

Issue Paper 4
Session 3: March 12-15, 2018

Issue: Sanctions for Programs Based on D/E Rates

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); 20 U.S.C. § 1082; 20 U.S.C. § 1092; 20 U.S.C. § 1094

Regulatory cites: 34 CFR §§ [668.16](#), 668.403, 668.409, and 668.410

Summary of Changes:

Summary of Changes Since Session 2: We propose to tie sanctions for poor performance under the D/E rates and loan repayment rate measures to standards of administrative capability. The potential sanctions on a program may be limitations on an institution's ability to expand programs by more than 10 percent for programs that do not meet benchmarks, or to start new programs in similar occupations to the programs that do not meet benchmarks without prior approval of the Department or a program review conducted by the Department. We also propose some clarifications on when notifications must be made in non-English languages. We expect that programs that are not taught in English or use non-English promotional materials provide notifications in the language of instruction or promotional materials.

Summary of Changes Provided Before Session 2: We propose to eliminate the loss of eligibility to participate in title IV, HEA programs as a possible sanction under the D/E rates measure, as well as restrictions on starting new programs that are similar to low-performing programs. We propose that notifications would be provided to students and prospective students for any year an educational program is determined by the Secretary to be low performing. We propose to add a requirement to notify students/prospective students that the institution has made or is making changes to the program to improve its outcomes. We propose to remove a requirement that the institution receive acknowledgment from the student that they have received the notification. For prospective students, we propose that they receive the notification on first contact with the institution, but not again prior to enrollment.

Notes: While the Department agrees it is important to hold poorly performing programs accountable, which we believe will be accomplished with the proposed language below, the Department would like additional and focused feedback from the negotiators on the following issues potentially raised by this accountability framework.

- The Department would also like additional feedback on an appropriate threshold for taking administrative action against a program. There are many factors that the current regulation does not take into account, such as demographic and economic variables that may impact a student's success and future earnings more than the D/E rates can

demonstrate. How can the Department better ensure when the Department does take action against a program, it is doing so for reasons that are within a program's or institution's ability to fix and not from mitigating factors that a program cannot control?

668.16 Standards of administrative capability.

To begin and to continue to participate in any Title IV, HEA program, an institution shall demonstrate to the Secretary that the institution is capable of adequately administering that program under each of the standards established in this section. The Secretary considers an institution to have that administrative capability if the institution—

(p) Develops and follows procedures to evaluate the validity of a student's high school completion if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

(q) Offers undergraduate educational programs that meets benchmarks as measured under both the D/E rates benchmark and the loan repayment rate benchmark under 34 CFR 668.403. If one or more of the institution's undergraduate educational programs meets neither the D/E rates benchmarks nor the loan repayment rate benchmark, the Secretary may determine that the institution's administrative capability is impaired and may limit an institution's ability to expand programs that do not meet benchmarks by more than 10 percent, or to start new programs that share the same four-digit CIP code to the programs that do not meet benchmarks without prior approval of the Department or schedule a program review.

§668.409 Final determination of the D/E rates and loan repayment rate measure.

(a) Notice of determination. For each award year for which the Secretary calculates a D/E rates and a loan repayment rate measure for a GEan undergraduate educational program, the Secretary issues a notice of determination informing the institution of the following:

(1) The final D/E rates for the program as determined under §§§668.404, § and 668.405, and the final loan repayment rate as determined under, if applicable, §668.406;

(2) The final determination by the Secretary of whether the program meets benchmarks or does not meet benchmarks is passing, failing, in the zone, or ineligible, acceptable or low-performing under the D/E rates measure and under the loan repayment rate measure, as described in §668.403, and the loan repayment rate, as described in §668.406, and the consequences of those determinations;

(3) Whether the program could become ineligible based on its final D/E rates for the next award year for which D/E rates are calculated for the program;

(4) (3) Whether the institution is required to provide the student warning a notification under §668.410(a); and

(5) If the program's final D/E rates are failing or in the zone, instructions on how it may make an alternate earnings appeal pursuant to §668.406.

(b) Effective date of Secretary's final determination. The Secretary's determination as to the D/E rates and loan repayment rate measure is effective on the date that is specified in the notice of determination. The determination, including, as applicable, the determination with respect to an appeal under §668.406, constitutes the final decision of the Secretary with respect

to the D/E rates and the loan repayment rate ~~measure~~ and the Secretary provides for no further appeal of that determination.

