* § 1002(b)(1)(E). Proprietary and vocational schools also must meet additional enrollment and management standards in order to fall within the definition of an "institution of higher learning." *See id.* §§ 1002(a)(3) (limitations on "correspondence courses"), 1002(a)(4) (limitations on bankruptcy filings).

In addition to satisfying these threshold criteria, institutions also must comply with a host of other requirements in order to participate in federal student aid programs. For example, Congress mandated that "[f]or purposes of qualifying institutions of higher education for participation in programs under [Title IV]," the Secretary also must determine the "administrative capability and financial responsibility of an institution of higher education." *Id.* § 1099c(a). Congress prohibited discrimination by "[i]nstitutions of higher education receiving Federal financial assistance." *Id.* § 1011. Section 1094 alone mandates that institutions comply with *twenty-nine separate requirements*, ranging from adopting certain health and safety programs to imposing restrictions on incentive pay. *See, e.g.*, 20 U.S.C. §§ 1094(a)(10) (required drug abuse prevention program), 1094(a)(12) (mandated campus security policy), 1094(a)(20) (prohibiting incentive pay based on success in securing enrollments or financial aid), & 1094(a)(26) (disclosure requirements to victims of crimes perpetrated by students).

2. Program Requirements

Once a college is qualified as an institution of higher education for the purposes of financial assistance, each program at the institution must satisfy an additional set of congressionally enumerated requirements. In general, to be eligible for Title IV assistance, a program must require a specified number of hours of study. 20 U.S.C. § 1088(b)(1).

3. Existing Debt And Cost Limitations

Among the scores of eligibility requirements imposed by Congress are a number of provisions specifically addressing student loan debt and, the closely related variable, the cost of attending schools.

§§ 1078(b)(1)(B), 1078-8(d)(1). On top of those limits, students may take out additional unsubsidized Stafford loans: $12,000 annually for graduate and professional students, $2,000 annually for dependent undergraduate students, and $6,000 annually for independent undergraduate students during their first two years and $7,000 annually thereafter. *Id.* § 1078-8(d)(2), (3), (4). In total, dependent undergraduate students may take out no more than $31,000 in Stafford loans, while independent undergraduates are limited to $57,500. *Id.* § 1078-8(d)(3), (4). As for the Perkins loan program, undergraduates are limited to $5,500 annually, while graduate and professional students are limited to $8,000 annually. *Id.* § 1087dd(a)(2)(A). In the aggregate, graduate and professional students are limited to $60,000 in Perkins loans; students who have already successfully completed two years of a program of education leading to a bachelor's degree are limited to $27,500; and other students are limited to $11,000. *Id.* § 1087dd(a)(2)(B). Thus, rather than compare debt to income, Congress has elected to consider debt levels alone.

c. Individual Debt Relief

Congress has also taken specific, measured steps to relieve individual borrowers of burdensome student loans. The HEA provides for debt relief for individual borrowers in the form of forbearance and income based repayment programs. Most recently—just three years ago—Congress passed legislation recognizing the need for flexibility to address income disparities and potentially high debt-to-earnings ratios of graduates. As part of the College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007), Congress created the Income-Based Repayment program, which caps monthly loan payments at a percentage of the borrower's income during periods of financial hardship. *See* 20 U.S.C. § 1098e. In fact, Congress amended the Income-Based Repayment program just this year. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2213, 124 Stat. 1029, 1081. If Congress had believed that students at proprietary and vocational institutions needed further safeguards from excessive debt—such as those in the Department's proposal—it surely would have included them at that time. It did not, and the Department should not override Congress's judgment.

Individual loan programs similarly provide debt relief. For the William D. Ford Federal Direct Loan Program, Congress outlined five potential repayment plans for student borrowers. *See* 20 U.S.C. § 1087e(d). These repayment plan options include standard repayment, graduated repayment, extended repayment, income contingent repayment, and income-based repayment pursuant to 20 U.S.C. § 1098e. Additionally, Congress has mandated that an institution of higher education that distributes Federal Perkins Loans "shall grant a borrower forbearance of principal and interest or principal only, renewable at 12-month intervals for a period not to exceed 3 years…if … the borrower's debt burden equals or exceeds 20 percent of such borrower's gross income." *Id.* § 1087dd(e)(1).

d. Borrower Education

Congress has also mandated study and education as a method for addressing debt management. The Department is required to conduct a "student aid recipient survey" that includes a description of the debt burden of loan recipients, their capacity to repay debt, and the impact of the debt on the students' course of study and post-graduation plans. *See* 20 U.S.C. § 1015a(k)(1)(D). Congress has also enacted several provisions requiring borrower education on

Finally, whereas the Department proposes to regulate tuition prices—albeit indirectly through direct regulation of student borrowing—Congress has avoided such an intrusive intervention into the market. Instead of capping prices, Congress has mandated disclosure.

Because the Department is seeking to alter—or "trump"—the scheme carefully calibrated by Congress, it may proceed with the proposed regulations only if it has been expressly and specifically authorized to do so. *Natural Res. Def. Council*, 976 F.2d at 41; *see also American Petroleum Inst.*, 52 F.3d at 1119; *Michigan Citizens*, 868 F.2d at 1293. As explained below, it has not been.

B. Congress Has Not Authorized The Department To Impose Additional Debt Requirements Or To Regulate Tuition Prices

The Department has pointed to no provision—much less an express and specific one—authorizing it to impose additional debt requirements as a condition of financial aid eligibility. It similarly has not invoked any provision authorizing it to set limits on tuition prices—the not-so-subtle goal, and obvious effect, of the proposed regulations. Implicitly conceding that no such provisions expressly and specifically grant it this authority, the Department purports to interpret the term "gainful employment" in the sections of the HEA defining an "institution of higher education." But the Department's interpretation of the phrase "gainful employment" to authorize a vast imposition of debt requirements beyond those established by Congress finds no support in the statutory language on which the Department relies, court and agency interpretations of the phrase, the structure of the Act, or past congressional action. Moreover, none of the other provisions cited in the proposed rule authorizes the Department to promulgate additional debt requirements.

1. The Department's Interpretation Of The Phrase "Gainful Employment" Is Contrary To The Plain Text Of The Statute, The Department's Past Interpretations, And Interpretations By Courts And Other Agencies

Courts interpret statutes according to their plain meaning. *United States v. Kirby*, 74 U.S. 482, 486 (1868). Here, the Department's interpretation of the phrase "gainful employment" to exclude programs from federal student assistance eligibility based on the debt incurred by their students is contrary to the plain meaning of the statutory language. The requirement that a college "provide an eligible program of training to prepare students for gainful employment in a recognized profession" has nothing to do with the average debt incurred by students in the program. The term "gainful employment" has an unambiguous meaning—well-established by dictionaries and well-accepted by Congress, courts, and executive agencies. It simply means a job that pays.

