



Gainful Employment Memo

Primary Statute: HEA sections 101(b)(1), 102(b)(1)(A)(i), and 102(c)(1)(A)

Background

Proprietary (for-profit) institutions of higher education were originally prohibited from participating in the federal financial aid system under the Higher Education Act (HEA) of 1965. However, the 1972 HEA reauthorization changed course, extending federal financial aid eligibility to these institutions under the condition that they “prepare students for gainful employment in a recognized occupation.” Non-degree programs at public and private, non-profit institutions were subject to the same requirement. A House report noted that lawmakers were concerned about opening up eligibility to proprietary schools because “most of the institutions have no experience administering public student grant programs.”

The “gainful employment” language remains in statute today. By law, the requirement applies to all for-profit certificate, associate degree, bachelor’s degree, and graduate degree programs, and covers non-degree programs (i.e., certificates) offered by public and private nonprofit institutions (primarily community colleges) at both the undergraduate and graduate levels.

2010 Regulations

In 2009, the Department of Education (ED) announced its intent to regulate on a variety of program integrity issues including the definition of gainful employment (GE). Up until that time, the phrase “gainful employment in a recognized occupation” had been largely undefined. Recognized occupations were defined as those included in the Department of Labor’s *Dictionary of Occupational Titles*, or its successor, the Occupational Information Network ([O*NET](#)). ED held three rounds of negotiations between November 2009 and January 2010 and published a proposed regulation in July 2010.¹

Among other provisions, the [proposed regulations](#) included a two-part test of whether GE-eligible programs were successfully preparing students for gainful employment that measured:

- The debt-to-earnings (DTE) ratio of graduates from the program; and
- The repayment rate of all former students in the program (graduates and non-graduates).

¹ ED uses a specialized process to develop regulations called “negotiated rulemaking.” The agency selects representatives from a variety of stakeholders with an interest in a regulation including higher education institutions, consumer advocates, state attorneys general, the student community, and others depending on the issue being discussed. The goal is to come to a consensus on the eventual rules, though in the absence of consensus ED can independently publish final regulations after the process concludes.

Programs that failed both metrics would either lose all eligibility for federal financial aid programs or face additional limitations on their enrollment. Failing programs were also required to make disclosures to students.

The proposed regulation was extraordinarily contentious, and ED received more than 90,000 comments. The controversy also attracted congressional attention. At the urging of the [Association of Private Sector Colleges and Universities](#) (APSCU, now Career Education Colleges and Universities, or CECU), multiple lawmakers sought several times to attach riders to annual appropriations bills prohibiting ED from using federal funds to finalize or implement the gainful employment regulation. Those efforts were unsuccessful.

The [final regulation](#) was published in June 2011. It required GE programs to meet at least one of the following two tests:

- Have a repayment rate of at least 35% for former students in the program; or
- Have a debt-to-earnings ratio of no more than 30% of discretionary income or 12% of annual earnings. Discretionary income was defined as the difference between annual earnings and 150% of the federal poverty level.

Programs that failed to meet one of the tests for three out of four years would lose eligibility for federal financial aid under Title IV of HEA. The final regulation also included a set of reporting and public disclosure requirements:

- Gainful employment programs had to share their repayment rates and debt-to-earnings ratios publicly;
- Programs that failed the GE test once were required to provide plain-language warnings to students;
- Programs that failed the test twice also had to include a warning about the risks of enrolling in the program, given that it could lose eligibility for federal financial aid; and,
- Schools had to prominently display warnings if they failed any metric on their websites and in their promotional materials.

The regulation also required that institutions seek ED approval prior to establishing new gainful employment programs. Largely in response to public comments, ED expanded appeal opportunities during the transition period before programs would lose eligibility. ED also capped the total number of programs that could lose eligibility in the first year of the regulation's implementation at 5% of all programs (weighted by enrollment).

To implement the regulation, ED would rely on both administrative and reported data: its own debt information on federal student loans, reported information from institutions about private education loans, and earnings data obtained through a data-matching agreement between ED and the Social Security Administration (SSA).

Following publication, the APSCU (now CECU) [sued](#) to have the regulation overturned. In 2012, a judge [struck down](#) the repayment rate provision, reasoning that insufficient evidence to support the threshold of 35% rendered it “arbitrary and capricious.” Although the court concluded that ED had authority to establish the debt-to-earnings test, it decided to invalidate the entire regulation, determining that the repayment rate provision was integral to the overall design.

2014 Regulations

In 2013, ED started a new rulemaking process for gainful employment, and after publishing a proposed regulation in May 2014 and sifting through approximately 95,000 comments from the public, finalized [new gainful employment regulations](#) in October 2014. The new regulation removed the repayment rate requirement and instead required programs to pass a slightly stricter debt-to-earnings ratio test. A program’s typical graduate’s debt repayments would need to be either less than 20% of their discretionary earnings or less than 8% of their annual earnings. Programs with debt-to-earnings ratios between 20% and 30% of discretionary income or between 8% and 12% of annual earnings would be placed in a “warning zone,” while those with ratios above the warning zone would fail. Programs would lose eligibility for Title IV financial aid if they failed the test twice in three years or spent four consecutive years in the warning zone. The regulation also continued to include a reporting and disclosure requirement to provide information to prospective and enrolled students.

