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Gainful Employment Liveblog Session 2: Day 1

By Ben Miller — November 18, 2013

Today begins the second negotiation session around employment at the U.S. Department of Education offices on K Street. Negotiators will meet for at least three full days from Monday to Wednesday. Live updates will appear below.

9 a.m. Opening Remarks

Jeff Appel, the deputy undersecretary at the U.S. Department of Education is delivering some opening remarks. He notes that the new draft is more comprehensive and reflects the Department's goals. But he also says "we made tremendous progress but want to emphasize this is not a finished project." He calls for concrete ideas and indicates that the Department is open to discussing all parts of the rule and is interested in achieving consensus.

Appel walks through some of the changes made to the rule in response to concerns heard by negotiators. The most noteworthy ones include the addition of a loan portfolio repayment rate and a program cohort default rate, as well as new provisions that require programs that are failing to provide some relief for borrowers. While he notes that the two new measures do not have impact estimates yet, he says that they are working on running data and providing estimates as soon as high-quality data are available.

Appel also notes that ideas around a placement rate were not accepted by the Department, but notes those can be discussed.

If you want to read a summary of what the Department is proposing to do, click here [see below]. A summary of what the negotiators had proposed is here [see below].

9:10 a.m. Draft Agenda

There's a discussion of what consensus means. Consensus is assumed by absence of dissent. But there's nothing binding until the last day. The goal is to reach consensus on the package, but in the past the Department has tried to reach tentative consensus on sub issues.

Marc Jerome from Monroe College objects to the proposed agenda, which would have started with the existing program certification or new program approval on the grounds that he would prefer to talk about the accountability metrics first. Brian Jones from Strayer University also agrees to moving up the accountability metrics first. No one objects.

9:25 a.m. Proposed Text Overview

John Kolotos, one of the Department's negotiators talks through the new proposal. He notes that the program-level cohort default rate has the same thresholds as what's in statute–above 30 percent for three years or 40 percent in one year. For the portfolio loan repayment rate, a program fails if the principal balance owed at the start of the year is more than it was at the start of the year.

Kolotos also notes that the draft has new provisions on getting new gainful employment programs approved. He says the goal is to limit the review to programs where there were previous failures. There's also a new piece around borrower relief. What this would do is not absolve borrowers of the debt, but bring their debt levels down to acceptable levels.

Kolotos turns to a discussion of the materials submitted. He thanks the negotiators for their hard work and high-quality of submissions. He indicates that he's worried that some ideas lack the support needed to be included in the rule. He says there were some concepts that were new or too theoretical that the Department does not think it could implement at this time.
We're going to start the morning with a discussion of the accountability metrics, then move onto other issues. There's nothing new in the debt-to-earnings measure from the last negotiation session.

Jerome from New York-based Monroe College asks how the Department came up with the repayment rate calculation idea. Kolotos says it was tough for them to take the repayment rate idea submitted by the negotiators, so thought about how to get something that was repayment-rate like and came up internally with the idea of the repayment rate.

Richard Heath from Anne Arundel Community College raises concerns about judging programs based upon all loan debt, not just that for tuition and fees.

Jones from Strayer wants to back up and discuss how this proposal deviates from the prior rule, which was finalized in 2011 and struck down in 2012. He notes that rule had different means of compliance, meaning that a program only had to pass one of three measures, whereas now it has to pass everything. He asks for a rationale of the policy shift and how these measures are intended to work together. Kolotos says that thresholds on the metrics would affect only the worst-performing programs, which is not different from how it approached this rule before. For the program cohort default rate, he notes that the Department is moving the statutory framework for the institutional cohort default rate and so that means taking the statutory consequences. For the repayment rate, Kolotos says having people not make enough payments to reduce the interest owed is an extreme case.

Jones continues pushing on the question, asking why the Department now feels like all tests need to be passed versus how it approached the rule in 2011. Kolotos notes that part of it is the ~~Department is no longer targeting the worst performing programs. It~~ is targeting those that are doing a subpar job at providing gainful employment. He also notes that the tests are less about judging the quality of a program and more about the performance of loan debt. [*Edit: Removed struck language because of concerns about clarity of the point, which was that these measures are supposed to be considerations of providing gainful employment, not measures of quality.]*

Jerome says he's concerned that some of the metrics may be dealing with assumptions about how many programs might fail. He suggests he'd like to talk about completion rates.

Barmak Nassirian from the American Association of State Colleges and Universities says he at first didn't like the repayment rate, but then saw it was at least simple and thinks the concept is workable. But he's concerned the threshold is so low that cohort after cohort of interest-only payments would be acceptable. He also talks about the two debt-to-earnings tests and asks why the two tests are separated. He argues making programs pass both tests. *Editorial note: having looked at the effects of requiring passage of both, you are better off just having the discretionary debt-to-earnings test, since almost no one who passes that test fails the annual debt-to-earnings test.*

Jerome challenges Nassirian asking if he knows what would happen if the metrics were applied to his AASCU members. Nassirian notes that there's a statutory limitation that means they are not considered.

Margaret Reiter, who represents consumer advocacy organizations, asks about the thresholds chosen and their justification on the new measures. She asks whether the program-level cohort default rate would be as open to manipulation as they are at the institutional level. Kolotos says the idea for the program-level cohort default rate is to apply the same logic as what's applied to the institutional level. He says he does not want to get into the issue of manipulation here. On the negative amortization rate, he acknowledges that it is a low standard. Kolotos says he is open to suggestions for a repayment rate threshold, says he is open to ideas on how to set a threshold because it is hard for them to come up with one.

Sandra Kinney from the Louisiana Community and Technical College System asks if there's a minimum number of students required in the repayment rate cohort, since she notes that 80 percent of her students don't borrow. Kolotos notes that the program-level cohort default rate would have the same appeals options as exist in the institutional level cohort default rate. This means that programs could in theory challenge the rate based upon what's called a participation rate index, which looks at the percentage of borrowers as a share of those enrolled multiplied by the default rate.

Jones from Strayer asks if the Department has done data analysis on the validity of the threshold size for the program-level cohort default rate.

Rory O'Sullivan from Young Invincibles notes that the thresholds catch extremes. He describes how a program that negatively amortizes for a few years could then pay down a small amount and still pass with even more debt than they owed at first.

Heath from Anne Arundel Community College notes that the last time the Department did the rule it said very few programs at community colleges would be impacted. He notes that part of that was because if the schools reported tuition and fee levels then the Department would only look at loan debt for tuition and fees. He's concerned about not having the same option because schools cannot reduce loan debt on a programmatic basis, only on a case-by-case basis. He says they are being tasked with using a performance measure that they have no control over on the front end. He says community colleges would not be in favor of no longer excluding loan debt for non-tuition and fee debt.

Raymond Testa from Empire Education Group brings up the issue of how the new metrics would only look at those who received federal student aid. He calls for the Department to include anyone who filled out the Free Application for Federal Student Aid (FAFSA), regardless of whether they received student aid or not. Testa notes that excluding non-Title IV recipients makes the cohort tougher, the debt-to-earnings tests got tougher, new metrics got added that were tougher. Testa says it is “ludicrous” to negotiate a metric without knowing the impact. Testa notes that if a few higher-balance borrowers are negatively amortizing, they could lead to a program failing the loan repayment test even if a lot of students are mostly repaying. Testa also questions how the Department is pushing everyone into income-based repayment, but that’s what causes negative amortization so it could lead to programs failing. *Note: We are taking a look at this issue at New America, but generally, a borrower on income-based repayment negatively amortizes if their earnings are lower than the low $20,000s, though it depends on family size and debt amounts.*

Kolotos notes the court restrictions on the types of students they can look at, said they are open to ideas. He again says that he wants to talk about concrete ideas and for the negotiators to stay on topic.

Della Justice from the Kentucky Attorney General’s office objects to the idea of saying they can’t negotiate on something without data, since the last rule ran into the problem of impact determining the thresholds.

10:20 a.m. Still discussing metrics

Nassirian suggests maybe instead judging programs on whether they are amortizing over 30 years, since at least that gets at the idea that the portfolio would get paid off at some point. But the threshold used right now would allow a program to make interest only payments and still pass. He thinks negative amortization is not the correct landing place.

Jerome says just because a loan portfolio negatively amortizes in one year doesn’t mean it negatively amortizes over the length of repayment. He argues that the loan repayment performance will reflect the demographics of the students, not the quality of the program. Nassirian responds by asking how many years after finishing should students continue to borrow from the government, which is what he says negative amortization is, before it should be expected to be retired?

One negotiator (I believe Margaret Reiter) asks whether the Department could let schools voluntarily choose to report information on non-Title IV students if they desired, either as an appeal or as part of an upfront process. She also asks whether earnings below the poverty level should be a sufficient measure of gainful employment. She says that deals with the discretionary income measure, since you know if earnings fall below the poverty level it would fail. For the repayment rate, she suggests looking at the amortization schedule on a 10-year plan. Says if it would normally bring it down, say 8 percent, then they should pick some amount it has to come down between 0 percent (the negative amortization test) and 8 percent (the 10-year amortization test).

Jones from Strayer returns to his earlier point about concerns around the Department’s new justification for a rule. He notes that the tone and objectives appear to have changed, which makes him very concerned. He notes a study from the National Center for Education Statistics study that showed a large number of students have debt burdens over 12 percent. He also raises the question of how would this rule work if it was applied to all institutions, not just gainful employment ones? He says he sees a “fundamental shift” in how this rule is being put together and does not see a justification yet for why this change occurred.

Steve Finley, an attorney at the Department, responds to Jones. He says the first proposal used repayment rate as a way to say it was good enough to maintain eligible. But there were changes made to remove things that the Department thought distorted results. It set a higher standard. He says what is here is two floors. What it means you can go through the door and walk on the floor. That's why he says it's not an alternative test. It's just a measure of it is good enough to just be in the door. He says the same thing is true with the program-level cohort default rate.

11 a.m. Back from the Break

Kolotos responds to Barmak about the debt-to-earnings rates idea of holding programs accountable for both measures. He says ideally ED would have programs be judged under the discretionary rate because it's closer to what's used in Income-Based Repayment programs, but actually a bit more lenient. But the reason for the annual rate is because if earnings are less than 150 percent of discretionary earnings you can't calculate the rate. He says there is some merit for a program to have low earnings but also low debt. He says if you want an absolute floor on earnings that needs to get discussed.

Nassirian says that there must be some level of income so low that any level of debt service is not acceptable. He suggests testing programs on both measures, but modulate the percentages to pass. Though he does not say what those percentages should be.

Jerome says that his culinary graduates earn between $17,000 or so a year, but fails discretionary because grads have $7,000 to $8,000 in debt. He thinks the idea of judging programs on either debt-to-earnings measure but not both. Reiter asks if graduates are still earning low salaries three years out. Jerome raises a concern that since the measures look at people three years after entering repayment, that could mean the earnings are measured starting as soon as 18 months after leaving school. Kolotos confirms that the income of students three years after finishing represents earnings starting after 18 months (and measured through month 30) and the others start at two-and-a-half years out.

The question of the ability to limit loan debt comes up again. Kolotos notes again that ED lacks the ability to change that statutory requirement on loan availability.

11:15 a.m. Minimum Program sizes

Rhonda Mohr from the California Community College Chancellor's Office asks about the minimum number of students for the measures. Kolotos notes that the way the cohort default rates work a college has to have at least 30 borrowers over a three-year period for the rates to have accountability consequences.

Mohr also asks if there is a minimum program number of borrowers for the student loan repayment rate. Kolotos says ED has not proposed one yet.

Jenny Ricakard from the University of Puget Sound asks about the proposal the repayment rate group put forward, which would have absolved programs that had high repayment rates. Kolotos says that idea was not workable because of difficulties with setting thresholds, though he did say it had merit and they would be open to thresholds.

Testa from the Empire Education Group objects to the idea that a training program that takes someone who was unemployed or unemployable and puts them into a position where they earn

$10 an hour and move toward earning a business. He notes that most students at his schools are female and seek part-time work at the beginning of their career. He suggests that if they can't define gainful employment here maybe that's something Congress needs to do.

O'Sullivan brings up the idea of maybe adjusting the family size for the discretionary earnings measure, which would make it harder to pass that rate, since the amount of income deducted for expenses would be about $4,000 higher.