Legal and lay dictionaries uniformly define "gainful employment" as work done for pay. No dictionary even hints that the term can be linked to debt levels or even the cost of obtaining the job. Black's Law Dictionary defines "gainful employment" as "[w]ork that a person can pursue and perform for money." Black's Law Dictionary 605 (9th ed. 2009). Likewise, business dictionaries define the term as "employment that is beneficial to both the employer and the employee." David L. Scott, *American Heritage Dictionary of Business Terms* 222 (2009). And

122 Stat. 3078, 3085-3086 (2008). But it did not alter the definition of "gainful employment in a recognized occupation." In addition to preparing students "for gainful employment in a recognized occupation," as of July 1, 2010, institutions will also be able to qualify for participation by administering a liberal arts program. *See* Pub. L. No. 110-315, § 102(d)(1), 122 Stat. at 3085-3086. Rather than change the definition of "gainful employment in a recognized occupation," Congress added a further exception in the statute

Courts, too, have consistently used "gainful employment" to mean work that pays. In the ERISA context, for example, courts have concluded that "gainful employment" is employment from which a claimant may "earn a reasonably substantial income rising to the dignity of an income or livelihood." *Tracy v. Pharmacia & Upjohn Absence Payment Plan*, 195 Fed. Appx. 511, 519 (6th Cir. 2006); *see also Helms v. Monsanto Co.*, 728 F.2d 1416, 1421-1422 (11th Cir. 1984); *Torix v. Ball Corp.*, 862 F.2d 1428, 1431 (10th Cir. 1988). The Sixth Circuit noted that gainful employment is more than just "nominal" employment. *Tracy*, 195 Fed. Appx. at 519.

Several agencies have also concluded that "gainful" employment is work that pays. *See, e.g.*, 25 C.F.R. § 26.1 (Bureau of Indian Affairs defining "gainful employment" as "work resulting in self-sufficiency"), 26 C.F.R. § 1.21-1(c)(1) (Department of Treasury defining "gainful employment" as "[e]mployment [that] may consist of service within or outside the taxpayer's home and includes self-employment…[w]ork as a volunteer or for a nominal consideration is not gainful employment"), 20 C.F.R. § 416.972(b) (Social Security Administration defining "gainful work activity" as "work activity that [the claimant does] for pay or profit").

It is unsurprising that no dictionary, court, or agency—including the Department—has previously tried to incorporate student debt levels into the term "gainful *employment*": The Department's position is simply a non sequitur. The Department contends that it "would consider that a program prepares students for gainful employment if the loan debt incurred by the typical student attending that program is reasonable." 75 Fed. Reg. at 43619. But the debt incurred pursuing a program (or the cost of the program) is wholly separate from whether the *employment* obtained following graduation from the program is "gainful." The word "gainful" modifies only "employment." It does not modify the entire process of embarking on a program of study, borrowing money to pay for it, and then obtaining a job. It is not the "program of training" (20 U.S.C. § 1002(b)(1)(A)) that must be gainful. As noted above, the requirements for an "eligible program"—minimum length of study requirements and in some cases minimum completion and placement rates—are set forth independently in the HEA. *See id.* § 1088(b). They do not include any requirement that graduates of the program earn a particular amount or satisfy particular debt repayment requirements. Under §§ 1001 and 1002, the only thing that must be "gainful" is the subsequent "*employment*" for which a particular program qualifies its students.

Because the "gainful employment" requirement of § 1001 and § 1002 provide no basis for the proposed regulations, the proposed regulations are also invalid because the Department has failed to justify singling out a certain subset of colleges—primarily, proprietary and vocational institutions but not traditional four-year colleges. The Department has offered no evidence that graduates of proprietary and vocational schools have higher default rates than graduates of traditional institutions. Thus, instead of choosing to tackle the problem of excessive student debt

"affordability" was a necessary principle of higher education reform, but that "*the Federal government does not currently have the authority to dictate tuition and fee rates for institutions of higher education.*" H.R. Rep. No. 109-231, at 159 (2005) (emphasis added). While the College Access and Opportunity Act of 2005 was not enacted, the committee report is strong additional evidence that the Department lacks authority to impose additional eligibility requirements in the guise of defining "gainful employment."[8] At the time of that House report, the language of the "gainful employment" provisions was the same as it is today. If the Department currently has authority to incorporate *debt* levels into the definition of "gainful employment," it certainly could have considered tuition cost in 2005. Conversely, if the Department cannot regulate program cost directly—as the House recognized in 2005—it also cannot do so indirectly by imposing a maximum debt-to-income ratio. *See, e.g., Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328 (1961) (a federal agency cannot "do indirectly what it cannot do directly."). Imposing a maximum debt-to-earnings ratio effectively regulates the price of tuition, since that is the only variable an institution can directly control.

Moreover, Congress has previously rejected the imposition of a maximum *cost*-to-earnings ratio on institutions of higher education. In the Higher Education Amendments of 1992, Congress enacted a provision that required states to establish standards for the review of all institutions of higher education that met certain at-risk criteria. One of the factors to be considered was "the relationship of the tuition and fees to the remuneration that can be reasonably expected by students who complete the course or programs." Pub. L. No. 102-325, § 499, 106 Stat. 448, 639. But in the Higher Education Amendments of 1998, Congress repealed the section of the U.S. Code (former 20 U.S.C. § 1099a-3) containing the requirement that States review the cost of tuition relative to expected earnings. *See* Pub. L. No. 105-244, § 491, 112 Stat. 1581, 1758-59. Congress did not transfer this specific requirement (or the others repealed) to the federal government for enforcement, but rather removed the set entirely. The Report of the Committee on Education and the Workforce of the House of Representatives stated that the reason for the removal of these requirements was that they were "unnecessary and overly burdensome." H.R. Rep. No. 105-481, at 148 (1998). There is no reason to think a *debt*-to-income ratio—which requires still more data collection and analysis—would be analyzed any differently.

4. The Department's Proposed Interpretation Of "Gainful Employment" Would Lead To Absurd Results

The Department's proposed interpretation of "gainful employment" also should be rejected because it would lead to absurd results. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). A particular occupation—for example, a dental assistant—might be considered "gainful employment" for students at College X, which charges a low tuition, but the precise same job would be considered not gainful for students attending College Y, which charges a higher tuition. Moreover, particular occupations might be deemed "gainful" at colleges where few students borrow money

[8] *See United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973) (considering the legislative history of an unenacted bill "wholly relevant to an understanding of" a subsequently enacted statute containing the same operative language). Here, the "gainful employment" language had been enacted at the time of the cited House report and was reenacted after this report.

The remaining sections cited by the Department are also unavailing because they merely provide miscellaneous requirements for administration of the HEA programs. None of these requirements comes remotely close to authorizing the proposed regulations. Section 1091 establishes several requirements for *students* to become eligible for HEA assistance. Section 1092 primarily requires institutions to publicly disclose certain pieces of information and to provide student borrowers with entrance and exit counseling. Section 1094 sets out requirements for Program Participation Agreements, which must be signed by all institutions seeking to participate in the HEA programs. Section 1099c requires the Department to "determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility" for each institution seeking to participate in HEA programs. 20 U.S.C. § 1099c(a). Finally, § 1099c-1 authorizes the Department to conduct "program reviews" of institutions participating in HEA programs and to "establish and operate a central data base of information on institutional accreditation, eligibility, and certification." 20 U.S.C. §1099c-1(a)(1), (3).

6. The "Additional Programs" Provision Is Also Beyond The Department's Authority

The Department's proposal includes a requirement that new programs receive approval from the Secretary before they can go into effect. To obtain approval, an institution must submit an application providing certain information, including projections of student enrollment in the program for the next five years and documentation from employers not affiliated with the institution "affirming that the curriculum of the additional program aligns with recognized occupations at those employers' businesses, and that there are projected job vacancies or expected demand for those occupations at those businesses." 34 C.F.R. § 668.7(g)(1). The Secretary may also cap enrollment in a new program "based on the projected growth estimates provided by the institution and the demonstrated ability of the institution to offer programs subject to this section." *Id.* § 668.7(g)(2).

