the institute for college access & success

MEMORANDUM TO INTERESTED PARTIES

TO: Editorial page editors, writers, and columnists
FROM: The Institute for College Access & Success
DATE: May 31, 2019
SUBJECT: Repeal of the Gainful Employment Standards for Career Programs

In the coming days, the U.S. Department of Education will publish a final regulation repealing the gainful employment rule, which identifies career education programs that consistently leave students with large debts they cannot afford. Many of these programs are offered by for-profit colleges, and they disproportionately enroll veterans and students of color.

This memorandum summarizes the current status and likely future developments related to the gainful employment rule. It includes new analysis of data released by the Department of Education in January 2019.[1]

- Approximately 375,000 students graduated from career programs where the typical graduates' debt is so large that, under the standard repayment plan, it is larger than their entire discretionary income (their earnings after a basic living allowance of about $18,000).

- Approximately 170,000 students graduated from career programs where the typical graduates' earnings are below the full-time federal minimum wage of $15,080 per year.

- Some of the most notorious for-profit colleges could not have offered most of their programs under the Gainful Employment rule. At Virginia College and Vatterott College, less than 10 percent of programs passed the Gainful Employment standard.

Despite the formal repeal, the controversy over gainful employment will continue in the courts, in Congress, and in the states. In the meantime, however, enrollment at some of the largest for-profit colleges has begun growing again.

Current Status of the Gainful Employment Rule

The Higher Education Act requires that, in order to offer their students federal financial aid, occupational programs must "prepare students for gainful employment in a recognized occupation."[2] In 2009, the Department of Education grew concerned over growing loan defaults and problematic

[1] TICAS analysis of U.S. Department of Education data published in January 2019, available at https://bit.ly/2gkRzjm.
[2] 28 U.S.C. 1002(b)(1)(A)(i), available at https://bit.ly/30NWflV.

recruiting practices at the for-profit colleges that operate many career programs. It began an effort to write a regulation that would define the terms in the Higher Education Act.[3]

In 2014, the Department of Education finalized the gainful employment rule.[4] The idea is simple: typical graduates need to earn enough to afford to repay their loans. Any program where typical graduates' debts exceed both 8 percent of their total income and 20 percent of discretionary income must improve or lose access to federal financial aid.[5]

The rule has improved value for students, including lower tuitions, more scholarships, free trial periods, and an emphasis on high-quality programs. Even industry representatives acknowledge that the rule forced for-profit colleges to reduce the cost of programs and offer students greater value.[1] According to New America, most programs that failed the rule's tests were either restructured to improve outcomes or closed to new enrollments.[1]

For many failing programs, better options exist. For example, in Birmingham, Alabama, a graduate of Strayer University's Masters in business program would earn close to 50 percent ($16,700) more than a graduate of the nearby Virginia College, but owe $6,400 less.[1]

The Department published debt-to-earnings data in January 2019 that reflect the validation and earnings appeals process established by the rule, making them reliable enough to serve as a basis for enforcement actions and (as discussed in the next section) providing new insight into the need for the gainful employment rule.

However, the Department never produced a second round of data. Because programs must fail the thresholds at least twice before losing eligibility, no program has lost eligibility under the rule. Moreover, after the Department illegally used the gainful employment data to decide unrelated cases of student fraud, the Social Security Administration has refused to provide wage data necessary to calculate debt-to-earnings ratios.[6]

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[3] U.S. Department of Education. "Negotiated Rulemaking Committees; Establishment." *Federal Register*. May 26, 2009. https://bit.ly/30UF7ea.

[4] U.S. Department of Education. "Program Integrity: Gainful Employment." *Federal Register*. March 25, 2014. https://bit.ly/2wsAFW3.

[5] Failing programs are those where typical graduates' estimated student loan payments exceed both 12 percent of total income and 30 percent of discretionary income; programs that fail in two out of three years lose eligibility for federal financial aid. "Zone" programs are those where typical graduates' estimated student loan payments exceed both 8 percent of total income and 20 percent of discretionary income; zone programs lose eligibility if they fail in four consecutive years. Passing programs are those where typical graduates' estimated student loan payments are below either 8 percent of total income or 20 percent of discretionary income. U.S. Department of Education. "Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs." January 9, 2017. https://bit.ly/2jeP7Ju.

[6] Michael Stratford. "Data Dispute Effectively Kills 'Gainful' Rule." *Politico*. December 5, 2018. https://politi.co/2QCVK9M; Andrew Kreighbaum. "Agencies at Loggerheads over Gainful-Employment Data." *Inside Higher Ed.* December 6, 2018; https://bit.ly/2Wzk7dG.

Last August, the Department sought public comment on a proposal to repeal the gainful employment rule. At the time, it estimated that repealing the rule would cost taxpayers $5 billion over ten years by spending more money on poorly performing programs.[7]

The Department's final rule has been under Office of Management and Budget review since April 11.[8] It is expected to be published in June and to closely mirror the proposal.

Analysis of the January 2019 Gainful Employment Data

Because it was produced through a process intended for enforcement purposes, the gainful employment data published by the Department of Education in January 2019 is as reliable as possible. The data are also the result of a new process – adopted by the Department in 2018 -- for colleges to provide alternative measurements of their employment outcomes.