In response to a separate 2012 court ruling from the judge in the APSCU case, ED calculated the new metrics based only on federal financial aid recipients’ information because the HEA’s ban on student unit record data prohibits the collection of information from non-federal aid recipients.²

Following publication of the 2014 regulation, APSCU again [filed](#) a lawsuit, but the same judge who heard the 2012 lawsuit [upheld](#) the regulation because the repayment rate provision had been removed. The Association of Proprietary Colleges, on behalf of some for-profit colleges in New York, also sued unsuccessfully on the basis of procedural violations and violations of institutions’ due process rights.

A third lawsuit, filed by the American Association of Cosmetology Schools, argued that administrative earnings data understated the earnings of their graduates because many of their graduates did not report tipped income on their taxes. The court upheld the regulation but required ED to loosen the requirements for appeals of the programmatic earnings data for the affected institutions.

² Institutions still had to report on the *private* loans of federal aid recipients, and that data was included in the total debt amounts of graduates from the program.

A lawsuit filed by acupuncture schools in 2017 again argued that the earnings data was understated, but the suit was ultimately dropped as the Trump Administration began to repeal the regulation.

The first year of data was finally published in January 2017, in the final month of the Obama Administration. More than 700 programs [failed](#) the remaining debt-to-earnings metric, and another 1,200 were in the warning zone. Ninety-eight percent of the failing programs were offered by for-profit institutions. A 2021 research [study](#) based on the programmatic outcomes that were released found that poor performance on the gainful employment metrics was associated with a greater likelihood of program or college closure, suggesting that for-profit colleges were responsive to the regulations.

2019 Regulations

The Trump Administration took office in January 2017 and quickly began to pull back on the gainful employment regulation. ED [allowed](#) institutions to delay implementation of the disclosure requirements and failed to release subsequent years of data. Its failure to implement the regulation was challenged in court; a collection of state attorneys general, for instance, [sued](#) in 2017, though the case was eventually [dismissed](#) for lack of standing once a new regulation was promulgated.

In 2017, ED announced its intent to regulate again on gainful employment, this time to repeal the 2014 regulations. The final regulations, which rescinded the 2014 regulation in full, were [published](#) in July 2019, and institutions were permitted to immediately cease implementing the 2014 requirements. The American Federation of Teachers (AFT) [sued](#) to reinstate the 2014 gainful employment regulation, but the case was [dismissed in part](#) and is currently on hold while ED develops a new regulation.

Separately, a court [ruled](#) in 2018 that ED misused data obtained from SSA under its gainful employment data-sharing agreement by using the information for an unrelated purpose. SSA terminated the data-sharing agreement as a result, leaving no mechanism to enforce the 2014 regulations in the meantime.

Proposed 2023 Regulations

After the Biden Administration took office, it announced plans to pursue a new gainful employment regulation and held negotiations between January and March of 2022. The negotiated rulemaking committee failed to achieve consensus, with representatives from every institutional sector and financial aid administrators objecting to the final draft. Among the dissenters' concerns were that the regulation did not take into account impacts of the COVID-19 pandemic, that ED had limited data, and that the process did not offer enough time to discuss the new minimum earnings metric.

In May 2023, ED released a proposed final gainful employment rule. The proposal was modeled on the 2014 version but included a stricter version of the 2014 debt-to-earnings test and a new minimum earnings metric:

- A program's typical graduate needs to achieve a debt-to-earnings ratio lower than 20% of discretionary income or 8% of annual income; and

- The median annual earnings of a program’s graduates must exceed those of the median high school graduate in the institution’s state.

Failing either test in two out of three years would cause a program to lose eligibility for Title IV financial aid. ED estimates that 1,800 programs enrolling over 700,000 students would currently fail the metrics. It also projects that these students could earn 43% more and take out 21% less debt on average by pursuing a better program at the same institution or an alternative credential at a nearby institution.

In addition to the metrics, ED also proposed a new disclosure requirement that would apply to all programs receiving Title IV financial aid—not just GE programs. Institutions would have to secure acknowledgement from every current or prospective student of programs with failing grades on the debt-to-earnings metric or the annual earnings test that they are aware of the program’s status on these measures. Only the failing GE programs at an institution would lose access to financial aid dollars.

Finally, ED leveraged the rule to add to its administrative capability requirements—regulations that ED relies on to implement the HEA’s requirement that an institution receiving Title IV aid has the capacity to administer federal financial aid programs. ED proposed considering an institution not administratively capable if over half its total students were enrolled in failing GE programs or if over half of its total federal financial aid dollars went to students enrolled in failing GE programs.

ED received over 7,400 comments on the proposed rule and aims to respond and publish a final regulation by November 1, 2023. If it meets this deadline, the rule will take effect July 1, 2024.

The memo will be updated after the release of the final regulation.

Acknowledgment: PNPI would like to thank Rory O’Sullivan, Clare McCann, David Bergeron, and Terrell Halaska Dunn for their contributions to the writing and editing of this memo.

Updated July 2023