This process shares the same defects as the rest of the Department's proposal: it is entirely inconsistent with congressional intent. As noted above, *supra* § III.A.2, Congress has laid down clear requirements before programs can become eligible to participate in HEA assistance. But Congress has not mandated that institutions obtain documentation from employers "affirming that the curriculum of the additional program aligns with recognized occupations at those employers' businesses, and that there are projected job vacancies or expected demand for those occupations at those businesses." *Id.* Thus, the provision is within the Department's authority only if specifically and expressly authorized—which it is not. In this provision the Department has sought to encompass not debt levels but rather general economic conditions into the definition of "gainful employment." If, for example, there were a temporary over-supply of nurses, under the proposed regulation, a program preparing students for nursing would suddenly no longer be eligible. Yet, no one would think nursing is not gainful employment or that the program did not prepare students for nursing. There is no indication that Congress intended to permit students to use financial aid only for programs preparing them for occupations that are in demand at the time the student enters the program or are expected to be in demand. Under such a standard, aid would all but dry up any time the economy began to enter a recession—precisely the time students should be going to school.

borrowing—cohort default rates. As noted above, *see supra* § III.A.3.a, the major HEA assistance programs each include a ceiling for an institution's recent cohort default rates. If an institution breaches that ceiling, it loses its access to the program. Those cohort default rates are starkly different from the repayment rate and debt-to-income measures that the Department has put forth. Most obviously, Congress has chosen to use default rates as the measuring stick for the HEA. It did not select repayment rates or debt-to-income ratios. The HEA also includes a safe harbor for schools that can show "exceptional mitigating circumstances"—including a high proportion of low-income students—that may pardon excessive cohort default rates. Moreover, unlike the Department's proposals, which scrutinize individual programs at an institution, the HEA's cohort default rates look at institutions as a whole. Finally, as already explained, *see supra* § III.A.4, the Department's repayment-rate test is not simply the mirror image of the HEA's cohort default rates. To the contrary, institutions with acceptable cohort default rates under the HEA could still lose their eligibility under the proposed regulations if they fail to meet the Department's repayment-rate threshold.

In short, the proposed regulations supplant—rather than complement—the means by which Congress chose to coordinate the HEA's assistance programs. The Department's proposal is thus not only unauthorized but also directly contrary to the HEA.

2. The Proposed Regulations Conflict With The Purposes Of The HEA

The proposed regulations also conflict with the purposes of the HEA. "[A]dministrative constructions of [a] statute ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be "reject[ed]." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). Here, the proposed regulations conflict with the purposes of the HEA in at least three respects.

First, the proposed regulations conflict with the central purpose of the HEA: providing financial assistance to students based on their need, not some judgment about whether the students are making a wise investment by electing to pursue an education. One of the primary goals of Title IV is to "mak[e] available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070(a). Congress enacted Title IV because it was acutely aware that hundreds of thousands of students elected not to go to college because they simply could not afford it. *See* S. Rep. No. 89-673, 1965 U.S.C.C.A.N. 4027, 4054 (Sept. 1, 1965) ("According to the U.S. Office of Education, there were in 1960, 1,079,000 high school graduates not attending college. Of that number, 42 percent indicated that finances played a role in their decisions not to go. Of these, nearly half flatly said they could not afford to consider college at all. Thus, it is reasonable to expect that some 217,000 high school graduates who would have liked to continue their education were prevented from doing so because of financial inability."); *see also* Conf. Rep. No. 89-1178, 1965 U.S.C.C.A.N. 4117, 4125 (Oct. 19, 1965) ("The House bill and Senate amendment both include programs to provide financial assistance to enable deserving students to attend college."). For this reason, Congress generally made financial assistance available to "all eligible students." *See, e.g.*, 20 U.S.C. § 1070(a)(1) (Pell grants); *id.* § 1078-8(b) ("Any student meeting the requirements for student eligibility ... shall be entitled to borrow an unsubsidized Federal Stafford Loan ....").

eligibility because its graduates' debt-to-income ratio is too high. But in determining the average income for a program's graduates, the Department proposes to use income data that it will not make available to affected institutions. *See* 75 Fed. Reg. at 43629 ("the specific individual's actual earnings information will not be available to the institution or to the Department"). Indeed, a hearing official in an action to terminate a program's eligibility must "accept[] as accurate the average annual earnings calculated by another Federal agency, so long as the other Federal agency provided that calculation for the list of program completers identified by the institution and by the Department." *Id.* at 43640 (proposed § 668.90). This truncated process is fundamentally unfair and would violate due process rights under the United States Constitution.

A due process challenge involves "two steps." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (citation omitted) Here, the proposed regulations implicate due process. Loss of financial aid eligibility imposes a severe economic penalty on an institution. It will result in significant economic losses. As courts have recognized, an institution's eligibility for federal student loans under the HEA thus involves interests protectable under the Due Process Clause. *Continental Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990); *see also Pro Schools, Inc. v. Riley*, 824 F. Supp. 1314, 1321 (E.D. Wis. 1993).[10]

But the proposed regulations do not afford "constitutionally sufficient" process. The fundamental requirements of due process are notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (internal quotation marks omitted)). "It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and *in a meaningful manner*." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added; internal quotation marks omitted). Refusing to provide access to the evidence underlying an ineligibility determination by the Department would deprive institutions of both meaningful notice and a meaningful opportunity to be heard.

"The right to prior notice" is "central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010) (internal quotation marks omitted). To be sufficient, notice must provide enough information for a claimant to be able to challenge the deprivation of his liberty or property interests: "Claimants cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with

[10] Schools have a protectable interest even though students—rather than institutions—are the primary beneficiaries of federal loans ("Where primary beneficiaries of federal programs depend on providers like ... schools ... for their benefits, and where the statutory program plan contains extensive discussion of certification or eligibility requirements and procedures for granting or revoking certification or eligibility, it is difficult to conclude that there are no rules or mutually explicit understandings supporting the providers' claims of entitlement to certification or eligibility status," *Continental Training Servs., Inc.*, 893 F.2d at 893 (internal quotation marks and citation omitted)).

This inadequate notice renders meaningless the appeals process specified by the proposed regulation. *See City of W. Covina v. Perkins*, 525 U.S. 234, 240 (1999) ("A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful."). Although an institution whose loan eligibility is revoked may challenge that decision before a hearing official, the hearing official must "accept[] ... the average annual earnings calculated by [SSA]." 75 Fed. Reg. at 43640. In other words, even though an institution can—in theory—challenge the Department's decision to deem it ineligible on the basis of a high debt-to-income ratio, the inability to access the evidence underlying the decision makes it implausible to do so in practice. And given the tremendous difficulty an institution would face if it had to try to collect income data itself, the opportunity provided by the proposed regulations for an institution to submit its own data is of little use. Thus, this hearing process "is not the fair hearing essential to due process. It is condemnation without trial." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 300 (1937).[11]

The Department has articulated no governmental interest in using secret income data sufficient to overcome the burdens placed on institutions. Given the paramount importance of financial aid eligibility for institutions, there is no justification for incurring even a small risk that the Department will err because it has relied on secret data. In these circumstances, the Department's proposed approach threatens to deprive institutions of due process of law.

