UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASSOCIATION OF PROPRIETARY COLLEGES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as Secretary of the Department of Education, and

THE DEPARTMENT OF EDUCATION,

Defendants.

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Case No. 14-cv-8838-LAK

BRIEF OF AMICUS CURIAE
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Mark Schneider, Ph.D., files this brief as *amicus curiae* in support of the Association of Proprietary Colleges ("APC") motion for summary judgment. As described in detail below, Dr. Schneider's expert opinion, based on his experience, including as Commissioner of the National Center for Education Statistics ("NCES"), a division within the Department of Education's Institute of Education Sciences, is that the Gainful Employment Rules lack a rational basis and should be vacated. Among other things: (i) the Rules are inconsistent with known data on student debt and graduate earnings; (ii) the Rules are unsupported by Department of Education analysis of program quality or student debt and graduate earnings data; (iii) the Department has set the key eligibility threshold at a level that many, if not most, degree programs at public and not-for-profit institutions cannot meet; and (iv) the Rules evaluate earnings 18 to 36 months after the student graduates, when graduate income is at its lowest, and thus the Rules do not reflect the true value of academic degree programs.

For these reasons, the Court should vacate the Rules.

STATEMENT OF INTEREST

The regulations at the center of APC's challenge — the Gainful Employment Rules ("GE Rules" or "Rules") — will change the way that the U.S. Department of Education (the "Department" or "ED") determines whether tens of thousands of educational programs are eligible to receive billions of dollars in federal student aid. Such a change in national education policy demands careful analysis and should be based on standards firmly rooted in empirical findings and comprehensive analysis. Dr. Schneider submits this brief to express his disagreement with the Department's methodology and its lack of analysis of relevant and informative data in developing the GE Rules, and concern that the Rules will cause injury to

many high quality programs and reduce the access of students, especially low-income students, to those programs.

Dr. Schneider has devoted his professional career to the development and use of the best possible data and statistics in making education policy and evaluating the results of educational programs.[1] From 2005 to 2008, Dr. Schneider served as Commissioner of NCES, as noted above, a division within the Department's Institute of Education Sciences, which collects, analyzes, and publishes statistics on education and student outcomes. Prior to that, Dr. Schneider was a Distinguished Professor of Political Science at the State University of New York, Stony Brook. Dr. Schneider is currently a Vice President and an Institute Fellow at American Institutes for Research ("AIR"), a non-profit, non-partisan behavioral and social science research organization based in Washington, D.C. AIR is one of the world's largest behavioral and social science research and evaluation organizations. AIR's goal is to use the best science available to bring the most effective ideas and approaches to improving education, health and the workforce. Dr. Schneider is also a Distinguished Professor Emeritus of political science at the State University of New York, Stony Brook, and a visiting scholar at the American Enterprise Institute ("AEI"), a non-profit, non-partisan organization dedicated to research and education on issues of government, politics, economics, and social welfare. Dr. Schneider has authored or edited numerous books and reports on higher education outcomes, statistics, data and policies. Most germane to the subject at hand, Dr. Schneider is the author of an AEI study titled, *Are Graduates From Public Universities Gainfully Employed*? *Analyzing Student Loan Debt and Gainful Employment*, in which he applied the GE Rules to data on the earnings and debt levels of graduates from all public colleges and universities in Texas, encompassing more than 500

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[1] Dr. Schneider's curriculum vitae is attached as Exhibit 1.

programs of study across the state. As a result, Dr. Schneider is qualified to assist the Court as it considers whether the Department has formulated the GE Rules based on accurate and relevant data, and whether the Rules achieve the Department's stated purpose.

SUMMARY

Under the GE Rules, the Department's stated purpose is to use debt-to-earnings ratios to determine whether a "gainful employment" program is of sufficient quality so that its graduates will earn enough money shortly after graduation to pay their educational debt with a portion of their income that the Department deems acceptable. The Department has concluded that programs where recent graduates have to devote more than 8% of their annual earnings or 20% of their discretionary income to repay their student loans lack the necessary quality, and the Department will not allow programs to disburse federal financial aid if the rates for their graduates exceed those limits for certain periods.

