From Washington

Sharon H. Bob

Department Publishes Notice of Proposed Rulemaking on "Gainful Employment" on July 26th

On July 26, 2010, the Department of Education published in the *Federal Register* a Notice of Proposed Rulemaking (NPRM) on Gainful Employment. On July 22, 2010, the Department issued a press release indicating that the Department will be defining in the NPRM whether a program successfully prepares students for gainful employment using a two-part test. The Department estimates that around 5 percent of all programs subject to the rule (i.e., all for-profit schools, with the exception of certain qualified liberal arts programs; all postsecondary vocational institutions; and any nondegree programs that are not less than one-year in length provided by institutions of higher education must prepare students for gainful employment in a recognized occupation) would no longer be eligible programs for Title IV purposes beginning 2012–2013 should the proposed rule become final. The Department also estimates that 55 percent of all programs would be required to warn their students about high debt-to-earnings ratios.

Comments are due September 9, 2010. The proposed regulations are subject to further amendment by the Department and will go into effect on July 1, 2011 assuming the final regulations are published by November 1, 2010.

Secretary of Education Arne Duncan stated in the press release: "While career colleges play a vital role in training our workforce to be globally competitive, some of them are saddling students with debt they cannot afford in exchange for degrees and certificates they cannot use. These schools—and their investors—benefit from billions of dollars in subsidies from taxpayers, and in return, taxpayers have a right to know that these programs are providing solid preparation for a job. The rules we've proposed today will help ensure that career college and training programs use federal student aid to prepare students for success."

The proposed gainful employment rules are complex and require careful analysis. The following is intended as an overview and general description of the proposed rules and not intended to provide a legal analysis of the rules or advice on their application.

The proposed definition of gainful employment would require an assessment as to whether the program provides training that leads to gainful employment by applying two tests: one test based upon debt-to-income ratios and the other test based upon loan repayment rates. The debt-to-income ratio has two separate components: *a debt-to-earnings ratio and a debt-to-discretionary income ratio.* The proposed rules would take into consideration whether former students, whether graduates or withdrawals, are repaying their federal student loans. The proposed rules would also examine the relationship between total student loan debt and average earnings for an institution's graduates after attending a postsecondary education program.

Mr. Burd contended that many students leave the school loaded down with unmanageable debt and insufficient training to make them competitive in the current job market.

The debt-to-income ratio is intended to provide a measure of program completers' ability to repay their loans. The use of discretionary income is intended to recognize that borrowers with higher incomes can afford to use a larger share of their income for loan repayments, while the use of annual income is intended to address programs whose borrowers have lower earnings. The loan repayment rate is intended as a measure of whether program enrollees are repaying their loans, regardless of whether they completed the program.

Based on these two tests, the program may be eligible, have restricted eligibility, or be ineligible:

"Fully eligible program" would (1) need to have at least 45 percent of their former students paying down the principal on their federal loans (as calculated under the regulations) OR (2) their graduates would need to have a debt-to-earnings ratio of 20 percent or less of discretionary income OR 8 percent or less of average annual earnings. Unless it passes both these tests, the program would have to disclose their loan repayment rates and debt-to-earnings ratios to current and prospective students and warn them that they may have difficulty repaying loans obtained for attending the program.

"Ineligible program" would (1) have less than 35 percent of their former students paying down the principal of their federal loans (as calculated under the regulations) AND (2) their graduates would have a debt-to-earnings ratio above 30 percent of discretionary income AND 12 percent of average annual earnings. An ineligible program may not offer student aid to new students and can provide Title IV aid for the remainder of the current award year plus one additional award year to current students, provided that it warns them about the high debt-to-earnings ratio.

"Restricted program" is a program that is not fully eligible or ineligible. Restricted programs are subject to limits on enrollment growth, must demonstrate employer support for the program, must warn prospective and current students that they may have difficulty repaying their loans, and must disclose their loan repayment rates and debt-to-income ratios.