V. The Proposed Regulations Are Arbitrary And Capricious And Contrary To Law Because They Are Impermissibly Retroactive

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Unsurprisingly, therefore, Congress has previously been careful to ensure that rules affecting an institution's eligibility for HEA programs apply only prospectively, so that institutions can foresee any eligibility criteria and adjust their behavior accordingly. For example, when Congress adjusted the methodology for evaluating cohort default rates in the Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008), it postponed the effective date of that adjustment in order to provide institutions with adequate notice of the change: "the method of calculating cohort default rates ...in effect on the day before the date of enactment of this Act shall continue in effect, and the rates so calculated shall be the basis for any sanctions imposed on institutions of higher education because of their cohort default rates, until three consecutive years of cohort default rates calculated in accordance with [the Act] are available," *id.* § 436(e)(2)(B), 122 Stat. at 3257.

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[11] *Ohio Bell* is especially instructive here. To determine a certain rate-making calculation regarding a phone company, a state agency relied on statistical evidence that was "secretly collected" and "never yet disclosed" to the company. 301 U.S. at 300. The Supreme Court concluded that the agency's procedure was a clear violation of due process: "The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." *Id.* at 303. The Court also emphasized that the agency's use of secret evidence would blunt the effectiveness of any subsequent judicial review. "[H]ow was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?" *Id.*

imposition of retroactive rules without explanation or express authorization is arbitrary and capricious and contrary to law.

VI. The Proposed Regulations Are Arbitrary And Capricious In Numerous Additional Respects

Even apart from the Department's lack of authority to promulgate the proposed regulations, the regulations should be rejected because they are arbitrary and capricious in many other respects. Under the Administrative Procedure Act, a court reviewing agency action must "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). Thus, it is well established that agency decision making must be "rational." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 43 (internal quotation marks omitted). "[I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," the agency action will be arbitrary and capricious and must be vacated. *Id.* Likewise, an agency action will be arbitrary and capricious "if [its] factual determinations lack substantial evidence." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1310 (D.C. Cir. 2010) (internal quotation marks omitted).

Here, the regulations proposed by the Department are arbitrary and capricious for numerous reasons:

First, as explained above, the proposed regulations drastically diverge from the regulatory scheme that Congress created in the HEA. *See generally* § III. Congress enacted a detailed set of eligibility requirements but did not consider the factors addressed by the Department: debt-to-income ratios and loan repayment rates. The Department also relied on the wrong factors in purporting to define "gainful employment," a phrase that has nothing to do with debt levels. Thus, the Department's proposal ignores the factors that Congress relied on in the HEA and interjects considerations that Congress never contemplated. For all of the reasons why the proposed regulations are beyond the Department's authority and contrary to the HEA, the regulations are also arbitrary and capricious.

Second, the proposed regulations are arbitrary and capricious for all the reasons explained in detail below in Part Two.

> If 25 percent of potentially affected students attend college despite the effects of the rule, the numbers are larger, of course. In that case, we estimate that more than 1.7 million students' college enrollment would be impacted, including more than 1.1 million female students, approximately 315,000 African-American students, and more than 290,000 Hispanic students. If there were no net effect of school or student responses, the number of students affected would of course be even larger. These estimates imply **upwards of 2.3 million fewer students would attend college over the next decade** (emphasis added), including more than 1.5 million female students, more than 420,000 African--American students and almost 390,000 Hispanic students.

2.3 million fewer students. That is more than a significant impact. It is unconscionable. And directly contrary to President Obama's 2020 goal.

I. The Department Of Education Misquotes And Misuses Expert Recommendations And Data In Support Of The Proposed Rule

The Department of Education states in the preamble to the proposed regulation that programs offered by the for-profit sector must lead to measurable outcomes or those programs will devalue postsecondary credentials through oversupply.

It is far beyond the Department of Education's mission or authority to determine how many graduates are needed in a particular field. The Department of Education Organization Act does not give the Department responsibility for managing the United States economy or its labor force. Additionally, the HEA does not give the Department the authority to create the complex debt-to-income ratio and repayment rate calculations proposed in this NPRM.

The NPRM also states that the proposed standards are necessary to protect taxpayers against wasteful spending on educational programs of little or no value that lead to high indebtedness for students. The value of a program is determined by the graduate of the program, and it may mean different things for different students. One student may value learning to look at a great work of art and appreciate the play of color and shadow; another may value learning how to build and repair a high performance automobile engine. Students choose what program of study to attend based on any number of human factors, including what they value – working with their hands, reading, being creative, helping others; the number of value propositions that go into choosing a field of study probably equals the number of students studying in postsecondary institutions in the United States. It is not the Department's statutory role to determine what programs are of "value" in this manner, and which are not. Taxpayers may well appreciate Federal dollars going to students training to be medical assistants more so than those training to analyze the writing of philosophers long dead; that does not mean a program in philosophy is of any less value.

And while there is a monetary value associated with a postsecondary education, both in terms of the cost of the program in forgone earnings and actual educational charges, and the value of the return on the investment for that education, it is again not within the Department's purview to either establish the cost of the program through any means, be it through direct price controls or creating a debt-to-income measure that is a back-door method of attempting to set tuition prices, nor to determine what a real wage is that a student should be paid for the career they choose. The economic condition of an area and our country at large, the amount of experience a person has at

The report concludes that Congress should expand the Student Right-to-Know Act to require proprietary schools to report recent graduates' training-related job placement rates.[16] They recommend "that the Secretary identify and take appropriate action to ensure that prospective proprietary school students have access to employment and earnings projections relevant to their chosen training field and local area."[17] While Congress has not explicitly authorized this change in the disclosures required under the Student Right-to-Know Act, the Department has taken it upon itself, in the Program Integrity NPRM issued on June 18, 2010, to require institutions to do just this as part of the reporting and disclosure requirements piece of the gainful employment proposed rule. While we do not believe the Department statutorily has the authority to issue that particular proposed rule and we state so in our comments filed on August 2, 2010, we do believe students should be provided with the relevant and appropriate information needed to make informed decisions about postsecondary education and career choices.

B. The Study Completed for the Florida Legislature

In the preamble to the regulation, the Department refers to "(a) recent study completed for the Florida legislature (that) concluded that for-profit institutions were more expensive for taxpayers on a per-student basis due to their high prices and large subsidies." In fact, a careful reading of this report shows the opposite conclusion was reached.

The report,[18] issued in January of 2010 by the Office of Program Policy Analysis & Government Accountability, an office of the Florida legislature, set out to answer six questions. For the purposes of responding to this NPRM, we are concerned with just one of those questions: How do the costs of career education programs compare between public and private institutions?

The report compares costs of several programs at private sector institutions and publicly funded schools, i.e. state community colleges and state universities. The OPPAGA report states:

> Students' costs represent a relatively small percentage of total program costs at public institutions. While the costs of private programs are paid for by students, state appropriations fund approximately 70% of program costs at public institutions, with students and other local sources making up the difference. Thus, the state's contribution to public programs must be considered to provide a reasonable comparison of total program costs between the two sectors.[19]

The OPPAGA report concludes that some public programs are actually more expensive when the state's contribution is considered.

C. The Baum and Schwartz Study

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[16] Ibid, page 13.

[17] Ibid, page 14.