According to these data, more than 350,000 graduates, carrying nearly $7.5 billion in debt, attended programs below minimum standards.[9] Almost 98 percent of these programs were offered by for-profit colleges, including the notorious ITT and the recently closed Argosy Colleges.

Many graduates of career programs have very low incomes. About 375,000 students graduated from career programs where the typical graduates' debt is so large that, under the standard repayment plan, it is larger than their entire discretionary income (their earnings after a basic living allowance of about $18,000). About 170,000 students graduated from career programs where the typical graduates' earnings are below the full-time federal minimum wage of $15,080 per year.

Many programs at colleges that have closed precipitously would have been ineligible for federal aid, had the gainful employment rule been in place. For-profit college chains enrolling over 100,000 students have closed since 2015.[10] At Virginia College and Vatterott College, fewer than 10 percent of their programs passed the gainful employment standard.

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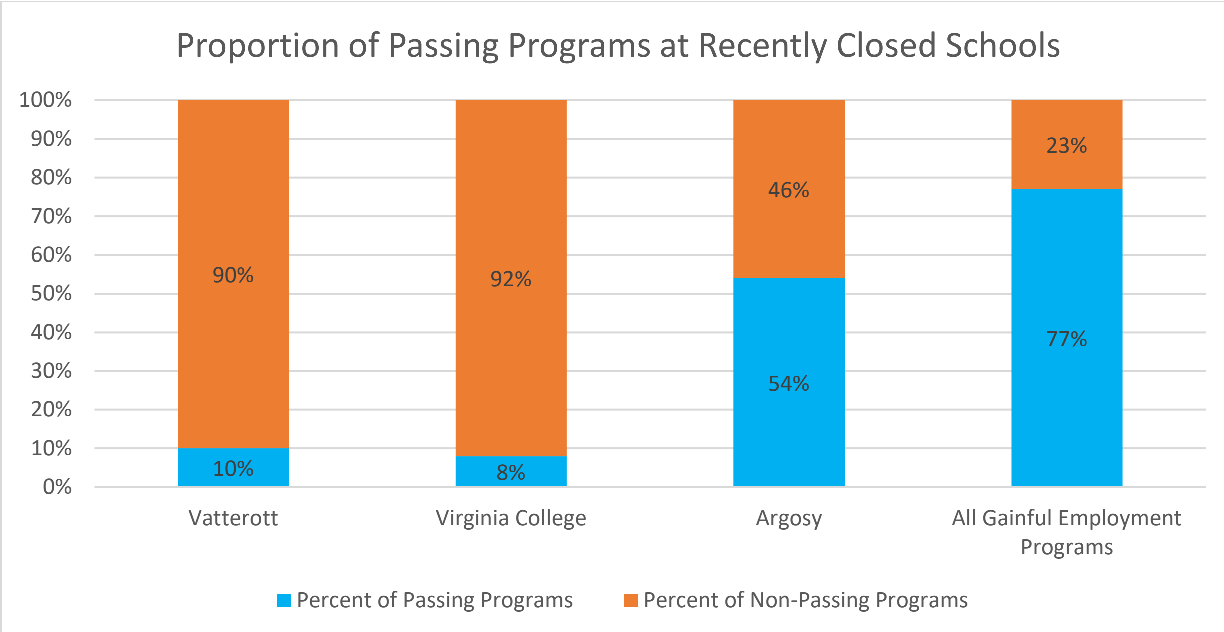
[7] U.S. Department of Education. "Program Integrity: Gainful Employment." *Federal Register*. August 14, 2018. https://bit.ly/2JOCs0g.

[8] Office of Management and Budget, reginfo.gov, accessed May 30, 2019, https://bit.ly/2Kb5GGh.

[9] TICAS analysis of U.S. Department of Education data published in January 2019, available at https://bit.ly/2gkRzjm.

[10] Michael Vasquez. "The Nightmarish End of the Dream Center's Higher-Ed Empire." *The Chronicle of Higher Education.* March 9, 2019. https://bit.ly/2W1974n.



Similarly, Career Education Corporation, a company that ran a number of for-profit colleges including American InterContinental University, Le Cordon Bleu, and Sanford-Brown Colleges, was a party to two major settlements for misleading and deceptive recruiting practices.[11] Fewer than half of their 192 programs passed the debt-to-earnings test.

<u>What to Look for in the New Rule</u>

Under the Department's regulatory process, the final rule must be closely related to the proposal to eliminate the rule published last August. Remaining questions include:

- Will the final rule retain any eligibility requirements? The proposed rule allowed career colleges to retain financial aid eligibility, regardless of how large their graduates' debts or how low their earnings may be.[12]

- Will the final rule require any consumer disclosures? The proposal eliminated requirements that colleges disclose key information on the program's cost, graduation rates, and employment outcomes. While the Department has said it intends to inform student choices, the Trump Administration has already substantially weakened these disclosures administratively.[13]

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[11] New York Attorney General. "A.G. Schneiderman Announces Groundbreaking $10.25 Million Dollar Settlement With For-Profit Education Company That Inflated Job Placement Rates To Attract Students." August 19, 2013. https://on.ny.gov/2Ke2Pfz; Office of the Attorney General of Maryland. "Assurance of Voluntary Compliance/Assurance of Discontinuance." January 3, 2019. https://bit.ly/2EJflux.
[12] The Institute for College Access & Success. "Detailed Comments on the Gainful Employment Notice of Proposed Rulemaking:" September 13, 2018. https://bit.ly/2KdEwOP.
[13] The Institute for College Access & Success. "Consumer Information in Higher Education." April 30, 2019. https://bit.ly/2QAHNZC.

