Glenn Rothner (SBN 67353)
ROTHNER SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101
grothner@rsglabor.com
Telephone: (626) 796-7555
Facsimile: (626) 577-0124

Daniel A. Zibel (*pro hac vice forthcoming*)
Aaron S. Ament (*pro hac vice forthcoming*)
Robyn K. Bitner (*pro hac vice forthcoming*)
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1015 15th Street N.W., Suite 600
Washington, D.C. 20005
dan@defendstudents.org
aaron@defendstudents.org
robyn@defendstudents.org
Telephone: (202) 734-7495

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF TEACHERS, CALIFORNIA FEDERATION OF TEACHERS, ISAI BALTEZAR, & JULIE CHO,

Plaintiffs,

vs.

ELISABETH DEVOS, *in her official capacity as Secretary of Education*, & UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Case No.: 5:20-cv-455

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Administrative Procedure Act Case]

TABLE OF CONTENTS

Page

INTRODUCTION 1

JURISDICTION AND VENUE 4

PARTIES 4

FACTUAL ALLEGATIONS 15

1. The Higher Education Act 15

2. The 2011 Gainful Employment Rule 16

3. Legal Challenges to the 2011 Gainful Employment Rule 18

4. The 2014 Gainful Employment Rule 20

4.1 The Gainful Employment Definition 21

4.2 The Accountability Framework 25

4.2.1 The Department Cited Substantial Support for the Eight Percent Annual Earnings Threshold ---------- 28

4.2.2 The Department Cited Substantial Support for the Twenty Percent Discretionary Income Threshold ---------- 31

4.2.3 The Department Considered Alternative Metrics ---------- 31

4.2.4 The Department Implemented an "Alternate Earnings Appeals" Process ---------- 35

4.3 The Transparency Framework 35

4.4 The Department Directly Addressed Challenges to its Statutory Authority 36

4.5 The Department Carefully Considerd the Source of Data Underlying the Gainful Employment Rule 37

5. Numerous Courts Upheld the Gainful Employment Rule 38

6. Pre-Repeal Developments 40

6.1 The Gainful Employment Rule was Working 40

6.2 The Gainful Employment Rule Covered Thousands of Programs Public, Non-Profit, and For-Profit 43

6.3 The Department Delayed the Enforcement and Operation of the Gainful Employment Rule 43

TABLE OF CONTENTS
(continued)

Page

7. Delays Turned into Repeal 46

7.1 The Department Provided No Basis for its Repeal of the Accountability Framework and Failed to Consider Evidence Before It 49

7.1.1 The Department Ignored Judicial Precedent and Concluded the Statute is No Longer Ambiguous 50

7.1.2 The Department Disregarded the Statutory Scope and Claimed Disparate Impact on For-Profit Schools 52

7.1.3 The Department Misconstrued the Evidence Supporting the Accountability Framework 55

7.1.3.1 Supposed Flaws with the Evidence Supporting the 2014 Rule 56

7.1.3.2 New "Analysis" and Research Insufficiently Supported the Repeal 57

7.1.4 The Department Concluded That the D/E Rates Measure is No Longer a Valid Metric 61

7.1.5 The Department Continued to Renege on its Prior Justifications for the Accountability Framework 64

7.2 The Department Failed to Consider Alternatives to the Repeal of the Accountability Framework 67

7.2.1 Failure to Consider Alternatives to the Certification Requirement 68

7.2.2 Failure to Consider Alternative Eligibility Metrics 69

7.2.3 Failure to Consider Alternative Thresholds and Sanctions for Failing D/E Rates Measures 72

7.2.4 Failure to Consider Alternatives to Issues with Tip-Based Occupations 75

7.3 The Department Provided No Reasonable Justification for the Repeal of the Transparency Framework 80

7.4 The Department Failed to Consider Alternatives to Repealing the Disclosure Requirements 84

8. Post-Repeal Developments 87

9. The Department Continues to Rely on 2014 GE Data and the Eligibility Metrics for Other Purposes 92

TABLE OF CONTENTS
(continued)

Page

CAUSES OF ACTION 95
COUNT 1 95
COUNT 2 98
COUNT 3 99
COUNT 4 101
COUNT 5 106
COUNT 6 108
COUNT 7 111
COUNT 8 113
COUNT 9 114
COUNT 10 118
COUNT 11 119
REQUEST FOR RELIEF 121

INTRODUCTION

1. The United States is facing a growing student debt crisis. The cost of college is rising. Student loan balances are rising. Student loan defaults are rising. Newspapers report almost daily about systemic failures by the companies that service student debt, mismanagement in the Public Service Loan Forgiveness program, and fraud and deceptive practices by for-profit colleges.

2. Since at least 1965, with the passage of the Higher Education Act ("HEA"), the federal government has played a central role in our system of higher education. Each year, under Title IV of the HEA, Defendant United States Department of Education (the "Department") provides billions of dollars in federal funding in the form of grants (*e.g.,* Pell Grants) and loans (*e.g.*, Federal Direct Loans) to help students pay for and finance programs of postsecondary education.

3. As it created and expanded the Title IV student aid programs over time, Congress established numerous, common sense safeguards to ensure that federal funding did not go to institutions or programs that offer students and society minimal value. *See, e.g.*, *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 433–34 (D.C. Cir. 2012) ("[S]chools receive the benefit of accepting tuition payments from students receiving federal financial aid, regardless of whether those students are ultimately able to repay their loans. Therefore, Congress codified statutory requirements in the HEA to ensure against abuse by schools."). Congress also vested the Department with clear authority to promulgate regulations governing Title IV programs. *See*, *e.g.*, 20 U.S.C. §§ 1221e-3, 3474.

4. In 2014, the Department adopted regulations to implement one such statutory requirement, *i.e.*, that certain postsecondary institutions can only participate in Title IV programs (and serve as conduits for students to receive federal student loans and grants) with respect to educational programs that "prepare students for gainful employment in a recognized occupation." *See* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014), *corrected by* 79

Fed. Reg. 71,957 (Dec. 4, 2014) (collectively, the "Gainful Employment Rule"). *See also infra* ¶ 70 (defining "gainful employment program").

5. In 2015, the Gainful Employment Rule took effect and began benefiting students and taxpayers alike. The Gainful Employment Rule required institutions to certify compliance for all new gainful employment programs; the Department began testing existing programs to determine whether they were in compliance with the rule; and students began receiving disclosures required under the Gainful Employment Rule, as well as warnings if their programs were at risk of losing Title IV eligibility due to non-compliance with the rule. Critically, this meant that prospective and enrolled students could assess if a particular program would provide a reasonable return on investment (both financial and time).

6. Despite abundant evidence that the Gainful Employment Rule was benefitting prospective students, enrolled students, and taxpayers, on July 1, 2019, the Department issued a final rule eliminating it entirely. *See generally* Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392 (July 1, 2019) (the "Repeal").

7. The consequences of the Repeal are immense for prospective and enrolled students. The Department has admitted that because of the Repeal, "some students may choose sub-optimal programs" that "have demonstrated a lower return on the student's investment, either through higher upfront costs, reduced earnings, or both." 84 Fed. Reg. at 31,445. Similarly, as a direct result of the Repeal, according to the Department, students could have "greater difficulty in repaying loans, increasing the use of income-driven repayment plans or risking defaults and the associated stress, increased costs, and reduced spending and investment on other priorities." 84 Fed. Reg. at 31,445.

8. The consequences are also immense for taxpayers. As the Department stated in proposing the Repeal, the "estimated net budget impact from the [Repeal] is $5.3 billion cost [due] . . . primarily [to] the elimination of the ineligibility

/ / /

provision of the GE regulations." Program Integrity: Gainful Employment, 83 Fed. Reg. 40,167, 40,180 (Aug. 14, 2018) (the "2018 NPRM").

9. In issuing the Repeal, the Department has acted arbitrarily, capriciously, and not in accordance with law, all in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The Department has:

- Disregarded prior judicial holdings regarding the meaning of the HEA (Count 1);
- Conceded that it has no intention of implementing a statutory mandate (Count 2);
- Based the Repeal on its own view of higher education policy, which disregards the statutory requirements set by Congress regarding Title IV eligibility (Count 3);
- Failed to adequately explain its departure from prior factual assertions, consider obvious alternatives, and base the Repeal on substantial evidence (Counts 4–9);
- Taken positions that are undeniably inconsistent with positions it is taking in ongoing litigation in this District and in its approach to denying full debt relief to students who have been defrauded by predatory colleges (Count 10); *and*
- Failed to provide members of the public an adequate opportunity to comment on the proposed Repeal (Count 11).

10. It is rare for a federal agency to publish a rule that is so replete with errors, makes so many unsubstantiated assertions, and takes so many unlawful shortcuts. For these reasons, Plaintiffs file this necessarily lengthy complaint to describe the Department's many failures in publishing the Repeal and seek a declaration that it violates the HEA and is arbitrary, capricious, and contrary to law. Plaintiffs also request an order vacating the Repeal in its entirety.

/ / /

JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (the APA).

12. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a) and this Court may grant declaratory, injunctive, and other relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 706.

13. INTRADISTRICT ASSIGNMENT: Pursuant to Civil Local Rule 3-2(c), assignment to the San Jose Division is appropriate because named plaintiff Isai Baltezar resides in Santa Cruz County, California and no exclusion to the rule applies.

PARTIES

14. Plaintiff American Federation of Teachers, AFL-CIO ("AFT") is a membership organization representing 1.7 million Pre-K through 12th grade teachers, early childhood educators, paraprofessionals, and other school-related personnel; higher education faculty and professional staff; federal, state, and local government employees; and nurses and other healthcare professionals. Among AFT's central purposes is to promote economic opportunity and education for students, their members, families, and communities.

15. As part of its organizational mission, AFT has long taken a leading role in fighting for the financial rights of public service workers, particularly when it comes to the cost of higher education and student loan debt.

16. For example, in 2016, AFT adopted a resolution highlighting the extent to which a "college education is one of the most important vehicles for economic and social mobility in the United States, for preparing students to fulfill their civic responsibilities, and for enabling students to achieve their dreams for themselves and their families." As part of that resolution, AFT resolved that it

/ / /

/ / /

would "continue to work . . . to hold for-profit educational institutions accountable for poor educational outcomes, fraudulent practices, and high student debt."[1]

17. In 2016, AFT also published a report entitled *Regulating Too Big to Fail Education*, discussing the crisis in federal oversight of for-profit higher education. Among the findings in that report, AFT highlighted the extent to which more should be done to prevent mismanaged for-profit colleges from escaping the Department's oversight.

18. AFT has long and consistently focused its attention on the Gainful Employment Rule.

19. For example, AFT submitted comments during the Department's rulemakings on the 2011 and 2014 Gainful Employment Rules. AFT has spoken out publicly and to the media about the importance of the Gainful Employment Rule.[2] Indeed, in its 2012–2014 "State of the Union," AFT referred to itself as a "knowledgeable voice and advocate in the framing of policy around gainful employment regulations that would protect students and veterans from the predatory recruitment practices of for-profit institutions."

20. On July 10, 2017, AFT President Randi Weingarten testified at a public hearing at the Department, during which she highlighted, *inter alia*, the importance of the Gainful Employment Rule to AFT and its members:

> The gainful employment regulation is about two things, transparency, providing students information, and second, stopping federal funding to programs that leave students with a mountain of debt and a worthless degree. AFT members teach in these programs that are subject to the gainful employment standards, and our members want them enforced. Why? Because we know the difference between the real educations that institutions provide and dead end make work [sic] that

---

[1] AFT Resolution, The Fight Against Student Loan Debt and for Public Investment in Higher Education (2016), https://www.aft.org/resolution/fight-against-student-loan-debt-and-public-investment-higher-education.

[2] *See, e.g.*, Michael Stratford & Paul Fain, *Backed Into a Corner*, Inside Higher Educ. (May 7, 2014), https://www.insidehighered.com/news/2014/05/07/gainful-employment-fight-profits-make-familiar-arguments-against-different-landscape.

> bad actors in the sector do. Repealing the gainful employment regulation will cost the American people over $1.3 billion over ten years, so why does the Department of Education want to do away with a rule that protects students' and taxpayers' investments in higher education? . . . The Department should protect students and taxpayers by rigorously enforcing the . . . the gainful employment rule. Abandon, please abandon the plans to delay, weaken, or otherwise roll back these regulations.[3]

21. AFT submitted comments in September 2018 in response to the proposed Repeal.

22. AFT brings this suit in an organizational capacity and on behalf of its members who are enrolled at, or who will soon enroll at, programs of study that are covered by the Gainful Employment Rule.

23. Plaintiff California Federation of Teachers ("CFT") is a union of professionals affiliated with AFT. CFT comprises California's 145 local unions chartered by the AFT. Through its local unions, CFT represents more than 120,000 employees at educational institutions working at every level of public and private education, from Head Start to the University of California. CFT is committed to promoting high-quality education and securing the conditions necessary to provide the best services to California's students.

24. As part of its mission, CFT has taken a leading role in fighting for the financial rights of public service workers, including when it comes to the growing cost of higher education and student debt.

25. CFT brings this suit on behalf of its members who are enrolled at, or will soon enroll at, programs of study that are covered by the Gainful Employment Rule.

---

[3] *See* U.S. Dep't of Educ., *Transcript of Public Hearing on Intent to Establish Negotiated Rulemaking Committees* 1, 46–48 (July 10, 2017), *available at*: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/july10dchearingtranscript.docx.

26. As a result of provisions in their collective bargaining contracts, AFT and CFT members may be eligible for salary or wage increases following the successful completion of higher education programs.

27. Plaintiff Isai Baltezar is a full-time fifth grade teacher at De La Vega Elementary School in Santa Cruz, California. He is a member of both AFT and CFT. Mr. Baltezar is a natural person who resides in Santa Cruz, California.

28. Mr. Baltezar is planning on applying to a certificate program in K-12 School Administration in order to boost his earnings potential and move into an administrative leadership position in either his, or another, school. Mr. Baltezar is currently researching programs to apply to and hopes to enroll in such a program during 2020. Because of the cost of such programs, Mr. Baltezar is considering programs that will allow him to receive loans from the Department in order to finance his attendance.

29. Mr. Baltezar has researched numerous certificate programs offered by institutions of higher education in order to decide in which program to enroll. To assist him in comparing programs and making a decision, Mr. Baltezar is interested in reviewing and assessing information about the programs' completion and withdrawal dates; the programs' length; the number of clock or credit hours required by the various programs; the total number of students enrolled during the most recent award year; the loan repayment rate for students who enrolled, completed, and/or withdrew from the programs; the total cost of tuition and fees; the programs' job placement rates; the number of students receiving federal and private loans; the median loan debt for students who completed and/or withdrew from each program; the mean or median earnings for the same group within each program; annual earnings rates for each program; whether various programs meet professional licensure requirements in California; and whether each program is programmatically accredited.

/ / /

30. In particular, and in order to assist him in choosing a program, Mr. Baltezar is interested in information that would enable to him to compare the amount of debt incurred by program enrollees or graduates with their post-graduation incomes. Mr. Baltezar is similarly interested in information that would enable him to compare debt and earnings information from similar programs across institutions in order to help him make an informed decision about which program to enroll in. Mr. Baltezar is looking for this information because he is concerned about his ability to pay back any federal loans he incurs to help finance his education.

31. Mr. Baltezar is researching programs to apply to, and in which he may enroll, but he has been unable to locate any such information about the programs he is considering.

32. Mr. Baltezar does not know whether the programs he is considering provide training to their students that lead to earnings sufficient to allow students to pay back their student loan debts.

33. Mr. Baltezar does not know whether any program he is considering is at risk of losing eligibility to participate in the Title IV student loan programs because it is not providing a program of training that prepares students for gainful employment in a recognized occupation.

34. If Mr. Baltezar had access to this information, he would carefully review it. His review of that information would affect his decision to enroll in a particular program.

35. Plaintiff Julie Cho is a part-time university lecturer at the University of California at Irvine, where she teaches both Film and Media Studies and Asian American Studies. She is a member of both AFT and CFT. Ms. Cho is a natural person who resides in Irvine, California.

36. Ms. Cho is currently assessing a career change into either disability services counseling or teaching students with special needs. To facilitate such a change, she is actively considering enrolling in one of a number of postsecondary

programs, including certificate programs in Special Education or Special Education Psychology. Ms. Cho is researching programs to apply to and hopes to enroll during 2020. Because of the cost of such programs, Ms. Cho is considering programs that will allow her to receive loans from the Department in order to finance her attendance.

37. Ms. Cho has researched numerous certificate programs offered by institutions of higher education in order to decide where to enroll. To assist her in comparing programs and making a decision, Ms. Cho is interested in reviewing and assessing information about the programs' completion and withdrawal dates; the programs' length; the number of clock or credit hours required by the various programs; the total number of students enrolled during the most recent award year; the loan repayment rate for students who enrolled, completed, and/or withdrew from the programs; the total cost of tuition and fees; the programs' job placement rates; the number of students receiving federal and private loans; the median loan debt for students who completed and/or withdrew from each program; the mean or median earnings for the same group within each program; annual earnings rates for each program; whether various programs meet professional licensure requirements in California; and whether each program is programmatically accredited.

38. In particular, and in order to assist her in choosing a program, Ms. Cho is interested in information that would enable to her to compare the amount of debt incurred by program enrollees or graduates with their post-graduation incomes. Ms. Cho is similarly interested in information that would enable her to compare debt and earnings information from similar programs across institutions in order to help her make an informed decision about which program to enroll in. Ms. Cho is looking for this information because she is concerned about her ability to pay back any federal loans she incurs to help finance her education.

/ / /

/ / /

39. Ms. Cho is researching programs to apply to, and in which she may enroll, but she has been unable to locate any such information about the programs she is considering.

40. Ms. Cho does not know whether the programs she is considering provide training to their students that lead to earnings sufficient to allow students to pay back their student loan debts.

41. Ms. Cho does not know whether any program she is considering is at risk of losing eligibility to participate in the Title IV student loan programs because it is not providing a program of training that prepares students for gainful employment in a recognized occupation.

42. If Ms. Cho had access to this information, she would carefully review it. Her review of such information would affect her decision to enroll in a particular program.

43. Plaintiffs Baltezar and Cho will be referred to as the "Individual Plaintiffs."

44. The Repeal has injured and will continue to injure AFT members, CFT members, and Individual Plaintiffs who are actively considering whether to enroll in, or continue their enrollment in, programs of higher education that, but for the Repeal, would be required to make certain disclosures under the Gainful Employment Rule. Because of the Repeal, AFT members, CFT members, and Individual Plaintiffs will no longer receive these mandated disclosures, including about gainful employment programs' completion rates, length, total cost, loan repayment rates, and job placement rates, as well as whether these programs satisfy certain state licensure or certification requirements.

45. The disclosure of this information would help AFT members, CFT members, and Individual Plaintiffs identify programs that offer credentials that potential employers recognize and value. Repealing these disclosures will reduce market information that will assist prospective and enrolled students and their

families in making critical decisions about their educational investments and the potential outcomes of those investments. Repealing these disclosures will also impair market information about gainful employment programs, decreasing the transparency of student outcomes for better decision making by prospective and enrolled students and their families, thereby leading to a less competitive marketplace that discourages self-improvement.

46. With the elimination of these disclosures, AFT members, CFT members, Individual Plaintiffs, and other interested members of the public (including family members of AFT members, CFT members, and Individual Plaintiffs) will have to seek out the information they need, and the information that interests them, to make critical decisions about the programs they are considering, rather than being provided the information they are entitled to receive under the Gainful Employment Rule.

47. The Gainful Employment Rule also includes eligibility sanctions that make certain programs ineligible participants in Title IV programs. Because of the elimination of these sanctions and the fact that non-passing programs remain accessible, AFT members, CFT members, Individual Plaintiffs, and other interested members of the public (including family members of AFT members, CFT members, and Individual Plaintiffs) are at risk of attending programs that are "sub-optimal." These sub-optimal programs have demonstrated a lower return on students' investment, either through higher upfront costs, reduced earnings, or both.

48. Because of the Repeal, AFT members, CFT members, and Individual Plaintiffs are at higher risk of difficulty repaying loans and a higher risk of loan default.

49. Because of the Repeal, AFT members, CFT members, and Individual Plaintiffs are also at risk of being forced to reduce spending and investment on other priorities.

/ / /

50. Because of the Repeal, AFT members, CFT members, and Individual Plaintiffs will no longer receive required warnings that a gainful employment program is at risk of becoming ineligible to participate in Title IV programs during the next Title IV award year.

51. Because of the Repeal, AFT members, CFT members, and Individual Plaintiffs have a greater likelihood of making poor educational investments and decisions.

52. Because of the Repeal, AFT members, CFT members, and Individual Plaintiffs also face a substantial risk of incurring debt to attend programs of higher education without knowing that such programs fail to prepare students for gainful employment in a recognized occupation.

53. AFT also brings this suit in its organizational capacity.

54. The Department's issuance of the Repeal has caused AFT to divert its limited resources and alter its resource allocation from other mission-centric efforts toward increased outreach and education of its members. AFT's outreach and education focuses on members who are prospective and enrolled students in gainful employment programs who, but for the Department's Repeal, would be able to access critical information regarding these programs, including whether potential programs were failing to provide a program of training that prepares students for gainful employment in a recognized occupation.

55. AFT has devoted substantial financial resources to developing, organizing, staffing, and promoting student debt clinics across the nation that provide its members, and their family members, with, *inter alia*, information on student debt management, including information on enrollment in income-driven student loan repayment plans and Public Service Loan Forgiveness. AFT has also partnered with a social enterprise company called "Summer," which helps student loan borrowers navigate the loan repayment process by partnering with colleges

/ / /

and employers to help borrowers track their loans and enroll in the optimal repayment plan.

56. Prior to the Repeal, AFT's efforts regarding student debt focused largely on helping its members navigate the complicated loan repayment and forgiveness systems in order to manage their student debt effectively.

57. Because the Repeal leaves AFT members, including Individual Plaintiffs, at a substantially higher risk of incurring debt that they will be unable to repay, AFT has been forced to divert and devote its resources to activities that guard against the likely increase in members in need of counseling to remedy student debt-related problems. Part of AFT's response to counteract the effects of the Repeal has been to launch its #doyourhomework campaign (the "Campaign").

58. As part of the Campaign, AFT has developed and promoted a website that addresses the loss of information provided to prospective and enrolled students because of the Repeal. This website, http://www.aftcontinuinged.org, provides information relevant to choosing programs of higher education that are likely to lead to earnings that bear a relationship to the cost of the program and the amount of debt that students are likely to incur in order to pay for the program.

59. AFT has promoted this website to its members and staff on social media and through other electronic sources.

60. AFT has hosted webinars for its members and staff to learn more about the Campaign.

61. To develop the original content for this website and promote it to AFT members, AFT has diverted resources—including staff time and AFT funds—from other mission-centric activities that AFT undertakes for its members, including, without limitation, resources that otherwise would have been put towards activities to help its members navigate the complicated loan repayment and forgiveness systems in order to manage their student debt effectively. But for the Repeal, the

/ / /

costs that AFT devoted to the Campaign would have been spent on these other activities.

62. As part of the Campaign, AFT has also developed content for its local affiliates, including CFT, to use in webinars and other materials in order to educate their members on making quality choices regarding higher education programs. That content addresses how prospective and enrolled students can obtain information about programmatic costs, the amount of debt that students are likely to incur, and programmatic outcomes.

63. AFT has also encouraged its affiliates to consider collective bargaining proposals that require school districts to provide assistance to employees on how to choose the best programs of continuing education. AFT has similarly encouraged its affiliates to consider collective bargaining proposals that require school districts to provide additional training and resources for high school students and their families on the financial aid system in higher education.

64. Through these and other efforts, and because of the Repeal, AFT has diverted resources, including both financial resources and time of its staff, towards: (i) helping its members identify programs that—although granted eligibility by the Department—are not actually preparing students for gainful employment in a recognized occupation; (ii) promoting awareness among its members of the fact that certain programs of higher education may not prepare students for gainful employment in a recognized occupation; *and* (iii) helping members choose institutions and programs of higher education that lead to post-graduation or post-completion earnings that are commensurate with the cost of the program and/or the amount of debt incurred to attend.

65. Defendant Elisabeth (Betsy) DeVos is the Secretary of the United States Department of Education and is being sued in her official capacity. Her official address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

/ / /

66. Defendant United States Department of Education is an executive agency of the United States government and an agency of the United States within the meaning of the APA. The Department's principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

67. Defendant DeVos and Defendant United States Department of Education shall be collectively referred to as the "Defendants" or the "Department."