The Department has not cited a single empirical study of student loan or graduate earnings patterns that suggests that the 8% and 20% thresholds have any basis in actual data, or indeed measure program quality or default rates on student loans at all. Not only does it appear that there are no such studies to support the Department's position, but a number of studies show that the Department's thresholds in the GE Rules are seriously off target. Dr. Schneider believes the Department ignored or downplayed recent studies that demonstrate these thresholds are too low, that these thresholds do not comport with student debt patterns across the country, and that new graduates commonly use a significantly larger share of their earnings to repay their loans. These recent studies are persuasive proof that the Department's debt metrics are unreasonable and the GE Rules should be vacated. In setting the debt metrics for the GE Rules, the Department has set itself on a collision course with real patterns of student debt and repayment.

BACKGROUND

The Higher Education Act ("HEA") requires that certain programs provide "a program of training to prepare students for gainful employment in a recognized profession" to be eligible for federal student aid funds under Title IV of the HEA ("Title IV Program funds"). 20 U.S.C. § 1088(b)(1)(A)(i). This requirement pertains to virtually all degree and non-degree programs offered at proprietary institutions, but does not cover degree programs at public and non-profit institutions.

The Department contends that the GE Rules' metrics based on debt-to-earnings ratios of recent program graduates can be used to evaluate the quality of the program to determine whether the program represents a good investment based on the ability of its graduates to repay their educational loans, thus sparing taxpayers the cost of covering loan defaults. Under the Rules, the Department uses social security income data to identify the earnings of graduates, which are then compared to the educational debt of those graduates. Graduates who do not receive federal aid are excluded from the metric, and their earnings are not considered. As discussed in more detail below, this last factor can lead to a highly imperfect and misleading measure of program quality.

The first ratio compares annual debt service to annual income ("annual D/E Rate"). The second is the ratio of annual debt service to discretionary income ("discretionary D/E Rate"), where discretionary income is calculated as annual income minus 150% of the national poverty level (in 2014, the 150% figure was $17,505). Both D/E Rates would be based on graduate earnings in as little as 18 months after graduation.

Programs pass if their graduates have an annual D/E Rate of less than or equal to 8% or a discretionary D/E Rate of less than or equal to 20%. Programs fail if their annual ratio is more

than 12% and their discretionary ratio is more than 30%. ED also created a "zone" into which programs fall if they do not pass one of the D/E Rates but their annual D/E Rate is between 8% and 12% or their discretionary D/E Rate is between 20% and 30%.

A program would be ineligible to provide Title IV aid to its students for three years if:

- The program fails in two out of three consecutive years;
- The program is in the zone for four consecutive years; or
- The program is in the zone and/or fails for four consecutive years.

ARGUMENT

I. The Department Ignored or Misconstrued Relevant Data and Studies in Setting the Thresholds for the D/E Rates which Demonstrates the Thresholds Are Unreasonable.

In developing its standards for the D/E Rates, the Department did not consider data on student debt and earnings that show the arbitrariness of the 8% and 20% thresholds that the Department has put forth.

NCES maintains several data sets and studies that ED could have and should have used to determine appropriate threshold rates. For example, the National Postsecondary Student Aid Study ("NPSAS"), which examines characteristics of students in postsecondary education, with special focus on how they finance their education, has collected detailed information on a representative sample of students since the late 1980s.[2] Drawing on the same data, the Baccalaureate and Beyond Longitudinal Study is a nationally representative study that follows baccalaureate graduates for up to ten years, collecting information on their early labor market experiences and post-baccalaureate training and education.[3] Yet these data were downplayed

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[2] *See* http://nces.ed.gov/surveys/npsas/about.asp.
[3] *See* http://nces.ed.gov/surveys/b&b/.

and were not used in developing the thresholds for the D/E Rates, even though they provide extensive background on student borrowing and graduate earning patterns. *See* 79 Fed. Reg. 65079.

