



# UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

JUN 1 - 2011

Michael D. Hays  
Jonathon C. Glass  
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Washington, DC 20036-6802

Dear Messrs. Hays and Glass:

This letter responds to your Department of Education Information Quality Guidelines Appeal Relating to the Gainful Employment NPRM, dated April 29, 2011 (Appeal), submitted on behalf of the Association of Proprietary Colleges (APC). In the Appeal, APC asks the Department of Education (Department) to reconsider the decisions rendered in a letter dated March 31, 2011 (Response), which denied APC's Information Quality Guidelines Correction Request (RFC), submitted February 1, 2011. APC also requests that the Department withdraw its proposed rule (34 CFR Part 668, Program Integrity: Gainful Employment) pending further study and convene a group of outside experts to study the possible effects of the proposed rule and examine alternatives.

The Department is committed to ensuring that the information it disseminates and uses for policymaking purposes is useful, objective, secure, and, when required, reproducible. APC submitted this Appeal under the Information Quality Act, Pub.L. 106-554 (IQA), and the U.S. Department of Education Information Quality Guidelines (IQG). The IQA, enacted in 2000, directed the U.S. Office of Management and Budget to issue government-wide guidelines that "[p]rovide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies."<sup>1</sup> OMB defined information as "... any communication or representation of knowledge such as facts or data, in any medium or form. . ."<sup>2</sup> In response to the IQA, the Department promulgated the IQG.

We reviewed your Appeal consistent with the rules set forth in the IQG.<sup>3</sup> Accordingly, the Department convened a panel made up of parties other than those who reviewed the RFC and prepared the Response to conduct an impartial review of the Appeal and prepare this letter. The appeal panel consists of Hugh J. Hurwitz, Deputy Chief Financial Officer & Senior Procurement Executive; John Clement, Director, Institutional Service Program Evaluation Division, Office of Postsecondary Education; and Luke Glisan, Special Assistant, Office of the General Counsel. The appeal panel reviewed the RFC, including all exhibits; the Response; and your Appeal.

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<sup>1</sup> Pub.L. 106-554.

<sup>2</sup> 67 FR 8460

<sup>3</sup> <http://www2.ed.gov/policy/gen/guid/iq/iqg.html>

On appeal, the IQG place the burden on the party requesting a correction of information to submit a "letter explaining why he or she believes the Department's decision was inadequate, incomplete, or in error."<sup>4</sup> Here, APC reasserts many of the arguments it presented in the RFC. As the Response explained, a number of these issues are not information quality issues and therefore cannot be challenged by an appeal asserted under the IQA.<sup>5</sup>

In addition, the IQG explain that the public comment rulemaking process is an appropriate venue in which the Department can respond to issues raised in an IQA challenge that are also raised in public comments:

Comments about information on which the Department has sought public comments, such as rulemaking or studies cited in a rulemaking, will be responded to through the public comment process, or through an individual response if there was no published process for responding to all comments. The Department may choose to provide an earlier response, if doing so is appropriate, and will not delay issuance of the final action in the matter.<sup>6</sup>

Here, the Department invited public comments on the proposed rule and, as noted in the Response, many of very same issues raised by the RFC and the Appeal are the subject of public comments.<sup>7</sup> Specifically, APC challenges the design of the proposed rule and the Department's selection of criteria used in the proposed rule to measure gainful employment. APC asks the Department to consider other criteria or sets of data. APC also contends that the proposed rule would have undesirable results in general, and on certain groups in particular. In accordance with the IQG, and the federal regulatory process, those issues will be addressed through the public comment process.<sup>8</sup>

Moreover, the policy statements and decision making criteria identified in the proposed rule are not official agency positions. Rather, they are proposals intended to inform the public of the Department's decision making process and encourage comments from interested parties. The comments, together with other aspects of the public comment process designed to elicit feedback, help to produce the final rule. The final rule will express the Department's official position. Thus, APC's challenges of the policy statements and decision making criteria expressed in the proposed rule are premature.

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<sup>4</sup><http://www2.ed.gov/policy/gen/guid/iq/iqg.html>

<sup>5</sup> Response at p. 2.

<sup>6</sup> The IQG also excludes from its coverage challenges related to "[c]omments received from the public in response to *Federal Register* notices." See <http://www2.ed.gov/policy/gen/guid/iq/iqg.html>. This exclusion affirms the finding in the Response that a number of the issues raised by the RFC, and again by the Appeal, which were also raised in public comments, are properly left to be addressed in the public comment process.