FACTUAL ALLEGATIONS

1. The Higher Education Act

68. Each year, under Title IV of the HEA, the Department provides billions of dollars in federal funding in the form of grants and loans to help students pay for and finance programs of postsecondary education. *See generally* 20 U.S.C. § 1001 *et seq.*

69. Title IV funding does not flow directly to students. Rather, under the HEA, funding goes from the Department to an eligible institution of higher education, which must meet an array of statutory and regulatory requirements. For purposes of determining eligibility to participate in Title IV programs, institutions are classified into three categories: (i) "public or other nonprofit" institutions; (ii) proprietary institutions, which are private, for-profit institutions; and (iii) postsecondary vocational institutions, which may be either public or private, non-profit institutions. *See* HEA §§ 101–102, 20 U.S.C. §§ 1001–1002.

70. By definition, in order to be an eligible participant in Title IV programs, both a proprietary institution and a postsecondary vocational institution must provide "an eligible program of training to prepare students for gainful employment in a recognized occupation" (a "gainful employment program"). HEA § 102(b)(1)(A)(i), (c)(1)(A), 20 U.S.C. § 1002(b)(1)(A)(i), (c)(1)(A). By definition, in order to be an eligible participant in Title IV programs, public and private non-profit institutions that are not reliant on being a postsecondary vocational institution must provide either: (i) an associate, bachelor's, graduate, or professional

degree; (2) at least a two-year program that is acceptable for full credit toward a bachelor's degree; or (3) at least a one-year training program that leads to a degree or certificate (or other recognized educational credential) and is a gainful employment program. HEA § 101(a)–(b), 20 U.S.C. § 1001(a)–(b). Taken together, these provisions establish the criteria for determining which programs (*i.e.*, "gainful employment programs" or "GE programs") must "prepare students for gainful employment in a recognized occupation" in order for students who attend those programs to be the beneficiaries of federal student loans and grants. *See also* 34 C.F.R. § 668(c)–(d) (defining eligible programs).[4]

2. The 2011 Gainful Employment Rule

71. For decades, the Department left the statutory phrase "prepare students for gainful employment in a recognized occupation" undefined, thereby leaving undefined what it means to be a "gainful employment program."

72. By 2011, however, the Department recognized "growing concerns about unaffordable levels of loan debt for students" who attended gainful employment programs. *See, e.g.*, Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,619 (July 26, 2010); Program Integrity: Gainful Employment–Debt Measures, 76 Fed. Reg. 34,386, 34,392 (June 13, 2011) (recognizing in 2011 that the rules "address harms to students that were identified by the [Government Accountability Office] and were identified in the public hearings and in comments submitted in response to the program regulations"). At that same time, the Department also recognized that "significant advances in electronic reporting and analysis . . . allow[ed] [it] to collect accurate and timely data that could not have been utilized in the past." 76 Fed. Reg. at 34,392–93. This, the Department reasoned, created a new

---

[4] This provision of the Department's regulations, 34 C.F.R. § 668.8(c)–(d), predates the adoption of the Gainful Employment Rule and took effect in 1994. *See* 58 Fed. Reg. 22,348–01, 1994 WL 155008 (Apr. 29, 1994).

In addition, except as specifically alleged, all references to the Code of Federal Regulations are to the version effective July 1, 2019.

ability to "provide the Department, students, and the institutions offering these programs with information about how well the programs are performing under the measures," 76 Fed. Reg. at 34,392–93, and thus enabled the Department to create a metrics-based approach to define what it means for a program to prepare students for gainful employment in a recognized occupation.

73. On May 26, 2009, the Department announced it would convene a negotiated rulemaking committee, as required by 20 U.S.C. § 1098a, to develop regulations regarding program integrity in Title IV programs, including regulations regarding preparing students for gainful employment in a recognized occupation. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728 (May 26, 2009). On September 9, 2009, the Department established that committee. Office of Postsecondary Education; Notice of Negotiated Rulemaking for Programs Authorized Under Title IV of the Higher Education Act of 1965, as Amended, 74 Fed. Reg. 46,399 (Sept. 9, 2009). After that committee failed to reach consensus on proposed rules, the Department published its own proposal. *See* Program Integrity Issues, 75 Fed. Reg. 34,806 (June 18, 2010) (proposing reporting and disclosure regulations); Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616 (July 26, 2010) (proposing measures for determining whether certain postsecondary educational programs lead to gainful employment in recognized occupations and the conditions under which these educational programs remain eligible for the student financial assistance programs authorized under Title IV of the HEA).

74. In final rules published in 2010 and 2011, the Department established a series of reporting and disclosure requirements for gainful employment programs, a "program approval" rule whereby a school must notify the Secretary at least ninety days before the first day of class when it intends to add an educational program that prepares students for gainful employment in a recognized occupation, and a framework to assess whether a program provides training that leads to gainful employment in a recognized occupation, as measured by factors consisting of

debt-to-earnings ratios of a program's graduates and the loan repayment rates for students who attended a program. *See* Program Integrity: Gainful Employment—New Programs, 75 Fed. Reg. 66,665 (Oct. 29, 2010); Program Integrity Issues, 75 Fed. Reg. 66,832 (Oct. 29, 2010); Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (collectively, the "2011 GE Rule"). At that time, the Department stated that "[a]dopting a definition now gives meaning to an undefined statutory term, thereby fulfilling the Department's duty to enforce the provisions of the HEA in a clear and meaningful way." 76 Fed. Reg. at 34,393.

75. Under the 2011 GE Rule, an educational program was "considered to provide training that leads to gainful employment in a recognized occupation" if the relevant cohort of students met certain eligibility metrics, namely: (i) a loan repayment rate of at least thirty-five percent; or (ii) the program's annual loan payment was less than or equal to thirty percent of discretionary income *or* twelve percent of annual earnings; or (iii) the data needed to make these determinations was not available. *See* 76 Fed. Reg. at 34,448 (codified at 34 C.F.R. § 668.7(a)).

76. The 2011 GE Rule set consequences for programs that did not meet the eligibility metrics, including requiring institutions to issue warnings to enrolled and prospective students for programs that fail once, 76 Fed. Reg. at 34,452 (codified at 34 C.F.R. § 668.7(j)(1)), or that fail two consecutive years or two out of three consecutive years, 76 Fed Reg. at 34,452 (codified at 34 C.F.R. § 668.7(h)(2)). Under the 2011 GE Rule, a failing program would become ineligible if it did not meet any of the minimum eligibility requirements for three out of the four most recent fiscal years. 76 Fed. Reg. at 34,452 (codified at 34 C.F.R. § 668.7(i)).

3. Legal Challenges to the 2011 Gainful Employment Rule

77. After the 2011 GE Rule was published, the Association of Private Sector Colleges and Universities ("APSCU") filed suit under the APA, advancing a number of arguments as to why the 2011 GE Rule was unlawful. *See generally* Compl., *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 870 F. Supp. 2d. 133

(D.D.C. 2012) (No. 1:11-cv-01314-RC) ("*APSCU I*"). Some of those arguments are relevant to whether the rationales that the Department has advanced to justify the Repeal do, in fact, satisfy the APA.

78. APSCU first argued that the eligibility metrics exceeded the Department's statutory authority under the *Chevron* framework. In this regard, APSCU asserted that the term "gainful employment" meant "a job that pays" and that "the Department's attempt to define the phrase in terms of debt and income . . . exceed[ed] its statutory authority." *APSCU I*, 870 F. Supp. 2d at 145. In response, the Department asserted that "Congress did not provide a precise definition of what it means to 'prepare students for gainful employment in a recognized occupation.'" *Id.* The Department also argued that "the operative statutory phrase [wa]s not simply 'gainful employment[,]' but rather 'gainful employment in a recognized occupation.'" *Id.* at 145–46. The Department further stated that the phrase "gainful employment in a recognized occupation" was "ambiguous." *Id.* at 146.

79. In *APSCU I*, the District Court upheld aspects of the 2011 GE Rule and vacated others. In doing so, the District Court held: (1) "the relevant statutory command is that a given program 'prepare students for gainful employment in a recognized occupation,'" *id.* at 146; (2) that phrase is ambiguous insofar as "[t]he means of determining whether a program 'prepare[s] students for gainful employment in a recognized occupation' is a considerable gap, which the Department has promulgated rules to fill," *id.* at 146; (3) the 2011 GE regulations "are a reasonable interpretation of an ambiguous statutory command," *id.* at 149; (4) both the disclosure requirements and the debt-to-earnings component of the eligibility metrics were lawfully promulgated and supported, *id.* at 154–56; and (5) the Department had not provided a reasonable explanation for the repayment rate component of the eligibility metrics, thus acting arbitrarily and capriciously, *id.* at 153–54.

/ / /

80. In *APSCU I*, because the repayment rate metric could "not be severed from the other debt metrics," which, in turn, could not be severed from the reporting requirements, the District Court vacated the eligibility metrics in their entirety, along with the associated reporting requirements. *Id.* at 154–57.

81. The Department subsequently moved to amend the holding of *APSCU I* with respect to the reporting requirements and portions of the debt measures. That motion was denied. *See generally Ass'n of Private Sector Colls. & Univs. v. Duncan*, 930 F. Supp. 2d 210 (D.D.C. 2013) (*"APSCU II"*).

4. The 2014 Gainful Employment Rule

82. Following the decisions in *APSCU I* and *APSCU II*, the Department restarted the regulatory process.

83. On March 25, 2014, the Department issued a notice of proposed rulemaking that noted, *inter alia*, "growing concerns about educational programs that, as a condition of eligibility for [T]itle IV, HEA program funds, are required by statute to provide training that prepares students for gainful employment in a recognized occupation (GE programs), but instead are leaving students with unaffordable levels of loan debt in relation to their earnings, or leading to default." Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426 (Mar. 25, 2014) (the "2014 NPRM").

84. Following a period of public comment, the Department published the Gainful Employment Rule on October 31, 2014. At that time, the Department stated that it was "concerned that a number of GE programs: (1) do not train students in the skills they need to obtain and maintain jobs in the occupation for which the program purports to provide training, (2) provide training for an occupation for which low wages do not justify program costs, and (3) are experiencing a high number of withdrawals or 'churn' because relatively large numbers of students enroll but few, or none, complete the program, which can often lead to default." 79 Fed. Reg. at 64,890. The Department further stated that it was "also concerned

about the growing evidence, from Federal and State investigations and *qui tam* lawsuits, that many GE programs are engaging in aggressive and deceptive marketing and recruiting practices. As a result of these practices, prospective students and their families are potentially being pressured and misled into critical decisions regarding their educational investments that are against their interests." 79 Fed. Reg. at 64,890.

85. To address these and other concerns, the Gainful Employment Rule defined what it means to "prepare students for gainful employment in a recognized occupation," and, in doing so, established two key "frameworks:" an "Accountability Framework" and a "Transparency Framework." 79 Fed. Reg. at 64,890.

4.1 The Gainful Employment Definition

86. The Gainful Employment Rule provides that a "program provides training that prepares students for gainful employment in a recognized occupation if the program" satisfies applicable certification requirements and "is not an ineligible program" under an aspect of the Accountability Framework known as the "D/E Rates Measure." 34 C.F.R. § 668.403(a); *see also infra* ¶¶ 101–110 (describing the D/E Rates Measure).

87. The Gainful Employment Rule defined a "gainful employment program" as an educational program offered by an institution under 34 C.F.R. § 668.8(c)(3) or (d) and identified by a combination of: (i) the institution's six-digit Office of Postsecondary Education ID ("OPEID") number; (ii) the program's six-digit CIP code, *see infra* ¶¶ 91–96, as assigned by the institution or determined by the Secretary; and (iii) the program's credential level. 34 C.F.R. § 668.402.

88. The Department's regulations at 34 C.F.R. § 668.8(c)(3) provide that one type of program offered by non-profit and public universities that is eligible to participate in Title IV is "a one-academic year [or more] training program that leads to a certificate, or other nondegree recognized credential, and *prepares students for gainful employment in a recognized occupation*." *Id.* (emphasis added).

89. The Department's regulations at 34 C.F.R. § 668.8(d) provide that to be eligible for Title IV, with a limited exception, *see id.* § 668.8(d)(4), a "program provided by a proprietary institution of higher education or postsecondary vocational institution" must provide "training that *prepares a student for gainful employment in a recognized occupation*." *Id.* (emphasis added).

90. The regulatory distinction in 34 C.F.R. § 668.8—between non-profit and public schools in subsection (c) and proprietary (or for-profit) schools in subsection (d)—reflects distinctions in the HEA. *See supra* at ¶ 70.

91. The six-digit CIP code is a "taxonomy of instructional program classifications and descriptions developed by the U.S. Department of Education's National Center for Education Statistics [("NCES")]." 34 C.F.R. § 668.402 (defining "[c]lassification of instructional program (CIP) code").

92. CIP codes can be two, four, or six digits. As described by NCES, the six-digit CIP code is the "most detailed" classification of postsecondary programs and "represent[s] specific instructional programs." Nat'l Ctr. For Educ. Statistics, *Introduction to the Classification of Instructional Programs: 2010 Edition (CIP-2010)* 1, 2 (2010), https://nces.ed.gov/ipeds/cipcode/Files/Introduction_CIP2010.pdf.

93. NCES has also described the six-digit CIP code as the "basic unit of analysis used by NCES and institutions in tracking and reporting program completions and fields of study data." *Id.* In contrast, four-digit CIP codes represent only "intermediate groupings" of similar programs. *Id.*

94. By way of example only, the four-digit CIP code 13.04 corresponds to programs that are for "Educational Administration and Supervision." Within that category, however, the six-digit CIP codes further classify[5] programs into fourteen subcategories at a more granular level of specialty:

[5] Nat'l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.04*, https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=90415.

13.0401	Educational Leadership and Administration, General
13.0402	Administration of Special Education
13.0403	Adult and Continuing Education Administration
13.0404	Educational, Instructional, and Curriculum Supervision
13.0406	Higher Education/Higher Education Administration
13.0407	Community College Administration
13.0408	Elementary and Middle School Administration/Principalship
13.0409	Secondary School Administration/Principalship
13.0410	Urban Education and Leadership
13.0411	Superintendency and Educational System Administration
13.0412	International School Administration/Leadership
13.0413	Education Entrepreneurship
13.0414	Early Childhood Program Administration
13.0499	Educational Administration and Supervision, Other

95. Similarly, the four-digit CIP code 13.13 corresponds to programs that are for "Teacher Education and Professional Development, Specific Subject Areas." Within that category, however, the six-digit CIP codes further classify[6] programs into forty subcategories at a more granular level of specialty:

13.1301	Agricultural Teacher Education
13.1302	Art Teacher Education
13.1303	Business and Innovation/Entrepreneurship Teacher Education
13.1304	Driver and Safety Teacher Education
13.1305	English/Language Arts Teacher Education
13.1306	Foreign Language Teacher Education
13.1307	Health Teacher Education
13.1308	Family and Consumer Sciences/Home Economics Teacher Education
13.1309	Technology Teacher Education/Industrial Arts Teacher Education
13.1310	Sales and Marketing Operations/Marketing and Distribution Teacher Education
13.1311	Mathematics Teacher Education
13.1312	Music Teacher Education
13.1314	Physical Education Teaching and Coaching
13.1315	Reading Teacher Education

[6] Nat'l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.13*, https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=90457.

13.1316	Science Teacher Education/General Science Teacher Education
13.1317	Social Science Teacher Education
13.1318	Social Studies Teacher Education
13.1319	Technical Teacher Education
13.1320	Trade and Industrial Teacher Education
13.1321	Computer Teacher Education
13.1322	Biology Teacher Education
13.1323	Chemistry Teacher Education
13.1324	Drama and Dance Teacher Education
13.1325	French Language Teacher Education
13.1326	German Language Teacher Education
13.1327	Health Occupations Teacher Education
13.1328	History Teacher Education
13.1329	Physics Teacher Education
13.1330	Spanish Language Teacher Education
13.1331	Speech Teacher Education
13.1332	Geography Teacher Education
13.1333	Latin Teacher Education
13.1334	School Librarian/School Library Media Specialist
13.1335	Psychology Teacher Education
13.1337	Earth Science Teacher Education
13.1338	Environmental Teacher Education
13.1339	Communication Arts and Literature Teacher Education
13.1399	Teacher Education and Professional Development, Specific Subject Areas, Other.

96. In 2014, the Department recognized that using a six-digit CIP code to define "gainful employment programs" would yield a different result than if the Department used a four-digit CIP code. For example, the Department stated that "about 32 percent of students in in-person zone and failing programs will not have nearby transfer options to an in-person program with the same six-digit CIP code and credential level. This decreases to about 10 percent when in-person programs in the same four-digit CIP code are included." 79 Fed. Reg. at 65,074. Understanding the difference—and the result of the difference—between defining programs at a six-digit level, as opposed to a four-digit level, the Department chose to define what constitutes a "gainful employment program" at the six-digit CIP code level.

/ / /

4.2 The Accountability Framework

97. The Accountability Framework created a process by which an institution establishes a gainful employment program's initial eligibility for Title IV participation (the "Certification Requirement"), as well as a process by which the Department determines whether a program can remain eligible to participate (the "Eligibility Metrics").

98. The Certification Requirement mandates that an institution establish the eligibility of a GE program by certifying, among other things, that the program is included in the institution's accreditation, satisfies applicable state or federal program-level accrediting requirements, and satisfies any state licensing or certification requirements for the occupations for which the program is designed to prepare students to enter. *See* 34 C.F.R. § 668.414. With respect to institutions offering programs that were already in existence, the Department established a "[t]ransitional certification," whereby institutions had to provide certifications of compliance to the Department as to each of the programs currently considered eligible. *Id.* § 668.414(a).

99. The Department noted in 2014 that the Certification Requirement, in addition to requiring institutions to provide certain information to the Department, "creat[ed] an enforcement mechanism for the Department to take action if a required approval [was] lost, or if a certification that was provided was false." 79 Fed. Reg. at 64,989. The Department also noted that these requirements had "minimal" burden on institutions and that "any burden [wa]s outweighed by the benefits of the requirements[,] which . . . will help ensure that programs meet minimum standards for students to obtain employment in the occupations for which they receive training." 79 Fed. Reg. at 64,989.

100. The Department referred to the Certification Requirement as an "independent pillar of the accountability framework . . . that complement[s] the metrics-based standards." 79 Fed. Reg. at 64,990.

101. In 2014, the Department also established the Eligibility Metrics to tie the continued eligibility of a GE program to the amount of debt students who completed the program incurred to attend that program in comparison to those same students' discretionary and annual earnings after completion.

102. The Eligibility Metrics establish thresholds that a program has to meet in order to remain eligible to participate in Title IV programs. The thresholds are premised on the debt-to-earnings rate or "D/E rates measure," which establishes a formula for calculating both the "annual earnings rate" and the "discretionary income rate."

103. The annual earnings rate was calculated as follows: "annual loan payment / the higher of the mean or median annual earnings." 34 C.F.R. § 668.404(a)(2).

104. The discretionary income rate was calculated as follows: "annual loan payment / (the higher of the mean or median annual earnings – (1.5 x Poverty Guideline[s])). 34 C.F.R. § 668.404(a)(1).

105. The "annual loan payment" is a component of both the discretionary income rate and the annual earnings rate calculations, the precise determination of which is subject to a methodology set forth in 34 C.F.R. § 668.404(b). That section sets out a process by which the median loan debt for a program is amortized over a period of time, the length of which is set in coordination with the type of program for which the debt was incurred (*i.e.*, ten years for a program that leads to certain certificates or associate degrees, fifteen years for programs that lead to bachelor's or master's degrees, and twenty years for programs that lead to a doctoral or first professional degree). 34 C.F.R. § 668.404(b)(2)(i).

106. The amortization of the median loan debt uses an interest rate that is the average of the annual statutory interest rates on federal Direct unsubsidized loans in effect during a specific period of time. 34 C.F.R. § 404(b)(2)(ii). The length of this period is set in coordination with the type of program for which the debt was

incurred (*i.e.*, three years for a program that leads to certain certificates, an associate degree, or a master's degree and six years for programs that lead to a bachelor's, doctoral, or first professional degree). The interest rate also depends on whether the loans were incurred with respect to graduate or undergraduate education.

107. Under the Eligibility Metrics, a program is considered passing if: (i) its annual earnings rate is less than or equal to eight percent; *or* (ii) its discretionary income rate is less than or equal to twenty percent. 34 C.F.R. § 668.403(c)(1).

108. Under the Eligibility Metrics, a program is considered failing if: (i) its annual earnings rate is greater than twelve percent or the denominator of the annual earnings rate is zero; *and* (ii) its discretionary income rate is greater than thirty percent (or the "income for the denominator of the [discretionary earnings rate] is negative or zero"). 34 C.F.R. § 668.403(c)(2).

109. Under the Eligibility Metrics, a program is considered "in the zone" if it is not a passing program and: (i) its annual earnings rate is greater than eight percent, but less than or equal to twelve percent; *or* (ii) its discretionary income rate is greater than twenty percent, but less than or equal to thirty percent. 34 C.F.R. § 668.403(c)(3).

110. Under the Accountability Framework, a GE program becomes ineligible if either: (i) it fails the Eligibility Metrics for two out of three consecutive years for which the program's D/E rates are calculated; *or* (ii) has a combination of in the zone and failing D/E rates for four consecutive award years for which the program's D/E rates are calculated. 34 C.F.R. § 668.403(c)(4).

111. Except as provided elsewhere in the Department's regulations, "an institution may not disburse [T]itle IV, HEA program funds to students enrolled in an ineligible program." 34 C.F.R. § 668.410(b)(1).

112. The Department "engaged in a thorough rulemaking process before promulgating its debt-to-earnings regulations" and the "final rule is replete with

explanations for the chosen metrics." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 190–91 (D.D.C. 2015) ("*APSCU III*").

113. As part of the Accountability Framework, an institution is required to provide a warning to enrolled and prospective students if the Secretary notifies that institution that one of its GE programs could become ineligible during the following award year, based on its final D/E rates measure. 34 C.F.R. § 668.410(a). The regulations include provisions regarding the content of these warnings, the language (*i.e.*, alternatives to English) to use in making these warnings, and the means of delivery to both prospective and enrolled students. 34 C.F.R. § 668.410(a)(2)–(6).

114. In 2014, the Department stated that such a warning was "essential" for students and would provide "currently enrolled students with important information about program outcomes and the potential effect of those outcomes on the program's future eligibility for [T]itle IV, HEA program funds." 79 Fed. Reg. at 64,964. The Department further highlighted how the "warnings will provide consumers with information of the kind that Congress has already determined necessary to make an 'informed judgment about the educational benefits available at a given institution.'" 79 Fed. Reg. at 64,967 (quoting Student Right-To-Know and Campus Security Act, Pub. L. No. 101-542, § 102, 104 Stat. 2381 (1990)).

4.2.1 The Department Cited Substantial Support for the Eight Percent Annual Earnings Threshold

115. The Department noted in the Gainful Employment Rule that the eight percent threshold in the Eligibility Metrics "has long been referred to as a limit for student debt burden" and that "[s]everal studies of student debt have accepted the 8 percent standard." 79 Fed. Reg. at 64,919. Specifically, the Department cited to the following sources:

- Keith Greiner, *How Much Student Loan Debt Is Too Much?*, 26 J. of Student Fin. Aid 1, 7–19 (1996) (cited at 79 Fed. Reg. at 64,919 n.100);

- Patricia M. Scherschel, *Student Indebtedness: Are Borrowers Pushing the Limits?,* USA Group Found. (Nov. 1998) (cited at 79 Fed. Reg. at 64,919 n.101);
- Steven A. Harrast, *Undergraduate Borrowing: A Study of Debtor Students and their Ability to Retire Undergraduate Loans*, 34 J. of Student Fin. Aid 1, 21–37 (2004) (cited at 79 Fed. Reg. at 64,919 n.102); *and*
- Tracey King & Ivan Frishberg, *Big Loans, Bigger Problems: A Report on the Sticker Shock of Student Loans*, The State PIRG's Higher Education Project (Mar. 2001), *available at:* www.pirg.org/highered/highered.asp?id2=7973 (cited at 79 Fed. Reg. at 64,919 n.103).

116. The Department also cited to the fact that, in 1986, the National Association of Student Financial Aid Administrators identified eight percent of gross income as a limit for excessive debt burden. 79 Fed. Reg. at 64,919 n.104 & accompanying text.

