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September 9, 2010

U.S. Department of Education
Mr. Arne Duncan
Ms. Jessica Finkel
1990 K Street NW
Washington, D.C. 20006-8502

Re: Program Integrity: Gainful Employment [Docket ID ED-2010-OPE-0012]

Dear Mr. Duncan and Ms. Finkel:

The Public Good Law Center (Public Good) is a public interest organization dedicated to the proposition that all are equal before the law. Our staff have worked with both representatives of and regulators of for-profit vocational and other post-secondary schools and are committed to seeking a level and more open playing field in this sector. As an organization with a particular interest in safeguarding consumers, Public Good submits this comment to explain why:

1. A third test for "gainful employment" under § 668.7(a) should be added to exclude relatively inexpensive, short-term programs of low educational value from qualifying for federal loans by comparing pre-enrollment and post-graduation earnings;

2. The Department should limit the definition of "discretionary income" under section 668.7(a)(3)(vi) to permit a meaningful comparison of pre-enrollment and post-completion earnings;

3. The promulgated warning and disclosure requirements of § 668.7(d) should be more specific in light of the recent GAO undercover investigation of for-profit colleges; and

4. The Department should close existing loopholes in the "employer affirmation" requirement under § 668.7(e)(1) and 688.7(g)(1)(iii) to exclude companies that merely rubber-stamp educational programs from providing affirmations.

1. Exclude Programs of Low Educational Value Under Section 668.7(a) By Adding a Third Test to Compare Pre-Enrollment and Post-Graduation Earnings.

We support the Secretary's effort to create debt thresholds based on a gainful employment measure. However, we believe that the two proposed tests for gainful employment do not sufficiently disqualify programs of low educational value from eligibility for federal student loans. We therefore suggest an additional, third, test comparing pre-enrollment and post-graduation earnings.

Identifying and Eliminating Low-Value Programs

To prevent federal student loan resources from being dissipated on low-quality educational programs, the Department should identify low-value programs by comparing students' pre- and post-program earnings. Such low-value programs may maintain apparently high loan repayment rates and low debt-to-earnings ratios by saddling students with "manageable " amounts of debt for educational programs that provide little or no benefit.

Low-value programs would be those whose percentage increase in post-graduate income is less than the program's debt-to-earnings ratio as a percentage of annual earnings for graduated students. For example, if a program's students earn 15 percent more after completing a program than they did before, but are paying on average 18 percent of their annual earnings for debt associated with the program, the program would be classified as a low-value program.

This low-value designation communicates to prospective students and administrators that the program does not on balance offer significant financial rewards for students who complete it.

Requiring Higher Loan Repayment Rate and Lower Debt-to-Earnings Ratio for Programs with Low Educational Value

The proposed rule should require low-value programs to meet more rigorous requirements for loan repayment rates and debt-to-earnings ratios. By making it more difficult for these programs to receive federal dollars, those more rigorous requirements will create an incentive for educational institutions to improve or eliminate programs that offer little educational value.

Programs in the new low-value category should have to meet a loan repayment rate 20 percentage points higher and debt-to-earnings ratios 4-5 percentage points lower than the levels required in the Department's current proposed rule. For example, in order to be fully eligible for federal loans, a low-value program would need a loan repayment rate of 65 percent, as distinct from the 45 percent rate for programs not classified as low value. The low-value category is necessary to prevent programs that offer little educational value to their students from violating the spirit of the "gainful employment" requirement.

Similarly, low-value programs should be subject to more rigorous debt-to-earnings ratios. We propose using debt-to-earnings ratios that are 5 percentage points lower for discretionary income and 4 percentage points lower for average annual earnings. Thus, a low-value program seeking full eligibility for federal loans would require a debt-to-earnings ratio of 15 percent or less of discretionary income (down from 20 percent) or 4 percent or less of average annual earnings (down from 8 percent).