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

§668.410—Consequences of Notification for low performing programs that do not meet benchmarks.

(a) General. For any year in which an undergraduate educational program is determined by the Secretary to not meet benchmarks ~~be low performing~~ under the D/E rates and loan repayment measures, the institution must provide a notification to students and prospective students.

~~(a) Student warning—(1) Events requiring a warning to students and prospective students. The institution must provide a warning with respect to a GE program to students and to prospective students for any year for which the Secretary notifies an institution that the program could become ineligible based on its final D/E rates measure for the next award year.~~

~~(2)(b) Content of warning notification. Unless otherwise specified by the Secretary in a notice published in the Federal Register, the warning notification must~~

~~(+)1) The notification must (A)s State that: “The performance of this program is below standards established by the U.S. Department of Education regarding the debt-to-income ratios and loan repayment performance of prior graduates. The Department based these standards on the amounts students borrow for enrollment in this program and their reported earnings. If in the future the program does not pass the standards, students who are then enrolled may not be able to use federal student grants or loans to pay for the program, and may have to find other ways, such as private loans, to pay for the program.”; the reported earnings that were reported to the Internal~~

Revenue Service. These graduates are not making sufficient payments to actively pay down the balance of their student loans. Students should take this into account when selecting a program for enrollment or in determining how much they should borrow to complete the program based on likely earnings upon completion.”;

(2B) An institution, if appropriate, may include in the notification: “Please note, however, that the school/institution believes that ~~this program measures~~ the earnings ~~could~~ may be affected ~~if~~ by a significant number of students who completed our program ~~graduates~~ and did not report all of their income, such as tip income, or ~~who~~ were self-employed and had business expenses that reduced the earnings being reported, or who selected to work ~~part-time~~ or take time out of the workforce, including to care for dependents or other family members.”; and

(3) An institution, if appropriate, may also include in the notification: “The institution believes that the data used here may not reflect the earnings potential in your geographic location because the institution enrolls students nationally and wages can vary significantly from one part of the country to another.”

~~(ii)2) Refer students and prospective students to (and include a link for) College Navigator, its successor site, or another similar Federal resource, for information about other similar programs.; and~~

~~(iii)3) For warnings a notification provided to enrolled students—~~
(A)i) Describe the academic and financial options available to students to continue their education in another program at the institution, including whether the students could transfer credits earned in the program to another program at the institution and which course credits would transfer, in the event that the program loses eligibility for title IV, HEA program funds;;
~~and~~

~~(B)ii) Indicate whether or not the institution will~~

~~(1) Continue has made, or is making, changes to provide instruction in the undergraduate educational program that are designed to allow students to complete the program; improve its outcomes, and provide details about those changes.~~

~~(2) Refund the tuition, fees, and other required charges paid to the institution by, or on behalf of, students for enrollment in the program; and~~

~~(C) Explain whether the students could transfer credits earned in the program to another institution.~~

~~(3) *Consumer testing.* The Secretary will conduct consumer testing to determine how to make the student warning as meaningful as possible.~~

~~(c) Alternative languages. - To the extent practicable, the institution must provide alternatives to the English language student warning for those students and prospective students for whom English is not their first language. Programs that are not taught in English or that use non-English promotional materials should must provide notifications in the language of the program instruction or the promotional materials.~~

~~(5) (d) Delivery to students. ~~(i)~~ (1) An institution must provide the warningnotification required under this section in writing to each student enrolled in the program no later than 30 days after the date of the Secretary's notice of determination under §668.409 by---~~

~~(A)i) Hand-delivering the warningnotification as a separate document to the student individually or as part of a group presentation; or~~

~~(B)ii~~ Sending the [warningnotification](#) to the primary email address used by the institution for communicating with the student about the program.

~~(ii)(2)~~ If the institution sends the [warningnotification](#) by email, the institution must—

~~(A)~~ (i) Ensure that the [warningnotification](#) is the only ~~substantive~~ content in the email;

~~(B)~~ Receive electronic or other written acknowledgement from the student that the student has received the email;

~~(C)~~ (ii) Send the [warningnotification](#) using a different address or method of delivery if the institution receives a response that the email could not be delivered; and

~~(D)~~ (iii) Maintain records of its efforts to provide the [warningsnotification](#) required by this section.