11:35 a.m. Metrics Formulas

The only major change in the debt-to-earnings rate is to take the lowest interest rate during the four-year period. Jeff Baker from Federal Student Aid notes it would be 3.86 percent because that's the current rate that's tied to May's Treasury Bills.

Reiter asks whether the interest rate for graduate programs should be tied to the interest rate for graduate students, which is higher than what undergraduate students pay. She also asks why it wouldn't be fairer to take something rather than the lowest level, since many students are not in four-year programs, but are in one-year ones. She says it doesn't have to be the highest, but could be the average.

Jerome distributes a handout that raises his concern that the median loan debt might not be a fair measure because they automatically pass the debt-to-earnings measure, though he does note in response to questions from other negotiators that a program with borrowers would still have to pass the loan portfolio repayment rate and the program-level cohort default rate.

Testa also endorses the idea of using the mean debt instead of the median debt due to concerns about programs having borrowers but being exempt because fewer than half borrowed. *Editorial note: unstated in this discussion is that the community colleges care strongly about the median debt because many may have a few borrowers but not enough to have a median debt of more than $0.*

Kolotos says ED will take back this idea to discuss whether it should use only a mean loan debt and whether it should use something instead of the lowest interest rate.

Jones from Strayer brings up the question of how long borrowers should be expected to pay back loans. This is something that was debated in the first session. Changing the amount of time someone is expected to repay matters because a longer time to repay means smaller monthly debt payments and a lower amount of income to pass a debt-to-income test.

Nassirian asks if two programs really are the same if they have the same amount of income but fewer borrowers? He also asks why is the Department not using the actual interest rates for borrowers? Jeff Baker from the Federal Student Aid office says it would be very complex to calculate the individual rates because it would have to calculate the payment amount loan by loan, versus aggregating up by the cohort.

Jones calls for differential amortization rates by different program levels.

Lunch break. Back at 1p.m.

1 p.m. Loan Debt Calculations

Ray Testa from Empire Education Group kicks off the afternoon session with a discussion of how long a student has to be enrolled to be excluded from a cohort in order to not have their earnings counted in a debt-to-earnings rate. He asks for exclusions to take place if someone is enrolled in a program or in military status for 30 days, instead of 60, to be excluded.

Margaret Reiter, who represents consumer advocacy organizations, asks about how ED would enforce figures on private student loan debt. Kolotos from ED says it has provisions around program review to catch things like that, but not sure what else could be done.

A community college negotiator asks about whether someone who gets a certificate and then an associate degree that's not counted in the rules if the student would show up in the calculations. Kolotos says if the person is still enrolled in the associate degree program at the time the calculation is done, then they would be excluded due to being in school. If they finished the associate degree at the community college, they wouldn't be counted at all because the program itself is not subject to the rules.

1:25 p.m. Completion rates?

Jerome asks how many programs have fewer than 10 graduates in a year due to low completion rates and thus aren't subject to the rules. Kolotos says they have to have 10 in order to get data from the Social Security Administration. He notes the prior rule aggregated students over multiple years in order to capture programs that may have had fewer completers in a given year.

Reiter asks if there should be a completion rate in the debt-to-earnings that makes a program automatically fail if they have too low a percentage of Title IV recipients complete. She does not provide a threshold. Kolotos says ED cannot figure out this information because it does not currently have program-level completion rates for gainful employment programs.

Nassirian says he thinks what Jerome is saying is reasonable, suggests saying if it has fewer than 10 graduates it has to have a graduation rate of X. Jerome suggests you could take institutional completion rates and assume they are stable over programs. Reiter notes that ED will receive data to calculate completion rates, but Kolotos says they cannot generate a threshold.

Sandra Mohr from the Louisiana Community and Technical College System notes that holding programs with small numbers of graduates accountable for their completion rates would magnify problems since it would be dealing with small numbers of students.

1:45 p.m. Transition Periods

ED is proposing that for the first four years of debt-to-earnings rates a program could substitute current loan debt instead of the loan debt of the students being evaluated. This is one year longer than what was in the prior suggested text. Kolotos says this is designed to provide opportunities for programs that want to take immediate action to improve.

Nassirian disagrees with this idea, says that the co-mingled of current debts with past ones does not make sense to him. He says that since the thresholds are so low, why not let the chips fall where they may? Kolotos says this is how ED wanted to build in opportunities for improvement, but Nassirian argues it feels manipulated. He says instead, programs should be allowed to make payments to reduce the debt of students to the point where indebtedness goes down.

Note: the Department handled this issue the last time around by allowing programs to be judged based upon the debt of more recent students, but also the earnings of those newly minted graduates as well.

2 p.m. Program Cohort Default Rates

Jones from Strayer asks if ED has done an analysis to see if the minimum borrower size of 30 that is used for institutions still is valid if used for programs. One of ED's lawyers notes that the cohort default rate process already has appeals in place to deal with volatility, which include things like low borrowing incidence.

2:10 p.m. Loan Portfolio Repayment Rate

This measure would look at the beginning and ending balance to see if students in the year being evaluated made enough payments to reduce the principal balance owed on their loans.

Jerome asks ED to clarify its rationale for why it chose this repayment rate calculation as a sign of program results/quality. He also produces a handout. He argues that the repayment rate is a reflection of just the demographics of borrowers. Copies of his handout aren't available, but his description indicates that its data from Mark Schneider, which shows the repayment rate by quartile for institutions based upon their percentage of students the are from minority groups.

Helga Greenfield, who is from Spelman College and represents Historically Black Collges Universities, also agrees with the idea that the demographics are an important part of this. Testa from Empire Education Group also agrees.

2:50 p.m. Continued metrics discussion

Belle Wheelan who missed the morning session to appear at New America's event on competency-based education at community colleges (which you should totally check out), asks why ED did not take her suggestion for having a year of data that's solely for informational purposes. This is a request that for-profit negotiators had also requested. Kolotos says that ED extended the transition period instead to four years as a way of making that concession.

She also returns to the discussion of race that carried on before the break. This is an issue that received significant attention in the last iteration of the rule, including a regression analysis and scatterpot presentation. Finding those exceeds the bounds of what the Internet here can entail, but you can find them

Heath from Anne Arundel CC returns to the question of what to do about students who already have a lot of loan debt from a prior credential, such as a bachelor's degree from elsewhere, who take on more loan debt, giving them a total combined balance that puts them at risk of default. And so even though only the debt from the gainful employment program is judged, the total loan balance accumulated from multiple places causes the negative result. Kolotos says Heath is correct and that someone who did default because of that high cumulative amount would count as a defaulted borrower.

3:05 p.m. Loan Portfolio Repayment

Nassirian asks about when interest is capitalized on a loan. This matters because when interest is added to the principal balance of a loan could affect how high the cumulative principal balance becomes.

ED notes there are a few instances. If a student does not pay interest on their unsubsidized loans while in college, then it capitalizes when they enter repayment. Similarly, any interest on an unsubsidized loan that accrues while it is in deferment or forbearance is capitalized when it exits that status.

3:15 p.m. Notifications and Consequences

Kolotos clarifies in response to a question that the enrollment limits for failing programs applies only to students receiving federal student aid, not all students overall.

Mohr asks if programs would get three separate notifications of results or a single one. Kolotos says the debt-to-earnings and repayment rates would be at the same time and the cohort default rate would likely be on a different schedule. The schools do not like the multiple announcements. Institutions would, however, get their program and institutional cohort default rates at the same time.

Kinney raises a common concern from the day–when will data be available on the new ideas. Kolotos reiterates the Department will provide the data when it has it. Jerome asks if the Department would host another negotiation session with data. Finley from ED says there are no plans for a third session, but he thinks the merits of the proposals are on the table for the discussion. Jerome says it's hard to vote on a regulation without any data. He indicates he wants some data before negotiators are formally asked to vote on something.

Kolotos explains the middle performance zone concept a bit more. He says the idea is that they don't want to inhibit programs from being able to improve, so the Department would not ask programs in this category to do anything for the first or second year. But it's once the program is at risk of losing eligibility sooner is when steps are taken. He notes this is similar to how financial responsibility scores work.

Heath asks about the lead time between when a program learns it loses eligibility and when that eligibility loss actually happens. He notes that without that, a program could lose eligibility in the middle of a semester, which would cause problems.

Nassirian says there need to be meaningful intermediate mechanisms for programs that reach the zone so that they cannot get a lot worse before losing eligibility. He cites ideas like preventing the award of dividends, cap enrollment, among other ideas. This would also include immediate notice to students with a warning about results. He later adds that maybe having institutions make co-payments to the cohort that failed one of the tests to make the debt service amount work.

Jerome asks what programs would do to improve the loan portfolio repayment rate in a year before it lost eligibility. Kolotos says it would be open to consideration. He notes that last time programs could calculate their results based upon the most recent cohort to enter repayment as a way of testing activities that may help improve results, like better career counseling. Jerome asks for institution-wide loan repayment rates.

There's been a lot of discussion about a recent National Center for Education Statistics study called "Degrees of Debt." What it looked at was bachelor's degree recipients one-year after completion, not students in associate or certificate programs. It also looked only at bachelor's degree recipients who borrowed, which is a bit different from the gainful employment calculation, which would look at all students who received Title IV aid (i.e. a Pell student who never borrows is included in gainful but not in the NCES study). What it found was that of those students who received a bachelor's degree and borrowed, and whose loans entered repayment one year later, 31 percent had monthly payments above 12 percent of their income. So it's different group in a different time period and not directly comparable.

Jerome and Jones both indicate frustration with how things are going, raising a concern heard before about how they have programs nearly identical to those offered at other types of institutions that are subject to this rule whereas their counterparts do not have to meet these standards.

4:05 p.m. Restrictions

The committee moves on to a discussion of how a program that loses eligibility has to wait three years before rejoining the aid programs. Programs that were failing and shut down voluntarily also have to wait three years. Kolotos notes this is the same framework as the 2011 version of the gainful employment rule.

Nassirian raises a concern that a program could shut down once it finds out that it is likely to fail based upon the draft set of rates and before those figures are finalized. He's worried about this because it might allow a program to shut down and then restart itself without the required waiting period. Kolotos says that ED could think about possibly still finalizing measures in those cases.

Wheelan raises concerns that this regulation will create work for accreditors, because programs that shut down must do a teach out plan and would potentially have to go to the accreditor to restart the program.

Della Justice and Nassirian raise concerns that the enrollment limit still allows for new students to enter, just not so many new students that it doesn't exceed the total number that were there before.

Jerome asks if Nassirian's concerns about results would look at the completion rates as well. He points out schools near him that have graduation rates in the low single digits of percentages. Nassirian says his outrage is on dropouts being saddled with debt, not just high rates of non-completion. He thinks a low completion rate does not say as much about its gainful employment performance as does looking at whether institutions leave students worse off or not. But he notes that's a philosophical answer.

Kolotos asks what should be done to a program that's a year away from failure since negotiators don't seem to like what ED put forward. Nassirian says limit eligibility to only currently enrolled students. He says there should be some kind of clawback mechanism to get money from schools. Reiter says she thinks penalties should apply to programs that are one year away from losing eligibility because they are in the zone as well as those that are about to lose eligibility because they are failing.

4:35 p.m. Zero median debt

Community college negotiators ask about a proposal they had put forward that would have exempted a program that had a median loan debt of $0 from being subject to a debt-to-earnings measure. The negotiators say this idea was in the final rule. Mathematically, a program where less than half of students borrow have a median debt of $0, so they couldn't fail a debt-to-earnigns test. This idea would just exempt them from the measures and presumably ease some concerns about failure. The one issue is that a program with a median debt of $0 would still possibly need to pass the repayment rate or cohort default rate test, which are not based on average amounts. Heath clarifies that the goal is to not scare colleges out of the loan programs and by telling programs upfront they can't fail would help them avoid those fears.

Jerome asks what about a program with low percentages of borrowers but high numbers of borrowers.

Nassirian says he likes the idea of an exemption for low borrowing.

That's a wrap. Back tomorrow at 9 a.m.

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Gainful Employment Liveblog Session 2: Day 2

By Ben Miller — November 19, 2013

The negotiators reconvene starting at 9 a.m. this morning for the middle day of what's scheduled to be a three-day session. While the negotiators discussed a lot of issues yesterday, there did not appear to be much consensus on many issues. In general, school representatives expressed concerns about discussing some measures without having specific data–particularly the repayment rate, which was referred to as both too strong and too weak at times. The committee also spent some time discussing whether there should be some kind of minimum earnings or completion requirement, with the former being put out by some consumer advocates, and the latter having some endorsement from both the consumer side and at least one for-profit negotiator. A large chunk of the afternoon session also discussed the inevitable question of how much demographics dictate program results or not–an issue that the Department addressed with a fair amount of work in its 2011 version of the rule.

