



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

October 31, 2017

The Honorable Patty Murray
Ranking Member, Committee on Health, Education, Labor and Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Ranking Member Murray:

Thank you for your August 30, 2017, letter requesting that the U.S. Department of Education (Department) Office of Inspector General (OIG) review the Department's actions related to certain provisions of the gainful employment and borrower defense regulations. As discussed with your staff, consistent with our authority and responsibility under the Inspector General Act to review current and proposed regulations, we agreed to provide you with our views on the regulations and how the Department's proposed changes to those regulations could affect the integrity and efficiency of the student financial aid programs.

Based on their susceptibility to fraud and abuse, the Federal student aid programs have long been a major focus of our audit and investigation work. The programs are large, complex, and inherently risky due to their design, reliance on numerous entities, and the nature of the student population. The OIG has produced volumes of significant work involving the Federal student aid programs, leading to statutory changes to the Higher Education Act of 1965 (HEA), as amended, as well as regulatory and Department operational changes.

One of the more significant areas of regulatory change was the implementation of the program integrity regulations, which went into effect in July 2011, with the gainful employment regulations first going into effect in July 2012. The regulations included changes that the OIG had previously recommended to the Department and Congress based on our audit and investigation work; the broad regulatory framework that had previously existed had made it nearly impossible in some cases for the Department to take administrative action based on issues we had identified. Two of the areas addressed by the program integrity regulations were the afore-mentioned definition of gainful employment and defining activities that constitute misrepresentation. The clarifications made to the misrepresentation regulation and the Department's findings of misrepresentation by Corinthian Colleges, Inc., and eventual closure in 2015 resulted in a tremendous increase in borrower loan defense claims. At that time, the Department recognized the need to modify and clarify conditions qualifying for borrow defense claims in the regulations. The new regulations were scheduled to become effective July 1, 2017.

Gainful Employment

Prior to the final regulations published by the Department in 2010, there was no statutory or regulatory definition of what constituted gainful employment. As a result, rules requiring eligible institutions and eligible programs to prepare students for gainful employment could not be effectively used to hold institutions accountable. The HEA has long provided for the extension of financial aid to students attending postsecondary programs that “lead to gainful employment in a recognized occupation,” including nearly all programs at proprietary and postsecondary vocational institutions.¹ The final regulations were subject to legal challenge resulting in the Department undergoing a second round of negotiated rulemaking followed by revised final regulations in 2014.

The Department’s goals in promulgating these regulations were to ensure that students who enroll in these programs do not have to face difficult challenges because they are not equipped to secure gainful employment and left with unaffordable debts and poor employment prospects. To provide an additional layer of protection for students and taxpayers, the Department defined a set of measures that identifies the lowest performing programs by focusing on the ability of students to repay their student loans. These measures establish debt-to-income and loan repayment rates that a program at an institution would need to meet in order to demonstrate that it provides training that leads to gainful employment in a recognized occupation and consequently remains eligible for Title IV funds. The regulations established reporting requirements and disclosure requirements for institutions.

In January 2017, the Department announced dates by which institutions subject to the Department’s gainful employment regulations must comply with certain provisions of the regulations relating to the submission of alternate earnings appeals and disclosure requirements. In March 2017, the Department announced that it was allowing additional time, until July 1, 2017, to comply with those provisions. On June 15, 2017, the Department announced its intention to negotiate issues related to gainful employment. In July 2017, the Department announced additional time, until July 1, 2018, for institutions to comply with certain disclosure requirements in the gainful employment regulations. The Department also extended the deadline for all programs to file alternative earnings appeals.

We initially identified the need to hold institutions required to prepare students for gainful employment accountable and recommended that Congress amend the statute to require institutions preparing students for gainful employment to have a 70 percent graduation rate and a 70 percent placement rate during the 1998 HEA reauthorization. This recommendation was not included in the final bill.

