Session 1: December 4-7, 2017

**Issue Paper #5**

**Issue:** D/E Rates Alternate Earnings Appeals

**Statutory cites:** 20 U.S.C. § 1221e-3; 20 U.S.C. § 3474; 20 U.S.C. § 1231a; 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A); 20 U.S.C. § 1088(b)

**Regulatory cites:** 34 CFR §668.406

**Summary of issue:** Under current regulations, if a GE program is failing or in the zone, an institution may file an alternate earnings appeal to request recalculation of the program’s most recent final D/E rates issued by the Secretary. An alternate earnings appeal offers recourse to an institution that believes SSA earnings used to calculate D/E rates do not accurately reflect the actual earnings of program completers. This may be significant for programs that prepare students for employment in fields where gratuities often comprise a significant portion of income, even though IRS rules require that tip income generally be reported. Providing an alternate earnings appeal ensures that institutions facing a program’s loss of eligibility have a more direct way to measure graduate earnings.

Under the GE regulations, alternate earnings must be from the same calendar year for which earnings were obtained from SSA to calculate the final D/E rates. Institutions may use either alternate earnings obtained from an institutional survey, or from a state-sponsored data system. The alternate earnings of all students who completed the program during the same cohort period used to calculate final D/E rates (or a comparable cohort period) must be included in the alternate earnings appeal.

An institutional earnings survey must be conducted in accordance with the Standards for Conducting the Recent Graduates Employment and Earnings (RGEES) Survey developed by NCES. Appeals submitted to the Secretary must include a certification signed by the institution’s chief executive officer attesting that the survey was conducted in accordance with NCES survey standards, and that the mean or median earnings used to recalculate the D/E rates were accurately determined from the survey results. Additionally, institutions must submit along with any appeal an examination-level attestation engagement report prepared by an independent public accountant or independent government auditor that the survey was conducted in accordance with NCES standards. The outcome of appeals is determined by the Secretary.

Under the current regulations, several institutions were able to submit materially complete appeals to the Secretary. However, the Department is aware that institutions did experience frustrations with the process. Among these were difficulty engaging a CPA to conduct the examination-level attestation by the deadline date, the expense of such an engagement, confusion over the exact documentation to be submitted as part of the appeal, and, most significantly, technical problems with using the RGEES Survey Tool developed by NCES for institutions to use in conducting earnings surveys.

Concerned over RGEES standards relevant to response rate and minimum number of respondents, the American Association of Cosmetology Schools (AACS) filed a lawsuit against the Department. The resulting court order prohibited the Department from requiring AACS members to obtain at least a 50 percent response rate from graduate surveys or have a minimum number of respondents to those surveys. The court further ordered that the Department reasonably extend the deadline for AACS member schools to file alternate earnings appeals. Accommodations made by the Department in response to the court order were extended to all institutions.

**Questions for consideration by the committee:**

* Should the alternate earnings appeal process as laid out in 34 CFR 668.406 be retained or amended? Is the analysis the same if D/E rates are calculated for all programs or just GE programs? Is the analysis the same if D/E rates are used to establish eligibility or could otherwise give rise to sanctions or if they are just disclosures?
* Could the manner in which institutions conduct alternate earnings appeals be streamlined and made less burdensome while maintaining an acceptable standard of accuracy?
* What would the disposition of recalculated D/E rates be? Would they replace the final D/E rates calculated by the Secretary in Department systems/informational sites and on institutional disclosures, or would they appear in addition to D/E rates calculated by the Secretary, with accompanying explanatory language?