Comments of the Career College Association

Docket ED-2010-OPE-0012

September 9, 2010

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Ms. Jessica Finkel
United States Department of Education
1990 K Street NW
Room 8031
Washington, DC 20006-8502

Via: Federal eRulemaking Portal

Re: Docket ED-2010-OPE-0012

Dear Ms. Finkel:

The Career College Association, on behalf of its 1,800 members and the 3.2 million students served by private sector institutions annually, thanks you for this opportunity to comment on the Notice of Proposed Rulemaking (NPRM) defining gainful employment published in the *Federal Register* on July 26, 2010.

Our comments are divided into three parts:

1. Our legal argument that the Department of Education lacks authority to promulgate the proposed regulations, which are not authorized by the Higher Education Act, conflict with the HEA, violate due process, and are arbitrary and capricious;
2. Comments on the preamble and proposed language contained in the NPRM; and
3. An alternative metric proposal, if in fact the Secretary continues forth with an unauthorized final rule.

The comments follow the discussion in the preamble to the proposed regulation in order.

We look forward to working with the Department throughout this regulatory process. Please feel free to contact me if you have any questions or if I can provide additional information. I can be reached at HarrisM@career.org or 202-336-6754.

Sincerely,

Harris N. Miller
President and CEO
Career College Association

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Part One: The Department Lacks Authority To Promulgate The Proposed Regulations, Which Are Not Authorized By The HEA, Conflict With The HEA, Violate Due Process, And Are Arbitrary And Capricious

I. Summary Of Legal Arguments

The Career College Association (CCA) strongly believes that the Department of Education lacks authority to promulgate the "gainful employment" regulations proposed in the notice of proposed rulemaking (NPRM) issued on July 26, 2010. *See* 75 Fed. Reg. 43616 (July 26, 2010). The proposed regulations are invalid—and thus beyond the Department's authority—for four independent reasons:

First, the proposed regulations are not authorized by the Higher Education Act (HEA) and conflict with the Act. The Department proposes to enact a new set of Title IV financial assistance eligibility requirements for proprietary institutions and certain vocational institutions. The proposed regulations would impose new limits on student debt in the form of maximum debt-to-income ratios and required loan repayment rates for recent graduates of programs at those institutions. By regulating debt levels, the proposed regulations would also have the effect of regulating tuition costs, a primary factor in determining debt levels. But Congress has neither imposed these debt and tuition limits nor authorized the Department to adopt them unilaterally. In the HEA, Congress has carefully and comprehensively addressed the Title IV financial aid eligibility requirements for institutions, programs, and students. It has specifically addressed maximum student debt levels and institutional loan default rates. But Congress has declined to impose the new requirements the Department proposes, and it has not granted the Department the authority to override—or even augment—the existing requirements by regulation. Implicitly recognizing that it is acting beyond any express congressional authorization, the Department purports to impose its new eligibility requirements as part of a convoluted "definition" of the term "gainful employment." But the Department's approach cannot be squared with the plain meaning of that term. Whether a job itself is "gainful" has no relation to student debt levels and loan default rates. "Gainful" employment is simply employment that pays. The new definition of "gainful employment" that the Department proposes is thus contrary not only to the entire scheme of the HEA but also to the plain language of the statutory provision on which the Department relies.

Second, the proposed regulations violate due process because they do not permit regulated institutions to access the data underlying the Department's determinations. Although the regulations allow the Department to terminate a program's eligibility for federal loans if its graduates' debt-to-income ratio is above a certain limit, the Department is forbidden from sharing with programs the critical data supporting such a determination. Specifically, the primary information that the Department uses to calculate debt-to-income ratios is the average annual earnings of a program's graduates. Yet, the Department will not provide programs with the individual earnings data used to calculate that average. The Department's failure to do so would deprive programs of a meaningful opportunity to contest adverse determinations by the Department.

Third, the proposed regulations are arbitrary and capricious and contrary to law because they impose new consequences based on past decisions by institutions. Although Congress has previously recognized the need to make significant changes to Title IV eligibility prospective, the proposed regulations would render programs ineligible based on *past years'* debt-to-income ratios and loan repayment rates—figures that turn directly on institutions' past decisions regarding tuition prices. It is impermissible to impose new consequences on past actions without express congressional authorization or, at a minimum, a reasonable explanation for doing so.

Finally, the proposed regulations are arbitrary and capricious—and deeply flawed—in numerous additional respects. Agencies have an obligation to engage in reasoned decision-making. An agency must consider the relevant factors and adopt regulations that are supported by the available evidence. Here, for all of the reasons the Department lacks authority to promulgate the proposed regulations and for all of the reasons set forth in Part 2 of these Comments, the proposed regulations fail to meet this standard.

II. Background

A. Statutory Background

Title IV of the Higher Education Act of 1965 as amended (HEA) provides a comprehensive program of federal financial assistance for students seeking postsecondary education and the many colleges and universities providing such an education. *See* 20 U.S.C. §§ 1070-1099(d). To ensure that its students are eligible for this assistance—and to receive any funding itself—an educational institution must meet an array of requirements mandated by Congress.

A threshold requirement for ensuring student eligibility for financial assistance is that an institution fall within the statutory definition of an "institution of higher education."[1] Section 1002 of Title 20 sets forth the definition of an institution of higher education "for purposes of student assistance programs." It provides that "the term 'institution of higher education' for purposes of [Title] IV of this chapter … includes, in addition to the institutions covered by the definition in section 1001 of this title," both "a proprietary institution of higher education" and "a postsecondary vocational institution" as defined further in the section. *Id.* § 1002(a)(1).

Section 1002(b) defines a "proprietary" institution as follows:

> For the purpose of this section, the term "proprietary institution of higher education" means a school that—

[1] *See* 20 U.S.C. § 1070 ("It is the purpose of this part, to assist in making available the benefits of postsecondary education to eligible students (defined in accordance with section 1091 of this title) in *institutions of higher education* …." (emphasis added)); *id.* § 1091(a) ("In order to receive any grant, loan, or work assistance under this subchapter …, a student must … be enrolled or accepted for enrollment in a degree, certificate, or other program … leading to a recognized educational credential at an *institution of higher education* that is an eligible institution in accordance with the provisions of section 1094 of this title …." (emphasis added)); *id.* § 1094(a) ("In order to be an eligible institution for the purposes of any program authorized under this subchapter …, an institution must be an *institution of higher education* or an eligible institution (as that term is defined for the purpose of that program") …. (emphasis added)).

> (A) *provides an eligible program of training to prepare students for gainful employment in a recognized occupation*;
>
> (B) meets the requirements of paragraphs (1) and (2) of section 1001(a) of this title;
>
> (C) does not meet the requirement of paragraph (4) of section 1001(a) of this title;
>
> (D) is accredited by a nationally recognized accrediting agency or association recognized by the Secretary pursuant to part G of [Title] IV of this chapter; and
>
> (E) has been in existence for at least 2 years.

Id. § 1002(b)(1) (emphasis added).

Of principal importance for present purposes is the highlighted language above: "*provides an eligible program of training to prepare students for gainful employment in a recognized occupation.*" 20 U.S.C. § 1002(b)(1)(A) (emphasis added). This is the statutory basis for the Department's proposed gainful employment regulation. That language also appears in § 1002(c)(1)(A), which defines a "postsecondary vocational" institution, and in § 1001(b)(1), which defines certain public or nonprofit institutions of higher learning that do not offer a bachelor's degree (nor provide at least two years of credit toward a bachelor's degree) but do offer a program of not less than one year.

Once a school has qualified as an institution of higher education, it must adhere to numerous requirements imposed on participating institutions. *See infra* § III(A). Additionally, each program at the school must satisfy a separate set of congressionally mandated criteria. These criteria consist primarily of clock hour and weeks of instruction requirements based on the level of instruction (associate degree, graduate, or professional degree). *See* 20 U.S.C. § 1088(b).

B. The Proposed Regulations

In the NPRM, the Department announced potential new program requirements that for-profit (and certain nonprofit and public) postsecondary institutions must meet before students in the affected programs can access federal student financial aid. *See* 75 Fed. Reg. 43616. In the NPRM, the Department acknowledged the critical role of these institutions. "For-profit postsecondary education, along with occupationally specific training at other institutions, has long played an important role in the nation's system of postsecondary education and training. Many of the institutions offering these programs have recently pioneered new approaches to enrolling, teaching, and graduating students." *Id.* at 43617. Indeed, these programs "support[] President Obama's goal of leading the world in the percentage of college graduates by 2020," and that goal "cannot be achieved without a healthy and productive higher education for-profit sector." *Id.* Nonetheless, the NPRM singled out these institutions for onerous requirements that will substantially affect the circumstances under which their students can obtain federal aid.

The proposed regulations interpret the term "gainful employment" in the definitions of non-degree nonprofit or public institutions, 20 U.S.C. § 1001(b)(1), proprietary institutions, *id.* § 1002(b)(1)(A)(i), and vocational institutions, *id.* § 1002(c)(1)(A). They would import into that term two new calculations—a debt-to-income ratio and a repayment-rate test—that purportedly measure whether students enrolled in each program at those institutions have too much student-loan debt. As explained in detail below, if a program fails to score well on both calculations, its financial aid eligibility will be restricted or even terminated. If that occurs, students in the program at issue can receive no federal student financial aid.

1. The Debt-To-Income And Repayment-Rate Measures

Under the proposed regulations, "the Department would assess whether a program provides training that leads to gainful employment by applying two tests: One test based upon debt-to-income ratios and the other test based upon repayment rates." 75 Fed. Reg. at 43618.

The debt-to-income test itself has two alternative formulas. *See* 34 C.F.R. § 668.7(c).[2] One formula measures the ratio of annual loan repayments for a program's graduates from the last three years compared to the average annual earnings of those graduates. *Id.* § 668.7(c)(1)(ii). The other debt-to-income formula measures the ratio of annual loan repayments for a program's graduates from the last three years compared to the average annual discretionary income of those graduates. *Id.* § 668.7(c)(1)(i).[3] To determine annual loan repayments, the Secretary calculates the "median loan debt of students who completed the program at the institution during [the last three years]" and then computes "an annual loan payment based on a 10-year repayment schedule and the current annual interest rate on Federal Direct Unsubsidized Loans." *Id.* § 668.7(c)(2). The average annual earnings of graduates is obtained from the Social Security Administration ("SSA") or another federal agency. *Id.* § 668.7(c)(3); *see* 75 Fed. Reg. at 43623. The institution is forbidden from "review[ing] the wage information for specific program graduates." 75 Fed. Reg. at 43629.[4]

The repayment-rate test evaluates the percentage of loans from the Federal Family Education Loan ("FFEL")[5] and William D. Ford Federal Direct Loan Programs that have been repaid by a program's enrollees:

> The rate would be based on the total amount of loans repaid divided by the original outstanding balance of all loans entering repayment in the prior four Federal fiscal years[.] A loan would be counted as being repaid if the

[2] In these Comments, citations to 34 C.F.R. §§ 668.7, 668.13 & 668.90 are to the regulations *proposed* by the Department. *See* 75 Fed. Reg. at 43638-43640.

[3] The proposed regulations deem this period the 3YP. However, if data are available, institutions may also attempt to demonstrate to the Secretary that the three-year period before 3YP should be used instead. 34 C.F.R. § 668.7(c)(3). The proposed regulations deem this period the P3YP.

[4] An institution, however, may seek to supply its own data if it is dissatisfied with the average annual earnings figure supplied by SSA or other agency. 34 C.F.R. § 668.90(a)(3)(vii).

[5] The FFEL Program has recently been terminated by Congress. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074. No new FFEL loans may be disbursed after June 30, 2010. *Id.*

> borrower (1) made loan payments during the most recent fiscal year that reduced the outstanding principal balance, (2) made qualifying payments on the loan under the Public Service Loan Forgiveness Program, as provided in 34 CFR 685.219(c), or (3) paid the loan in full. Other borrowers who are meeting their legal obligations but are not actively repaying their loans, such as those in deferment or forbearance, are not considered to be in repayment.

75 Fed. Reg. at 43619; *see also* 34 C.F.R. § 668.7(b). The repayment rate considers all students who have enrolled in a program in the last four years, not just those who graduated. *Id.*

2. The Benchmarks For "Gainful Employment"

As a general matter, a program fulfills the "gainful employment" requirement if it satisfies one of the three following criteria: (1) it has a repayment rate of at least 35 percent; (2) it has a debt-to-income ratio of 12 percent or less (under the income measure) or 30 percent or less (under the discretionary income measure) for 3YP; or (3) it has a debt-to-income ratio of 8 percent or less (under the income measure) or 20 percent or less (under the discretionary income measure) for P3YP. 34 C.F.R. § 668.7(a). A program is "ineligible" if it fails to meet these criteria. *Id.* § 668.7(f). In that case, it "may not disburse any title IV, HEA program funds to students who begin attending that program after [the program has been deemed ineligible]." *Id.*

A program is placed on "restricted" status if it has a repayment rate of less than 45 percent and a debt-to-income ratio of more than 8 percent (under the income measure) or more than 20 percent (under the discretionary income measure). *Id.* § 668.7(a)(2). If a program is "restricted," it must [1] "provide annually to the Secretary" documentation from employers that its curriculum "aligns with recognized occupations at those employers' businesses" and that "there are projected job vacancies or expected demand for those occupations at those businesses," [2] make certain public disclosures about its students' debt levels, and, most importantly, [3] limit "HEA program recipients in that program to the average number enrolled during the prior three award years." *Id.* § 668.7(e).

3. Regulation Of Tuition Prices

The proposed regulations thus impose two new types of eligibility requirements related to student debt levels. Those debt limitations, however, are also effectively limitations on tuition prices. A principal factor in determining student debt levels is the cost of tuition. That factor, moreover, is the only one within the direct control of institutions. An institution that does not meet the new debt requirements has only one option: lower tuition in an attempt to lower student debt levels. As a result, the proposed regulations would have the effect of regulating tuition prices.

4. Regulation Of Additional Programs

Finally, under the proposed regulations, when an institution seeks to "offer[] an additional program that is subject to" the gainful-employment rules, the institution must submit an application for the Secretary's approval. 34 C.F.R. § 668.7(g)(1). The application must provide (1) documentation of approval from an accrediting agency if the new program entails a "substantive change;" (2) projections of student enrollment in the program for the next five years; and (3) documentation from employers not affiliated with the institution "affirming that the curriculum of the additional program aligns with recognized occupations at those employers' businesses, and that there are projected job vacancies or expected demand for those occupations at those businesses." *Id.* The Secretary may also "restrict" any approval of a program "based on the projected growth estimates provided by the institution and the demonstrated ability of the institution to offer programs subject to this section." *Id.* § 668.7(g)(2).

III. The Department Lacks Authority To Promulgate The Proposed "Gainful Employment" Regulations, Which Conflict With The Higher Education Act

The Department should abandon the proposed regulations because it lacks authority to promulgate them. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[A]n agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Here, Congress has not granted the Department the authority to condition eligibility for federal financial assistance on satisfying prescribed debt-to-income ratios or loan "repayment" rates distinct from the "default rates" established in the Act. To the contrary, Congress has enacted a comprehensive scheme of eligibility requirements that the Department lacks authority to unilaterally augment. The proposed regulations are not only beyond the Department's authority, but they also conflict with the text and purposes of the HEA.

A. Absent Express And Specific Authorization, The Department Cannot Alter The Comprehensive Set Of Financial Aid Eligibility Requirements Imposed By Congress

Congress has enacted a comprehensive scheme of student aid eligibility requirements. It has addressed the problem of excess student debt through maximum default rates, borrowing caps, and debt relief and management. Congress has not, however, imposed maximum debt-to-income ratios or the kind of loan repayment rate requirements the Department seeks to implement. Absent specific express authority, the Department cannot augment the regime enacted by Congress with new requirements that have no grounding in statute.

An agency may not promulgate regulations that alter a legal regime enacted by Congress absent express and specific authorization. Thus, the D.C. Circuit has held that an agency cannot use general rulemaking authority "to trump … specific provisions" of a statute governing the issue the agency seeks to address by regulation. *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). For example, general rulemaking authority cannot be invoked "as justification for adding new factors to a list of statutorily specified ones." *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). As the D.C. Circuit has explained, this is true even where an agency is entitled to deference in its interpretation of the relevant statute:

> For example, if Congress banned the importation of apples, oranges, and bananas from a particular country, the canon of *expresio unius est exclusio alterius* might well indicate that Congress *did not* intend to ban the importation of grapefruits. In

> that event, an agency decision to ban grapefruits would be contrary to Congress' specific intent.

Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir. 1989).

These principles apply here because Congress has enacted a comprehensive statutory scheme governing financial aid eligibility but has declined to impose the requirements the Department seeks to put in place.