[18] Office of Program Policy Analysis & Government Accountability. "Public Career Education Programs Differ From Private Programs on Their Admission Requirements, Costs, Financial Aid Availability, and Student Outcomes." Available at http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1018rpt.pdf

[19] Ibid, page 9

II. The Proposed Metrics Are Not Based On Economic Research Or Theory

While attempting to analyze the impact of the Department's proposed regulation, CCA consulted with Drs. Jonathan Guryan and Matthew Thompson. Drs. Guryan and Thompson will be submitting their own comments on the proposed regulation, but what they have to say in those comments about the debt-to-income ratio bears repeating:[21]

> The standard economic analysis of education implies that the decision of whether to continue schooling beyond high school should be based on a comparison of the lifetime benefits and the lifetime costs of that schooling. These costs and benefits should both be properly discounted to account for the fact that many of the benefits and some of the costs occur far in the future. Even when the benefits only slightly exceed the costs, when properly measured, it benefits the student to continue to pursue additional education.
>
> The proposed gainful employment formula is different from this ideal in a number of ways. Most significantly, the proposed formula focuses on the level of earnings in the first few years after completion of the schooling. While the Department of Education's intent is likely to ensure that students are able to afford the necessary loan payments in those early years after schooling, it must be noted that any deviation from a comparison of lifetime benefits to lifetime costs has the potential to harm the students. For this reason, special care should be taken when analyzing a rule that effectively restricts borrowing for schooling costs.
>
> If education confers benefits to students – such as increased earnings throughout their post-schooling career – restricting borrowing can cause students to be worse off on net. The guidelines that informed the Department of Education's choice of debt/earnings ratio cut-offs were based on lending rules that are meant to apply to borrowers at all stages of their working life and for physical assets that do not lead to increases in earnings. Rules that apply to early career earnings should be different.
>
> Second, the calculation of annual debt payments should be based on the repayment amounts that students have the option to choose. The proposed rule calculates annual loan payments assuming a 10-year repayment period. However, all students with Title IV loans have the options either of extending the repayment period to between 12 and 30 years through the choice of an "extended repayment", or of reducing the payments they must make in the early years after school completion through the choice of a "graduated repayment". Calculations reported to us by Mark Kantrowitz, the publisher of FinAid.org, indicate that the average repayment length chosen by students for Title IV loans is at least 15 years, and possibly close to 19 years.
>
> In addition, students with low earnings, the ones that the proposed gainful employment rule is meant to protect, have the option of reducing their Title IV payments to a lower percentage of their earnings through the choice of "income-based repayment". For many students, and particularly for those with lower than average earnings in the years for

[21] Comments of Drs. Jonathan Guryan and Matthew Thomson, submitted to the Department of Education on Docket Number ED-2010-OPE-0012

regulations proposed on June 18, 2010 are finalized without modification – information about graduation rates (calculated in a manner different from those already required under the Student Right-to-Know Act), placement rates, and loan debt of students previously enrolled in the program. And this is only a small portion of the reporting and disclosure requirements schools participating in the Title IV programs must provide to students.[22]

There are other sources of information about postsecondary institutions that are made available to students. The Federal government presents institutional information on its College Navigator website, which includes financial aid information, student demographic information and graduation rates. When filling out the FAFSA online, students are informed of the cohort default rate of the institutions to which they request their FAFSA information sent. State authorizing bodies and accrediting organizations also have, in many cases, requirements for information that must be provided to students.

CCA supports a process for simplifying the critical information that a prospective student needs to review to minimize the chances that the individual is overwhelmed by the data that must be presented to him/her.

Even if there were a legitimate concern that students lacked helpful information, the vast majority of what the Department has proposed would not even address that concern. Setting maximum debt-to-income ratios and minimum repayment rates does not provide students with "necessary information" to allow them "to evaluate their postsecondary education options." It will simply give students fewer programs and institutions to choose amongst.

As for the Department stating that the students may be "misled by skillful marketing" and that individuals "may not have the ability to evaluate fully the costs and benefits of entering into loans," this is simply insulting to all students who choose to attend private sector institutions. It implies they are less sophisticated or intelligent than those who choose to attend not-for-profit schools. We cannot believe the Department intended to belittle the millions of students who have chosen to enroll in and graduated from for-profit colleges, and are now working in the careers they strove for and are living lives that have been made better because they achieved their postsecondary education goals.

IV. Postsecondary Institutions Are Subject To Multiple Levels Of Oversight

The Department's statement in the preamble that for-profit institutions may be subject to less oversight by States and other entities is, at best, a gross understatement of the facts and misleading in its simplicity. The amount of information all postsecondary institutions are required to provide to students, accreditors, state regulatory bodies, and the Department of Education itself is extraordinary. This information is subject to review and verification by all of these bodies, and additional parties and outside agencies (e.g. students, plaintiffs' attorneys, state Attorneys General, professional licensing bodies, independent auditors, membership associations) have means of recourse if any of this information is missing or incorrect, either purposefully or accidently.

[22] The full list of disclosures required under the HEA is available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2010831rev

student pays cash for part of a program, they may not always be aware of the total amount (because they depend on the student to provide that information) and they have no real control over the amount borrowed.

The student loan programs are a way – the only way, for many students - for students to achieve their postsecondary dreams. And having funds available for students to pay for the program of their choice at the institution of their choice, regardless of the cost, is important to helping students complete postsecondary education and for us to meet President Obama's 2020 goal.[23] But student loans can be a double edged sword because loans must be repaid and the debt burden can seem overwhelming. Congress created a variety of repayment plans to help students repay their student loans and students are permitted to choose among these plans to find the one that best serves them, but these are backend ways of addressing the problem.

We believe there are several steps the Department of Education and institutions can take to prevent student loan overborrowing that would address the heart of the issue – the borrowing of more funds than are necessary – rather than holding institutions responsible for a ratio that depends in large part on the income a student earns, which is dependent on factors the institution has absolutely no control over including the type of company where the student works, the prevailing wage for the position, and even, in some cases, if the student chooses to work or not.

CCA advocates permitting institutions to limit the amount of loan funds a student may borrow to that which is needed to pay for the student's educational charges, such as tuition and fees, supplies, and room and board. Students would have to actively request and demonstrate need for any funds between this amount and the annual maximum loan amount for which the student is eligible. We realize that this would require Congressional authorization and we look forward to working with the Department to advocate for such a program proactively to deter student loan overborrowing. If there is concern that such a program could be detrimental to some students, and we share that concern, then we suggest a demonstration program involving institutions from all sectors of postsecondary education be implemented so the actual effects – positive and negative - can be observed, and rules adjusted accordingly.

We also look forward to working with the Department and private loan lenders to develop a plan that will more effectively serve student borrowers. Private loan funds are necessary for many students to meet the obligation of their educational charges when students choose to attend institutions that are more costly, or programs that are more expensive, but institutions are removed from the private loan borrowing process. The private loan certification form is a positive step in making sure schools are more aware of any private loan funds a student may receive, but we do not know yet if it effectively impacts the problem of overborrowing. We believe the use of private loan certification forms and their impact on student loan borrowing need to be examined, either through a GAO report or through one of the Department's research means. This will allow us to analyze the impact the certification forms have on private loan borrowing, and make effective changes.

We believe that private loan funds should be disbursed directly to the institution rather than the student. This will provide the institution with one final opportunity to counsel students about

[23] President Obama has made increasing the number of Americans graduating from college a priority for his Administration. The ultimate goal is for the United States to lead the world in college educated citizens by 2020.

employment" as a means of determining an institution's eligibility for participating in the Title IV HEA programs. Moreover, the Department's proposed repayment rate calculation would count students utilizing Congressionally-authorized repayment plans and debt management plans against the institution.

