

September 13, 2018

Jean-Didier Gaina  
U.S. Department of Education  
400 Maryland Ave. SW  
Washington, DC 20202

Re: Docket ID ED-2017-OPE-0076

Dear Jean-Didier Gaina,

This letter is being submitted on behalf of the National Student Legal Defense Network (“NSLDN”) in response to the proposed rescission of the Gainful Employment rule. 83 Fed. Reg. 40,167 (Aug. 14, 2018) (“2018 NPRM”). NSLDN is a non-partisan, non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. NSLDN appreciates the opportunity to comment on this proposed rule and strongly recommends that the Department does not finalize the proposal.

As described by the Department, in order for an institution of higher education to be eligible to participate in Title IV, HEA programs, an educational program “must lead to a degree at a non-profit or public institution or it must prepare students for ‘gainful employment in a recognized occupation.’ Therefore, with very few exceptions, any non-degree program offered by non-profit or public institutions and all educational programs offered at for-profit institutions” must prepare students for “gainful employment in a recognized occupation.”<sup>1</sup>

In October 2014, the Department finalized what is now known as the “Gainful Employment” or “GE” rule. Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014) (“2014 Final Rule”). As stated by the Department when the 2014 Final Rule was published, the regulations were “intended to address growing concerns about educational programs that, as a condition of eligibility for title IV, HEA program funds, are required by statute to provide training that prepares students for gainful employment in a recognized occupation ..., but instead are leaving students with unaffordable levels of loan debt in relation to their earnings, or leading to default.” *Id.* At that time, the Department also expressed “concern” that “a number of GE programs: (1) [d]o not train students in the skills they need to obtain and maintain jobs in the occupation for which the program

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<sup>1</sup> <https://studentaid.ed.gov/sa/about/data-center/school/ge>

purports to provide training, (2) provide training for an occupation for which low wages do not justify program costs, and (3) are experiencing a high number of withdrawals or ‘churn’ because relatively large numbers of students enroll but few, or none, complete the program, which can often lead to default.” *Id.* The Department also expressed “concern” about the “growing evidence, from Federal and State investigations and qui tam lawsuits, that many GE programs are engaging in aggressive and deceptive marketing and recruiting practices. As a result of these practices, prospective students and their families are potentially being pressured and misled into critical decisions regarding their educational investments that are against their interests.” *Id.*

To address these and other concerns, the Department proposed a rule with two key “frameworks”: accountability and transparency. The accountability framework “define[d] what it means to prepare students for gainful employment in a recognized occupation by establishing measures by which the Department will evaluate whether a GE program remains eligible for title IV, HEA program funds.” *Id.* The transparency framework was designed to “increase the quality and availability of information about the outcomes of students enrolled in GE programs” which the Department believed would benefit “[s]tudents, prospective students, and their families, as they make critical decisions about their educational investments; the public, taxpayers, and the Government, by providing information that will enable better protection of the Federal investment in these programs; and institutions, by providing them with meaningful information that they can use to help improve student outcomes in their programs.” *Id.*

In the 2018 NPRM, Department proposes a wholesale rescission of the Gainful Employment rule. Because the Department’s 2018 NPRM provides no persuasive reasons or basis for rescission and does not consider *any* reasonable alternatives, the Department should not finalize the proposed rule. It should permit the 2014 Final Rule to remain in effect and should immediately begin enforcing it in full as required by federal law and cease the illegal delays it has put in place. In this comment, we first detail the problems with the 2018 NPRM’s proposal to rescind the accountability framework. Next, we address problems with the proposal to rescind the transparency framework. Finally, we raise additional benefits identified in the 2014 Final Rule that the 2018 NPRM ignores.

## **I. The Department Must Not Rescind the Accountability Framework.**

Under the 2014 Final Rule, the Department “define[d] what it means to prepare students for gainful employment by establishing measures that assess whether programs provide quality education and training to their students that

lead to earnings that will allow students to pay back their student loan debts.” 79 Fed. Reg. 64,890 (Oct. 31, 2014). The Department created a “certification process” under which an institution “establishes a GE program’s eligibility for title IV, HEA program funds, as well as a process by which the Department determines whether a program remains eligible.” 79 Fed. Reg. 64,891 (Oct. 31, 2014).

*First*, the Department is proposing to rescind the “certification requirements” for GE programs, *i.e.*, requirements that institutions must meet in order to be initially eligible to receive title IV, HEA program funds. 34 C.F.R. § 668.414(b)-(d). These standards also set forth requirements for GE programs that were participating in Title IV programs at the time the 2014 regulations took effect. 34 C.F.R. § 668.414(a). In 2014, the Department recognized that these certification requirements, in addition to requiring institutions to provide certain information to the Department, “creat[ed] an enforcement mechanism for the Department to take action if a required approval has been lost, or if a certification that was provided was false.” 79 Fed. Reg. 64,989 (Oct. 31, 2014). The Department noted at the time that these requirements had “minimal” burden on institutions and that “any burden is outweighed by the benefits of the requirements which ... will help ensure that programs meet minimum standards for students to obtain employment in the occupations for which they receive training.” *Id.* Nevertheless, without explanation, justification, acknowledgment, or good reason, the NPRM proposes to rescind entirely the “independent pillar of the accountability framework,” *id.*, housed in 34 C.F.R. § 668.414.