117. In addition, the Department cited a study by Sandy Baum and Marie O'Malley that determined that borrowers typically feel overburdened when the debt-to-earnings ratio is in excess of eight percent. 79 Fed. Reg. at 64,919 n.105 & accompanying text.

118. The Department also responded to comments suggesting that "the paper by [Sandy] Baum and [Saul] Schwartz that [the Department] rel[ies] on for support of the 20 percent discretionary income rate threshold rejects the 8 percent annual earnings rate threshold and that for this reason, a higher threshold for the annual earnings rate is more appropriate." 79 Fed. Reg. at 64,919 n.106 & accompanying text. The Department considered this comment and noted that Baum and Schwartz "specifically acknowledge the widespread acceptance of the 8 percent standard and conclude that, although it is not as precise as a standard based on a

function of discretionary earnings, it is 'not . . . unreasonable.'" 79 Fed. Reg. at 64,919 n.107 & accompanying text (ellipses in original). The Department also noted that Baum and Schwartz "recommend[ed] a sliding scale limit for debt-to-earnings, based on the level of discretionary earnings, that results in a 'maximum Debt-Service Ratio' standard generally stricter than 8 percent." 79 Fed. Reg. at 64,919.

119. In adopting the eight percent annual earnings threshold, the Department likewise looked to guidance from financial regulators regarding the size of debt service payments for non-mortgage debt, specifically noting that the Federal Housing Administration's underwritings standards set total debt at an amount not exceeding forty-three percent of annual income. The Department further noted that, with housing debt comprising thirty-one percent of total income, twelve percent would be left for all other debt, including student loan debt, car loans, and other consumer debt. 79 Fed. Reg. at 64,919 n.109 & accompanying text. The Department then highlighted how eight percent was an appropriate standard because it fell "reasonably within the 12 percent of gross income attributable to non-housing debt under current lending standards, as well as the 9.75 percent of gross income attributable to non-credit card debt." 79 Fed. Reg. at 64,919 n.109 & accompanying text.

120. The Department's reliance on these studies vis-à-vis the eight percent threshold were also consistent with the characterization of that figure by Baum and Schwartz, who, in their paper cited by the Department, noted that "[a] number of other studies have also accepted the 8 percent rule, either explicitly or implicitly." Sandy Baum & Saul Schwartz, *How Much Debt is Too Much? Defining Benchmarks for Managing Student Debt,* College Board 1, 2 (2006), *available at*: https://files.eric.ed.gov/fulltext/ED562688.pdf.

/ / /

/ / /

/ / /

4.2.2 The Department Cited Substantial Support for the Twenty Percent Discretionary Income Threshold

121. The Department based its support for the twenty percent discretionary income threshold on a 2006 study in which Baum and Schwartz proposed a benchmark for a manageable debt level of not more than twenty percent of discretionary income. 79 Fed. Reg. at 64,919 (highlighting that Baum and Schwartz "proposed that borrowers have no repayment obligations that exceed 20 percent of their income, a level they found to be unreasonable under virtually all circumstances").

122. The Department had previously relied upon the Baum and Schwartz study in promulgating the 2011 GE Rule, when it increased the twenty-percent measure by fifty percent (from twenty to thirty percent) in order to make certain that a program's debt levels were not excessive. In *APSCU I*, the District Court held that the discretionary income threshold from the 2011 GE Rule was "based upon expert studies and industry practice—objective criteria upon which the Department could reasonably rely." 870 F. Supp. 2d at 153.

123. In 2014, the Department eliminated that fifty-percent buffer and instead created a "three-tier pass, zone, fail construction" to "make it unnecessary to create [a] buffer by raising the passing thresholds." 79 Fed. Reg. at 64,920.

4.2.3 The Department Considered Alternative Metrics

124. The Department considered numerous alternative eligibility metrics in 2014. *See* 79 Fed. Reg. at 64,912 (including a section entitled "Alternative Metrics").

125. In the 2014 NPRM, the Department proposed to include an eligibility metric *in addition* to the D/E rates measure—the "pCDR measure" or the program-level cohort default rate—"which examines the rate at which borrowers who previously enrolled in the program default" on their federal student loans. 79 Fed. Reg. at 16,540. Unlike the D/E rates measure, the pCDR measure was designed to "evaluate the default rate of former students enrolled in a GE program, regardless

of whether they completed the program." 79 Fed. Reg. at 16,540. As the Department stated in 2014, the pCDR measure applied to "those programs that have relatively high enrollments but no or few completions such that students are left with debt they cannot repay." 79 Fed. Reg. at 16,442.

126. The 2014 NPRM proposed that, in order for a GE program to remain eligible for purposes of Title IV, it would have to pass *both* the D/E rates measure *and* the pCDR measure.

127. In response to comments, the Department reaffirmed its view about the "importance of holding GE programs accountable for the outcomes of students who do not complete a program and ensuring that institutions make strong efforts to increase completion rates." 79 Fed. Reg. at 64,915. At the same time, based on the "wealth of feedback" submitted during the comment period, the Department determined that "further study is necessary before we adopt pCDR or another accountability metric that would take into account the outcomes of students who do not complete a program." 79 Fed. Reg. at 64,915.

128. The Department considered numerous other alternatives in response to comments. For example, as noted in the Gainful Employment Rule, commenters proposed—and the Department considered—alternative metrics "closely linked to student academic achievement, loan repayment behavior, or employment outcomes like job placement rates." 79 Fed. Reg. at 64,912. Commenters suggested, and the Department considered, metrics that accounted for local labor market conditions. *Id.* Still other commenters suggested that metrics should be tailored to measure student outcomes in specific occupational fields, such as cosmetology or medical professions, or use licensure exam pass rates. Still other alternatives were suggested and considered. *See, e.g.*, 79 Fed. Reg. at 65,091 ("As part of the development of these regulations, the Department engaged in a negotiated rulemaking process in which we received comments and proposals from non-Federal negotiators representing institutions, consumer advocates, students, financial aid

administrators, accreditors, and State Attorneys General. The non-Federal negotiators submitted a variety of proposals relating to placement rates, protections for students in failing programs, exemptions for programs with low borrowing or default rates, rigorous approval requirements for existing and new programs, as well as other issues. . . . In addition to the proposals from the non-Federal negotiators and the public, the Department considered alternatives to the regulations based on its own analysis, including alternative provisions for the D/E rates measure, as well as alternative metrics.").

129. In addition to considering alternative eligibility metrics, in 2014 the Department contemplated alternative methods for calculating the D/E rates measure. For example, the Department looked at alternatives to the "n-size," which represents the minimum number of students that completed a program during a four-year period in order for the Department to issue D/E rates with respect to a program. *See* 34 C.F.R. § 668.404(f)(1). In 2014, the Department considered the implications of using an "n-size of 10" for two-year cohort periods, and "although the Department believe[d]," in 2014, that "an n-size of 10 would be reasonable for the D/E rates measure, [it] elected to retain the n-size of 30 and to include those who completed over a four-year period if needed to achieve a 30-student cohort for a given program." 79 Fed. Reg. at 65,092.

130. The Department also considered several options for the interest rate to apply to the "annual loan payment" component of the D/E rates measure calculation. In the 2014 NPRM, the Department used the average interest rate over the six years prior to the end of the applicable cohort period on federal Direct unsubsidized loans. This proposal was designed to approximate the interest rate that a large percentage of students in the calculation received, even those students who attended four-year programs, and to mitigate against year-to-year fluctuations in interest rates that could lead to volatility in the D/E rates measure results. After receiving comments suggesting the use of a sliding scale, whereby interest rates

would be averaged over a number of years that corresponded to program length, the Department changed its position in the final rule. 79 Fed. Reg. at 65,092–93.

131. The Department likewise considered several options regarding the amortization period for the annual loan payment component of the D/E rates measure. For example, in the 2014 NPRM, the Department invited comment on using a 10-year amortization for all programs, which it believed to be a "reasonable assumption," as well as a 20-year amortization period for all programs. 79 Fed. Reg. at 65,093. As the Department stated:

> Although the prevalence of the standard 10-year repayment plan and data related to older cohorts could support a 10-year amortization period for all credential levels, the Department has retained the split amortization approach in the regulation. Growth in loan balances, the introduction of plans with longer repayment periods than were available when those older cohorts were in repayment, and some differentiation in repayment periods by credential level in more recent cohorts contributed to this decision.

79 Fed. Reg. at 65,093; *see also* 79 Fed. Reg. at 65,094–95 (including tables demonstrating the Department's analysis of amortization periods).

132. The Department also conducted an extensive analysis of student demographics. Although it acknowledged that student characteristics could play a role in postsecondary outcomes, "based on . . . regression and descriptive analyses," the Department could not "conclude that the D/E rates measure is unfair towards programs that graduate high percentages of students who are minorities, low-income, female, or nontraditional or that demographic characteristics are largely determinative of results." 79 Fed. Reg. at 65,057. Instead, in 2014, the Department concluded that:

> [There was] a negative association between the proportion of low-income students and the annual earnings rate when controlling for other demographic and non-demographic factors, similar passing rates across all quartiles of low-income variables, and similar demographic profiles in passing, zone, and failing programs for almost all of the variables examined. These and other results of our analyses suggest that the regulation is not primarily measuring student demographics.

79 Fed. Reg. at 65,057.

4.2.4 The Department Implemented an "Alternate Earnings Appeals" Process

133. The Gainful Employment Rule also included a process (the "Alternate Earnings Appeals" process) for an institution to appeal the Department's calculation of its D/E rates, which allowed an institution to use "alternate earnings" data from "institutional survey[s]" or a state-sponsored data system to recalculate a program's final D/E rates and appeal a "zone" or "failing" determination. *See generally* 34 C.F.R. § 668.406.

4.3 The Transparency Framework

134. The second component of the Gainful Employment Rule, the Transparency Framework, was designed to "increase the quality and availability of information about the outcomes of students enrolled in GE programs," which the Department believed would benefit "[s]tudents, prospective students, and their families, as they make critical decisions about their educational investments; the public, taxpayers, and the Government, by providing information that will enable better protection of the Federal investment in these programs; and institutions, by providing them with meaningful information that they can use to help improve student outcomes in their programs." 79 Fed. Reg. at 64,890.

135. To accomplish this goal, the Department established both reporting and disclosure requirements. *See* 34 C.F.R. § 668.411 (detailing the "Reporting Requirements"); *id.* § 668.412 (detailing the "Disclosure Requirements"). Accordingly, the Gainful Employment Rule "establishes the rules and procedures under which . . . [a]n institution reports information about the program to the Secretary" and "[a]n institution discloses information about the program to students and prospective students." *Id.* § 668.401(b)–(c).

136. Under the Reporting Requirements, in accordance with procedures established by the Secretary, institutions were required to report information to the Department, including student-level information regarding GE programs,

/ / /

programmatic job placement rates, and "any other information the Secretary requires the institution to report." 34 C.F.R. § 668.411.

137. Under the Disclosure Requirements, institutions were required to post or provide a copy of a "disclosure template provided by the Secretary" on certain program webpages, in certain promotional materials, and, in certain circumstances, directly to prospective students through procedures set forth via regulation. This information included, but was not limited to: (i) the primary occupations that the program prepares students to enter; (ii) the programmatic completion rates (as calculated by the Department); (iii) the length of the program; (iv) the number of clock or credit hours required; (v) the number of individuals enrolled in the program in the most recent year; (vi) the loan repayment rate, as calculated by the Secretary for various cohorts; (vii) information on the cost of tuition, books, fees, etc.; (viii) job placement rates; (ix) the percentage of students receiving Title IV funds; (x) median loan debt for certain groups; (xi) median earnings of certain groups; (xii) the most recent program-level cohort default rate; (xiii) the most recent annual earnings rate; (xiv) information regarding licensure requirements; (xv) information regarding accreditation; and (xvi) a link to the Department's College Navigator website, its successor, or other similar federal resource. *See* 34 C.F.R. § 668.412.

138. Because gainful employment programs are defined at the six-digit CIP code level, *see* 34. C.F.R. § 668.402, institutions had to make any required disclosures regarding those programs at the six-digit CIP code level, rather than at the four-digit CIP code level. *See supra* ¶¶ 91–95.

4.4 The Department Directly Addressed Challenges to its Statutory Authority

139. After proposing the Gainful Employment Rule, the Department received comments from the public asserting that the Department was exceeding its statutory authority. *See* 79 Fed. Reg. at 64,892 (describing comments asserting, for example, that the HEA does not support the Department's action to define gainful employment and that Congress did not intend for the Department to measure

whether a program leads to gainful employment based on debt and earnings). In response, the Department asserted that the statutory authority for the rule derived from three sources, namely provisions of the HEA, the General Education Provisions Act, and the Department of Education Organization Act. 79 Fed. Reg. at 64,892. The Department also asserted that *APSCU I* and *APSCU II* had "confirmed" its authority to regulate. With regard to those lawsuits, the Department noted "[s]pecifically" that *APSCU I* "concluded that the phrase 'gainful employment in a recognized occupation' is ambiguous" and that "Congress delegated interpretive authority to the Department." 79 Fed. Reg. at 64,892–93; *see also* 79 Fed. Reg. at 64,891 ("The Department's authority for the regulations is also informed by the legislative history of the provisions of the HEA . . . as well as the rulings of the U.S. District Court for the District of Columbia in [*APSCU I & II*].").

140. In proposing the Gainful Employment Rule, the Department also received comments questioning the Department's differential treatment of for-profit institutions and public institutions. In response, the Department affirmed that the coverage lines in the Gainful Employment Rule were drawn "by statute" and that it "d[id] not have the authority to exclude" certain programs from the regulations. 79 Fed. Reg. at 64,897. The Department also stated that the fact that "similar programs offered by for-profit institutions and public institutions" were treated differently under the regulations "reflects the treatment of these programs under the HEA and a policy decision made by Congress." 79 Fed. Reg. at 64,898.

4.5 The Department Carefully Considered the Source of Data Underlying the Gainful Employment Rule

141. In proposing the Gainful Employment Rule, the Department received comments regarding the reliance on data from the Social Security Administration Master Earnings File ("SSA earnings data") and, more specifically, comments questioning whether the rule should be based on a different data source, such as data from the Bureau of Labor Statistics ("BLS"). 79 Fed. Reg. at 64,941. In

response, the Department considered BLS data as well as other sources of earnings data that commenters had not even proposed, but found no sources superior to the SSA earnings data. *See* 79 Fed. Reg. at 64,941–42 (explaining why the Department declined to use data from the BLS); 79 Fed. Reg. at 64,956 (noting that the Department conferred with SSA, but it did not have data superior to the SSA earnings data).

5. Numerous Courts Upheld the Gainful Employment Rule

142. After the Gainful Employment Rule was published, the Association of Proprietary Colleges ("APC") filed suit to challenge the regulations under the APA. *See Ass'n of Proprietary Colls. v. Duncan*, 107 F. Supp. 3d 332 (S.D.N.Y. 2015) ("*APC v. Duncan*"). APSCU also filed suit again to challenge the Gainful Employment Rule. *See APSCU III*, 110 F. Supp. 3d 176 (D.D.C. 2015).

143. In *APC v. Duncan*, APC asserted three arguments: (1) the Gainful Employment Rule violated the Due Process Clause of the United States Constitution; (2) the regulation exceeded the Department's authority under the HEA; and (3) the regulation constituted arbitrary and capricious decision making under the APA. *APC v. Duncan*, 107 F. Supp. 3d at 345.

144. After rejecting APC's constitutional arguments, the District Court turned to APC's argument that the statutory phrase at issue (*i.e.*, the "gainful employment" phrase) was unambiguous, and even if ambiguous, the Department's interpretation of that phrase was unreasonable and contrary to legislative intent. 107 F. Supp. 3d at 358. With respect to the question of statutory ambiguity, the District Court found the *APSCU I* analysis regarding the meaning of that phrase to be "thorough," "faithful to Supreme Court precedent," and with "persuasive" logic and reasoning. *Id.* at 359.

145. As a result, the District Court held the phrase "prepares students for gainful employment in a recognized occupation" to be the "relevant statutory command" left ambiguous by Congress. *Id.* at 359–60. The District Court concluded

that the Gainful Employment Rule was "a reasonable interpretation of [that] ambiguous statutory command." *Id.* at 363.

146. In *APSCU III*, the District Court first considered whether the term "prepare students for gainful employment in a recognized occupation" had a "plain meaning that the Department (and the Court) must simply implement," or whether the "language was ambiguous such that the Court should accept the Department's interpretation—assuming, of course, that its interpretation is a reasonable one." 110 F. Supp. 3d at 184. The District Court agreed with the Department, *APSCU I*, and *APC v. Duncan*, holding that the phrase was "ambiguous" and "leaves a policy gap" for the Department to fill. 110 F. Supp. 3d at 186. The District Court also held that the Department's interpretation of that statutory phrase was reasonable under step two of the *Chevron* framework.

147. In *APSCU III*, the District Court next considered whether the Gainful Employment Rule was arbitrary and capricious under the APA. The Court considered and rejected APSCU's thirteen separate arguments that the Gainful Employment Rule was arbitrary and capricious. 110 F. Supp. 3d at 190–98. The Court likewise rejected a host of arguments that the Department's reporting, disclosure, and certification requirements were arbitrary and capricious. *Id.* at 198–204.

148. In *APSCU III*, the District Court also considered the Department's use of the SSA earnings data, holding that the Department had determined that no better data existed and had done so "only after rejecting other possible sources of data as inadequate." *Id.* at 195 (citing to the Department's description of "problems with alternative data from the [BLS]").

149. The *APSCU III* decision was upheld in its entirety by the United States Court of Appeals for the D.C. Circuit. *APSCU v. Duncan*, 640 Fed. App'x 5 (D.C. Cir. 2016) ("*APSCU Appeal*").

/ / /

6. Pre-Repeal Developments

6.1 The Gainful Employment Rule Was Working

150. On January 9, 2017, the Department released the first set of D/E rates measures for GE programs participating in Title IV. At the time, the Department noted that "[t]he data show that, while many postsecondary programs offer value to students, there are a significant number of career training programs—specifically for-profit programs—that do not provide their graduates with a reasonable return on investment."[7]

151. The 2017 data release further indicated "that over 800 programs serving hundreds of thousands students fail the Department's accountability standards with an annual loan payment that is at least greater than 30 percent of discretionary income and greater than 12 percent of total earnings."[8] The Department also noted that "[n]inety-eight percent of these failing GE programs are offered by for-profit institutions."[9] Moreover, the Department highlighted that "[a]n additional 1,239 programs received a 'zone' rate, with an annual loan payment that is between 20 and 30 percent of discretionary income or between 8 and 12 percent of total earnings."[10]

152. The January 2017 data release established that the Gainful Employment Rule was working as intended.

153. When the Department proposed to rescind the Gainful Employment Rule, Steve Gunderson, the President of Career Education Colleges and

---

7 *See* Press Release, U.S. Dep't of Educ., *Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs* (Jan. 9, 2017), https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs.

8 *Id.*

9 *Id.*

10 *Id.*

Universities, formerly known as APSCU, reportedly stated: "The reality is every school that has a program that was failing gainful employment metrics—and they knew it couldn't be fixed—they've already closed. **The sector today is so much better.**"[11]

154. Other data available to the Department provides further evidence that the Gainful Employment Rule was working as intended. For example, in 2012—after the publication of the 2011 GE Rule—ITT Technical Institute noted in a Securities and Exchange Commission annual filing that "[t]he GE Requirements have and will continue to put downward pressure on tuition prices, so that students do not incur debt that exceeds the levels required for a program to remain eligible under Title IV Programs."[12] A study by New America, provided to the Department during the 2018 comment period, established that sixty-five percent of failing programs in the first cohort of GE data were no longer enrolling students as of August 2018.[13]

---

[11] *See* Erica Green, Devos Ends Obama-Era Safeguards Aimed at Abuses by For-Profit Colleges, N.Y. Times (Aug. 18, 2018), https://www.nytimes.com/2018/08/10/us/politics/betsy-devos-for-profit-colleges.html (emphasis added); *see also* Comment from Hon. Raja Krishnamoorthi, Member of Congress, to U.S. Dep't of Educ., Docket No. ED-2018-OPE-0042 1, 2 & n.9 (Sept. 10, 2018), *available at*: https://www.regulations.gov/document?D=ED-2018-OPE-0042-12124 (highlighting Mr. Gunderson's remark in a comment to the Department).

[12] ITT Technical Servs., Inc., Annual Report (Form 10-K) (Dec. 31, 2011), *quoted in* Comment from Inst. for Coll. Access & Success, to U.S. Dep't of Educ., Docket No. ED-2018-OPE-0042 1, 7 n.26 (Sept. 13, 2018), *available at:* https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13819&attachmentNumber=1&contentType=pdf.

[13] Comment from New Am. Found., to U.S. Dep't of Educ., Docket No. ED-2018-OPE-0042 1, 16 (Sept. 14, 2018), *available at:* https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13659&attachmentNumber=1&contentType=pdf. *See also, e.g.*, Kevin Carey, *Door Opens for Predatory Colleges*, N.Y. Times, July 1 , 2017, at A11 (noting that the Gainful Employment rule has "prove[n] more effective at shutting down bad college programs than even the most optimistic backers could have hoped").

155. Evidence that post-dates the Repeal is consistent with evidence establishing that the Gainful Employment Rule was working. For example, in November 2019, Robert Kelchen, an associate professor at Seton Hall University, and Zhuoyao Liu, a Ph.D. candidate at the same university, released a paper showing that for-profit college programs that passed gainful employment metrics were associated with a lower likelihood of closing. As Professor Kelchen stated, "for-profit colleges, possibly encouraged by accrediting agencies and/or state authorizing agencies, closed lower-performing programs and focused their resources on their best-performing programs."[14]

156. On December 17, 2019, Jonathan Kaplan, former President of for-profit Walden University, wrote a paper highlighting how the Gainful Employment Rule had been "achieving one of its stated policy goals," *i.e.*, "encouraging for-profits to examine with more intention the financial return of their programs for students."[15] As Mr. Kaplan stated:

> I believe the gainful-employment regulation imposed reasonable constraints and accountability standards on proprietary institutions, notwithstanding the fact that I led a for-profit university for years. While its debt-to-earnings metric was an imperfect proxy for academic quality, in my view, the rule's repeal by the Trump administration is misguided.[16]

---

[14] *See* Madeline St. Armour, *Study: Gainful Employment Associated with Closures*, Inside Higher Educ.(Nov. 12, 2019), https://www.insidehighered.com/quicktakes/2019/11/12/study-gainful-employment-associated-closures (discussing Robert Kelchen & Zhuoyao Liu, *Did Gainful Employment Regulations Result in College and Program* Closures? *An Empirical Analysis* (Nov. 2019), *available at:* https://kelchenoneducation.files.wordpress.com/2019/11/kelchen_liu_nov19.pdf).

[15] Jonathan Kaplan, *The Misguided Repeal of Gainful Employment*, Inside Higher Educ. (Dec. 17, 2019), https://www.insidehighered.com/views/2019/12/17/repealing-gainful-employment-regulation-mistake-it-was-imperfect-good-policy.

[16] *Id.*

6.2 The Gainful Employment Rule Covered Thousands of Programs: Public, Non-Profit, and For-Profit

157. According to a chart the Department published in April 2018, the Gainful Employment Rule covered the following numbers of programs in 2015, broken down by type of program:

Type of Institution	Number of GE Programs
Private, Non-Profit <2 Years	78
Private, Non-Profit 2–3 Years	173
Private, Non-Profit 4+ Years	212
Total Private, Non-Profit	**463**
Private, For-Profit <2 Years	1,460
Private, For-Profit 2–3 Years	2,042
Private, For-Profit 4+ Years	2,174
Total Private, For-Profit	**5,676**
Public, <2 Years	293
Public, 2–3 Years	1,898
Public, 4+ Years	302
Total Public	**2,493**
Total Foreign Schools	**5**

6.3 The Department Delayed the Enforcement and Operation of the Gainful Employment Rule

158. Following President Trump's inauguration, and the nomination and confirmation of Defendant Secretary DeVos, the Department took a number of steps to delay the enforcement and operation of the Gainful Employment Rule.

159. For example, in March 2017, the Department published a notice in the *Federal Register* announcing that it would allow additional time—until July 1, 2017—for institutions to submit an alternate earnings appeal and comply with the Disclosure Requirements. *See* Program Integrity: Gainful Employment, 82 Fed. Reg. 13,227 (Mar. 10, 2017).