Any credible regulation intended to measure debt levels and protect student borrowers must draw on as many data points as possible in the universe of higher education, especially ones of the quality released by NCES. But the Department has done just the opposite – it has promulgated a highly complex rule relying on a single study based on mortgage data by Sandy Baum and Saul Schwartz, titled *How Much Debt Is Too Much? Defining Benchmarks For Managing Student Debt*, and has ignored other higher education data that are far more relevant and recent.[4] Now almost a decade old, in *How Much Debt Is Too Much?*, the authors considered "measures of what might constitute manageable debt from the borrowers' perspective," and used the mortgage industry standard of 8% of an individual's gross income as a starting point.[5] Under any reasonable research protocol, if the Department wanted to rely on this mortgage data study, the Department would have to show that the mortgage data are relevant to the population being measured. The Department has failed to make this showing.

The Department has not only misplaced its reliance on mortgage industry standards, but as discussed below, it has ignored available high-quality education data that shows that the metrics the Department has adopted do not reflect the debt-to-earnings ratios in any sector of higher education in the United States. The data further show that, if applied to students enrolled

[4] Sandy Baum & Saul Schwartz, *How Much Debt Is Too Much? Defining Benchmarks For Managing Student Debt*, The College Board (2006), *available at* http://research.collegeboard.org/publications/content/2012/05/how-much-debt-too-much-defining-benchmarks-manageable-student-debt.

[5] *Id.* at 1. Despite the Department's emphasis on the Baum and Schwartz study, Baum and Schwartz did not expressly conclude that 8% was the appropriate threshold for graduate debt. Rather, the authors identified numerous shortcomings associated with using the 8% rule as a benchmark for manageable student loan payments and concluded that, "any benchmark needs stronger justification than has thus far been forthcoming." *Id.* at 3. It clearly appears that the authors anticipated more research on the subject, rather than having their work be used as the basis for a federal agency to set a bright line standard.

in educational programs offered by public and not-for-profit private institutions of higher education, many programs at non-profit institutions would likely fail the debt-to-earnings benchmarks set by the Department.

For example, a recent study by the Department's own NCES, entitled *Degrees of Debt*, shows that, on average, 2009 bachelor degree graduates are devoting 13% of their monthly income to repay their student loans — higher than the cut off in the G/E regulations. This percentage has remained fairly consistent for the past 20 years; the same NCES report notes that the average was 11% in 2001 and 12% in 1994.[6] Looking across the sectors of higher education, NCES found that the 2009 graduates of non-profit institutions dedicated, on average, 16% of their monthly income to repay their student loans, while the graduates of four-year public institutions were at 12%, and graduates of proprietary institutions were at 13%. In short, NCES data suggest that many graduates in all sectors of education commonly use a far larger share of their earnings to repay their loans than the 8% threshold the GE Rules require. Given the incongruence between the actual and historical experience of student borrowers and the experience of the mortgage industry, the Department's reliance on mortgage-based data is unreasonable.

National data also suggest the debt-to-earnings ratio, if applied more broadly, could put a large number of public and non-profit programs in jeopardy. ED's *Degrees of Debt* study reported that nearly one-third of all bachelor's degree recipients at all institutions had debt-to-earnings ratios higher than 12% in the first year after graduation.[7] The same study found that roughly 26% of graduates from four-year public colleges and 39% of graduates of four-year non-

[6] Jennie H. Woo & Matthew Soldner, *Degrees of Debt: Student Borrowing and Loan Repayment of Bachelor's Degree Recipients 1 Year after Graduating—1994, 2001, and 2009*, U.S. Department of Education, pg. 11 (Oct. 2013), *available at* http://nces.ed.gov/pubs2014/2014011.pdf.