*Second*, the 2014 Final Rule created the “debt-to earnings (D/E) rates measure that will be used to determine whether a GE program remains eligible for title IV, HEA program funds.” 79 Fed. Reg. 64,890 64,891 (Oct. 31, 2014). That measure “evaluates the amount of debt ... students who completed a GE program incurred to attend that program in comparison to those same students’ discretionary and annual earnings after completing the program.” *Id.* “[T]o pass the D/ E rates measure, the GE program must have a discretionary income rate less than or equal to 20 percent or an annual earnings rate less than or equal to 8 percent.” 79 Fed. Reg. 64,890, 64,891. The 2014 Final Rule also established “a zone for GE programs that have a discretionary income rate greater than 20 percent and less than or equal to 30 percent or an annual earnings rate greater than 8 percent and less than or equal to 12 percent.” *Id.* The regulations established that “GE programs with a discretionary income rate over 30 percent and an annual earnings rate over 12 percent will fail the D/E rates measure [and] a GE program becomes ineligible for title IV, HEA program funds, if it fails the D/E rates measure for two out of three consecutive years, or has a combination of D/E rates that are in the zone or failing for four consecutive years.” *Id.* The regulations also set forth a

detailed process for challenging the information used to calculate the D/E rates and for institutions to use in order to appeal that determination.

On January 9, 2017, the Department released the first set of D/E rates for career programs under the GE rules. At the time, the Department noted:

The release of these rates builds on the Department’s ongoing efforts to promote college completion and increase accountability in the postsecondary education marketplace by setting standards for career training programs, including programs offered by for-profit institutions, to ensure they are serving students well. The data show that, while many postsecondary programs offer value to students, there are a significant number of career training programs—specifically for-profit programs—that do not provide their graduates with a reasonable return on investment.<sup>2</sup>

The data released in 2017 indicated “that over 800 programs serving hundreds of thousands students fail the Department’s accountability standards with an annual loan payment that is at least greater than 30 percent of discretionary income and greater than 12 percent of total earnings.” *Id.* The Department also noted that “[n]inety-eight percent of these failing GE programs are offered by for-profit institutions.” *Id.* In addition, the Department highlighted that “[a]n additional 1,239 programs received a ‘zone’ rate, with an annual loan payment that is between 20 and 30 percent of discretionary income or between 8 and 12 percent of total earnings.” *Id.* Simply put: the 2017 data release established that the Department’s GE regulations were working.

Nevertheless, without explaining away or even acknowledging its prior recognition that the GE regulation was accomplishing the HEA’s goals (*i.e.*, ensuring that, outside of public and nonprofit degree granting programs, federal Title IV dollars are provided to career programs only that “prepare students for gainful employment in a recognized occupation,”) the Department now proposes to rescind the entire accountability framework without offering a reasoned basis for its decision, and without considering reasonable alternatives.<sup>3</sup>

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<sup>2</sup> <https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs>

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In so doing, the Department also fails to acknowledge that its prior interpretation of “gainful employment in a recognized occupation,” has been upheld as reasonable and that the metrics were not arbitrary and capricious by the D.C. Circuit, *Ass’n of Private Sector Colleges and Universities v. Duncan*, 640 Fed. App’x 5, 8 (D.C. Cir. 2016), and two district courts. *Ass’n of Private Sector Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 189 (DDC 2015); *Ass’n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 363 (SDNY 2015). The Department offers no interpretation of the statutory phrase to replace the rescinded interpretation. Thus, it leaves open and ambiguous eligibility for Title IV funds.

In the sections that follow, we detail certain of the underlying justifications for the proposed rescission, and contrast those purposed justifications to the reasoned analysis from the 2014 Final Rule.

a. 8 percent threshold for annual earnings rate

As noted above, in order to avoid being an “ineligible program,” 34 C.F.R. § 668.403(a)(2), a program must satisfy the “D/E rates measure.” A GE program is considered to be “passing” the D/E rates measure if its “discretionary income rate is less than or equal to 20 percent” or its “annual earnings rate is less than or equal to eight percent.” *Id.* §668.403(b)-(c).

In 2014, the Department relied, in part, on a research study conducted by Sandy Baum and Saul Schwartz that proposed a manageable debt load as not more than 20 percent of discretionary income and 8 percent of annual earnings. *See* 79 Fed. Reg. 64,890, 64,922 (Oct. 31, 2014) (discussing the 8 percent rule in the 2014 Final Rule); 79 Fed. Reg. 16,426, 16,443 (Mar. 25, 2014) (discussion in 2014 NPRM). As the Department noted in the 2014 Final Rule, the Baum & Schwartz research study was one of “a number of data and research sources and authorities” that the Department “considered ... [i]n addition to the analysis and recommendation of Baum and Schwartz.” 79 Fed. Reg. 64,890, 64,922.<sup>4</sup> The Department now argues