While proprietary schools are not the only sector subject to the gainful employment regulation, they are the largest. That sector has seen increases in loan debt and increasing default problems. According to the recently released fiscal year (FY) 2014 Cohort Default Rates, the industry proprietary school default rate was 15.5 percent compared to the national rate for all schools of

¹ The statute does provide an exception for proprietary schools providing a baccalaureate degree in liberal arts prior to January 1, 2009.

11.5 percent. Students who are not gainfully employed and cannot afford to repay their loans face very serious challenges. Discharging Federal student loans in bankruptcy is very rare. The common consequences of default include large fees—collection costs that can add 25 percent to the outstanding loan balance—and interest charges; struggles to rent or buy a home, buy a car, or get a job; collection agency actions, including lawsuits and garnishment of wages; and the loss of tax refunds and even Social Security benefits. Moreover, borrowers in default are no longer entitled to any deferments or forbearances and may be ineligible for any additional student aid until they have reestablished a good payment history.

Limitations on the Cohort Default Rate (CDR) also point out the need for gainful employment regulations to ensure accountability. The CDR measures only defaults that occur within a two year period after a borrower enters repayment. In audit work we completed more than 15 years ago, we identified that the CDR does not reflect the default trends that occur in later years. That continues to be the case. For example, the Department in 2013 estimated that for students enrolled in proprietary schools offering two year programs nearly half of all loans (in dollars) will default in twenty years. We also identified that increased use of deferments and forbearances will reduce CDRs. More recently, the increased utilization of income contingent repayment plans will also reduce CDRs and thus their effectiveness as an accountability measure.

During the Federal Register Notice clearance process for the June 2017 announcement, we informed the Department that we disagreed with certain delays of the gainful employment regulations. Specifically, since schools remain obligated to complete and post on their websites the disclosure template by July 1, 2017, OIG recommended that the distribution requirements under 34 C.F.R. § 668.412(e) remain in effect. Since schools should have completed the disclosure template and schools will already be directly engaged with students as they enter into a financial commitment to attend a school, the burden of complying with §668.412(e)(3) to provide the template to prospective students should be negligible. This would ensure that students are fully informed prior to enrollment and before Title IV funds are committed or disbursed. This is consistent with the Secretary's concern when announcing renegotiation of the borrower defense and gainful employment regulations that the regulations did not do enough to protect students. Granting what would effectively be an 18-month extension negatively impacts program integrity.

Based on our audit and investigative work, we recommended to Congress in 1998 and again in 2004 that it address a serious loophole to address the lack of a definition in the HEA related to the statutory requirement to prepare students in certain schools and programs for gainful employment. Providing student loans to fund programs with limited employment opportunities obviously results in increased loan debt and increased use of income-based repayment and defaults. These issues not only negatively impact students but also increase the long-term cost to the government to provide access to student loans. While there are different ways that the statutory requirement for gainful employment could be given meaning, without some criteria for what gainful employment is, schools cannot be held accountable and students can be harmed by not being able to pay loan debt. It is critical to inform students of potential risks presented in enrolling in certain programs.

Borrower Defenses

In 2010, when the Department formulated its plan for rounds of negotiated rulemaking, we recommended that several key provisions be expanded upon and clarified. Among other provisions, we recommended that the Department clarify the definition of misrepresentation. We had found it was nearly impossible to get the Department to take administrative actions based on our audit and investigative efforts when obvious abuses occurred due to a lack of, or extremely broad, regulatory requirements. The definitions provided through the public negotiated rulemaking process identified substantial misrepresentation to include activities in any advertising, promotional materials or marketing of the nature of education programs, nature of financial charges, and employability of graduates. As previously stated, with the collapse of Corinthian Colleges, Inc., the Department began to receive, for the first time, significant numbers of borrower defense claims. The Department thereafter revised and expanded the borrower defense regulations.

The existing regulations allow borrowers to assert a borrower defense if a cause of action would have arisen under applicable State law. In contrast, the final regulations that were to be effective on July 1, 2017, established a new Federal standard that would make it easier for a borrower to assert a borrower defense on the basis of a substantial misrepresentation, a breach of contract, or a favorable nondefault contested judgment against a school, for its act or omission relating to the making of the borrower's Direct Loan or the provision of educational services for which the loan was provided. The new regulation also made it easier for the Department to collect the amount of loan relief from the school.