The Department should use the same three-year period (3YP) defined in § 668.7(a)(3)(iii). The percentage increase in post-graduate income should be the quotient of students' average earnings in the three years following graduation over average earnings in the three years prior to enrollment, with numbers adjusted for inflation. A three-year horizon for pre- and post-program earnings should provide a realistic measure of how much a program' s curriculum improves a graduate's earning potential. We are assuming the same standard loan repayment terms of a 10-year repayment schedule and the current annual interest rate in Federal unsubsidized loans as is presumed in the proposed rule. Programs should be able to petition for a calculation of post-graduate income that also takes into account years five through eight after completion, if the program successfully argues that the careers of its graduates offer financial gains in later years.

While the Department of Education may choose to adopt a different standard from the one offered in this proposal, some standard is necessary to prevent low-value programs from taking advantage of students and the federal loans they bring with them.

<u>Exceptions for Students Who Earned Less Than $8,000 Per Year or Were Not Employed Before Enrollment</u>

The calculation of average pre-enrollment earnings should not include years where the student earned less than $8,000 per year. This measure would avoid giving unfair advantage to programs that accept recent high school or college graduates, or other individuals new to the workforce who have little or no previous income. For those students, the measure should be whether their post-graduation earnings satisfy the debt-to-earnings ratio referenced above, which is 4-5 percentage points lower than that required by the proposed rule under § 668.7(a)(2)(ii).

<u>Disclosure Requirement for Low-Value Programs</u>

The Department should require low-value programs to disclose their low-value identification to prospective students, using the same disclosure mechanisms as described in § 668.7(d). (Further discussed under (3) below.)

<u>Administrative Costs</u>

Identifying low-value programs would not create significant additional administrative costs because the current proposed rule already requires the Department to determine the average earnings of a program's former students by using information from other federal agencies. The Department can access data on students' past earnings through the same avenue it will use to access data on students' present earnings.

2. Limit the Definition of "Discretionary Income" Under Section 668.7(a)(3)(vi) to Permit a Meaningful Comparison of Pre-Enrollment and Post-Completion Earnings.

The definition of "discretionary income" under § 668.7(a)(3)(vi) should be limited to income earned from wages and salaries to allow for a meaningful comparison of pre-enrollment and post-graduation earnings. Section 668.7(a)(3)(vi) in its current form defines discretionary income as the "difference between average annual earnings and 150 percent of the most current Poverty Guideline for a single person in the continental U.S." Under this definition, annual income may include sources unrelated to earned wages or salaries, such as disability benefits, alimony payments, or interest and dividends.

For example, if a student earned $25,000 per year before enrolling in an educational program and earned $22,000 per year after graduation but also received $10,000 per year in alimony payments, the student's post-graduation income would be $32,000 per year. Under the proposed rule, that student's "discretionary income" would be higher than before obtaining the education. Yet the increase in income would be unrelated to the educational program.

We therefore suggest basing the pre-enrollment and post-graduation comparison in income on the figure of wage earnings in line 7 of IRS form 1040A or that of Form W-2.

3. Make the Debt Warning Disclosures in Section 668.7(d) More Prominent and More Specific.

We support the intent behind § 668.7(d): To require institutions to include prominent warnings and disclosures in their communications with prospective students. However, we are concerned that the proposed requirements are not specific enough regarding the content and manner of warnings and disclosures. As it is currently designed, the disclosure rule provides schools with too much discretion with regard to the content of the disclosures and the manner and time in which the disclosures are made.

In its August 2010 testimony regarding for-profit colleges before the Senate Committee on Health, Education, Labor, and Pensions, the GAO described several for-profit colleges' deceptive practices in communicating with prospective students.[1] Some of these deceptive practices are currently not in violation of federal disclosure requirements. We therefore suggest requiring additional warnings and disclosures in order to eliminate those deceptive practices by making the required disclosure mechanisms more efficient. Those proposed additional measure include a standard disclosure form, a reference website, and a cooling-off period between providing the disclosure form and enrolling a prospective student.

1 U.S. Government Accountability Office, "For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices," GAO-10-948T (August 2010).