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<sup>4</sup> The Department noted that, in addition to the Baum and Schwartz analysis, it “considered research on earnings gains by other scholars, including Cellini and Chaudhary, Kane and Rouse, Avery and Turner, and Deming, Goldin, and Katz. We also took into account lending ratios currently set by the FHA and the CFPB, as they estimate sustainable levels of non-housing debt.” 79 Fed. Reg. 64,890, 64,922 (Oct. 31, 2014) (internal footnotes and citations omitted). The Department also noted that it considered a study by NCES and “other studies suggested by commenters” and distinguished by the methodologies used in those analyses and the “conclusions the commenters draw from these studies.” *Id.* Elsewhere in the 2014 Final Rule, the Department noted that “the 8 percent cutoff has long been referred to as a limit for student debt burden” and that “[s]everal studies of student debt have accepted the 8 percent standard.” *Id.* at 64919 (citing Scherschel, P. (1998). *Student Indebtedness: Are Borrowers Pushing the Limits?* USA Group Foundation; Harrast, S.A. (2004). *Undergraduate Borrowing: A Study of Debtor Students and their*

that the authors' acknowledgment that the 8 percent threshold "has no particular merit or justification" as a benchmark for student loan debt is "more significant than the Department previously acknowledged and raises questions about the reasonableness of the 8 percent threshold as a critical, high-stakes test of purported program performance." 83 Fed. Reg. at 40,171. The Department claims that "[r]esearch published subsequent to the GE regulations adds to the Department's concern about the validity of using D/E rates." *Id.* The Department cites to no research that undermines Baum and Schwartz, who, as noted in 2014 by the Department, further stated that while the 8 percent threshold is not as precise as the discretionary income threshold, it is "not ... unreasonable." 79 Fed. Reg. at 64,919.

Since the NPRM was issued, Sandy Baum has explained that the Department's 2018 NPRM "misrepresented [her] research, creating a misleading impression of evidence-based policymaking." S. Baum, "DeVos misrepresents the evidence in seeking gainful employment deregulation," Aug. 22, 2018, <https://www.urban.org/urban-wire/devos-misrepresents-evidence-seeking-gainful-employment-deregulation>; see also Comment of S. Baum Submitted in Docket ID No. ED-2018-OPE-0042. In her blog post, Baum states, with respect to her earlier analysis, that "our examination of a range of evidence about reasonable debt burdens for students would best be interpreted as supporting a stricter standard." *Id.* Baum further noted "[o]ur research set a guideline for a level of debt payments no individual student should exceed. Under GE, half of a program's graduates could exceed this limit before sanctions would kick in. If this research is going to be

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Ability to Retire Undergraduate Loans. NASFAA Journal of Student Financial Aid, 34(1), 21–37; King, T., & Frishberg, I. (2001). Big Loans, Bigger Problems: A Report on the Sticker Shock of Student Loans. Washington, DC: The State PIRG's Higher Education Project, [www.pirg.org/highered/highered.asp?id2=7973](http://www.pirg.org/highered/highered.asp?id2=7973)). In the 2014 Final Rule, the Department also noted that "[i]n 1986, the National Association of Student Financial Aid Administrators identified 8 percent of gross income as a limit for excessive debt burden." *Id.* (citing Illinois Student Assistance Commission (2001). Increasing College Access . . . or Just Increasing Debt? A Discussion about Raising Student Loan Limits and the Impact on Illinois Students.). The Department also cited a study by Baum and O'Malley that "determined that borrowers typically feel overburdened when that ratio is above 8 percent." *Id.* The Department also cited guidance from "financial regulators," including the Federal Housing Administration and the Consumer Financial Protection Bureau suggesting that non-mortgage debt remain below 12-percent of pretax income. *Id.* The Department then noted that the eight percent figure was an "appropriate minimum standard because it falls reasonably within the 12 percent of gross income allocable to non-housing debt under current lending standards as well as the 9.75 percent of cross income attributable to non-credit card debt." *Id.*

In the 2018 NPRM, however, the Department makes absolutely no mention of these analyses, nor does it indicate why it is departing from its prior view that the "8 percent cutoff has long been referred to as a limit for student debt burden."

brought into the debate, it should be used to support eliminating eligibility for federal student aid for more programs—not eliminating the rules.” *Id.*

In its 2018 NPRM, the Department did not explain its basis for changing its mind about reliance on Baum and Schwartz, nor why it believed the authors’ acknowledgment on the 8 percent cutoff was “more significant” than it had previously believed. It did not acknowledge that the 8 percent cutoff was widely cited, nor that guidance from financial regulators supported it. *See supra* at n.4. The Department also did not consider the alternative of selecting a different threshold for annual earnings that it believed in 2018 was supported by other evidence. Nor did the Department consider the obvious alternative of using only the 20 percent discretionary income cutoff, which would have been further supported by Baum’s research. Instead, based on this insufficient rationale, it rescinded the entire accountability framework and its reliance on the 8 percent cutoff.

b. Effect of student demographics on D/E rates

In 2014 the Department examined the effects of student demographic characteristics on the annual earnings rate measure. It concluded there was not “evidence to indicate that the composition of a GE program’s students is determinative of outcomes.” 79 Fed. Reg. at 64,923. The Department explained that its analysis showed that the characteristics of students attending GE programs “are not strong predictors of which programs pass the D/E rates measure, further suggesting the regulations do not disproportionately negatively affect programs serving minorities, economically disadvantaged students, first-generation college students, women, and other underserved groups of students.” 79 Fed. Reg. at 64,910.

Yet in 2018, the Department argues that “research findings suggest that D/E rates-based eligibility creates unnecessary barriers for institutions or programs that serve larger proportions of women and minority students. Such research indicates that even with a college education, women and minorities, on average, earn less than white men who also have a college degree, and in many cases, less than white men who do not have a college degree.” 83 Fed. Reg. at 40,171. In support of this proposition, the Department cites a statistic from a single study that has nothing to do with D/E rates. The cited analysis shows that earnings vary by race and gender, but neither breaks down the education attainment by GE and non-GE programs nor does it include any data on the relationship of debt to earnings (either under a discretionary income rate or an annual earnings rate methodology).