A. Fundamental Flaws with the Proposed Repayment Rate Calculation

The Department is proposing to establish a new method of determining program eligibility based on the number of students making a high enough payment on their student loans in the first three years after leaving an institution that the principal amount of those loans is lower at the end of the year prior to the calculation being made than it was at the beginning of that year. A student could make payments that reduce the principal balance in the previous years, but if for some reason the balance does not go down in the most recent year, the loan will not be considered in repayment for the purpose of this regulations.

The early years of anyone's career can be, and increasingly are, tumultuous. Starting salaries are not indicative of lifetime earnings. Students are attempting to establish themselves in their careers while also beginning to make payments on their student loans. CCA requests the Department count all students meeting their legally obligated loan payment, regardless of the amount of that payment and whether or not the principal of the loan is reduced, as being in repayment for the purposes of this calculation. It makes no senses to consider a borrower to not be in repayment when he or she is, in actuality, making student loan payments. To hold institutions accountable for students going above and beyond their required loan payment makes no sense. Institutions cannot pay loans back on behalf of students; the loan payment amount is based on many factors, most of which are established by Congress. If students are making their required loan payments, they are in fact repaying their loans.

B. The Department's Plan Would Count Students Using Congressionally-Authorized Loan Management Plans Against the Institution

Borrowers will be considered to be in repayment if, in the most recent fiscal year, they made payments that reduced the outstanding principal balance, made qualifying payments under the Public Service Loan Forgiveness Program, or paid the loan in full (although consolidation loans will not be considered to pay any of the underlying loans in full until the consolidation loan is paid in its entirety). Borrowers meeting their legal obligations but who are not actively "repaying" their loans, as defined by the Department (and not, it is important to note, Congress) are not considered in repayment.

Congress has authorized a variety of loan repayment plans to provide borrowers with options for meeting their loan obligations when first embarking on their careers and to allow the consideration of other financial obligations students have. Consolidation loans may result in an overall longer repayment term and additional interest being charged; payments made in the first few years may only apply to the interest being charged for the loan and the principal balance actually increasing. That is not unusual. Students are counseled to this fact, are presented with other repayment options, yet they may still choose loan consolidation as their repayment option.

Consider a student whose career dream, after earning a nursing degree, is to assist low-income women in receiving proper prenatal care. She recognized this goal after graduating from a

For the Department of Education to disregard these Congressionally-authorized debt management and repayment tools is unacceptable. At the very least, if the Department insists in going forward with the proposed repayment rate calculation, all students meeting their legal repayment obligation (even if that means the student's loans are in deferment or forbearance) should be considered in repayment for purposes of the calculation, not just those students in in-school or military deferment.

C. Repayment Rates Are a Reflection of the Sociodemographics of the Student Body, Not the Quality of the Institution

Mr. Mark Kantrowitz, the publisher of FinAid.org and a financial aid expert cited by the Department in the NPRM, conducted an analysis of what impact the proposed rule would have on Pell Grant recipients.[24] It found that:

> (t)he average loan repayment rate is 66% at colleges with less than a tenth of their enrollments receiving a Pell Grant, compared with 26% at colleges with more than two-thirds of their students receiving a Pell Grant. The results are similar even when the analysis is restricted to public, non-profit or for-profit colleges, suggesting that a low loan repayment rate may be caused, at least in part, by the demographics of the students enrolled in a college and not just due to differences in educational quality.[25]

He also found that, generally, Pell Grant recipients contribute 5.2% to the loan repayment rate and non-recipients contribute 74.3% to the loan repayment rate. Since more than half of Pell Grant recipients (52.3%) who are enrolled at for-profit colleges are enrolled at colleges with Department-predicted ineligible loan repayment rates under 35%, this may lead to a significant migration of Pell Grant recipients among programs and colleges. Community colleges are not equipped to handle such an influx.

The repayment rate data published by the Department illustrates that those colleges serving more at-risk students, such as private sector schools, minority serving institutions, and community colleges, have lower repayment rates. This alone demonstrates the rate is not a reflection of institutional quality, but rather illustrates issues faced by institutions attempting to educate larger numbers of lower-income students.

Inasmuch as the repayment rate demonstrates anything, it is that students who enter postsecondary education poor may have a harder time repaying their student loans or be more inclined to use alternative methods for repaying their loans. It does not matter where those loans were incurred.

D. Small Numbers of Borrowers Skew the Calculation

Because of the Department is defining repayment as payments reducing the principal of a loan, small numbers of borrowers in a program can skew the results. If there are few borrowers but one of those borrowers has large loan amounts and does not meet the Department's "repayment"

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[24] http://www.finaid.org/educators/20100901gainfulemploymentimpactonpell.pdf

[25] Ibid.

ratio, and would permit institutions to monitor compliance with the calculation on an on-going basis and without denying institutions the due process to which they are entitled.

As stated above, the 8% debt-to-income ratio is not supported by the experts the Department cites as the reason for arriving at that figure. In fact, all of the thresholds seem arbitrary, and Ms. Mary Ellen McGuire, of the White House Domestic Policy Council, indicated as much during an August 12, 2010 call held with Morgan Stanley to discuss the gainful employment provision. Ms. McGuire, who was actively involved in developing the proposal, stated the 8% figure did come from the Baum and Schwartz study, and the 12% threshold "... quite honestly, is just 50% more than the 8%. That was just a number the Department felt made some bit of sense." It is hard to fathom that that the Department of Education is basing a regulatory proposal that could ultimately deny hundreds of thousands of students access to postsecondary education on what amounts to a gut reaction that makes a "bit of sense" to them. These figures are neither supported in economic research nor make sense to large portions of the postsecondary community.

A. Institutions Will Be Held Accountable for Debt Over Which They Have No Control

All forms of student debt – Federal Stafford loans, Federal Perkins loans, private educational loans, and institutional financing plans – are included in the Department's proposed debt-to-income ratio. As explained elsewhere in these comments, institutions have little to no control over the amount of private educational loans students incur. They may counsel against receiving private loans, but they cannot prevent students from borrowing private loans.

Also previously discussed is the fact that students may often times borrow more Federal student loan funds than are needed to pay the necessary educational expenses, such as tuition and fees. Schools are not permitted to limit the amount of funds students borrow; they may counsel against it, but ultimately the decision to overborrow is the student's.

If the Department finalizes the proposed rule, we recommend two ways to make the debt portion of the debt-to-income ratio a more realistic measurement. First, all private loans should be excluded from the calculation. We repeat: schools currently have no control over private loan funds that students may borrow. Unless and until institutions have some method of approving or declining loan amounts, or the ability to impact the funds received, they should not be held accountable for those funds.

Secondly, institutions should only be held accountable for debt incurred to pay actual educational expenses, to alleviate the affect overborrowing by students can have on the debt-to-income ratio. The Department could easily arrive at this amount by using the amount institutions reported as the net price on the College Navigator website as the cost of education and, therefore, the maximum amount of debt students would need to accumulate to pay those charges, minus any grant or gift aid received by the individual student.

B. The Calculation Assumes a 10-Year Repayment Rate for All Student Loans

The Department of Education proposes to use a 10-year standard repayment rate for purposes of the debt-to-income ratio calculation and the current interest rate charged for an Unsubsidized Stafford Loan. These figures will be used regardless of the actual repayment plan the student

to obtain employment at a new company; that company is public, rather than non-profit, so the salary difference is $20,000 annually. To this student, $20,000 is a substantial amount.

