Gainful Employment

Global Comments

- While the Department's proposal contains some components of the 2014 rule issued by the Obama administration, this new 2022 proposal differs in many, significant ways that I will be highlighting throughout the day. The 2014 rule had components that improved the quality and fairness and unfortunately the new proposed 2022 rule removes so many significant items that it appears the department did not really use the 2014 rule as the starting place as requested by this committee.

- The Department has argued that it lacks the statutory authority to require degree programs at institutions of higher education to comply with the "gainful employment" rule. As we repeatedly have observed, the Department has the authority to require all programs at all institutions to demonstrate compliance with D/E rate thresholds (and other metrics) under its statutory, quality assurance authority at title 20 U.S.C. § section 1087d subsection (a) paragraph (4). There is no need or requirement to attach the Department's accountability framework to the "gainful employment" concept.

    - Even if the Department declines to use its statutory, quality assurance authority to extend its accountability framework to all institutions, it still can and should require all institutions to calculate and disclose D/E rates for informational purposes. Under title 20 USC section 1092, the Department is authorized to require the calculation and disclosure of a wide range of institutional and financial assistance data. The professional licensure disclosures now required under 668.43 are based on this authority, I am excited that the department has included section 668.43 in this proposal. I am requesting that the agency can and should move the entire D/E rate calculation and disclosure framework under 668.43, requiring all institutions to calculate and disclose informational D/E rates for their programs.
    - The Department can require all institutions to calculate and disclose D/E rates for informational purposes while still only using the D/E rates to determine eligibility for "gainful employment" programs under its proposed Subpart Q. The calculation and disclosure of D/E rates for all institutions is authorized under title 20 USC 1092, while the authority to use the D/E rates to determine the eligibility of gainful employment programs, per the Department, is authorized separate under title 20 USC

1002.

- o To summarize I am proposing to move the debt to earnings metric calculations into section 668.43 while still only applying debt to earnings rates for eligibility in the federal direct loan program to gainful employment programs defined in the current proposal in subpart Q, thus non-profit and public institutions would not lose federal direct loan eligibility over failing scores. Also the college transparency act bill which is moving through Congress is another indication that policy makers are demanding more data. Implementing this approach is more likely to be supported by all future administrations and would greatly benefit and protect all students in higher education.

- ➢ Sanctions based on pre-rule data. The Department should not impose sanctions for metrics calculated using data from years that precede the effective date of the rule. It is fundamentally unfair to sanction institutions based on program and pricing decisions that were made prior to the effective date of the rule, and that even now cannot be reversed. We also believe it would be extraordinarily inappropriate to hold institutions accountable for earnings data generated during calendar years 2020 and 2021, when the COVID-19 pandemic caused significant disruptions to employment for millions of Americans, including graduates. And D/E rates calculated using data from years that precede the effective date of the proposed rule should be for informational purposes only.

- ➢ Record Retention Issues. The Department should not impose sanctions for metrics calculated using data from years that exceed required record retention periods, or at least not until schools have been afforded an opportunity to adjust their policies to ensure that such records are being maintained. In almost all cases, institutions are not required to maintain student finance and financial aid records beyond five years following a student's graduation. Moreover, federal and state agencies are consistently encouraging institutions to destroy records after record retention periods have expired in order to prevent data breaches. In some cases, the proposed rule would require institutions to produce data for the sixth, seventh, eight, and ninth award years preceding the award year for which the D/E rates are being calculated.

Definitions (668.402)

- Use of 6-digit (CIP) code. The Department should use the full 6-digit CIP code to distinguish individual gainful employment programs
  - The Department should use the full 6-digit CIP code to distinguish individual gainful employment programs, not the first 4 digits. The first 4 digits merely signal "program groupings," which may include many different, individual programs. For example, the 4-digit program grouping 51.38 includes 23 different types of nursing programs. 51.08 Allied health and medical assisting services CIP group includes medical assistant in the same group as physical therapy, occupational therapy, respiratory therapy, radiology, pharmacy, dental, and veterinary assistant programs all of which are vastly different in salary outcomes. Requiring institutions to combine these many different programs when performing D/E rate calculations reduces and confuses the value of the resulting metric and related disclosures.
  - It is the 6-digit CIP code, not the 4-digit program grouping, that is tied to specific "recognized occupations" and should be used with any measure of gainful employment. The statutory language at title 20 USC 1002 requires proprietary institutions to offer programs that "prepare students for gainful employment in a recognized occupation." Per title 34 CFR section 600.2, a "recognized occupation" is "identified by a Standard Occupational Classification (SOC) code established by the Office of Management and Budget (OMB) or an Occupational Information Network code established by the Department of Labor." The federal government's CIP-SOC Crosswalk matches 6-digit CIP codes with 6-digit SOC codes based on their descriptions. The underlying principle is that the academic program represented by the 6-digit CIP code needs to provide the skills and knowledge required to perform in the associated, recognized occupation, represented by the 6-digit SOC code.
  - Finally, we observe that the Department already has the full 6-digit CIP code in its data systems, and in fact already uses the full 6-digit code to distinguish programs in those systems (e.g., ECAR, NSLDS).
- Cohort Period.
  - The Department's proposal would measure a student's ability to repay their debt using earnings as little as 18 months following graduation. For many programs across many institutions, it is often the case that graduates will not be able to fully