The Department also argues in 2018 that the 2014 Final Rule “failed to take into account the abundance of research that links student outcomes with a variety

of socioeconomic and demographic risk factors.” *Id.* at 40,174. But the Department does not cite *any* research, much less the “abundance of research,” and further does not explain why such research would be more persuasive than the Department’s own analysis on the specific question of whether demographics were drivers of whether programs passed the D/E ratio. Further in 2014, the Department analyzed other research on this topic and conducted additional of its own research. 79 Fed. Reg. at 65,043. The Department ultimately concluded in 2014 that “the regulation is not primarily measuring student demographics.” 79 Fed. Reg. at 65,057.

The Department also fails to note that court decisions upholding the 2014 Final Rule reviewed the Department’s analysis of whether student demographics were driving D/E ratios. These courts all found that the Department’s analysis was not arbitrary. *Ass’n of Private Sector Colleges and Universities v. Duncan*, 640 Fed. App’x 5, 7 (D.C. Cir. 2016) (“The rulemaking record repeatedly demonstrates that neither the 2014 Rule nor the Department’s rulemaking process was arbitrary or capricious. Instead, the Department addressed the subjects of concern to the Association and, upon returning to drafting after the vacatur of its 2011 rule, conducted analyses that led it “not [to] agree” with or to find “no evidence” to support the concerns identified by the Association.”); *Ass’n of Private Sector Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 192 (DDC 2015) (“The Department therefore made extensive efforts to get to the bottom of this criticism, and this Court cannot fairly say that the agency acted arbitrarily in the face of it.”); *Ass’n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 363 (SDNY 2015) (“DOE’s ‘determination that the [GE Rules] appropriately measure[ ] whether a program prepare[s] its students for gainful employment in a recognized occupation rather than a program’s demographics’ was therefore not arbitrary.”).

The Department fails to explain why the extensive regression analysis and discussion in the 2014 Final Rule are no longer accurate or persuasive. It fails to cite any change in the factual basis for the Department’s regression analysis in 2014 that would cause it to be less reliable in 2018. Since nothing has changed and the Department has cited no basis for its change in course, the Department has failed to justify rescission on this basis.

c. Timing and effect of the rule on the economy

The Department in 2014 believed that “a four year zone makes it unlikely that fluctuations in labor market conditions could cause a passing program to become ineligible” because, based on National Bureau of Economic Research, “recessions have, on average, lasted 11.1 months since 1945.” 79 Fed. Reg. at 64,920. In 2018, the Department argues that this conclusion was an “error” because a single recession, the most recent “Great Recession,” lasted over two years. 83 Fed.



Reg. at 40,171-72. The Department fails to acknowledge that the Great Recession was included in the research cited in 2014. It also fails to recognize that its selection of one recent example, which itself is an outlier, rather than reliance on the average over more than 65 years is much less reliable.

The Department suffers from myopic focus on the present in other sections of its 2018 NPRM as well. For example, it states that “[t]he Department believes that it is during these times of economic growth, when demand for skilled workers is greatest, that it is most critical that shorter-term career and technical programs are not unduly burdened or eliminated.” 83 Fed. Reg. at 40,172. The Department’s analysis is flawed. First, it fails to account for the fact that the 2014 Final Rule would have covered periods of both economic growth and slow down. Second, it fails to explain why programs that failed to prepare their students for gainful employment would contribute meaningfully to the demand for skilled workers during a period of economic growth. Third, the Department fails to explain why its reasoning in the 2014 Final Rule, that it expected “that the great majority of programs, including those in the for-profit sector, will pass the D/E rates measure and comply with the other requirements of the regulations.” 79 Fed. Reg. at 64,908. The Department fails to point to any evidence in 2018 that would support its assertion that the 2014 Final Rule would contribute in any way, much less in a meaningful way, to a labor shortage in a growing economy. The Department’s analysis does not support rescission and it has failed to provide a reasoned basis for its change.

d. Proximity to school

The Department explains in great detail the “importance of place” in determining availability of academic programs in its 2018 NPRM. It cites data that indicates that many students study in close proximity to where they live. The Department goes on to claim that Title IV programs “should similarly enable adult learners to select the more expensive program due to its convenience, its more personalized environment, or its better learning facilities.” 83 Fed. Reg. at 40,171. But in arguing that students should be able to pick a more expensive program that is closer to home, the Department offers only a hypothetical harm without citation or study to back it up. It does not point to any students who would not have access to any particular program if failing schools were no longer eligible for Title IV funds. And the Department fails to recognize that studies have shown that students in fact do substitute from failing programs to better performing ones.<sup>5</sup> It also fails

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<sup>5</sup> Cellini, Darolia & Turner, “Where Do Students Go when For-Profit Colleges Lose Federal Aid?” National Bureau of Economic Research Working Paper No. 22967 <http://www.nber.org/papers/w22967>; Chou, Looney & Watson, “Measuring Loan Outcomes at Postsecondary Institutions: Cohort Repayment Rates as an Indicator of Student Success and

to recognize that the Department analyzed whether students would have transfer options in the 2014 Final Rule and concluded “the substantial majority of students will find alternatives.” 79 Fed. Reg. at 65,075.<sup>6</sup> The Department provided no analysis of the 2017 data release about whether students would lose access to programs if the failing schools closed even though it had the data available to it.

e. Income-driven repayment plans and amortization period

In 2014, the Department noted that it has “made income-driven repayment plans available to borrowers who have a partial financial hardship only to assist them in managing their debt—and that programs should ideally lead to outcomes for students that enable them to manage their debt over the shortest period possible.” 79 Fed. Reg. at 64,940. Importantly, in 2014, the Department noted about income-driven plans that “an educational program generating large numbers of borrowers in financial distress raises troubling questions about the affordability of those debts.” 79 Fed. Reg. at 64,940.