Live updates will appear below.

9 a.m. Borrower Relief

The facilitator notes that there are about eight or nine substantive topics to debate and the committee has sort of made it through one. The committee now moves on to a discussion of borrower reflief. This is something the Department included in response to comments from consumer advocates between sessions. The way it works is if a program would become ineligible in the next year, the program/institution must enter into an agreement with the Department where it either provides a letter of credit or sets aside some loan dollars it would otherwise have received (but still credits the students' accounts as if they received the dollars). If the program subsequently becomes ineligible, then the Department would take those funds to reduce the debt of students to the point where the program has a passing debt-to-earnings threshold. For a public institution/program, the borrower relief would have to be provided by a full faith and credit pledge.

As an example, if a program has a debt-to-earnings ratio of 15 percent, the amount of relief would be equal to 7 percent of earnings (15 percent minus the 8 percent passing level). This formula works for programs that fail either the debt-to-earnings test or the cohort default rate test.

Eileen Connor, from the New York Legal Assistance Group, says she is glad the Department included this position but is concerned that it does not provide help to all students just currently enrolled ones. The Department acknowledges this, but said having this apply to current students reflects a balance and also preserves the idea of the zone where a program can be struggling but doesn't face consequences right away.

Marc Jerome from Monroe College notes that this idea is somewhat similar to the idea he had submitted in his comments. What that would have done is allow a program to immediately allow all prospective students to have their debt limited to a threshold that the Department thought was appropriate, his proposal had said 12 percent, but he suggests being open to other limits.

The idea here is that rather than the school paying for the reduction, the borrowers just never take on as much loan amounts in the first place. Though this can cost the school in the form of lost revenue. The Department is concerned about how to actually cancel the loan amount. Jerome says it could be done through a reduction in tuition or increase in scholarships. Jerome says they could fund students to the level where those who already have too much debt could not borrow more because they would have scholarship dollars. The Department says it will consider it but needs more specifics.

Barmak Nassirian from AASCU does not seem to like Jerome's idea. He says that if the college can manipulate students' loan amounts through packaging or other things, then that's something the school can do under current law. He says that this creates a loophole where you over package everyone with excessive debt and then make them whole as loans come in. In other words, he's arguing that the college would just package everyone right up to the threshold that's considered acceptable. *Note: What if the threshold got set to zero? Jerome's language prior to his actual regulatory language suggestion suggests no debt at one point.*

Margaret Reiter, who represents consumer advocacy organizations says what this proposal would do is prevent a program from ever losing eligibility, since a failing program could pay down its debt to be passing for two years and avoid penalties. "You would never be able to say this program is really not performing," she says. She notes this may not be a bad thing because the debt burden is being lowered in two or three years. But she's not sure if high-debt burden programs should be able to keep operating in this cycle. She also says that if part of the rule is designed to get at programs that may not be too expensive, but are lousy in terms of results, which this would not deal with. *Note: There are several other measures at play here, so it's not clear that this would exempt a program form the program cohort default rate or the loan portfolio repayment rate.*

Richard Heath from Anne Arundel Community College notes that colleges already have the ability in the financial aid office to limit student debt on a case-by-case basis. He calls this a complicated workaround to something that can already be done on a case-by-case basis. He also raises the concern that this borrower relief does not deal with a program that's so horrendous that should not have any student debt. Heath notes the presence of states' attorneys general about whether states would be willing to stand by and pledge full faith and credit for its colleges. He notes that Maryland has independent community colleges that get some state dollars but that are actually prohibited from taking on debt.

Della Justice from the Kentucky from the Kentucky Attorney General's Office said she cannot speak to what states can or cannot pledge, but notes this does sound like a return of student financial aid funds type calculation. She indicates some concern that Jerome's proposal could be manipulated as Reiter had described. She also asks why bring the debt down to just passing levels and not wipe it out entirely? The Department says because here the failure is based upon a specific quantifiable amount, so you can calculate a relief amount.

There's some question as to which students actually get this relief based upon when they were enrolled. For example, Justice is asking if students that were enrolled in the year prior to eligibility loss but are no longer enrolled in the year it loses aid would be given relief. For example, in a one-year program, students would no longer be enrolled after one year. Kolotos notes the Department has never done this before and the Department thinks the way the borrower relief is constructed is a reasonable approach to require repayment of prior loan debt taken on by students who have left may not be feasible.

Kolotos notes that the Department does not want to encourage program closures at this point, so there's a need to balance not producing such a large monetary amount owed that it just shuts down, but enough so that programs that are making substantive improvements are encouraged to continue participating.

Suggestion: If the concern about borrower relief is that programs should not have any debt in some cases, then you could solve this problem by setting the relief amount to what it would take to pass the discretionary debt-to-earnings test. What this would mean is a program that fails because earnings are too low would have to have their debt reduced to $0, since that's the only way to pass. It provides a way to lower some debt and wipe some debt out for others.

Rory O'Sullivan from Young Invincibles asks whether a student that's been enrolled for say three years out of a four-year program would get the same debt relief amount as someone who's been enrolled for multiple years. The Department says its focus had been on short-term program relief, so it needs to think about the issue.

Jerome again argues for his proposal because he thinks the Department's proposal does not stop overborrowing, but instead only has consequences when a program is close to kicking in. He also argues that this will take a long time to litigate with each institution/program. He says his idea would let students get relief on the front end right away after the first metric comes in. Kolotos calls for a 10 minute break to discuss.

Kolotos responds to Heath's concern about the full faith and credit pledge, says it would be treated as a liability just like any other liability a public college has to face if loan dollars are awarded that should not have been. The Department says it would use its authority as a lender to just pay down borrowers' debts with any dollars received.

10:25 a.m. Still on Borrower Relief

The committee is back after a longer-than expected break. The Department said the examples it was presenting was a one-year fix for short-term programs and is open for discussions of some of the mechanics, especially with what to do with multi-year programs.

Kolotos explains a bit more (this is close to a direct quote): In essence, what we're doing is what is the percentage difference in borrowing between a passing program and what a program actually scored at. You take that percentage difference and multiply it by the amount of loans of currently enrolled students. For a four-year program, it would take into account loans received as freshman, sophomore, junior, and senior. If they were juniors, it would be estimated loan amount in final year.

Connor says that this just gets a program to the bare minimum floor and that this doesn't necessarily get to the quality of the program and just allows it to pass.

Here's the actual language for who gets relief based upon the Department's language: "provide for borrower relief for students currently enrolled in, and borrowing to attend, the program." That seems to suggest that students enrolled in the program the year before it would lose eligibility would receive this forgiveness, but it's hard to parse. What is clear is that this borrower relief would not apply to the students who had graduated three or four years prior and are being used to actually generate the calculations.

Reiter argues that students that get partial loan reduction will not help them if they still cannot get a job. Suggests it is inadequate relief. Jerome says he cannot go back and change the past on data he did not have since this is the first time that schools received Social Security Administration earnings amount.

Kolotos notes that there is an appeal option within the borrower relief provision that allows an institution to argue for a smaller letter of credit or set aside agreement if it can show that students are not borrowing as much. Jerome says he will look at it.

Kevin Jensen from the College of Western Idaho asks whether a state that does not step up and back an institution would be able to have a set-aside agreement. Kolotos says he is not aware of any state that has not stepped up to back a school, noting it is part of the financial responsibility requirements. The Department also notes that it could handle this the way it does for over payments in the Pell Program–count aid against future disbursements. Kolotos notes that the goal is to avoid having public institutions post a letter of credit. If the full faith and credit pledge doesn't work, it can be treated like any other liability with the Department.

10:45 a.m. Does Poor Repayment Indicate Bad Quality?

Belle Wheelan from the Southern Association of Colleges and Schools Commission on Colleges does not think that a program that's not paying its loan back is necessarily a bad program. She says that students may be gainfully employed and choosing not to pay back loans. She reiterates that she's not comfortable making the leap to assume that a program with poor loan repayment is actually a low-quality program.

Brian Jones from Strayer University notes that there are other provisions for borrower relief in existing rules and regulations, such as a closed school. But he notes that one place where a discharge cannot occur is if a student is enrolled in a program elsehwere. He says this indicates that there is some value in the program because the student can take that credit elsewhere. He's concerned that failing this metric is being conflated with the quality of the program. The Department said yesterday this is not trying to indicate the quality of a program. He also points out that not all of the programs under consideration here are strictly vocational and suggests that the way the closed school discharge should work should be factored into borrower consideration. It's not entirely clear what this would mean in specifics, but he wants this calculated into what the liability should be if the program has some worth elsewhere in the educational marketplace.

Reiter notes that students who attend a program that ultimately fails also have reduced their lifetime limits for Pell Grants and Subsidized Stafford Loans. She calls for the Department to not count those amounts toward the lifetime caps for those programs if taken on while in a failing program.

Raymond Testa from Empire Education Group notes that these provisions are being discussed on a rule that's never really existed before and gets a bit animated. "We're awfully arrogant to think we have found the holy grail of measurements," he says. He says negotiators are blind if they think institutions operate only in the context of gainful employment, noting the presence of state and accrediting actions, as well as the Department. He says that he will provide a proposal later today for risk-adjustment for students. He also raises concerns that there's no focus on the lot of satisfied students. He doesn't want programs held accountable for benchmarks that have never existed before.

Jerome again calls for debt-to-earnings rates for everyone in the country. Note that the College Scorecard will be getting earnings data added to it in early 2014. That's not quite the same thing, though provides some way to provide an estimated debt-to-earnings rate.

11:25 a.m. Certifications and Approval Process For Existing Programs

Up next is a discussion of certifying gainful employment programs that exist but do not have measures calculated yet. The idea is that the head of a college would certify that the program meets certain requirements for the state or accrediting agency, including that it has the approval for necessary certification for students to get licensed.

Jensen from the College of Western Idaho says he likes this provision and wants to know if a program that's in pre-approval status would be OK under this certification. Kolotos says the concept is the same and it would be OK.

Nassirian calls it a good "opening bid." He wants a due diligence requirement on the institution that the program is likely to meet expected financial metrics that the Department views as markers of reasonable success. He wants some evidence of market viability that would likely meet what the Department sees as an acceptable program.

Reiter asks about programmatic accreditation where it may not be required, but it's generally needed. For example, she notes that sometimes years of experience can be substituted for completing a programatically accredited program. She's concerned that's a loophole and wants the language to clarify that just because every single employer does not require programmatic accreditaiton does not mean it should not be seen as necessary. She also raises concerns about placement opportunities, which many programs are expected to provide, noting that sometimes placements may technically available but are too far away for a student to get to or are not in their area.

Ted Daywalt from VetJobs asks if this provision will stop institutions from offering programs where graduates cannot sit for necessarily licensing tests because it does not have the correct approvals. The Department says this provision is supposed to help get at this issue. Daywalt wants stronger language that explicitly says there is no funding.

Sandra Kinney from the Louisiana Community and Technical College System wants to note that not all programs have programmatic accreditation. She says they try to get it where its needed.

Neil Harvison, from the Association of Specialized and Professional Acccreditors, says the language is clear where it's talking about required programmatic accreditation. But he's concerned that it's harder to set the criteria if employers "prefer" it but do not actually need it. He also notes that concerns about how far away experiential things like internships are supposed to be disclosed to students before they enroll so they should be aware of possibly having to travel.

Medical assisting is a good example of where the line between required and necessary can be blurred. States don't have required certification, but employers generally desire some form of certification. But there are at least four different options. Some require the completion of a programmatically accredited offering and are good for three to five years; others may only be good for a year and can be obtained just through workplace experience. Employers generally prefer the type of certification that's good for longer and requires program completion, but there's not a stated requirement that only those kinds of certification are acceptable.

Harvison says Reiter's issue could be addressed by saying that the program has to have programmatic accreditation from an accrediting agency recognized by the Department of Education, if required. Nassirian, however, says the issue is there can be programs that appear to prepare people for something that does require licensure, but it's not actually in a field that requires licnesure. His example is telling students they are preparing for nursing, but it's really a nurse technologist requirement.