- Will the Department strengthen its legal justification for the final rule? The gainful employment rule was founded on an extensive base of evidence including six years of research and over 185,000 public comments. The proposal ignored this substantial factual record, misrepresented key research, and failed to consider obvious alternatives that could better achieve its objectives.[14]

- Will the Department remedy deficiencies in its cost-benefit analysis? In analyzing its proposal last summer, the Department failed to account for the benefits to students of higher earnings and lower debts, benefits which dwarf the other economic impacts of the rule.[15]

Next Steps

The repeal of the Gainful Employment rule will not be the end of the story. There are at least four venues in which the debate will continue.

First, the Department remains obligated to enforce the existing rule until July 1, 2020, the earliest possible effective date for gainful employment's repeal. An ongoing suit brought by 18 state attorneys general is challenging the Department's failure to carry out the rule.[16]

Second, states and legal groups may challenge the new regulation. While the Department has wide discretion over regulatory decisions, it must show that they have a reasoned basis and are not arbitrary or capricious. At a minimum, it's likely that litigation will stretch past January 2021, potentially giving new leadership at the Department an opportunity to reconsider its views.

Third, Congress may act. Senate Democrats have introduced legislation protecting the gainful employment rule.[17] Senator Alexander has proposed what he calls "gainful employment for all." While there are many unanswered questions about this idea -- Alexander would look at loans where accrued interest exceeds payments, rather than debt-to-earnings ratios, and apply the standard to all academic and career programs – it nonetheless speaks to congressional interest in holding colleges accountable for student loan affordability.

Finally, states may impose stricter scrutiny on for-profit colleges, including standards similar to the gainful employment rule.[18] These legislative efforts will complement existing federal and state investigations into the predatory practices of for-profit colleges.[19]

In the meantime, however, some for-profit colleges may put students at risk. While the industry as a whole continues to decline, large publicly traded for-profit college companies reporting increased new and expanded enrollment include the Career Education Corporation ("new enrollment growth was the

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[14] The Institute for College Access & Success. "Detailed Comments on the Gainful Employment Notice of Proposed Rulemaking:" September 13, 2018. https://bit.ly/2KdEwOP.
[15] The Institute for College Access & Success. "Detailed Comments on the Gainful Employment Notice of Proposed Rulemaking:" September 13, 2018. https://bit.ly/2KdEwOP.
[16] *State of Maryland v. United States Department of Education*. https://bit.ly/2Mg4rrS.
[17] See the PROTECT Students Act (S. 867). https://bit.ly/2VYgKZD.
[18] Felicia Mello. "Fewer Schools, More Accountability." CALMatters. April 9, 2019. https://bit.ly/2G2uTit; ; Ashley A. Smith. "States Seek Tighter Regulation of For-Profits." Inside Higher Ed. March 14, 2019. https://bit.ly/2MjyK0L. .
[19] The Institute for College Access & Success. "Detailed Comments on the Gainful Employment Notice of Proposed Rulemaking:" September 13, 2018. https://bit.ly/2KdEwOP.

strongest it has been in over five years"), Lincoln Educational Services Corporation ("six consecutive quarters of solid start growth"), and Universal Technical Institute ("[d]uring our second quarter of fiscal 2019, new student starts grew 11.2% compared to the prior year").[20]

For More Information

The Institute for College Access & Success. "What to Know About the Gainful Employment Rule." April 30, 2019. https://bit.ly/2Kd5Tsp.

The Institute for College Access & Success. "Detailed Comments on the Gainful Employment Rule." September 13, 2018. https://bit.ly/2KdEwOP.

Various. "Comments from 68 Organizations to Secretary DeVos Urging the Department to Enforce the Gainful Employment Rule." September 13, 2018. https://bit.ly/2HMYkXY.

The Institute for College Access & Success. "Same Program, Different Results: Better Options Exist for Students in the Worst-Performing Gainful Employment Programs." September 14, 2018. https://bit.ly/30UQPWn.

[20] Career Education Corporation. "Career Education Corporation CEO Todd Nelson On Q1 2019 Results - Earnings Call Transcript." May 10, 2019. https://bit.ly/2EI7ra8; Lincoln Educational Services. "Lincoln Educational Services Corporation CEO Scott Shaw on Q1 2019 Results - Earnings Call Transcript." May 12, 2019. https://bit.ly/2Wt0WSZ; Universal Technical Institute. "Universal Technical Institute's CEO Kim McWaters on Q1 2019 Results - Earnings Call Transcript." May 10, 2019. https://bit.ly/2XiYz2e.