But in the 2018 NPRM, the Department changed its position on income-driven repayment plans. The Department identified IDR plans as “other tools now available to enable students with lower incomes to manage high levels of debt.” 83 Fed. Reg. at 40,172. The Department noted that “the existence of income-driven repayment plans does not address the high cost of college— and, in fact, could make it even easier for students to borrow more than they need and institutions to charge high prices.” *Id.* However, instead of retaining the 2014 GE accountability framework, the 2018 NPRM notes only that “the Department’s plans to increase transparency will help address” the issues of high college cost, overborrowing and excessive costs charged by institutions. *Id.* The Department offers no explanation for its belief that transparency will solve these problems, nor why the accountability

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Institutional Accountability” National Bureau of Economic Research Working Paper No. 23118, <http://www.nber.org/papers/w23118>

<sup>6</sup> Professor Nick Hillman has filed a comment indicating that the Department’s reliance on his research for the proposition that “it is not appropriate to eliminate [a failing GE program], simply because a lower-cost program exists” is “inconsistent with [his] research findings and should not be used as a justification for eliminating GE rules.” <https://www.regulations.gov/document?D=ED-2018-OPE-0042-13086>. Professor Hillman further notes “Convenience certainly matters in choosing a college, but students living in education deserts do not have the luxury of shopping around for lower-cost options. When a local market has several high-cost and high-risk colleges and no public options, regulators have an even greater responsibility to protect consumers.” *Id.* Given that the analysis cited for the Department’s argument does not support the Department’s argument, the Department lacks a reasoned basis for its rescission of the 2014 Final Rule.

framework was not a reasonable way of addressing them. This is not a good reason for the change.

The Department also changed its mind without explanation regarding the effect of IDR plans on amortization. In the 2014 Final Rule, the Department stated that “the income-driven repayment plans offered by the Department do not provide for a set repayment schedule, as payment amounts are determined as a percentage of income.” 79 Fed. Reg. at 64,940. The Department concluded that “we have not relied on these plans for determining the amortization schedule used in calculating a program’s annual loan payment for the purpose of the D/ E rates measure.” 79 Fed. Reg. at 64,940.

But the 2018 NPRM, the Department stated that “the increased availability of these repayment plans with longer repayment timelines is inconsistent with the repayment assumptions reflected in the shorter amortization periods used for the D/E rates calculation in the GE regulations.” 83 Fed. Reg. at 40,172. The Department also argues in the 2018 NPRM that the REPAYE 20-year amortization schedule “creates an unacceptable and unnecessary double standard” with the 10-year amortization period for graduates of certificate and associate degree programs. 83 Fed. Reg. at 40,172-73. The Department offers no reasoned explanation for its change in view. It also cites to no research or studies that would show that students from certificate and associate degree programs generally are relying on REPAYE. Nor does it explain why changing the amortization period for these programs wouldn’t be a reasonable alternative if the “double standard” were truly such a problem.

f. Focus on GE programs, rather than all Title IV Programs

The Department in 2018 claims that a flaw of the 2014 Final Rule was that it focused too much on the for-profit, career and vocational sector, and displayed prejudice toward this sector. The Department states that it “does not believe it is appropriate to attach punitive actions to program-level outcomes published by some programs but not others.” 83 Fed. Reg. at 40,174. The Department argues also in its 2018 NPRM that there are numerous examples on non-profit institutions behaving badly, for example, by “misrepresenting their selectivity levels, inflating the job placement rates of their law school graduates, and even awarding credit for classes that never existed demonstrate that bad acts occur among institutions regardless of their tax status.” 83 Fed. Reg. at 40,174. It is undoubtedly true that schools of all types commit bad acts and the Department should be committed to reigning in that behavior against all institutions. The Department also argues that “[n]on-profit, private institutions also, in general, charge higher tuition and have students who take on additional debt, including enrolling in majors that yield

societal benefits, but not wages commensurate with the cost of the institution.” *Id.* But the Department cites no literature to support the premise that non-profit, private programs charge higher tuition for *comparable* programs as for-profit schools, and in 2014, had noted that for-profit schools charged more than public and non-profit programs. 79 Fed. Reg. at 64,905.

The Department’s argument about the tax status of institutions fails to acknowledge that Congress created the “gainful employment” regime — and determined which programs would be subject to that regime. In HEA § 101(a)(4), 20 U.S.C. § 1001(a)(4), Congress created the general rule that an institution of higher education, for purposes of HEA programs, was defined as a “public or other nonprofit institution.” For purposes of HEA eligibility, a “nonprofit” institution is an entity “no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.” HEA § 103(13), 20 U.S.C. § 1003(13). Congress then created an exception to this general rule to permit “additional” institutions to be eligible to participate in Title IV programs, so long as the eligible programs “to prepare students for gainful employment in a recognized occupation.” *See, e.g.*, HEA § 101(b)(1), 20 U.S.C. § 1001(b)(1); HEA § 102(b)(1)(A), 20 U.S.C. § 1002(b)(1)(A); HEA § 102(c)(1)(A), 20 U.S.C. § 1002(c)(1)(A). The Department noted in 2014 that “[t]he components of the accountability framework that a program must satisfy to meet the gainful employment requirement are rooted in the legislative history of the predecessors to the statutory provisions of sections 101(b)(1), 102(b), 102(c), and 481(b) of the HEA that require institutions to establish the title IV, HEA program eligibility of GE programs.” 79 Fed. Reg. at 65,035.