160. In May 2017, the Department's "Regulatory Reform Task Force," which it convened following the February 24, 2017, issuance of Executive Order 13,777, announced that the Department had already identified the Gainful

/ / /

Employment Rule to consider for "repeal, replacement, or modification" and that aspects of the rule had been "delay[ed]."[17]

161. In July 2017, the Department published a notice in the *Federal Register* announcing that it would further delay—until July 1, 2018—the time for institutions to comply with certain Disclosure Requirements in the Gainful Employment Rule. Program Integrity: Gainful Employment, 82 Fed. Reg. 30,975, 30,976 (July 5, 2017). The Department also extended the time for institutions to submit alternate earnings appeals again. 82 Fed. Reg. at 30,976. The Department's justification regarding the alternate earnings appeals delay was premised on a ruling in *American Association of Cosmetology Schools v. DeVos*, which ordered the Department not to enforce aspects of the alternate earnings appeals process against institutions that were members of the American Association of Cosmetology Schools. 258 F. Supp. 3d 50, 56, 76 (D.D.C. 2017) (noting twice that the limited relief would "avoid[] upending the entire" GE regulatory scheme and would narrowly provide greater flexibility to AACS members schools to challenge the D/E rates).

162. Except as to alternate earnings appeals for AACS member schools, *AACS* did not invalidate the Certification Requirements, Eligibility Metrics, Reporting Requirements, or Disclosure Requirements.

163. Despite the limited applicability of *AACS*, the Department's July 2017 extension, *see supra* ¶ 161, applied to *all* programs governed by the Gainful Employment Rule.

164. In August 2017, the Department published a notice in the *Federal Register* establishing October 6, 2017, as the deadline for institutions to submit a

[17] U.S. Dep't of Educ., *Regulatory Reform Task Force Progress Report* 1, 4, 48 (May 2017), *available at*: https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report.pdf.

notice of intent to file an alternate earnings appeal. The Department also established February 1, 2018, as the deadline to actually file such an appeal. Program Integrity: Gainful Employment, 82 Fed. Reg. 39,362, 39,363 (Aug. 18, 2017).

165. In the August 2017 notice, the Department announced new requirements for the substance of alternate earnings appeals, designed expressly "[t]o comply with the Court Order" in *AACS*. 82 Fed. Reg. at 39,363.

166. A coalition of eighteen state attorneys general filed suit to challenge the Department's constructive revocation of the Gainful Employment Rule without engaging in the processes required by the APA. *See generally* Compl., *Maryland v. U.S. Dep't of Educ.*, No. 1:17-cv-02139 (D.D.C. Oct. 17, 2017). That action remains pending.

167. In June 2018, the Department published a notice in the *Federal Register* announcing that it would allow additional time for institutions to comply with the Disclosure Requirements in 34 C.F.R. § 668.412(d)–(e). Program Integrity: Gainful Employment, 83 Fed. Reg. 28,177, 28,178 (June 18, 2018). The Department also announced that the "requirements in 34 C.F.R. § 668.412(a), (b), and (c) that schools post disclosures on their program websites using the approved disclosure template provided by the Department and that those disclosures be updated annually remain in effect." 83 Fed. Reg. at 28,178.

168. In May 2019, just two months before the Repeal was announced, the Department released the 2019 disclosure template, which it asserted would "provid[e] the data that we believe are especially meaningful to students while reducing administrative burden for schools."[18]

[18] U.S. Dep't of Educ., Fed. Student Aid, *Gainful Employment Electronic Announcement No. 119 – Release of the 2019 GE Disclosure Template* (May 9, 2019), https://ifap.ed.gov/eannouncements/050919GEAnnounce119Release2019GEDisclosureTemplate.html.

7. Delays Turned into Repeal

169. After giving poor-performing institutions the benefit of these delays, *supra* ¶¶ 158–168, the Department has now taken a final action (*i.e.*, the Repeal) to eliminate the Gainful Employment Rule in its entirety, asserting that the rule would "penaliz[e] programs" and "create an approach to institutional accountability that could potentially be used to manipulate the higher education marketplace." 84 Fed. Reg. at 31,410–11.

170. Section 492 of the HEA, 20 U.S.C. § 1098a, requires the Secretary to involve the public in the development of proposed regulations affecting Title IV, HEA programs. The statute requires the Secretary to subject regulatory proposals to a negotiated rulemaking process, subject to exceptions inapplicable here.

171. On August 30, 2017, the Department announced its intention to establish two negotiated rulemaking committees to prepare proposed Title IV regulations. One such committee (the "Committee") would consider specific changes to the Gainful Employment Rule. *See* Negotiated Rulemaking Committees; Negotiator Nominations and Schedule of Committee Meetings-Borrower Defenses, Financial Responsibility, and Gainful Employment, 82 Fed. Reg. 41,194 (Aug. 30, 2017).

172. Under the HEA, if negotiators reach consensus on proposed regulations, the Department agrees to publish those regulations without alteration, unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreement reached during negotiations. *See* HEA § 492(b), 20 U.S.C. § 1098a(b).

173. Regardless of whether consensus is reached, any proposed rules are subject to the standard "notice and comment" rulemaking procedures set forth in § 553 of the APA.

174. The Committee met to consider and develop proposed regulations on December 4–7, 2017, February 5–8, 2018, and March 12–15, 2018.

175. During its meetings, the Committee considered many proposals, including the Department's draft regulatory language, and Committee members' alternative language and suggestions.

176. At the final meeting, on March 15, 2018, the Committee did not reach consensus on proposed regulations.

177. On August 14, 2018, the Department published the 2018 NPRM in the *Federal Register*, *see supra* ¶ 8, in which it proposed to rescind the Gainful Employment Rule in its entirety. 83 Fed. Reg. at 40,167.

178. In connection with the 2018 NPRM, the Department required interested parties to provide comments within thirty days—by September 13, 2018—instead of employing the standard 60-day period contemplated by Executive Order 12,866. *See* Exec. Order No. 12,866, § 6(a)(1), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (publishing the Executive Order dated Sept. 30, 1993). This 30-day period was shorter than the 45-day period used in either 2014 or 2011.

179. The Department received 13,966 comments in response to the 2018 NPRM.

180. After the 2018 NPRM, but before the Repeal was published, the Department's Office of the Inspector General ("OIG") described the proposed repeal as a "Significant Management Decision[ ] with Which the OIG Disagreed."

181. In a November 2018 report to Congress, OIG stated that it "notified the Department [in May 2018] of our disagreement with its proposal to eliminate the Gainful Employment regulations without an adequate replacement to ensure accountability." U.S. Dep't of Educ., Office of the Inspector Gen., *Semiannual Report to Congress, No. 77* 1, 65 (Nov. 2018), *available at*: https://www2.ed.gov/about/offices/list/oig/semiann/sar77.pdf. The OIG also highlighted how:

> [She] and her predecessors have testified before Congress on issues involving proprietary schools over the years, and the sector continues to be a high-risk area for the Department. OIG resources devoted to

> postsecondary school investigations continue to be disproportionately devoted to fraud and abuse in the proprietary sector. The sector also represents a disproportionate share of student loan defaults. In addition, findings of misrepresentation of job placement rates and guaranteed employment by Corinthian Colleges and other schools provide a clear demonstration of the need for particular accountability.

Id.

182. The Department's findings with respect to Corinthian Colleges related to its misrepresentation of job placement statistics that were required to be disclosed because of the 2011 GE Rule.

183. Rather than respond meaningfully to the extensive opposition to the 2018 NPRM and abandon its proposal to rescind the Gainful Employment Rule, the Department made no changes to the proposed rule. Instead, on July 1, 2019—291 days after the conclusion of an abbreviated comment period—the Department took a final agency action to rescind the Gainful Employment Rule in its entirety by publishing the Repeal in the *Federal Register*.

184. After the Repeal was issued, OIG stated that it "disagreed with the [Repeal] without including an adequate replacement to ensure accountability and compliance with the requirements of the HEA." U.S. Dep't of Educ., Office of the Inspector Gen., *Semiannual Report to Congress, No. 79* 1, 68 (Nov. 2019), *available at*: https://www2.ed.gov/about/offices/list/oig/semiann/sar79.pdf.

185. The effective date of the Repeal is July 1, 2020, due to the statutory requirement known as the "Master Calendar Rule." The Master Calendar Rule provides that regulations affecting Title IV programs must be published in final form by November 1, prior to the start of the July 1 award year in which they become effective. *See* HEA § 482(c), 20 U.S.C. § 1089(c). Nevertheless, in publishing the Repeal, the Secretary exercised her authority to designate certain parts of the Repeal for "early implementation" at the discretion of each institution. 84 Fed. Reg. at 31,395–96.

/ / /

186. The Department acknowledged that the Repeal would harm prospective and enrolled students. The Department admitted that, "[t]o the extent non-passing programs remain accessible with the rescission of the 2014 Rule, some students may choose sub-optimal programs" that "have demonstrated a lower return on the student's investment, either through higher upfront costs, reduced earnings, or both." 84 Fed. Reg. at 31,445. The Department further acknowledged that "this could lead to greater difficulty in repaying loans, increasing the use of income-driven repayment plans or risking defaults and the associated stress, increased costs, and reduced spending and investment on other priorities." 84 Fed. Reg. at 31,445.

187. As described below, the Repeal is arbitrary, capricious, and contrary to law because it departs, without consideration, from settled judicial precedent on the issue of whether the phrase in the HEA "prepare students for gainful employment in a recognized occupation" is ambiguous and requires interpretation by the agency; fails to consider obvious known alternatives; fails to provide a reasoned (or in some cases, any) support for the changes; relies on factors Congress did not intend for the Department to consider; demonstrates inconsistencies with other agency positions; fails to consider important aspects of the problem the Gainful Employment Rule was intended to address; rests on explanations that run counter to the evidence before the Department; and relies on explanations so implausible that they could not be ascribed to a difference of view or the product of agency expertise. Moreover, in adopting the Repeal, the Department—due to certain failures alleged herein—deprived members of the public of an adequate opportunity to comment on the Repeal and the substantive bases on which it relied.

7.1 The Department Provided No Basis for its Repeal of the Accountability Framework and Failed to Consider Evidence Before It

188. None of the Department's justifications is sufficient to satisfy the requirements of the APA.

7.1.1 The Department Ignored Judicial Precedent and Concluded the Statute is No Longer Ambiguous

189. The Department asserted that it did "not need[] to define the term 'gainful employment' beyond what appears in the statute" and that, through the Repeal, it was "confirm[ing] that it, in fact, *is* enforcing the law as written and as intended." 84 Fed. Reg. at 31,401 (emphasis in original). Yet, in making this determination, the Department failed to consider or acknowledge the holdings of *APSCU I*, *APSCU III*, *APSCU Appeal* (affirming *APSCU III*), and *APC v. Duncan*, all of which held that the relevant statutory phrase is ambiguous, leaving a substantial gap for the Department to fill.

190. In fact, prior to the issuance of the Repeal, the Department agreed—repeatedly and consistently in *Federal Register* notices and court filings alike—that the statutory language ("prepare students for gainful employment in a recognized occupation") was ambiguous. As alleged *supra*, in each of *APSCU I*, *APSCU III*, *APSCU Appeal* (affirming *APSCU III*), and *APC v. Duncan*, federal courts agreed with the Department that the language was ambiguous.

191. In the Repeal, however, the Department reversed course, asserting that it previously "incorrectly described legislative intent." 84 Fed. Reg. at 31,402. As the only contemporaneous examples of Congressional intent regarding the scope of the HEA, the Department asserted that, "in 1972[,] when the National Vocational Student Loan Insurance Act (NVSLIA) was passed, Congress decided to incorporate vocational education programs into the HEA, by allowing their participation in the Educational Opportunity Grants as well as the student loan programs." 84 Fed. Reg. at 31,401. According to the Department, the "House conference report" for the 1972 passage also lent credence to the Department's view that the inclusion of proprietary schools in the HEA was an "important step toward achieving the goals of providing equitable access to postsecondary education, for all students, regardless

/ / /

of whether their interests were in the traditional trades or vocations, or in typical degree programs." 84 Fed. Reg. at 31,401.

192. The Department's recitation of Congressional intent in the Repeal is riddled with inaccuracies and non sequiturs. *First*, despite the reference to the "House conference report," the ascribed quotation is actually to a statement from a single member discussing the 1972 legislation. *See* 84 Fed. Reg. at 31,401 n.52 & accompanying text (quoting the statement of Representative Ogden Reid, while erroneously describing that statement as the "House conference report"). *Second*, the NVSLI did not *pass* in 1972, but was *amended* that year (after it passed in 1965). *Third*, and perhaps most egregiously, the Department does not provide any explanation of how or why the 1972 amendments or the quoted text impacts the limitation that, as a condition of participation in Title IV, certain programs must "prepare students for gainful employment in a recognized occupation." Although the Department cites the 1972 inclusion of proprietary schools in Title IV grant programs as a step toward achieving the goals of providing additional access, it does not address the limitation that such programs need to provide programs that "prepare students for gainful employment in a recognized occupation."

193. The Department's other rationalizations regarding legislative intent are similarly misguided because they do not actually demonstrate the intent of Congress. For example, a 2011 letter from 113 members of Congress (*i.e.*, a minority of members of one chamber), which the Department cited, is not a reasonable source of legislative intent. Nor is the introduction—and subsequent failed passage—of legislation that would have prohibited the implementation of the 2011 GE Rule. 84 Fed. Reg. at 31,402. Nevertheless, the Department relied on these events to justify its purportedly new reading of legislative intent.

/ / /

/ / /

/ / /

7.1.2 The Department Disregarded the Statutory Scope and Claimed Disparate Impact on For-Profit Schools

194. A primary rationale for the Repeal is the extent to which the Gainful Employment Rule disproportionately impacts for-profit or proprietary institutions. For example, the Department asserted that "the GE regulations have a disparate impact on proprietary institutions and the students these institutions serve." 84 Fed. Reg. at 31,392. Similarly, the Department noted how "[t]he GE regulations failed to equitably hold *all* institutions accountable [for] student outcomes, such as student loan repayment." 84 Fed. Reg. at 31,394 (emphasis added). The Department also "agree[d] with commenters who expressed concern that the GE regulations established policies that unfairly target career and technical education programs." 84 Fed. Reg. at 31,397; *see also* 84 Fed. Reg. at 31,392 (asserting that the GE Rule "wrongfully targets some academic programs and institutions while ignoring other programs").

195. The Department also noted that the Gainful Employment Rule created an "uneven playing field," given that public institutions of higher education "benefit from direct appropriations" from states in the form of "taxpayer subsidies." 84 Fed. Reg. at 31,397 & n.23. The Department went on to argue that taxpayer subsidization of public institutions "may fool students into enrolling in a program that has passing D/E rates without realizing that the earnings generated by the program do not justify the direct, indirect, or opportunity costs of obtaining that education." 84 Fed. Reg. at 31,397.

196. The Department also asserted that the Repeal was necessary because the scope of the Gainful Employment Rule was underinclusive insofar as there was "ample evidence that any transparency and accountability framework must be expanded to include all [T]itle IV programs since student loan repayment rates are unacceptably low across all sectors of higher education and because a student may

/ / /

unknowingly select a non-GE program with poor outcomes because no data are available. " 84 Fed. Reg. at 31,400.

197. The Department also stated that its "review of student loan repayment rates makes it clear that the problem of students borrowing more than they can repay through a standard repayment period is not limited to students who attend proprietary institutions or who participate in [career and technical education]." 84 Fed. Reg. at 31,398.

198. None of the asserted differences in how the Gainful Employment Rule affects for-profit schools in comparison to non-profits and public institutions provides a basis for the Repeal. The Gainful Employment Rule does not discriminate between for-profit and other schools—it applies the *same standards* to gainful employment programs at all types of institutions. Any disparate impact results from *statutory* distinctions, created by Congress, for Title IV eligibility between types of schools and types of programs.

199. The Department acknowledged in the Repeal that it "could not simply expand the GE regulations to include all [T]itle IV programs since the term 'gainful employment' is found only in section 102 of the HEA." 84 Fed. Reg. at 31,394; *see also* 84 Fed. Reg. at 31,394 ("[W]ithout a statutory change, there was no way to expand the GE regulations to apply to all institutions."); 84 Fed. Reg. at 31,400 ("Since the GE regulations cannot be expanded to include all institutions, and since negotiators could not come to consensus on a GE-like accountability and transparency framework that was substantiated by research and applicable to all [T]itle IV programs, the Department decided to take another approach."). But the Department's "[]other approach" was to repeal the Gainful Employment Rule in an attempt to treat *similarly* institutions and programs that Congress had sought to treat *differently*.

200. The Department's position in the Repeal—without acknowledgment or justification—is squarely at odds with a position it took in 2015. In its briefing in

APC v. Duncan, the Department rejected the notion that the Gainful Employment Rule was arbitrary because it disproportionally affected vocationally oriented programs:

> As to plaintiff's opinion that the rules are arbitrary because many traditional colleges would have low D/E rates, *see* Pl.'s Opp'n at 32, plaintiff overlooks Congress' determination that a vocational student is "not like . . . the typical college liberal arts student," S. Rep. No. 89-758 at 4. In contrast to liberal arts students, vocational students "feel the primary reason they are in school is for purposes of acquiring job skills which will allow them to enter and compete successfully in our increasingly complex occupational society." *Id.*[] Congress accordingly *intended* vocational programs to face eligibility criteria above and beyond the criteria affecting non-vocational programs. *See, e.g.*, 20 U.S.C. § 1002(b)(1)(A)(i). It is not arbitrary for the Department to hold vocational programs to statutory requirements [when] Congress intended to reach only those programs.

Defs.' Reply in Supp. of Their Cross Mtn. for Summ. J. at 27–28, *APC v. Duncan*, 107 F. Supp. 3d (S.D.N.Y. 2015) (1:14-cv-08838-LAK).

201. Moreover, to the extent the Gainful Employment Rule affected gainful employment programs differently at for-profit schools than non-profit schools, that was a product of their performance, not the rule. Analysis that was part of the public record—and submitted to the Department during the comment period—established that, "[b]ased on data on student earnings and debt outcomes released by the Department of Education in 2017, among certificate programs where all programs are subject to the rule regardless of institutional control, 779 of the 869 programs that did not pass the debt-to-earning standard . . . were operated by for-profit colleges."[19] The same analysis also noted (again, in a comment provided to the Department) that "98 percent of the students enrolled in programs that did not meet this standard were in for-profit programs."[20]

---

[19] *See* Comment from Sandra E. Black, *et al.*, to U.S. Dep't of Educ., Docket No. ED-2018-OPE-0042 1, 7 (Sept. 12, 2018), *available at:* https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13499&attachmentNumber=1&contentType=pdf.

[20] *Id.*

202. Even further, the Department relied on a report that found that graduates of certificate programs at for-profit institutions have both higher net tuition and lower earnings, on average, than public institutions' graduates. This same report concluded that "even if the median debt burdens across both types of institutions were equalized"—taking into consideration the Department's view that tuition subsidies at public institutions unfairly improve D/E rates measures for public institutions—"a disparity would still remain in GE pass rates" between proprietary and public institutions.[21]

203. To the extent the Department's rationale was based on the purported fact that "the term 'gainful employment' is found only in section 102 of the HEA," the Department erred in failing to recognize the numerous other references in Title IV that use the "gainful employment" language. *See, e.g.*, HEA § 101(b)(1), 20 U.S.C. § 1001(b)(1) (referring, in the context of public and nonprofit institutions, to programs that "prepare students for gainful employment in a recognized occupation"); HEA § 481(b)(1)(A)(i), 20 U.S.C. § 1088(b)(1)(A)(i) (referring to programs of training that "prepare students for gainful employment in a recognized profession").

7.1.3 The Department Misconstrued the Evidence Supporting the Accountability Framework

204. The Department highlighted its view that there was insufficient evidentiary support—at the time of adoption and at present—for the Accountability Framework, both in its entirety and with respect to certain components. But in this regard, the Department both: (i) erroneously took issue with evidence considered in

[21] Preston Cooper & Jason D. Delisle, *Measuring Quality or Subsidy? How State Appropriations Rig the Gainful Employment Test*, American Enterprise Institute 1, 10 (Mar. 2017), http://www.aei.org/wp-content/uploads/2017/03/Measurning-Quality-or-Subsidy.pdf (cited at 84 Fed. Reg. at 31,397, 31,402, 31,430–31).

2014; and (ii) simultaneously relied on new materials that were insufficient to justify and substantiate the Repeal.

7.1.3.1 Supposed Flaws with the Evidence Supporting the 2014 Rule

205. In numerous places in the Repeal, the Department attempted to debunk evidentiary findings that it once relied on to support the Gainful Employment Rule. For example, the Department asserted that its reliance in 2014 on studies comparing costs and debt levels among students who enrolled at community colleges with those who enrolled at proprietary institutions was "illegitimate" because "research published by the Brown Center in 2016 shows that there are considerable differences between the characteristics of students who enroll at proprietary institutions and those who enroll at two-year public institutions." 84 Fed. Reg. at 31,393 (citing Stephanie Riegg Cellini & Rajeev Darolia, *Different degrees of debt: Student borrowing in the for-profit, nonprofit, and public sectors*, Brown Center on Education Policy at Brookings (June 2016) (the "Cellini & Darolia Paper")).

206. The Department asserted that the Cellini & Darolia Paper supports the Repeal because it shows that "differences in characteristics" (*e.g.*, financial independence, minority group status, single-parent status) "may explain disparities in student outcomes, including higher borrowing levels and student loan defaults among students who enroll at proprietary institutions." 84 Fed. Reg. at 31,393. But the Cellini & Darolia Paper does the *opposite*, stating and showing that "the relatively high *for-profit cost (mostly tuition) is by far the largest predictor* of this explained variation" in borrowing rates between for-profit and public two-year colleges. *See* Cellini & Darolia Paper at 11 (emphasis added); *see also id.* ("Costs continue to explain the vast majority of variation between the for-profit sector and community colleges, with every other factor remaining small and in the opposite direction. These results suggest that observable demographics, academics, location,

/ / /

and even student resources contribute much less to differences in borrowing between sectors when compared to the net costs of attendance.").

7.1.3.2 New "Analysis" and Research Insufficiently Supported the Repeal

207. The Repeal is not based on enough factual support or relevant evidence for a reasonable mind to accept it as adequate to support a conclusion.

208. For example, the Department asserted that there was "research published in 2014[,] . . . but not considered during the Department's development of the 2014 Rule," that undercut part of the Department's 2014 rationale for the Gainful Employment Rule. 84 Fed. Reg. at 31,393. But the Department's lone citation in this regard is to a non-final "working paper" of the National Bureau of Economic Research by Lance Lochner and Alexander Monge-Naranjo (the "Lochner Paper") that was not subject to peer review and has never been published elsewhere, despite the fact that it was released by the authors nearly six years ago.[22] Moreover, the data cited in the Lochner Paper was over twenty-five years old, was from a period when the proprietary sector was remarkably different (*i.e.*, there were no online institutions and few large corporate chains), and included only students who completed bachelor's degrees (and not graduate programs, certificate programs, or associate programs). As one group of commenters pointed out, citing to data from the Department, between 2000 and 2010, "fall enrollments at for-profit institutions more than tripled, compared to a growth of about [twenty-eight percent] among all institutions."[23]

---

[22] Lance Lochner & Alexander Monge-Naranjo, *Default and Repayment Among Baccalaureate Degree Earners*, (Nat'l Bureau of Econ. Research, Working Paper No. 19,882, 2014), *available at:* https://www.nber.org/papers/w19882.pdf.

[23] Comment from Sandra E. Black, *et al.*, to U.S. Dep't of Educ., Docket No. ED-2018-OPE-0042 1, 6 (Sept. 12, 2018), *available at:* https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13499&attachmentNumber=1&contentType=pdf.

209. Moreover, the Lochner Paper explicitly acknowledged deficiencies with its sample size (consisting of only thirty-three students from for-profit schools) that led the authors to conclude that "we cannot statistically distinguish" between graduates of proprietary institutions and non-profit institutions. Lochner Paper at 12.

210. Elsewhere in the Repeal, the Department asserts that "many of the studies" provided by commenters have "serious limitations that, in some cases, reduce the validity and reliability of their conclusions." 84 Fed. Reg. at 31,405. But again, the Department only points to a single study. 84 Fed. Reg. at 31,405 nn.75–76 & accompanying text (citing Stephanie Cellini & Nicolas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data* (Nat'l Bureau of Econ. Research, Working Paper No. 22,287, 2018)) (the "Cellini & Turner Working Paper").