In June 2017, the Department announced delays in certain provisions of the new regulations until July 2018. On October 24, 2017, the Department announced its intent to further delay the provisions of the borrower defense regulations until July 2019, to give the Department adequate time to conduct negotiated rulemaking and develop revised regulations. However, borrower defense claims can still be processed under the existing regulations. Decisions by the Department to grant relief in full or in part can significantly increase the costs of the loan program to the Federal government and ultimately the taxpayer.

Included as part of the new borrower defense regulations were improvements to the financial responsibility regulations for schools. As reported in our recent audit report, "FSA's Processes for Identifying At-Risk Title IV Schools and Mitigating Potential Harm to Students and Taxpayers" ([ED-OIG/A09Q0001](#)), we highlighted some of the benefits that the new regulations concerning schools' financial responsibility could provide FSA in its monitoring efforts and improve FSA's ability to identify schools at risk of unexpected closure. We noted that the enforcement of these provisions would improve FSA's processes for mitigating potential harm to students and taxpayers by giving FSA the ability to obtain financial protection from schools based on information that is broader and more current than information currently collected from schools.

In the Federal Register clearance process, we recommended excluding the changes to the financial responsibility regulations in 34 C.F.R. §668.171 and §668.175 from the proposal to delay the effective date of the borrower defense regulations. The financial responsibility provisions include tools to improve the Department's oversight of schools and avoid the costs to

students and taxpayers associated with precipitous school closures, including situations unrelated to the qualification of students for borrower defense discharges. The Department did not agree with recommendations. Within our statutory responsibility, we disagreed with the regulatory delay. As required by Section 5(a)(12) of the Inspector General Act of 1978, as amended, we noted this disagreement in our 75th Semiannual Report to Congress.

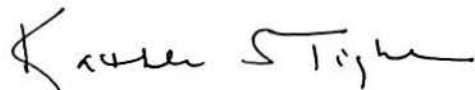
Ongoing And Planned Work

We continue to audit and investigate risks to and abuses of the Federal student aid programs, and based on our findings, will continue to recommend administration actions to the Department, and work with the Department of Justice, when warranted, on civil and criminal actions to better protect students and taxpayers. We are currently reviewing the Department's controls over its borrower defense loan discharges process. We believe that the report will include recommendations to the Department to improve borrower defense claims processing as well as other information for policy makers to consider during the upcoming negotiated rulemaking sessions. We look to issue the report by the end of November.

Many of the program integrity provisions in place today, both in the HEA and the Department's regulations, resulted from recommendations made by my office in response to fraud, waste and abuse uncovered in our audit and investigative work. While significant statutory and regulatory changes have been accomplished over the years, deficiencies continue and risks constantly emerge as the educational environment and workforce evolves. At the same time, we also recognize the authority of the new administration to review regulations promulgated by the prior administration and pursue changes in policy direction. Negotiated rulemaking required by the HEA should provide for a public, fair and balanced vetting of concerns by all parties impacted by the subject regulations. As with past negotiated rulemaking efforts, we expect to be fully engaged with the Department as it proceeds. We will not hesitate to voice our concerns regarding program integrity matters.

Thank you for raising your concerns to my office. I look forward to continuing to work with you and all members of the Senate Health, Education, Labor and Pensions Committee to promote the efficiency, effectiveness, and integrity of the Department's programs and operations. If you have any questions or need more information, please do not hesitate to contact me directly at (202) 245-6900, or have a member of your staff contact our Congressional Liaison, Catherine Grant, at (202) 245-7023.

Sincerely,



Kathleen S. Tighe

cc: The Honorable Lamar Alexander, Chairman,
United States Senate Committee on Health, Education, Labor and Pensions
The Honorable Betsy DeVos, Secretary of Education
Joseph C. Conaty, Delegated the Duties and Functions of the Deputy Secretary
James F. Manning, Acting Under Secretary