

## MEMO

To: Negotiated Rulemaking Committee  
From: Barmak Nassirian  
AASCU  
Subject: Preliminary Thoughts and Request for Clarification  
Date: September 5, 2013

I write to offer a preliminary reaction to the preparatory material circulated last week. I thank the Department for the thoughtful framework and for the starting point that its draft has provided for the committee's deliberations. As I'm sure is the case with all other negotiators, I found myself in agreement with certain features of the proposed regulatory approach, and in disagreement with others. In the interest of saving time at the meeting, I thought it might be helpful to outline my immediate conceptual concerns and propose alternatives for the group's consideration.

On the two specific issues below, I believe that the proposed draft fails to track the underlying statutory language. Given the high likelihood of judicial review of whatever regulations emerge at the end of this rulemaking, it is particularly important for the committee to faithfully interpret the specific words of the underlying statute ("prepare students for gainful employment in a recognized occupation") as literally as possible. We should collectively heed the admonition that in interpreting statutory language, no words should be treated as "mere surplusage." Neither normative policy priorities nor practical implementation or compliance concerns should re-write or completely ignore the black letter of the statutory authorization.

### Issue 1

The "gainful employment" clauses in the sections 101 and 102 of the statute articulate upfront *eligibility requirements* for participation in federal student aid programs. The Department's approach, in contrast, focuses almost entirely on developing post-facto metrics for loss of eligibility. Furthermore, the specific phraseology of the statutory language ("prepare students for gainful employment in a *recognized* occupation") provides a clear indication that programs seeking to establish eligibility through this provision would be subject to a process of Secretarial recognition of the occupations for which such programs claim to be preparing students.

While I have no conceptual objections to articulating metrics for loss of eligibility, I do strongly object to the absence of formal upfront recognition procedures, and respectfully request the committee's consideration of such a process. Given the vagaries of the economy and varying job market circumstances, I would hope that the regulatory articulation of the upfront process would be fairly minimal so as to allow the Department to conduct basic due-diligence on the fundamental credibility of

institutional claims. Such obvious low-threshold items as ensuring that the occupations listed are real, that there is a reasonable market need for them, that they pay wages sufficiently above minimum wage to justify the cost and/or length of programs seeking eligibility, and that the programs actually satisfy all the necessary requirements for actual employment in the occupation in question, would be the type of front-end review through which the Department could approve or deny initial claims of eligibility.

Not only is such a review required by the plain reading of the statute, it also constitutes good policy in that it addresses a fundamental weakness of the Department's proposed approach, which is its indifference to the plight of multiple cohorts of students who end up enrolling in sub-par programs that later lose eligibility on the basis of the bad educational and economic outcomes they produced for those students. As an additional sub-topic here, I hope that the committee would consider extending relief to former students at schools that end up losing eligibility, perhaps by using the false certification discharge it has under current law.

## **Issue 2**

In light of the outcome of the litigation around the 2011 final regulations, I accept the Department's decision to limit the tracking of outcomes to Title IV-recipients-only. I also understand the interpretive and analytical logic of limiting the two debt-to-earnings tests to students who actually complete the various programs, since the inclusion of non-completers would result in a chaotic mixing of apples and oranges. Having said this, I believe that algorithmically omitting any and all references to non-completers, as the proposed draft does, is troublesome on policy and legal grounds. First, in only tracking completers, we may unintentionally set up perverse incentives for bad actors to game the metrics by enrolling large numbers of non-completers whose aid dollars end-up cross-subsidizing small numbers of completers. A school with a cohort of 1,000 students, for example, could have 990 drop-outs (with crushing debt and no real occupational benefits to show for it) and only 10 completers on the basis of whose aid packaging and post-completion earnings it could retain full eligibility. Second, proposed regulations cannot unilaterally edit or amend the statutory language to read "prepare *graduates*" or "prepare students *who complete*." The statute clearly references students—whether completers or not—and the regulatory scheme must, in some way, factor in post-enrollment consequences for non-completers in any loss-of-eligibility metrics it devises. I suspect we could have a good conversation about different ways in which non-completers can be appropriately factored into any final metrics.

## **Request for Clarification**

Finally, I'm having a difficult time understanding the background data provided by the Department, specifically why the number of gainful employment programs for which data have been made available (in 2011 and 2013) has changed so significantly over time. Here's a quick, rough count of the number of programs with data as far as I see:

**Overall**

	10+ completers	30+ completers
2011 informational rates 07-08?	n/a	5,505
New data for 07-08	2,418	1,548
New data for 08-09	6,845	5,632

I don't understand why there is such a decrease in the availability of program-level data (~4,000 programs) between the 2011 informational rates and the new data for 07-08, as I believe they are for the same year. (Correct?) Furthermore, the sudden spike between the 07-08 and 08-09 looks too steep, and strongly suggests that there's something wrong with the new numbers released for 07-08.

Looking just at medical assisting programs, it looks like the drop between the 2011 and 2013 data releases is concentrated almost exclusively within the for-profit sector. See the counts below for CIP 510801 only:

Sector	# programs in 2011 information rates	# programs in new data for 07-08	# programs in new data for 08-09
Pub 4-year	1	4	5
Priv NFP 4-year	3	4	8
Priv FP 4-year	72	28	115
Pub 2-year	33	86	126
Priv NFP 2-year	3	0	3
Priv FP 2-year	210	48	270
Pub <2yr	6	19	22
Priv NFP <2yr	4	1	5
Priv FP <2yr	80	13	99
Total	412	203	653

Can the Department please address whether my reading of the data is correct, and, if so, what might be causing the anomaly in the new 07-08 numbers?