manage their loan debt in the years immediately following their graduation. The Department's Income-Drive Repayment Plans were designed specifically with this issue in mind, permitting students to set their "monthly student loan payment at an amount that is intended to be affordable based on [the student's] income." Placing the initial measurement four years following graduation will afford graduates additional time to establish normal earning levels and thus better capture whether typical earnings for the program are reasonable relative to typical debt burden. This would involve revising the Department's proposal so that the two- and four-year cohort periods would begin with the fifth award year prior to the award year for which the D/E rates are calculated.

- Exclusion of Graduate Programs. D/E rates calculated for graduate degree programs, including those offered by proprietary institutions, should be strictly for informational purposes. D/E rates are not an appropriate measure of "gainful employment" for graduate degree programs. In most cases graduate students have already completed undergraduate degrees and have significant employment experience prior to beginning their graduate program. We also believe that graduate students are sophisticated and able to evaluate the costs and benefits of graduate degree programs. Finally, we are confident that when Congress created the statutory definition of proprietary institutions of higher education decades ago, it did not contemplate that proprietary institutions would offer graduate degree programs in medicine, education, management, and other fields. We are unaware of evidence to suggest that Congress intended to apply a "gainful employment" framework to graduate programs.
    - At minimum Medical and dental programs are not the only programs with a required internship or residency periods. The Department should include a similar extended cohort period for any graduate healthcare or other program with a similar internship or residency component that extends the time needed for a graduate to enter the workforce and achieving representative earnings. As an example, Doctor of Pharmacy students have residencies and some open up their own independent Pharmacies which takes time to be able to take an income.

Gainful Employment Framework (668.403)

- D/E rate thresholds. We are deeply concerned that with each iteration of the D/E rates, the Department changes the D/E rate thresholds for programs, in each case making it more difficult for programs to remain eligible. Under the 2011 rule, a program was only deemed failing if its annual earnings rate exceeded 12% and its discretionary

income rate exceeded 30%. Under the 2014 rule, a program was deemed failing if its annual earnings rate exceeded 8% and its discretionary income rate exceeded 20%, but the Department created a "zone" concept allowing a program additional time to come into compliance if its annual earnings rate was between 8% and 12% or its discretionary income rate was between 20% and 30%. In this most recent proposal, the thresholds remain at 8% and 20% and the zone concept has been removed. This is an alarming and material deviation from the 2014 framework, and would appear to highlight the arbitrary nature of these thresholds. We are strongly opposed to this change and, at a minimum, believe the 2011 thresholds at 12% and 30% should be reinstated. We also request to see the impartial, non-partisan, peer-reviewed research supporting the Department's determination that the 8% and 20% rate thresholds, along with the associated cohort and earnings periods, are an appropriate means by which to measure a graduate's ability to service his or her debt.

- Timeframe for loss of eligibility. Under the Department's proposal, a program would lose eligibility if it fails two out of three consecutive award years. It also is required to make significant student warnings if it fails only a single year. We emphasize here that we believe these warnings will cause harm to programs, making it impossible to recruit future students and leading to program teach-out. The current proposal affords institutions virtually no opportunity to adjust for market shifts or other unforeseen events – like a global pandemic – that negatively impact earnings for one or more years. A program that consistently prepares students for gainful employment might fail in a year like 2020 when unemployment increased dramatically. Under the Department's proposal, the program would be required to make the required warnings due to this single-year anomaly, which we believe would likely force it to close precisely when it is most needed (*i.e.*, during an economic downturn when individuals are looking to retrain). We propose a program would only lose eligibility if it fails three out of four consecutive award years. This affords institutions a reasonable opportunity to adjust for market shifts or other unforeseen events. In addition, we propose the new rule specify that the Secretary has the discretion to waive sanctions for any program training students to be essential workers or to enter professions experiencing critical national job shortages.