Jerome notes that the misrepresentation rules can deal with this issue of "certificate" creep. He says he likes the Department's idea but wants it to be kept simple.

Justice notes the issue of certified medical assistants, which notes there is a preferred exam that is not required, but very much wanted by employers. She notes that not having this preferred certification makes it very tough to get jobs in an area, if not impossible. She says schools should know what requirements are needed in a region.

Afternoon Session

The committee is back with a suggestion from Thomas Dalton from Excelsior College about working with other negotiators to come up with a standard under which a program could be exempt from these regulations. He suggests maybe something like a low program cohort default rate for three straight years.

Next up are some comments from Christine Johnson, Capella University's government affairs official, to talk about how they handle offering education in 50 states. She says that when a student is looking at a licensure option they have students talk with a counselor about goals and make sure they are looking for licensure on the right type of job. They will also lay out potential barriers to licensure, such as more requirements for credits. They will then notify students several types of year about the licensure requirements, including any changes. Students then sign a disclosure that acknowledges the licensure requirements.

Nassirian asks how much of what Capella does is voluntary best practices versus a mandatory threshold to particpate, since they are trying to figure out what should be minimally required of everybody.

Justice asks Johnson if Capella still offers programs to students if they are in a state where it is incapable of receiving licensure. Johnson says that though they inform the student they cannot seek a license, such as some programs that require APA approval, they still let them enroll. She notes that some students enroll without the goal of licensure. Justice asks what kinds of jobs those students end up getting if they cannot get licensure. Johnson said she will get back to them on what those jobs are, but notes some students may move to another state where they can get licensed. She acknowledges that this issue is handled through disclosure.

1:30 p.m. New Program Approvals

The Department proposes to look at new programs only if they are substantially similar to one that failed out of the federal student aid programs or was voluntarily shut down as it was failing. It would also look at approval if it was in a new type of instructional program as what the institution already offered or if it had a program in the past three years it had a failing program in the same type of instructional program family. Programs that have to apply would then need to include some information, including letters of recommendation from likely employers.

Reiter has a number of concerns about what's in the required application that indicate she thinks it is not strong enough. For example, she thinks that the employer letters of recommendation need to come from employers that have actually hired people in the relevant fields lately. She also raises a concern that the language as drafted require just the provision of the information in the application, but nothing around what happens if it's inaccurate or says that the program would not have sufficient programmatic accreditaiton. She thinks this will do nothing to stop predatory actors. Kolotos says they will consider langauge.

Kinney asks about the mechanism for submitting this information and how long the turnaround time for approval would be. She's also worried about what to do with colleges that may operate on a state border and have a lot of graduates work in a different state from the school, so requirements about being able to obtain employment in the state where the program is offered could be difficult. Jeff Baker from the Federal Student Aid office says that they are working on improving the E-App system so these items could be submitted through it. He also says they are talking with the program compliance teams to get things turned around quickly.

Jensen also asks about conditions under which the Department would deny applications. Finley from ED says they would spot-check applications for accuracy and fraudulent data could be grounds for denial.

Wheelan responds to Reiter's comment about employers that have actually hired peope, saying that some industries may move in quickly and not be hiring in the region yet. Reiter suggests having the employers indicate they are a new industry in the area.

Jones asks about the Department's legal authority around asking for institutions that have not had any problematic programs to go through this activity. I unfortunately missed Finley's response to this question.

A discussion then follows about where these approval requirements would fit within the existing state review work. For example, Jerome talks about all the work he has to do through the New York Board of Regents. Kolotos asks if that would mean the Department would have to rank states on their ability to provide oversight, suggesting that's not a great solution. Justice indicates they do not want of these requirements to pre-empt state law.

Nassirian says he thinks letters of recommendation are just noise in the system and meaningless.

Jensen suggests that these requirements should come in after failure to get state approval. This would allow programs that already go through a lot of approval and rigor from a state to not have to provide a lot of information for this process. He also raises the concern about how the Department does not have clearer standards for not approving bad applications.

Nassirian questions whether relying on state approval makes sense. He notes that if states were doing a good job with approval then these negotiations would not be necessary. He notes that it's uneven across states and asks how decisions about the differences in the adequacy of state approval could be made.

Jensen says if we don't trust states to do the job they are supposed to do, then that's a big problem. There's a bit of a confusion about whether states just approve institutions or programs. The federal government does not require state approval of each program, but some states do it anyway.

Harvison brings up his earlier concern that this section of the rule may be trying to do more than this one rule can do. He notes that you can't solve all the problems in higher education in one rule.

Justice says that since this is gainful employment and most of these programs will be coming from places that had problems in the past, then the Department should be the one to do the upfront approval check.

Heath says the Department should then do the debt-to-earnings upfront and tell them institutionally how much they should be able to loan based upon expected results. Kolotos says the Department could potentially project a debt-to-earnings rate, but there's no assurance that a program would continue to meet this rate over time. This would make that protection illusory. He doesn't think they would get an application that would project to fail these standards.

Jerome closes this discussion noting that the Department has some limitations on what it can do on program approval based upon the judge's ruling on the last gainful employment rule. That footnote is:

> The court notes, however, that the broader argument is not frivolous. The program approval rule requires any school that wishes to offer a Title IV-eligible gainful employment program to submit an application to the Secretary, who can wait until a month before the beginning of class to decide whether he will examine the program more closely. See 34 C.F.R. §§ 600.10(c)(1), 600.20(d)(1)(ii)(B). If he decides to take a closer look, he can reject an application because he finds "the process and determination by the institution" to be "[in]sufficient." Id. § 600.20(d)(1)(ii)(E)(4). A school submitting a new program for approval must "[d]escribe . . . how the institution determined the need for the program and how the program was designed to meet . . . market needs." Id. § 600.20(d)(2)(i). For the Secretary to have the power to perform an evaluation of the market demand for every new gainful employment program brings him dangerously close to exercising "supervision . . . over the . . . program of instruction . . . of an[] educational institution." 20 U.S.C. § 1232a. A proposed revision to the program approval rule would substantially narrow the Secretary's power. See Application and Approval Process for New Programs, 76 Fed. Reg. 59,864, 59,877 (Sept. 27, 2011) (proposing amendments to 34 C.F.R. §§ 600.10, 600.20).

3:05 p.m. Reporting Requirements

Kolotos says the Department hopes to finish the discussion of the regulatory text today and leave tomorrow for discussion of anything that's submitted tonight with revised text tomorrow.

Kolotos says the Department can include Perkins loans in its debt-to-earnings calculation, but they would have to be reported as an institutional loan in the reporting requirements.

Raymond Testa asks about the ability to include all students who applied for federal student aid, not just those who receive the aid, in the counts of students. This would allow people who did not receive federal aid to be captured as well and expand the cohort. He's concerned that $0 borrowers are now excluded (though really only $0 borrowers who did not receive Pell Grants) , which raises the mean and median loan figure. The Department says they are continuing to talk about it, but it's a difficult issue it will try to answer tomorrow.

Heath asks if the gainful employment reporting is in addition to what's already being given out for other purposes. He says this moves a little closer to unit data reporting on students. The Department disagrees. The colleges already do enrollment reporting, and adds a little bit more information for gainful employment purposes.

3:25 p.m. Disclosures

Kolotos says this is pretty similar to what was in the last iteration of language in that it contains a list of items that would be whittled down to fewer items on an actual template. It did, however, change the one-click requirement in response to Testa.

Jerome asks if the Department could collect this same information for non-gainful employment programs as well. He notes that the Department cannot hold them accountable the same way as the gainful employment programs, but asks if they could get that information so the student could choose between gainful and non-gainful programs. The Department's lawyer says that question is outside the scope of this negotiation and cannot address it now.

Libby DeBlasio from the Colorado Department of Law's Consumer Protection Section says she thinks consumer testing this form will be important. She also thinks that cost, primary occupation, and some other elements must be required in the template, and let the Secretary have discretion about other items beyond those. She also talks about the website disclsoures, which last time she found were not often easy to find or clear to understand. She thinks the language that the disclosures be clear and conspicious is importnat, but not strong enough. She wants the Department to consider adding the word "prominently," which has some legal understanding. She also mentions some discussions from the FTC about having it displayed next to certain trigger words and be "above the fold," so that students do not have to scroll down to them. She thinks a web link is ok, but must be clear, conspicuous, and prominent and must be in these regulations because an electronic announcement to schools is not enough. Finally, she thinks that the disclosures must be made before the student signs the enrollment agreement and that it must be done verbally as well as in writing.

Jerome argues for simplifying it to three items: (1) salaries, (2) debt levels, and I believe (3) completion rates. He says those simpler items will give people what they need to know.

Jones asks where these disclosures fit with ratings, scorecards, and all the other disclosure items that the Department is working on. He asks if that's going to be coming at consumers with too many disclosures. He asks them to keep the bigger picture of these elements in mind. He asks how it will be included in the rating system generally. The Department says it is outside the scope of this process. It could be reasonable to do for other programs, but that's not the place for this conversation.

Kinney agrees that fewer disclosures are better, otherwise it will be expensive to do and could have those costs passed on to students. Kolotos reminds individuals that there would be a disclosure template that would not have all the items on this list and the Department would calculate many of these items for colleges to try and minimize burden.

Jensen asks if the template could employ skip logic like what is currently used on the FAFSA– such as skipping over some elements for smaller programs where items cannot be disclosed.

Heath says that before students can add a gainful employment program they have to go down through the disclosure requirements and read the potential job and earnings before they can add that certificate and take classes for it. He thinks this is necessary because students can typically add programs whenever they want and so they should have to do this before they can add a program.

Reiter brings up the issue of placement rate, which was something that some negotiators had submitted a proposal around. She says that the placement rate disclosed there should be at least as strong as what negotiators had submitted, but allow programs to report ones that are tougher (e.g., require students to be enrolled for longer).

Kolotos says this is not a program review process. If the Department cannot find the disclosures quickly (i.e. 10 minutes) it will contact the institution and ask them to correct it.

Reiter is concerned about what it means to have to disclose information about a program by name. She notes that a program might technically be a "less-than one-year certificate in dental assisting," so ads that talk about a career as a dental assistant might not have to disclose this information. She also cites an example of an advertisement for a career in nursing, without a specific name attached. She also wants language added that prevents an institution from trying to denigrate or undermine the importance of the language.

Ronnie Higgs from California State University–Monterey Bay objects to the requirement to orally disclose information to students. He says they do not come into contact with everyone before they enroll. Reiter says it is a burden, but students also are taking on a burden by enrolling. She suggests colleges could make a video to disclose it. *For the record, that doesn't seem like a great idea, unless it has pandas, maybe?*

4:15 p.m. Defense Against Collection Actions

After some discussions about the mechanics of data corrections that deal more with timing of data being released, there's a discussion about the conforming changes added to the rule about discharge options. The Department had added some language denying the borrower's right to challenge collection proceedings based upon failing programs. The Department's lawyer notes that the Department often gets discharge applications for things that occurred years or decades prior. Connor is concerned about having the right to a defense being denied to the student entirely since a school could shut down and the borrower couldn't go after them for relief.

The Department says this would not eliminate the right to challenge a collection action based upon misrepresentation or things of that nature, which could include a lack of accreditation.

Nassirian is not pleased. He indicates that he thinks this goes beyond the scope of the negotiations. Connor and O'Sullivan also are concerned about the scope of this provision. Nassirian mentions an attempt in the late 1990s to convene a negotiation panel on borrower defenses to repayment and the group reached consensus after a day to not deal with this issue. The Department says that is not an accurate description of that session and this is an attempt to fix an unacceptable situation that was left in place there.

Reiter also brings up the concern about scope and this would need its own negotiated rulemaking session. She also notes that the Department was not willing to discuss the false certification provisions as out of scope and why this does not also fall out of scope.

The Department said it already addressed false certification in a different rulemaking so that's why it was not brought up here. The Department says this is not a change to the discharge statute from 20 years ago, but will go back and look at the issue again.

Jensen also objets to this provision and says it feels like more than just a conforming change. He and Nassirian are the only representatives of colleges to weigh in on this question.

DeBlasio says that the defense options of borrowers are limited because they often have mandatory arbitration clauses and so cannot seek relief from the schools.

4:35 p.m. Alternative Earnings Measures

The Department had previously included language saying that programs could document their earnings through other means as long as it was approved by the National Center for Education Statistics (NCES). To make this process easier, NCES will develop a form for what this could look like so that it is easier to follow. In conducting the survey, the institution can include students that do not receive federal student aid.