[7] *Id.* at 12.

profit colleges had monthly debt payments that exceed the Department's threshold of 12% of their income.[8] Given the propensity of graduates to have debt-to-earnings ratios of more than 12%, and the likelihood that graduates with high debt-to-income ratios would be found in low-paying fields, there is a substantial risk that many valuable degree programs at non-profit schools would close if the GE Rules applied to them. Moreover, the Department's own report, drawn from the experience of graduates in all sectors of higher education, demonstrates that the 8% threshold is contrary to the recognized patterns of student debt and earnings as published by the Department's statistical office and therefore is unreasonable.

These findings have been confirmed by Dr. Schneider's own research. Using the nationwide average loan debt for bachelor students of $29,400,[9] and the 5.42% interest rate the Department used for the 2012 Informational Rates amortized over 15 years,[10] as a mathematical matter, a graduate with a bachelor's degree would need a salary of $36,418 to keep the annual D/E Rate below the 8% passing score threshold. But, according to the Census Bureau, in 2012, 18 to 24-year-olds with bachelor's degrees around the country earned significantly less than that — an average of just $26,100.[11] Further, according to NPSAS, the average monthly payment for student debt is $312. Given average annual earnings of $26,100, young college graduates on average are spending 14% of their earnings on debt service — well above both the 8% passing threshold and 12% failing threshold that the Department has chosen.[12]

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[8] *Id.* at 12.

[9] *See* Mark Schneider, *Are Graduates from Public Universities Gainfully Employed? Analyzing Student Loan Debt and Gainful Employment*, pg. 1 (2014), *available at* http://www.aei.org/files/2014/05/13/-are-graduates-from-public-universities-gainfully-employed-analyzing-student-loan-debt-and-gainful-employment_155912583329.pdf.

[10] *See* Department of Education, *Methodology for 2012 GE Informational Rates and 2012 GE Informational Rates Variations Calculations*, pg. 4 (May 2014), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/2012-ge-info-rates-methodology050714.pdf.

[11] *See* US Census Bureau, *2012 Person Income Table of Contents*, Current Population Survey, *available at* www.census.gov/hhes/www/cpstables/032013/perinc/pinc04_000.htm.

[12] *See* Mark Schneider, *Are Graduates from Public Universities Gainfully Employed? Analyzing Student Loan Debt and Gainful Employment*, pg. 9, n. 14, (2014).

In a study authored by Dr. Schneider and published by AEI, Dr. Schneider applied the GE Rules' metrics to 520 programs in the Texas public university system that satisfied the Department's minimum cohort size of 30 students and for which there were earnings data to calculate D/E Rates.[13] Applying the D/E Rate metrics to these graduates using their wages one year after completion, Dr. Schneider found that more than 25% of public bachelor's degree programs across the state of Texas would be at risk of losing Title IV eligibility. Limiting the universe of graduates to those who had borrowed to finance their education, thereby more closely tracking the GE Rules which apply only to students receiving Title IV aid, a remarkable 54% of programs were at risk.[14] The Texas data demonstrates that many high-quality, low-cost degree programs offered by public institutions would fail the GE Rules' thresholds and again shows that the debt-to-earnings metrics are not a reasonable measure of program quality.

A recent report from the Brookings Institution largely confirmed Dr. Schneider's findings based on the Texas data. Brookings examined the debt and earnings data of roughly 3 million recent graduates with a bachelor's degree or higher across all sectors of higher education.[15] Brookings found that, on average, bachelor's degree graduates who borrowed to finance their education devote 14.1% of their earnings to pay their student debt in the first year, and that eight in ten such graduates devote more than 10% of their earnings to pay their educational debt in that year.[16]

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[13] *Id.* at 3.

[14] *Id.* at 4.

[15] Brad Hershbein, Benjamin Harris, & Melissa Kearney, *Major Decisions: Graduates' Earning Growth and Debt Repayment*, pg. 1 (2014), *available at* http://www.hamiltonproject.org/files/downloads_and_links/Major_Decisions_Part2_Graduates_Earnings_Growth_Debt_Repayment.pdf. The study analyzed data from the U.S. Census Bureau's American Community Surveys from 2009 through 2012. The survey samples approximately 1% of all U.S. residents each year. The study looked at earnings by undergraduate major among respondents who had completed a bachelor's degree or higher. The study also relied on the most-recent available student debt data from the Department's NPSAS study.