Calculating D/E Rates (668.404)

- Annual Earnings Issues. The D/E rates calculated by the Department are only as good as the data upon which they are based. If the underlying data is flawed or incomplete, the rates not only fail to serve their purpose, they can be harmful.

- To me it is still entirely unclear which agency will supply the Department with the earnings data, with the result that we cannot evaluate whether that data would be routinely and accurately supplied, complete, or appropriate for the purposes of a D/E rate calculation.
- The 2014 earnings data from the Social Security Administration excluded critical income components, including unearned income and self-employment income. Many graduates, start their own businesses following graduation (e.g., Physician Assistants opening up independent rural clinics, Pharmacist opening up local independent Pharmacies, cosmetology graduates). In the initial years, these entrepreneurs may not have significant earned income, but would potentially have unearned income that should be captured in the calculation.
- The Department offers no mechanism to account for the impact of wage discrimination on reported earnings. It is well established that women, minorities, and groups bearing other socioeconomic characteristics are subjected to wage discrimination in the United States. For example, our bachelor's level nursing programs which produces the third most BSN graduates in the state of TN and is 90% female. In the state of TN FMLA time off is still unpaid at many company. Without any mechanism to accommodate for the impact of wage discrimination on the earnings of the graduates or FMLA for of these programs and schools, there is a material possibility that they will produce less favorable D/E rates, and will be systematically eliminated. Proprietary schools would be encouraged to develop programs, and to locate them in markets, that will attract students who are unlikely to be subject to wage discrimination.
- The Department offers no means by which to accommodate market events that negatively impact earnings for graduates. Events like the Great Recession and COVID-19 pandemic can result in widespread unemployment and depressed earnings. At the time an event of this nature occurs, institutions have no ability to alter the debt and cost data that would be used in a D/E rate, as it is fixed well in advance of the event occurring. As consequence, many graduates might suffer a multi-year decline in earnings performance. Under the Department's proposal, a single failing D/E rate would require warning disclosures, which would likely lead to the termination of the program. And no replacement program could be introduced for years.

- The Department offers no solution to the problem of unreported income. As the Department is well aware, on June 28, 2017, the D.C. District Court issued an opinion and order in the matter of the American Association of Cosmetology Schools ("AACS") v. the U.S. Department of Education. In its opinion, the District Court largely agreed with AACS, finding that the Department did not adequately address how underreported income would be treated when calculating the D/E ratios for programs like cosmetology.
- The Department also has removed the critical opportunity, present in the 2014 rule, for institutions to file an alternate earnings appeal. In the AACS litigation, the Department actually leaned into the alternate earnings appeal, arguing that the availability of an "alternate earnings appeal process" justified the use of the SSA earnings, as it affords schools an opportunity to address the problem of underreported income by using alternate earnings data collected from a state data system or through a survey. With the appeal process removed, the Department would appear to have no mechanism for addressing the unreported income issue. We also believe the appeal process represents sound policy as it is a mechanism designed to improve the accuracy of the earnings information.
- In both the 2011 and 2014 gainful employment rules, the Department used the higher of the mean or median of the earnings cohort as the denominator when calculating D/E rates, on the belief that this approach best and most fairly represented the earnings for the cohort. Here the Department proposes only to use the median.

- Exclusion of Direct PLUS Loans. D1 romanette 1 The Department proposes to include Direct PLUS loans made to parents of dependent students when determining the debt load for the students. The D/E rate is intended to measure the ability of a student to service his or her debt. To do so, it compares the student's debt load to his or her earnings. A Direct PLUS loan is not part of the student's debt load. It is the obligation of the parent. Including it in the D/E rate calculation is inappropriate. If the Department intends to include parental debt in the numerator, it must also include the earnings of the parent in the denominator.