1. General Requirements For Institutions

There are numerous requirements that an institution must meet in order to ensure that its students are eligible for federal financial assistance. For a proprietary institution of higher education to qualify for participation, it must admit only students who have graduated from a secondary school (or the equivalent). 20 U.S.C. § 1001(a)(1). The institution also must be authorized as a matter of state law to provide a program of education in the state where it is located. *Id.* § 1001(a)(2). The institution must also be accredited by a nationally recognized accrediting agency, *id.* § 1002(b)(1)(D), and have been in existence for at least two years, *id.* § 1002(b)(1)(E). Proprietary and vocational schools also must meet additional enrollment and management standards in order to fall within the definition of an "institution of higher learning." *See id.* §§ 1002(a)(3) (limitations on "correspondence courses"), 1002(a)(4) (limitations on bankruptcy filings).

In addition to satisfying these threshold criteria, institutions also must comply with a host of other requirements in order to participate in federal student aid programs. For example, Congress mandated that "[f]or purposes of qualifying institutions of higher education for participation in programs under [Title IV]," the Secretary also must determine the "administrative capability and financial responsibility of an institution of higher education." *Id.* § 1099c(a). Congress prohibited discrimination by "[i]nstitutions of higher education receiving Federal financial assistance." *Id.* § 1011. Section 1094 alone mandates that institutions comply with *twenty-nine separate requirements*, ranging from adopting certain health and safety programs to imposing restrictions on incentive pay. *See*, *e.g.*, 20 U.S.C. §§ 1094(a)(10) (required drug abuse prevention program), 1094(a)(12) (mandated campus security policy), 1094(a)(20) (prohibiting incentive pay based on success in securing enrollments or financial aid), & 1094(a)(26) (disclosure requirements to victims of crimes perpetrated by students).

2. Program Requirements

Once a college is qualified as an institution of higher education for the purposes of financial assistance, each program at the institution must satisfy an additional set of congressionally enumerated requirements. In general, to be eligible for Title IV assistance, a program must require a specified number of hours of study. 20 U.S.C. § 1088(b)(1).

3. Existing Debt And Cost Limitations

Among the scores of eligibility requirements imposed by Congress are a number of provisions specifically addressing student loan debt and, the closely related variable, the cost of attending schools.

a. Cohort Default Rates

Of critical importance here, Congress mandated that institutions not exceed certain default rates. The HEA specifies that postsecondary institutions will become ineligible for certain federal aid programs if they exceed certain "cohort default rates" related to federal student loans.[6] For example, an institution "whose cohort default rate [for FFEL or Direct loans] is equal to or greater than [25 percent (or 30 percent after fiscal year 2011)] for each of the last three most recent fiscal years for which data are available shall not be eligible to participate [in the Pell or Direct programs] for the fiscal year for which the determination is made and for the two succeeding fiscal years." 20 U.S.C. § 1085(a)(2); *see also id.* §§ 1070a(j)(1), 1087c(d). Similarly, "any institution with a cohort default rate [for Perkins loans] … that equals or exceeds 50 percent for each of the 3 most recent years for which data are available shall not be eligible to participate in [the Perkins program] for the fiscal year for which the determination is made and the 2 succeeding fiscal years." 20 U.S.C. § 1087bb(e)(3)(A).

Congress also specified parameters for calculating "cohort default rates." The term "default" generally "includes only such defaults as have existed for" 270 days for loans payable monthly and 330 days for loans payable less frequently. *Id.* § 1085(*l*); *see also id.* § 1087bb(g)(2) (for Perkins loans, 240 days for loans payable monthly and 270 days for loans payable quarterly). By definition, students in forbearance or deferral, moreover, are not in "default" even though they are not actively repaying their loans.

Congress also built in a safe harbor for institutions whose high cohort default rates are excusable due to "exceptional mitigating circumstances." 20 U.S.C. § 1085(a)(2)(A), (a)(3). Those institutions continue to have access to federal student aid programs. In particular, "an institution of higher education shall be treated as having exceptional mitigating circumstances" if at least two-thirds of its students are eligible for certain Pell Grants or have an income below the poverty level. *Id.* § 1085(a)(5)(A)(i).[7]

b. Borrowing Caps

In addition, each of the individual federal assistance programs imposes a cap on the amount of money that can be borrowed each year and in the aggregate by a single student. There is a base cap on the combined amount of Stafford subsidized and unsubsidized loans that a student may take out in a single year: $3,500 for the first year of undergraduate education, $4,500 for the second year, $5,500 each year after the second year, and $8,500 for graduate and professional studies. *See* 20 U.S.C. §§ 1078(b)(1)(A), 1078-8(d)(1). Likewise, there is a base cap on the combined amount of Stafford subsidized and unsubsidized loans that a student may take out in the aggregate: $23,000 for undergraduates and $65,500 for graduate or professional students. *Id.*

[6] The definition of "cohort default rate" varies by program. For the Perkins Loan Program, for instance, it generally means "for any award year in which 30 or more current and former students at the institution enter repayment on loans [under the Perkins Loan Program] (received for attendance at the institution), the percentage of those current and former students who enter repayment on such loans (received for attendance at that institution) in that award year who default before the end of the following award year." 20 U.S.C. § 1087bb(g)(1); *see also id.* § 1085(m)(1)(A).

[7] In addition to meeting either of those criteria, the institution must meet certain completion or placement rates. 20 U.S.C. § 1085(a)(5)(A)(ii), (iii).

§§ 1078(b)(1)(B), 1078-8(d)(1). On top of those limits, students may take out additional unsubsidized Stafford loans: $12,000 annually for graduate and professional students, $2,000 annually for dependent undergraduate students, and $6,000 annually for independent undergraduate students during their first two years and $7,000 annually thereafter. *Id.* § 1078-8(d)(2), (3), (4). In total, dependent undergraduate students may take out no more than $31,000 in Stafford loans, while independent undergraduates are limited to $57,500. *Id.* § 1078-8(d)(3), (4). As for the Perkins loan program, undergraduates are limited to $5,500 annually, while graduate and professional students are limited to $8,000 annually. *Id.* § 1087dd(a)(2)(A). In the aggregate, graduate and professional students are limited to $60,000 in Perkins loans; students who have already successfully completed two years of a program of education leading to a bachelor's degree are limited to $27,500; and other students are limited to $11,000. *Id.* § 1087dd(a)(2)(B). Thus, rather than compare debt to income, Congress has elected to consider debt levels alone.

c. Individual Debt Relief

Congress has also taken specific, measured steps to relieve individual borrowers of burdensome student loans. The HEA provides for debt relief for individual borrowers in the form of forbearance and income based repayment programs. Most recently—just three years ago—Congress passed legislation recognizing the need for flexibility to address income disparities and potentially high debt-to-earnings ratios of graduates. As part of the College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007), Congress created the Income-Based Repayment program, which caps monthly loan payments at a percentage of the borrower's income during periods of financial hardship. *See* 20 U.S.C. § 1098e. In fact, Congress amended the Income-Based Repayment program just this year. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2213, 124 Stat. 1029, 1081. If Congress had believed that students at proprietary and vocational institutions needed further safeguards from excessive debt—such as those in the Department's proposal—it surely would have included them at that time. It did not, and the Department should not override Congress's judgment.

Individual loan programs similarly provide debt relief. For the William D. Ford Federal Direct Loan Program, Congress outlined five potential repayment plans for student borrowers. *See* 20 U.S.C. § 1087e(d). These repayment plan options include standard repayment, graduated repayment, extended repayment, income contingent repayment, and income-based repayment pursuant to 20 U.S.C. § 1098e. Additionally, Congress has mandated that an institution of higher education that distributes Federal Perkins Loans "shall grant a borrower forbearance of principal and interest or principal only, renewable at 12-month intervals for a period not to exceed 3 years…if … the borrower's debt burden equals or exceeds 20 percent of such borrower's gross income." *Id.* § 1087dd(e)(1).

d. Borrower Education

Congress has also mandated study and education as a method for addressing debt management. The Department is required to conduct a "student aid recipient survey" that includes a description of the debt burden of loan recipients, their capacity to repay debt, and the impact of the debt on the students' course of study and post-graduation plans. *See* 20 U.S.C. § 1015a(k)(1)(D). Congress has also enacted several provisions requiring borrower education on debt management. *See, e.g.*, *id.* § 1092(b)(1)(A)(ii) (institutions are required to provide exit counseling for borrowers, including debt management strategies and notice of the consequences of defaulting on a loan).

e. Cost Disclosure

Congress has also adopted a limited regime for regulating the cost of attending colleges. Nowhere has Congress set any caps on tuition prices. But Congress has mandated disclosure of education costs, requiring the Department to (1) develop methodologies and definitions permitting the reporting of college costs, (2) collect cost data, and (3) make that data available in an accessible format to "allow[] parents and students to make informed decisions" about the costs of attending college. *See* 20 U.S.C. § 1015(a), (b). The Department is also required to study college costs. *See id.* § 1015(c). In addition, Congress has called upon the Department to create a website that lists postsecondary education schools (by type and state) that have the highest tuition and fees and the highest tuition and fees net of financial aid. *See id.* § 1015a(c)(1). Schools with the greatest increases in costs and net costs also must be listed and additionally must submit a report explaining the increases and describing "the steps the institution will take toward the goal of reducing costs." *Id.* § 1015a(c)(1) & (e). And Congress has required the Department to make available on its "College Navigator website" for "each institution of higher education that participates in programs under [Title IV]" a "link to the appropriate section of the Bureau of Labor Statistics website that provides information on regional data on starting salaries in all major occupations." *Id.* § 1015a(i)(1)(w).

4. Congress Has Not Adopted The Limitations Proposed By The Department

Among this sea of eligibility requirements, nowhere has Congress imposed any debt-to-income requirements for financial aid eligibility. Nowhere has Congress prescribed the loan repayment rates that the Department seeks to adopt. And nowhere has Congress imposed limitations on tuition costs. Among the numerous and detailed requirements set forth in the HEA, the requirements proposed by the Department are notably absent.

Whereas the Department proposes to impose maximum debt-to-income rates, Congress elected to employ debt level caps and a multitude of other debt control provisions. Similarly, whereas the Department proposes certain "repayment" rate requirements, Congress carefully calibrated maximum loan "default" rates that do not track the rates proposed by the Department. The Department's "repayment" rates are not just the mirror image of the default limits set by Congress. Students in deferral or forbearance, students who have been in default less than 270 days, and students who default after the relevant three-year window are not considered under the statute to be in default for purposes of calculating "cohort default rates." *See supra* pp.15-16. But most of those same students would not be deemed to be "repaying" their loans for purposes of calculating a "repayment" rate. *See* 75 Fed. Reg. at 43638. As a result, many institutions with acceptable "cohort default rates" would not be able to satisfy the Department's new "repayment" requirements. Moreover, whereas Congress allowed a safe harbor from the cohort default rate limits for institutions with "exceptional mitigating circumstances"—including a high enrollment of low-income students—the proposed regulations offer no such accommodation.

Finally, whereas the Department proposes to regulate tuition prices—albeit indirectly through direct regulation of student borrowing—Congress has avoided such an intrusive intervention into the market. Instead of capping prices, Congress has mandated disclosure.

Because the Department is seeking to alter—or "trump"—the scheme carefully calibrated by Congress, it may proceed with the proposed regulations only if it has been expressly and specifically authorized to do so. *Natural Res. Def. Council*, 976 F.2d at 41; *see also American Petroleum Inst.*, 52 F.3d at 1119; *Michigan Citizens,* 868 F.2d at 1293. As explained below, it has not been.

B. Congress Has Not Authorized The Department To Impose Additional Debt Requirements Or To Regulate Tuition Prices

The Department has pointed to no provision—much less an express and specific one—authorizing it to impose additional debt requirements as a condition of financial aid eligibility. It similarly has not invoked any provision authorizing it to set limits on tuition prices—the not-so-subtle goal, and obvious effect, of the proposed regulations. Implicitly conceding that no such provisions expressly and specifically grant it this authority, the Department purports to interpret the term "gainful employment" in the sections of the HEA defining an "institution of higher education." But the Department's interpretation of the phrase "gainful employment" to authorize a vast imposition of debt requirements beyond those established by Congress finds no support in the statutory language on which the Department relies, court and agency interpretations of the phrase, the structure of the Act, or past congressional action. Moreover, none of the other provisions cited in the proposed rule authorizes the Department to promulgate additional debt requirements.

1. The Department's Interpretation Of The Phrase "Gainful Employment" Is Contrary To The Plain Text Of The Statute, The Department's Past Interpretations, And Interpretations By Courts And Other Agencies

Courts interpret statutes according to their plain meaning. *United States v. Kirby*, 74 U.S. 482, 486 (1868). Here, the Department's interpretation of the phrase "gainful employment" to exclude programs from federal student assistance eligibility based on the debt incurred by their students is contrary to the plain meaning of the statutory language. The requirement that a college "provide an eligible program of training to prepare students for gainful employment in a recognized profession" has nothing to do with the average debt incurred by students in the program. The term "gainful employment" has an unambiguous meaning—well-established by dictionaries and well-accepted by Congress, courts, and executive agencies. It simply means a job that pays.

Legal and lay dictionaries uniformly define "gainful employment" as work done for pay. No dictionary even hints that the term can be linked to debt levels or even the cost of obtaining the job. Black's Law Dictionary defines "gainful employment" as "[w]ork that a person can pursue and perform for money." Black's Law Dictionary 605 (9th ed. 2009). Likewise, business dictionaries define the term as "employment that is beneficial to both the employer and the employee." David L. Scott, *American Heritage Dictionary of Business Terms* 222 (2009). And lay dictionaries define "gainful" as "providing an income," "profitable," "remunerative," and "lucrative." *See, e.g.*, *Merriam Webster's Collegiate Dictionary* 511 (11th ed. 2004); *American Heritage College Dictionary* 566 (4th ed. 2002); *Oxford English Dictionary* 314 (2d ed., 1989); *Random House Dictionary of the English Language* 782 (2d ed. 1987); *Webster's Third New International Dictionary of the English Language, Unabridged* 928 (1971).

Congress undoubtedly had in mind this well-established definition of "gainful employment" when it enacted the HEA. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (internal quotation marks omitted)). Had Congress intended to break new ground, it would have certainly done so clearly, by explicitly providing a new definition of "gainful employment." The absence of such a definition in the HEA conclusively shows that the term "gainful employment" must be construed according to its ordinary meaning. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.").

Indeed, the Department has never previously indicated that the phrase "gainful employment" has any relationship to student debt levels. The original Higher Education Act of 1965 defined "eligible institution[s]" in part based on whether they provided a "program of training to prepare students for gainful employment." Pub. L. No. 89-329, § 435(a), 79 Stat. 1219, 1247-48. But before the Department considered adopting the proposed regulations, it had not embraced the interpretation it now suggests. To the contrary, the Department has applied the "gainful employment" requirement in administrative decisions, but it has never suggested that the term is linked to student-loan debt or even to work that pays more than the cost of attending school. Instead, the Department has repeatedly considered only whether the goal of a program is to prepare students for an occupation of some kind. *See, e.g., In re Academy for Jewish Educ.*, No. 94-11-EA, 1994 WL 1026087, at *3 (Dep't of Educ. Mar. 23, 1994) ("[I]t is implicit that the statutorily intended goal or result of … a program be preparation for gainful employment in such an occupation; not that such a goal or result be potentially derived or incidentally available at the conclusion of the program."); *In re Bnai Arugath Habosem*, No. 94-73-EA, 1994 WL 1026098, at *2 (Dep't of Educ. June 16, 1994) ("[I]t is not sufficient to simply show that gainful employment in a recognized occupation is potentially *derived or incidentally available* at the completion of the school's program."); *In re Derech Ayson Rabbinical Seminary,* 109 Educ. L. Rep. 1473, 1995 WL 931579, at *5 (Dep't of Educ. Jan. 12, 1995) ("[W]hile the fact that students subsequently have obtained jobs may be an incidental benefit of the program, this was not the primary goal of the program.").

The Department's consistent interpretation of the term "gainful employment" is important because "[i]t is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 274-275 (1974)). Here, Congress has repeatedly amended the HEA but has never suggested the interpretation the Department now proposes. In fact, Congress changed the definition of a proprietary institution of higher education in the Higher Education Opportunity Act. *See* Pub. L. No. 110-315, § 102(d)(1), 122 Stat. 3078, 3085-3086 (2008). But it did not alter the definition of "gainful employment in a recognized occupation." In addition to preparing students "for gainful employment in a recognized occupation," as of July 1, 2010, institutions will also be able to qualify for participation by administering a liberal arts program. *See* Pub. L. No. 110-315, § 102(d)(1), 122 Stat. at 3085-3086. Rather than change the definition of "gainful employment in a recognized occupation," Congress added a further exception in the statute

Courts, too, have consistently used "gainful employment" to mean work that pays. In the ERISA context, for example, courts have concluded that "gainful employment" is employment from which a claimant may "earn a reasonably substantial income rising to the dignity of an income or livelihood." *Tracy v. Pharmacia & Upjohn Absence Payment Plan*, 195 Fed. Appx. 511, 519 (6th Cir. 2006); *see also Helms v. Monsanto Co.*, 728 F.2d 1416, 1421-1422 (11th Cir. 1984); *Torix v. Ball Corp.*, 862 F.2d 1428, 1431 (10th Cir. 1988). The Sixth Circuit noted that gainful employment is more than just "nominal" employment. *Tracy*, 195 Fed. Appx. at 519.