Standard Disclosure Forms

We suggest the Department create a standard disclosure form, which explains to students the risks they face in choosing to attend a school that has failed to meet the Department's standards and advises students to enroll in a school that is in compliance with those standards. The standard disclosure form should include a reference to a federal website that lists schools not in compliance.

According to the GAO testimony, institutional representatives of for-profit colleges provided prospective students with deceptive information about the duration and/or cost of their programs. For example, some schools' programs extend a full 12 months per year, but their recruiters told students the cost of attendance for only 9 months of classes per year.[2] Such deceptive practices could be avoided by using a standardized disclosure form that defines the number of months for which the data is provided.

Plain Language Requirement

To make written warnings and disclosures an effective tool for prospective students' understanding of the potential financial consequences of enrolling in a particular program, explanations should be written in plain English or the equivalent level in whatever language has been used in conversation (s) with the student, readily comprehensible to a person with an eighth-grade reading level. Requiring schools to simply disclose a program's most recent loan repayment rate, as currently proposed under § 668.7(d)(2), may only confuse prospective students because in the absence of guidelines for comparison these rates could well be meaningless to most prospective students. Instead, the Department should require schools to define what a loan repayment rate is and disclose the loan repayment rate of 35 percent required under the proposed rules.

A standard disclosure form would provide students with a clearer way of assessing whether or not to invest in a particular school. In drafting the disclosure form, the Department should follow the plain language guidelines propagated by the federal government.[3] The federal government supports and encourages efforts to make disclosures accessible to the majority of the public. For example, in 1999, two U.S. Securities and Exchange Commission employees received the Plain Language Award for helping to get companies to write financial disclosure documents in plain language.[4] The Obama administration has applauded Congress's attempt to improve disclosure practices in the credit card industry by requiring documents that credit card companies sent out to include "plain language that is in plain sight."[5] The Department should follow those examples.

Use of Proper Formatting and Layout

We further suggest the Department create mandatory form requirements for the language of

2 GAO-10-948T at 11.
3 *See* www.plainlanguage.gov.
4 *See* http://govinfo.library.unt.edu/npr/library/news/012799.html.
5 *See* http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reforms-to-Protect-American-Credit-Card-Holders/.

warnings, including font size and location. The proposed disclosure rule under § 668.7(d)(1) allows schools to circumvent the rule by hiding the disclosures in layers of papers and/or paragraphs and using inconspicuous fonts to make the disclosures. Currently, the disclosure requirements for graduation rates, job prospects upon graduation, and likely earnings can be satisfied by posting the information on the institution's website, even if the information is hidden and difficult to find.[6] We therefore propose that any warnings and disclosures must be made in bold face in at least 12-point font in immediate proximity to the prospective student's signature.

Similar concerns have prompted other agencies to develop specific formatting and layout standards for disclosures rules. For example, in 2008, the Federal Reserve Board approved new credit card rules that required credit card offers to display fees and APRs in bold text, to format the interest rates in 16-point font, to highlight key terms, and to feature important information in prominent places.[7] A standard disclosure form would limit schools' ability to undermine the protections afforded to students.

Reference Website

We suggest the Department create a reference website, which allows students to compare programs at different educational institutions by listing which programs are in compliance with the federal guidelines and which are not. As a result of for-profit institutions' marketing and sales strategies, students may erroneously believe that a particular school is unique in providing the flexibility and/or curricular training that the student needs. Thus, a student who is unaware of alternative schools may believe that he or she only has one option for attending school even though that school may not be in compliance. Referencing a federal website on the disclosure form, which lists schools in compliance will allow students to become aware of other school options, and will therefore make it less likely that students will enroll in a school that is not in compliance.

Seven-Day Mandatory Cooling-Off Period

We suggest that the Department require schools to wait at least seven days from the time they provide a student with the disclosure form to the time they enroll that student. If students are not given sufficient time to read and understand the disclosure form, they will continue to fall prey to schools' notorious use of high-pressure sales techniques.