- Assessed tuition should exclude institutional grants. The Department proposes to use the total amount of tuition and fees assessed the student for his or her enrollment in the program when calculating the numerator of the D/E rate. The regulation should specify that the total amount assessed the student will be reduced by the amount of any institutional scholarships or grants the student received to attend the program as that is money they never owed. The

D/E rate calculation is a student-by-student calculation that is intended to capture each student's actual total cost or debt load. Accordingly, the cost assessed should be reduced by any scholarships or grants the student received. This approach is consistent with the rule, provides more accurate data, and is particularly important given the prevalence of tuition discounting and institutional aid in higher education. Many public and private, non-profit institutions offer athletic, academic, and merit-based scholarships. And they heavily discount tuition, with some reports suggesting an average discount of as much as 50%. This approach also incentivizes institutions to grant institutional aid in order to bring programs into compliance with acceptable D/E rate thresholds.

- Total Debt should exclude federal and state grant funds. Students are able to borrow funds to cover living, housing, and related expenses even when they have received federal or state grant funds that cover most or all of their tuition and fees. Under the Department's proposed rule, these funds borrowed for living, housing, and related expenses are not deducted from the debt total included in the D/E rate. To ensure that institutions are not held accountable for funds borrowed in excess of what is required to pay for tuition and fees, the Department should reduce the total debt number by the amount of any federal or state grant funds that the student received and used to pay tuition and fee costs.

- Here is an example for a TN PROMISE Student - $5k tuition, offset by a $1k state grant, a $1k Pell grant, and $3 institutional grant, so that that the tuition now $0 owed to the school. We cannot control if the student then decides to borrow $5k in federal loans for living expenses even though their tuition was already100% covered through grants, so if the student is eligible and chooses to borrow $5k for living expenses the hit to the debt in the debt to earnings calculation if institutional grants are not excluded would be $5k even though the tuition was already covered down to $0 owed.

Issuing D/E Rates (668.405)

- Earnings Adjustment. When determining the mean and median earnings for a cohort group, the federal agency calculating these numbers should exclude any individual who has reported no income and the Department should exclude from the calculation of the median loan debt the same number of students with the highest loan debts. A report of no income could easily represent a misreporting, an underreporting, a determination by the graduate not to seek employment, or the inability of the graduate to obtain employment due to a disability or some similar issue. It is wholly inappropriate to assume that the sole basis for

an individual's reporting of no income is that he or she is unable to find employment and to penalize institutions based on this assumption.

Determination of the D/E Rates (668.406)

- D/E rate corrections and appeals. Under both the 2011 and the 2014 rules, the Department provided an institution with the data on the completers list that would be subject to the D/E rate calculation and that included an opportunity to correct the data. Then the department issuing the debt rates for those completers and institutions got the opportunity to correct the data. Then Department then issued draft D/E rates, and the institution had the opportunity to challenge the accuracy of the rates including alternate earnings appeals. These necessary processes are absent from the current proposal. Corrected data, in turn, made for more accurate D/E rates and we all know how wrong the department got the data in the 2014 process. The Department's failure to include these processes, like the omission of the alternate earnings appeal, represents a serious issue for institutions and increases the likelihood that the D/E rates will be inaccurate and misleading. This is even more important given the department as proposed eliminating the zone and with the current proposed disclosure language that is in place if you fail once your program is more than likely finished. It would be terrible if a simple data error that was unable to be challenged ended a successful program for being offered to students.
- The 8-digit OPE ID safe harbor. As part of a reinstated process for appealing draft D/E rates, we propose that the Department perform alternate safe harbor D/E rate calculation at the level of the 8-digit OPE ID (i.e., individual locations) to any program at the six digit OPEID that failed its D/E rate. This would permit the Department to assess, and institutions to demonstrate, that while a D/E rate calculated for a program across all locations and markets might be failing, the D/E rate for programs in specific locations and markets may be passing. Critically, this would allow successful programs to avoid becoming collateral damage especially given the push to group programs together at the four digit CIP code. Further, calculations and related disclosures that are based on individual locations will be more meaningful to the students attending those locations, as they more accurately reflect the quality of instruction, operational costs, employer demand, and market characteristics of that student's specific campus. We highlight that because the Department already has the ability to gather and calculate data at the 8-digit OPE ID level, there are no system limitations that should inhibit the efficient calculation of location-specific, alternative rates.

Consequences of the D/E Rates (668.407)

- Period of ineligibility. Institutions should not be penalized if a program that is being retired produces failing D/E rates in final years. A program that an institution voluntarily determines to wind down could suffer a decline in D/E rates, particularly if the decision to wind down the program was based on market changes. For example if you are producing graduates for a rural hospital and that hospital closes due to market reasons outside of the institutions control then the institution would be prevented from creating future similar programs within the 4 digit CIP code with other hospitals in any other market location for three years, even the new version is shorter, less expensive, and redesigned to be more attractive to employers. If Medical assisting failed in NY you could not open up PTA in FL. I would of hated to have a real estate program in 2008. We need a stronger way to allow for institutions to do the right things based on local market conditions.