<sup>7</sup> See Department's March 31, 2011 response letter; <http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax>; see also <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/negreg-summerfall.html>.

<sup>8</sup> As noted in the Response, "[i]n all its rulemaking, the Department does not consider comments submitted after the close of the comment period, in this case September 9, 2010." Because APC submitted the RFC after the comment period closed, the RFC will not be treated as including comments. However, many of the issues raised in the RFC were timely submitted as comments and will be considered through the public comment process.

Aside from the issues discussed above, the Appeal raises several issues that fall within the information quality challenge process arising under the IQA and are not part of the public comment process. However, we first address one issue that initially appeared to be an issue proper for consideration but upon further analysis we determined that APC had misread a factual study and APC's argument did not contest information quality. APC contends that "the Department falsely insisted (purportedly based on a recent Florida study) 'that for profit institutions were more expensive for taxpayers on a per-student basis due to their high prices and large subsidies.'"<sup>9</sup> APC argues that "[i]n fact, the Florida study found just the opposite: 'some public programs are more expensive when the state's contribution is considered.'"<sup>10</sup> APC's selective use of a quote from the Florida study it relied upon is misleading. The Florida study goes on to provide context for the quote relied on by APC, explaining that for the majority of programs the study examined, "the public program cost was significantly less than the private program."<sup>11</sup> Thus, the text, when read in full, supports the contention made in Department's proposed rule.<sup>12</sup> APC's appeal is denied as to this issue.

### Peer Review

APC contends that "[t]he response improperly failed to uphold APC's challenge to the Division's wholesale violation of the IQG's peer review requirement."<sup>13</sup> The appeal panel's review establishes that this contention does not support reversal of the Response.

The IQG assesses information quality using three factors: utility, objectivity, and integrity. With regard to peer review, under the utility factor, the IQG provides, "The Department relies upon internal reviews and analyses, along with feedback from advisory committees, educators, education researchers, policymakers, and the public to achieve [utility]."<sup>14</sup> Under the objectivity factor, the IQG provides, "Department of Education research and evaluation information products should . . . undergo peer review." Also under the objectivity standard, the IQG provides that statistical reports and data collections that draw upon sample survey data "should undergo editorial and technical review to ensure accuracy and clarity" and that "[q]ualified technical staff and peers both inside and outside the Department should do the technical review[.]" The integrity factor does not address peer review.

In its Response the Department explained that after publishing the proposed rule, it held two days of public hearings intended to solicit and accommodate the views of all interested groups that commented on, among other things, the data and analysis included in the proposed rule. Additionally, the Department held more than 30 meetings with different stakeholder groups during which the groups explained their reaction to and thoughts on the proposed rule. Throughout this process, the

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<sup>9</sup> NPRM at 43618.

<sup>10</sup> Appeal at p. 31.

<sup>11</sup> Florida's Office of Program Policy Analysis & Government Accountability, Report No. 10-18, at 9.

<sup>12</sup> The Department did not explicitly address this issue in the Response and was not required to do so because in light of the facts, it is not an information quality issue. The appeal panel chose to address it in order to resolve any misconceptions.

<sup>13</sup> Appeal at pp. 15-18.

<sup>14</sup> <http://www2.ed.gov/policy/gen/guid/iq/iqg.html>

Department received feedback from independent experts who analyzed the proposed rule and its impact.

Also, as explained in the Response, the Department relied on interagency review of the analysis and methodology employed in the proposed rule. Economists from the President's Council of Economic Advisers and the Office of Management and Budget reviewed the analysis underlying the proposed rule. The Department's response to these analyses will be presented in the final rule.<sup>15</sup>

The appeal panel finds that the Department subjected the information contained in the proposed rule to the appropriate level of scrutiny by experts within and outside the Department.<sup>16</sup> The Appeal is therefore denied as to this issue.

### **The Missouri Data**

APC argues that the Response failed to apply the correct IQG standards to the Missouri data and that the Missouri data relied upon is not representative of the country. The IQG set forth a number of requirements pertaining to information presented in the form of statistical data, including that the information should be clearly described and defined, well thought out, accurate, and reliable.<sup>17</sup> In addition, the IQG require that with regard to information provided by other parties, "any known limitations of the information should be documented."<sup>18</sup> As explained below, the Department's decision to use the Missouri data, the best available data for testing potential effects of the proposed rule, was supported as being reasonable and proper.