Several for-profit colleges investigated by the GAO used questionable sales and marketing tactics, including pressuring prospective students into signing enrollment forms before being permitted to talk to a financial aid representative.[8] We therefore suggest including a mandatory cooling-off period between the time an institution makes the mandated disclosures and the time a student signs enrollment documents. Left unregulated, schools might provide students with a few minutes to read the disclosure form. This would prevent students from having enough time to

6 GAO-10-948T at 9-10.
7 *See* http://www.bankrate.com/financing/credit-cards/new-credit-card-disclosure-rules/.
8 GAO-10-948T at 12.

properly think through the implications of the disclosure form or to research other school options. In order to increase students' ability to make good choices, schools should have to wait at least seven days after they make the original disclosure before they the student can sign the enrollment form.

Such a requirement should be modeled after existing cooling-off periods. A seven-day cooling-off period, for example, is required for creditors under the Mortgage Disclosure Improvement Act (MDIA) in closing a loan.[9] Students, like home buyers, are required to make a significant financial commitment in order to pursue their goals. Indeed, the level of financial commitment involved in paying for an education is surpassed only by that required to purchase a home—and student loan debt, unlike mortgage debt, generally cannot be discharged in bankruptcy and may be collected from federal tax refunds and social security payments. In other words, taking on federal student loan debt is an extraordinarily serious undertaking, and consumers should be provided the same sort of protections that they now receive before taking on mortgage debt.[10] When even door-to-door sales of consumer products—a much less serious commitment than an education—require a cooling off period of three business days, it would be remiss not to institute such a period to counter the high-pressure tactics employed by some school recruiters.[11]

<u>Administrative Costs</u>

Creating additional warning and disclosure requirements would not create significant additional administrative costs, because the current proposal already requires educational institutions to make certain disclosures. The Department's cost of developing a standard disclosure form is low because it can model the form after existing disclosure forms.

The administrative cost of creating a reference website would not be high since the Department already has data available on which schools are in compliance and which are not.

4. Close Existing Loopholes in the "Employer Affirmation" Requirement Under Section 668.7(e)(1) for Restricted Programs and Under Section 688.7(g)(1)(iii) for Additional Programs to Exclude Employers Who Merely Rubber-Stamp Educational Programs From Providing Affirmations.

We share the Secretary's concern about aligning educational programs with recognized occupations and employer demand for those occupations. The requirement for "employer affirmation" under § 668.7(e)(1) and § 668.7(g)(1)(iii), however, contains loopholes that threaten

9 *See* http://www.federalreserve.gov/newsevents/press/bcreg/20090508a.htm.

10 *See Emerging Risk? An Overview of the Federal Investment in For-Profit Education: Hearing before the Senate Committee on Health, Education, Labor and Pensions*, 111th Congress (2010) (statement of Steven Eisman, Portfolio Manager, FrontPoint Financial Services Fund, LP). *Available at* http://help.senate.gov/imo/media/doc/Eisman.pdf.

11 The disclosure regarding the cooling-off period must be placed in immediate proximity to the customer's signature in bold face type of a minimum size of 10 points. *See* FTC Rule Concerning Cooling-Off Period For Sales Made At Homes Or Certain Other Locations, 16 CFR § 429.1 (1995).

to undermine the requirement's purpose. It leaves the regulation vulnerable to attack from unscrupulous school operators willing to establish nominally independent businesses that will rubber-stamp the school's educational programs and thereby maintain federal loan eligibility.

In order to close this loophole without adding additional administrative duties, we propose four modifications:

a. Add a requirement of minimum business size to the regulation to prevent sham "affirmers."

b. Include a requirement regarding hiring capacity of the employers providing affirmation.

c. Clearly define the phrase "commensurate with the size of the program" so that schools may readily understand what is expected of them by way of employer-affirmation.

d. Require employer affirmations to be made under penalty of perjury as to factual statements.