Several agencies have also concluded that "gainful" employment is work that pays. *See, e.g.*, 25 C.F.R. § 26.1 (Bureau of Indian Affairs defining "gainful employment" as "work resulting in self-sufficiency"), 26 C.F.R. § 1.21-1(c)(1) (Department of Treasury defining "gainful employment" as "[e]mployment [that] may consist of service within or outside the taxpayer's home and includes self-employment…[w]ork as a volunteer or for a nominal consideration is not gainful employment"), 20 C.F.R. § 416.972(b) (Social Security Administration defining "gainful work activity" as "work activity that [the claimant does] for pay or profit").

It is unsurprising that no dictionary, court, or agency—including the Department—has previously tried to incorporate student debt levels into the term "gainful *employment*": The Department's position is simply a non sequitur. The Department contends that it "would consider that a program prepares students for gainful employment if the loan debt incurred by the typical student attending that program is reasonable." 75 Fed. Reg. at 43619. But the debt incurred pursuing a program (or the cost of the program) is wholly separate from whether the *employment* obtained following graduation from the program is "gainful." The word "gainful" modifies only "employment." It does not modify the entire process of embarking on a program of study, borrowing money to pay for it, and then obtaining a job. It is not the "program of training" (20 U.S.C. § 1002(b)(1)(A)) that must be gainful. As noted above, the requirements for an "eligible program"—minimum length of study requirements and in some cases minimum completion and placement rates—are set forth independently in the HEA. *See id.* § 1088(b). They do not include any requirement that graduates of the program earn a particular amount or satisfy particular debt repayment requirements. Under §§ 1001 and 1002, the only thing that must be "gainful" is the subsequent "*employment*" for which a particular program qualifies its students.

Because the "gainful employment" requirement of § 1001 and § 1002 provide no basis for the proposed regulations, the proposed regulations are also invalid because the Department has failed to justify singling out a certain subset of colleges—primarily, proprietary and vocational institutions but not traditional four-year colleges. The Department has offered no evidence that graduates of proprietary and vocational schools have higher default rates than graduates of traditional institutions. Thus, instead of choosing to tackle the problem of excessive student debt across the *entire* higher education sector, the Department has opted simply and unjustifiably to attack a subset of the relevant institutions.

2. By Using The Phrase "Gainful Employment," Congress Did Not Authorize The Creation Of A Massive New Regulatory Scheme

If Congress had intended to give the Department the authority to impose additional debt requirements, it surely would have said so in terms more expansive and more plain than the two-word phrase "gainful employment," which was first used in the HEA in 1965 and has not been altered in relevant respect since. Congress does not set forth the "fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Accordingly, courts consistently reject attempts by agencies to "discover" significant and sweeping regulatory authority in stray phrases or words. *See, e.g., MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

Here, the Department has strained the phrase "gainful employment" well beyond the breaking point. The Department's interpretation would usher in drastic changes to higher education. It would introduce new requirements for students and schools to be eligible for federal loans, which would have a sweeping effect on program eligibility and, derivatively, on tuition costs. It would impose a new divide between degree and non-degree programs as well as between for-profit institutions and nonprofit (or public) institutions. And it would limit the options of students seeking postsecondary education. In other words, the proposed regulations would allow the Department to exercise significant authority and influence in the market for higher education.

Moreover, the disclosure obligations and enrollment limitations the Department seeks to impose in the proposed regulations, *see* 75 Fed. Reg. at 43639, do not even purport to give content to the "gainful employment" eligibility requirement. These regulations do not seek to measure an institution's performance in any sense and then declare the institution to be "eligible" or "ineligible." They simply impose new obligations and restrictions. The HEA, however, does not explicitly give the Department such authority, and it is implausible that Congress would have done so silently. To the contrary, had Congress intended for the Department to wield so much power, it surely would have said so in plain, unequivocal terms.

3. Congress Has Recognized That The Department Lacks The Authority It Proposes To Assert And Has Rejected Maximum Cost-To-Earnings Ratios

The House of Representatives has recognized that the Department lacks authority to impose additional eligibility requirements that would deviate from the comprehensive congressional scheme. The House's report on the College Access and Opportunity Act of 2005 stated that "affordability" was a necessary principle of higher education reform, but that "*the Federal government does not currently have the authority to dictate tuition and fee rates for institutions of higher education*." H.R. Rep. No. 109-231, at 159 (2005) (emphasis added). While the College Access and Opportunity Act of 2005 was not enacted, the committee report is strong additional evidence that the Department lacks authority to impose additional eligibility requirements in the guise of defining "gainful employment."[8] At the time of that House report, the language of the "gainful employment" provisions was the same as it is today. If the Department currently has authority to incorporate *debt* levels into the definition of "gainful employment," it certainly could have considered tuition cost in 2005. Conversely, if the Department cannot regulate program cost directly—as the House recognized in 2005—it also cannot do so indirectly by imposing a maximum debt-to-income ratio. *See, e.g., Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328 (1961) (a federal agency cannot "do indirectly what it cannot do directly."). Imposing a maximum debt-to-earnings ratio effectively regulates the price of tuition, since that is the only variable an institution can directly control.

Moreover, Congress has previously rejected the imposition of a maximum *cost*-to-earnings ratio on institutions of higher education. In the Higher Education Amendments of 1992, Congress enacted a provision that required states to establish standards for the review of all institutions of higher education that met certain at-risk criteria. One of the factors to be considered was "the relationship of the tuition and fees to the remuneration that can be reasonably expected by students who complete the course or programs." Pub. L. No. 102-325, § 499, 106 Stat. 448, 639. But in the Higher Education Amendments of 1998, Congress repealed the section of the U.S. Code (former 20 U.S.C. § 1099a-3) containing the requirement that States review the cost of tuition relative to expected earnings. *See* Pub. L. No. 105-244, § 491, 112 Stat. 1581, 1758-59. Congress did not transfer this specific requirement (or the others repealed) to the federal government for enforcement, but rather removed the set entirely. The Report of the Committee on Education and the Workforce of the House of Representatives stated that the reason for the removal of these requirements was that they were "unnecessary and overly burdensome." H.R. Rep. No. 105-481, at 148 (1998). There is no reason to think a *debt*-to-income ratio—which requires still more data collection and analysis—would be analyzed any differently.

4. The Department's Proposed Interpretation Of "Gainful Employment" Would Lead To Absurd Results

The Department's proposed interpretation of "gainful employment" also should be rejected because it would lead to absurd results. *See Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). A particular occupation—for example, a dental assistant—might be considered "gainful employment" for students at College X, which charges a low tuition, but the precise same job would be considered not gainful for students attending College Y, which charges a higher tuition. Moreover, particular occupations might be deemed "gainful" at colleges where few students borrow money

[8] *See United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973) (considering the legislative history of an unenacted bill "wholly relevant to an understanding of" a subsequently enacted statute containing the same operative language). Here, the "gainful employment" language had been enacted at the time of the cited House report and was reenacted after this report.

but not "gainful" at colleges whose student body is less affluent. Under the Department's proposal, students in a position to pay for more of their education without loans than the average student could be entirely foreclosed from financial aid even though their expected salary would be more than sufficient to cover the debt they would incur. By declaring entire programs ineligible based on average program debt measures, the Department has foreclosed aid to any student enrolling in the program, even if a particular student might easily satisfy the Department's program-wide requirements.

It is also difficult to understand how the Department's proposal would address the fact that the same degree can prepare students for vastly different jobs. For example, two students obtain arts degrees at the same institution with the same tuition price and may incur the same debt, one of whom goes to work for a video gaming company and makes a six-figure starting salary and the other of whom ends up being an assistant at a small art gallery making much lower wages. The Department's proposal might well deny aid for the entire arts program, even though some students would more than earn back the cost of tuition.

5. None Of The Other Provisions Cited By The Department Authorizes Imposition Of Additional Debt Requirements

The NPRM offers several statutory provisions that purportedly authorize the Department to issue the proposed regulations. *See* 75 Fed. Reg. at 43638 (citing 20 U.S.C. §§ 1001, 1002, 1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c-1). But none of those provisions provides any basis for the Department to reinterpret the term "gainful employment."

Several of these sections merely provide definitions applicable either throughout the HEA or portions thereof. Sections 1001, 1002, and 1003 list general definitions applicable throughout the HEA. They provide the Department no rulemaking authority, let alone any specific authority to define "gainful employment." Similarly, § 1070g provides definitions for the HEA's sections on TEACH Grants. Although it provides the Department with authority to "determine[]" whether institutions are eligible for TEACH Grants pursuant to certain specified criteria, 20 U.S.C. § 1070g(1),[9] it nowhere suggests that the Department may interpret "gainful employment." Likewise, § 1085 lists several definitions applicable to the HEA's sections on the now-terminated FFEL Program, but it too does not provide any statutory basis for the Department to interpret "gainful employment" as it seeks to do in the proposed regulations. To the contrary, § 1085 explicitly uses cohort default rates as the appropriate criterion for determining whether an institution should be eligible for the FFEL Program, and it carefully delineates the Secretary's responsibilities in administering that process. *See* 20 U.S.C. § 1085(a). Finally, § 1088 offers definitions applicable to all the loan programs in the HEA; it does not authorize the Secretary to interpret "gainful employment."

[9] Specifically, this section allows the Secretary to "determine[]" whether an institution "(A) provides high quality teacher preparation and professional development services, including extensive clinical experience as a part of pre-service preparation; (B) is financially responsible; (C) provides pedagogical course work, or assistance in the provision of such coursework, including the monitoring of student performance, and formal instruction related to the theory and practices of teaching; and (D) provides supervision and support services to teachers, or assistance in the provision of such services, including mentoring focused on developing effective teaching skills and strategies." 20 U.S.C. § 1070g(1).

The remaining sections cited by the Department are also unavailing because they merely provide miscellaneous requirements for administration of the HEA programs. None of these requirements comes remotely close to authorizing the proposed regulations. Section 1091 establishes several requirements for *students* to become eligible for HEA assistance. Section 1092 primarily requires institutions to publicly disclose certain pieces of information and to provide student borrowers with entrance and exit counseling. Section 1094 sets out requirements for Program Participation Agreements, which must be signed by all institutions seeking to participate in the HEA programs. Section 1099c requires the Department to "determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility" for each institution seeking to participate in HEA programs. 20 U.S.C. § 1099c(a). Finally, § 1099c-1 authorizes the Department to conduct "program reviews" of institutions participating in HEA programs and to "establish and operate a central data base of information on institutional accreditation, eligibility, and certification." 20 U.S.C. §1099c-1(a)(1), (3).

6. The "Additional Programs" Provision Is Also Beyond The Department's Authority

The Department's proposal includes a requirement that new programs receive approval from the Secretary before they can go into effect. To obtain approval, an institution must submit an application providing certain information, including projections of student enrollment in the program for the next five years and documentation from employers not affiliated with the institution "affirming that the curriculum of the additional program aligns with recognized occupations at those employers' businesses, and that there are projected job vacancies or expected demand for those occupations at those businesses." 34 C.F.R. § 668.7(g)(1). The Secretary may also cap enrollment in a new program "based on the projected growth estimates provided by the institution and the demonstrated ability of the institution to offer programs subject to this section." *Id.* § 668.7(g)(2).

This process shares the same defects as the rest of the Department's proposal: it is entirely inconsistent with congressional intent. As noted above, *supra* § III.A.2, Congress has laid down clear requirements before programs can become eligible to participate in HEA assistance. But Congress has not mandated that institutions obtain documentation from employers "affirming that the curriculum of the additional program aligns with recognized occupations at those employers' businesses, and that there are projected job vacancies or expected demand for those occupations at those businesses." *Id.* Thus, the provision is within the Department's authority only if specifically and expressly authorized—which it is not. In this provision the Department has sought to encompass not debt levels but rather general economic conditions into the definition of "gainful employment." If, for example, there were a temporary over-supply of nurses, under the proposed regulation, a program preparing students for nursing would suddenly no longer be eligible. Yet, no one would think nursing is not gainful employment or that the program did not prepare students for nursing. There is no indication that Congress intended to permit students to use financial aid only for programs preparing them for occupations that are in demand at the time the student enters the program or are expected to be in demand. Under such a standard, aid would all but dry up any time the economy began to enter a recession—precisely the time students should be going to school.

For the same reason, the proposed restrictions on the number of students entering programs is not within the Department's authority. Program caps that attempt to align the number of graduates with the projected demand for jobs impermissibly injects general economic conditions into the analysis of whether a program prepares students for gainful employment. The pre-approval process also improperly authorizes the Secretary to calculate, for the first few years that a new program is in existence, the program's repayment rates and debt-to-income ratios based on data collected from *other* programs at the institution. 34 C.F.R. § 668.7(g)(3). That is irrational, since programs must be judged on their own merit and not on information from other programs.

* * *

In sum, the Department has not pointed—and cannot point—to any statutory provision that authorizes it to promulgate a regulation interpreting the term "gainful employment" in the manner the Department proposes. As noted, "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The proposed regulations therefore exceed the Department's authority and should be abandoned.

C. The Proposed Regulations Conflict With The Higher Education Act

For the reasons discussed above, the Department simply lacks authority to promulgate the proposed rules. But the proposed rules are even more deeply flawed: They affirmatively conflict with the text and purposes of the HEA.

1. The Proposed Regulations Conflict With The Text Of The HEA

The regulations the Department has proposed are not merely unauthorized; they, in fact, conflict with the HEA. An agency is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomm. Corp.*, 512 U.S. at 231 n.4. Here, Congress itself has set a clear path for implementing the HEA's assistance programs. The Department cannot simply ratchet up the requirements imposed by Congress.

As a general matter, the proposed regulations introduce new methods for measuring an institution's eligibility for HEA programs—methods that Congress neither envisioned nor approved. As noted above, *see supra* § III.A, Congress provided for several measures and programs to determine whether and to what extent students and institutions should qualify for federal financial assistance. Among other things, the HEA includes general requirements for institutions and programs, student borrowing caps, debt relief and education programs, cost disclosure requirements, and—as discussed in greater detail below—limits on an institution's cohort default rates. Nowhere did Congress contemplate using repayment rates or debt-to-income ratios to gauge whether institutions and students should have access to federal aid.

More specifically, the proposed regulations are in direct conflict with the HEA's principal mechanism for evaluating an institution's eligibility for aid programs based on student borrowing—cohort default rates. As noted above, *see supra* § III.A.3.a, the major HEA assistance programs each include a ceiling for an institution's recent cohort default rates. If an institution breaches that ceiling, it loses its access to the program. Those cohort default rates are starkly different from the repayment rate and debt-to-income measures that the Department has put forth. Most obviously, Congress has chosen to use default rates as the measuring stick for the HEA. It did not select repayment rates or debt-to-income ratios. The HEA also includes a safe harbor for schools that can show "exceptional mitigating circumstances"—including a high proportion of low-income students—that may pardon excessive cohort default rates. Moreover, unlike the Department's proposals, which scrutinize individual programs at an institution, the HEA's cohort default rates look at institutions as a whole. Finally, as already explained, *see supra* § III.A.4, the Department's repayment-rate test is not simply the mirror image of the HEA's cohort default rates. To the contrary, institutions with acceptable cohort default rates under the HEA could still lose their eligibility under the proposed regulations if they fail to meet the Department's repayment-rate threshold.

In short, the proposed regulations supplant—rather than complement—the means by which Congress chose to coordinate the HEA's assistance programs. The Department's proposal is thus not only unauthorized but also directly contrary to the HEA.

2. The Proposed Regulations Conflict With The Purposes Of The HEA

The proposed regulations also conflict with the purposes of the HEA. "[A]dministrative constructions of [a] statute … that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be "reject[ed]." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). Here, the proposed regulations conflict with the purposes of the HEA in at least three respects.

