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May 23, 2014

Secretary Arne Duncan
U.S. Department of Education
1990 K Street NW Room 8037
Washington, DC 20006-8502

Re: **Docket ID: ED-2014-OPE-0039**
Proposed Rule Gainful Employment 34 CFR Parts 600 and 668: Federal Register Vol. 79, No. 57.

Dear Secretary Duncan:

The Children's Advocacy Institute (CAI), located at the University of San Diego School of Law, seeks to improve the health, safety, and well-being of children and youth. CAI advocates in legislatures to make laws, in the courts to interpret laws, before administrative agencies to implement laws, and before the public to educate and build support for laws to improve the status of children and youth across the nation. CAI educates policymakers about children's needs for economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and injury.

Because obtaining a quality postsecondary education greatly impacts the ability of young adults to attain self-sufficiency, one area on which CAI has focused a great deal of attention, research, and advocacy over the past several years is the sufficient and meaningful regulation of for-profit postsecondary institutions. As part of our work in this area, we have reviewed the Department of Education's recently proposed rule on gainful employment and welcome the opportunity to comment on it.

CAI commends the Department of Education for proposing this rule in an attempt to better protect students around the country who endeavor to better their lives through postsecondary education. A number of for-profit postsecondary programs and institutions provide a valuable resource for students from all walks of life, including veterans, former foster youth, single mothers, older students, as well as traditional college-age students. The programs that deliver valuable education, training, and career preparation should be recognized for the quality educational service that they provide. Students should be able to access federal and state resources to assist with the cost of attending these quality intuitions. However, programs that consistently fall short and routinely leave their students with a mountain of debt and without promised education, preparation, training, and gainful employment should be identified and should no longer be eligible for federal aid. The federal government must not facilitate the exploitation of vulnerable populations of students by allowing institutions that consistently fail their students to access taxpayer money to do so.

The Department must implement regulations not only to protect students who are entrusting their futures to for-profit programs, but to protect taxpayers as well. When students do not receive the training and education for which they pay and consequently cannot earn enough money to repay their loans or support themselves or their families, the students default and the taxpayers, not the for-profit programs, pay the price. The Department's regulations must set forth serious consequences that will be imposed on for-profit programs that fail to meet a minimum threshold of performance. There are too many documented instances of these large, well-funded programs misleading students, the public, and regulators with regard to their success rates and their services.[1] If consumers are uninformed, the marketplace is not a sufficient incentive for change and improvement. Thus, if the Department does not implement strong, meaningful regulations and enforce them, for-profit programs have little incentive to provide the quality education so many students need and for which so many vulnerable individuals are paying enormous sums of money.

In February, CAI joined a coalition of over 50 organizations representing youth, veteran, civil rights, and consumer interests to urge the administration to adopt a meaningful rule. The rule in includes some important provisions that would improve protections for students and taxpayers as compared with the status quo. However, the proposed rule falls far short of what is needed and as such, threatens to leave students who want nothing more than to improve their lives, vulnerable to predatory private postsecondary programs.

Specifically:

I. CAI COMMENDS THE DEPARTMENT OF EDUCATION ON ITS PROPOSAL TO CREATE A MEANINGFUL APPROVAL PROCESS TO WEED OUT PROGRAMS THAT WILL NOT PREPARE STUDENTS FOR GAINFUL EMPLOYMENT IN A SPECIFIED OCCUPATION BEFORE THEY HARM STUDENTS

One of the most egregious practices in which too many for-profit postsecondary programs engage is promising to prepare students for careers in a particular field, while in reality the advertised program lacks the accreditation to allow graduates to enter the field as represented. We commend the Department for addressing this problem by proposing procedures that would require an institution to certify that each of its Gainful Employment (GE) programs meets all applicable accreditation and licensure requirements necessary for a student to obtain employment in the occupation for which the program provides training.[2]

II. CAI RECOMMENDS THAT THE DEPARTMENT OF EDUCATION IMPLEMENT AN EFFECTIVE METRIC BY WHICH TO PREVENT PROGRAMS WITH HIGH DEBT AND HIGH DROPOUT RATES FROM RECEIVING FEDERAL FUNDING, AS THE PROPOSED PROGRAM COHORT DEFAULT RATE (pCDR) ALONE WILL NOT ACHIEVE THIS PURPOSE AND WILL LEAVE STUDENTS AND TAXPAYERS VULNERABLE.

