

**Issue Paper 5**  
**Session 2: February 5-8, 2018**

**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 §668.405 and 668.406

**Summary of Changes:**

We propose to change the minimum threshold from 30 to 10 students with respect to the number of students SSA data is needed for the Secretary to calculate draft D/E rates. We propose to eliminate alternate earnings appeals in favor of appending the notification language found in proposed §668.410(b)(1) to include a disclaimer informing potential students that the D/E rates measure could be affected if a significant number of program graduates under-reported earnings such as tip income, or were self-employed and had business expenses that reduced the earnings being reported.

§668.405 Issuing and challenging D/E rates.

(a) Overview. For each award year, the Secretary determines the D/E rates for a GEan educational program at an institution by—

(1) Creating a list of the students who completed the program during the cohort period and providing the list to the institution, as provided in paragraph (b) of this section;

(2) Allowing the institution to correct the information about the students on the list, as provided in paragraph (c) of this section;

(3) Obtaining from SSA the mean and median annual earnings of the students on the list, as provided in paragraph (d) of this section;

(4) Calculating draft D/E rates and providing them to the institution, as provided in paragraph (e) of this section;

(5) Allowing the institution to challenge the median loan debt used to calculate the draft D/E rates, as provided in paragraph (f) of this section; and

(6) Calculating final D/E rates and providing them to the institution, as provided in paragraph (g) of this section; ~~and~~.

~~(7) Allowing the institution to appeal the final D/E rates as provided in §668.406.~~

(b) ~~Creating the list of students.~~ (1) The Secretary selects the students to be included on the list by ~~---~~

(i) Identifying the students who completed the program during the cohort period from the enrollment data ~~provided~~ reported by the institution ~~under §668.411~~; and

(ii) Indicating which students would be removed from the list under §668.404(e) and the specific reason for the exclusion.

(2) The Secretary provides the list to the institution and states which cohort period was used to select the students.

(c) ~~Institutional corrections to the list.~~ (1) The Secretary presumes that the list of students and the identity information for those students are correct unless, as set forth in procedures established by the Secretary, the institution provides evidence to the contrary satisfactory to the Secretary. The institution bears the burden of proof that the list is incorrect.

(2) No later than 45 days after the date the Secretary provides the list to the institution, the institution may ~~---~~

(i) Provide evidence showing that a student should be included on or removed from the list pursuant to §668.404(e); or

(ii) Correct or update a student's identity information and the student's program attendance information.

(3) After the 45-day period expires, the institution may no longer seek to correct the list of students or revise the identity or program information of those students included on the list.

(4) The Secretary considers the evidence provided by the institution and either accepts the correction or notifies the institution of the reasons for not accepting the correction. If the Secretary accepts the correction, the Secretary uses the corrected information to create the final list. The Secretary provides the institution with ~~the final list and indicates the cohort period or cohort periods used to create~~ the final list.

(d) Obtaining earnings data. The Secretary submits the final list to SSA. For the purposes of this section, SSA returns to the Secretary ~~---~~

(1) The mean and median annual earnings of the students on the list whom SSA has matched to SSA earnings data, in aggregate and not in individual form; and

(2) The number, but not the identities, of students on the list that SSA could not match.

(e) Calculating draft D/E rates. (1)(i) If the SSA earnings data includes reports from records of earnings on at least ~~30~~10 students, the Secretary uses the higher of the mean or median annual earnings provided by SSA to calculate draft D/E rates for ~~a GE~~an educational program, as provided in §668.404.

~~(ii) If the SSA earnings data includes reports from records of earnings on fewer than 30 but at least 10 students, the Secretary uses the earnings provided by SSA only for the purpose of disclosure under §668.412(a)(13).~~

~~\_\_\_\_\_~~ (2) If SSA reports that it was unable to match one or more of the students on the final list, the Secretary does not include in the calculation of the median loan debt the same number of students with the highest loan debts as the number of students whose earnings SSA did not

match. For example, if SSA is unable to match three students out of 100 students, the Secretary orders by amount the debts of the 100 listed students and excludes from the D/E rates calculation the three largest loan debts.

(3)(i) The Secretary notifies the institution of the draft D/E rates for the program and provides the mean and median annual earnings obtained from SSA and the individual student loan information used to calculate the rates, including the loan debt that was used in the calculation for each student.