Nassirian is concerned that the Department would not automatically receive the data. It would be given through an attestation and could be subject to review. It would not be stored in the National Student Loan Data System.

Jerome likes the inclusion of the non-federal student aid students in this measure.

Data Corrections and Challenges

The Department notes that the program cohort default rate would be challenged the same way that institutional cohort default rates are. Jerome reiterates an earlier request for informational data.

Mohr asks if the program could be exempted due to having low percentages of students borrow (what's known as a participation rate index challnge) after one year of high rates instead of waiting for three years of rates that would produce a sanction. The Department will consider the issue.

4:45 p.m. Wrapping Up

Nassirian asks if proposals for exceptional performance would be discussed tomorrow. The Department said it would take ideas, but did not see much interest from the committee and does not plan to discuss it.

That's it for today. Back at 9 a.m. tomorrow.

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Gainful Employment Liveblog Session 2: Day 3

By Ben Miller — November 20, 2013

Today is supposed to be the third and final day of the last scheduled negotiated rulemaking session on gainful employment. Negotiators spent the last two days talking through all the parts of the draft regulatory text except for one small piece provided by the Department of Education. Today the Department and negotiators are expected to present various tweaks and new regulatory text suggestions for consideration. The committee will also start gauging whether it has consensus on any sub issues. Consensus is like a jury deliberation, it has to be unanimous. If the committee is able to reach consensus on all issues, then that text will become what the Department releases for public comment in the form of a Notice of Proposed Rule Making (NPRM). If consensus is not reached on any single issue, then the Department may draft an NPRM as it desires, though any sub issues agreed to will likely appear in the same form as approved by the committee.

Live updates will appear below.

9:10 a.m. Getting Started Again

There's still some small discussion of the conforming changes from the Department's text be considered, but the facilitator also indicates that there are a number of new proposals that came in through the night and are being copied for distribution. The facilitator also gives a bit of clarity around what consensus means. As he describes it, the measure of consensus is not perfection, but whether a negotiator can live with it. If a negotiator says he or she cannot, then the facilitator says he or she should be prepared to explain why they cannot live with it and what changes would be needed to do so.

Apparently proposals came in as late/early as 4 a.m. yesterday.

So the plan is to discuss these small conforming changes, then new proposals and some of the ones that came in between sessions. The Department will then take a longer break around lunch time to discuss what its heard before coming back for the afternoon.

9:15 a.m. Conforming Changes

John Kolotos talks about the question of using gainful employment failure as a borrower defense. The Department believes that the borrower defense is relevant for this session, but is removing it. Several consumer-minded negotiators had argued strongly against this provision yesterday. The rest of the conforming changes are very minor.

Margaret Reiter, who represents consumer advocacy organizations, puts forth an idea that an institution that is providing gainful employment should have to add something to its mission statement about that. Kevin Jensen from the College of Western Idaho says the leadership of his independent community college would not go for this. Brian Jones from Strayer University also objects, noting that his institution has a lot of compliance obligations and would not add in something to its mission statement about being a good steward of federal financial aid funds. Neil Harvison, who represents specialized accreditors, asks if the Department could even do this given concerns about respecting the mission of universities. Reiter suggests that instead of being in the mission statement language about gainful employment could be added somewhere else on the website. Marc Jerome from Monroe College in New York also does not like this idea, indicating that he thinks its ineffective.

Della Justice from the Kentucky Attorney General's office indicates she likes this idea since if the college has to do it under the law, why shouldn't it say so? Jensen says the issue is more that the institution wants to maintain its ability to make choices about the direction of the institution and not be told what they have to say. Jenny Rickard from the University of Puget Sound also objects. Kolotos suggests that the committee moves on.

9:30 a.m. Definitions

Sandra Kinney from Louisiana Community and Technical College System asks about whether part-time students are included in the cohort for completion. What follows is some confusion about whether the completion rates should be for all students or for part-time ones as well. Kinney says trying to have the Department figure out all the different program lengths and attendance intensities for students would be extremely difficult. Kolotos says the idea is that the Department would know who was enrolled and whether or not they finished so they could calculate a measure. The Department hears the concern about looking only at full-time students, but notes that in a lot of instances the completion rate of part-time students may not be very good and does not want to lose that. He indicates wanting some way to take both into acount. *What about calculating a full-time equivalent completion rate?*

Kolotos says the Department can look into finding some way to do maybe a half-time or full-time calculation, but notes that at some point it needs to fix enrollment status, so it knows what group to put a student into.

Barmak Nassirian from the American Association of State Colleges and Universities says that the goal is really to find the rate of churn, regardless of when they left the program. This would be a one-year attrition rate, or something close to it. Kolotos notes that if the negotiators don't think these completion rates are meaningful and want all students included in the figures, then the burden of calculating them would have to go to the institution since the Department cannot do this itself.

Jerome says it is a big step in the right direction to include more than first-time, full-time students. So maybe one measure of full-time and one measure of part-time could be used. *What's frustrating about this conversation is it does not seem to know about the new measures the National Center for Education Statistics is proposing to add in to the Integrated Postsecondary Education Data System, which would have completion figures for part-time students after six or eight years. That would likely provide an option to employ.*

The Department says the best it can do at this point is federal student aid only, but will take back an idea on part-time or full-time students.

Jerome says that the loan repayment rate disclosed should not be different from the loan repayment rate that's used for accountability purposes. He also does not think that median earnings for dropouts does not make sense. He wants the section on disclosure items simplified and shortened. *Here's my suggestion: drop the old repayment rate calculation in the disclosure. Then tell students how long loans are likely to be paid off based upon the amount the balance has been reduced by the time the rates are calculated. That works off the same formula and takes a complicated concept and translates it into clear understanding about years to repay.*

10:10 a.m. New Proposals

There are seven new documents the negotiators just received in hard copy. They have not been given to the public yet. We are going to hear explanations from the various authors and only time for clarifying questions at the moment.

1) Margaret Reiter: New Program Application

She has primarily some language on the application section and a few other smaller language suggestions. She says they are trying to address questions about how a program is supposed to know what employers are looking for in terms of programmatic accreditation. For each occupation tied to a program, the institution should say if it has programmatic accreditation that the institution knows or should know it should have for graduates to get jobs. (That's a paraphrase because I don't have the actual language). She says there is also some clarifying language around licensure requirements.

Jerome says he thinks that this would be too burdensome and would make the regulation much longer and would not have consensus on this degree of requests.

Justice says that the requirements should go further and be clearer that the program has the various accreditations and approvals needed for graduates to sit for the state licensing exam and/or what employers require. She describes this as not a disclosure issue, but a preparation issue. She also argues again for adding a debt-to-earnings rate onto an application since these are programs that already have some flag attached to them and so they have to make some representation about likelihood of passing.

Harvison says that these suggestions are overly prescriptive, such as having externships within the state, within one hour commute of where the program is located, and if neither is true, why not.

2) Ray Testa: Risk Adjustment

He says the idea for this proposal is to eliminate the category of the zone and consider risk-adjustment based upon income and dependency status. The zone elimination is something he had suggested in his earlier comments submitted at the end of September.

His proposal is that the threshold would change based upon the amount of Pell and independent students in a program. The threshold for the annual debt-to-earnings rate would range between 8 percent and 14 percent for programs, with the higher thresholds allowed for programs with more Pell or independent students.

3) Richard Heath: Low-Risk Programs

Richard Heath from Anne Arundel Community College puts out a suggestion around exempting what he calls "low-risk programs." He says a median loan debt of $0 for all program completers or that the published cost of tuition and fees for a full-time student is less than or equal to the maximum Pell Grant for that year.

Jerome says that if this were accepted, programs with a zero graduation rates or high default rates with less than 50 percent borrowing would pass. He says there are not a lot of those programs, but there are enough.

4) Kevin Jensen: Minimum Repayment Cohort

This proposal pulls some language from the institutional cohort default rate sections so that if that section ever changes they do “not lose control.” That’s a bit vague, but it sounds like maybe they have to hit the minimum cohort size of at least 30 over two years, not three.

He also suggests a minimum cohort size for the loan repayment metric of 30 borrowers.

5) Proposal from the public: for-profit medical schools

We are hearing from Rocky Vista University, which is a for-profit osteopathic medical school and is the only for-profit medical school in the United States. Rocky Vista has asked to be excluded from these rules before and asks so again to point out that medical schools have no history of lack of repayment or issues of deb-to-earnings. To be clear, these are degrees to become doctors, not nursing. The representative from Rocky Vista also argues that graduate professional training does not have a problem here. She says the issue is that a medical degree recipient just cannot pass a debt-to-earnings test in 10 years and calls for having a longer amortization time for graduates of much longer programs.

6) Tom Dalton: Exceptional Performers

Tom Dalton from Excelsior College proposes to exempt institutions with a three-year cohort default rate of 10 percent or less for three consecutive years. He says the point of using cohort default rates is because it has been around for a long time and is now three-years long, which makes it tougher to manipulate. He says 10 percent is chosen because that’s the common high-performance threshold used to allow for things like single disbursement of aid dollars (I believe it’s now actually 15 percent for that, but am not sure).

O’Sullivan asks about whether the Department has data on manipulation of cohort default rates using deferment or forbearance. Jensen says he thinks that the notion of exceptional performance is a valuable carrot, but wants to know some data about the use of deferment or forbearance to help establish a threshold for acceptable usage of those items.

Eileen Connor from the New York Legal Assistance Group raises concerns that it operates at the institutional level so there would be no reporting on programs.

I’ve made this point with respect to the rankings system, but there’s a difference between a rate that tells you something about poor performance and one that tells you something about good performance. A low cohort default rate does not necessarily indicate something is *particularly good. It's the same reason why a very low debt-to-earnings rate does not indicate necessarily that graduates have good incomes, they could just have low debts.*

Jerome asks if the Department has any ideas for exceptional performers. Kolotos says the Department does not have any and wanted some ideas. Jerome asks Dalton if he would consider allowing the exceptional performance standard to be done at the programmatic level. He says yes, but it would then require data reporting.

7) Libby DeBlasio and Della Justice: Disclosures

This is some wording around how information is presented to consumers and when it would be given, such as doing some information as a frequently asked question, subject to consumer testing.

They also propose to limit enrollment to the number of students minus any that withdrew, so you cannot replace dropouts. She also proposes expanding the borrower relief to students who completed the year before the failure.

LIbby DeBlasio from the Colorado Department of Law also discusses adding language about required consumer testing. She says that until a permanent comes out, issue a temporary template under the current regulations that includes primary occupations and a few other elements. She talks through some other changes about disclosures, but they are text changes and not easy to follow.

Marc Jerome's Proposal

Jerome lays out three things he had asked for: (1) informational rates; (2) reinstate the 12 percent threshold from before; and (3) go back to the amortization rates of 10, 15, or 20 years. This would essentially be the 2011 rule. He also raises the idea suggested in September comments on immediate loan reduction to students.

The Department will now break to discuss these issues until 1:15 p.m.

1:20 p.m. Verbal Presentation of Changes

The Department is going to walk through the document and take some suggested changes and why they are taking some things and not taking others. Simultaneously, the Department is working on a red-lined document that will be presented later on.

Elizabeth McFadden from the Department's General Counsel's office is now presenting. The Department will start from the beginning on the version of the document that Libby DeBlasio had submitted because it is a full copy. I don't believe that is available electronically, so this may be hard to follow.

668.402: Definitions

The Department will add a definition of a prospective student at some point in this section. It is agreed to.

668.403 Gainful Employment Program Framework

Page 8–The Department will add Perkins Loans into the debt-to-earnings rates, but cannot add it to other measures. This was a suggestion by Margaret Reiter.

Reiter had proposed to make a program fail the debt-to-earnings rate if it had an annual rate above 12 percent or above 30 percent. The Department is not taking that change. This means that a program still has to fail both debt-to-earnings measures to fail, which is more lenient.

Page 9–Reiter had wanted to make a program lose eligibility if it was in the zone for three years instead of four. The Department is not accepting this change to give programs a chance to improve.