Despite this view—and the clear Congressional distinction between public and nonprofit institutions, on the one hand, from institutions that are Title IV eligible because they “prepare students for gainful employment in a recognized occupation, on the other—the Department argues in 2018 that the 2014 Final Rule “reinforce[s] an inaccurate and outdated belief that career and vocational programs are less valuable to students and less valued by society, and that these programs should be held to a higher degree of accountability than traditional two- and four-year degree programs that may have less market value.” 83 Fed. Reg. at 40,171. But the Department completely fails to acknowledge that *Congress* determined to make the eligibility criteria for Title IV funds different for different types of institutions. The fact that the 2014 Final Rule did precisely that, treated different institutions differently, is not a reason to rescind the rule. In fact, the 2018 NPRM is inconsistent with Congressional intent and should not be finalized.

In addition, we note that the 2014 Final Rule was remarkably evenhanded to for-profit schools, noting, for example, that “[o]n balance, we believe, and research

confirms, that the for-profit sector has many positive features. There is also, however, growing evidence of troubling outcomes and practices at some for-profit institutions.” 79 Fed. Reg. at 65,032. In the 2014 Final Rule, the Department also noted “[t]he regulations do not target for-profit programs for loss of eligibility under the title IV, HEA programs. To the contrary, the Department appreciates the important role for-profit institutions play in educating students.” *Id.* at 64904. The fact, noted above, that private, non-profits charge high prices for majors that provide societal benefits but not high wages precisely highlights the distinction Congress drew: non-GE programs’ eligibility for Title IV funds is not premised on a promise to “prepare students for gainful employment.”

The Department’s argument that the disclosures required by the 2014 Final Rule offer limited transparency because they only cover a small subset of schools is equally unavailing. 83 Fed. Reg. at 40,175. In 2014, the Department noted that the disclosures would “be valuable even though they do not apply to all programs at all institutions because, we believe, that information about program performance and student outcomes have value in and of themselves. Prospective students will be able to evaluate the information contained in a particular program’s disclosures against their own goals and reasons for pursuing postsecondary education regardless of whether they have comparable information for programs at other institutions.” 79 Fed. Reg. at 64,978. Even if the GE disclosures were insufficient, the solution is not to remove them altogether, with vague promises of updating College Scorecard or other disclosures, as the Department is doing in the 2018 NPRM. The solution would be to require other, appropriate, tailored disclosures from other types of programs. But the mere fact that non-GE disclosures are not required today says little about the utility of the GE disclosures themselves. In addition, the Department cites no empirical data that shows that students are not often choosing between multiple GE programs, so that the required disclosures would contain the proper comparison for them. We do not dispute the utility of publication by the Department of program-level data for all types of institutions. But we don’t think that’s substitute for the requirements of the 2014 Final Rule for GE programs.

- g. Cosmetology and hospitality programs and alternate earnings appeals process

The Department notes, without citation or support, in its 2018 NPRM that cosmetology and hospitality programs “have felt a significant impact due to the GE regulations.” 83 Fed. Reg. at 40,174. It acknowledges that the 2014 Final Rule included the alternate earnings appeals process, meant to mitigate the effect on programs where income from tips is not reported to the IRS. But the Department argues that “process for developing such an appeal has proven to be more difficult to navigate than the Department originally planned.” *Id.* The Department claims that

“the survey response requirements of the earnings appeals methodology are burdensome given that program graduates are not required to report their earnings to their institution or to the Department, and there is no mechanism in place for institutions to track students after they complete the program.” *Id.* But the Department has not offered any support for its assertions.

On March 5, 2018, NSLDN requested documents related to the alternate earnings appeals under the Freedom of Information Act (FOIA). Specifically, we requested: all documents constituting notices of intent to file alternate earnings appeals by institutions of higher education; all documents constituting those alternate earnings appeals; and all documents constituting subsequent communications with any institutions about their earnings appeals. The Department failed to produce the documents under the timeline required by the FOIA. As of the date of this comment, we have not received the relevant information requests and therefore cannot effectively comment on the Department’s assertions about the alternative earnings appeals process. NSLDN has filed a lawsuit to enforce its rights under FOIA with respect to that request. That suit is pending. *See National Student Legal Defense Network v. U.S. Dep’t of Education*, No. 1:18-cv-01209 (D.D.C.).

In addition, the Department noted in 2014 that institutions would have sufficient time to collect the data they need “because an institution will know in advance the cohort of students and calendar year for earnings that will be considered as a part of an appeal, the institution can begin collecting alternate earnings data well before draft D/E rates are issued in the event that the institution believes its final D/E rates will be failing or in the zone and plans to appeal those D/E rates.” 79 Fed. Reg. at 64,959. The Department provides insufficient explanation for why institutions who believe they may need to file an alternate earnings appeal are not able to gather the data they need.