The Department of Education expresses concern that GE programs 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 lead to default." Many of the students who are aggressively recruited are known in advance to be at high risk of circumstances in their lives interfering with program completion. Programs with high dropout and default rates harm students, the public, and

[1] See, for example, the catalog of media coverage at http://www.protectstudentsandtaxpayers.org/media-coverage/
[2] Federal Register Vol. 79, No. 57: Tuesday, March 25, 2014 / Proposed Rule. p. 16437

taxpayers. However, especially given the Department's expressed concern, its proposed regulations fall far short of adequately addressing this issue.

The Department has proposed the program cohort default rate (pCDR) as one measure to determine whether or not a program will receive and remain eligible to receive Title IV-E, Higher Education Act (HEA) funding. The pCDR would evaluate the default rate of former students enrolled in a GE program, regardless of whether they completed the program. A program would pass if its pCDR is lower than 30 percent and fail if its pCDR is 30 percent or higher. This is not sufficient for two reasons.

First, some for-profit colleges have a well-documented history of manipulating cohort default rates.[3,4] One of the primary purposes of this measure is to increase transparency and to improve market information that would assist students, prospective students and their families to make critical decisions about their educational investments. Utilizing a measure for which information historically has been manipulated has the potential not only to be an inadequate measure, but also to defeat the purposes for which it was created by misleading the very individuals it was meant to assist and allowing ineffective, low-quality programs to continue operating in ways that are detrimental both to students and to tax payers.

Second, pCDR is problematic because default is an extreme situation; it measures whether borrowers have failed to make any required payments in at least 270 days, and it does not measure whether students are able to pay down their loans. If the intent of this regulation is, in part, to protect students from unduly burdensome debt and to protect taxpayers from the costs associated with repayment plans and programs created for students with high debt and low-income, then the pCDR is a woefully inadequate measure because it does not reflect these two important realities.

To adequately protect students, prospective students and their families, as well as taxpayers, the Department should develop a much stronger repayment rate or other metric to ensure transparency and accountability. If the Department instead determines to retain the pCDR metric as its means of measuring outcomes for non-completers, then the Department should, at the very least, lower the pCDR threshold. 30% is too high, as such a rate would basically authorize a school to sit back and collect taxpayer money while one out of three of its students fail. A more reasonable and appropriate rate would be 15%, which is generous given the default rates at postsecondary institutions offering similar courses around the country.[5] Additionally, and importantly, this regulation must contain a much lower pCDR of 15% because students who default on these loans have no way to discharge them. If a consumer defaults on credit cards or on a mortgage, that consumer has a means by which to discharge those obligations. If a student defaults on a student loan that was incurred as a means by which to increase earning potential, there is no recourse. The

[3] United States Senate, Health, Education, Labor, and Pension Committee. *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success.* July 30, 2012. at p. 151. Available online at: http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf

[4] The Institute for College Access and Success. August 21, 2012 Memo. *Steps the Education Department Should Immediately Take to Curb Default Rate Manipulation.* Available online at: http://www.ticas.org/files/pub/TICAS_memo_on_CDR_evasion_082112.pdf

[5] Information on default rates at postsecondary institutions is available for comparison online at: https://www.nslds.ed.gov/nslds_SA/defaultmanagement/search_cohort_2yr2011.cfm. For example, the default rate at the University of San Diego (2011) was 2%, The default rate at South Dakota State University (2011) was 2.1%, the default rate at Humphreys College (small private career college in Stockton, CA in 2011) was 9.8%.

taxpayers are stuck with the bill, and the student is stuck with a lifetime obligation and his or her credit in shambles without any means by which to address it. Given these factors and the profoundly disastrous consequences of default, 15% is generous to the regulated career colleges.

The Department also should take steps to reduce or eliminate manipulation of the pCDR. There are several ways in which institutions have manipulated rates in the past, for example, some schools abuse forbearances and deferments to delay defaults until after the period for which the schools are held accountable.[6] The rule should extend the time period over which the pCDR is determined beyond the allowable forbearance period to make it more difficult for institutions to manipulate the pCDR, factor forbearances and deferments into their calculation, or monitor the number of defaults that take place after the time period set for school accountability for pCDR to reduce or eliminate manipulation. A second method institutions use to manipulate pCDR is to combine their campuses for reporting purposes.[7] The rule should take this into consideration and either not allow changes in Office of Postsecondary Education ID numbers (OPEIDs) or require continued compliance under former OPEIDs for at least three years after any change in OPEID.