The Department also chose not to accept a proposal from Testa to adjust the debt-to-earnings thresholds based upon the percentage of students at a program that received Pell Grants or were independents. The Department says that it looked at this issue the last time and will look at the issue this time. When it did the analysis the last time, it did not see a degree of effect of Pell Grant status that made it think there was enough of a connection to have to make adjustments for it and so does not see a reason to make such adjustments at this time. It did, however, note that it would be doing this analysis again and if it sees evidence that such adjustment is necessary it would do so. Testa asks about the independent status, since that is related to loan limits. Kolotos says the Department will look at it but did not see a reason at the moment to make that change.

668.404 Calculating Debt-to-Earnings Rates

Reiter had suggested to amortize loans based upon an average rate. Representatives of for-profit schools had asked for differentiated amortization schedules based upon the type of credential. The Department is not accepting either suggested change. It is, however, adding Perkins Loan debt into the calculations.

Jerome asks the Department to see what the actual amortization schedule was by program type. Kolotos says the Department has looked at it, but most people elect 10 year plans. Kolotos says but if you look at how long it takes someone to pay off their loans, you are looking at very old cohorts. But when you look at the data, he sees most loans are paid back in less than 10 years. Jones from Strayer University asks if the loans are broken down by type of credential when it looks at average repayment periods. Kolotos says he will take it back.

Reiter had suggested deleting language that clarified what it meant to start paying a loan upon completion so that a loan with a grace period could not be exempted on the grounds that it did not immediately come due. Kolotos suggests saying “after” instead of “upon” completion.

668.407 and 668.408 Calculating, Issuing, and Challenging Program Cohort Default Rates

Kevin Jensen from the College of Western Idaho had proposed including a new section that mirrored what was already required under the regulations for cohort default rates. The Department says it does not need to include this here since it already exists elsewhere in regulations. He says if the underlying section ever changed, then it could see if it had to change the language.

668.409 Determining Loan Portfolio Repayment Performance

Jensen had also suggested a minimum of 30 borrowers for the repayment rate. The Department is adding in a minimum size, but it is looking at 10 borrowers, not 30. That would be 10 in a cohort of two years.

668.411 Final Determination and Consequences of GE Measures

DeBlasio and Justice, the attorney general representatives suggested providing warnings to students at programs enrolled in the zone. The Department will not adopt that. It continues to believe that the first few years in the zone not entail barriers to allow these programs to improve.

The Department also does not accept proposals from DeBlasio and Justice that would require field testing and provide actual disclosure language. The Department says it will field test it, but can't require it as a practical matter and does not want to lock down the language.

DeBlasio and Justice had suggested that programs subject to the enrollment cap be calculated after subtracting dropouts. The Department does not accept it, citing the borrower relief provisions as a way for a program to consider what it should do in terms of students to add.

DeBlasio and Justice had suggested that borrower relief provisions apply to not just students currently enrolled in the program, but also those who were previously enrolled and whose results were measured and produced the failure. The idea is the borrowers that actually "caused" the failure get some help. The Department notes that it is trying to balance who gets relief here and that those borrowers that are measured have some relief through income-based repayment and that including this could triple the size of the population eligible for relief, which would be overwhelming.

Nassirian asks if the Department is documenting that some harm occurred. The Department says not necessarily because the program that may fail could also pass in one last year in which case no harm had occurred. Nassirian asks what about programs that do end up getting that final failure? He asks for a distinction between programs that did fail and those that came close to failing. The Department reiterates it is a difficult position to balance.

668.412 Reporting Requirements

Reiter, DeBlasio, and Justice had asked for programs to report for an occupational code known as SOC for each student as well. The Department says it is not appropriate to add this in for the student-level data, which is what this section addresses.

Reiter had requested adding language around private education loans that says the institution should report private education loans "which the institution is, or reasonably should be aware of." The Department accepts this change.

668.413 Disclosure Requirements for Gainful Employment Programs

DeBlasio and Justice had put forth comments to require consumer testing on the template or to put forth a temporary template. The Department says a temporary template would still have to be approved by the Office of Management and Budget, so there's no reason to do a temporary one. The Department says it will have a template out for the current disclosure requirements sometime this month. This would apply to things that are in the parts of the current language not struck down by the court. The Department then has time to consumer test something before the final version of this rule is published.

DeBlasio and Justice had proposed disclosing the mean earnings and not the median. The Department wants to keep the median language and explain what a median is in plain English. Testa from Empire Education Group asks about disclosing both. The Department says it will take it back.

DeBlasio and Justice had suggested changing some of the language around disclosures about licensure. The Department suggests having programs list the state or states where "completion of the program satisfies the educational prerequisites for licensure." Nassirian asks what happens if a program would not qualify for anywhere in the United States. He says that not being eligible anywhere should not be eligible. The Department says that there is some interplay between this section and the certification requirements that will be discussed later.

3:30 p.m. Still on Disclosures

We're now back in session after a delay that was supposed to be about 35 minutes and still went on for more like an hour.

The Department says it will add the prominent to its description of the disclsoures, but says they need to keep readily accessible. In terms of the remedy if the website needs to be fixed, the Department would add language saying in addition to other actions by the Secretary.

In terms of language for direct distribution to students, the Department would require the disclosures to be given to prospective students before they enroll or sign an enrollment agreement or similar type activity. It would not,however, require disclosures to be provided orally.

668.14 Calculating, Issuing, and Challenging Completion, Withdrawal, and Repayment Rates and Median Earnings

The Department will accept concerns from negotiators and do separate completion measure for part-time and full-time. And it will assign students to a status based upon their attendance intensity the first time a student's data is reported to the Department. Part-time students will be se judged on whether they complete within 200 percent of the program length or 300 percent of the program length. This means two rates each for full-time and part-time students. Full-time students would be measured at 100 percent and 150 percent of time and part-time students will be checked at 200 percent and 300 percent of program length.

The Department does not accept a suggestion from Nassirian to report an attrition rate instead of a withdrawal rate. The Department says it will have the data to calculate some form of an attrition rate, so if that information is needed then it could add it.

The Department notes it is still working on the new programs text.

4 p.m. Debt Reduction Proposal

Jerome asks if the Department is going to set aside time to discuss the accountability metrics, given concerns that they could close some programs/institutions or if the Department was going to keep going through the regulatory text. Kolotos says in a way the metrics have already been discussed through the comments on this proposal and its language. He says the Department's proposal are those three metrics: debt-to-earnings; loan portfolio repayment rate; program-level cohort default rate and that the thresholds it suggested on those rates are the ones it wants to keep.

Kolotos says he wants to discuss Jerome's proposal that would allow an institution to reduce the debt for each cohort to get it to the point where the debt amounts would pass. Kolotos says it is a viable idea and thinks the debt reduction amount would be equal to what it would otherwise have to provide through the letter of credit or the set aside of loan dollars. So it could reduce the debt instead. The one exception would be for the program-level cohort default rate, in which it could not calculate an amount to set aside. The one catch is it would only be available for the transition period.

Jerome says that since an institution cannot change the debt of past students, so there is nothing it can do to change the course of action for those individuals. So instead, the program would lower the debt levels of new students and stop lending to existing students that are above the acceptable level. Or he says they could get to a zero median debt for the program so it does not fail. What it gets in exchange is relief from the penalties. He says not many institutions will take advantage of this because it is costly. Nassirian asks if past cohorts of students get any relief. Jerome says no. (That's not dissimilar from what the Department is saying either, since its borrower relief does not apply to past students. Jerome says he would do this through scholarship and institutional aid.

So to clarify, the institution would lower the debt for current and new students through institutional aid or scholarships. It would be good for the transition period only. Justice asks what would happen if it's the last year of the four-year transition period and the program is multiple years long. The answer is not clear and Jerome says he wanted this to be a permanent change.

Nassirian says he is concerned that making this a permanent allows institutions another "bite at the apple" to keep flying near the limits. He asks how many schools could really afford this. Jerome says he thinks it could be as little as paying for students' books instead of using loan dollars. Kolotos says he thinks Jerome is doing the right thing and that this is a replacement for requiring a letter of credit. He clarifies that the idea is to use institutional support with the students' consent, which is how he can legally limit the borrowing.

Justice says it has to be every single new student and every single current student. Jerome says that is how he sees it.

Nassirian says the problem is peaks and valleys. He says this is a way of setting the ratio at the maximum allowable level to ensure compliance. So an institution can set the price at one level and then go back and change the loan amounts once the data show it was priced too high.

Kolotos clarifies this would allow the program to avoid penalties and be subject to eligibility loss for everything. It would exempt them from the loan portfolio repayment rate but could not exempt it from the program-level cohort default rate. Kolotos calls this proposal the "most proactive" idea that negotiators have put before the commitee. Justice asks if the Department would limit the number of times the institution could rely upon this provision.

The Department asks for a short break for individuals to read the language and then take a consensus vote.

For what it's worth, if you wanted to do a debt reduction program it would probably be better to structure it one of two ways. Either have them cut off debt entirely, which is a cleaner test and makes it simpler to worry about the ability to raise tuition on non-borrowers and use it to pay off debts for others. Or, you could have the debt reduction be set to the discretionary level needed to pass. What this would mean is that a program with very low earnings would have to cut debt to zero, since they would not have any discretionary earnings and thus any debt level would produce an automatic ratio of infinity. If done to the annual rate, there is a bit of a risk that high-cost programs could cost shift dollars around.

4:40 p.m. Another Meeting

The Department is proposing to hold a one-day meeting between December 9 and 20. The Department could do it over the phone or in person. It would try to have the data available before then. It would take a consensus vote at that time and not take a vote today.

The Department says it will review the exceptional performers language.

Jones from Strayer says he appreciates the attempt to get data. He asks about the process going forward. He notes that some of the ideas the Department has put forward lies in the impact of the data. He asks if the terms of the rule appear to be set, what is the point of the data if there isn't openness to using that data to find some critical underlying points. He says if the Department is going to have the data would it be used to revisit core components of the rule. Kolotos says it will give the data and we can discuss the metrics, but it must be done in one day and not have session after session. Jones says he in particular is concerned about the impact of complying with one of three metrics versus having to comply with all three metrics.

Jensen from the College of Western Idaho says he wants to remind people that this work impacts millions of families and large numbers of people. He says we are not doing proper due diligence if we try to wrap this up in one day. He asks for a two-day session given how much is at stake. Reiter says she thinks it can be done in one day and can't keep going around on things the Department does not want to do.

Kolotos responds to Jones. He says he believes the Department put forward the right policy. The data should inform the policy, but it should not drive it. *That seems to suggest that the policy should not be driven by the outcomes estimates but by what makes sense from a policy standpoint.*

Kinney from the Louisiana Community and Technical College System says she is still concerned about the unintended consequences for places with small numbers and percentages of borrowers and that it could penalize low-cost, low-risk programs and benefit high-cost high-risk institutions that can buy themselves out of this issue. Jensen says he has some political problems at the local level with how this rule could come out. He says this could create incentives for low-cost programs to leave the loan programs. He does not want fundamental errors to be made in the way this rule is put together. Justice agrees that she's concerned that community colleges get no reward for being low cost under a proposal like the one that Jerome put out.

That's it for today, we'll be back at some point next month for overtime negotiations.

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How the Negotiators Want to Change ED's Gainful Employment Proposal

By Ben Miller — November 7, 2013

The next round of negotiated rulemaking around gainful employment starts in 11 days. While the Department of Education has not posted its next regulatory proposal yet, it released 19 documents from negotiators laying out ideas for changing the initial language released by the Department in August. Though there's no guarantee any of these ideas will become part of proposals, they do provide insight into how the negotiators are approaching discussions.

Overall the submissions from negotiators demonstrate the extent to which the discussions sessions are focused on two separate conversations that are touching on the same global set of issues, but not the same narrower topics. On one side are proposals from the representatives of for-profit colleges—particularly those from Marc Jerome from Monroe College in New York and Raymond Testa from Empire Education Group, a chain of beauty schools. These submissions argue for tweaks to the rule that would result in a proposal that is a more forgiving version of what the Department issued in 2011. On the other are proposals from consumer advocates that are focused on three main areas: (1) job placement rates, (2) an approval process for new or existing programs, and (3) relief for student borrowers. The first and second issues represent additional forms of accountability, while the third gets at an additional form of borrower protection.

Party Like It's 2011

The lawsuit brought by for-profit colleges that ultimately struck down the first gainful employment regulation challenged whether the Department had the legal authority to promulgate the rule. The subsequent judge's verdict affirmed that the Department had the authority to write a rule in this area, but invalidated the final one published it based upon the justification for the threshold chosen for acceptable levels of student loan repayment.