211. The Department criticizes the Cellini & Turner Working Paper, for example, on the ground that it was "not available for full peer review." Notwithstanding the fact that the Department simultaneously relied upon the Lochner Paper that *expressly* acknowledges that it was not peer-reviewed, the Department cites only to the January 2018 "working draft" version of Cellini and Turner's analysis, entirely disregarding the fact that the final paper *was* peer-reviewed and published in the Journal of Human Resources. *See* Stephanie Cellini & Nicolas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data*, 54 J. of Human Res. 342 (2019) (the "Cellini & Turner Study"). Citations to both the working paper and the final, peer-reviewed paper were provided to the Department during the comment period.

212. Following its publication in the Journal of Human Resources, an Associate Professor at the University of Michigan's Gerald Ford School of Public

/ / /

Policy referred to the Cellini & Turner Study as "the definitive study" on for-profit colleges.[24]

213. In contrast to the Lochner Paper's sample size of thirty-three students from for-profit colleges, the Cellini & Turner Study relied on a sample size of 566,571 individual students from for-profit colleges. Cellini & Turner Study at 353 (Table 1, Column 1).

214. The Department asserts that the Cellini & Turner Study "was comparing what employees earn in fields that may pay very different prevailing wages." 84 Fed. Reg. at 31,405. In reality, that study compared students in the *same fields* attending similar certificate programs at for-profit and community colleges. Cellini & Turner Study at 351.

215. The Department also asserts that the Cellini & Turner Study "admits that [the] methodology for creating demographically matched comparison groups relied on the use of zip codes and birthdates, but every one of the same age in the same zip code is not otherwise socioeconomically and demographically matched." 84 Fed. Reg. at 31,405. But the Cellini & Turner Study matched students using earnings and other demographics, including zip code and age. *See* Cellini & Turner Study at 351 (describing how the research "generate[d] propensity scores based on up to seven years of prior earnings and demographic characteristics (for example, married, number of children, male, and years prior to enrollment)" and noting that they "identify a matched control for each for-profit student within gender-age-CIP-zip cells[, *i.e.,*] each for-profit student is matched with one public sector student with similar prior earnings and demographics in the same cell").

216. Compounding the substantive errors, the Repeal is also premised on additional, vague citations to "analysis" or unnamed research. In one example, the

[24] Kevin Stange (@kevin_stange), Twitter (Oct. 1, 2019, 10:09 PM), https://twitter.com/kevin_stange/status/1179216891145080833?s=20.

Department asserted in the 2018 NPRM that "[r]esearch published subsequent to the promulgation of the GE regulations adds to the Department's concern about the validity of using D/E rates . . . to determine whether or not a program should be allowed to continue to participate in [T]itle IV programs." 83 Fed. Reg. at 40,171. When challenged under the Information Quality Act to provide a source for this point, the Department failed to do so, instead claiming that it "has used well-respected, peer-reviewed references to substantiate its reasons throughout these final regulations for believing that D/E rates could be influenced by a number of factors other than program quality." 84 Fed. Reg. at 31,427.

217. In other places, the Department cites to its own "analysis" without additional information or description. For example, the Department cites data it claims came from "analysis provided by Federal Student Aid," with a footnote that simply says "Federal Student Aid, 2018." 84 Fed. Reg. at 31,398 & n.27. Moreover, although the Department acknowledges in the Repeal that it received a "bibliography" of papers that it "agree[d]" concluded that "students who attend proprietary institutions, in many instances, have outcomes that are inferior to students who attend other institutions," 84 Fed. Reg. at 31,405, it countered that its "analysis of the outstanding student loan portfolio demonstrates that poor outcomes are not limited to these institutions or the small number, relative to total postsecondary enrollment, of students who attend them." 84 Fed. Reg. at 31,405. But the Department never discloses or describes this "analysis," nor did it subject this "analysis" to public comment.

218. Still further, the Department asserted in the 2018 NPRM that "[o]ther research findings suggest that D/E rates-based eligibility creates unnecessary barriers for institutions or programs that serve larger proportions of women and minority students," 79 Fed. Reg. at 40,171, but failed to identify such findings. Although the Department included a reference to a 2016 study from the College Board in the 2018 NPRM, the Department concedes in the Repeal that the cited

research "did not address GE programs specifically," 84 Fed. Reg. at 31,427, and therefore could not have been about D/E rates-based eligibility.

7.1.4 The Department Concluded That the D/E Rates Measure is No Longer a Valid Metric

219. The Department asserted that the "D/E rates measure is *scientifically invalid* because it fails to control or account for the confounding variables that could influence the relationship between the independent (program quality) and dependent variable (D/E rates) or render the relationship between the independent and dependent variables as merely correlative, not causal." 84 Fed. Reg. at 31,427 (emphasis added).

220. In this same vein, the Department also asserted that it "has not been able to develop a methodology to accurately control for or repress confounding variables, such as student demographic characteristics, to isolate the impact of institutional quality on student outcomes, [or to] more accurately attribute student outcomes to a single variable, such as institutional quality." 84 Fed. Reg. at 31,435. The Department further asserted that, "[i]n the past, the Department has performed single variant analysis to identify non-traditional student characteristics that increase the risk of non-completion or student loan defaults. However, the Department has not performed multi-variant analysis to develop an algorithm that would allow it to isolate independent variables and examine causal relationships between those variables and student outcomes." 84 Fed. Reg. at 31,435.

221. Although the Department is correct that the Gainful Employment Rule does not "control" for "confounding variables" such as student demographics *within* the D/E rates measure, the Department did—in 2014—conduct extensive multivariate regression analysis to consider whether the demographic composition of a program influenced the ultimate outcomes under the D/E rates measure and Eligibility Metrics. *See, e.g.*, 79 Fed. Reg. at 65,042 (showing, in Table 2.2, the results of "[t]he second regression [that] used percent zero EFC, female, and above

age 24 as independent variables in addition to percent Pell and percent minority"); 79 Fed. Reg. at 65,052–54 (showing, in Tables 2.12 & 2.13, a "regression model with annual earnings rate as the dependent variable and *multiple* independent variables that are indicators of student, program, and institutional characteristics") (emphasis added).

222. After considering the results of the demographic analysis in 2014, the Department determined that "student characteristics of programs do not overly influence the performance of programs on the D/E rates measure." *See, e.g.*, 79 Fed. Reg. at 64,910; *see also, e.g.*, 79 Fed. Reg. at 64,923 ("[T]he Department has examined the effects of student demographic characteristics on results under the annual earnings rate measure and does not find evidence to indicate that the composition of a GE program's students is determinative of outcomes."); 79 Fed. Reg. at 64,908 ("[W]e do not expect student demographics to overly influence the performance of programs on the D/E rates measure."). As the Department stated in summary:

> [T]he Department cannot conclude . . . that demographic characteristics are largely determinative of results. . . . Instead, we find a negative association between the proportion of low-income students and the annual earnings rate when controlling for other demographic and non-demographic factors, similar passing rates across all quartiles of low-income variables, and similar demographic profiles in passing, zone, and failing programs for almost all of the variables examined. These and other results of our analyses suggest that the regulation is not primarily measuring student demographics.

79 Fed. Reg. at 65,057.

223. As the District Court held in *APSCU III*, "[t]he Department therefore made extensive efforts [in 2014] to get to the bottom of this criticism [regarding the impact of demographics], and this Court cannot fairly say that the agency acted arbitrarily in the face of it." *APSCU III*, 110 F. Supp. 3d at 192.

224. Although the Department, in the Repeal, "acknowledge[d]" this prior analysis, it also claimed that it was an "incomplete analysis of the data available to the Department." 84 Fed. Reg. at 31,414. However, the Department pointed to only

a single example of "data available to the Department" that was not fully analyzed in 2014, *i.e.*, a 1994 analysis by the National Center for Education Statistics ("NCES Analysis"), which the Department asserted "confirm[s] the impact of student characteristics on student outcomes," 84 Fed. Reg. at 31,414, and which the Department erred by not considering in 2014.

225. The 1994 NCES Analysis is based on data from 1989–1990. Although the 1994 NCES Analysis discusses factors that influence the likelihood of graduation, it does not specifically address student loan borrowers who graduated, nor is it specific to gainful employment programs. As a result of these limitations, the 1994 NCES Analysis is not a reliable source for the Department to use in order to contradict its 2014 conclusion, *see, e.g.*, *supra* ¶ 222, that student demographics and characteristics would not overly influence the performance of gainful employment programs on the D/E rates measure.

226. The Gainful Employment Rule, in contrast, only considers the outcomes of student loan borrowers who graduated from a GE program. Moreover, the Department's multivariate regression analysis in 2014 was based on data it gathered in connection with institutional compliance with the 2011 GE Rule.

227. In promulgating the Repeal, the Department "[did] not analyze[] the racial or ethnic demographics of students served by programs that failed the 2015 D/E calculations." 84 Fed. Reg. at 31,414. With respect to gender disparities, the Department asserts—without citing to any non-anecdotal evidence—that "it seems clear" that women and low-income students will be impacted more significantly than other students by program closures due to the Gainful Employment Rule. 84 Fed. Reg. at 31,414–15.

228. The Department asserted as a basis for the Repeal that the performance of programs on the D/E rates measure can, but should not, be impacted by factors other than "program quality." *See* 84 Fed. Reg. at 31,427 ("The Department has used well-respected, peer-reviewed references to substantiate its

reasons throughout these final regulations for believing that D/E rates could be influenced by a number of factors other than 'program quality.'"); 84 Fed. Reg. at 31,396 (agreeing that the "D/E rates measure is a fundamentally flawed and unreliable *quality indicator*") (emphasis added). According to the Department, because the D/E rates measure fails to take into account factors other than program quality, the D/E rates measure is an invalid indicator. 84 Fed. Reg. at 31,396.

229. With respect to all purported justifications for the Repeal, the Department failed to provide relevant evidence a reasonable mind might accept as adequate to support the conclusions drawn. The Department's decision to Repeal the Gainful Employment Rule was therefore arbitrary and capricious under the APA.

7.1.5 The Department Continued to Renege on its Prior Justifications for the Accountability Framework

230. In the Repeal, the Department reversed course on both the thresholds for the Eligibility Metrics and the D/E rates measures (*i.e.*, the discretionary income rate and the annual earnings rate). *See, e.g.*, 84 Fed. Reg. at 31,427 (referring to the D/E rates measure as "scientifically invalid").

231. With respect to the thresholds, the Department claimed that there is "no empirical basis for the 8 percent" D/E rates measure threshold for the annual earnings rate. 84 Fed. Reg. at 31,407. The Department also asserted that, in 2014, it "failed to provide a sufficient, objective, and reliable basis for the 20 percent [discretionary income] threshold." 84 Fed. Reg. at 31,407. The Department also stated that rulemaking subsequent to the Gainful Employment Rule rendered the twenty percent standard "obsolete" because "no borrower would ever be required to pay more than 10 percent of their discretionary income." 84 Fed. Reg. at 31,407.

232. With respect to the D/E rates measure calculations, the Department expressed its concern with the use of an amortization rate that differs from the amortization terms "made available" to borrowers under the law and the

Department's REPAYE regulations. 84 Fed. Reg. at 31,409. Yet there was an obvious alternative amortization rate to address this concern, *see supra* ¶ 131, which the Department presented to the Committee but subsequently failed to address in the Repeal.

233. The Department also expressed concerns with the fact that the use of SSA earnings data to calculate D/E rates was inaccurate because that data excluded "unreported tip income and some self-employment earnings" and would "[p]enaliz[e] programs," even where asserted data-related problems were "not the fault of institutions of higher education." 84 Fed. Reg. at 31,409–10.

234. The Department also disagreed with its prior conclusion that the D/E rates measure "sufficiently control[] for the impact of recessions." 84 Fed. Reg. at 31,411. Yet as the Department suggested in a footnote, albeit with selective quotations, 84 Fed. Reg. at 31,411 n.99 (asserting that *APC v. Duncan* stated that Plaintiff's argument that the Gainful Employment Rule "failed to adjust for economic cycles was 'just a red herring'"), *APC v. Duncan* examined this exact issue and concluded that the argument that the Gainful Employment Rule failed to sufficiently adjust for economic cycles was "*not just* a red herring," (emphasis added) but "also untrue." 107 F. Supp. 3d at 368.

235. The Department's rejection of its prior position regarding economic cycles appears to be grounded in the fact that the "Great Recession lasted eighteen months," 84 Fed. Reg. at 31,411 n.99, while the Department repeatedly asserted in 2014 that "recessions have, on average, lasted, 11.1 months," 79 Fed. Reg. at 64,920. But in the 2018 NPRM, the Department asserted something different, namely that "the Great Recession lasted for well over two years." 83 Fed. Reg. at 40,172.

236. Regardless of the length of the Great Recession, the Department acknowledged in the Gainful Employment Rule that the Great Recession was an "outlier event[]." 84 Fed. Reg. at 31,411.

/ / /

237. In addition, the Department stated in the Repeal that unemployment data regarding the aftermath of the Great Recession established that the "three-year window afforded to institutions in the 2014 Rule would come up desperately short of a jobless recovery that lasted eight years." 84 Fed. Reg. at 31,411 n.99.

238. In the Repeal, the Department did not consider whether the four-year "zone" window would ameliorate its concerns about the Gainful Employment Rule not controlling for the impact of recessions. Under the Gainful Employment Rule, a program becomes ineligible if it *either* fails the D/E rates measure for two out of three consecutive years *or* has a combination of zone and failing D/E rates for four consecutive years. *See* 34 C.F.R. § 668.403(c)(4).

239. In the Repeal, the Department failed to consider the extent to which, as it stated in 2014:

> Sensitivity to temporary economic fluctuations outside of an institution's control is also reduced by calculating the D/E rates based on two-year and four-year cohorts of students, rather than a single-year cohort, and calculating a program's annual earnings as means and medians. Calculating D/E rates based on students who completed over multiple years reduces the impact of short term fluctuations in the economy that may affect a particular cohort of graduates but not others. Similarly, means and medians mitigate the effects of economic cycles by measuring central tendency and reducing the influence of students who may have been most impacted by a downturn.

79 Fed. Reg. at 64,926. Nor did the Department explain why this position is no longer accurate or justified.

240. The Department failed, in the Repeal to consider the extent to which, as it stated in 2014, "[t]he zone protects passing programs from losing their eligibility for [T]itle IV, HEA program funds where their increase in D/E rates was attributable to temporary fluctuations in local labor market conditions." 79 Fed. Reg. at 64,926. Nor did the Department explain why this position is no longer accurate or justified.

241. In the Repeal, the Department did not consider available debt-to-earnings data for multiple cohorts of students across numerous years, even though,

as one commentator explained, "the Department has in its possession debt-to-earnings data for multiple cohorts of students across several years" and "student roster information from 2008–09 through 2013–14 that have not been sent to the Social Security Administration to generate earnings data."[25] The commenter also noted that, in order to determine the potential effects of broader national conditions, the Department could "cross the data by program with information on national, regional, and local economic conditions to see if in fact there is a connection."[26] The Department failed to do this or respond to this comment.

242. With respect to all of its justifications, the Department failed to provide relevant evidence that a reasonable mind might accept as adequate to support the conclusions drawn.

7.2 The Department Failed to Consider Alternatives to the Repeal of the Accountability Framework

243. An agency not only has a duty to consider reasonable alternatives to its chosen policy, but also must provide a reasoned explanation for its rejection of those alternatives.

244. The Department was aware of myriad alternatives to the Gainful Employment Rule, as a whole and with respect to its component pieces.

245. Although the Department stated in the Repeal that it "reviewed and considered various changes to the final regulations," and that "changes made in response to comments [were] described in the *Analysis of Comments and Changes* section of [the] preamble," 84 Fed. Reg. at 31,448, no changes were actually made.

---

[25] *See* Comment from Ben Miller *et al.*, to U.S. Dep't of Educ., Docket No. ED-2018-OPE-0042 1, 11–12 (Sept. 13, 2018) ("Miller Comment"), *available at:* https://www.regulations.gov/contentStreamer?documentId=ED-2018-OPE-0042-13794&attachmentNumber=1&contentType=pdf.

[26] *Id.*

7.2.1 Failure to Consider Alternatives to the Certification Requirement

246. The Department did not consider any reasonable alternatives to the Certification Requirement that determines initial eligibility. *See* 34 C.F.R. § 668.414. To the extent the Department did consider such alternatives, the Department failed to identify those alternatives in either the 2018 NPRM or the Repeal and failed to give a reasoned explanation for its rejection of those alternatives.

247. With respect to the elimination of the Certification Requirement, the Department stated only that it "considered disclosures related to licensure and certification, as well as accreditation, as part of its Accreditation and Innovation negotiated rulemaking package and, therefore, will not include regulations related to disclosures of this information in this rulemaking." 84 Fed. Reg. at 31,424.

248. The Department did not consider *any* alternative to the Certification Requirement, despite the fact that there were obvious alternatives that were known and common. For example, in developing the Gainful Employment Rule, the Department heard from commenters that "the certification requirements should expanded." 79 Fed. Reg. at 64,990. At the time, the Department dismissed this consideration because it was "unnecessary in light of the requirements already provided by the regulation." 79 Fed. Reg. at 64,990.

249. Moreover, members of the Negotiated Rulemaking Committee received and presented alternative certification requirements. For example, one committee member submitted a memorandum to the Department containing proposed amendments to 34 C.F.R. § 668.414 that would have strengthened the certification requirements.[27]

---

[27] *See* Memorandum from Laura Metune, Vice Chancellor of External Affairs, California Cmty. Colls. Chancellor's Office, to U.S. Dep't of Educ., *Gainful Employment Negotiated Rulemaking Committee* (Jan. 30, 2018), *available at*: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/gememoissue8metune.pdf.

250. Prior to the second and third negotiated rulemaking sessions, the Department also released issue papers that proposed revisions to 34 C.F.R. § 668.414. The Department did not consider these alternatives when publishing the Repeal. If they were considered, the Department did not give a reasoned explanation for its rejection of these alternatives.

251. With respect to initial certification requirements generally, the Department's issue papers also show that it was aware of a potential alternative rule requiring "any Title IV eligible education program that prepares students for employment in an occupation for which the State or Federal government has requirements for certification/licensure" to "certify in its [Program Participation Agreement with the Department] that the program is approved by a recognized accrediting agency and meets the State or Federal requirements," which would include the requirements regarding gainful employment.[28]

7.2.2 Failure to Consider Alternative Eligibility Metrics

252. The Department did not consider any reasonable alternative to the Eligibility Metrics. To the extent the Department did consider such alternatives, the Department failed to identify those alternatives in either the 2018 NPRM or the Repeal and failed to give a reasoned explanation for its rejection of those alternatives.

253. The Department was aware of numerous alternative metrics. For example, during Day 2 of Session 1 of negotiated rulemaking, Greg Martin, the

---

[28] *See* U.S. Dep't of Educ., *Certification Requirements,* First Amended Issue Paper No. 8, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper8certificationrequirements.pdf**Error! Hyperlink reference not valid.** *see also* U.S. Dep't of Educ., *Certification Requirements,* Second Amended Issue Paper No. 8, 2017–2018 Negotiating Rulemaking (Session No. 3, Mar. 12–15, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper8certificationrequirements.pdf**Error! Hyperlink reference not valid.**

Department's representative, acknowledged that "there have been other metrics considered in previous negotiations."[29] In the Repeal, however, the Department did not consider any of those metrics.

254. In 2014, for example, the Department considered and proposed using pCDR (*i.e.*, the program-level cohort default rate, "which examines the rate at which borrowers who previously enrolled in the program default," *see supra* ¶ 125, as part of the Eligibility Metrics. Using the pCDR metric would have been an obvious alternative to Repeal because the Department proposed using the pCDR metric in its 2014 NPRM. But the Department did not consider using pCDR in the Repeal.

255. In the preamble to the Repeal, the Department stated that during the negotiated rulemaking session, there was a "proposal from one negotiator to use a one-to-one ratio to report debt-to-earnings," but there was "no consensus" around that proposal. 84 Fed. Reg. at 31,408. The Department did not consider that "one-to-one ratio" proposal in developing the Repeal and, to the extent it did, it failed to give a reasoned explanation for the rejection of that alternative.

256. In the preamble to the Repeal, the Department also stated that one commenter "offered alternative D/E rates and thresholds for consideration, including using a 10% debt-to-income threshold with a 10-year repayment term or a 15% or 20% debt-to-income thresholds [sic]." 84 Fed. Reg. at 31,407. Although it noted that comment in the discussion, the Department does not appear to have considered that proposal in developing the Repeal and, to the extent it did, it failed to give a reasoned explanation for the rejection of that alternative.

---

[29] U.S. Dep't of Educ., *Transcript of Gainful Employment Negotiated Rulemaking Committee 2017–2018* 1, 12 (Session No. 1, Dec. 5, 2017), *available at*: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/tuesdaydecemeber5transcript.docx.

257. The Department also evinced its knowledge of obvious alternatives through the proposals the agency itself made during negotiated rulemaking. For example, prior to Negotiated Rulemaking Session 2, the Department released a version of Issue Paper #3, that suggested numerous alternatives to the formula for calculating the D/E rates measure.[30]

258. Issue Paper #3 (Session 2) proposed numerous additional alternatives, including amending the "Annual Loan Payment" component of both the annual earnings and discretionary income threshold formula to use: (i) an amortization period of fifteen years, regardless of program length; (ii) the statutory interest rate on federal Direct unsubsidized loans during the last award year of the cohort period, rather than the average rate over the last three years; and (iii) a "loan debt" that no longer included private educational loans or institutional loans.

259. Issue Paper #3 (Session 2) also proposed to "no longer exclude from the numerator and the denominator of the D/E rates calculation students who have one or more [T]itle IV loans in a military related deferment status" and to "require that a student be enrolled for at least 60 days for that individual to be counted as an exclusion to the D/E rate calculations." The Department likewise noted in Issue Paper #3 (Session 2) that it "propose[d] to use a single two-year cohort period in calculating D/E rates and remove the four-year cohort rate."

260. Prior to Negotiated Rulemaking Session 3, the Department released another new version of Issue Paper #3, which suggested additional alternatives to

[30] *See* U.S. Dep't of Educ., *Debt Calculations*, First Amended Issue Paper No. 3, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–7, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper3debtcalculations.pdf.

the formula for calculating the Eligibility Metrics.[31] This paper summarized the proposed alternatives to the Eligibility Metrics "[s]ince Session 2" as follows:

> [W]e propose to amortize debt over a ten-year period for undergraduate certificates, post-baccalaureate certificates, and associate's [sic] degrees. We also propose to amortize debt over a fifteen-year period for bachelor's degrees. In conforming with our previous proposal to limit these regulations to undergraduate programs, we removed the amortization of debt for Master's [sic] level programs or higher. We also propose moving the calculation of a loan repayment rate to § 668.406.

261. In issuing the 2018 NPRM and the Repeal, the Department did not consider any of these, or other, reasonable alternatives to the Eligibility Metrics. To the extent the Department did consider such alternatives, the Department failed to identify those alternatives in either the 2018 NPRM or the Repeal and failed to give a reasoned explanation for its rejection of any considered alternatives.

7.2.3 Failure to Consider Alternative Thresholds and Sanctions for Failing D/E Rates Measures

262. The Department did not consider alternative sanctions for GE programs that fail to meet certain minimum threshold D/E rates measures that were less drastic than the chosen policy of complete repeal. Nor did the Department consider alternative thresholds. To the extent the Department did consider such alternatives, including during negotiated rulemaking, the Department failed to identify those alternatives or give a reasoned explanation for the rejection of those alternatives.

263. The Department was aware of numerous alternative thresholds and sanctions, insofar as it had considered various alternatives in 2011. For example, in 2011, the Department set a discretionary income rate threshold of thirty percent

---

[31] *See* U.S. Dep't of Educ., *Debt Calculations*, Second Amended Issue Paper No. 3, 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper3ratecalculations.pdf.

and an annual earnings threshold of twelve percent. In the Gainful Employment Rule, the Department set a passing discretionary income rate threshold at twenty percent, with a "zone" between twenty percent and thirty percent, and a failing rate at thirty percent. Similarly, with respect to annual earnings, the Gainful Employment Rule established a passing rate of eight percent, a failing rate of twelve percent, and a "zone" between those two marks.

264. The Department also demonstrated its knowledge of obvious alternative thresholds and sanctions through proposals it made during the negotiated rulemaking process. For example, in Issue Paper #2 (Session 2), the Department proposed to amend the framework so that programs were no longer considered "passing" or "failing" based on D/E rates.[32] Instead, the Department proposed to refer to GE programs as "acceptable" if they met established standards and "low-performing" if they did not meet the established standards. The Department also proposed to "remove the concept of a 'zone' from regulations."