We believe the best course is for the Department rules to include a metric which considers the debt-to-earnings (D/E) rates of students who do not graduate to more accurately reflect the realities faced by students who do not complete the programs and are left with debt. In order to adequately protect students and taxpayers, programs must be required to pass both the debt-to-earnings and the repayment rate metrics, not just one of them.

III. CAI RECOMMENDS THAT THE DEPARTMENT STRENGTHEN ITS PROPOSED DEBT-TO-EARNINGS METRIC

The legislative history of the statute preceding the HEA demonstrates Congress' conviction that the training offered by the postsecondary programs for which these regulations have been drafted should equip students to earn enough to repay their loans.[8] Allowing students to borrow was expected neither to "unduly burden" the students nor pose a "poor financial risk" to taxpayers.[9]

Thus, the Department has proposed the debt-to-earnings (D/E) rate as a measure to determine whether students will be able to pay back the educational debt they incur to enroll in the occupational programs that are the subject of this rulemaking. The three considerations on which the Department focused in its rulemaking were (1) the payment burdens on the borrower, (2) taxpayer subsidies, and (3) default.

The D/E rates consider two different debt-to-earnings rates: The first is discretionary income, which measures the proportion of annual income above 50% of the Poverty Guideline for a single person in the continental United States[10] – that students who complete the program are devoting to annual debt payments. In order to pass this metric, students' loan debt payments must not exceed 30% of their discretionary income. The second rate, the annual earnings rate, measures the proportion of annual earnings that students who complete the program are devoting to annual debt payments. To pass here, student loan debt payments must not exceed 12% of their annual income.

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[6] *See Supra* note 4.
[7] *Id.*
[8] APSCU v. Duncan, 870 F.Supp.2d at 139; see also 76 FR 34392
[9] Federal Register Vol. 79, No. 57: Tuesday, March 25, 2014 / Proposed Rule. p. 16441; see also 76 FR 34392.
[10] 34 CFR 668.7(a)(vi)

Given the Department's focus, this is a common sense regulation. Programs that result in high debt without providing the training necessary to secure employment that provides a salary sufficient to repay high student debt puts an enormous burden on the student and often the student's family, it results in a high risk of default and by extension, a high risk to taxpayer investment. Unfortunately, the impact of this proposed rule is substantially diminished because thousands of programs with median and mean debt levels that exceed 100% of their graduates' discretionary incomes would not fail because they would pass the annual earnings rate component. [11]

CAI recommends that the Department include in its debt-to-earnings metric students who took out education loans and then did not graduate from the institution for which that debt was incurred. Some institutions have already begun to takes steps meant to manipulate these numbers by lowering D/E rates for graduates, for example, by providing post-graduation scholarships to students with high debt, while doing nothing for students who take out large loans and do not graduate.[12]

CAI recommends that the Department lower the acceptable debt-to-earnings ratio. One of the Department's stated purposes for this rule was to address programs that provide training in an occupation for which low wages do no justify program costs. Yet, the Department proposes debt-to-earnings standards that will allow programs to pass even when student loan payments consume their students' entire discretionary income. To rectify this oversight, the Department must lower the acceptable debt-to-earnings ratio to more realistically reflect the success or failure of GE programs. Programs with median and mean debt levels that exceed their graduates' *entire* discretionary incomes absolutely should not be able to pass this metric.

IV. CAI RECOMMENDS THAT THE DEPARTMENT STRENGTHEN THE DEBT-TO-EARNINGS STANDARDS FOR BACHELOR'S AND GRADUATE DEGREE PROGRAMS.

The proposed rule assumes a repayment period of 15 years for bachelor's and master's degrees and a 20-year repayment period for doctoral programs. This has a significant impact on the D/E calculations for these programs. CAI recommends that the Department return to the previously proposed assumed repayment periods of 10 years for everyone. The increased time frames help programs by lowering their average annual debt payments. The extended timeframes are not necessary. While an individual with a bachelor's, a master's or a doctoral degree will have had to borrow more money than an individual with a certificate or an associate's degree to finance their education, those individuals should be earning more when they graduate. Thus, the debt-to-income ratios should be similar without having to expand the timeframe.