~~(6)e~~ Delivery to prospective students—(i) — (1) General.— An institution must provide any [warningnotification](#) required under this section to each prospective student or to each third party acting on behalf of the prospective student at the first contact about the program between the institution and the student or the third party acting on behalf of the student by—

~~(A)i~~ Hand-delivering the [warningnotification](#) as a separate document to the prospective student or third party individually; or as part of a group presentation;

~~(B)ii~~ Sending the [warning notification](#) to the primary email address used by the institution for communicating with the prospective student or third party about the program; or

~~(C)iii~~ Providing the prospective student or third party a copy of the disclosure template as required by §668.412(e) that includes the [student warningnotification](#) required by this section;

~~or~~

~~(D)iv) Providing the warningnotification orally to the student or third party if the contact is by telephone.~~

~~(ii) *Special warning requirements before enrolling a prospective student.* (A) Before an institution enrolls, registers, or enters into a financial commitment with a prospective student with respect to the program, the institution must provide any warning required under this section to the prospective student in the manner prescribed in paragraph (a)(6)(i)(A) through (C) of this section.~~

~~(B) An institution may not enroll, register, or enter into a financial commitment with the prospective student with respect to the program earlier than—~~

~~(1) Three business days after the institution first provides the student warning to the prospective student; or~~

~~(2) If more than 30 days have passed from the date the institution first provided the student warning to the prospective student, three business days after the institution provides another warning as required by this paragraph.~~

~~(iii) Email delivery and acknowledgement. - If the institution ~~sends~~provides the warningnotification to the prospective student or the third party by email, including by providing the prospective student or third party an electronic copy of the disclosure template, the institution must—~~

~~(A)i) Ensure that the warningnotification is the only substantive content in the email;~~

~~(B) Receive electronic or other written acknowledgement from the prospective student or third party that the student or third party has received the email;~~

~~(C)~~ (ii) Send the warningnotification using a different address or method of delivery if the institution receives a response that the email could not be delivered; and

~~(D)~~ iii Maintain records of its efforts to provide the warning required under this section.notification.

~~(7)~~ f Disclosure template. - Within 30 days of receiving notice from the Secretary that the institution must provide a student warning for the programnotification under this section, the institution must update the undergraduate educational program's disclosure template described in §668.412 to include the warningnotification in paragraph ~~(a)~~(2b) of this section or such other warningnotification specified by the Secretary in a notice published in the Federal Register.

~~(b) Restrictions—(1) Ineligible program.~~ Except as provided in §668.26(d), an institution may not disburse title IV, HEA program funds to students enrolled in an ineligible program.

~~(2) Period of ineligibility.~~ (i) An institution may not seek to reestablish the eligibility of a failing or zone program that it discontinued voluntarily, reestablish the eligibility of a program that is ineligible under the D/E rates measure, or establish the eligibility of a program that is substantially similar to the discontinued or ineligible program, until three years following the date specified in the notice of determination informing the institution of the program's ineligibility or the date the institution discontinued the failing or zone program.

~~(ii) An institution may not seek to reestablish the eligibility of a program that it discontinued voluntarily after receiving draft D/E rates that are failing or in the zone, or establish the eligibility of a program that is substantially similar to the discontinued program, until—~~

~~(A) Final D/E rates that are passing are issued for the program for that award year; or~~

~~(B) If the final D/E rates for the program for that award year are failing or in the zone, three years following the date the institution discontinued the program.~~

~~(iii) For the purposes of this section, an institution voluntarily discontinues a program on the date the institution provides written notice to the Secretary that it relinquishes the title IV, HEA program eligibility of that program.~~

~~(iv) For the purposes of this subpart, a program is substantially similar to another program if the two programs share the same four digit CIP code. The Secretary presumes a program is not substantially similar to another program if the two programs have different four digit CIP codes but the institution must provide an explanation of how the new program is not substantially similar to the ineligible or voluntarily discontinued program with its certification under §668.414.~~

~~(3) *Restoring eligibility.* An ineligible program, or a failing or zone program that an institution voluntarily discontinues, remains ineligible until the institution establishes the eligibility of that program under §668.414(c).~~

~~(Authority: 20 U.S.C. 1001, 1002, 1088, 1094, 1099c)~~