265. The Department further evinced its knowledge of obvious alternative thresholds in Issue Paper #2 (Session 3) when it proposed "to add a loan repayment rate into the framework for undergraduate educational programs" and to "refer to a program as one that 'meets benchmarks' if it meets the established standards and a program as one that 'does not meet benchmarks' if it does not meet established standards."[33]

---

[32] *See* U.S. Dep't of Educ., *D/E Rates*, Amended Issue Paper No. 2, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper2debttoearningsrates.pdf.

[33] *See* U.S. Dep't of Educ., *D/E Rates*, Second Amended Issue Paper No. 2, 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper2derates.pdf.

266. With respect to sanctions, prior to Session 2, the Department proposed in Issue Paper #4 to eliminate the loss of eligibility as a sanction for failing to meet the D/E rates measure thresholds.[34] But in that same Issue Paper, the Department did *not* propose to eliminate entirely the warnings and notifications that would be provided for programs that were deemed "low-performing" due to their D/E rates measures.

267. The Department further demonstrated its knowledge of obvious alternative sanctions in Issue Paper #4 (Session 3), in which it proposed to "tie sanctions for poor performance under the D/E rates and loan repayment rate measures to standards of administrative capability."[35] The Department further proposed "potential sanctions" that included "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."

268. In Issue Paper #4 (Session 3), the Department further illustrated its knowledge of obvious sanctions, in which it proposed "some clarifications on when notifications" should be made to students in languages other than English as a result of a GE program's failure to meet D/E rates measure thresholds.

---

[34] *See* U.S. Dep't of Educ., *Sanctions for Programs Based on D/E Rates*, Amended Issue Paper No. 4, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper4sanctions.pdf.

[35] *See* U.S. Dep't of Educ., *Sanctions for Programs Based on D/E Rates*, Second Amended Issue Paper No. 4, 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018), *available at:* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepaper4sanctions.pdf.

269. To the extent the Department had concerns with the specific Eligibility Metrics established in the Gainful Employment Rule, the Department failed to consider other obvious alternatives. For example, in light of the fact that the 2018 NPRM expressed no concern with the substantive basis for the twenty percent discretionary income rate threshold, the Department could have considered the obvious alternative of removing only the eight percent annual earnings rate, as commenters suggested.

270. In issuing the Repeal, the Department did not consider any of these, or other, reasonable alternatives to the thresholds or sanctions for failing to meet the Eligibility Metrics. To the extent the Department did consider such alternatives, the Department failed to identify those alternatives in either the 2018 NPRM or the Repeal and failed to give a reasoned explanation for its rejection of those alternatives. The Department's actions in this regard were arbitrary, capricious, and not in accordance with law.

7.2.4 Failure to Consider Alternatives to Issues with Tip-Based Occupations

271. In 2014, the Department received comments contending that the Department's earnings assessment process for the D/E rates measure was flawed with regard to information on self-employed individuals because the ultimate source of data on their earnings is the individual, who may fail to report or significantly underreport earnings or who may have relatively significant business expenses that offset even substantial income. *See* 79 Fed. Reg. at 64,955. Commenters also noted that many individuals in careers with substantial tip-income components tend to underreport tips.

272. In response to this and other concerns, the Department included in the Gainful Employment Rule the Alternate Earnings Appeals process, *see supra* ¶ 133, whereby institutions could submit an alternative means of calculating the D/E rates measure.

/ / /

273. In the Repeal, the Department made two general assertions regarding the alternate earnings appeal process that are relevant here. First, the Department claimed that—in light of the *AACS* decision, *see supra* ¶¶ 161–163—the "standard for such appeals was inappropriately high." 84 Fed. Reg. at 31,410. Second, the Department claimed that "[t]he administrative burden and complexity of accounting for underreported income for the purpose of the D/E rates measure is another factor that supports the [Repeal]." 84 Fed. Reg. at 31,410.

274. Although the Department repeatedly referred to the ruling in the *AACS* case as a decision of the United States Court of Appeals for the D.C. Circuit, *see* 84 Fed. Reg. at 31,410, the *AACS* decision is a decision of the United States District Court for the District of Columbia.

275. In the *AACS* litigation, plaintiffs challenged the Gainful Employment Rule on a number of grounds related to the underreporting of income derived from tips by graduates of cosmetology programs and the resulting impact on the D/E rates measure calculation.

276. As an initial matter, *AACS* noted that the Department "had discretion to use SSA [earnings] data as the presumptive measure of average income for GE programs." 258 F. Supp. 3d at 73. The District Court stated that it "had no reason to believe that SSA [earnings] data is anything but precise with respect to *reported* income," and that although "incomplete" because it measures reported income rather than total income, the Department "has discretion to sacrifice some measure of fit for the sake of administrability." *Id.* (emphasis in original)..

277. Ultimately, however, the District Court concluded that the alternate earnings appeals process was insufficient for the AACS member schools and ordered the Department not to require these schools to adhere to certain restrictions regarding the sample size used for alternate earnings appeals. *Id.* at 76–77.

278. In all other regards, *AACS* upheld the Gainful Employment Rule.

/ / /

279. In response to the *AACS* ruling, the Department established a new date for institutions to file both a notice of intent to file an alternate earnings appeal and the appeal itself. *See* 82 Fed. Reg. at 39,363; *supra* ¶ 165. In addition, the Department modified the alternate earnings appeals process for all institutions (*i.e.*, AACS *and* non-AACS institutions). The Department stated that, in response to the *AACS* litigation, it would not enforce certain aspects of the regulations related to the alternate earnings appeals. Instead, the Department asserted that, with respect to appeals relying on survey information, it would "consider the response rate, the nonresponse bias analysis, and any other information requested by the Secretary that indicates that the responses are a reliable measure of the program graduates' true earnings." 82 Fed. Reg. at 39,363. With respect to appeals "based on data from State-sponsored data systems," the Department stated that it would "consider the[ir] validity . . . on a case-by-case basis, taking into account the response rate and other information requested by the Secretary." 82 Fed. Reg. at 39,363.

280. This alternative to the alternate earnings appeal process was made "to reduce the burden on institutions in conducting these appeals while still ensuring that institutions provide enough information for the Department to determine whether the program graduates for whom alternate earnings data [we]re provided are a valid representation of the overall cohort." 82 Fed. Reg. at 39,363.

281. In the *Federal Register* notice, the Department also invited public comment and stated that it would "consider these comments in determining whether to take any future action in connection with the upcoming negotiated rulemaking." 82 Fed. Reg. at 39,363.

282. Although the Department concluded that this alternative to the alternate earnings appeals process satisfied the *AACS* ruling, the Department failed to consider this alternative when issuing the Repeal.

/ / /

283. In the Repeal, the Department also failed to consider the extent to which issues surrounding reporting of tip income are a real problem. The Department put forth no data on the extent to which tip income is underreported and failed to consider a comment describing how the IRS "works with employers who may have a lot of tipped employees to create Tip Reporting Alternative Commitments (TRACs)," which include "promises from businesses to distribute materials and educate employees about the importance of reporting tips." Miller Comment at 23. Nor did the Department consider the impact of "Tip Rate Determination Agreements," *i.e.*, a voluntary compliance agreement that the IRS describes as "designed to enhance tax compliance among tipped employees,"[36] or the increasing extent to which tips are paid by credit card, which are more likely to be reported. Miller Comment at 23. The Department also did not consider the "role of institutions in encouraging proper tip reporting" and whether "cosmetology programs include in their delivered curriculum ethics lectures on the importance of reporting." *Id.* The Department failed to respond to comments on these topics.

284. The Department asserted in the 2018 NPRM that the "process for developing . . . an [alternate earnings] appeal has proven to be more difficult to navigate than the Department had originally planned." 83 Fed. Reg. at 40,174. The Department further asserted in the 2018 NPRM that it "reviewed earnings appeal submissions for completeness and considered response rates on a case-by-case basis . . . . Through this process, the Department has corroborated claims from institutions that the survey response requirements of the earnings appeals methodology are burdensome given that program graduates are not required to

[36] *See generally* U.S. Internal Revenue Serv., *Voluntary Compliance Agreements – Restaurant Tax Tips*, https://www.irs.gov/businesses/small-businesses-self-employed/voluntary-compliance-agreements-restaurant-tax-tips (last updated Nov. 9, 2018).

report their earnings to their institution or to the Department . . . .” 83 Fed. Reg. at 40,174.

285. In the Repeal, the Department reiterated this conclusion, asserting that “[a]dministering the GE regulations, particularly alternate earnings appeals, has also turned out to be much more burdensome to the Department than was originally anticipated.” 84 Fed. Reg. at 31,419.

286. The Department did not make relevant information available to the public to adequately comment on this justification.

287. On March 5, 2018, the National Student Legal Defense Network (“Student Defense”), counsel to Plaintiffs in this litigation, requested documents related to alternate earnings appeals under the Freedom of Information Act (“FOIA”).

288. Student Defense requested: (i) all documents constituting notices of intent to file alternate earnings appeals by institutions of higher education; (ii) all documents constituting those alternate earnings appeals; and (iii) all documents constituting or reflecting communications with any institutions about their alternate earnings appeals.

289. The Department failed to produce the documents under the timeline required by the FOIA.

290. By the time the comment period closed, Student Defense had not received the relevant information requested.

291. It is Student Defense’s general practice to publish documents received from the government under the FOIA on its website, so that members of the public can review them.

292. In its comment submitted in response to the 2018 NPRM, Student Defense highlighted that it could not effectively comment on the Department’s assertions about the alternative earnings appeals process because the requested information was not provided.

7.3 The Department Provided No Reasonable Justification for the Repeal of the Transparency Framework

293. In the Repeal, the Department openly admitted that repealing the Transparency Framework would harm students. The Department asserted "that[,] by rescinding the 2014 Rule[,] some students would be more likely to make poor educational investments." 84 Fed. Reg. at 31,394. The Department further stated that "[w]ith the elimination of the disclosures and the ineligibility sanction that would have removed students' program choices, students, their parents, and other interested members of the public will have to seek out the information that interests them about programs they are considering." 84 Fed. Reg. at 31,444–45.

294. In repealing the Reporting Requirements, the Department's sole justification was that it would reduce cost and burden on institutions that offer gainful employment programs. *See, e.g.*, 84 Fed. Reg. at 31,418.

295. In repealing the Disclosure Requirements, the Department asserted in the 2018 NPRM that it "underestimated" the "burden" that the regulations would have on institutions. *See, e.g.*, 83 Fed. Reg. at 40,173 ("The Department also believes that it underestimated the burden associated with distributing the disclosures directly to prospective students."); 83 Fed. Reg. at 40,177 ("Furthermore, when developing the GE regulations, the Department, as noted in feedback received from multiple institutions, underestimated the burden on institutions associated with the use of a standardized disclosure template in publishing program outcomes and distributing notifications directly to prospective and current students.").

296. The Department produced no data demonstrating the extent to which the administrative burden associated with the Gainful Employment Rule differed from its expectations when it passed the rule.

297. The only "evidence" the Department offered to support its view were anecdotal comments of one individual who was a member of the 2017–2018 Negotiated Rulemaking Committee.

298. During negotiated rulemaking, a Department representative, when asked for estimates of the Gainful Employment Rule's administrative burden, stated "we don't currently have anything right now."[37]

299. In the Gainful Employment Rule, the Department estimated the total "burden hours"—*i.e.*, the number of hours of "burden" created by the rule to students and institutions—to be 6,925,627. *See* 79 Fed. Reg. at 65,005.

300. Given what the Department stated about how it had underestimated the burden attributable to the Gainful Employment Rule in 2014, it would logically follow that repealing the Rule would result in an estimated burden decrease that was *larger* than the 2014 estimated increase. In the 2018 NPRM and Repeal, however, the Department states that the total "burden hours" reduced by the proposed repeal would be 6,925,628, a one hour difference (or one ten-millionth of a percent difference) from the estimated burden of the Gainful Employment Rule. *See* 83 Fed. Reg. at 40,182; 84 Fed. Reg. at 31,452. Functionally, this is the exact same burden that the Department estimated in 2014.

301. In repealing the Disclosure Requirements, the Department also asserted that "disclosures required by the GE regulations include some data, such as job placement rates, that are highly unreliable and may not provide the information that students and families need to make informed decisions about higher education options." 84 Fed. Reg. at 31,392. But to "address" this concern, the Department "describe[d] in [the Repeal] our preliminary plans for the expansion of the College Scorecard." 84 Fed. Reg. at 31,394.

302. The College Scorecard is a Departmental website, launched in 2013 and available at http://collegescorecard.ed.gov, that provides information to the public regarding institutions of higher education.

---

[37] U.S. Dep't of Educ., *Transcript of Gainful Employment Negotiated Rulemaking Committee 2017–2018* 1, 23 (Session No. 2, Feb. 8, 2018), *available at*: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/day4getranscript.pdf.

303. Appendix A to the Repeal includes a comparison of information that was "made available to students and parents through the 2017 GE disclosure template with the information" that the Department claims "will be provided through the expanded College Scorecard or other consumer information tools, such as College Navigator." 84 Fed. Reg. at 31,395; *see also* 84 Fed. Reg. at 31,435–37 (Appendix A).

304. The Department did not explain why job placement rates are "highly unreliable" or why the Department was wrong to include these rates as part of the Reporting and Disclosure Requirements in 2014. Nor did the Department explain why, in the Repeal, it stated that job placement rates are "highly unreliable and may not provide the information that students and families need to make informed decisions about higher education options," 84 Fed. Reg. at 31,392, but also stated, as recently as July 2018, that it could propose to "develop[] a single definition for purposes of measuring and reporting job placement rates" as part of a different rulemaking proceeding. *See* Negotiated Rulemaking Committee; Public Hearings, 83 Fed. Reg. 36,814, 35,815 (July 31, 2018).

305. The Department did not explain why it no longer believes, as it asserted in 2014, that the "direct delivery" of information to students makes it more likely that students will receive and review disclosed information. 79 Fed. Reg. at 64,969. Nor did the Department explain why it no longer considers direct distribution of information to prospective and enrolled students to be preferable to making information available via College Scorecard or elsewhere on the Department's website. *See* 79 Fed. Reg. at 64,978.

306. Non-binding plans to expand the Department's College Scorecard do not mitigate the fact that students will be "more likely to make poor educational investments" as a result of the Repeal.

307. The Department failed to conside r that, as a commenter pointed out, during August 2018, the College Scorecard received approximately 63,000 visitors,

which is a small fraction of both the number of students enrolled in GE programs and the number of students enrolled in failing programs.

308. The Repeal does not maintain or add any regulations that require disclosure of *any* information to enrolled or prospective students. Rather, the Department stated that it "encourages all institutions to post links to the Scorecard on their institutional websites." 84 Fed. Reg. at 31,423. In contrast, the Gainful Employment Rule required institutions to post the required disclosures on programmatic websites with a link that is "prominent, readily accessible, clear, conspicuous, and direct." 34 C.F.R. § 668.412(c). In addition, the Gainful Employment Rule required institutions to include, in a "prominent manner," the disclosures in all promotional materials (including catalogs, invitations, flyers, billboards and advertising on or though radio, television, print media, the Internet, and social media), or, if "space or airtime constraints . . . preclude[d]" this, the institution was required to include a link that was "prominent, readily accessible, clear, conspicuous, and direct" and identified as "Important Information about the educational debt, earnings, and completion rates of students who attended this program." 34 C.F.R. § 668.412(d).

309. The Repeal also does not maintain or add any regulations that require disclosure of information to students, in the form of warnings, when a program is at risk of being determined *not* to prepare students for gainful employment in a recognized occupation.

310. The lack of any requirement that schools warn students about a potential loss of Title IV eligibility suggests either that the Department does not intend for a GE program to ever lose Title IV eligibility because it fails to prepare students for gainful employment in a recognized occupation or that warning of such a determination is no longer "essential" or "necessary" for students.

/ / /

/ / /

7.4 The Department Failed to Consider Alternatives to Repealing the Disclosure Requirements

311. The Department stated in the Repeal that it "considered multiple options regarding which metrics to disclose, which entity bears the burden of computing them, and how to disseminate them to students and the public." 84 Fed. Reg. at 31,449.

312. With respect to disclosures, the Department stated that it was "not convinced that the GE disclosures are useful to students." 84 Fed. Reg. at 31,419. At the same time, it acknowledged that information regarding "[a]ffordability and earnings associated with institutions and programs continues to be an area of interest" for students and their families. 84 Fed. Reg. at 31,445. And, as noted *supra* ¶ 168, the Department declared in May 2019 that the 2019 disclosure template would provide information that was "especially meaningful to students."

313. The Department suggested numerous alternatives during negotiated rulemaking. For example, in Issue Paper #6 provided before the second session, the Department proposed requiring certain programs to disclose, on specific programmatic websites, information about the primary occupation that the program prepares students to enter, programmatic completion rates, program length, enrollment numbers, the loan repayment rate, cost information, the job placement rate, the percentage of Title IV recipients, median loan debt, completion rates, earnings information, professional licensure information, accreditation status, and a link to the College Navigator and College Scorecard websites.[38]

314. By the third negotiated rulemaking session, the Department proposed to narrow the information required to be disclosed, but nevertheless continued to

---

[38] U.S. Dep't of Educ., *Program Disclosures*, First Amended Issue Paper No. 6, 2017–2018 Negotiated Rulemaking (Session No. 2, Feb. 5–8, 2018), *available at*: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper6programinformationdislcosures.pdf.

propose many of the same disclosure requirements included in the Gainful Employment Rule.[39]

315. In issuing the Repeal, the Department failed to provide any non-conclusory explanations for rejecting an obvious alternative to complete repeal of the Disclosure Requirements.

316. The Department's failures are particularly troubling in light of its reliance on a focus group report to support complete repeal of the Disclosure Requirements, despite that report identifying an approach for disclosures that was found to be both "helpful and important." Holly Bozeman *et al.*, *Summary Report for the 2017 Gainful Employment Focus Groups*, Westat 1-1, 5-2 (Mar. 2017) ("Focus Group Report").[40] Indeed, with respect to the "warning language that would be added to a webpage if a program fails to meet U.S. Department of Education standards," participants in the focus group found the "visual display" to be "very effective." *Id.* at 5-6.

317. The Department claimed in the Repeal that the Focus Group Report showed that "students mostly want to know how students like them have done in the program," 84 Fed. Reg. at 31,419, when in reality the report states:

> **Prospective and current students looked for and valued a variety of types of information in their search for a college or program of study.** Prospective students were asked what type of information has been most important for them in their search process; students were evenly split between tuition costs, accreditation, and length of program. Current students were asked what type of information they had looked for when considering a program, and similarly, tuition costs were most important, followed by schedule. In contrast to the prevailing opinion that cost was a determining factor, one current student countered that it was "[n]ot about the money [spent], it's about the job that will last

---

[39] *See, e.g.*, U.S. Dep't of Educ., *Program Disclosures*, Second Amended Issue Paper No. 6, 2017–2018 Negotiated Rulemaking (Session No. 3, Mar. 12–15, 2018), *available at*: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/session3issuepapers6disclosures.pdf.

[40] The Focus Group Report is available online at: https://www2.ed.gov/about/offices/list/ope/summaryrpt2017gefocus317.pdf.

> the longest . . . . [I] don't want to waste time on something [if] I'm not going to get anything out of it."

Focus Group Report at 2-1 (emphasis in original).

318. Insofar as the Department asserted that the Gainful Employment Rule had a disparate impact on proprietary institutions and that, "[w]ithout a statutory change, there was no way to expand the GE regulations to apply to all institutions," 84 Fed. Reg. at 31,394, the Department failed to consider that, even though it did not have the authority to expand the Accountability Framework beyond those programs that prepare students for gainful employment in a recognized occupation, it did have the authority to expand the Transparency Framework to cover additional institutions. *See, e.g.*, 79 Fed. Reg. at 64,890 (discussing how the Department's authorities under 20 U.S.C. § 1221e-3 and 20 U.S.C. § 3474 "include promulgating regulations that . . . require institutions to report information about the program to the Secretary" and "require . . . institution[s] to disclose information about the[ir] program[s] to students, prospective students, and their families, the public, taxpayers, and the Government, and institutions"); 79 Fed. Reg. at 64,891 (describing how section 431 of the Department of Education Organization Act, 20 U.S.C. § 1231a, provides authority for the Transparency Framework insofar as that provision permits the Secretary to "inform the public regarding federally supported education programs; and collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving the intended purposes of such programs").

319. Although the Department has purportedly tried to cure the harms created by repealing the Disclosure Requirements through non-binding assertions about its plans to update the College Scorecard (which, at the time of the publication of the Repeal, it was "still developing," 84 Fed. Reg. at 31,424), the Department never considered whether providing debt and earnings metrics on a Departmental website is an adequate substitute for the Disclosure Requirements,

which are provided on institutional and programmatic websites, in marketing materials, and via direct distribution to prospective and enrolled students.

320. To the extent the Department had concerns with job placement rate disclosures, the Department failed to consider the obvious alternative of adding an explanation about how the rates are calculated to make clear to prospective students whether they can make an apples-to-apples comparison across programs. Nor did the Department consider the obvious alternative of developing a single methodology for measuring and reporting job placement rates, despite the fact that this was a known alternative to repeal. *See* 83 Fed. Reg. at 35,815 (convening, in a different rulemaking proceeding, a negotiated rulemaking committee to consider, *inter alia*, "[d]eveloping a single definition for purposes of measuring and reporting job placement rates").

8. Post-Repeal Developments

321. On June 28, 2019, the Department issued Electronic Announcement #122 ("EA122") regarding the "Early Implementation of the Rescission of the Gainful Employment Rule."

322. In EA122, the Department recognized that the Master Calendar Rule requires that regulations affecting Title IV programs be published in final form by November 1, prior to the start of the July 1 award year in which they become effective. At the same time, the Department noted that the HEA permits the Secretary to designate a regulation for early implementation, which allows those subject to its terms to comply sooner if they wish to do so. *See* HEA § 482(c)(2), 20 U.S.C. § 1089(c)(2).

323. In EA122, the Department stated that "[i]nstitutions that early implement the rescission of the GE rule will not be required to report GE data . . . for the 2018–2019 award year," which would otherwise be due on October 1, 2019. In addition, "those institutions that early implement will not be required to comply with the current requirements in 34 C.F.R. § 668.412(d) and (e) that require

institutions to include the disclosure template, or a link thereto, in their GE program promotional materials and directly distribute the disclosure template to prospective students, which will be required starting on July 1, 2019."

324. In EA122, the Department also stated that "[i]nstitutions that early implement will no longer be required to post the GE Disclosure Template and may remove the template and any other GE disclosures that are required under 34 C.F.R. [§] 668.412 from their web pages. Finally, an institution that early implements will not be required to comply with the certification requirements for GE programs under 34 C.F.R. [§] 668.414."

325. On or about September 13, 2019, the Department issued Electronic Announcement #123 ("EA123"), which, like EA122, provides that institutions that "choose to early implement" will not be required to report GE data for the 2018–19 award year. The Department made clear in EA123 that institutions "that do not early implement the rule are still expected to comply with the 2014 rule until the rescission becomes effective on July 1, 2020."

326. By choosing to early implement the Repeal, the Department relieved institutions of their regulatory obligations to comply with the Certification, Reporting, and Disclosure Requirements. The Department does not track which institutions have chosen to early implement.

327. Since publication of the Repeal, the Department also released a "redesign" of the College Scorecard website, which it asserts provides "customized, accessible, and relevant data on potential debt and earnings based on field of study (including for 2-year programs, 4-year degrees, certificate programs, and some graduate programs), graduation rates, and even apprenticeships."[41]

---

[41] Press Release, U.S. Dep't of Educ., *Secretary DeVos Delivers on Promise to Provide Students Relevant, Actionable Information Needed to Make Personalized Education Decisions* (Nov. 20, 2019), *available at*: https://www.ed.gov/news/press-

328. The information provided by the updated College Scorecard is not a substitute for the information required to be reported and disclosed under the Gainful Employment Rule.

329. For example, the Gainful Employment Rule required that institutions provide the required disclosures on: (i) "any Web page containing academic cost, financial aid, or admissions information;" (ii) in "all promotional materials made available by or on behalf of an institution;" and (iii) by "direct distribution" to prospective students, either by email or hand-delivery. *See* 34 C.F.R. § 668.412(c)–(e). By contrast, interested parties must visit the College Scorecard website to review information about an institution's offerings. Further, while the Gainful Employment Rule required an "institution that offers a GE program in more than one program length" to publish a "separate disclosure template for each length of the program," 34 C.F.R. § 668.412(f), the College Scorecard does not separate GE programs by length.