First, the proposed regulations conflict with the central purpose of the HEA: providing financial assistance to students based on their need, not some judgment about whether the students are making a wise investment by electing to pursue an education. One of the primary goals of Title IV is to "mak[e] available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070(a). Congress enacted Title IV because it was acutely aware that hundreds of thousands of students elected not to go to college because they simply could not afford it. *See* S. Rep. No. 89-673, 1965 U.S.C.C.A.N. 4027, 4054 (Sept. 1, 1965) ("According to the U.S. Office of Education, there were in 1960, 1,079,000 high school graduates not attending college. Of that number, 42 percent indicated that finances played a role in their decisions not to go. Of these, nearly half flatly said they could not afford to consider college at all. Thus, it is reasonable to expect that some 217,000 high school graduates who would have liked to continue their education were prevented from doing so because of financial inability."); *see also* Conf. Rep. No. 89-1178, 1965 U.S.C.C.A.N. 4117, 4125 (Oct. 19, 1965) ("The House bill and Senate amendment both include programs to provide financial assistance to enable deserving students to attend college."). For this reason, Congress generally made financial assistance available to "all eligible students." *See, e.g.*, 20 U.S.C. § 1070(a)(1) (Pell grants); *id.* § 1078-8(b) ("Any student meeting the requirements for student eligibility … shall be entitled to borrow an unsubsidized Federal Stafford Loan ….").

In enacting and updating the HEA, Congress has thus focused on student need—not on whether particular careers students might pursue are lucrative enough to justify the associated educational expense. The only requirement Congress has imposed relating to post-graduation employment is that certain types of programs have "verified placement rate of at least 70 percent." 20 U.S.C. § 1088(b)(2)(A)(ii). The proposed regulations, however, conflict with the purpose of facilitating postsecondary education for all eligible students. They instead further the goal not pursued by Congress: limiting financial assistance to programs the Department deems cost effective.

Second, the proposed regulations conflict with the HEA's purpose of extending financial aid to at-risk students. A priority of the HEA is to "prepare students from low-income families for postsecondary education." 20 U.S.C. § 1070(a)(4)(B). The Act further recognizes that "there are a significant number" of colleges "serving high percentages of minority students and students from low-income backgrounds," *id.* § 1051(a)(1), and it proposes to "enhance the role of such institutions in providing access and quality education to low-income and minority students," *id.* § 1051(a)(6). To that end, the HEA includes incentives and flexibility for institutions that provide financial aid to at-risk students. Most notably, although the HEA measures an institution's eligibility for financial aid programs based on its recent cohort default rates, the Act provides a safe harbor for schools that enroll substantial numbers of low-income students. *See id.* § 1085(a)(5)(A). The proposed regulations, however, do not afford programs any leeway for enrolling at-risk students. They do not contemplate that programs do and should enroll low-income and minority students, and that doing so may affect the repayment-rate and debt-to-income measures. Such inflexibility is inconsistent with the tailored and accommodating approach that Congress set forth.

Third, the proposed regulations conflict with the critical objective of providing the broadest access to higher education. As the Senate explained in its report on the original HEA, "a broad, well-coordinated program of student financial assistance extending to virtually all areas of postsecondary educational opportunity is of fundamental importance in helping to meet current shortages and future needs." *See* S. Rep. No. 89-673, 1965 U.S.C.C.A.N. 4027, 4053 (Sept. 1, 1965). The proposed regulations, however, will almost certainly limit the range of postsecondary options from which students can choose. Among other things, the regulations will discourage institutions from offering worthwhile but expensive programs. Some arts and humanities programs, for instance, may provide rich and beneficial educational experiences but they may not lead to opportunities in lucrative professions such as finance, engineering, medicine, or the law. Although many students will wish to opt for these programs, institutions may choose not to offer them for fear that—under the Department's proposal—students will be ineligible for federal financial aid. Similarly, the proposed regulations may discourage institutions from providing a four-year education. The proposed regulations dampen the incentives for institutions to offer such programs: longer programs will lead to more debt for students, and they will thus be less likely to satisfy the Department's repayment rate and debt-to-income tests. Constricting the market for postsecondary education in these ways undermines a central purpose of the HEA.

IV. The Proposed Regulations Violate Due Process

In addition to being outside of the Department's authority, the proposed regulations also violate due process. Under the proposed regulations, the Department may strip a program of its eligibility because its graduates' debt-to-income ratio is too high. But in determining the average income for a program's graduates, the Department proposes to use income data that it will not make available to affected institutions. *See* 75 Fed. Reg. at 43629 ("the specific individual's actual earnings information will not be available to the institution or to the Department"). Indeed, a hearing official in an action to terminate a program's eligibility must "accept[] as accurate the average annual earnings calculated by another Federal agency, so long as the other Federal agency provided that calculation for the list of program completers identified by the institution and by the Department." *Id*. at 43640 (proposed § 668.90). This truncated process is fundamentally unfair and would violate due process rights under the United States Constitution.

A due process challenge involves "two steps." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (citation omitted) Here, the proposed regulations implicate due process. Loss of financial aid eligibility imposes a severe economic penalty on an institution. It will result in significant economic losses. As courts have recognized, an institution's eligibility for federal student loans under the HEA thus involves interests protectable under the Due Process Clause. *Continental Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990); *see also Pro Schools, Inc. v. Riley*, 824 F. Supp. 1314, 1321 (E.D. Wis. 1993).[10]

But the proposed regulations do not afford "constitutionally sufficient" process. The fundamental requirements of due process are notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (internal quotation marks omitted)). "It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and *in a meaningful manner*." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added; internal quotation marks omitted). Refusing to provide access to the evidence underlying an ineligibility determination by the Department would deprive institutions of both meaningful notice and a meaningful opportunity to be heard.

"The right to prior notice" is "central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010) (internal quotation marks omitted). To be sufficient, notice must provide enough information for a claimant to be able to challenge the deprivation of his liberty or property interests: "Claimants cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with

[10] Schools have a protectable interest even though students—rather than institutions—are the primary beneficiaries of federal loans ("Where primary beneficiaries of federal programs depend on providers like … schools … for their benefits, and where the statutory program plan contains extensive discussion of certification or eligibility requirements and procedures for granting or revoking certification or eligibility, it is difficult to conclude that there are no rules or mutually explicit understandings supporting the providers' claims of entitlement to certification or eligibility status," *Continental Training Servs., Inc.*, 893 F.2d at 893 (internal quotation marks and citation omitted)).

sufficient information to understand the basis for the agency's action." *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005). Thus, meaningful notice requires both "notice of the ... allegations" and "notice of the substance of the relevant supporting evidence." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987) (plurality); *id.* at 269 (Brennan, J., concurring in relevant part); *id.* at 273 (Stevens, J., concurring in relevant part); *Cleveland Bd. of Educ.*, 470 U.S. at 546 (due process requires "notice of the charges" and "an explanation of the . . . evidence"). Thus, in *Brock*, the Supreme Court addressed the constitutionality of the Secretary of Labor's procedures for issuing a temporary employee reinstatement order under the Surface Transportation Assistance Act and agreed with the employer's argument that "the confidentiality of the [agency] investigator's evidence operate[d] to deny employers procedural due process under the Fifth Amendment." 481 U.S. at 260.

Government reliance on secret evidence also deprives parties of a meaningful opportunity to be heard. *Morgan v. United States*, 304 U.S. 1, 18 (1938)("The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one"). The reason that "the evidence used to prove the Government's case must be disclosed to the individual [is] so that he has an opportunity to show that it is untrue." *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *see also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.");*Greene v. McElroy*, 360 U.S. 474, 496 (1959) (noting the "immutable" principle that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."). Thus, courts have held that a determination based on secret evidence offends "principles of due process upon which our judicial system depends to resolve disputes fairly and accurately." *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1346 (9th Cir. 1981); *see also American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) ("[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.").

Here, the proposed regulations threaten to deprive institutions of both meaningful notice and a meaningful opportunity to be heard. They deem a program ineligible for federal loans if its debt-to-income ratio is too high. The critical data on which that calculation rests is the average annual earnings of the program's recent graduates. As noted above, that figure is calculated by SSA (or another Federal agency) and provided to the Department and the institution. Critically, however, neither SSA nor the Department is permitted to share with the institution the individual earnings data that is used to calculate average earnings. Indeed, SSA is not permitted to share this information even with the Department. 75 Fed. Reg. at 43629. But without that information, an institution cannot know *why* its debt-to-income ratio was too high and it cannot determine *how* to challenge the ineligibility decision. It cannot determine if the input data is correct or whether, for example, SSA is looking at the wrong years.

This inadequate notice renders meaningless the appeals process specified by the proposed regulation. *See City of W. Covina v. Perkins*, 525 U.S. 234, 240 (1999) ("A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful."). Although an institution whose loan eligibility is revoked may challenge that decision before a hearing official, the hearing official must "accept[] … the average annual earnings calculated by [SSA]." 75 Fed. Reg. at 43640. In other words, even though an institution can—in theory—challenge the Department's decision to deem it ineligible on the basis of a high debt-to-income ratio, the inability to access the evidence underlying the decision makes it implausible to do so in practice. And given the tremendous difficulty an institution would face if it had to try to collect income data itself, the opportunity provided by the proposed regulations for an institution to submit its own data is of little use. Thus, this hearing process "is not the fair hearing essential to due process. It is condemnation without trial." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 300 (1937).[11]

The Department has articulated no governmental interest in using secret income data sufficient to overcome the burdens placed on institutions. Given the paramount importance of financial aid eligibility for institutions, there is no justification for incurring even a small risk that the Department will err because it has relied on secret data. In these circumstances, the Department's proposed approach threatens to deprive institutions of due process of law.

V. The Proposed Regulations Are Arbitrary And Capricious And Contrary To Law Because They Are Impermissibly Retroactive

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Unsurprisingly, therefore, Congress has previously been careful to ensure that rules affecting an institution's eligibility for HEA programs apply only prospectively, so that institutions can foresee any eligibility criteria and adjust their behavior accordingly. For example, when Congress adjusted the methodology for evaluating cohort default rates in the Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008), it postponed the effective date of that adjustment in order to provide institutions with adequate notice of the change: "the method of calculating cohort default rates …in effect on the day before the date of enactment of this Act shall continue in effect, and the rates so calculated shall be the basis for any sanctions imposed on institutions of higher education because of their cohort default rates, until three consecutive years of cohort default rates calculated in accordance with [the Act] are available," *id.* § 436(e)(2)(B), 122 Stat. at 3257.

[11] *Ohio Bell* is especially instructive here. To determine a certain rate-making calculation regarding a phone company, a state agency relied on statistical evidence that was "secretly collected" and "never yet disclosed" to the company. 301 U.S. at 300. The Supreme Court concluded that the agency's procedure was a clear violation of due process: "The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." *Id.* at 303. The Court also emphasized that the agency's use of secret evidence would blunt the effectiveness of any subsequent judicial review. "[H]ow was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?" *Id.*

Similarly, when Congress enacted the 85/15 rule, it clarified that the Department could not issue implementing regulations that were retroactive. *See* Pub. L. No. 103-333, § 510, 108 Stat. 2539, 2573 (1994). As one member of Congress explained,

> [m]any Members on both sides of the aisle have expressed serious reservations about the Department of Education's intent to apply the [85/15] regulation … to a period of time prior to the effective date of the regulation. The Appropriations Committee's delay in the effective date of this regulation will allow institutions sufficient time to comply with its intent. As a result, quality training institutions will not be forced out of the program for failing to comply with confusing and unforeseen accounting rules.

140 Cong. Rec. H5253 (daily ed. June 28, 1994).[12]

The Department's proposed regulations here make eligibility contingent on past years' data and thus do not provide institutions with an opportunity to adjust their programs to comply with the proposal's new requirements. Both the repayment-rate and debt-to-income tests look backwards to determine whether a program should remain eligible for federal student aid. The repayment-rate test depends on loan repayment rates for students who have entered repayment within the last four years. 34 C.F.R. § 668.7(b). Similarly, the debt-to-income test views the loan payments and earnings of a program's graduates from the past three (and sometimes six) years. *Id.* § 668.7(c). Thus, in 2012—the first year in which the regulations would be applicable—a program's eligibility for HEA assistance may be contingent on events transpiring *years* before the promulgation of the rules. For example, an institution's past decisions about the tuition to charge for a program would now affect program eligibility in ways that were not known at the time the institution set its tuition levels. That is a textbook example of retroactivity, since programs have not previously been on notice that the earnings-to-debt ratios for their graduates or the loan repayment rates of their students would subsequently be used to judge whether they could qualify for HEA aid. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265.

Congress has not authorized the Department to promulgate retroactive regulations. *See Bowen*, 488 U.S. at 208 (A "statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). And the Department offers no justification for doing so. It provides no explanation for departing from past congressional practice and no justification for changing the consequences of past decisions by institutions. The Department's

[12] In the 85/15 rule, Congress required a proprietary institution of higher education to have "at least 15 percent of its revenues from sources that are not derived from funds under [the HEA], as determined in accordance with regulations prescribed by the Secretary." Higher Education Amendments of 1992, Pub. L. No. 102-325, § 481(b)(3), 106 Stat. 448, 611. After the Department initially promulgated a regulation that would have had a retroactive effect, Congress instructed that "[n]o funds appropriated herein shall be used to implement any regulation promulgated under [the 85/15 rule] *prior to July 1, 1995*." Pub. L. No. 103-333, § 510, 108 Stat. at 2573 (emphasis added).

imposition of retroactive rules without explanation or express authorization is arbitrary and capricious and contrary to law.

VI. The Proposed Regulations Are Arbitrary And Capricious In Numerous Additional Respects

Even apart from the Department's lack of authority to promulgate the proposed regulations, the regulations should be rejected because they are arbitrary and capricious in many other respects. Under the Administrative Procedure Act, a court reviewing agency action must "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). Thus, it is well established that agency decision making must be "rational." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 43 (internal quotation marks omitted). "[I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," the agency action will be arbitrary and capricious and must be vacated. *Id.* Likewise, an agency action will be arbitrary and capricious "if [its] factual determinations lack substantial evidence." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1310 (D.C. Cir. 2010) (internal quotation marks omitted).

Here, the regulations proposed by the Department are arbitrary and capricious for numerous reasons:

First, as explained above, the proposed regulations drastically diverge from the regulatory scheme that Congress created in the HEA. *See generally* § III. Congress enacted a detailed set of eligibility requirements but did not consider the factors addressed by the Department: debt-to-income ratios and loan repayment rates. The Department also relied on the wrong factors in purporting to define "gainful employment," a phrase that has nothing to do with debt levels. Thus, the Department's proposal ignores the factors that Congress relied on in the HEA and interjects considerations that Congress never contemplated. For all of the reasons why the proposed regulations are beyond the Department's authority and contrary to the HEA, the regulations are also arbitrary and capricious.

Second, the proposed regulations are arbitrary and capricious for all the reasons explained in detail below in Part Two.

Part Two: Comments on the Preamble and Proposed Language Contained in the NPRM

Notwithstanding our belief that the Department does not have the statutory authority to promulgate this regulation, the Career College Association understands the importance of providing input and commentary during the NPRM process. As such, below find our discussion of the preamble and proposed regulatory language contained in this NPRM. In these Comments, CCA makes a number of suggestions about ways in which the Department could more rationally approach this issue. These suggestions, however, should not be interpreted as a concession that the Department has the authority to promulgate regulations adopting some or all of the suggested approaches. To the contrary, CCA firmly believes the Department would lack such authority for the reasons set forth in these Comments and strongly urges the Department to abandon the "gainful employment" regulations in their entirety. These suggestions are provided in the event the Department proceeds to promulgate what we believe would be invalid—and in any case deeply flawed—regulations.

The full extent of the impact of this proposed regulation is not known. The rule in itself has been determined to be a "significant regulatory action," having an "annual effect on the economy of $100 million or more, or adversely affect(ing) a sector of the economy, productivity, competition, jobs … or communities in a material way." CCA cannot stress enough the negative impact this proposed rule will have if it is enacted. Students **will** lose access to postsecondary education. The United States workforce **will** be negatively impacted. The economy **will** be adversely affected. Thousands of jobs **will** be lost.

The Department of Education estimates 307,000 students are enrolled in programs that will be made ineligible by this unauthorized regulation. It is estimated up to 32,000 of those students will leave postsecondary education all together. That is 32,000 people who will not receive the benefits of a postsecondary education – higher wages, more job security, better healthcare. Thirty-two thousand people who will not be part of President Obama's 2020 goal.

And this is a very conservative estimate. Dr. Jonathan Guryan, a senior consultant in Charles River Associate's Labor and Employment Practice and Associate Professor of Human Development and Social Policy and of Economics in the Institute for Policy Research at Northwestern University, and Dr. Matthew Thompson, Vice President and co-head of the Labor and Employment Practice at CRA, estimate this number to be much higher. In comments they will be submitting to the Department on this NPRM, they state:[13]

> Our most conservative estimate, which assumes half of the potentially affected students attend college, is that more than 1.1 million students will be restricted access because of the proposed rule. Because female, African-American and Hispanic students are disproportionately represented at for-profit colleges, the numbers are particularly large among these groups. The estimates from this scenario imply approximately 790,000 fewer female students, more than 210,000 fewer African-American students, and more than 190,000 fewer Hispanic students may attend college as a result of the rule.