In the Response, the Department explained that it took identifiable and verifiable steps to ensure that it relied upon proper data. To fill its need for information relevant and useful to designing the proposed rule, the Department sought data that (a) contained information about program completers and exiters who attended both public and for-profit institutions; and (b) linked the data to the State's unemployment insurance records.<sup>19</sup> The Department and State Higher Education Executive Officers reviewed potential State data systems and concluded that the Missouri data set was the only one that could meet the two conditions described above.

Additionally, in the proposed rule the Department identified and listed the data's limitations. The proposed rule explained that the Missouri data did not contain information concerning cosmetology programs and was not representative of national race and ethnicity populations.<sup>20</sup> Thus, the usable scope and applicability of the data was made known. Also, in the proposed rule the Department provided a description of the data and methods used to generate the data thereby allowing interested parties to review the data and make comments in the public comment process.<sup>21</sup> Finally, the Response

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<sup>15</sup> See Response at p. 4.

<sup>16</sup> The Response also explained that the IQG applies a higher quality control standard to influential information.

<sup>17</sup> <http://www2.ed.gov/policy/gen/guid/iq/iqg.html>

<sup>18</sup> <http://www2.ed.gov/policy/gen/guid/iq/iqg.html>

<sup>19</sup> Response at p. 5.

<sup>20</sup> NPRM at 43669.

<sup>21</sup> <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html>

refers to the technical note that the Department developed in collaboration with the Missouri Department of Higher Education to explain the characteristics and limitations of the matched Missouri/National Student Loan Data System data set.<sup>22</sup>

The Department's use of the Missouri is in accord with the IQG requirements. APC has not identified any data quality issues concerning the Missouri data that require reversal of the Response and its Appeal is denied as to this issue.

#### **Secret Data (as used in the Repayment Rate Data)**

APC contends that the Department relied on "secret data" to construct the debt-to-income and loan repayment calculations used in the proposed rule.<sup>23</sup> Upon review, APC did not identify the category or type of data that it believes is secret. Based on the appeal panel's best interpretation, the information that APC refers to as secret is actually personally identifiable information protected from disclosure by federal privacy laws. The IQG do not vest the appeal panel with the authority to address issues arising under statutory privacy protections. Additionally, in the Response the Department explained its basis for relying upon the information used in the debt-to-income and loan repayment calculations. APC has not challenged the points raised in the Response. Accordingly, because the secret information appears to be protected from disclosure by federal privacy laws, and the Department has explained its basis for the information employed in the subject calculations, the appeal panel denies APC's Appeal of this issue.

Finally, though not a data quality issue, in the Appeal APC argued that the Response failed to address valid substantive issues raised in the RFC and that as a result, the Department waived any objection it has to those issues and the issues must be resolved in APC's favor.<sup>24</sup> However, the Response resolved a number of issues by finding that they were best addressed by responding to them in the context of the rulemaking process, and resolved the remaining issues by substantively considering the arguments made by APC and denying the relief requested. Thus, the issues raised in the RFC were adequately addressed and the Department did not waive its ability to respond.

Based on the foregoing, the appeal panel finds that the majority of the issues raised in the appeal will be appropriately addressed in the public comment rulemaking process. With regard to those issues appropriately raised in the Appeal that will not be addressed by the rulemaking process, the appeal panel finds that the Department met the quality requirements imposed by the IQA and the IQG and therefore denies APC's appeal.

The Department values input from the public on the quality of information it produces. The Department is committed to promoting transparency in its process and providing the public with information that is objective and useful. If you have any questions about this decision, please contact Darrin King, Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management at [om.infoqualityappeal@ed.gov](mailto:om.infoqualityappeal@ed.gov) or the following address:

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<sup>22</sup> <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/ge-analysis-missouri.pdf>

<sup>23</sup> Appeal at p. 52.

<sup>24</sup> In support of this argument APC cites to a number of court decisions analyzing waiver in varying litigation contexts. None of these decisions are on point with APC's IQA request for correction.

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Sincerely,

A handwritten signature in black ink, appearing to read "W. Varnon", written over a horizontal line.

Winona H. Varnon  
Principal Deputy Assistant Secretary for Management

cc: Mr. Robert Gordon, Associate Director OMB  
Dr. Eduardo M. Ochoa, Assistant Secretary