V. CAI RECOMMENDS THAT THE DEPARTMENT INCLUDE BORROWER RELIEF THAT IS FAIR AND PROVIDES A GREATER INCENTIVE TO IMPROVE WEAK PROGRAMS.

Unfortunately, the Department has moved backwards here and removed from its draft of this rule vital (albeit very weak and limited) protections for students. Notably, it has removed provisions that

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[11] February 4, 2014 letter to President Obama from a coalition of more than 50 organizations that advocate for students, consumers, veterans, service members, college access, and civil rights. Available online at: http://projectonstudentdebt.org/files/pub/GE_Coalition_letter_to_President_Feb_2014.pdf

[12] Center for Responsible Lending. Department of Education Rule Should Give Failing Grades to Useless Career Education Programs. Available Online at: http://www.responsiblelending.org/media-center/press-releases/archives/CRL-to-DOE-Give-Failing-Grades-to-Useless-Career-Ed-Programs.html#

would have required programs that lose eligibility to provide some measure of debt relief for enrolled students. This necessary regulation would have provided relief for students who are likely to struggle with their loan payments.

Further, the Department removed a cap on the amount of federal financial aid available to programs about to lose eligibility. This move puts taxpayers at enormous risk of financing ill-fated programs that have not been performing well. And it indirectly rewards the bad programs and empowers them to continue their bad behavior.

CAI recommends not only that the Department include relief for students, but that the Department strengthens that relief available to students. Students should not be responsible for *any* loans they received to attend failing programs. Providing full relief to all such students is not only fair, it also provides a more effective incentive for schools to improve their programs so they never have to provide such relief. Ideally, the schools themselves should be accountable for absorbing whatever debt remains.

VI. CAI RECOMMENDS THAT THE DEPARTMENT IMPLEMENT STRONGER PROTECTIONS FOR SCHOOLS OFFERING LOW-COST PROGRAMS IN WHICH MOST STUDENTS DO NOT BORROW.

The Department's proposed GE rule does make allowance for the Secretary to pass a program on D/E if the institution can show that the borrowing rate for all Title IV and non-Title IV completers over the relevant cohort period is less than 50 percent. However, this new appeal process for "mitigating circumstances" of low-borrowing applies only to the D/E metric.
The protections that the Department proposes do not include adequate protection for schools that are low-cost and in which most students do not borrow. These programs are low-risk to tax-payers and as such should not be subject to the same thresholds as more expensive school at which students incur very high debt.

CAI recommends that the same process for "mitigating circumstances" be applied to the pCDR metric for programs that are low-cost and for which most students do not borrow.

VII. CONCLUDING COMMENTS

Opponents of a strong gainful employment rule have argued that such a strong rule would deny access to nearly 2 million students seeking postsecondary education. But the question is, access to what? The government should not be providing resources for programs that leave students worse off than when they started. These students are entrusting their future to institutions that market themselves veterans, single mothers, current and former foster youth, and others as being the key to not only an education but also a well-paying career. If these institutions are not delivering on their promises, not only are they denying these students the education for which the students have paid a large sum of money and devoted a large amount of time and effort, they are subjecting many of these students to financial ruin, and taxpayers will be left holding the bag. It is not asking too much that these institutions provide access to quality education. The regulations do not deny access to education, rather, they ensure access to quality education and they ensure that taxpayer dollars are not squandered.

CAI understands and appreciates the Department's efforts to be fair to the for-profit college industry and not to unduly burden them. However, the regulations here proposed are far too conciliatory to an industry that is victimizing war veterans, single mothers, former foster youth, and other vulnerable individuals who do not possess the kind of power that the for-profit lobby wields. The regulations should not be weakened simply because too many programs would fail under more stringent standards. Again, the point of the regulations is to protect students and taxpayers. The regulations give the institutions ample opportunity to correct any issues that may disqualify them, ample opportunity to dispute information that the institutions believe to be erroneous, and due process. If the institutions cannot improve the quality of their programs given all the latitude provided, they should not be allowed access to taxpayer money. It is in the best interest of this country, the tax-payers, and the millions of students around the country seeking to improve their lives and the futures of their families for the Department to enact regulations that are meaningful, far more stringent and reflective of the realities faced by the students that for-profit programs serve.

Sincerely,

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Center for Public Interest Law
Children's Advocacy Institute

Melanie Delgado, Staff Attorney
Children's Advocacy Institute