The Department in 2018 also stated that its own review of the alternate earnings appeals “has been time-consuming and resource-intensive.” *Id.* at 40,174-75. The Department indicates that the contents of some of the appeals “suggest continued confusion about the requirements on the part of schools.” *Id.* at 40,175. But the Department does not explain whether any such “confusion” or the “time-consuming and resource-intensive” nature of the appeals is a result of the fact that this is the first time the process has been used. We note the Department released in January 2017 the first round of D/E rates, teeing up the first round of alternate earnings appeals. Although, in theory, the *second* round of D/E rates should have been released in January 2018, that did not happen. Thus, because of the Department’s own delays in implementing the 2014 Final Rule, the Department does not have sufficient information and data to determine whether the burden or

confusion was a one-time event, or whether it had a basis in long-term reality. The Department does not consider any other reasonable alternatives for improving or streamlining the alternative earnings appeal process, short of complete rescission, including accepting different forms of data from the institution, altering the analysis of the data submitted, or other possible reforms.

## II. Disclosures

The Department claims in its 2018 NPRM that it plans to expand disclosures. *See* 83 Fed. Reg. at 40,175 (“[T]he Department believes that its efforts to expand the College Scorecard, which includes all programs that participate in the title IV, HEA programs, to include program-level earnings, debt, and other data, will better accomplish our goal of increasing transparency.”) Yet instead of proposing detailed disclosure requirements for all institutions, including the contents of the disclosures, how that information would be calculated, and how disclosures would be presented and delivered, the Department only vaguely sought comment on possible disclosures. The Department stated: “we are interested in comments on whether the Department should require that all institutions disclose information, such as net price, program size, completion rates, and accreditation and licensing requirements, on their program web pages, or if doing so is overly burdensome for institutions.” *Id.* at 40,173. In reality, all that the Department is doing in its proposal is taking away badly needed disclosures from students. In so doing, the Department ignores its reasoning in the 2014 Final Rule, where it said that “[t]he disclosure requirements will help ensure students, prospective students, and their families, the public, taxpayers, and the Government, and institutions have access to meaningful and comparable information about student outcomes and the overall performance of GE programs.” 79 Fed. Reg. at 64,891.

### a. Purported burden of delivering disclosures to prospective students

In the 2014 Final Rule, the Department included extensive and detailed analysis of the burdens on schools of providing the required disclosures. 79 Fed. Reg. at 65000-01 (breaking down estimated burden by hour and minute). But, based on mere anecdote, the Department claims in its 2018 NPRM that the 2014 Final Rule underestimated the burden. 83 Fed. Reg. at 40173 (“A negotiator representing financial aid officials confirmed our concerns, stating that large campuses, such as community colleges that serve tens of thousands of students and are in contact with many more prospective students, would not be able to, for example, distribute paper or electronic disclosures to all the prospective students in contact with the institution. Although in decades past, institutions may have included these materials in the packets mailed to a prospective student’s home; many institutions no longer mail paper documents, and instead rely on web-based materials and

electronic enrollment agreements.”). The Department went on to note that the 2014 Final Rule required disclosures to prospective students only before the individual enrolls or commits to the institution and permitted hand-delivery or email. But the Department concluded that “even this requirement has an associated burden, especially since institutions are required to retain documentation that each student acknowledges that they have received the disclosure.” *Id.* The Department makes no attempt to quantify the costs of recordkeeping or delivery or explain, based on data, why the extensive analysis on burden in the 2014 Final Rule regulatory impact analysis was incorrect. In 2014, the Department stated that “[r]equiring these types of acknowledgements does not impose a significant burden on institutions or prospective students yet provides adequate assurance that a prospective student has received important information about the program.” 79 Fed. Reg. at 64,984. The Department’s assertion in 2018 that the 2014 Final Rule underestimated the burden to deliver disclosures is not based on evidence, but mere conjecture.

b. Job placement rates

The Department asserts that there are “challenges and errors” with the disclosures from the 2014 Final Rule and cites job placement rates disclosures as an example. 83 Fed. Reg. at 40,173. The Department claims that “there is significant variation in methodologies used by institutions to determine and report in-field job placement rates, which could mislead students into choosing a lower performing program that simply appears to be higher performing because a less rigorous methodology was employed to calculate in-field job placement rate.” *Id.* The Department notes that in 2013, it convened a Technical Review Panel (TRP) that “could not come to consensus on a single, acceptable definition of a job placement that could be used to report this outcome on GE disclosures, nor could it identify a reliable data source to enable institutions to accurately determine and report job placement outcomes.” 83 Fed. Reg. 40,167, 40,173 (Aug. 14, 2018). Nevertheless, aware of that fact, the Department chose to publish the 2014 Final Rule. Now, however, the Department, without justification or explanation, simply states that it would be “irresponsible to continue requiring institution to report job placement rates.” *Id.* But this is *precisely* what the Department opted to do only four years ago, and the Department cites *no* new evidence and provides *no* explanation or justification for why it is reversing course. The Department does not explain why the only possible option to remedy this inconsistency is to eliminate the disclosure, and all the 2014 Final Rule disclosures. The Department does not explain why the obvious alternative of adding explanation about how the rates are calculated, to make clear to prospective students whether, or not, they can make an apples-to-apples comparison, would not be viable. Moreover, the Department is simply proposing to delete the requirement, without considering adequate alternatives as



part of this rulemaking. Indeed, the Department has announced a wholly separate proceeding, to commence later in 2018, that would potentially develop “a single definition for purposes of measuring and reporting job placement rates.” 83 Fed. Reg. 36,814, 36,815 (July 31, 2018).