At the very least, this term should be defined in some manner. CCA suggests defining the term "substantial increase in earnings" as one that exceeds twice the cost-of-living index in any given year.

D. The Proposed Calculation Will Deny Institutions the Due Process Afforded to Them Under the Law

Under the proposed regulations, SSA will provide income information to the Department; the Department will make the calculation. Institutions will never have access to individual student's income information, even when found out of compliance with the calculation and subject to disciplinary action in the form of a hearing. Institutions will only be able to verify that the students in the calculation should be in the calculation. As explained above, these procedures would deprive institutions of due process.

There are also some practical concerns associated with an institution's inability to access income information.

Institutions must have full and timely access to the income information because the outcome can make a program ineligible. Mistakes can and will be made. Schools need the ability to search data for any apparent anomalies and to challenge that information before the Department. If the Department cannot or will not provide student-by-student SSA income information to institutions, then another source for determining income should be used. While Bureau of Labor Statistic income information is not ideal, using BLS information would allow schools the opportunity to monitor compliance with the debt-to-income ratio calculation and make adjustments as necessary, as well as permit them access to the information for which they will be held accountable. Nothing about this debt-to-income ratio calculation is ideal, but BLS data is a "devil you know" situation and affords institutions the ability to calculate the ratio for which they will be held accountable. We explain our request to use BLS data and the proper percentiles to more accurately reflect the return-on-investment a student receives from postsecondary education in Part III of these comments.

Additionally, CCA requests the Department to include a draft debt-to-income ratio period, with institutions having the ability to verify and challenge the data included in the calculation. This method is accepted and used with the cohort default rate calculation. Institutions receive their draft CDR and the data used to make the calculation. They are then afforded the opportunity to verify that data and challenge any inaccuracies they find before the final, official rate is produced and published. A similar process would help to prevent errors from stripping institutions of their ability to enroll Title IV-eligible students. And it is very important to note that half of the information – the income information – is completely out of the institution's control. Schools can access student debt information through the National Student Loan Data System (NSLDS) and correct inaccuracies. They should have this same ability with the income information, or a data set that schools can access should be used instead.

Next, institutions will be required to provide documentation from employers not affiliated with the institution that the program's curriculum aligns with recognized occupations at those employers' businesses and that there are projected job vacancies or expected demand for those occupations at those businesses. We have several concerns with the Department's proposed employer verification process which will also be employed when a program is placed on restricted status.

We are very concerned that employers will be put into the position of affirming the curriculum of a program. Curriculum design is well outside the knowledge set of many employers; asking someone in a specific field to verify a curriculum leading to a degree in that field puts them in a position of making an important determination that is well outside of their duties. What if an employer states that they do not like a textbook that is used at an institution? Will the institution be required to change that textbook? We believe employers should simply be requested to affirm that the skills and knowledge taught in the program are in line with what entry-level positions in that field require.

Employers would also be required to verify that there will be job vacancies at their businesses. Again, could an institution be liable under the misrepresentation regulations if an employer states, for example, that it will have projected job vacancies but then goes out of business? And one employer's needs may not reflect the national employment picture. Students can and do move locations for many reasons. They may be attending school in one state while planning to live and work in another at a later date. If an employer says they have no projected vacancies, will the application be denied? Will enrollment numbers be limited to what that employer projects as future employment needs?

How many employers will need to provide this verification? If an institution is applying to offer the program at three locations, will three verifications be needed? If one employer projects enough employment need for all three locations, would the single employer affirmation suffice? Would institutions be permitted to obtain multiple verifications from multiple employers to allow for increased enrollment in the program? If a program is approved but has enrollment limitations placed on it, could an institution obtain additional verifications from employers projecting need for additional workers, and would the enrollment cap be lifted?

CCA requests clarification on what will be considered an "unaffiliated employer." Many private sector schools work with employment advisory boards to ensure workforce needs are being met. Additionally, many schools have sent students to local employers as part of required internship or clinical training programs that are necessary to graduate from the program. Finally, many schools have good relationships with employers because those employers have hired graduates of the institution. We believe employers such as these can and should be permitted to speak on behalf of the institution. A truly "unaffiliated" employer has little reason to speak for an institution; more, without having any contact with the school or experience with graduates of the institution, the employer could not honestly provide the validation the Department is seeking. CCA believes any employer not under common ownership with the institution should be permitted to provide the employer documentation requested by the Department.

Enforcement year	Earnings year (Most recent calendar year for which earnings data are available for calculation of the debt to income ratio)	3 Year Period (Three most recently completed award years prior to the earnings year – for calculation of the debt to income ratio)	Prior four Federal Fiscal Years (for the borrowers in the loan repayment rate calculation)	Last Date of Attendance of Cohort of Students in Prior Four FFY (Borrowers will have left school at least 6 months before going into repayment)
7/1/2012 – 6/30/2013	1/1/2010 to 12/31/2010* *Assuming that the SSA needs to wait a year until self-employed people have filed their tax returns to get all data.	7/1/2006 to 6/30/2009	10/1/2007 to 3/31/2011* *Loan repayment rate calculation will exclude those who entered repayment after 3/31 of any year	4/1/2007 to 9/30/2011

If the Department insists on preceding with the publication of this unauthorized regulation, and meets the master calendar deadline for publication so that the rule becomes effective on July 1, 2011, then all aspects of the regulation should become effective as of that date and the rule should make program eligibility turn on data for students whose last date of attendance is on or after July 1, 2011. This will afford institutions every opportunity to put into place policies that will have a positive impact on the proposed rule, and not unfairly hold them accountable for students who have left years previously. It will also ensure the Department is not imposing retroactive rules without explanation or express authorization in a manner that is arbitrary and capricious and contrary to law.

XI. Timing Of The Calculation

It is unclear in the proposed rule when the debt-to-income and repayment rate calculations will made and institutions notified of the results. In conversations with the Department, we have been told they will be "operationally driven" and the calculations will be made "as soon as the information is available." It is simply unacceptable that institutions will not know when the sword hanging over their heads may fall. The Department of Education holds institutions to strict, enforced deadlines for the submission of information. The entire financial aid award year and institutional and student eligibility for participation in the Title IV programs is deadline driven; not submitting a piece of paper by the day mandated results in losing eligibility. The Department itself is held to deadlines, as evidenced by the hurried nature of this proposed rule – if the final regulation is not published on or before November 1, the implementation will be delayed by one award year.

operating will lead to a rush to publish the final rule in time to meet the master calendar. We are very concerned that the Department will not be able to fully consider the large number of comments submitted regarding this proposed rule and that they will draft a final regulation, submit it to the Office of Management and Budget for analysis, and issue the final regulation for publication in the *Federal Register* in time to meet the master calendar deadlines. We would like to stress again that it is much more important that the full impact of this regulation be determined, and the language of the regulation be thoughtfully written, than it is to rush a half-developed rule, the full implications of which area unknown, to final publication.