There will also be a transition period during which:

- the Department would limit the number of programs declared ineligible to the lowest-performing programs producing no more than 5 percent of completers during the prior award year (using a procedure outlined in the regulation); and
- additional programs and programs that fail to meet the debt thresholds but fall outside the 5 percent cap would be subject to the same rule as programs on a restricted eligibility status.

The proposed rule differs from the rule proposed during the negotiated rulemaking sessions, which generally would have required programs to have either an 8 percent debt-to-earnings ratio for its graduates or a 75 percent loan repayment rate. Among other things, the currently proposed version of the loan repayment rate would generally treat students in deferment and forbearance status as not repaying their student loans.

Mr. Kvaal began by noting that there are many for-profit schools that are thriving, which is a good thing since many for-profit schools have pioneered methods to address student needs.

The current proposed rules reflect an apparent intent on the part of the Administration to tightly control the growth of students attending for-profit institutions. For example, if a program is on restricted status, and it is estimated that 55 percent of the programs will be on a restricted status, it will be subject to a cap on enrollment of Title IV recipients equal to the average number of students enrolled during the prior three years. Restricted programs would have to provide the Department with annual affirmations from employers not affiliated with the institution and the employers would have to affirm that the program aligns with jobs their businesses need and whether there are anticipated job openings or future demand. Restricted programs would also have to make debt-warning disclosures that include (1) a prominent warning in its promotional, enrollment, registration, and in all other materials, and disclose to current students and prospective students on its Web site, and in all admissions meetings with prospective students, that they may have difficulty repaying loans obtained for attending the program, and (2) disclose the most recent loan repayment rate and most recent debt measures.

Schools would also face limitations in offering new programs. If the new program were a substantive change, then accrediting agency approval would be required. Institutions would have to provide the Department with projected student enrollment for the next five years at all locations where the program will be offered along with employer affirmations that there is a need for the positions that would be sought by graduates of the program. If the additional program constitutes a substantive change based solely on program content, the Secretary would calculate the loan repayment rate and debt measures for that program as soon as data is available; otherwise, the Secretary would use data from the other programs in the same job family.

Reining in For-Profit Higher Education: A Conversation with Administration Official James Kvaal

On July 30, 2010, the New America Foundation convened a panel to discuss "Reining in For-Profit Higher Education: A Conversation with Administration Official James Kvaal." Stephen Burd, the editor of *Higher Education Watch,* a public policy blog published by the New America Foundation, moderated a panel consisting of James Kvaal, senior advisor in the Office of the Under Secretary at the U.S. Department of Education; Barmak Nassirian, associate executive director of the American Association of Collegiate Registrars and Admissions (AACRAO); and Katherine Mangu-Ward, senior editor of *Reason* magazine and Reason.com, formerly a reporter for the *Weekly Standard.*

Mr. Burd described the current environment where "business is booming" for for-profit schools and indicated that, while many members of the higher education community are not opposed to for-profit education, there is concern that for-profit institutions are not serving the students they enroll and are putting their students in harm's way. He contended that many students leave the school loaded down with unmanageable debt and insufficient training to make them competitive in the current job market. Mr. Burd said that on July 23, 2010 (published in the *Federal Register* on July 26, 2010), the Obama Administration proposed tough regulations that would cut off federal financial aid to for-profit schools' programs whose students take on the highest amounts of debt and have the worst record of loan repayment and restrict enrollment at hundreds of other institutions.

Mr. Kvaal noted that for-profit colleges have a legal incentive to maximize profits, a theme that appears in many of the current articles about the for-profit sector.

