



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 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 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

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.

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).

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.

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 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.

A lawsuit filed by acupuncture schools in 2017 again argued that the earnings data was understated, but the suit was 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.

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 September 2023, ED released a final gainful employment rule. The 2023 rule is modeled on the 2014 version, but includes 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 about 1,700 programs enrolling nearly 700,000 students would currently fail the metrics. It also projects that these students could earn 43% more and take out 22% less debt on average by pursuing a better program at the same institution or an alternative credential at a nearby institution.

The final rule contained two adjustments to the accountability metrics. It exempted gainful employment programs in Puerto Rico and other Territories from the accountability tests but maintained data reporting requirements for them. Additionally, ED created a process to identify programs where graduate earnings are typically lower during the three-year window after graduation because of state licensure requirements, and then rise dramatically thereafter (e.g., graduates may be required to spend their first years after graduation in fellowships or residencies that typically pay lower). These programs – often in medical or mental health fields – would use later earnings data to calculate their GE metrics.

In addition to the metrics, ED also created a new Financial Value Transparency Framework that will provide information for all GE and non-GE programs including the cost of attendance, borrowing amounts, graduate earnings, and sources of financial aid. The data will be available on a new website run by ED. ED also created a new disclosure requirement that would apply to all GE programs and all non-GE certificate and graduate programs (excluding non-GE undergraduate degree 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.

2023 Financial Capability and Certification Regulations

In October 2023, ED released regulations which included the addition of new elements to its administrative capability and certification requirements. ED relies on administrative capability rules to implement the Higher Education Act's requirement that an institution receiving Title IV aid has the capacity to administer federal financial aid programs. ED relied on the new GE metrics to provide an additional standard that institutions must meet to demonstrate financial capability. After July 1, 2024, ED will deem any institution that receives over half of its Title IV financial aid revenue from failing GE programs *not* financially capable. Going forward, institutions that sign a program participation agreement (PPA) with ED must also certify that all their GE programs require no more than the minimum number of credit hours required for licensure in the state where the institution is located.

The provision does not apply to fully online programs or certain other exceptions for institutions that serve students in multiple states.

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