XIV. Conclusion

The Department of Education must abandon its proposed rule based on the legal and factual impediments described in Part One and Part Two of these Comments unless and until Congress authorizes it explicitly and unambiguously. At the very least, the Department should delay issuance of a final rule until it has the benefit of the Government Accountability Office report on the for-profit postsecondary institutions requested by Congress and until it takes more time to utilize additional research means available to the Department to fully assess the problem and proposed solution before creating a regulatory scheme that can and will have devastating effects on student access to postsecondary education in the United States.

received. This could be implemented fairly easily, as the Department could require or permit institutions when reporting student data under section 668.6(a) to add two additional data elements. First, they could report the cost of the program as disclosed to students under §668.6(b)(3). Second, they could report the total amount of grant aid received by the student. With these two additional data elements, the Department could cap the amount of loan debt attributed to each student to the amount that the student needed to pay institutional costs.

If the Department believes this method would be too complicated or create additional burden, it could rely on the "net price" reported on the College Navigator website. This price, which is calculated for all institutions, is the cost minus grant aid. Again, since many students are eligible for and take out loan amounts above and beyond what is required to pay educational charges, and institutions cannot prevent students from doing so, we believe institutions should not be held responsible for loan amount above what is necessary for educational expenses.

B. The Definition of Income

The Department's calculation relies on Social Security and/or other Federal income information, which, out of privacy concerns for individual students, will not be made available to institutions, thus depriving those institutions of the due process otherwise afforded to them when found out of compliance with an Education Department regulatory provision.

CCA's alternative debt-to-income ratio would use Bureau of Labor Statistic income thresholds for several reasons. These thresholds, while neither perfect nor ideal, are a known quantity. Institutions have full access to the income thresholds published by the BLS, unlike income information reported to the SSA. Thus, institutions would be able to periodically calculate their debt-to-income threshold since they will have full and complete knowledge of student debt information, as described above, and the income levels to which they will be held accountable. This will afford institutions the opportunity to monitor their ratio at intervals and adjust institutional practices in a way that will assist students in making wise borrowing decisions while permitting the institution to remain within acceptable debt-to-income limits. Programs would be able to present actual income data if they had credible information that it was accurate and verifiable.

Because BLS information is neither perfect nor ideal, if institutions can demonstrate the graduates of a program earn incomes above the reported BLS thresholds, they may perform the debt-to-income calculation using actual income figures. Actual earnings may be demonstrated through the use of survey results of employers or former students, or through other empirical evidence documenting actual earnings. In this instance, the debt-to-income ratio would be met the annual loan payment of the students is 30% or less of discretionary income, with discretionary income being defined as the difference between the actual average income and 150%of the most current Poverty Guideline for a single person in the Continental United States (available at http://aspe.hhs.gov/poverty).

C. The Repayment Rate Terms

The ratio relies on a 10-year standard repayment plan, using the interest rate for Federal Unsubsidized Stafford Loans. Students are afforded a range of Congressionally-authorized repayment plans with a variety of repayment terms. Students choose among those plans to utilize

A debt-to-income ratio is far from an accurate indicator of a program's quality or the strength of the support services an institution provides to students by way of educating them on student loan obligations and repayment plans. As such, the Department's proposed regulation includes a second metric to allow institutions to demonstrate program strength. The proposed repayment rate calculation is unauthorized by Congress, thus beyond the Secretary's authority to promulgate. It would be extremely difficult for institutions to monitor the repayment rate calculation because they do not have the ability to accurately track the up-to-the-minute repayment status of students' Federal education loans.

CCA proposes as an alternative for programs that do not meet the debt-to-income metric the use of the cohort default rate (CDR). The CDR is a measurement prescribed by Congress. Institutions are familiar with the CDR, and are able to monitor their compliance with the rate. The CDR includes a draft release period during which institutions have access to all the data used in the calculation, and they have the opportunity to verify the information and challenge incorrect data. Thus, using the CDR would mitigate the concerns we have regarding institutions' lack of due process if and when found out of compliance with the due process and repayment rate calculations.

The Department's repayment rate proposal would not include students in deferment and forbearance, other than in-school and military deferment, as being in repayment for purposes of the calculation. We do not believe this is in the best interest of students or institutions, as explained in the previous section of these comments. To summarize, deferments and forbearances are authorized by Congress as tools for assisting students in meeting their loan payment obligations and effectively managing their debt while taking into consideration other life factors – such as unemployment due to economic recession or a student's decision to postpone work due to family obligations – that are beyond the control of an institution. It is the lender, not the institution, which grants the deferment or forbearance; the institution is neither consulted nor notified during the process. It is important to note that, as of July 1, 2010, the Department of Education is the lender that will bear the responsibility for allowing students to defer or forbear their loan payments as permitted under the law.

We are well aware critics of private sector colleges accuse them of pushing students into forbearance and deferment as a way of lowering institutional cohort default rates, because loans in these statuses are considered in repayment for the purpose of the calculation. Again, lenders, not institutions, grant the deferment or forbearance. If the Department of Education wishes to address what they believe may be overuse of forbearance and deferment as debt management tools, the Department needs to address this with lenders and, ultimately, Congress. They should not create a complicated and messy new concept of repayment rate that excludes from the numerator students who are doing exactly as they have been told by the lenders to be in an authorized repayment status.

In using the cohort default rate as a secondary metric of gainful employment, the Department must take into consideration the demographics of the student population served by the institution. Kantrowitz examined[27] the impact certain at-risk characteristics of students, including Pell Grant recipient status, has on CDRs. He found that Pell Grant recipient status accounts for 32.9% of the

[27] Kantrowitz, Mark. "Calculating the Contribution of Demographic Differences to Default Rates." http://www.finaid.org/educators/20100507demographicdifferences.pdf

recipients, as indicated by the table below. Programs with lower proportions of Pell recipients (i.e., less than 60 percent of Pell recipients) in effect would have to have a CDR lower than the current maximum rate of 30 percent for the purpose of this gainful employment measure. The programmatic CDR and thresholds will only be used for purposes of determining compliance with this proposed regulation.

Thresholds for program cohort default rates would be as follows:

Percentage of Students Receiving Pell Grants	Programmatic Cohort Default Rate
0% – 20%	25
20% - 40%	28
40% - 60%	30
60% - 80%	40
80% - 100%	42

Programs above both the debt-to-income threshold and CDR threshold would be out of compliance with the proposed regulation and placed on restricted status.

III. The Penalty for Programs that Fail to Meet Either the Debt to Income Ratio Test or the Alternative CDR Test Should be Placed on Restricted Status for Three Years While the Institution, Working in Conjunction with the Department, Would Have An Opportunity to Make Changes to Return to Full Compliance

Because many factors in the debt-to-income and cohort default rate calculation are well out of the control or influence of the institution, we believe schools should have the opportunity to make adjustments to their operations that could have a positive impact on those measurements. As such, if a program is out of compliance with both the debt-to-income threshold and has a three-year cohort default rate above the appropriate threshold, the institution could be placed on a restricted status to afford the institution the time to make those changes necessary to return to full compliance.

IV. There Should Be No Requirement That New Programs Need to Meet Either of the Two Metrics

Unless and until a program has enough students complete that program to calculate both a debt-to-income ratio and the three-year cohort default rate calculation, the program should not be held accountable for those measurements. Thus, new programs authorized in the manner currently authorized under law and regulation shall have to be in continuous operation for a period of time that permits the calculation of the three-year cohort default rate before wither the debt-to-income ratio or the use of the three-year CDR shall be applied to it for the purpose of this proposed regulation.

V. The Proposed Debt-to-Income Metric and CDR Alternative Would Apply to All Institutions

The Department maintains the reason for releasing this proposed rule is to address their concern about growing levels of student debt. CCA shares that concern. We believe everyone involved in