Having the Department's legal authority upheld has changed the dynamic among the for-profit negotiators. Rather than arguing the Department should do nothing to hold career programs accountable, they are instead pushing for the Department to establish a rule that is close to the 2011 rule instead of the stronger 2013 proposal. For example, the 2013 rule proposed to add an additional performance category for programs where graduates' ratio of student debt payments to income was below the failing level of 12 percent of annual or 30 percent of discretionary income, but was higher than the suggested passing threshold of 8 percent for annual and 20 percent for discretionary income. The proposal from Testa [www2.ed.gov/policy/highered/reg/hearulemaking/2012/23testa93013.pdf] calls for the elimination of this performance level entirely; the one from Jerome would keep it, but increase the thresholds on it so that programs would pass if their debt-to-earnings was at or below 12 percent for annual or 30 percent for discretionary; it would be in the middle if the ratio was between 12 percent and 15 percent for annual or 30 percent and 35 percent for discretionary.

The table below breaks down what these different proposals look like and how they compare to the Departments' 2011 rule and 2013 proposal.

Outcome	2011 ED	2013 ED	Ray Testa	Marc Jerome
Pass	=12% annual and/or =30% discretionary	=8% annual and/or =20% discretionary	Same as 2011 ED	Same as 2011 ED
Middle	None	>8% and =12% annual and/or >20% and =30% discretionary	None	>12% and =15% annual and/or >30% and =35% discretionary
Fail	>12% annual and >30% discretionary	Same as 2011 ED	Same as 2011 ED	>15% annual and >35% discretionary

As the table above shows, Testa's proposal would duplicate what the Department did before, while Jerome's would duplicate it but with an even more lenient threshold for failing. Here's how the proposals would work out based upon actual earnings and debt data for 2008 and 2009 graduates.

Outcome	2011 ED	2013 ED	Ray Testa	Marc Jerome
Pass	91	78	91	91
Middle	0	13	0	4
Fail	9	9	9	5

The results are not that dissimilar across proposals. The biggest difference is the Department's 2013 proposal would shift about 13 percent of programs from passing to a middle status, while Jerome wants to make even fewer programs at risk of failing.

The return to 2011 is not limited to thresholds. Both Jerome and Testa also called for having the Department calculate the average monthly loan debt payments using different estimates for how long borrowers would repay based upon the type of credential. In other words, payments for bachelor's degree programs would be based on a 15-year repayment timeframe, while those in a certificate program would be based on 10 years. This is exactly what the Department had in its 2011 rule, which was added as a concession because lengthening the repayment time will reduce annual debt payments, thus allowing programs whose graduates have lower average incomes to pass. While Testa and Jerome each argue that this change better reflects actual time to repay, statistics from the Department note that the vast majority of borrowers are on the 10-year repayment plan [www.consumerfinance.gov/blog/a-closer-look-at-the-trillion/] and the average overall time to repay is 12 years.

Finally, the Jerome and Testa proposals also argue for allowing programs to cap the debts of students at the amount charged for tuition and fees, another concession by the Department included in the 2011 rule that would lower student debt payments and allow programs with lower average graduate earnings to pass. They argue for this change on the grounds that students may borrow for things like living expenses, which the institution cannot directly control. The notion of overborrowing or taking on debt in excess of institutional charges is a common argument coming from schools, though there's no concrete data to back up the frequency or extent to which this actually occurs. Nor is there any information around the extent to which borrowing for living expenses contributes to completion or not.

Repayment Rates

The repayment rate threshold ultimately undid the last rule, but this measure can serve an important accountability purpose by judging programs on the outcomes for both their graduates and non-graduates. And so a work group came up with a proposal to add repayment rates back in [www2.ed.gov/policy/highered/reg/hearulemaking/2012/14repayment-rate93013.pdf]. They did not, however, set a threshold for what these rates should be, but instead called for an expert panel to come up with a high, moderate, and low repayment rate. In the work group's formulation, programs with high repayment rates would not be subject to further accountability. Programs with moderate rates would have to pass a debt-to-earnings test, have their job placement rates audited, and have new programs seek upfront approval. Low repayment rates would be subject to the same requirements as a program with a moderate repayment rate, but would lose eligibility after two years of low rates. It's a concrete idea that would add the rate back in, but still struggles with the need to define a threshold.

This proposal is quite different from the one released earlier this week by New America in "Improving Gainful Improvement." [www.edcentral.org/improving-gainful-employment/] In that paper, I argued that repayment should be based upon the principal reduction of the cumulative amount borrowed for a program. Though the idea of a high, middle, and low repayment rate could be applied to this pooled repayment rate.

- A high repayment rate could be one where the total amount of outstanding principal at the end of four years in repayment is equal to or less than what the total amount of principal outstanding would be if borrowers were retiring their debts as scheduled on the standard 10-year repayment plan.
- A middle rate could be if the principal reduction is at least equal to the amount that would be remaining if the borrowers were retiring their debts on a 12-year repayment schedule–the average length of time it takes a borrower to repay.
- A low repayment rate could be if the principal reduction is less than the amount of principal that would be outstanding after 20 years–meaning borrowers would retire their debts before being eligible for loan forgiveness through the newer forms of Income-Based Repayment.

To understand how this would set different thresholds, consider the table below, which shows what the repayment amount would be for $100,000 in principal based upon a 10 year, 12 year, or 20 year term.

Principal when entering repayment	Standard 10-Year Plan (most common borrower plan)	12-Year Plan (average time to repay student loans)	20-year Plan (pay off debts before loan forgiveness occurs)
$100,000	$67,881	$75,197	$89,186
	32% Principal Reduction	25% Principal Reduction	11% Principal Reducation

Mark it Zero

Several proposals talked about what to do if a program ended up having average or median loan debt of $0. Since these programs would automatically have a debt-to-earnings ratio of 0, they would all pass, but negotiators representing community colleges in particular wanted to make this clear. Richard Heath from Anne Arundel Community College and Kevin Jensen from the College of Western Idaho argued that [www2.ed.gov/policy/highered/reg/hearulemaking/2012/17heath-jensen93013.pdf] programs that can attest to having no average debt should just be exempted from further eligibility reporting and determinations. This idea seems more designed to allay concerns about schools than represent an actual change in results for who is held accountable, but that could change if other measures of some sort were added.

The Waiting is the Hardest Part

Negotiators representing for-profit colleges were particularly concerned about when penalties should start kicking in for colleges. Testa called for a hold harmless of a year or two. He also called for programs that require state licensing or a board examination should be measured on graduates after five and six years in repayment, not three and four. Jerome, meanwhile, asked for potentially much longer. His proposal [www2.ed.gov/policy/highered/reg/hearulemaking/2012/24jerome-opportunity-to-improve-program10113.pdf] entails one year of rates that are only for informational purposes and have no consequences. Then, colleges would get a transition period before penalties could occur that would be equal to 100 percent of the typical time to complete a program–i.e., one year for a one-year certificate, four years for a bachelor's degree. That means delays of anywhere from two to five years before sanctions could occur. Its not clear if programs would not start having their failures counted until after the transition period, which could potentially lengthen the time even further. Either way, a bachelor's degree program would end up avoiding consequences until the re-election campaign of the next President.

Placement Rates

The negotiators from states' attorneys generals offices are particularly interested in placement rates because it is a common legal hook for them to pursue action against schools. And the lack of a clear definition clearly makes these efforts more difficult, even in the face of obvious fraud. In two documents, the group working on placement rates argued about the need for a definition [www2.ed.gov/policy/highered/reg/hearulemaking/2012/21jobplacement-rate-as-metric93013.pdf] and laid out their suggestion [www2.ed.gov/policy/highered/reg/hearulemaking/2012/21jobplacement-rate-as-disclosure93013.pdf]. Under their proposal, a successfully placed student is one who within 180 days of graduation (or after passing a necessary licensing test) has worked for at least 13 weeks in a full-time position in the relevant field. This is the same definition that currently applies to very short-term programs. Individuals working part time could be counted as placed only with a signed attestation that they intentionally pursued part-time work. The definition also provides greater clarity of what a relevant field is, by saying it has to be a job that the U.S. Department of Labor notes is connected to the program or is a position that requires at least some postsecondary education and makes routine use of the skills and knowledge taught in the program. It also makes allowances for counting someone as placed if they stay at their same employer or at least work in the applicable industry at a salary at or above the 25th percentile as determined by the Bureau of Labor Statistics.

Beyond the definition, there's also the question of what threshold to choose for a placement rate. The suggestion appears to be 70 percent, perhaps paired with a 70 percent completion rate, which is what short-term programs require. But the group did include this interesting chart that breaks down what other states or accreditors require.

Accreditor	Completion Rate	Placement Rate	Notes
ABHES	70%	70%	
ACCET	67%	70%	
ACCSC	54%^	66%	^ Rate varies by program length; 54% is for a one year program.
ACICS	67%	67%	70% in 2013 by program.
COMTA	65%	65%	
DETC	Comparable to average of peer group.	none	75% student satisfaction.
NACCAS	50%	60%	

State	Completion Rate	Placement Rate	Notes
Arizona	60%^	60%^	^ or per accrediting agency.
Kansas	see note	see note	% will be based on pilot program.
Ohio	see note	see note	One standard deviation from mean.
Oregon	50%	50%	
Tennessee	67%	75%	
Texas	60%	60%	

Student Debt Relief

Both the for-profit college representatives and the more student focused groups presented ideas around student debt relief. But the former argued for it as a measure to help programs pass, while the latter argued harmed borrowers should receive relief. On the student-focused side, the proposal [www2.ed.gov/policy/highered/reg/hearulemaking/2012/22student-relief93013.pdf] called for using a program's fail or middle zone status to be grounds for not having to make loan payments or deal with collection actions. This would allow borrowers who went through bad programs to not still have to pay the debts they took on to attend them. The proposal also raised the idea of making schools refund the tuition paid at bad programs, sign a letter of credit to cover potential loan cancellations, or form a "victim's fund" to offset costs for harmed borrowers.

On the student side, Jerome proposed [www2.ed.gov/policy/highered/reg/hearulemaking/2012/24jerome-practical-alternatives-to-reduce-debt10113.pdf] that failing programs should be allowed to limit the student debt of new and continuing students to the point where the program could pass either of the debt-to-earnings measures. And a program would be able to use these measures for the number of years that a student typically takes to complete a program. Using the measures would also exempt a school from debt warnings and enrollment caps. The mechanics of how this would work are not completely clear since there would have to be some judgment of possible income levels, and it's not clear if colleges would just not let students borrow for living expenses,which they may need to graduate. In addition, Jerome asked called for a loan forgiveness program for students that do not finish their first term. In both cases, the goal is clearly focused on ways to hit the numerical targets and less about underlying educational improvements.

Program-Level Cohort Default Rates

When the Department suggested the idea of a program-level cohort default rate as another accountability metric, it said it would operate separately from the debt-to-earnings rates. In other words, programs that failed the cohort default rate test would still fail, regardless of how they performed on the debt-to-earnings figures. In the working group on this issue [www2.ed.gov/policy/highered/reg/hearulemaking/2012/20brianjones-cdr-metric93013.pdf], college representatives called for making them connected–so a program that failed the cohort default rate could be "saved" by passing the other rate. They also called for using a larger minimum program size than the 10 that the Department suggested using for debt-to-earnings rates. Connecting cohort default rates [www.edcentral.org/edcyclopedia/cohort-default-rates/] to other results would weaken the rule, since every additional measure that can save a program just gives programs another way to avoid penalties. The working group did, however, adopt a proposal from Rory O'Sullivan of Young Invincibles [www2.ed.gov/policy/highered/reg/hearulemaking/2012/16osullivan-pcdr93013.pdf] that the Department release data on how much cohort default rates [http://www.edcentral.org/edcyclopedia/cohort-default-rates/] may be manipulated using deferment or forbearance.

Upfront Program Approvals

Several negotiators released their own proposals for how to handle the approval process of gainful employment programs, especially for new ones looking to join the federal student aid programs for the first time. Barmak Nassirian, a negotiator from the American Association of State Colleges and Universities, argued for an approval process [www2.ed.gov/policy/highered/reg/hearulemaking/2012/10nassirian-approval-process92513.pdf] that would potentially apply to all programs. Programs where instructional expenses made up more than half of total spending or where the average amount borrowed was $0 would be automatically approved. All other programs would have to submit an application that contained basic information about the program as well as projected debt-to-earnings ratios, borrowing amounts, costs, and a number of other factors. Figures would require an attestation of accuracy from institutional officials. Any program that projected it would fail or be in the middle zone of a debt-to-earnings test would automatically be denied. There would be mechanisms for denied programs to still participate that would involve a letter of credit, while approved ones would have greater oversight through a high-risk designation.