[13] Comments of Drs. Jonathan Guryan and Matthew Thompson on Docket ID ED-2010-OPE-0012

> If 25 percent of potentially affected students attend college despite the effects of the rule, the numbers are larger, of course. In that case, we estimate that more than 1.7 million students' college enrollment would be impacted, including more than 1.1 million female students, approximately 315,000 African-American students, and more than 290,000 Hispanic students. If there were no net effect of school or student responses, the number of students affected would of course be even larger. These estimates imply **upwards of 2.3 million fewer students would attend college over the next decade** (emphasis added), including more than 1.5 million female students, more than 420,000 African---American students and almost 390,000 Hispanic students.

2.3 million fewer students. That is more than a significant impact. It is unconscionable. And directly contrary to President Obama's 2020 goal.

I. The Department Of Education Misquotes And Misuses Expert Recommendations And Data In Support Of The Proposed Rule

The Department of Education states in the preamble to the proposed regulation that programs offered by the for-profit sector must lead to measurable outcomes or those programs will devalue postsecondary credentials through oversupply.

It is far beyond the Department of Education's mission or authority to determine how many graduates are needed in a particular field. The Department of Education Organization Act does not give the Department responsibility for managing the United States economy or its labor force. Additionally, the HEA does not give the Department the authority to create the complex debt-to-income ratio and repayment rate calculations proposed in this NPRM.

The NPRM also states that the proposed standards are necessary to protect taxpayers against wasteful spending on educational programs of little or no value that lead to high indebtedness for students. The value of a program is determined by the graduate of the program, and it may mean different things for different students. One student may value learning to look at a great work of art and appreciate the play of color and shadow; another may value learning how to build and repair a high performance automobile engine. Students choose what program of study to attend based on any number of human factors, including what they value – working with their hands, reading, being creative, helping others; the number of value propositions that go into choosing a field of study probably equals the number of students studying in postsecondary institutions in the United States. It is not the Department's statutory role to determine what programs are of "value" in this manner, and which are not. Taxpayers may well appreciate Federal dollars going to students training to be medical assistants more so than those training to analyze the writing of philosophers long dead; that does not mean a program in philosophy is of any less value.

And while there is a monetary value associated with a postsecondary education, both in terms of the cost of the program in forgone earnings and actual educational charges, and the value of the return on the investment for that education, it is again not within the Department's purview to either establish the cost of the program through any means, be it through direct price controls or creating a debt-to-income measure that is a back-door method of attempting to set tuition prices, nor to determine what a real wage is that a student should be paid for the career they choose. The economic condition of an area and our country at large, the amount of experience a person has at his/her job, whether he/she chooses to work for a Fortune 500 corporation or a small mom-and-pop business or even for him/herself – this is what can and should determine wages for occupations.

Nothing in the HEA allows the use of debt-to-income ratios or repayment rate calculations to protect the Federal funds awarded through the Title IV programs. Instead, Congress established the cohort default rate calculation, financial responsibility ratios and other means contained within the HEA to achieve this goal.

In support of the Department's position, several sources are selectively quoted and/or incorrectly interpreted.

A. The 1997 Government Accountability Report

The preamble cites a Government Accountability Office (GAO) report from the 1990s that found there were labor oversupplies when the number of expected jobs openings was compared to the corresponding number of postsecondary graduates who completed training in certain programs. Oversupply in the labor market, the preamble explains, results in unemployment and a decline in real wages. While this 13-year-old GAO report did conclude there was an oversupply of employees available in some fields in 12 surveyed states, this report is not necessarily reflective of the current economic conditions and labor demands of our country. The GAO itself acknowledges that in the report when it states, "[u]nforeseen changes in economic conditions at the local or national level can cause actual and projected demand to differ."[14]

It is very important to note that the GAO report states that "(m)any of the proprietary school students who trained for oversupplied occupations benefitted in one way or another."[15] The benefits listed include obtaining a career in the supposedly oversupplied field or obtaining a job by simple warrant of having a postsecondary credential. If the goal of receiving education and training is to find employment and one does so, then the goal is achieved regardless if the field is deemed oversupplied, or if the degree is used as a door-opener to an area outside of that studied. Limiting enrollment in or eliminating programs because they may be considered to lead to employment in fields estimated to have a surplus of workers can and will have the effect of preventing students from attending the institution of their choice or studying in the field of their choice, and could have significant long-term negative effects on the workforce needs of our country. We do not live in a managed economy.

The GAO report also addresses state and Federal job-training programs that prepare workers for many of the same careers for which some private sector colleges provide training, and acknowledges that the ability to choose training in those programs is limited to occupations for which local employers have guaranteed placement of program graduates, while more choice is available at the private sector schools. The Title IV programs are, the report states, based on individual choice because recipients of Title IV aid may choose their area of study. The Title IV recipients, in fact, also choose which postsecondary institution best meets their needs to study in that chosen field.

[14] U.S. Government Accountability Office. "Proprietary Schools: Millions Spent to Train Students for Oversupplied Occupations." GAO/HEHS-97-104. Washington, DC: Government Accountability Office, 1997. Page 2.

[15] Ibid, Page 9.

The report concludes that Congress should expand the Student Right-to-Know Act to require proprietary schools to report recent graduates' training-related job placement rates.[16] They recommend "that the Secretary identify and take appropriate action to ensure that prospective proprietary school students have access to employment and earnings projections relevant to their chosen training field and local area."[17] While Congress has not explicitly authorized this change in the disclosures required under the Student Right-to-Know Act, the Department has taken it upon itself, in the Program Integrity NPRM issued on June 18, 2010, to require institutions to do just this as part of the reporting and disclosure requirements piece of the gainful employment proposed rule. While we do not believe the Department statutorily has the authority to issue that particular proposed rule and we state so in our comments filed on August 2, 2010, we do believe students should be provided with the relevant and appropriate information needed to make informed decisions about postsecondary education and career choices.

B. The Study Completed for the Florida Legislature

In the preamble to the regulation, the Department refers to "(a) recent study completed for the Florida legislature (that) concluded that for-profit institutions were more expensive for taxpayers on a per-student basis due to their high prices and large subsidies." In fact, a careful reading of this report shows the opposite conclusion was reached.

The report,[18] issued in January of 2010 by the Office of Program Policy Analysis & Government Accountability, an office of the Florida legislature, set out to answer six questions. For the purposes of responding to this NPRM, we are concerned with just one of those questions: How do the costs of career education programs compare between public and private institutions?

The report compares costs of several programs at private sector institutions and publicly funded schools, i.e. state community colleges and state universities. The OPPAGA report states:

> Students' costs represent a relatively small percentage of total program costs at public institutions. While the costs of private programs are paid for by students, state appropriations fund approximately 70% of program costs at public institutions, with students and other local sources making up the difference. Thus, the state's contribution to public programs must be considered to provide a reasonable comparison of total program costs between the two sectors.[19]

The OPPAGA report concludes that some public programs are actually more expensive when the state's contribution is considered.

C. The Baum and Schwartz Study

[16] Ibid, page 13.

[17] Ibid, page 14.

[18] Office of Program Policy Analysis & Government Accountability. "Public Career Education Programs Differ From Private Programs on Their Admission Requirements, Costs, Financial Aid Availability, and Student Outcomes." Available at http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1018rpt.pdf

[19] Ibid, page 9

The Department of Education states the debt-to-income ratio's targets were set based on industry practices and expert recommendations. The preamble attributes the income-based repayment plan formula to research conducted by economists Sandy Baum and Saul Schwartz, stating that they recommend 20% of discretionary income as the outer boundary of manageable student loan debt. The Department goes on to say they are adopting the 8% threshold of annual earnings for repayment of student loans because this percentage is a fairly common underwriting standard.

In fact, the Baum and Schwartz report, "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt," does not support the 8% threshold for student debt payments and instead criticizes the blanket use of such a rule:

> In sum, we believe that using the difference between the front-end and back-end ratios historically used for mortgage qualification as a benchmark for manageable student loan borrowing <u>has no particular merit or justification</u> [emphasis added]. This is not to say that 8 percent is an unreasonable number. Some of the problems listed above suggest that higher limits might be appropriate, while others suggest the opposite. It is simply to say that any benchmark needs stronger justification than has thus far been forthcoming.[20]

The 8% threshold appears to come from old mortgage underwriting guidelines (which are no longer commonly used), not any economic research. Baum and Schwartz explain that this number appears to come from guidelines for the fraction of annual earnings that should be devoted to non-housing debt for the average home buyer. While mortgage industry guidelines are appropriate for considering the ability of a consumer to take on and repay mortgage debt, they are not appropriate to use after debt is incurred to determine if the payments are "affordable."

The mortgage guidelines predict a consumer's ability to pay back a level of debt at a later date based on current information, including income and other debt the consumer has. These standards apply to borrowers regardless of where they are in their career – entry level, management, self employed, or retired. They are not intended to estimate the reasonableness of a payment on debt incurred in the past without consideration of credit worthiness or current life situation, much less using current income from the earliest days of establishing a career.

Baum and Schwartz outline in their report why the 8% rule has shortcomings. They also state that the life-cycle model, in which consumers base current borrowing in part on future income:

> …suggests that the ability and willingness of young people to maintain any given debt-service ratio is greater than that of older cohorts. The front-end and back-end ratios, based on current income, do not take into account the higher future income of some borrowers and especially of student loan borrowers.

In short, calculating a student debt-to-income ratio using outdated mortgage underwriting standards and fresh out of college earnings is undercut, not supported by the cited Baum and Schwartz report.

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[20] Baum, Sandy and Saul Schwartz. 2006. "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt." New York: The College Board.

II. The Proposed Metrics Are Not Based On Economic Research Or Theory

While attempting to analyze the impact of the Department's proposed regulation, CCA consulted with Drs. Jonathan Guryan and Matthew Thompson. Drs. Guryan and Thompson will be submitting their own comments on the proposed regulation, but what they have to say in those comments about the debt-to-income ratio bears repeating:[21]

> The standard economic analysis of education implies that the decision of whether to continue schooling beyond high school should be based on a comparison of the lifetime benefits and the lifetime costs of that schooling. These costs and benefits should both be properly discounted to account for the fact that many of the benefits and some of the costs occur far in the future. Even when the benefits only slightly exceed the costs, when properly measured, it benefits the student to continue to pursue additional education.
>
> The proposed gainful employment formula is different from this ideal in a number of ways. Most significantly, the proposed formula focuses on the level of earnings in the first few years after completion of the schooling. While the Department of Education's intent is likely to ensure that students are able to afford the necessary loan payments in those early years after schooling, it must be noted that any deviation from a comparison of lifetime benefits to lifetime costs has the potential to harm the students. For this reason, special care should be taken when analyzing a rule that effectively restricts borrowing for schooling costs.
>
> If education confers benefits to students – such as increased earnings throughout their post-schooling career – restricting borrowing can cause students to be worse off on net. The guidelines that informed the Department of Education's choice of debt/earnings ratio cut-offs were based on lending rules that are meant to apply to borrowers at all stages of their working life and for physical assets that do not lead to increases in earnings. Rules that apply to early career earnings should be different.
>
> Second, the calculation of annual debt payments should be based on the repayment amounts that students have the option to choose. The proposed rule calculates annual loan payments assuming a 10-year repayment period. However, all students with Title IV loans have the options either of extending the repayment period to between 12 and 30 years through the choice of an "extended repayment", or of reducing the payments they must make in the early years after school completion through the choice of a "graduated repayment". Calculations reported to us by Mark Kantrowitz, the publisher of FinAid.org, indicate that the average repayment length chosen by students for Title IV loans is at least 15 years, and possibly close to 19 years.
>
> In addition, students with low earnings, the ones that the proposed gainful employment rule is meant to protect, have the option of reducing their Title IV payments to a lower percentage of their earnings through the choice of "income-based repayment". For many students, and particularly for those with lower than average earnings in the years for

[21] Comments of Drs. Jonathan Guryan and Matthew Thomson, submitted to the Department of Education on Docket Number ED-2010-OPE-0012

which earnings are measured for the gainful employment rule, it is advisable to choose one of these options.

If the goal of the proposed gainful employment rule is truly to ensure that students can afford their loan payments upon completing schooling, the rule should compare their earnings to the amounts they are required to pay. If students choose to pay back their loans over a shorter period than they have to, it cannot be argued that those students are unable to afford the payments. The correct test, absent measuring the gains resulting from, or quality of the program, is whether students finish school with required debt payments – the lowest ones available to them given their options – that are too high relative to their earnings. If it is logistically difficult for the Department of Education to determine which of these repayment options offers the lowest annual payment for each borrower, a simple adjustment to the rule would be to extend the repayment length used in the formula to 15 or 20 years. The allowable repayment period varies between 12 and 30 years and depends on the total amount of the Title IV loan. At a minimum, this modification would reflect a more realistic loan payment amount that an individual would be required to make on a student loan.

* * * * * * * * *

We also wish to address the Department's choice of an 8 percent threshold for the debt to earnings ratio. This is not a number that is implied by any economic model that we know of. It is incorrect for the Department to suggest that this number is supported by research. The standard economic analysis of the educational investment decision does not imply a limit on annual debt payments related to annual earnings. Rather, experts who study the economics of education use a model based on a comparison of costs with benefits, including the gains to earnings resulting from the schooling.

While the Department has stated that the 8 percent threshold is based on research, as economists we wish to make it clear that this number is not based on economic theory. In fact, as we have described, economic theory implies a quite different set of guidelines for making good decisions regarding schooling.

III. The Department Assumes A Paternalistic Attitude Towards Students Choosing Private Sector Institutions

In the preamble of the NPRM, the Department states the proposed standards will "protect students who often lack the necessary information to evaluate their postsecondary education options and may be misled by skillful marketing, resulting in significant student loan debts without meaningful career opportunities." This is both incorrect and insulting to all students who choose to enroll in a private sector college.

Private sector colleges, along with non-profit private and public institutions, are required by the Department through Congressional mandate to provide a vast quantity of information to students about everything from financial aid information to campus crime information, information about their privacy rights, how to report a missing classmate, general information about the school, refund policies, satisfactory academic progress policies, voter registration forms, and – if the regulations proposed on June 18, 2010 are finalized without modification – information about graduation rates (calculated in a manner different from those already required under the Student Right-to-Know Act), placement rates, and loan debt of students previously enrolled in the program. And this is only a small portion of the reporting and disclosure requirements schools participating in the Title IV programs must provide to students.[22]

There are other sources of information about postsecondary institutions that are made available to students. The Federal government presents institutional information on its College Navigator website, which includes financial aid information, student demographic information and graduation rates. When filling out the FAFSA online, students are informed of the cohort default rate of the institutions to which they request their FAFSA information sent. State authorizing bodies and accrediting organizations also have, in many cases, requirements for information that must be provided to students.

CCA supports a process for simplifying the critical information that a prospective student needs to review to minimize the chances that the individual is overwhelmed by the data that must be presented to him/her.

Even if there were a legitimate concern that students lacked helpful information, the vast majority of what the Department has proposed would not even address that concern. Setting maximum debt-to-income ratios and minimum repayment rates does not provide students with "necessary information" to allow them "to evaluate their postsecondary education options." It will simply give students fewer programs and institutions to choose amongst.

As for the Department stating that the students may be "misled by skillful marketing" and that individuals "may not have the ability to evaluate fully the costs and benefits of entering into loans," this is simply insulting to all students who choose to attend private sector institutions. It implies they are less sophisticated or intelligent than those who choose to attend not-for-profit schools. We cannot believe the Department intended to belittle the millions of students who have chosen to enroll in and graduated from for-profit colleges, and are now working in the careers they strove for and are living lives that have been made better because they achieved their postsecondary education goals.

IV. Postsecondary Institutions Are Subject To Multiple Levels Of Oversight

The Department's statement in the preamble that for-profit institutions may be subject to less oversight by States and other entities is, at best, a gross understatement of the facts and misleading in its simplicity. The amount of information all postsecondary institutions are required to provide to students, accreditors, state regulatory bodies, and the Department of Education itself is extraordinary. This information is subject to review and verification by all of these bodies, and additional parties and outside agencies (e.g. students, plaintiffs' attorneys, state Attorneys General, professional licensing bodies, independent auditors, membership associations) have means of recourse if any of this information is missing or incorrect, either purposefully or accidently.

[22] The full list of disclosures required under the HEA is available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2010831rev

The Department has many methods at its disposal for holding institutions accountable for their actions. Multiple deadlines, hundreds of reporting requirements, program reviews, verification of student aid data and more provide the Department the tools to ensure the integrity of the Title IV programs. These methods already exist in the Higher Education Act and regulation. Secretary Arne Duncan recently announced he will be increasing the Department's resources to provide the necessary oversight, an action which CCA fully supports.

Adding a new, unauthorized method for the Department to terminate program and, ultimately institutional, participation in the Title IV programs will do nothing to improve program oversight; it will simply create yet another complex scheme the Department must fund, staff, create the technology to support, and maintain. If the Department feels it cannot adequately do the job Congress has mandated with the tools already at its disposal, the answer is not to issue more misguided regulations.