330. Still further, although the Gainful Employment Rule defined covered programs in terms of a six-digit CIP code, the "[College] Scorecard uses the first four digits of the CIP code in its calculations."[42] As a result, the updated College Scorecard aggregates information from disparate programs. For example, the Scorecard would include together the following types of programs:

---

releases/secretary-devos-delivers-promise-provide-students-relevant-actionable-information-needed-make-personalized-education-decisions.

[42] *See* U.S. Dep't of Education, *Technical Documentation: College Scorecard Data by Field of Study* 1, 13 (Nov. 20, 2019), *available at*: https://collegescorecard.ed.gov/assets/FieldOfStudyDataDocumentation.pdf. Notably, although the Department sought to justify its use of four-digit CIP information in the Scorecard by claiming that it can provide "more information that is not privacy-suppressed," it recognized that the "trade-off" of using four-digit CIP, instead of six-digit CIP, was the "loss of granularity in describing individual program offerings by institutions." *Id.*

> A program that focuses on the principles and practice of administration in four-year colleges, universities and higher education systems, the study of higher education as an object of applied research, and which may prepare individuals to function as administrators in such settings. Includes instruction in higher education economics and finance; policy and planning studies; curriculum; faculty and labor relations; higher education law; college student services; research on higher education; institutional research; marketing and promotion; and issues of evaluation, accountability and philosophy.[43]

with the following:

> A program that focuses on early childhood educational program administration and prepares individuals to serve as a principal or director of an early childhood educational program. Includes instruction in early childhood education, program and facilities planning, budgeting and administration, public relations, human resources management, early childhood growth and development, counseling skills, applicable law and regulations, school safety, policy studies, and professional standards and ethics.[44]

331. There is a meaningful difference in information and data regarding programs if the information is provided at a four-digit CIP code level as opposed to a six-digit CIP code level. *See supra* ¶¶ 91–95.

332. As an example, according to the 2015 D/E rates measure data the Department released in 2017, a master's degree program at Capella University—a proprietary institution—corresponding to the six-digit CIP code for "Educational Leadership and Administration, General" (CIP Code 13.0401) had a median earnings value of $57,339, whereas a master's degree program at Capella University corresponding to the six-digit CIP code for "Higher Education/Higher Education Administration" (CIP Code 13.0406) had a median earnings value of $43,156. Because these programs share a four-digit CIP code, but not a six-digit CIP code, the College Scorecard does not differentiate between them. Therefore, a prospective student looking at the College Scorecard will not be able to differentiate

---

[43] Nat'l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.0406*, https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=90420.

[44] Nat'l Ctr. for Educ. Statistics, *IPEDS Detail for CIP Code 13.0414*, https://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=56&cipid=93060.

the programs or determine which program tends to lead to higher post-graduation earnings.

333. Similarly, according to that same data, a master's degree program at Capella University corresponding to the six-digit CIP code for "Adult and Continuing Education and Teaching" (CIP Code 13.1201) had a median earnings value of $56,675, whereas a master's degree program at Capella University corresponding to the six-digit CIP code for "Early Childhood Education and Teaching" (CIP Code 13.1210) had a median earnings value of $40,022. Because these programs share a four-digit CIP code, but not a six-digit CIP code, the College Scorecard does not differentiate between them. Therefore, a prospective student looking at the College Scorecard will not be able to differentiate the programs or determine which program tends to lead to higher post-graduation earnings.

334. Likewise, according to that same data, a master's degree program at Grand Canyon University corresponding to the six-digit CIP Code for "Educational Leadership and Administration, General" (CIP Code 1304.01) had a median earnings value of $57,252, whereas a master's degree program at Grand Canyon University corresponding to the six-digit CIP Code for "Educational, Instructional, and Curriculum Supervision" (CIP Code 1304.04) had a median earnings value of $45,838. Because these programs share a four-digit CIP code, but not a six-digit CIP code, the College Scorecard does not differentiate between them. Therefore, a prospective student looking at the College Scorecard will not be able to differentiate the programs or determine which program tends to lead to higher post-graduation earnings.

335. Without information at the six-digit CIP code level, prospective and enrolled students will not be able to make an accurate assessment of whether the earnings they are likely to make post-graduation are worth the cost of tuition for a given program.

/ / /

336. In addition, although the College Scorecard provides both earnings and debt information for some programs, albeit identified by four-digit CIP code, in no case does the Department provide the type of information necessary to compare earnings to debt, including no way for a student to determine whether median post-graduation debt is too high, given median post-graduation earnings. Moreover, even if the College Scorecard did compare earnings to debt, the earnings data comes from students graduating in 2015 and 2016. Debt data, on the other hand, was collected from students who graduated in 2016 and 2017.

337. The College Scorecard does not inform students whether any program prepares students for gainful employment in a recognized occupation. Nor does the College Scorecard provide a warning to prospective and enrolled students that a program is at risk of losing Title IV eligibility due to a failure to prepare students for gainful employment in a recognized occupation.

9. The Department Continues to Rely on 2014 GE Data and the Eligibility Metrics for Other Purposes

338. Throughout the Repeal, the Department reiterated its apparent position that the Eligibility Metrics were "arbitrary," "lack[ed] an empirical basis," and were published without a "sufficient, objective, and reliable basis."

339. Nevertheless, before, during, and even after publication of the Repeal, the Department incorporated the Eligibility Metrics and D/E rates measure into its administration of the "Borrower Defense" Rule and relied upon these very calculations to justify its actions as non-arbitrary.

340. As relevant here, the 1995 Borrower Defense Rule is a regulation under which students can seek and obtain discharges of their federal student loan debt based on an act or omission of an institution of higher education that would give rise to a cause of action against the school under applicable state law. *See*

/ / /

/ / /

generally 34 C.F.R. § 685.206(c)(1) (applicable to loans issued between July 1, 1995 and July 1, 2017).[45]

341. The regulation provides that "[i]f the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay." 34 C.F.R. § 685.206(c)(2).

342. Between 2015 and 2017, the Department fully discharged the loans of students who attended particular programs at institutions owned by Corinthian Colleges, Inc. ("CCI") pursuant to the 1995 Borrower Defense Rule. In 2017, however, the Department changed its approach under the 1995 Borrower Defense Rule and decided that, when a valid Borrower Defense claim had been brought by or on behalf of a former CCI student, the amount of relief granted would be determined by comparing the average 2014 earnings of a subset of CCI students with the average 2014 earnings of students from "peer" institutions that offered comparable programs and were considered to be passing the D/E rates measure using information released in January 2017, *supra* ¶¶ 150–151 (the "Average Earnings Rule").

343. On December 20, 2017, a class of students filed suit to challenge the Department's new approach. *See generally* Compl., *Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018) (No. 3:17-cv-07210-SK).

---

[45] The 1995 Borrower Defense Rule was modified by the Department in 2016 (effective July 1, 2017) and again in 2019 (effective July 1, 2020). *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016); Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019).

344. On May 25, 2018, the District Court enjoined the Department from using the "Average Earnings Rule" because the plaintiffs had shown a likelihood of success on the merits that the Department had violated the Privacy Act. *Calvillo Manriquez*, 345 F. Supp. 3d at 1099.

345. The Department appealed. Following the submission of written briefs and oral argument, the United States Court of Appeals for the Ninth Circuit ordered the parties to submit supplemental briefing on whether the "Average Earnings Rule" was arbitrary and capricious.

346. In its supplemental brief, the Department repeatedly relied upon the Gainful Employment Rule to argue that the "Average Earnings Rule" was not arbitrary and capricious because, in part, a comparison between *passing* GE programs and CCI programs is a non-arbitrary component to calculating the amount of loan discharge afforded to former CCI students. *See generally* Supplemental Br. of Defs.-Appellees, *Calvillo Manriquez v. DeVos*, No. 18-16375 (9th Cir. Mar. 5, 2019). For example, the Department noted how "limiting the comparator programs to those with passing Gainful Employment scores *helped* Corinthian borrowers." *Id.* at 13 (emphasis in original). The Department also asserted that "[a]verage earnings for the subset of programs with passing Gainful Employment scores are, as might be expected, 'higher' than the average earnings for schools generally." *Id.* Finally, the Department argued that "limiting the comparison to schools with passing Gainful Employment scores made the earnings of Corinthian borrowers seem comparatively lower and had the effect of increasing the amount of loan forgiveness Corinthian borrowers received." *Id.*

347. On December 10, 2019, the Department announced a new methodology for determining the amount of relief it would provide borrowers who stated a valid Borrower Defense claim under the 1995 Borrower Defense Rule. For students who stated valid claims with respect to schools that were both "non-operational" and "for which there is 2014 GE earnings data," the Department's stated policy is to use the

2014 data "to establish the borrower defense applicant's program earnings, and the earnings for the comparison group." *See* U.S. Dep't of Educ., *Policy Statement Re: Tired Relief Methodology to Adjudicate Certain Borrower Defense Claims* 1, 7 (Dec. 10, 2019) ("2019 Borrower Defense Policy Statement").[46]

348. In the 2019 Borrower Defense Policy Statement, the Department stated that "the use of GE earnings data for determining [a borrower's] harm is appropriate." *Id.* at 8. But, the Department did not mention or distinguish how it had repeatedly criticized the very same earnings data in the Repeal. *See, e.g.*, 84 Fed. Reg. at 31,410 (describing how the "SSA data may be inaccurate"); 84 Fed. Reg. at 31,409 (noting that the "earnings portion of the D/E calculation [is] subject to significant errors").

349. Despite representing in the Repeal that using the SSA earnings data could lead to "significant errors," 84 Fed. Reg. at 31,409, the Department has used that very same data to deny full debt relief to defrauded students. The fact that the Department relies on the SSA earnings data to serve one policy goal (effectuating incomplete loan relief), while claiming that using the same data could lead to "significant errors" to serve another policy goal (repealing the Gainful Employment Rule) demonstrates that the Repeal was not based on any legitimate position that such data was unreliable.

CAUSES OF ACTION

COUNT 1

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to Failures to Properly Interpret the Statutory Mandate

350. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

---

[46] The 2019 Borrower Defense Policy Statement is available online at: https://www.ed.gov/sites/default/files/documents/borrower-defense-relief.pdf.

351. The APA requires courts to "set aside agency action, findings, and conclusions found to be[] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

352. The Repeal is a "final agency action for which there is no other adequate remedy in a court" and is "subject to judicial review." 5 U.S.C. § 704; *see id.* § 702.

353. During the course of multiple lawsuits, courts have uniformly concluded that the gainful employment provision of the HEA is ambiguous, leaving a regulatory gap for the Department to fill. *APSCU I*, 870 F. Supp. 2d at 145–46; *APC v. Duncan*, 107 F. Supp. 3d at 358–60; *APSCU III*, 110 F. Supp. 3d at 184–89, *aff'd*, *APSCU Appeal*, 640 F. App'x at 7. *See supra* ¶¶ 77–80, 142–149.

354. Despite these holdings, in issuing the Repeal, the Department asserted that the statute is *unambiguous* and that, by repealing the Gainful Employment Rule in its entirety, "it, in fact, *is* enforcing the law as written and as intended." 84 Fed. Reg. at 31,401 (emphasis in original). The Department also stated, without acknowledging these holdings, that "[t]he Department does not agree that it needs to define the term 'gainful employment' beyond what appears in statute. Since it was added to the HEA in 1968, the term 'gainful employment' has been widely understood to be a descriptive term that differentiates between programs that prepare students for named occupations and those that educate students more generally in the liberal arts and humanities." 84 Fed. Reg. at 31,401. *See supra* ¶ 189.

355. By contradicting numerous federal courts that have held otherwise, without acknowledging or explaining its divergence from these judgments, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law.

356. Because the Department had previously, and repeatedly, asserted that the relevant statutory language was ambiguous, the Department also acted

arbitrarily, capriciously, and not in accordance with law by failing to provide a sufficient justification for its changed interpretation of the statute. *Supra* ¶¶ 190–193.

357. Insofar as the Department asserts that leaving an ambiguous term undefined is simply "enforcing the law as written," *supra* ¶ 189, and by failing to elucidate that provision by regulation, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

358. In addition, by taking this position, the Department specifically limited its interpretation to "two words in the HEA," "gainful employment," 84 Fed. Reg. at 31,411, but did not consider the entire statutory command. For example, in a section entitled "Is there a need to define gainful employment?" the Department notes that a commenter "stated that the Department must establish a definition for the term 'gainful employment in a recognized occupation.'" 84 Fed. Reg. at 31,401. But in responding to that comment, the Department's entire discussion focuses on the need to "define the term 'gainful employment,'" stating that "[t]he Department does not agree that it needs to define the term 'gainful employment' beyond what appears in statute." 84 Fed. Reg. at 31,401.

359. By limiting its statutory interpretation to the narrow phrase "gainful employment," instead of the more complete phrase "prepare students for gainful employment in a recognized occupation," the Department interpreted the statutory language in a manner that is contrary to the holdings of numerous federal courts recognizing that the "relevant statutory command" for the purposes of determining eligibility for certain institutions and programs under Title IV is that programs "prepare students for gainful employment in a recognized occupation." *See, e.g.*, *APSCU I*, 870 F. Supp. 2d at 146 (noting that, "importantly[,] . . . the relevant statutory command is that a given program 'prepare students for gainful employment in a recognized occupation,'" and contrasting that language with the

more narrow phrase, "gainful employment"); *APC v. Duncan*, 107 F. Supp. 3d at 359 (agreeing with and incorporating the holding of *APSCU I*); *APSCU III*, 110 F. Supp. 3d at 185 (analyzing the complete version of the statutory language, including the meaning of the word "prepare"), *aff'd*, *APSCU Appeal*, 640 F. App'x 5 (D.C. Cir. 2016). *See supra* ¶¶ 82, 150–51.

360. By failing to consider the complete portion of the statutory language, and limiting its interpretation to an incomplete portion, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 2

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Disregard for, and Refusal to Interpret and Apply, a Statutory Mandate

361. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

362. In order for certain institutions to participate in Title IV, HEA programs with respect to certain postsecondary programs, those programs must prepare students for gainful employment in a recognized occupation. *Supra* ¶¶ 69–70.

363. In the Repeal, the Department acknowledged and admitted that it has a stated policy of ignoring this Congressional mandate. For example, the Department stated that "programs with non-passing results will benefit from avoiding ineligibility." 84 Fed. Reg. at 31,446. The Department also highlighted the extent to which "non-passing programs remain accessible with the rescission of the 2014 Rule." 84 Fed. Reg. at 31,445.

364. Insofar as the Department has adopted a regulation that completely disregards and refuses to interpret and apply a statutory mandate, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 3

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Reliance on Impermissible Factors

365. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

366. An agency decision will normally be deemed arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider[.]" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

367. In the HEA, Congress created a statutory distinction between degree programs offered by public and non-profit institutions, on the one hand, and programs offered by proprietary and postsecondary vocational institutions (and non-degree programs at public and non-profit institutions), on the other, whereby public and non-profit institution degree programs that are not required to prepare students for gainful employment can be Title IV eligible, whereas proprietary and postsecondary vocational institutions are only Title IV eligible with respect to programs that prepare students for gainful employment in a recognized occupation. *See supra* ¶¶ 69–70.

368. In the Repeal, the Department relied on factors that Congress, as demonstrated by this statutory scheme, did not intend for it to consider.

369. The Department based the Repeal on its view that the Gainful Employment Rule disproportionately impacted proprietary institutions. *See, e.g.*, 84 Fed. Reg. at 31,392 ("[T]he GE regulations have a disparate impact on proprietary institutions and the students these institutions serve."); *id.* at 31,394 (justifying the Repeal on the basis that "there was no way to expand the GE regulations to apply to all institutions"); 84 Fed. Reg. at 31,396 (asserting that the "limited applicability of the 2014 Rule to some, but not all, higher education programs makes it an inadequate solution for informing consumer choice and addressing loan default issues"). *See supra* ¶ 194.

370. The Department also asserted that the Gainful Employment Rule created an "uneven playing field" between public institutions and for-profit institutions, given that public institutions "benefit from direct appropriations" from states in the form of "taxpayer subsidies." 84 Fed. Reg. at 34,397. *See supra* ¶ 195.

371. The Department further asserted that there is a "need for an accountability and transparency framework that applies to all [T]itle IV programs and institutions," 84 Fed. Reg. at 31,394, and that the Gainful Employment Rule did not adequately solve the problems that extended beyond proprietary institutions. *See supra* ¶¶ 196–197.

372. The Department's reliance on its view that: (i) the Gainful Employment Rule disproportionally affects proprietary institutions; (ii) the Gainful Employment Rule created an "uneven playing field" between proprietary and public institutions; and (iii) there is a need for accountability for *all* institutions and programs, not merely gainful employment programs, constitutes a policy disagreement with Congress over the distinction Congress created between programs that must "prepare students for gainful employment in a recognized occupation" in order to be eligible to receive Title IV funds and those that do not need to meet that standard to be eligible. *See supra* ¶¶ 198–199.

373. To the extent the Gainful Employment Rule had a larger effect on proprietary institutions than other types of institutions, such an effect was consistent with the clear intent of Congress that the Department consider one type of program and institution differently than other programs and institutions. *See supra* ¶¶ 194–202. Rather than acknowledge and accept that statutory scheme, the Department relied on an effect of that statutory distinction as a basis for the Repeal. In this regard, the Department has relied on factors that Congress has not intended for it to consider and has therefore acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 4

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Elimination of the Disclosure Requirements

374. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

375. In the Gainful Employment Rule, as part of the Transparency Framework, the Department established a series of disclosure requirements wherein an institution "must use" a Secretary-developed "disclosure template . . . to disclose information about each of its GE programs to enrolled and prospective students." 34 C.F.R. § 668.412(a). *See supra* ¶¶ 134, 137–138.

376. In enacting the Disclosure Requirements in 2014, the Department stated that "[t]he disclosure requirements will help ensure students, prospective, students, and their families, the public, taxpayers, and the Government, and institutions have access to meaningful and comparable information about student outcomes and the overall performance of GE programs." 79 Fed. Reg. at 64,891. The "helpful[ness] and importan[ce]" of the Disclosure Requirements were confirmed in the Focus Group Report. *See supra* ¶¶ 316–317.

377. By repealing the Disclosure Requirements without a reasonable explanation, the Department is depriving both prospective and enrolled students, including Individual Plaintiffs, of critical information about the programs they are attending or considering attending, which is required to be disclosed under the Gainful Employment Rule. Individual Plaintiffs are deprived of information necessary to make an informed decision regarding enrollment, and, as a result, may choose programs that will lead them to incur debt that they will be unable to afford to repay. *See supra* ¶¶ 44–52.

378. The repeal of the Disclosure Requirements is arbitrary and capricious in at least five ways.

/ / /

379. First, the Department eliminated the Disclosure Requirements in their entirety, without actual consideration of regulatory alternatives. *See supra* ¶¶ 311–320. For example, the Department stated in the Repeal—but not in the 2018 NPRM—that a justification for rescinding the Disclosure Requirements is that "[c]onsumer testing has revealed that students mostly want to know how students like them have done in the program." 84 Fed. Reg. at 31,419. But the Department failed to consider that the Disclosure Requirements require institutions to disclose those kinds of facts and, to the extent the Department disagrees that the existing disclosure requirements accomplish this goal, the Department also failed to consider that the Gainful Employment Rule affords the Department the ability to modify the precise topics as part of the disclosure template.

380. The Department's proposals during the negotiated rulemaking process, the Department's consideration of regulatory alternatives in prior rulemakings, and comments submitted in response to the 2018 NPRM all demonstrate that the Department was aware of regulatory alternatives. *See, e.g.*, *supra* ¶ 313. Nevertheless, the Department did not seek comment on those alternatives during the comment period, nor did it provide a sufficient explanation for its rejection of those alternatives in the Repeal. *See supra* ¶ 315.

381. Second, throughout the preamble to the Repeal, the Department indicates that it intends to "address concerns" with the repeal of the Disclosure Requirements by expanding the College Scorecard. *See, e.g.*, 84 Fed. Reg. at 31,394 ("However, to address concerns that by rescinding the 2014 Rule some students would be more likely to make poor educational investments, the Department describes in this document our preliminary plans for the expansion of the College Scorecard."). *See supra* ¶¶ 301–302. Later, the Department refers to information that "will be provided through the expanded College Scorecard or other consumer information tools, such as College Navigator." 84 Fed. Reg. at 31,395; *see also* 84 Fed. Reg. at 31,406 ("This is another reason why we are rescinding the GE

regulations and proposing to expand the College Scorecard."); *id.* at 31,408 (referring to the "expanded College Scorecard"); 84 Fed. Reg. at 31,411 ("We think consumers should make those decisions for themselves, aided by information the Department plans to make available through the College Scorecard."); 84 Fed. Reg. at 31,419 ("The Department will now provide outcomes data to all students using the College Scorecard, or its successor, which has the advantage of reducing the burden on institutions and allowing students to more easily compare outcomes among the institutions and programs available to them.").

382. In relying on the College Scorecard as a substitute for the Disclosure Requirements, the Department also states that, "[s]ince we are still developing the tool and are not required to publish regulations in order to produce the College Scorecard, we will not commit to all of the particulars of its content in this final regulation." 84 Fed. Reg. at 31,424.

383. The plans the Department does reveal in Appendix A, *see supra* ¶ 303, demonstrate that even an "Expanded [S]corecard" is not an adequate substitute for the Disclosure Requirements. For example, under the 2017 disclosure template, institutions were required to disclose the "[p]ercent of students graduating on time for each program." 84 Fed. Reg. at 31,435. The Department's plans for expanding the scorecard with respect to completion rates asserts that an expanded College Scorecard "*could include*" program-level information, not that it would. 84 Fed. Reg. at 31,435 (emphasis added). Similarly, the 2017 disclosure requirement included information about costs of the program, but under the current and expanded Scorecard, cost information would be at the "institution level." 84 Fed. Reg. at 31,435. Institution-level information (rather than program-level information) does not provide sufficiently detailed information for prospective and enrolled students to make informed decisions.

384. The Department's replacement of existing disclosure requirements with vague, undeveloped, and "preliminary plans for the expansion of the College

Scorecard"—that it is under no compulsion to implement or maintain—is arbitrary and capricious, insofar as preliminary, non-binding plans to take future action do not mitigate the harm that students will be "more likely to make poor educational investments" as a result of the Repeal. 84 Fed. Reg. at 31,394. Moreover, the Department has failed to adequately justify the departure from its 2014 conclusion that direct distribution of disclosures to students was "more effective in ensuring that students obtain critical information about program-level student outcomes" than making information available on the Department's website. 79 Fed. Reg. at 64,978. *See supra* ¶¶ 305–307.

385. The Department's non-binding update to the College Scorecard in November 2019 is not a substitute for the Gainful Employment Rule, nor does it ameliorate the Department's failures to comply with the APA in the Repeal. For example, not only is the College Scorecard not provided directly to prospective and enrolled students by direct distribution, but also it provides data at the four-digit CIP code level, rather than the six-digit level and, thus, is not as specific and precise as the information provided under the Gainful Employment Rule. *See supra* ¶¶ 91–95, 138, 329–337. Nor does the College Scorecard provide a warning to prospective and enrolled students that a program is at risk of losing Title IV eligibility due to a failure to prepare students for gainful employment in a recognized occupation. *See supra* ¶¶ 113–114, 309, 337.

386. Third, as part of its justification for the Repeal, the Department asserted in the 2018 NPRM that it "underestimated" the "burden" that the disclosure aspects of the regulations would have on institutions. *See, e.g.*, 83 Fed. Reg. at 40,173 ("The Department also believes that it underestimated the burden associated with distributing the disclosures directly to prospective students."); 83 Fed. Reg. at 40,177 ("Furthermore, when developing the GE regulations, the Department, as noted in feedback received from multiple institutions, underestimated the burden on institutions associated with the use of a

standardized disclosure template in publishing program outcomes and distributing notifications directly to prospective and current students."). *See supra* ¶ 294. But these and other statements regarding administrative burden lacked evidence, *see supra* ¶¶ 295–298, and were inconsistent with its prior statements regarding the extent of that burden, *id.* ¶¶ 299–300.

387. Fourth, the Department's elimination of the Disclosure Requirements based on concerns regarding the precise disclosures to be required is also arbitrary and capricious insofar as the Gainful Employment Rule already afforded the Secretary discretion to identify, with greater specificity, the information that must be included in the template and to design an appropriate template for the disclosures. 34 C.F.R. § 668.412.