[16] *Id.* at 2.

The Brookings study also highlighted another important shortcoming in the GE Rules. The study found that, across all majors, earnings grew 65% in the first five years after graduation. The study also found that, "only a handful of majors have five-year growth rates under 25 percent."[17] This is largely consistent with Dr. Schneider's research in this area, and is a critical factor in evaluating whether the GE Rules choose an earnings period that is rational because they choose a period that is so soon after graduation.

For instance, the Texas data show that new graduates with bachelor's degrees in the relatively high-paying field of economics are, on average, spending 11% of their earnings to service their educational debt, and that 8 of the 10 economics programs with reportable data would fail to meet the 8% standard. The fact that the majority of economics programs, whose graduates typically enjoy higher earnings than graduates from other fields, would struggle to pass the Department's D/E Rates is further evidence that the GE Rules employ a measurement period that begins an unreasonably short time period after graduation. However, Texas maintains long-term wage data as well, and calculating the debt-to-earnings ratios using wages later in these graduates' careers demonstrates that the measurement period is arbitrary. For example, 10 years after graduation, economics graduates across the state are only devoting 5% of their wages to their educational debt service, well below the 8% threshold. Thus, there is strong sector-based evidence that the GE Rules fail to take into account significant increases in earnings that reflect the value of a program by applying the D/E Rates to program graduates so soon after they have entered the job market.

None of these other studies precisely match the methodology that the Department uses in calculating the D/E Rates (nor could they). And on many points, Dr. Schneider was purposefully

[17] *Id.* at 3.

conservative in his analysis, employing parameters that are more strict than those prescribed under the GE Rules.[18] But this does not diminish their value or relevance, particularly when contrasted with the Department's misplaced reliance on mortgage industry standards. For example, in both the Texas study and the Brookings study, graduate earnings were measured one year after graduation, which is highly relevant given that student earnings are measured beginning as soon as 18 months after graduation under the GE Rules. Thus, the Texas and Brookings studies show that 18-36 months is simply too soon to take a snapshot of a student's career or measure the value of an education, and there is no outside source (including any data source) that would suggest that this timeframe is appropriate or is based on any economic analysis.

It is standard, even essential, practice for researchers and statisticians to build on the work of others and test findings from other studies using different statistical methods and data sets, to assess the reliability and robustness of findings. The Department has chosen to do just the opposite. It has taken pains to distinguish and dismiss the results of these other studies, *see* 79 Fed. Reg. 64921-22, that draw their data from the world of higher education, which is directly relevant, and instead turned to mortgage-related studies that are not germane to the study of student debt and not germane to a population of graduates, most of whom have not taken a mortgage loan to buy a home. This approach to research and statistical analysis is unreasonable, and potentially misleading.

[18] *See* Mark Schneider *Are Graduates from Public Universities Gainfully Employed? Analyzing Student Loan Debt and Gainful Employment*, pg. 9, n. 12 (2014). For example, in the Texas study, Dr. Schneider used the average earnings of program graduates who had been employed for at least three quarters of the first year after graduation, excluding those students who had been unable to find work for that time. The GE Rules do not contain a similar exception. Excluding those students would undoubtedly raise the average earnings of program graduates, and improve the likelihood that a program would pass the D/E Rates.

II. <u>The GE Rules Are Unreasonable Because they Measure Student Characteristics, Not Student Outcomes.</u>

The Department's statistical presentation in its GE Commentary is seriously flawed in numerous respects and discredits the Department's claim that the GE Rules measure student outcomes rather than student demographics or other characteristics. The fundamental flaws include the following:

1. The Department failed to employ its own well-established set of student risk factors, as identified by NCES 20 years ago and used in a large number of research papers, in analyzing whether particular student characteristics affect outcomes such as the D/E Rates.[19] These risk factors, which include characteristics such as whether the student is working full-time, or whether the student has dependents, have a known impact across a range of student outcomes.[20] In addition, these factors are especially common among students who enroll in programs offered by community colleges and for-profit institutions subject to the GE Rules. It is inexplicable that the Department did not employ them here in a systematic way to build on that base of knowledge. The selective use and omission of the known risk factors in this case runs counter to basic, reliable research and data analytics in this field.