V. The Department States The Proposed Rule Is To Address Growing Concerns Of The Unaffordable Debt Students Incur And To Measure If Incurred Debt Is Reasonable

The Career College Association shares the Department's concerns about increasing (and increasingly unmanageable) student debt. With the assistance of our eight year old Default Prevention Committee, comprised of financial aid officers from our member institutions, default prevention practitioners, third party servicers, student loan experts, and representatives from the Department of Education, we are creating a comprehensive student loan counseling program to assist institutions in helping their students borrow wisely and consciously. The first phase of this project, a financial literacy program for students, is available on CCA's website at www.career.org. Additional ongoing projects focus on counseling students on active loan repayment and maintaining their repayment status, and developing strong counseling to prevent overborrowing. And while these programs will have a positive impact on student borrowing and student loan repayment, they do not address the heart of the problem: students take on too much debt because, in many instances, they have access to too much loan money and they borrow more than they need to finance their postsecondary education.

We have strong anecdotal evidence from institutions that already have robust financial aid and debt management programs counseling against overborrowing and only taking out the student loan funds necessary to pay for their educational charges that as soon as one student overborrows and passes the word around about the availability of this easy money, more students will come into the financial aid office and request the "extra" loan funds – those above and beyond that needed to pay tuition, fees, charges and supplies – for which they are eligible. And institutions are not permitted to refuse them those funds.

Students also have access to private loan funds, and institutions have no control over the amount of those funds that students may borrow. Schools are required to provide students with the private loan certification form, counsel them about the benefits of Federal over private loans, and caution against borrowing in excess. These steps are intended to assist students in making the best choice for them about borrowing, but they have not been in place long enough to see if there will be a positive impact to reduce unnecessary borrowing. Also, institutions still do not know all the private loan funds that students may receive because in most instances these funds are provided directly to the student. While the school may learn about them after the fact when a student pays cash for part of a program, they may not always be aware of the total amount (because they depend on the student to provide that information) and they have no real control over the amount borrowed.

The student loan programs are a way – the only way, for many students - for students to achieve their postsecondary dreams. And having funds available for students to pay for the program of their choice at the institution of their choice, regardless of the cost, is important to helping students complete postsecondary education and for us to meet President Obama's 2020 goal.[23] But student loans can be a double edged sword because loans must be repaid and the debt burden can seem overwhelming. Congress created a variety of repayment plans to help students repay their student loans and students are permitted to choose among these plans to find the one that best serves them, but these are backend ways of addressing the problem.

We believe there are several steps the Department of Education and institutions can take to prevent student loan overborrowing that would address the heart of the issue – the borrowing of more funds than are necessary – rather than holding institutions responsible for a ratio that depends in large part on the income a student earns, which is dependent on factors the institution has absolutely no control over including the type of company where the student works, the prevailing wage for the position, and even, in some cases, if the student chooses to work or not.

CCA advocates permitting institutions to limit the amount of loan funds a student may borrow to that which is needed to pay for the student's educational charges, such as tuition and fees, supplies, and room and board. Students would have to actively request and demonstrate need for any funds between this amount and the annual maximum loan amount for which the student is eligible. We realize that this would require Congressional authorization and we look forward to working with the Department to advocate for such a program proactively to deter student loan overborrowing. If there is concern that such a program could be detrimental to some students, and we share that concern, then we suggest a demonstration program involving institutions from all sectors of postsecondary education be implemented so the actual effects – positive and negative - can be observed, and rules adjusted accordingly.

We also look forward to working with the Department and private loan lenders to develop a plan that will more effectively serve student borrowers. Private loan funds are necessary for many students to meet the obligation of their educational charges when students choose to attend institutions that are more costly, or programs that are more expensive, but institutions are removed from the private loan borrowing process. The private loan certification form is a positive step in making sure schools are more aware of any private loan funds a student may receive, but we do not know yet if it effectively impacts the problem of overborrowing. We believe the use of private loan certification forms and their impact on student loan borrowing need to be examined, either through a GAO report or through one of the Department's research means. This will allow us to analyze the impact the certification forms have on private loan borrowing, and make effective changes.

We believe that private loan funds should be disbursed directly to the institution rather than the student. This will provide the institution with one final opportunity to counsel students about

[23] President Obama has made increasing the number of Americans graduating from college a priority for his Administration. The ultimate goal is for the United States to lead the world in college educated citizens by 2020.

financial literacy, the benefits of Federal over private loans, the dangers of overborrowing and other financial aid options available to the student. Again, this would require Congressional authorization and CCA looks forward to working with the Department, Congress, loan providers, and other postsecondary organizations, to assist students in making wise borrowing choices.

Finally, if these proposed regulations are indeed intended to prevent growing student debt, we believe the Department and Congress should address student loan debt at all institutions. Many students attend multiple institutions, some of which are in the for-profit sector, most of which are not. Debt incurred at one institution or program is no different than debt from another college; it is all the same thing in the end – money students must pay back. Students can and do borrow loan funds at virtually all Title IV participating institutions, and for every eligible program at those institutions. Debt taken on in a culinary program is no different than debt from a philosophy program, or to earn a law degree or a certificate in computer programming. And student loan debt from earning a culinary or computer programming degree at a private sector institution is no different than student loan debt earning culinary or computer programming degrees at a not-for-profit institutions. If these regulations are really proposed to address student debt, then we look forward to working with the Department and our postsecondary partners in other sectors to do just that.

On the issue of reasonableness, we do not believe an artificial ratio based on an outdated home lending standard and that has no basis in economic theory in any way measures if a level of debt is “reasonable.” Reasonableness is relative. More goes into determining the reasonableness of a payment for anything – a cell phone contract, a pair of blue jeans, an apartment, groceries, or a student loan payment – than a wholly unreasonable debt-to-income ratio. It may be reasonable to one person to pay $100 for a pair of designer jeans at Bloomingdale’s, yet another would not pay $15 at Wal-Mart. The amount of funds the person has available in the form of cash or credit helps to determine the reasonableness of the purchase; so does the value the person places on the item being purchased. And that same person may pay the $100 for the jeans knowing they have a student loan payment due and the purchase will make them unable to meet that loan payment obligation. The value placed on the designer item, when a $15 equivalent is available, might outweigh – to that person – the value of making an on-time student loan payment.

Other financial obligations, family situation, wants versus needs and other factors, well beyond an institution’s control and in many instances subjective, factor in to a student determining if their student loan payment is reasonable. And that determination of reasonableness may change over time. It may have seemed entirely reasonable for a student who has undergone stringent loan counseling and financial literacy education to assume $40,000 in student loan debt. Several years later, when faced with a mortgage and car payment and the decision to work or stay home and raise children, the determination of that reasonableness may change.

The idea of reasonableness is very much a value proposition, and establishing a false metric to define that term is, quite frankly, unreasonable.

VI. The Repayment Rate Calculation Is Unauthorized And Severely Flawed

The Department of Education proposes creating a “repayment rate” calculation as a means of defining the term “gainful employment.” Nowhere in the Higher Education Act or any other law passed by Congress is this calculation authorized, let alone authorized to define the term “gainful employment" as a means of determining an institution's eligibility for participating in the Title IV HEA programs. Moreover, the Department's proposed repayment rate calculation would count students utilizing Congressionally-authorized repayment plans and debt management plans against the institution.

A. Fundamental Flaws with the Proposed Repayment Rate Calculation

The Department is proposing to establish a new method of determining program eligibility based on the number of students making a high enough payment on their student loans in the first three years after leaving an institution that the principal amount of those loans is lower at the end of the year prior to the calculation being made than it was at the beginning of that year. A student could make payments that reduce the principal balance in the previous years, but if for some reason the balance does not go down in the most recent year, the loan will not be considered in repayment for the purpose of this regulations.

The early years of anyone's career can be, and increasingly are, tumultuous. Starting salaries are not indicative of lifetime earnings. Students are attempting to establish themselves in their careers while also beginning to make payments on their student loans. CCA requests the Department count all students meeting their legally obligated loan payment, regardless of the amount of that payment and whether or not the principal of the loan is reduced, as being in repayment for the purposes of this calculation. It makes no senses to consider a borrower to not be in repayment when he or she is, in actuality, making student loan payments. To hold institutions accountable for students going above and beyond their required loan payment makes no sense. Institutions cannot pay loans back on behalf of students; the loan payment amount is based on many factors, most of which are established by Congress. If students are making their required loan payments, they are in fact repaying their loans.

B. The Department's Plan Would Count Students Using Congressionally-Authorized Loan Management Plans Against the Institution

Borrowers will be considered to be in repayment if, in the most recent fiscal year, they made payments that reduced the outstanding principal balance, made qualifying payments under the Public Service Loan Forgiveness Program, or paid the loan in full (although consolidation loans will not be considered to pay any of the underlying loans in full until the consolidation loan is paid in its entirety). Borrowers meeting their legal obligations but who are not actively "repaying" their loans, as defined by the Department (and not, it is important to note, Congress) are not considered in repayment.

Congress has authorized a variety of loan repayment plans to provide borrowers with options for meeting their loan obligations when first embarking on their careers and to allow the consideration of other financial obligations students have. Consolidation loans may result in an overall longer repayment term and additional interest being charged; payments made in the first few years may only apply to the interest being charged for the loan and the principal balance actually increasing. That is not unusual. Students are counseled to this fact, are presented with other repayment options, yet they may still choose loan consolidation as their repayment option.

Consider a student whose career dream, after earning a nursing degree, is to assist low-income women in receiving proper prenatal care. She recognized this goal after graduating from a licensed, accredited nursing program at a for-profit institution. Our student attended classes at night because she had to work during the day, and she used student loans to pay for her tuition and fees. She finds employment in a clinic offering free or low-cost medical care to poor women. For whatever reason, employment at the clinic does not qualify for public service loan forgiveness. The student utilizes the income-based repayment plan because as well as facing student loan payments, she must pay rent on an apartment for herself and her elderly father, whom she cares for, as well as a car payment to provide transportation to and from work at the clinic. This student, working the job of her dreams and supporting herself and her parent could put future nurses at risk of not receiving an education because she is using an authorized loan payment plan that the Department does not consider "repaying" loans. That is an absurd result.

There are reasons written into law for approving the deferment or forbearance of a Federal student loan that assist borrowers in managing their loan debt while taking into consideration the fact that circumstances occur that may prevent a student from meeting that obligation for some period of time. Students may experience illness or have a family member become ill and defer their loan payments while recovering or caring for their loved one. In times of economic depression, such as the one the United States is currently facing, companies cease operating and workers become unemployed. They may have to defer their loan payments while searching for new employment. Unemployment and the lack of jobs – any jobs – has become such a prevalent condition that Congress has extended the length of time laid off workers may collect unemployment benefits.

All of these conditions are beyond the control of any postsecondary institution. Institutions may not know a student borrower is in deferment as schools are not given proactive notification when this happens. And if schools are given notice, or take on the burdensome task of monitoring NSLDS (if and when real-time reports on deferment and forbearance become available), what should schools do? Contact former students who are already in a stressful situation and inform them that the decision to utilize the deferment program Congress established to assist students facing economic hardship can put future students at risk?

To hold institutions accountable for circumstances well beyond their control by disallowing the authorized debt management plans established by Congress creates a perverse incentive for institutions to <u>not</u> provide the proper loan repayment counseling to students. Why should a school help a graduate laid off due to their company shutting down file the proper paperwork to receive an unemployment deferment when that deferment could put the program at risk? Or assist a student who obtains an entry-level position at their dream company to consolidate their loans? This proposed rule forces schools to put the needs of students last.

A cursory examination of the repayment rate charts released by the Department show repayment rates to be lower than expected at most institutions, including public and non-profit medical schools. Were Harvard Medical School held to the same standard for which for-profit institutions will be accountable, it would not have an acceptable repayment rate. Not many would argue that Harvard Medical School should be placed on restricted status or made ineligible for participation in the Title IV programs. It is, however, safe to assume many borrowers were considered to not be repaying their loans because those loans were in deferment, and that after an initial employment period most Harvard Medical School graduates will begin to earn enough money to actively repay their loans.

For the Department of Education to disregard these Congressionally-authorized debt management and repayment tools is unacceptable. At the very least, if the Department insists in going forward with the proposed repayment rate calculation, all students meeting their legal repayment obligation (even if that means the student's loans are in deferment or forbearance) should be considered in repayment for purposes of the calculation, not just those students in in-school or military deferment.

C. Repayment Rates Are a Reflection of the Sociodemographics of the Student Body, Not the Quality of the Institution

Mr. Mark Kantrowitz, the publisher of FinAid.org and a financial aid expert cited by the Department in the NPRM, conducted an analysis of what impact the proposed rule would have on Pell Grant recipients.[24] It found that:

> (t)he average loan repayment rate is 66% at colleges with less than a tenth of their enrollments receiving a Pell Grant, compared with 26% at colleges with more than two-thirds of their students receiving a Pell Grant. The results are similar even when the analysis is restricted to public, non-profit or for-profit colleges, suggesting that a low loan repayment rate may be caused, at least in part, by the demographics of the students enrolled in a college and not just due to differences in educational quality.[25]

He also found that, generally, Pell Grant recipients contribute 5.2% to the loan repayment rate and non-recipients contribute 74.3% to the loan repayment rate. Since more than half of Pell Grant recipients (52.3%) who are enrolled at for-profit colleges are enrolled at colleges with Department-predicted ineligible loan repayment rates under 35%, this may lead to a significant migration of Pell Grant recipients among programs and colleges. Community colleges are not equipped to handle such an influx.

The repayment rate data published by the Department illustrates that those colleges serving more at-risk students, such as private sector schools, minority serving institutions, and community colleges, have lower repayment rates. This alone demonstrates the rate is not a reflection of institutional quality, but rather illustrates issues faced by institutions attempting to educate larger numbers of lower-income students.

Inasmuch as the repayment rate demonstrates anything, it is that students who enter postsecondary education poor may have a harder time repaying their student loans or be more inclined to use alternative methods for repaying their loans. It does not matter where those loans were incurred.

D. Small Numbers of Borrowers Skew the Calculation

Because of the Department is defining repayment as payments reducing the principal of a loan, small numbers of borrowers in a program can skew the results. If there are few borrowers but one of those borrowers has large loan amounts and does not meet the Department's "repayment"

[24] http://www.finaid.org/educators/20100901gainfulemploymentimpactonpell.pdf

[25] Ibid.

definition (even if the student is making his legally obligated payments), that students loans can have an adverse impact on the calculation.

As with cohort default rates, institutions should be given latitude in the calculation when there are small numbers of borrowers in a program.

E. The Thresholds Were Arrived at Arbitrarily

In a call held on August 12, 2010,[26] Ms. Mary Ellen McGuire, former Senior Advisor for Education on the White House Domestic Policy Council, admits the repayment rate thresholds were not arrived at through any sort of study of economic or education theory. Instead, they were determined by looking at various thresholds and determining "what the market can bear:"

> On the 35% and 45%, the way that education legislation works whether it's K-12 or higher ed is, quite honestly - we do something called runs where we run a whole different – we run percentages, 20%, 25%, 30%, 35%. We look at where they land.
>
> We see, sort of, what the percentages may be in terms of who falls into the category and we think about what we believe the market can bear. And really what I mean -- market, when I talk about it, is from a student perspective. There is certainly some worry if that – if we go above a certain threshold -- and we have, maybe, 20% of these institutions that are identified.
>
> Where will these students then go if the no longer can attend these particular institutions? We certainly need some time -- a little bit more time, to build our community college system. So the 35% and 45% is really just the result of running numbers and deciding that those made a bit of sense.

Ms. McGuire's words indicate the thresholds used to determine program and institutional eligibility for private sector schools were an attempt to reach a number that would not put so many students on the street that community colleges could not readily accept them; indeed, community colleges will be given more time to build their capacity. This flies in the face of the President's 2020 goal and eloquently speaks to the fact that this arbitrary and capricious proposed rule is not at all intended, as the Department maintains, to address student loan debt.

VII. The Debt-To-Income Ratio Has Several Flaws And Is Not Permitted Under The Higher Education Act

The debt-to-income ratio, as outlined in the notice of proposed rulemaking, has several flaws, the first and foremost of which being Congress has not authorized the Department to create such a measure as a condition of programmatic and, ultimately, institutional eligibility. Should the Department continue with this unauthorized rule, there are several areas for improvement that could make the calculation a more reasonable measure of student debt levels. In Part III of these comments, we propose an alternate debt-to-income measure that would more fairly calculate the

[26] Transcript of Morgan Stanley's Call on Regulatory and Legislative Issues in the For-Profit Education Sector (August 12, 2010).

ratio, and would permit institutions to monitor compliance with the calculation on an on-going basis and without denying institutions the due process to which they are entitled.