Loopholes in the Proposed Rule

The potential loopholes in the proposed rule may be illustrated by example: Suppose a for-profit nursing school with a loan repayment rate between 35 and 45 percent (and therefore on probation under § 668.7(e)) were to locate a small-scale business that employed a single doctor to supply the necessary annual affirmation of the school's program(s). Under the present scheme, with the vague phrase "commensurate with the ... size of the program" subject to all-too-creative interpretation, the employer-affirmation requirement could be satisfied by this small business comprising a single non-working doctor. This loophole thereby removes the incentive to improve the loan repayment rates or effectiveness of the educational program.

The same problem would arise with the institution of new programs under section 668.7(g)—only there all that would be needed is a single year's affirmation.

Proposed Solutions

a. Business-Size Requirement

We recommend that the employer-affirmation requirement be limited by adding to the rule a requirement that any business providing an employer affirmation have had an average of at least $2 million in annual revenue in the three years prior to the year in which it issued the affirmation. Those programs with legitimate curricula would easily be able to satisfy the proposed requirements, because the current threshold is so low as to encompass almost all legitimate employers of a size to hire program graduates on a regular basis. The threshold would bar only the use of a sham business to rubber-stamp unnecessary new programs or struggling probationary programs.

b. Employment History Requirement

We suggest that the employer-affirmation requirement be further limited by adding to the rule a requirement that any business providing an employer affirmation have hired a minimum of five employees over the course of the previous three years. This requirement will further guard against sham affirmations, particularly if the Department is able to verify employment status with other federal agencies.

c. Definition of "Commensurate"

We recommend that the Department define specifically what it means in requiring the number and location of affirming employers to be "commensurate" with the anticipated size of a new program. This clarification could be accomplished as to "number," for example, by requiring that aggregate employer affirmations contain a specific estimated number of annual anticipated hires by the employers that meets or exceeds the stated anticipated number of students expected to enroll each year in the new program (or continuing program on probation). Alternatively, an educational institution could be required to show that it has employer affirmations for a certain percentage of anticipated enrolled students. We suggest that that number be set no lower than 80 percent.

The rule should also clarify what the boundaries are for "locations" of the affirming employers. The percentage of spaces attested to by affirming employers outside the school's metropolitan area or state should not exceed the percentage of students enrolled (under § 668.7(e)), or reasonably expected to enroll (under § 668.7(g)), who at the time of enrollment live outside the metropolitan area or state. For schools with significant numbers of students outside the school's geographical area (i.e., online institutions), the school would be required to attest that there is a "close fit" between the geographical location of its students and the geographical location of the jobs attested to by its affirming employers. (That is, an online school in Topeka whose students live mostly in Illinois may not use employer affirmations primarily from California.) This measure would ensure that schools were not able to claim "phantom" affirmations from employers located in cities or states in which students completing the program are unlikely to live, while at the same time recognizing the reality that some institutions do provide training to students who may reside far from the school.

d. Employer Affirmation Made Under Penalty of Perjury As to Factual Statements

We suggest that the Department provide a form statement, which employers may complete in attesting to the availability of positions in the relevant field. We recommend that the factual section of the statement—that is, the part attesting that the past three years' revenue of the affirming employer exceeded $2 million annually and that the employer hired at least five employees in the past three years—be made under penalty of perjury.

We further recommend that a separate section of the statement estimating the number of positions available each year be attested as "truthful and accurate based on my best estimate" or words to that effect.

Clarification

We advise that the language of the proposed rule in § 668.7(g)(iii) be changed to "The number and locations of the businesses from which affirmation is required must be commensurate with the anticipated size of the program" to clarify that seeking employer affirmation from businesses is the educational institution's responsibility.

Administrative Costs

The additional requirements for employer affirmation impose no administrative burden for educational institutions aside from obtaining an affirmation from those businesses with which the school would already have to be in contact.

Thank you for your work in developing the much-needed proposed rule and for the opportunity to express our position on the proposal. We would be glad to provide any additional comments or information you deem helpful.

Sincerely,

/s/

Seth E. Mermin
Executive Director

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