A working group on program approvals [www2.ed.gov/policy/highered/reg/hearulemaking/2012/25prior-approvals10113.pdf] released a somewhat similar proposal. Among the criteria it laid out for program approvals are: having programmatic accreditation that is needed to obtain relevant certification or licensing; whether the level of education is not higher than what is generally required by employers (e.g., not a bachelor's degree in cosmetology when a certificate suffices); the program is no more than 10 percent longer than what is typically required; projected earnings are above 150 percent of the poverty level for two individuals (about $23,265); it would pass a debt-to-earnings test; and has placement opportunities lined up. The proposal also contains a lot of details on how these figures would be calculated.

Jones, from Strayer University, offered a different take. His proposal for program approval [www2.ed.gov/policy/highered/reg/hearulemaking/2012/20brianjones-new-program-approval93013.pdf] focused on what other regulatory oversight currently exists. He argues programs that have been substantively reviewed by a state or accreditor should not be subject to review, neither should programs that would be reviewed as part of a change to a program participation agreement. Finally, colleges where all programs pass for two years would not have new programs subject to review.

The proposal from Heath and Jensen also focused on the performance of an institution's programs. Their proposal [www2.ed.gov/policy/highered/reg/hearulemaking/2012/17heath-jensen93013.pdf] calls for institutions to have their programs evaluated if they have at least one failing program or two in the middle zone in a given year. Any program that is voluntarily closed after not doing well on the tests or loses eligibility must seek approval if it wants to re-enter the aid programs within five years.

Lots of ideas, but will they go anywhere?

The future for the various ideas aren't clear. Some would extend the timeframe for accountability and lower its threshold so much to create an excessively lax regulation that would be enforced sometime around 2020. Others involve penalties, like a letter of credit, that the Department has already indicated it does not want to pursue for public institutions. The ideas around how to employ the repayment rate make sense, but they still haven't solved the threshold issue. We'll have to wait until sometime in the next few days to see what's actually in the Department's next round of language. Stay Tuned.

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New Gainful Employment Language is Out and it's Tougher Than Before

By Ben Miller — November 11, 2013

The next set of negotiations around gainful employment are kicking off in a week and the Department of Education just released its second round of regulatory language [www2.ed.gov/policy/highered/reg/hearulemaking/2012/draft-regs-session2-11813.pdf]. It sends a strong signal about the Department's willingness to be aggressive in this space. What's presented is arguably the strongest version of gainful employment in years. There are more opportunities to fail, including a chance for immediate eligibility loss. But that's almost window dressing. This proposal contains provisions that would almost immediately knock out programs that can't possibly provide gainful employment because they lack sufficient approvals and accreditations. And for the first time penalties would go beyond just loss of federal student aid–programs here could be on the hook for some loan dollars even before they leave the program.

It's a stark contrast from how the negotiation process proceeded the last time. Then, each successive version of the rule instituted greater complexity in the name of carving out ways for programs still to pass. Now, the complexity is back, but all the tweaks and additions would definitively benefit students and hurt unsuccessful programs.

More accountability metrics means more chances to fail

The first proposal released in August would have only judged programs based upon how they fared on two measures of the total amount of student loan payments made each year compared to the earnings of graduates. Though a good measure of accountability, some parties had argued that focusing only on the results for graduates made it possible for programs that have high dropout rates to avoid any sanctions.The new proposal addresses this issue by adding in two new measures: a program cohort default rate (pCDR) and a loan portfolio repayment rate.

The pCDR was announced at the first negotiation session in September and would function in a similar way to the existing institutional cohort default rate: a program is ineligible if its pCDR is more than 40 percent in one year or over 30 percent for three straight years. This means programs with extremely bad pCDRs lose eligibility immediately–the only accountability metric with a penalty that swift.

The repayment rate appeared only as a disclosure metric in the first version because of concerns about picking a threshold that could have sufficient legal justification before a court. It's now back as an accountability measure, but in a slightly different way. Instead of judging the percentage of borrowers or their loan dollars being repaid, it looks at whether the total amount of all outstanding principal owed on federal student loans at the end of an award year is larger or smaller than it was at the start of that year. If the total principal balance owed at the end of the year is larger than it was at the start, then the program fails the loan repayment test. If a program's loan balance is negatively amortized for three straight years, it loses eligibility.

This loan portfolio repayment rate idea is very similar to what I suggested last week in "Improving Gainful Employment," but knowing the timeframe for policy development, this is more a case of a "great minds think alike" scenario.

The table below summarizes what the different metrics and thresholds would be for the three accountability measures:

	Debt-to-Earnings	Program Cohort Default Rate	Loan Portfolio Repayment Rate
Included in...	August and November proposals	November proposal	November proposal
Description	Comparison of average annual student debt payments to either all annual earnings or discretionary earnings of graduates	Percentage of student loan borrowers from a program that defaulted on their loans within three years of entering repayment	Whether the total principal owed on all loans borrowed for a program is less at the end of the year than it was at the start
Passing Thresholds	Debt payments are 8% or less of annual earnings and/or 20% or less of discretionary earnings	Less than 30%	Principal reduced
Failing Thresholds	Debt payments are above 12% of annual and 30% of discretionary earnings	Above 30%	Principal grows
Zone Thresholds	Between passing and failing	None	None
Ineligibility	Fail twice in three years or four years in the zone	Three straight years above 30% or one year above 40%	Fail twice in three years

Keep Them Separated

The final rule issued in 2011 had connected measures. That mean a program only had to pass at least one in order to avoid failing. The measures here are separate. In other words, if a program has an excessively high pCDR in one year, it is ineligible for federal student aid, regardless of how it performs on other measures. It's a much stronger statement that the institution bears the burden of proof of showing its success in multiple ways and is not being given as much of the benefit of the doubt.

The effect of adding two separate accountability measures, means that in any given year there are three different ways for a program to end up failing: the two debt-to-earnings tests, the pCDR, and the loan portfolio repayment rate. Or to put it another way, the program must now show its students have reasonable debt compared to their earnings, are not defaulting on their loans, and are repaying their loans, all to avoid failing.

Borrower Relief

By far the largest change among consequences is a new provision that any program at risk of losing eligibility in the next year must provide relief to borrowers–a huge win for consumer advocates. The idea behind this provision is for programs to provide enough money to bring graduates' average debt down to the point where the program could pass the debt-to-earnings ratio. For example, if the current debt-to-earnings rate was 15 percent because average annual debt payments were $3,000 and average annual earnings were $20,000, then the school would have to provide funds to get the average debt payment down to $1,600. The actual cost of this change would vary depending on the difference between the average and median debt.

Programs would have three ways to provide this relief to borrowers. It could be done either through a letter of credit, a set aside agreement, in which the Secretary withholds the necessary amount of loan dollars from payments to the school while the school still credits the borrowers account like the dollars were received, or a pledge of the full faith and credit by the state. Schools can reduce the penalties here if it can show that currently enrolled students are borrowing less and it sets up the letter of credit or set-aside agreement. Programs that are at risk of losing eligibility on two or more measures must provide whichever form of relief is the largest.

While some elements of this proposal do look like a suggestion from Marc Jerome of Monroe College, a for-profit institution in New York, to allow failing programs to reduce debt levels, there's one important difference. In Jerome's proposal, this debt reduction would allow a program to pass. Here, the financial penalty only kicks in if the program fails and loses eligibility. This prevents the possibility of allowing a school to use a ponzi-scheme type method to keep passing, whereby it could reduce past students' debts using funds obtained by having current students take on more debt.

An Emphasis on Proper Approval

There's an inherent loophole in the current accreditation structure that governs participation in the federal student aid programs. An institution can be accredited, which allows all its eligible programs to receive federal aid. But a given program may lack the necessary programmatic accreditation that actually allows its graduates to sit for licensing tests. The best example of something like this would be going to a law school that's not accredited by the American Bar Association (ABA)–sure you can earn a law "degree" but you can't actually sit for the bar exam in the vast majority of states.

The new proposal tries to get at this issue in two ways. First, new programs hoping to join the aid programs will have to address whether they have any necessary programmatic or state approval in order to have graduates sit for any required tests. This should help ensure that new programs can't enter the aid programs and offer courses of study that are guaranteed to not lead to the promised jobs.

But more importantly, the proposed language would require all existing programs to attest that their graduates can sit for relevant tests as well. The proposal would have all institutions amend the document they use to participate in the aid programs to attest that all programs have necessary approval and accreditation and that students completing these programs will be able to get necessary licensing. It's an immediate check (due by September 1, 2015) that could potentially shut down large numbers of programs that had been taking students' money to enroll in programs where they could tell even from the beginning that ultimate licensure was impossible.

This provision does, however, rest on the Department's enforcement willingness to ensure that information on the participation agreement is accurate and take action when it is not.

New Programs

The Department's last proposal indicated it wanted a process for new programs and asked for ideas. This version includes language around what it would take for new programs to start up. Under this language, programs would have to apply for approval if they met any of the following conditions:

- Were previously ineligible or had been failing or in the zone and shut down voluntarily.
- The institution had a failing program in the same set of instructional codes within the past three years.
- The institution does not offer any programs in the same family of instructional codes.

Any programs meeting these requirements have to submit an application, which includes basic info on things like the type of program, expected cost, and projected debt-to-earnings rate. But it also requires much more substantive work, like a narrative around how a program was developed, at least three letters of recommendations signed by the heads of businesses likely to employ graduates, and documentation of approval by the accreditor or other relevant agency. The application also has to address whether a program meets requirements for state licensing, including programmatic accreditation, as mentioned above. These requirements are similar to earlier proposals for program approval during the last regulatory process, which would have required employer affirmations about the need for a program.

Despite the strong reporting requirements, it's not clear how onerous the actual approval may be. The language suggests that any program that fills out the required application and doesn't have outstanding issues with the aid programs is approved. There's no provision that talks about whether the Secretary could deny an application based upon just its contents.

Rejected concessions

The negotiators representing for-profit colleges had asked for a number of changes to the rule that would have made it very similar to the 2011 version. But very few of these have made it in. Among the requests not included:

- Eliminate the middle zone of performance on the deb-to-earnings rate (it's still there)
- Allow debt used in the debt-to-earnings rate to be capped at tuition and fees (any student debt of any sort is included)
- Calculate student loan payments on different timeframes depending on the type of credential, such as 10 years for a certificate and 15 years for a bachelor's degree (it's 10 years for everything)
- Make the repayment rate connected to the debt-to-earnings rates so that passing one could absolve a program's performance on the other (failing one means you fail regardless of the other)
- Give 180 days to complete the earnings survey instead of 60 (it's still 60 and only 45 to appeal)
- Require students only to be in school for 30 days instead of 60. (still 60)
- Provide a year of rates that are only available for informational purposes. (Not only do schools not get this extra year, they have to provide data on four cohorts of students from 2010 to 2014 within 30 days of the rule going into effect on July 1, 2015.)

Probably the most notable inclusion is the Department clarified that the interest rate for the debt-to-earnings tests would be the lowest undergraduate rate from the four years prior to when program results are measured.

But not all requests from the consumer group negotiators were honored either. Most notably is that negotiators requested that borrowers cite a program failing the gainful employment tests as grounds for not having to pay loans. The Department not only rejected that idea, but suggests specifically writing into the law that having a program fail cannot be grounds on which to argue that a loan should not be repaid.

No Longer Leaner, Meaner Still

The Department's initial gainful employment proposal in August was a simpler version of what it had finalized in 2011 that would also be stronger in its effects on holding poor-performing programs accountable. This version has definitely added some heft and complexity. But it's more like an armor upgrade (in the policy sense, not necessarily in the legal sense). Loopholes around not holding programs accountable for non-graduates are gone. Relief for borrowers is added. Focus on other parts of the triad around state or accreditor oversight also gets a role too. Clearly, a lot of work still remains–including three more days of negotiation sessions. But for those looking to weaken the rule, there's now a lot more pieces that would have to fight at chipping away.

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