2. The Department ran a number of single variable regression analyses to measure a subject that requires a multivariate analysis. *See* 79 Fed. Reg. 65043. The single variable models were inappropriate because they cannot measure what the Department was trying to

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[19] National Center for Education Statistics, *Profile of Undergraduates in U.S. Postsecondary Education Institutions: 1992-93*, pg. 4 (1995), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=96237; *see also*, Chris Ross & Nigel Gault, *Gainful Employment Rule Measures the Characteristics of the Students, Not the Effectiveness of the Programs* (May 2014). The NCES study identified the following risk factors: delay in enrollment after high school; part time enrollment; financial independence; students with dependents; students working full time; students who are single parents; and students who have not graduated high school.

[20] *See, e.g.,* Susan Choy & Dennis Carroll, *Ten Years After College: Comparing the Employment Experiences of 1992–93 Bachelor's Degree Recipients With Academic and Career-Oriented Majors, National Center for Education Statistics* (2008); Jonathan Guryan & Matthew Thompson, *Report on the Proposed Gainful Employment Regulation*, Charles River Associates (2014).

measure.[21] This analysis, presented in Table 2.4 addressing the individual passing, zone, and failing rates with respect to various individual characteristics, and Tables 2.5 through 2.11 disaggregating by quartiles various individual characteristics, are misleading and statistically unsound. *See* 79 Fed. Reg. 65045-46, 65052. These charts do not address the collective effect of the student demographic factors, and thus do not even purport to answer the question of the collective effect of student demographics on the D/E Rates.

3. When the Department did run its multivariate analyses in response to the critique of its prior models, it included variables that are unrelated to student demographics and other student characteristics, such as "institutional characteristics," even though the question, as framed by the Department, was to examine "the relationship between student demographics and program results." *See* 79 Fed. Reg. 65052. This has to skew the results of any analysis intended to measure the effect of student characteristics. It also adds "noise" to the model in the sense that it introduces irrelevant factors that dilute the effects of the independent variables measuring the conditions of interest. Again, this is contrary to basic research and data analysis principles. Given the robust data available to the Department, it could have easily run a multivariate analysis based solely on student demographics — which was the stated purpose of the statistical exercise. *See* 79 Fed. Reg. 65043.

4. Finally, while the Department's multivariate analysis explained 44% of the variance in the D/E Rates,[22] the Department entirely failed to address other factors that would be expected to

[21] The standard statistical methodology employed to determine the collective effect of certain independent variables (such as student characteristics) on a dependent variable (such as D/E Rates) is called multivariate regression analysis. *See* James H. Stock & Mark W. Watson, *Introduction to Econometrics: First Edition*, Addison-Wesley: Boston (2003), at 149-152.

[22] The 44% is expressed as the "R-Squared," which captures the variance attributable to the collective effect of the independent variables that the Department measured. The effect of each independent variable is expressed as a "coefficient," such as the coefficients set forth in the Department's chart at Table 2.12. 79 Fed. Reg. 65,053. It would be mistaken to focus on the magnitude of individual coefficients for the purpose of these analyses, since the issue is to evaluate the collective effect of the student variables as reflected in the R-Squared.

affect student outcomes, such as local and national economic trends, that would help explain the bulk of the variation in D/E Rates. In short, the Department's statistical model is "underspecified." Given the consequences for programs and students derived from this statistical model, this is an arbitrary and inaccurate way to measure program effectiveness.

In contrast, the analyses conducted by Charles River Associates and the Parthenon Group, which were submitted to the Department during the comment period, used much more sophisticated models that identified statistically significant effects for a range of additional variables that the Department failed to consider. The Department could have replicated their analyses in order to test their results, but the Department chose not to do so. Thus, the Department's analysis was unreasonably limited.