After introducing the panel, Mr. Kvaal stated that the Department was in a unique stage of rulemaking and there were strict rules about what he could say. He said that he could not discuss anything beyond the content of the proposed rules. Mr. Kvaal began by noting that there are many for-profit schools that are thriving, which is a good thing since many for-profit schools have pioneered methods to address student needs. He pointed out that Secretary of Education Arne Duncan had indicated that for-profit schools are helping to meet President Obama's goal of increasing college graduation by 2020. However, he noted that the Department needs to ensure that students are being trained and that taxpayers are not losing money. He noted that for-profit colleges have a legal incentive to maximize profits, a theme that appears in many of the current articles about the for-profit sector.

Mr. Kvaal said that since the negotiated rulemaking session, the Department has worked with many of the stakeholders and has taken their feedback into account in drafting the proposed rules. He asserted that currently there are no standards for determining whether a program prepares students for "gainful employment," and these proposed rules give for-profit colleges a method to demonstrate that they are preparing students for gainful employment. The rules, according to Mr. Kvaal, provide multiple measures that will be able to distinguish good programs, not-so-good programs, and those programs that are not worthwhile.

Mr. Kvaal then provided an overview of the proposed regulations and described the two components: the loan repayment rate and the debt-to-earnings ratio. Mr. Kvaal said that the proposed rules attempt to provide some flexibility to schools and offer a transition year for 2012–2013 where 5 percent of all programs subject to the rule will become ineligible. The Department based its estimates on data from one state (Missouri) that had earnings data, and based on the data, estimated that 8 percent of all programs will be restricted programs. The remainder of the programs will be eligible programs, although many will have to provide debt warnings to their students. Only fully eligible programs that have at least 45 percent of their former students paying down the principal on their federal loans and graduates with a debt-to-earnings ratio of 20 percent or less of discretionary income or 8 percent or less of average annual earnings will not have to provide a debt warning.

Mr. Nassirian asserted that contrary to the statements made by the advocates of for-profit institutions, the vast majority of participants engaged in "counterfeiting degrees and consumer fraud."

Mr. Nassirian began by indicating that he was not bound by any requirements for "decorum." (Mr. Nassirian is noted for his provocative sound bites and no one was disappointed.) He asserted that contrary to the statements made by the advocates of for-profit institutions, the vast majority of participants engaged in "counterfeiting degrees and consumer fraud." Mr. Nassirian agreed that there are some for-profit institutions that do a good job and are honorable, but he pointed out that there is no proper regulatory framework to control for-profit institutions that are delivering a worthless product and whose main activity is advertising. He stated that no one but the Department was willing to spend money to obtain an education from these schools.

Mr. Nassirian pointed out that the proposed regulations did not go far enough and asked how a 45 percent repayment rate makes a school golden, and how that was a measure of success. He said that the measure was inadequate and no other industry would see it as a success. Mr. Nassirian asked that if a school fails under these rules, how do the students' failures get addressed? He recommended that the Department put more emphasis on gatekeeping controls that could be used upfront. While the proposed rules may help future students, the rules do nothing for prior students. Mr. Nassirian suggested that these former students be eligible for a loan discharge.

Ms. Mangu-Ward applauded the Department for the well-written NPRM. Her suggestion was that the rules should apply to all institutions and she gave herself as an example of someone who received federal financial aid to be a philosophy major where she took a course titled "Arts, Love and Reality" on the Department's dime. Ms. Mangu-Ward also pointed out that everyone, including her alma mater, Yale University, markets its education product.

Ms. Mangu-Ward quoted Terry Hartle, from the American Council on Education, who said that these are the most complicated rules ED has ever produced. She noted that these rules could be gamed and then there could be additional rules. She suggested that the Department look at the banking industry because it has ways to determine who will pay back loans. She then returned to her theme, which was that ED should not be singling out for-profit institutions, but Mr. Nassarian responded that Congress has limited which programs should be preparing students for gainful employment and liberal arts programs are exempt.

Mr. Kvaal stated that the Department wants institutions to demonstrate that if they want to begin new programs that there is a need to prepare students for specific occupations and they must project their enrollment. When someone asked if there would be a penalty for not meeting enrollment projections, Mr. Kvaal said that it was an interesting question, which should be submitted as a comment. Someone asked Mr. Kvaal whether distance education programs had to obtain input from "local employers," and again he responded that this comment should be made to the Department.