- Loss of eligibility for continuing students. Students who have enrolled in or remained enrolled in a program with full knowledge of the program's D/E rates should be permitted to receive Title IV aid until they complete the program. The federal financial aid programs are founded, in part, on the belief that students should have the ability to choose their programs and institutions. Moreover, it is highly likely that if they lose access to aid, many students will be forced to withdraw from the program. Some may determine not to complete their education, others may be unable to find another institution willing to accept them, and others still may required to retake classes or restart clinicals. These outcomes are all extremely negative for the student and significantly devalue the taxpayer's investment in the student's education. If the Department's aim is to protect students and to promote the successful completion of their education, its gainful employment scheme should avoid forcing mass withdrawals.
- Institutions should not lose Pell eligibility. If a program is subject to a loss of eligibility due to failing D/E rates, it should only lose access to the Direct Loan program. Students attending the institution and choosing to continue in the program should still have the opportunity to access Pell grants and maybe the institutions can offer matching similar institutional grants similar to how the yellow ribbon VA program works.

Financial Responsibility Comments

- General comment about the need to readdress the composite score calculation for the SEC impact of requiring operating leases to be put on balance sheet. This is a significant impact and based on my calculations it will reduce the composite score about 0.4 points when all that happened is put existing leases as additional assets and labilities on the balance sheet when no real change in financial position has occurred. The composite score calculation also encourages schools to make bad financial decisions including taking out debt when it may not be needed to use to buy CAPEX. In this high interest rate environment schools will have to weigh passing the composite score against paying more in interest to fund debt. Schools will also benefit on the composite score by now signing shorter term leases with higher per sq foot rental rates since they are being put on balance sheet instead of longer term more financially sound leases.

- 668.171 1iA- Disagree on these various arbitrary Mandatory triggers including:
    - 10% of programs failing GE (which could be just 1)
    - If less than a 1.5 recalculate composite score every time, there is a disbursement of equity
    - Any citing by a state licensing authority to meet a state requirement.
    - For publicly traded companies any SEC action
    - CDR rate above 30%
    - Any creditor action including pulling a line of credit.
    - Any two discretionary triggers will become a mandatory trigger

- 668.171 2d – Discretionary triggers (two of which will become a mandatory) some of the concerns are below.
    - Accrediting agency actions (no materiality threshold for the action)
    - Fluctuations in title IV volume (could be up or down with no materiality threshold)
    - High annual drop out rates (no definition of what is high)
    - Pending borrower defense claims (still not a chance to see a claim when it is pending)
    - Discontinuation of programs (no threshold on what is material)
    - Closure of locations (no threshold on what is material)

Certification Comments

- 668.13c1i – The secretary may provisionally certify an institution if the institution has received the same finding of non-compliance on more than one program review or audit. There is no materiality threshold, so a $1 finding two years in a row could lead to provisional certification.

- 668.14a3 - I am concerned that the Department is using the PPA to impose personal guarantees on owners that are operating institutions that are following all of the rules. I don't think the Department stands on strong legal footing here. The department has previously said that the Department doesn't believe that title 20, USC, Section 1099c, subsection (c), paragraph 4 restricts its ability to impose personal guarantees on to corporate entities. But the proposal here is not limited to corporate owners, and would extend to natural persons that own institutions.

- 668.32 – SARA impact – Concerns over obtaining state approval for all states for online programs exist

- 668e – If provisionally certified the secretary MAY restrict growth of new enrollment, new programs, new locations for an unspecified period. (no required thresholds or requirements to satisfy or information on how long)

- 668e – Upon conversion of a for-profit to a non-profit the former for-profit must continue to report and meet 90/10 type thresholds for an unspecified period.

Administrative Capability Comments

668.16 requirements to be eligible for title 4 funding including:

- Adequate career services (no definition on what adequate means)
- Institutional partnerships with employers (no definition on how many partners are required)
- The institution has high rate of withdrawal (no threshold on what is high)
- The institution has delayed disbursements (no definition of what constitutes a delays)
- No significant actions by state or federal agency (no definition on what is considered significant)