In sum, as a result of these flaws in the Department's data analysis, the Department's data sets are materially incomplete, and its findings and conclusions are irrational and inaccurate. Perhaps the best evidence of this conclusion is the fact that the Department is taking the opposite approach in its efforts to create a so-called "ratings system" for all colleges, including public and non-profit institutions. While these efforts are still under way, the Department has made very clear that, when it comes to measuring outcomes at other colleges, it will use refined metrics, such as "first-generation college status," which account for the nature of their student populations while also considering school characteristics, such as institutional mission and admissions rate.[23] However, when it comes to the GE Rules to be applied largely to proprietary colleges, the Department rejects its own rationale for developing metrics that reflect the character of the student body and the institution.

[23] Department of Education, *A New System of College Ratings - Invitation to Comment*, pgs. 8, 15. (Dec. 2014), *available at* http://www2.ed.gov/documents/college-affordability/framework-invitation-comment.pdf.

III. The Department Is Overlooking Better Measures of Program Quality and Using a Formula that Condemns Programs at Proprietary Colleges to Failure.

By focusing exclusively on the D/E Rates to measure program quality, the Department has improperly eschewed well-accepted and well-established measures of student outcomes and program quality, such as student retention or graduation rates or placement rates. Instead, the Department has devised a new debt-to-earnings formula that, as a mathematical matter, is stacked against programs offered by proprietary colleges such as the APC members. For anyone familiar with statistics and higher education data, and who closely examined the individual elements of the D/E Rate formulas, it will come as no surprise that the Department has projected that 99% of the programs that will lose eligibility under the GE Rules are from the proprietary sector, with less than 1% from the public and non-profit sectors. *See* 79 Fed. Reg. 65064.

Several components of the Rules directly disadvantage proprietary colleges. First, the Department excludes students who do not receive Title IV student aid. This will drive up program debt levels and lower the graduate earnings used to calculate the D/E Rates because it removes the most affluent students from the population (those who do not need to borrow to finance their education). These more affluent students, empirically, are often higher performing. The earnings of the remaining less affluent graduates will not reflect, and indeed will be lower than, the earnings of the entire population of graduates. In reality, these students should count as students with loan amounts of zero in the calculation of the D/E Rates, which would reduce those rates, but instead they are simply not included in the calculation. The Department has not provided any studies or data to attempt to quantify the impact of this change — but it will certainly increase the number of failing programs.

Second, the Department changed the passing rate thresholds to make them more demanding. Under the GE Rules as initially published in 2011, a program passed if it had an

annual D/E Rate below 12% or a discretionary D/E Rate below 30%. *See* 76 Fed. Reg. 34448. Changing thresholds is no mere tweak. By moving those thresholds to the 8% and 20% levels in the current GE Rules, the Department effectively requires program graduates to increase their earnings by 50% to pass the same test. If median earnings of $25,000 were sufficient for a program to pass the rates under the prior rules, those earnings now need to be $37,500. Despite its claims to the contrary, the Department has failed to adequately explain why such a dramatic increase in the level of graduate earnings required to pass the GE Rules is justified, especially in light of the well-known data on educational debt and graduate earnings from NPSAS and the Baccalaureate and Beyond Longitudinal Study, as discussed above (page 4 and footnotes 2-3).