As stated above, the 8% debt-to-income ratio is not supported by the experts the Department cites as the reason for arriving at that figure. In fact, all of the thresholds seem arbitrary, and Ms. Mary Ellen McGuire, of the White House Domestic Policy Council, indicated as much during an August 12, 2010 call held with Morgan Stanley to discuss the gainful employment provision. Ms. McGuire, who was actively involved in developing the proposal, stated the 8% figure did come from the Baum and Schwartz study, and the 12% threshold "… quite honestly, is just 50% more than the 8%. That was just a number the Department felt made some bit of sense." It is hard to fathom that that the Department of Education is basing a regulatory proposal that could ultimately deny hundreds of thousands of students access to postsecondary education on what amounts to a gut reaction that makes a "bit of sense" to them. These figures are neither supported in economic research nor make sense to large portions of the postsecondary community.

A. Institutions Will Be Held Accountable for Debt Over Which They Have No Control

All forms of student debt – Federal Stafford loans, Federal Perkins loans, private educational loans, and institutional financing plans – are included in the Department's proposed debt-to-income ratio. As explained elsewhere in these comments, institutions have little to no control over the amount of private educational loans students incur. They may counsel against receiving private loans, but they cannot prevent students from borrowing private loans.

Also previously discussed is the fact that students may often times borrow more Federal student loan funds than are needed to pay the necessary educational expenses, such as tuition and fees. Schools are not permitted to limit the amount of funds students borrow; they may counsel against it, but ultimately the decision to overborrow is the student's.

If the Department finalizes the proposed rule, we recommend two ways to make the debt portion of the debt-to-income ratio a more realistic measurement. First, all private loans should be excluded from the calculation. We repeat: schools currently have no control over private loan funds that students may borrow. Unless and until institutions have some method of approving or declining loan amounts, or the ability to impact the funds received, they should not be held accountable for those funds.

Secondly, institutions should only be held accountable for debt incurred to pay actual educational expenses, to alleviate the affect overborrowing by students can have on the debt-to-income ratio. The Department could easily arrive at this amount by using the amount institutions reported as the net price on the College Navigator website as the cost of education and, therefore, the maximum amount of debt students would need to accumulate to pay those charges, minus any grant or gift aid received by the individual student.

B. The Calculation Assumes a 10-Year Repayment Rate for All Student Loans

The Department of Education proposes to use a 10-year standard repayment rate for purposes of the debt-to-income ratio calculation and the current interest rate charged for an Unsubsidized Stafford Loan. These figures will be used regardless of the actual repayment plan the student chooses to best manage his finances and what the actual interest rate charged on those loans should be.

Students are afforded a range of Congressionally-authorized repayment plans with a variety of repayment terms. Students choose among those plans to utilize the one that best serves their economic position right out of college and, frequently, when first entering the workforce. Conversations with Mr. Mark Kantrowitz, the publisher of FinAid.org and a financial aid expert cited by the Department in the NPRM, enlightened us to the fact that the average loan held by SLM Student Loan Trust takes approximately 19 years to repay, with 16 years being more typical.

CCA requests that the Department make two changes to the repayment portion of the debt-to-income calculation. First, the Department should use whatever payment plan the student is utilizing when making the calculation. Second, the Department should use the student's actual interest rate for the calculation.

If the Department is going to persist in issuing this rule, the rule should be crafted in a manner that most accurately reflects what is actually happening with student borrowers. Students choose repayment plans because the amount to be paid most closely matches the student's ability to pay given their current circumstances. To use the shortest repayment plan which results in the largest payment amount for students for no reason other than ease for the Department in making the calculation is inexcusable. If the Department is going to issue this rule, the systems and infrastructure should be put in place to calculate the ratio as accurately as possible. This may require the Department to develop the ability to do the calculation using real student information than simple proxies.

C. The Proposed Rule Would Use Starting Salary Figures

The Department's proposed debt-to-income calculation would use starting salary data for the "income" portion of the ratio calculation. Student income from the first few years of their careers, however, does not accurately reflect the impact postsecondary education will have on their lifetime earnings or their ability to ultimately repay their loan obligations.

If institutions can show that students experience a "substantial" increase in earnings after the initial employment period, institutions may use income information from the prior three-year period for the ratio calculation. However, institutions would have to provide information to the Department, such as survey results of employers or former students, or other empirical evidence, documenting the increased earnings.

CCA requests that the Department of Education calculate both the three-year and the prior three-year debt-to-income ratios for all institutions. The Department will have the information enabling them to do this calculation. Since the Department will have the data, it will be a simple matter to determine that graduates are indeed experiencing a "significant increase" in earnings.

If the Department declines to do both the three-year and the prior three-year calculation to assist institutions, we request clarification on what would be considered a "substantial increase" in earnings. Again, this term is very subjective. To one student, a raise of $100 a month would be enough money to live in an apartment without a roommate; that $100 would be considered a substantial increase in their earnings. Another student may be going to school to earn a credential to obtain employment at a new company; that company is public, rather than non-profit, so the salary difference is $20,000 annually. To this student, $20,000 is a substantial amount.

At the very least, this term should be defined in some manner. CCA suggests defining the term "substantial increase in earnings" as one that exceeds twice the cost-of-living index in any given year.

D. The Proposed Calculation Will Deny Institutions the Due Process Afforded to Them Under the Law

Under the proposed regulations, SSA will provide income information to the Department; the Department will make the calculation. Institutions will never have access to individual student's income information, even when found out of compliance with the calculation and subject to disciplinary action in the form of a hearing. Institutions will only be able to verify that the students in the calculation should be in the calculation. As explained above, these procedures would deprive institutions of due process.

There are also some practical concerns associated with an institution's inability to access income information.

Institutions must have full and timely access to the income information because the outcome can make a program ineligible. Mistakes can and will be made. Schools need the ability to search data for any apparent anomalies and to challenge that information before the Department. If the Department cannot or will not provide student-by-student SSA income information to institutions, then another source for determining income should be used. While Bureau of Labor Statistic income information is not ideal, using BLS information would allow schools the opportunity to monitor compliance with the debt-to-income ratio calculation and make adjustments as necessary, as well as permit them access to the information for which they will be held accountable. Nothing about this debt-to-income ratio calculation is ideal, but BLS data is a "devil you know" situation and affords institutions the ability to calculate the ratio for which they will be held accountable. We explain our request to use BLS data and the proper percentiles to more accurately reflect the return-on-investment a student receives from postsecondary education in Part III of these comments.

Additionally, CCA requests the Department to include a draft debt-to-income ratio period, with institutions having the ability to verify and challenge the data included in the calculation. This method is accepted and used with the cohort default rate calculation. Institutions receive their draft CDR and the data used to make the calculation. They are then afforded the opportunity to verify that data and challenge any inaccuracies they find before the final, official rate is produced and published. A similar process would help to prevent errors from stripping institutions of their ability to enroll Title IV-eligible students. And it is very important to note that half of the information – the income information – is completely out of the institution's control. Schools can access student debt information through the National Student Loan Data System (NSLDS) and correct inaccuracies. They should have this same ability with the income information, or a data set that schools can access should be used instead.

E. Students in In-School and Military Deferments, As Well as Other Congressionally Established Debt Management Programs, are Not Excluded From the Calculation

Congress has authorized students to delay making loan payments when faced with periods of financial hardship, when returning to postsecondary education, and when on active-duty military service. The department recognizes in-school and military service deferments in the repayment rate calculation, but not in the debt-to-income calculation. CCA is unsure if this is an oversight or an intentional action. We request clarification on how students in an authorized deferment or forbearance will be counted in the debt-to-income ratio. We believe that at the very least, students in in-school deferments, who may very likely have no income as they pursue their postsecondary goals or whose income may be reduced while attending school, be taken out of the calculation. Likewise, students in a period of deferment or forbearance while awaiting a decision on an application for discharge of their student loan obligation due to total and permanent disability should be removed from the calculation.

VIII. The Department Proposes To Assume New Oversight Functions Of Institutions Without The Authorization Of Congress

The Notice of Proposed Rulemaking sets forth new procedures institutions impacted by the gainful employment regulation must adhere to when they seek to expand their capacity for offering new educational opportunities to students. Specifically, when seeking to add a new program at an institution, schools would be required to provide the Department of Education with the information described in the NPRM and the Department will grant or deny the institution the ability to enroll Title IV students in that program. Nowhere in the HEA is the authority for program approval given to the Department. The authority to approve new programs has not been conferred on the Department by Congress. As well as being outside the statutory authority granted to the Department, there are several areas in the proposed rule that are unclear.

First, schools will have to provide the projected enrollment for the program for the next five years for each location of the institution that will offer the additional program. CCA requests that the Department provide the rationale for providing enrollment information for five years. We have found no education, workforce or economic study in which either enrollment or employment figures work in some type of five-year cycle. Without such, we are led to believe there is no rational basis for the five year projection of enrollment. Five year figures could be hard to accurately project. If an institution under- or over - estimated the number of students who would enroll in a program, and a student somehow had access to that information (i.e., looked at papers on a desk at the institution and saw the figure) and either enrolled or withdrew due to this number that later proved inaccurate, could the institution be liable under the misrepresenation regulations? Could the institution be subject to some other sanction from the Department for inaccurately projecting a number based on no empirical data?

CCA believes the five-year projection requirement is too long a period to be able to accurately make this type of projection and requests that the Department, if it proceeds with this regulation, require institutions to project the estimated enrollment figures for the next two years for each location at which the program will be offered.

Next, institutions will be required to provide documentation from employers not affiliated with the institution that the program's curriculum aligns with recognized occupations at those employers' businesses and that there are projected job vacancies or expected demand for those occupations at those businesses. We have several concerns with the Department's proposed employer verification process which will also be employed when a program is placed on restricted status.

We are very concerned that employers will be put into the position of affirming the curriculum of a program. Curriculum design is well outside the knowledge set of many employers; asking someone in a specific field to verify a curriculum leading to a degree in that field puts them in a position of making an important determination that is well outside of their duties. What if an employer states that they do not like a textbook that is used at an institution? Will the institution be required to change that textbook? We believe employers should simply be requested to affirm that the skills and knowledge taught in the program are in line with what entry-level positions in that field require.

Employers would also be required to verify that there will be job vacancies at their businesses. Again, could an institution be liable under the misrepresentation regulations if an employer states, for example, that it will have projected job vacancies but then goes out of business? And one employer's needs may not reflect the national employment picture. Students can and do move locations for many reasons. They may be attending school in one state while planning to live and work in another at a later date. If an employer says they have no projected vacancies, will the application be denied? Will enrollment numbers be limited to what that employer projects as future employment needs?

How many employers will need to provide this verification? If an institution is applying to offer the program at three locations, will three verifications be needed? If one employer projects enough employment need for all three locations, would the single employer affirmation suffice? Would institutions be permitted to obtain multiple verifications from multiple employers to allow for increased enrollment in the program? If a program is approved but has enrollment limitations placed on it, could an institution obtain additional verifications from employers projecting need for additional workers, and would the enrollment cap be lifted?

CCA requests clarification on what will be considered an "unaffiliated employer." Many private sector schools work with employment advisory boards to ensure workforce needs are being met. Additionally, many schools have sent students to local employers as part of required internship or clinical training programs that are necessary to graduate from the program. Finally, many schools have good relationships with employers because those employers have hired graduates of the institution. We believe employers such as these can and should be permitted to speak on behalf of the institution. A truly "unaffiliated" employer has little reason to speak for an institution; more, without having any contact with the school or experience with graduates of the institution, the employer could not honestly provide the validation the Department is seeking. CCA believes any employer not under common ownership with the institution should be permitted to provide the employer documentation requested by the Department.

IX. An Entire Institution Can Lose The Ability To Enroll Title IV Eligible Students If One Program Fails To Meet The Proposed Metrics

Institutions with one or more programs on restricted or ineligible status due to not meeting the proposed debt-to-income ratios and repayment rate thresholds can be put on provisional certification. In the preamble, the Department states it will take into consideration that an institution is provisionally certified due to one or more programs not meeting the gainful employment metrics when the institution applies for recertification of the Program Participation Agreement. The implication in this is that an institution's PPA may not be renewed if one or more programs are restricted or ineligible due to the gainful employment metrics.

With the number of factors out of a school's control, including the lack of access to all data used in the calculation and the inability to limit student borrowing or prevent students from deferring loan payments, that is almost certain to happen.

X. The Proposed Rule Will Be Applied Retroactively

The Department intends to publish the final rule resulting from this Notice of Proposed Rulemaking on or before November 1, 2010, with the rule becoming effective July 1, 2011 and programs could possibly lose eligibility for participation in the Title IV programs as soon as July 1, 2012. The Department states that during this one-year transition period the lowest performing programs producing no more than 5% of completers during the prior award year would lose eligibility; the remaining programs out of compliance with the rule would be placed on restricted status.

The proposed effective date of July 1, 2012, for imposition of sanctions on programs and institutions would mean that the periods of assessment used for determining compliance with the rule would all be prior to the effective date of the new regulation. For the first several years of enforcement, institutions would be held accountable for meeting a metric that was not in existence during the period of attendance of most or all of the students whose data forms the basis of the calculations. Bearing in mind the proposed repayment rate calculation includes all students who have enrolled in a program, regardless of completion, institutions could be held responsible for the behavior of a student who attended for less than one semester in 2007.

The chart below illustrates our understanding of the cohorts of students whose data would be used to enforce this regulation as of July 1, 2012:

Enforcement year	Earnings year (Most recent calendar year for which earnings data are available for calculation of the debt to income ratio)	3 Year Period (Three most recently completed award years prior to the earnings year – for calculation of the debt to income ratio)	Prior four Federal Fiscal Years (for the borrowers in the loan repayment rate calculation)	Last Date of Attendance of Cohort of Students in Prior Four FFY (Borrowers will have left school at least 6 months before going into repayment)
7/1/2012 – 6/30/2013	1/1/2010 to 12/31/2010* *Assuming that the SSA needs to wait a year until self-employed people have filed their tax returns to get all data.	7/1/2006 to 6/30/2009	10/1/2007 to 3/31/2011* *Loan repayment rate calculation will exclude those who entered repayment after 3/31 of any year	4/1/2007 to 9/30/2011

If the Department insists on preceding with the publication of this unauthorized regulation, and meets the master calendar deadline for publication so that the rule becomes effective on July 1, 2011, then all aspects of the regulation should become effective as of that date and the rule should make program eligibility turn on data for students whose last date of attendance is on or after July 1, 2011. This will afford institutions every opportunity to put into place policies that will have a positive impact on the proposed rule, and not unfairly hold them accountable for students who have left years previously. It will also ensure the Department is not imposing retroactive rules without explanation or express authorization in a manner that is arbitrary and capricious and contrary to law.

XI. Timing Of The Calculation

It is unclear in the proposed rule when the debt-to-income and repayment rate calculations will made and institutions notified of the results. In conversations with the Department, we have been told they will be "operationally driven" and the calculations will be made "as soon as the information is available." It is simply unacceptable that institutions will not know when the sword hanging over their heads may fall. The Department of Education holds institutions to strict, enforced deadlines for the submission of information. The entire financial aid award year and institutional and student eligibility for participation in the Title IV programs is deadline driven; not submitting a piece of paper by the day mandated results in losing eligibility. The Department itself is held to deadlines, as evidenced by the hurried nature of this proposed rule – if the final regulation is not published on or before November 1, the implementation will be delayed by one award year.

As such, we request that the Department of Education create and adhere to a realistic calendar for calculating the debt-to-income ratio and repayment rate calculation, notifying institutions of the draft results of those calculations and permitting an adequate period to review and challenge those calculations, in the event erroneous information is found to be included in the calculations, prior to the release of the final calculation results. This time frame could mimic that of the cohort default rate release cycle.

XII. The Department's Notice Of Proposed Rulemaking Is Not Constructed To Gather Thoughtful Comment

A notice of proposed rulemaking is a public notice issued by law when one of the independent agencies of the United States government, including the Department of Education, wishes to add, remove, or change a rule or regulation as part of the rulemaking process. The purpose of a Notice of Proposed Rulemaking is to gather input from affected parties and the general public about changes to existing regulations and new regulations promulgated in support of new or existing statute. Congress created the requirement to enlighten agencies — that is, to force them to listen to the comments and concerns of parties whom the regulation will likely affect.

Generally, in the preamble of the proposed regulations, agencies ask questions to solicit input on specific areas. In the case of this NPRM, the Department's questions seem less designed to solicit thoughtful responses than they are to gather support for the rule. Asking if a proposed regulation is strict enough or should be more strict does not seek enlightenment into the proposed rule, but rather almost leads the public to support the Department's position, if not lead them to agree that it does need to be strengthened.