When asked how the metrics were derived, Mr. Kvaal responded that one state had earnings data and the loan repayment information was derived from NSLDS.

At a group of 13 California community colleges, about a third of the applicants for financial aid who appeared eligible for Pell Grants did not receive them.

Mr. Nassarian said that he hoped that these rules would encourage schools to do more teaching and less advertising. He also said that the student loan crisis was similar to the mortgage crisis. Ms. Mangu-Ward responded that while many were not able to pay on their mortgages, many people worked hard to pay their mortgages. Mr. Kvaal stated that the Department was attempting to regulate loans by examining programs and ED was not interested in having students lose access.

Senate Appropriations Committee Passes Education Spending Bill for FY 2011

On July 29, 2010, the full Senate Appropriations Committee approved, by a vote of 18–14 along party lines, a $169.6 billion bill that would provide FY 2011 funding for the Departments of Labor, Health and Human Services (HHS) and Education, including federal student aid programs. The annual spending bill for FY 2011 includes the following:

- $19.5 billion for student financial assistance, maintaining the maximum discretionary Pell Grant program award level at $4,860 for a total of roughly $17.6 billion for Pell Grant funding. Combined with mandatory funding provided in the *Health Care and Education Reconciliation Act of 2010,* the maximum award would be maintained at $5,550 for the 2011–2012 award year. The Senate bill does not include additional funds to close the Pell Grant shortfall. The House Appropriations Subcommittee on Labor, HHS, and Education included the $5.7 billion needed to pay the Pell Grant shortfall.

- The LEAP program would remain funded at the FY 2010 level, as would the GEAR UP, Supplemental Educational Opportunity Grant (SEOG) and Federal Work-Study programs.

- No funding is provided for the Perkins Loan program.

- The bill would eliminate 23 programs totaling more than $371 million.

During the mark-up, Senator Tom Harkin (D-IA) indicated that the bill is unlikely to see floor time in the full Senate until after the November elections. From there, the bill would need to be reconciled through the conference process with the House version. If the House and Senate are unable to pass FY 2011 appropriations bills, Continuing Resolutions will need to be passed to continue funding for federal programs beyond October 1, 2010.

The proposed rules would drag more low-income students into the verification process and keep some of them from receiving the grants they're eligible for, while putting more pressure on the cash-strapped community colleges that serve them.

– Debbie Cochrane
TICAS

TICAS Report Examines FAFSA Application Process and Discusses Red Tape Faced by Applicants

On July 26, 2010, The Institute for College Access & Success released a report that examined how the complicated process after students submit their FAFSA can prevent the students from obtaining grants that they would otherwise qualify for. The report, "New Study Shows Post-FAFSA Paperwork Keeps Students from Getting Financial Aid," concluded that on average, at a group of 13 California community colleges, about a third of the applicants for financial aid who appeared eligible for Pell Grants did not receive them.

The report also noted that the Department of Education's pending regulations, which are intended to streamline verification, could actually increase paperwork burdens on some of the neediest students and the colleges that serve them. "The proposed rules would drag more low-income students into the verification process and keep some of them from receiving the grants they're eligible for, while putting more pressure on the cash-strapped community colleges that serve them, according to the report's author Debbie Cochrane. Ms. Cochrane recommended in the Institute's press releases that the Department should retain the cap and that "colleges could use more guidance from the Department of Education to minimize unnecessary hurdles for students and also contain their own workloads."

The report is available at: www.ticas.org/files/pub/AfterFAFSA.pdf.

Contact Information:

Sharon H. Bob, Ph.D.
Powers Pyles Sutter & Verville, P.C.
1501 M Street, NW, 7th Fl.
Washington, DC 20005
Phone: 202-872-6772
E-mail: Sharon.bob@ppsv.com