IV. <u>The GE Rules Apply So Selectively that They Do Not Serve the Department's Stated Goal of Protecting Students from Low-Quality Programs that Leave Students with Unmanageable Debt and Therefore Are Unreasonable.</u>

By setting a minimum cohort size of 30 graduates for a program to be subject to the D/E Rates, the Department is removing from scrutiny a large number of programs, particularly at public institutions with low graduation rates, high numbers of student defaulters, and high default rates.[24] In some circumstances, the design of the D/E Rates actually rewards colleges and programs with low graduation rates. Based on publicly-available data for all institutions that participate in the federal student financial aid programs in the Department's Integrated Postsecondary Education Data System ("IPEDS"),[25] the Department's decision to base the rates on a subset of students who receive Title IV funds and set a minimum cohort size of 30 graduates means that the D/E Rates will never be calculated for approximately 61% of non-degree

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[24] The Rules only apply the D/E Rates to programs with 30 graduates over the two-year cohort period. If a program does not have 30 graduates, the cohort period is extended to four years and the rates can be applied to programs with 30 graduates over the four-year period. Programs that do not have 30 graduates over a four-year period are not required to pass the D/E Rates because they are not measured.

[25] *See* http://nces.ed.gov/ipeds/about/.

programs at community colleges (18,128 of 29,585) based on a four-year cohort.[26] This means that roughly 61% of all GE programs at community colleges will be permanently exempted from the D/E Rate calculations because they just do not graduate enough students to meet the 30-graduate threshold, even when the cohort period is expanded to four years. This flies in the face of ED's assertion that the GE Rules are intended to protect students. Many of the institutions whose graduation rates are so low that their programs avoid the 30-person requirement also have high default rates and large numbers of defaulters.[27]

The Department's use of a median debt figure is crucial to understand how this works. The GE formula captures students who receive Federal Pell Grants but do not take out federal student loans. Such students are counted in the D/E Rates with a debt level of zero, which helps bring down the median debt. Indeed, any program in which more than one-half of the graduates receive Federal Pell Grants but not Title IV loans is assured of passage because its median debt will be zero. Thus the Rule automatically exempts any program in which fewer than 50% of the students borrowed. This is the case regardless of whether the students who actually do take out loans manage to graduate, obtain jobs or default on their loans. The Rules' use of the median debt effectively exempts programs even if they have a high number of defaulters and/or high default rates, undermining the Department's argument that the Rules are intended to protect borrowers. This provides a boon for community colleges or other public institutions that receive

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[26] Dr. Schneider reached this result by sorting the IPEDS 2012 completion data to identify the non-degree programs at community colleges and then identify programs in which there were fewer than 8 graduates reported in that year. The number of graduates was multiplied by 4 to correspond with the 4-year cohort in the GE Rules. This may result in a slight overestimate (since 8 x 4 equals 32), but it is the best approximation available with the single-year IPEDS data.

[27] *See* Andrew Gillian, *In Debt and In the Dark*, Education Sector (July 2013), *available at* http://www.educationsector.org/publications/debt-and-dark-it%E2%80%99s-time-better-information-student-loan-defaults. According to the study, 188 public 2-year colleges where more than 100 students have defaulted on their federal loans have default rates higher than their graduation rates — that is, the students are more likely to default on their loans than they are to graduate. *Id.* at 11-12. Yet as noted above most of the programs at these schools will not graduate enough students to trigger the calculation of D/E Rates to be held accountable under the GE Rules.

government subsidies to hold down their tuition so that a large number of students can manage with a Federal Pell Grant alone without taking out loans. This simultaneously places a significantly higher burden on proprietary colleges that do not enjoy such government subsidies.[28]

The Department has provided no indication that it actually examined this aspect of the GE Rules or estimated the total number of GE programs that would be exempted from the Rules based on the use of the 30-person cohort and the median debt. This is a glaring omission in any reasonable approach to research and statistical analysis of this subject. It is hard to fathom the rationale for a set of Rules that will *never* measure roughly 60% of the covered programs.

The design of the D/E Rate formulas, and the decision to omit other well-known outcome measures such as retention rates, graduation rates, and placement rates, will have a negative effect on programs at proprietary colleges, while shielding programs at public institutions and community colleges from scrutiny under the GE Rules.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for summary judgment on the grounds that the Department's GE Rules, and particularly the thresholds the Department has chosen for its D/E Rates, are arbitrary, unreasonable, and lack any reasoned or evidentiary basis.

[28] The effects on private not-for-profit institutions would likely be as, if not more, severe.

Respectfully submitted,

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