388. Fifth, to the extent the Department's elimination of the Disclosure Requirements was premised on the fact that it was too narrowly targeted towards gainful employment programs (*i.e.*, that it "fails to provide transparency regarding program-level debt and earnings outcomes for all academic programs," 84 Fed. Reg. at 31,392), the Department acted arbitrarily and capriciously by failing to consider how its broad statutory authority to impose disclosure requirements could be used with respect to programs other than those that purport to prepare students for gainful employment in a recognized occupation. *See* 81 Fed. Reg. at 76,017 ("The HEA authorizes the Department to adopt disclosure regulations as does the general authority of the Secretary in 20 U.S.C. § 1221e–3 and 20 U.S.C. § 3474.").

389. Given that the Department has: (i) failed to consider or justify its rejection of known alternatives to a repeal of the Disclosure Requirements; (ii) based the Repeal on a non-binding policy that the agency will disclose additional information in the future; (iii) asserted that it underestimated the burden created by the Gainful Employment Rule without evidence or data to substantiate that claim, while simultaneously estimating that the reduction in burden via repeal is equivalent to the burden created; (iv) failed to recognize that the Gainful

Employment Rule already afforded the Department the discretion to identify appropriate disclosures; and (v) failed to consider how its statutory authorities could be used to remedy problems the Department identified with the Gainful Employment Rule, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 5

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Failure to Consider Alternative Continuing Eligibility Metrics & Thresholds

390. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

391. In promulgating and repealing regulations, federal agencies are required to consider reasonably obvious alternatives to the chosen policy that could serve the agency's identified goals. In its consideration of those alternatives, the agency must give a reasoned explanation for its rejection of those alternatives. The agency's failure to do so constitutes arbitrary and capricious decision-making.

392. To the extent the Department eliminated the D/E rates measure (and thus the thresholds) because it believed those metrics "lack[] sufficient accuracy and validity" or were published without a "sufficient, objective, and reliable basis," 84 Fed. Reg. at 31,407, the Department was obligated to consider known, common, and reasonable alternatives to those metrics and provide a reasoned explanation for its rejection of the same.

393. The Department was aware of numerous obvious alternatives to the D/E rates measure formula and thresholds. *See supra* ¶¶ 253–261 (alternative metrics); *id.* ¶¶ 262–270 (alternative thresholds).

394. For example, the Department was aware of, but failed to consider, numerous obvious alternatives to the formula for calculating the D/E rates

measure, including, but not limited to, alternative formulas or mechanisms to calculate the discretionary income rate and the annual earnings rate, such as changes to the formula for calculating the annual loan payment and/or the amortization period. The Department previously considered such alternatives in the 2011 GE Rule, proposed them itself in the 2014 NPRM, discussed them during the 2017–2018 negotiated rulemaking, and received public comments raising those alternatives in response to the 2018 NPRM. *See supra* ¶¶ 252–261.

395. The Department was also aware of numerous obvious alternatives to the threshold for considering a program passing, failing, or in the "zone" with respect to the D/E rates measure, insofar as the Department used such alternatives in the 2011 GE Rule, proposed such alternatives in the 2014 NPRM, discussed such alternatives during the 2017–2018 negotiated rulemaking, and received such alternatives via public comments in response to the 2018 NPRM. *See supra* ¶¶ 263–269.

396. Yet the Repeal failed to consider reasonable alternatives to the D/E rates measure or thresholds that were less drastic than the chosen policy of complete repeal and that were neither unknown nor uncommon. To the extent the Department did consider such alternatives, the Department failed to identify those alternatives or give a reasoned explanation for the rejection of the alternatives.

397. By failing to consider reasonable alternatives and failing to give a reasoned explanation justifying the rejection of those alternatives, but nevertheless publishing the Repeal, the Department has acted in a manner that is arbitrary, capricious, and contrary to law within the meaning of the APA, 5 U.S.C. § 706.

/ / /

/ / /

/ / /

/ / /

/ / /

COUNT 6

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Failure to Explain a Change in Position on Continuing Eligibility Metrics and Thresholds

398. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

399. Agencies may change their existing policies if they provide a reasoned explanation for the change. When an agency changes its existing position, policy, or factual findings, it must display both an awareness that it is changing its position and that there are good reasons for the new policy. An unexplained inconsistency in an agency policy is a proper basis for holding an interpretation to be arbitrary and capricious.

400. In promulgating the Gainful Employment Rule in 2014, the Department established the D/E rates measure as a means of determining whether a given program is preparing students for gainful employment in a recognized occupation. In the Repeal, however, the Department has departed from its prior statements and policies regarding the continuing eligibility metrics and thresholds without adequate explanation or justification.

401. First, the Department has failed to provide a reasoned explanation for its change in position regarding the use of SSA earnings data. Although the Department has previously asserted that it "found no sources superior to the SSA [earnings data]," *see supra* ¶ 141, and although numerous courts (*e.g.*, *APSCU III* and *AACS*) have held that the use of SSA earnings data was rational, *id.* ¶¶ 148, 276, the Department now claims that SSA earnings data "may be inaccurate" in light of the issues with underreported tip income. *Id.* ¶ 348.

402. Moreover, without justification or explanation, the Department continues to rely on the use of SSA earnings data for purposes of Borrower Defense relief determinations. *See supra* ¶ 347.

403. Second, the Repeal failed to provide a reasoned explanation for why the alternate earnings appeals process was insufficient to overcome any limitations created by the SSA earnings data. *See supra* ¶¶ 133, 165, 279–292.

404. Third, the Department failed to establish good reasons for deviating from the eight percent annual earnings threshold. For example, although the Department states in the Repeal that there was "no empirical basis for the 8 percent threshold and [the Department] will, therefore, no longer use it to determine [T]itle IV program eligibility," 84 Fed. Reg. at 31,407, the Department entirely failed to acknowledge the following sources, *see supra* ¶ 115, or provide a reasoned explanation for why its prior consideration of, and reliance on, these sources was no longer correct:

- Keith Greiner, *How Much Student Loan Debt Is Too Much?*, 26 J. of Student Fin. Aid 1, 7–19 (1996) (cited at 79 Fed. Reg. at 64,919 n.100);
- Patricia M. Scherschel, *Student Indebtedness: Are Borrowers Pushing the Limits?* USA Group Found. (Nov. 1998) (cited at 79 Fed. Reg. at 64,919 n.101);
- Steven A. Harrast, *Undergraduate Borrowing: A Study of Debtor Students and their Ability to Retire Undergraduate Loans*, 34 J. of Student Fin. Aid 1, 21–37 (2004) (cited at 79 Fed. Reg. at 64,919 n.102); *and*
- Tracey King & Ivan Frishberg, *Big Loans, Bigger Problems: A Report on the Sticker Shock of Student Loans*, The State PIRG's Higher Education Project (Mar. 2001), *available at:* www.pirg.org/highered/highered.asp?id2=7973 (cited at 79 Fed. Reg. at 64,919 n.103).

405. Fourth, the Department failed to provide a reasoned explanation for why its prior consideration of the Federal Housing Administration's underwriting standards regarding total debt levels, which the Consumer Financial Protection

Bureau also adopted, was no longer correct, nor did it display awareness that it had previously relied on this source. *See supra* ¶ 119.

406. Nor did the Department provide a reasoned explanation why its prior consideration of the 1986 study by the National Association of Student Financial Aid Administrators, *see supra* ¶ 116, or the study by Sandy Baum and Marie O'Malley, *id.* ¶ 117, were no longer correct, nor did it display awareness that it had previously relied on these sources.

407. Fifth, the Department asserted that because it "used a different set of thresholds that included 12 percent as the passing rate [in 2011]," rather than the eight percent used in 2014, there was an "absence of a reasoned methodology for distinguishing between passing and failing programs." 84 Fed. Reg. at 31,407. But the Department failed to provide a reasoned explanation for why the Department's 2014 justification for this difference was inadequate or insufficient and failed to even display awareness that the Department had previously explained this distinction. *See* 79 Fed. Reg at 64,920.

408. Sixth, the Department failed to provide a reasoned explanation for why its prior conclusion that the twenty percent discretionary earnings threshold was a reasonable way of ascertaining whether a program prepares students for gainful employment in a recognized occupation was no longer correct. *See supra* ¶¶ 121–122. The Department failed to provide a reasoned explanation and good reason why it now believes that, "[i]n the 2014 Rule, the Department failed to provide a sufficient, objective, and reliable basis for the 20 percent threshold for the debt-to-discretionary income standard." 84 Fed. Reg. at 31,407.

409. The sole justification that the Department provided for why the twenty percent discretionary earnings threshold lacked a reasonable basis in 2014 and lacks that same basis today is that a new income-driven repayment plan (REPAYE) was introduced in 2015. According to the Department, REPAYE "renders the 20 percent debt-to-discretionary income threshold in the 2014 Rule obsolete since no

borrower would ever be required to pay more than 10 percent of their discretionary income." 84 Fed. Reg. at 31,408. *See supra* ¶ 231.

410. The Department's reliance on the REPAYE monthly payment amount to counter the D/E rates measure does not constitute a reasoned explanation because, *inter alia*: (i) the "discretionary income" used for purposes of REPAYE is not the same as the "discretionary income rate" for purposes of the D/E rates measure, *compare* 34 C.F.R. § 685.209(b)(1)(iii)(A) *with* 34 C.F.R. § 668.404(a)(1); (ii) the Department's failed to distinguish between the debt-to-earnings rates, which measure the average total debt compared to earnings of an identified group of program completers, with the option of individual students to make lower monthly payments on their student loans; and (iii) the Department failed to recognize that the lower monthly payment option available to an individual student is not an indication of, or replacement for, whether the program prepared that student for gainful employment in a recognized occupation.

411. Seventh, in issuing the Repeal, the Department failed to provide a reasoned explanation for why its prior conclusion, that the four-year "zone" makes it unlikely that fluctuations in labor market conditions could cause a passing program to become ineligible, was incorrect. *See supra* ¶¶ 233–240.

412. By failing to provide a good reason for its changes and ignoring or countermanding its prior factual findings without reasoned explanation, but nevertheless publishing the Repeal, the Department has acted in a manner that is arbitrary, capricious, and contrary to law within the meaning of the APA, 5 U.S.C § 706.

COUNT 7

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Failure to Consider Alternative Certification Requirements

413. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

414. In the Gainful Employment Rule, the Department included the Certification Requirement, whereby an institution would establish a GE program's initial eligibility to participate in Title IV, HEA programs, as well as a process by which the Department determines whether a program remains eligible. *See supra* ¶¶ 98–100.

415. The Certification Requirement, set forth in 34 C.F.R. § 668.414, ensured "that a program eligible for [T]itle IV, HEA program funds meets certain basic minimum requirements necessary for students to obtain gainful employment in the occupation for which the program provides training." 79 Fed. Reg. at 64,911.

416. The Repeal eliminates, in its entirety, the Certification Requirement and *any process* by which the Department establishes a GE program's eligibility.

417. The Department did not consider any alternative certification requirement, despite obvious alternatives that were known and common. *See supra* ¶¶ 246–251. For example, in developing the Gainful Employment Rule in 2014, the Department heard from a commenter that it should require more expansive certification requirements. 79 Fed. Reg. at 64,990. *See supra* ¶ 248. At the time, the Department dismissed this consideration because it was "unnecessary in light of the requirements already provided by the regulation." 79 Fed. Reg. at 64,990. Given that the Repeal removed these requirements, the Department should have considered these known alternatives.

418. Alternative certification requirements were also presented during the 2017–2018 negotiated rulemaking. *See supra* ¶ 249 & n.27.

419. For example, prior to the second and third negotiated rulemaking sessions, the Department released issue papers that proposed revisions to 34 C.F.R. § 668.414. *See supra* ¶¶ 250–251. The Department did not consider these alternatives publishing the Repeal, and if they were considered, the Department did not give a reasoned explanation for their rejection.

/ / /

420. By failing to consider reasonable alternatives, but nevertheless repealing the Certification Requirement, the Department has acted in a manner that is arbitrary, capricious, and contrary to law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 8

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to its Failure to Adequately Explain its Change in Position Regarding Certification Requirements

421. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

422. In 2014, the Department recognized that the Certification Requirement, in addition to requiring institutions to provide certain information to the Department, "creat[ed] an enforcement mechanism for the Department to take action if a required approval has been lost, or if a certification that was provided was false." 79 Fed. Reg. at 64,989. The Department also noted that the Certification Requirement had "minimal" burden on institutions and that "any burden [would be] outweighed by the benefits of the requirements[,] which . . . will help ensure that programs meet minimum standards for students to obtain employment in the occupations for which they receive training." 79 Fed. Reg. at 64,989. *See supra* ¶ 99.

423. The Department also referred to the Certification Requirement as an "independent pillar of the accountability framework . . . that complement[s] the metrics-based standards." 79 Fed. Reg. at 64,990. *See supra* ¶ 100.

424. The Repeal eliminates, in its entirety, the Certification Requirement and any process by which the Department establishes a GE program's eligibility to participate in Title IV.

425. In the Repeal, the Department did not provide a reasoned explanation for why the Certification Requirement was no longer sound policy or any good reason to support having no certification requirement. *See supra* ¶¶ 246–251.

426. The only arguable justification it provided came in response to a comment that "institutions of higher education should be required to certify [that] programs that lead to careers with State licensure requirements actually meet those State licensure standards." 84 Fed. Reg. at 31,424. In response to that comment, the Department asserted that it "considered disclosures related to licensure and certification" as part of a separate rulemaking process. 84 Fed. Reg. at 31,424. *See supra* ¶ 247.

427. The Certification Requirement is different than the Disclosure Requirements, insofar as certifications are made to the Department and used by the Department for determinations of programmatic eligibility for Title IV participation. In contrast, disclosures are public-facing materials that both prospective and enrolled students, including Individual Plaintiffs, can readily access.

428. Insofar as the Department has eliminated the Certification Requirement without sufficient acknowledgment, justification, explanation, or good reason, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 9

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Insofar as it is Unsupported by Substantial Evidence

429. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

430. In issuing and repealing regulations, federal agencies are required to base their decisions on adequate factual support, meaning that agencies must have and rely upon enough relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1072 (9th Cir. 2015) (recognizing that the "arbitrary and capricious standard

incorporates the substantial evidence test" in the case of informal agency proceedings).

431. In issuing the Repeal, the Department failed to base its decision on adequate factual support because the evidence before the agency established that institutions of higher education are offering programs that do not prepare students for gainful employment in a recognized occupation. Despite these facts, the Department eliminated regulations designed to ensure implementation of the HEA's statutory guardrails.

432. In the Repeal, the Department has not considered substantial evidence to justify its findings or changes in position. For example, in asserting that the D/E rates measure is "scientifically invalid" because it fails to control for demographic factors as part of the calculation, the Department failed to sufficiently consider or explain the overwhelming evidence from its 2014 analysis that "student characteristics of programs do not overly influence the performance of programs on the D/E rates measure." 79 Fed. Reg. at 64,910; *see also, e.g.*, 79 Fed. Reg. at 64,923 ("[T]he Department has examined the effects of student demographic characteristics on results under the annual earnings rate measure and does not find evidence to indicate that the composition of a GE program's students is determinative of outcomes."); 79 Fed. Reg. at 64,908 ("[W]e do not expect student demographics to overly influence the performance of programs on the D/E rates measure. "). *See supra* ¶¶ 132, 220–226.

433. Even further, in changing its position about the effects of macro-economic and labor market conditions on a program's likelihood of passing the D/E rates measures, the Department has failed to analyze data within its possession, as one commenter suggested. *See supra* ¶¶ 233–241.

434. Compounding the Department's errors, the Repeal is also premised on numerous misstatements regarding the limited research it does cite. For example:

/ / /

a. The Department asserted in the Executive Summary that "research published in 2014—and discussed throughout [the Repeal]"—shows how the Gainful Employment Rule was insufficiently justified. 84 Fed. Reg. at 31,393. But the Department's only citation is to a working paper, the Lochner Paper, that was not peer-reviewed or published in final form, used a decades-old and small sample of bachelor's degree recipients, and admitted to shortcomings that render it unable to "statistically distinguish" between graduates of proprietary institutions and non-profit institutions. Yet the Department cited this paper for numerous propositions. *See* 84 Fed. Reg. at 31,393 nn. 5–6, 31,415 n.125, 31,423 n.164. *See also supra* ¶¶ 208–211.

b. The Department stated in the 2018 NPRM that "[r]esearch published subsequent to the promulgation of the GE regulations adds to the Department's concern about the validity of using D/E rates as to [sic] determine whether or not a program should be allowed to continue to participate in [T]itle IV programs." 83 Fed. Reg. at 40,171. But the Department did not indicate to what sources it was referring. When challenged on this statement under the Information Quality Act, the Department's response was, without citation or reference, that it "used well-respected, peer-reviewed references to substantiate its reasons throughout these final regulations for believing that D/E rates could be influenced by a number of factors other than program quality." 84 Fed. Reg. at 31,427. *See supra* ¶ 216.

c. The Department repeatedly cited its own "analysis" without description, discussion, or indication of that analysis's methodology or specific findings. *See, e.g.*, 84 Fed. Reg. at 31,398 n.27 & accompanying text (asserting that the Department's analysis of enrollment data suggests that students who enroll in proprietary institutions "are well

aware that other, lower cost options exist"); 84 Fed. Reg. at 31,405 (asserting, without a description of data or methodology, that the Department's "analysis of the outstanding student loan portfolio demonstrates that poor outcomes are not limited to [proprietary] institutions or the small number, relative to total postsecondary enrollment, of students who attend them"); 84 Fed. Reg. at 31,425 (asserting, in response to comments about the lack of analysis, that "[t]he Department has provided a more than rigorous review of data that was not considered in connection with the 2014 Rule," without describing that review or its underlying data). *See supra* ¶¶ 216–217.

d. The Department asserts that the Cellini & Darolia Paper shows that "differences in characteristics" (*e.g.*, financial independence, minority group status, single-parent status) "may explain disparities in student outcomes, including higher borrowing levels and student loan defaults among students who enroll at proprietary institutions." 84 Fed. Reg. at 31,393. In reality, the Cellini & Darolia Paper does the *opposite*, stating that "the relatively high for-profit cost (mostly tuition) is by far the largest predictor of this explained variation" in borrowing rates between for-profit and public two-year college students. *See supra* ¶¶ 205–206.

e. The Department makes numerous statements regarding the Cellini & Turner Paper that misconstrue its findings and methodology, including that it: (i) was not peer-reviewed, when it was; (ii) compared what employees earn in different fields, when the study compared earnings in the same fields; and (iii) failed to consider demographically-matched comparison groups beyond zip codes and birthdates, when it considered a wide array of demographic indicators. *See supra* ¶¶ 210–215.

/ / /

435. By failing to base its decision on the facts and evidence before it and nevertheless publishing the Repeal without adequate factual support or substantial evidence, the Department has acted in a manner that is arbitrary, capricious, and contrary to law within the meaning of APA, 5 U.S.C. § 706.

COUNT 10

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to Defendants' Continued Reliance on the Gainful Employment Rule to Defend its Other Decisions

436. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

437. Throughout the Repeal, the Department asserted that the D/E rates measure "lack[ed] sufficient accuracy and validity" or was published without a "sufficient, objective, and reliable basis." *See supra* ¶ 231. The Department also asserted that the D/E rates measure was "scientifically invalid." *See supra* ¶¶ 219, 230. Yet the Department failed to provide a reasonable explanation for its use of, and continued reliance on, the D/E rate measure as part of its "Average Earnings Rule" to calculate the amount of Borrower Defense debt relief that should be provided to former CCI students. *See supra* ¶¶ 338–346.

438. Both before and after the comment period, the Department argued in court that a comparison between passing GE programs and CCI programs was a non-arbitrary component of its calculations of the amount of loan discharges afforded to former CCI students. *See supra* at ¶ 346. For example, the Department noted how "limiting the comparator programs to those with passing Gainful Employment scores *helped* Corinthian borrowers" because "limiting the comparison to schools with passing Gainful Employment scores made the earnings of Corinthian borrowers seem comparatively lower and had the effect of increasing the amount of loan forgiveness Corinthian borrowers received." *See supra* at ¶ 346.

/ / /

439. In publishing the Repeal, the Department has not explained the inconsistencies between its positions that: (i) limiting the Borrower Defense comparison to CCI programs, on the one hand, and comparable, passing GE programs on the other, supported the Department's position that the "Average Earnings Rule" was non-arbitrary; with its position that: (ii) the metrics used to determine whether a program was passing "had no empirical basis" (for the eight percent annual earnings threshold) and were without a "sufficient, objective, and reliable basis" (for the twenty percent discretionary income threshold).

440. In publishing the Repeal, the Department has not explained why the SSA earnings data used in the Gainful Employment Rule is "subject to significant errors" and "inaccurate" when used to "penaliz[e] programs" under the Gainful Employment, but is nevertheless sufficient to serve as the basis for determining the amount of debt relief provided to student loan borrowers who have stated a valid Borrower Defense claim. *See supra* ¶¶ 347–349.

441. Insofar as the Department, in publishing the Repeal, acted on concerns that it wholly ignored when justifying its schemes for determining Borrower Defense relief, the Department has acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

COUNT 11

Agency Action that is Arbitrary, Capricious, and Not in Accordance with Law Due to the Use of an Inadequate Comment Period

442. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

443. The APA requires an agency to publish "notice" of "either the terms or substance of the proposed rule or a description of the subjects and issues involved" in order to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and then, "[a]fter

consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b)–(c).

444. Under the APA's notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Although an agency is permitted to add supporting documentation in response to comments submitted during a comment period, such documentation is limited to materials that supplement or confirm existing data. An agency is not permitted to introduce in a final rule the *only* evidence that it claims supports a proposition.

445. The Department has deprived the public of an adequate opportunity to comment by repeatedly citing to unnamed sources and vague, undisclosed references to its own "analysis," including, for example and without limitation, by:

a. Basing its concern regarding the "validity" of the D/E rates measure in part on the Department's "analysis" of the D/E rates issued in 2017 without disclosing that analysis or providing the opportunity to comment on that analysis. *See supra* ¶¶ 216–217.

b. Basing its concern regarding the "validity" of the D/E rates measure in part on "[r]esearch published subsequent to the promulgation of the GE regulations," without identifying that research in the 2018 NPRM or providing the opportunity to comment. *See supra* ¶ 216.

c. Basing its concern about prior findings on outcomes on its "analysis of the outstanding student loan portfolio," 84 Fed. Reg. at 31,405, without identifying that analysis in the 2018 NPRM or providing the opportunity to comment. *See supra* ¶ 217.

d. Stating in the 2018 NPRM that "[o]ther research findings suggest that D/E rates-based eligibility creates unnecessary barriers for certain

demographic groups," 79 Fed. Reg. at 40,171, while failing to identify such findings. Although the Department included a reference to a 2016 study from the College Board in the 2018 NPRM, the Department conceded in the Repeal that the cited research "did not address GE programs specifically" and therefore could not have been about "D/E rates-based eligibility." 84 Fed. Reg. at 31,427. *See supra* ¶ 218.

e. Asserting in the 2018 NPRM and Repeal that administering the alternate earnings appeals process has been more burdensome to the Department than was originally anticipated, without providing commenters with an opportunity to review the underlying information regarding alternate earnings appeals, despite requests for that information. *See supra* ¶¶ 284–292.

446. By failing to provide adequate notice and comment, the Department has violated the APA's procedural requirements, 5 U.S.C. § 553, and, as a result, has acted in a manner that is arbitrary, capricious, and contrary to law within the meaning of APA, 5 U.S.C. § 706.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that Defendants have violated the APA by issuing the Repeal in a manner that is arbitrary, capricious, and otherwise contrary to law;

B. Hold unlawful, vacate, and set aside the Repeal;

C. Enjoin the Defendants from implementing the Repeal;

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

D. Award Plaintiffs their costs and reasonable attorneys' fees; *and*

E. Grant such other relief as the Court deems just and proper.

Dated: January 22, 2020

Respectfully submitted,

Glenn Rothner
ROTHNER SEGALL & GREENSTONE

Daniel A. Zibel (*pro hac vice forthcoming*)
Aaron S. Ament (*pro hac vice forthcoming*)
Robyn K. Bitner (*pro hac vice forthcoming*)
NATIONAL STUDENT LEGAL DEFENSE NETWORK

By *__/s/ Glenn Rothner__*
GLENN ROTHNER
Counsel for Plaintiffs