(ii) The draft D/E rates and the data described in paragraphs (b) through (e) of this section are not considered public information.

(f) Institutional challenges to draft D/E rates. (1) The Secretary presumes that the loan debt information used to calculate the median loan debt for the program under §668.404 is correct unless the institution provides evidence satisfactory to the Secretary, as provided in paragraph (f)(2) of this section, that the information is incorrect. The institution bears the burden of proof to show that the loan debt information is incorrect and to show how it should be corrected.

(2) No later than 45 days after the Secretary notifies an institution of the draft D/E rates for a program, the institution may challenge the accuracy of the loan debt information that the Secretary used to calculate the median loan debt for the program under §668.404 by submitting evidence, in a format and through a process determined by the Secretary, that demonstrates that the median loan debt calculated by the Secretary is incorrect.

(3) In a challenge under this section, the Secretary does not consider—

(i) Any objection to the mean or median annual earnings that SSA provided to the Secretary; [based on the program information provided to SSA;](#)

(ii) More than one challenge to the student-specific data on which draft D/E rates are based for a program for an award year; or

(iii) Any challenge that is not timely submitted.

(4) The Secretary considers the evidence provided by an institution challenging the median loan debt and notifies the institution of whether the challenge is accepted or the reasons why the challenge is not accepted.

(5) If the information from an accepted challenge changes the median loan debt of the program, the Secretary recalculates the program's draft D/E rates.

~~(6) Except as provided under §668.406, an~~ (6) An institution that does not timely challenge the draft D/E rates for a program waives any objection to those rates.

~~(g) Final D/E rates.~~ (1) After expiration of the 45-day period and subject to resolution of any challenge under paragraph (f) of this section, a program's draft D/E rates constitute its final D/E rates.

(2) The Secretary informs the institution of the final D/E rates for each of its GE programs by issuing the notice of determination described in §668.409(a).

(3) After the Secretary provides the notice of determination to the institution, the Secretary may publish the final D/E rates for the program.

~~(h) Conditions for corrections and challenges.~~ An institution must ensure that any material that it submits to make any correction or challenge under this section is complete, timely, accurate, and in a format acceptable to the Secretary and consistent with any instructions provided to the institution with the notice of its draft D/E rates and the notice of determination.

(Authority: 20 U.S.C. 1001, 1002, 1088, 1094)

~~§668.406 D/E rates alternate earnings appeals. [Reserved]~~

~~(a) *General.* If a GE program is failing or in the zone under the D/E rates measure, 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. The alternate earnings must be from the same calendar year for which the Secretary obtained earnings data from SSA to calculate the final D/E rates under §668.404.~~

~~(b) *Basis for appeals.* (1) The institution may use alternate earnings from an institutional survey conducted under paragraph (c) of this section, or from a State-sponsored data system under paragraph (d) of this section, to recalculate the program's final D/E rates and file an appeal if by using the alternate earnings—~~

~~(i) For a program that was failing the D/E rates measure, the program is passing or in the zone with respect to the D/E rates measure; or~~

~~(ii) For a program that was in the zone for the purpose of the D/E rates measure, the program is passing the D/E rates measure.~~

~~(2) When submitting its appeal of the final D/E rates, the institution must—~~

~~(i) Use the annual loan payment used in the calculation of the final D/E rates; and~~

~~(ii) Use the higher of the mean or median alternate earnings.~~

~~(3) The institution must include in its appeal the alternate earnings of all the students who completed the program during the same cohort period that the Secretary used to calculate the final D/E rates under §668.404 or a comparable cohort period, provided that the institution may elect—~~

~~(i) If conducting an alternate earnings survey, to exclude from the survey, in accordance with the standards established by NCES, all or some of the students excluded from the D/E rates calculation under §668.404(e); or~~

~~(ii) If obtaining annual earnings data from one or more State-sponsored data systems, and in accordance with paragraph (d)(2) of this section, to exclude from the list of students submitted to the administrator of the State-administered data system all or some of the students excluded from the D/E rates calculation under §668.404(e).~~