XIII. The Timing Of The NPRM And Supporting Documentation Have Not Afforded Time For Fully Assessing The Impact Of The Proposed Rules

The proposed rule was issued on July 26, 2010, five weeks after the first part of the proposed rule (disclosure and reporting requirements, which were contained in the June 18, 2010 NPRM) was published. Data supporting the proposed rule was issued almost three weeks later, on August 13, 2010. The proposed rule looks nothing like what was discussed during the negotiated rulemaking sessions. The piecemeal approach to issuing this language and the delay in providing the repayment rate calculations made by the Department has resulted in institutions being unable to fully assess the total impact of the proposed rule as it will apply to their programs. If the Department had the data and repayment rate calculations at their disposal at the time the proposed rule was published (and we must believe the Department did have this information available and did not release a proposed rule without any knowledge of the actual impact on students!), we believe the release of the data at that time would have permitted institutions a better chance of assessing the rule's impact.

The proposed regulations are confusing enough that the Department took the unprecedented step of holding a conference call for the postsecondary community to answer questions about the NPRM and also issued a Frequently Asked Questions whitepaper to attempt to provide guidance.

CCA requested an extension of the comment period because we firmly believe it is more important to get the final rule right than it is to simply get it published, but our request was denied by the Department. The very limited comment period under which the Department is operating will lead to a rush to publish the final rule in time to meet the master calendar. We are very concerned that the Department will not be able to fully consider the large number of comments submitted regarding this proposed rule and that they will draft a final regulation, submit it to the Office of Management and Budget for analysis, and issue the final regulation for publication in the *Federal Register* in time to meet the master calendar deadlines. We would like to stress again that it is much more important that the full impact of this regulation be determined, and the language of the regulation be thoughtfully written, than it is to rush a half-developed rule, the full implications of which area unknown, to final publication.

XIV. Conclusion

The Department of Education must abandon its proposed rule based on the legal and factual impediments described in Part One and Part Two of these Comments unless and until Congress authorizes it explicitly and unambiguously. At the very least, the Department should delay issuance of a final rule until it has the benefit of the Government Accountability Office report on the for-profit postsecondary institutions requested by Congress and until it takes more time to utilize additional research means available to the Department to fully assess the problem and proposed solution before creating a regulatory scheme that can and will have devastating effects on student access to postsecondary education in the United States.

Part Three: Alternative Metric Proposals

Notwithstanding the Career College Association's position, stated above, that the Department of Education does not have the statutory authority to promulgate the regulation outlined in this Notice of Proposed Rulemaking, we hold the utmost respect for the regulatory process and as such appreciate the opportunity to participate fully in that process. We respectfully submit the following comments for consideration by the Secretary in the event that the Department proceeds with publication of a Final Rule that contains a metric for judging whether or not a program meets the "gainful employment" test. We submit these suggestions, however, while reserving any and all rights to address concerns with any Final Rule outside of the regulatory process.

I. The Proposed Debt-to-Income Metric is Flawed and Unworkable

In an attempt to define the term "gainful employment," and as a possible means of addressing growing student loan debt, the Department of Education is proposing a debt-to-income ratio that is complex and, for reasons outlined above, unworkable. Following, we summarize and reiterate why the Department's proposed ratio is problematic and suggest an alternative debt-to-income ratio. We have tried to apply Occam's Razor to the ED proposal, trying to incorporate simple and straightforward concepts and definitions long understood by the Department and other stakeholders.

A. The Definition of Debt

The Department's proposed rule includes all forms of potential student debt, including private educational loans for which institutions may not have full knowledge or control and institutional financing plans which many institutions provide to students as a no-interest, no penalty method of paying for those portions of educational charges not covered by Federal financial aid programs. Additionally, postsecondary institutions may differ in the strength of their loan counseling programs, both on the front end in encouraging minimal student loan borrowing, and on the back end in assisting students in selecting a loan repayment program that assists them in satisfying their loan obligation in the manner most beneficial to the student in terms of length of repayment and total principal and interest repaid. Also, the proposed rule contains the anomalous situation, discussed above, in which all graduates and other students can be in a status recognized by the government and the lenders as proceeding toward loan repayment—the bottom line objective—and still yield a low repayment rating.

CCA's alternative debt-to-income proposal would define student loan debt as including only Federal student loan debt (subsidized and unsubsidized Federal Stafford Loan, Perkins Loan, and Graduate PLUS loan funds) taken out for the program at the institution at which the debt was incurred, or at an institution under common ownership as the institution at which the debt was incurred.

Debt would be limited to that debt necessary for actual educational expenses. The Department's proposed debt-to- income metric counts all debt incurred by the student, even if the debt was incurred to pay for non-institutional charges. However, as discussed above, institutions have no means to control or limit the borrowing of their students, and they should not be held accountable for the borrowing of their students for non-institutional charges. The amount of loan debt attributed to a student should be capped at the total of institutional charges less the grant aid received. This could be implemented fairly easily, as the Department could require or permit institutions when reporting student data under section 668.6(a) to add two additional data elements. First, they could report the cost of the program as disclosed to students under §668.6(b)(3). Second, they could report the total amount of grant aid received by the student. With these two additional data elements, the Department could cap the amount of loan debt attributed to each student to the amount that the student needed to pay institutional costs.

If the Department believes this method would be too complicated or create additional burden, it could rely on the "net price" reported on the College Navigator website. This price, which is calculated for all institutions, is the cost minus grant aid. Again, since many students are eligible for and take out loan amounts above and beyond what is required to pay educational charges, and institutions cannot prevent students from doing so, we believe institutions should not be held responsible for loan amount above what is necessary for educational expenses.

B. The Definition of Income

The Department's calculation relies on Social Security and/or other Federal income information, which, out of privacy concerns for individual students, will not be made available to institutions, thus depriving those institutions of the due process otherwise afforded to them when found out of compliance with an Education Department regulatory provision.

CCA's alternative debt-to-income ratio would use Bureau of Labor Statistic income thresholds for several reasons. These thresholds, while neither perfect nor ideal, are a known quantity. Institutions have full access to the income thresholds published by the BLS, unlike income information reported to the SSA. Thus, institutions would be able to periodically calculate their debt-to-income threshold since they will have full and complete knowledge of student debt information, as described above, and the income levels to which they will be held accountable. This will afford institutions the opportunity to monitor their ratio at intervals and adjust institutional practices in a way that will assist students in making wise borrowing decisions while permitting the institution to remain within acceptable debt-to-income limits. Programs would be able to present actual income data if they had credible information that it was accurate and verifiable.

Because BLS information is neither perfect nor ideal, if institutions can demonstrate the graduates of a program earn incomes above the reported BLS thresholds, they may perform the debt-to-income calculation using actual income figures. Actual earnings may be demonstrated through the use of survey results of employers or former students, or through other empirical evidence documenting actual earnings. In this instance, the debt-to-income ratio would be met the annual loan payment of the students is 30% or less of discretionary income, with discretionary income being defined as the difference between the actual average income and 150%of the most current Poverty Guideline for a single person in the Continental United States (available at http://aspe.hhs.gov/poverty).

C. The Repayment Rate Terms

The ratio relies on a 10-year standard repayment plan, using the interest rate for Federal Unsubsidized Stafford Loans. Students are afforded a range of Congressionally-authorized repayment plans with a variety of repayment terms. Students choose among those plans to utilize the one that best serves their economic position right out of college and, frequently, when first entering the workforce. Conversations with Mr. Mark Kantrowitz, the publisher of FinAid.org and a financial aid expert cited by the Department in the NPRM, enlightened us to the fact that the average loan held by SLM Student Loan Trust takes approximately 19 years to repay, with 16 years being more typical.

The benefits of postsecondary education, including the benefit of increased income, occur over a person's lifetime. Starting salary is not indicative of the increased income benefit students will experience. Congress recognizes starting salaries are lower than those experienced later in a career. This is reflected in the myriad repayment plans authorized by Congress to assist students in meeting their loan obligations. The standard 10-year repayment plan is no longer the norm. We suggest the Department use a 15-year repayment plan to take into consideration the fact that most borrowers need additional time to pay off their loan obligations, while others do indeed pay off their loans in a shorter amount of time.

D. The Cohort of Students

CCA believes that only students who complete the program at the institution should be included in the debt-to-income ratio.

CCA maintains a debt-to-income ratio is, at best, a poor measure of a program's ability to prepare students for the workforce. However, we respectfully submit the following changes to the ratio as a more realistic reflection of students' ability to repay their Federal loan obligations using a variety of repayment options.

Program Level	Debt-to-Income Ratio	Repayment Term	BLS Earnings
Non-Degree	8%	15 Years	50th Percentile
Associates Degree	12%	15 Years	50th Percentile
Bachelors Degree	15%	15 Years	50th Percentile
Graduate Degrees	20%	15 Years	50th Percentile

CCA believes that if a debt-to-income ratio were to be included in the final rule, these changes to the metric would better serve students and institutions. The actual debt-to-income ratio and Bureau of Labor Statistic's earnings percentile should differ among program levels for the previously explained reasons. The amount of Federal student loans for which students are eligible increases every additional year of a program. Thus, students in Bachelors degree programs are eligible for and accumulate more loan debt than students in Associates degree or non-degree programs and any debt-to-ratio calculation should allow for this. The BLS earnings threshold should be at an appropriate level to more accurately reflect the amount of time it takes to measure a return on the investment of postsecondary education, as well as reflect the lifetime benefit of achieving advanced higher education credentials.

II. The Proposed Repayment Rate Calculation is not Authorized by Congress, is Flawed, and is Not an Accurate Measure of Program Quality

A debt-to-income ratio is far from an accurate indicator of a program's quality or the strength of the support services an institution provides to students by way of educating them on student loan obligations and repayment plans. As such, the Department's proposed regulation includes a second metric to allow institutions to demonstrate program strength. The proposed repayment rate calculation is unauthorized by Congress, thus beyond the Secretary's authority to promulgate. It would be extremely difficult for institutions to monitor the repayment rate calculation because they do not have the ability to accurately track the up-to-the-minute repayment status of students' Federal education loans.

CCA proposes as an alternative for programs that do not meet the debt-to-income metric the use of the cohort default rate (CDR). The CDR is a measurement prescribed by Congress. Institutions are familiar with the CDR, and are able to monitor their compliance with the rate. The CDR includes a draft release period during which institutions have access to all the data used in the calculation, and they have the opportunity to verify the information and challenge incorrect data. Thus, using the CDR would mitigate the concerns we have regarding institutions' lack of due process if and when found out of compliance with the due process and repayment rate calculations.

The Department's repayment rate proposal would not include students in deferment and forbearance, other than in-school and military deferment, as being in repayment for purposes of the calculation. We do not believe this is in the best interest of students or institutions, as explained in the previous section of these comments. To summarize, deferments and forbearances are authorized by Congress as tools for assisting students in meeting their loan payment obligations and effectively managing their debt while taking into consideration other life factors – such as unemployment due to economic recession or a student's decision to postpone work due to family obligations – that are beyond the control of an institution. It is the lender, not the institution, which grants the deferment or forbearance; the institution is neither consulted nor notified during the process. It is important to note that, as of July 1, 2010, the Department of Education is the lender that will bear the responsibility for allowing students to defer or forbear their loan payments as permitted under the law.

We are well aware critics of private sector colleges accuse them of pushing students into forbearance and deferment as a way of lowering institutional cohort default rates, because loans in these statuses are considered in repayment for the purpose of the calculation. Again, lenders, not institutions, grant the deferment or forbearance. If the Department of Education wishes to address what they believe may be overuse of forbearance and deferment as debt management tools, the Department needs to address this with lenders and, ultimately, Congress. They should not create a complicated and messy new concept of repayment rate that excludes from the numerator students who are doing exactly as they have been told by the lenders to be in an authorized repayment status.

In using the cohort default rate as a secondary metric of gainful employment, the Department must take into consideration the demographics of the student population served by the institution. Kantrowitz examined[27] the impact certain at-risk characteristics of students, including Pell Grant recipient status, has on CDRs. He found that Pell Grant recipient status accounts for 32.9% of the

[27] Kantrowitz, Mark. "Calculating the Contribution of Demographic Differences to Default Rates." http://www.finaid.org/educators/20100507demographicdifferences.pdf

difference in default rates between for-profit and non-profit colleges and 30.7% of the difference in default rates between for-profit and public colleges. He goes on to advocate creating separate CDR's based for Pell and non-Pell eligible students:

> Instead of basing eligibility on a single default rate, the default rate should be split into two default rates, one for at-risk students and one for low risk students. … Disaggregating the default rates in this manner will allow the evaluation of a college's default rates to be focused more on effectiveness and institutional quality and not as much on the degree to which a college serves students from at-risk populations. Even with such a split, for-profit colleges still have higher default rates than non-profit and public colleges within each demographic category, and thus have much room for improvement. But they should not otherwise be penalized for fulfilling a public policy objective of enrolling and graduating students from at-risk populations, so long as their degrees are high quality with genuine value in the marketplace.[28]

When looking at the Department's proposed recalculation rate[29], Kantrowitz observed the impact Pell grant recipients had on that rate: the average loan repayment rate is 66% at colleges where less than a tenth of the students receive Pell Grants, compared with 26% at colleges where about two-thirds of the students receive Pell Grants. The results are similar across all types of institutions - public, nonprofit or for-profit.

Both of these studies show one important point: students with Pell Grants may experience more difficulty repaying their student loans, regardless of the sector of the institution they attended. Because of this, we believe any use of cohort default rates should be weighted to account for this phenomenon.

If the Department goes forth with this proposed rule, it is CCA's position that the CDR be used as a secondary measurement of gainful employment. The CDR would be calculated for applicable programs in the manner currently prescribed in statute and regulation for institutions, using the same definitions and counting loans in repayment for purposes of the CDR calculation in the same manner, but for purposes of this regulation the CDR would be calculated at the program level.

The Department does not currently track CDRs at the program level. We believe the cost to institutions and the Department will be minimal to aggregate the data in this manner. Certainly, it will be much less than the cost to develop and implement the appropriate infrastructure to calculate and monitor the proposed repayment rate.

Institutions would be required to meet CDR thresholds based on the percentage of their student population that receives Pell grants. Rather than simply splitting the CDR calculation into those programs with high Pell recipients and those with low recipients as recommended by Mark Kantrowitz, a more nuances approach is to calculate the CDR based on quintiles of Pell

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[28] ibid

[29] Kantrowitz, Mark. "The impact of Loan Repayment Rates on Pell Grant Recipients." http://www.finaid.org/educators/20100901gainfulemploymentimpactonpell.pdf

recipients, as indicated by the table below. Programs with lower proportions of Pell recipients (i.e., less than 60 percent of Pell recipients) in effect would have to have a CDR lower than the current maximum rate of 30 percent for the purpose of this gainful employment measure. The programmatic CDR and thresholds will only be used for purposes of determining compliance with this proposed regulation.

Thresholds for program cohort default rates would be as follows:

Percentage of Students Receiving Pell Grants	Programmatic Cohort Default Rate
0% – 20%	25
20% - 40%	28
40% - 60%	30
60% - 80%	40
80% - 100%	42

Programs above both the debt-to-income threshold and CDR threshold would be out of compliance with the proposed regulation and placed on restricted status.

III. The Penalty for Programs that Fail to Meet Either the Debt to Income Ratio Test or the Alternative CDR Test Should be Placed on Restricted Status for Three Years While the Institution, Working in Conjunction with the Department, Would Have An Opportunity to Make Changes to Return to Full Compliance

Because many factors in the debt-to-income and cohort default rate calculation are well out of the control or influence of the institution, we believe schools should have the opportunity to make adjustments to their operations that could have a positive impact on those measurements. As such, if a program is out of compliance with both the debt-to-income threshold and has a three-year cohort default rate above the appropriate threshold, the institution could be placed on a restricted status to afford the institution the time to make those changes necessary to return to full compliance.

IV. There Should Be No Requirement That New Programs Need to Meet Either of the Two Metrics

Unless and until a program has enough students complete that program to calculate both a debt-to-income ratio and the three-year cohort default rate calculation, the program should not be held accountable for those measurements. Thus, new programs authorized in the manner currently authorized under law and regulation shall have to be in continuous operation for a period of time that permits the calculation of the three-year cohort default rate before wither the debt-to-income ratio or the use of the three-year CDR shall be applied to it for the purpose of this proposed regulation.

V. The Proposed Debt-to-Income Metric and CDR Alternative Would Apply to All Institutions

The Department maintains the reason for releasing this proposed rule is to address their concern about growing levels of student debt. CCA shares that concern. We believe everyone involved in higher education shares that concern as well. As such, we strongly suggest applying these proposed metrics to all programs at all institutions of postsecondary education, regardless of sector. As we stated above, student loans are student loans, regardless of where they are incurred or what program was studied or even where that program was taught. Students transfer among institutions and change their program of study. They move from one institution to another in pursuit of additional or higher postsecondary credentials. Evenly applying these rules will allow students the opportunity to make the absolute best choice when selecting a program, and allow all programs to operate on a level playing field.