c. The “best way” to provide disclosures

The 2014 Final Rule required delivery of warning disclosures to prospective and enrolled students either by hand or by email to the email address on file. But in the 2018 NPRM, the Department claims that “the best way to provide disclosures to students is through a data tool that is populated with data that comes directly from the Department, and that allows prospective students to compare all institutions through a single portal, ensuring that important consumer information is available to students while minimizing institutional burden.” 83 Fed. Reg. at 40,173. However, the Department does not explain its dramatic change in its position from the 2014 Final Rule, where it stated “[w]e believe the burden on institutions to obtain this acknowledgement is outweighed by the increased likelihood that in the course of, or as a result of, acknowledging receipt, students will read the warning and take it into account when making educational and financial decisions. We note that the requirement to obtain this kind of acknowledgement is no more burdensome than the requirement that institutions do so with regard to entrance counseling requirements.” 79 Fed. Reg. at 64,969. In the 2014 Final Rule, the Department also committed to consumer testing of its disclosures. *Id.* at 64,679. The Department cites to no results of that consumer testing. The Department noted in 2014 that it believed “that direct delivery” of the required warning disclosure “makes it most likely that students receive it and review it.” *Id.* at 64,969. It also noted that its approach to disclosures in 2014 was “consistent with long-standing provisions in the HEA requiring institutions to publish consumer information on their Web sites under the assumption that students and families are likely to look on those Web sites for that information.” *Id.* at 64,978. In 2018, the Department cites to no evidence that students will check a Department data tool and that additional disclosures on College Scorecard will be “the best way” to provide the disclosures.

III. Unaddressed benefits from GE 2014

The Department does not explain why many of the benefits it articulated in the 2014 Final Rule are no longer applicable today.

The 2014 Final Rule made clear that its purpose was to “address growing concerns about educational programs that, as a condition of eligibility for title IV, HEA program funds, are required by statute to provide training that prepares

students for gainful employment in a recognized occupation, but instead are leaving students with unaffordable levels of loan debt in relation to their income.” 79 Fed. Reg. at 65,024. In the 2014 Final Rule the Department identified two major benefits of the Final Rule. First, “[b]ecause the regulations establish an accountability framework that assesses program performance we expect students, prospective students, taxpayers, and the Federal Government to receive a better return on the title IV, HEA program funds.” 79 Fed. Reg. at 64,891-92. The Department further explained that the accountability framework would “[e]nsure that institutions have a meaningful opportunity and reasonable time to improve their programs for a period of time after the regulations take effect, and ensure that those improvements are reflected in the D/E rates. *Id.* at 64,891. The Department noted that the accountability framework would also “protect students and prospective students and ensure that they are informed about programs that are failing or could potentially lose eligibility.” *Id.* Finally, the accountability framework was carefully designed to “provide institutions and other interested parties with clarity as to how the calculations are made, how institutions can ensure the accuracy of information used in the calculations, and the consequences of failing the D/E rates measure and losing eligibility.” *Id.* In 2014 the Department carefully calibrated the needs of a variety of stakeholders. Second, the transparency framework would “improve market information that will assist students, prospective students, and their families in making critical decisions about their educational investment and in understanding potential outcomes of that investment. The public, taxpayers, the Government, and institutions will also gain relevant and useful information about GE programs, allowing them to evaluate their investment in these programs.” *Id.* at 64,892.<sup>7</sup>

But in 2018, the Department ignores these important benefits by rescinding the entire rule and provides no substitute for addressing the concerns that led to

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<sup>7</sup> The Department in 2014 also described the benefits of the rule as

(1) improved and standardized market information about GE programs that will increase the transparency of student outcomes for better decision making by students, prospective students, and their families, the public, taxpayers, and the Government, and institutions, leading to a more competitive marketplace that encourages improvement; (2) improvement in the quality of programs, reduction in costs and student debt, and increased earnings; (3) elimination of poor performing programs; (4) better return on educational investment for students, prospective students, and their families, as well as for taxpayers and the Federal Government; (5) greater availability of programs that provide training in occupational fields with many well-paying jobs; and (6) for institutions with high- performing programs, potential growth in enrollments and revenues resulting from the additional market information that will permit those institutions to demonstrate to consumers the value of their GE programs.

79 Fed. Reg. at 65,080.

the 2014 Final Rule in the first place. The Department notes in its 2018 NPRM that “the total estimated net budget impact from the proposed regulations is \$5.3 billion cost in increased transfers from the Federal government to Pell Grant recipients and student loan borrowers and subsequently to institutions, primarily from the elimination of the ineligibility provision of the GE regulations.” 83 Fed. Reg. at 40,190. In other words, up to \$5.3 billion in taxpayer dollars will go to programs that would otherwise fail the accountability framework established in the 2014 Final Rule. The “errors” or “flaws” identified by the 2018 NPRM in the 2014 Final Rule, even if they were supported by actual data and findings, which they are not, do not justify its the wholesale rescission of the 2014 Final Rule, especially when the costs to student borrowers and taxpayers will come at such a steep price.

#### IV. Conclusion

NLSDN appreciates the opportunity to comment on the 2018 NPRM. We strongly believe that the Department should not issue a final rule and should instead fully and immediately implement the 2014 Final Rule as properly published by the Department. For further information, please contact Senior Counsel Martha Fulford, [martha@nsldn.org](mailto:martha@nsldn.org).

Sincerely,

National Student Legal Defense Network