~~(c) Survey requirements for appeals. An institution must—~~

~~(1) In accordance with the standards included on an Earnings Survey Form developed by NCES, conduct a survey to obtain annual earnings information of the students described in paragraph (b)(3) of this section. The Secretary will publish in the FEDERAL REGISTER the Earnings Survey Form that will include a pilot-tested universe survey as well as the survey standards. An institution is not required to use the Earnings Survey Form but, in conducting a survey under this section, must adhere to the survey standards and present to the survey respondent in the same order and same manner the same survey items, included in the Earnings Survey Form; and~~

~~(2) Submit to the Secretary as part of its appeal—~~

~~(i) A certification signed by the institution's chief executive officer attesting that the survey was conducted in accordance with the survey standards in the Earnings Survey Form, and that the mean or median earnings used to recalculate the D/E rates was accurately determined from the survey results;~~

~~(ii) An examination-level attestation engagement report prepared by an independent public accountant or independent governmental auditor, as appropriate, that the survey was conducted in accordance with the requirements set forth in the NCES Earnings Survey Form. The attestation must be conducted in accordance with the attestation standards contained in the Government Accountability Office's Government Auditing Standards promulgated by the Comptroller General of the United States (available at [www.gao.gov/yellowbook/overview](http://www.gao.gov/yellowbook/overview) or its successor site), and with procedures for attestations contained in guides developed by and available from the Department of Education's Office of Inspector General; and~~

~~(iii) Supporting documentation requested by the Secretary.~~

~~(d) *State-sponsored data system requirements for appeals.* An institution must—~~

~~(1) Obtain annual earnings data from one or more State-sponsored data systems by submitting a list of the students described in paragraph (b)(3) of this section to the administrator of each State-sponsored data system used for the appeal;~~

~~(2) Demonstrate that annual earnings data were obtained for more than 50 percent of the number of students in the cohort period not excluded pursuant to paragraph (b)(3) of this section, and that number of students must be 30 or more; and~~

~~(3) Submit as part of its appeal—~~

~~(i) A certification signed by the institution's chief executive officer attesting that it accurately used the State-provided earnings data to recalculate the D/E rates; and~~

~~(ii) Supporting documentation requested by the Secretary.~~

~~(e) Appeals procedure. (1) For any appeal under this section, in accordance with procedures established by the Secretary and provided in the notice of draft D/E rates under §668.405 and the notice of determination under §668.409, the institution must—~~

~~(i) Notify the Secretary of its intent to submit an appeal no earlier than the date that the Secretary provides the institution the draft D/E rates under §668.405(e)(3), but no later than 14 days after the date the Secretary issues the notice of determination under §668.409(a) informing the institution of the final D/E rates under §668.405(g); and~~

~~(ii) Submit the recalculated D/E rates, all certifications, and specified supporting documentation related to the appeal no later than 60 days after the date the Secretary issues the notice of determination.~~

~~(2) An institution that timely submits an appeal that meets the requirements of this section is not subject to any consequences under §668.410 based on the D/E rates under appeal while the Secretary considers the appeal. If the Secretary has published final D/E rates under §668.405(g), the program's final D/E rates will be annotated to indicate that they are under appeal.~~

~~(3) An institution that does not submit a timely appeal waives its right to appeal the GE program's failing or zone D/E rates for the relevant award year.~~

~~(f) Appeals determinations. (1) Appeals denied. If the Secretary denies an appeal, the Secretary notifies the institution of the reasons for denying the appeal, and the program's final D/E rates previously issued in the notice of determination under §668.409(a) remain the final D/E rates for the program for the award year.~~

~~(2) Appeals granted. If the Secretary grants the appeal, the Secretary notifies the institution that the appeal is granted, that the recalculated D/E rates are the new final D/E rates for the program for the award year, and of any consequences of the recalculated rates under §668.410. If the Secretary has published final D/E rates under §668.405(g), the program's published rates will be updated to reflect the new final D/E rates.~~

~~(g) Conditions for alternate earnings appeals. An institution must ensure that any material that it submits to make an appeal under this section is complete, timely, accurate, and in a format acceptable to the Secretary and consistent with any instructions provided to the institution with the notice of determination.~~

~~(Authority: 20 U.S.C. 1001, 1002, 1088, 1094)~~