An Advisory by the Arts Accrediting Associations on
Gainful Employment (GE)

Overview

Within the Higher Education Act exists the term "gainful employment." The Act, which governs institutional eligibility in federal student assistance programs, applies the term specifically to propriety institutions and postsecondary vocational (non-degree-granting) institutions whose academic programs, it claims, are intended to "prepare students for gainful employment in a recognized occupation."

What Constitutes a Gainful Employment (GE) Program?

1. All Title IV-eligible, stand-alone non-degree-granting (NDG) – certificate, or equivalently titled or reported – programs at any level (undergraduate, post-baccalaureate, graduate, or post-graduate) in public or private non-profit institutions.

   Please note: Certificates required or awarded as part of degree programs in these institutions are not considered GE programs. Other exceptions are: a) NDG programs at least two academic years long that are fully transferrable to a baccalaureate degree program; and b) preparatory courses of study required to enter a Title IV-eligible program.

2. All Title IV-eligible degree and non-degree programs at for-profit institutions.

3. All degree-based teacher preparation programs that result in direct teacher certification by the institution itself. Degree-based teacher preparation programs that prepare students for certification by a state entity other than the institution are not considered GE programs.

The GE definitions and rules are much more complicated than the summary provided. For this reason, it is imperative that arts executives communicate and coordinate with institutional Title IV officers on an ongoing and regular basis as these individuals will always have the most current information from USDE.

The Issue: A Brief History of Recent GE Regulations

2008-2016
Following the reauthorization of the Higher Education Act by Congress in 2008 and citing abuses by the for-profit sector of higher education, officials at the Department of Education set about developing a federal definition of "gainful employment." A series of negotiated rulemaking hearings were held in 2009. (Negotiated rulemaking is the process by which certain government agencies draft, revise, and finalize federal regulations. Various stakeholders are represented during the negotiations, and the public is given the opportunity to provide comment on drafts prior to finalization.) Then in 2010 and 2011, following a period of public comment, the U.S. Department of Education released its final "gainful employment" regulations.

The regulations outlined a series of disclosure and reporting requirements for programs that fell under the gainful employment definition, including debt-to-earnings benchmarks. In order to

maintain program eligibility for Title IV funding, programs classified as “gainful employment programs” had to comply with these requirements and meet certain federally-defined benchmarks.

Those “gainful employment” regulations were published in Title 34, Parts 600 and 668 of the Code of Federal Regulations (CFR) in three separate sets of regulations in October 2010, June 2011, and October 2011; however, legal challenges followed, which vacated the majority of the regulations and forced USDE to go back to the drawing board.

Several of the original regulations were vacated as a result of a June 2012 decision by a federal judge in the case *Association of Private Colleges and Universities v. Arne Duncan*. The court ruled that “[b]ecause one of the debt measures [in the gainful employment regulations] lacks a reasoned basis, that regulation will be vacated as arbitrary and capricious. Because the majority of the related rules cannot stand without the debt measures, they will be vacated as well.” However, as was stated in the court decision, “Because the disclosure requirements...are not so intertwined with the vacated debt measure, they will remain in effect.” These disclosure requirements included items such as the occupations that particular “gainful employment” programs prepare students to enter, on-time graduation rates for these programs, program costs, job placement rates, and median student loan debt for program graduates.

The U.S. Department of Education resolved to go back to the drawing board and craft a new set of gainful employment regulations.

After the release of draft regulatory language in August 2013, the Department held a series of negotiated rulemaking sessions aimed at rewriting many of the gainful employment regulations. These particular negotiations ended without consensus, and so the Department was free to develop the proposal language on its own. Thus, newly-proposed gainful employment regulations were published in the *Federal Register* on March 25, 2014. Comment was collected through May 27, 2014.

Just as before, lawsuits followed. This time, however, the courts sided with the USDE in both the *Association of Proprietary Colleges v. Arne Duncan* and the *Association of Private Sector Colleges and Universities v. Arne Duncan*.

After clearing these final legal hurdles, USDE was free to release its final gainful employment regulations in the *Federal Register* on October 31, 2014, (the “2014 GE Rule”), the majority of which went into effect on July 1, 2015. A correction issued on December 4, 2014 announced that institutions would have until July 1, 2017 to comply with the new disclosure requirements outlined in Part 668.412. Until then, institutions had to demonstrate compliance with the 2014 GE Rule’s disclosure requirements by annually updating their disclosures in accordance with Part 668.6(b), using the Department’s Gainful Employment Program Disclosure Template.

Although education subcommittees in both the House of Representatives and Senate approved appropriations bills that prohibited the Department of Education from using funds to develop or enforce regulations that “expand the federal government’s role in higher education,” both subcommittees’ language was not present in the *Consolidated Appropriations Act, 2016*. That Act, which contained multiple bills, appropriations, and an omnibus spending bill that funded the government for the remainder of fiscal year 2016, was signed into law on December 18, 2015.

2017-Present: The Locus of Opposition and Subsequent Repeal

There was great concern in the higher education and accreditation communities about several aspects of the 2014 GE Rule and its regulations. Particularly troubling was the concept of indexing the price of higher education to the earnings of graduates, the potential for eventual extension of this concept to all programs in all types of institutions, and the high and perpetual implementation costs that reduce funds allocated to educational programs.

In Congress, opinion was (and continues to be) divided regarding these regulations. Some see the regulations as the Department of Education's best effort to protect students and deter "bad actor" institutions that leave students with high levels of debt and questionable marketable skills. Other members of Congress view these regulations as unfairly burdensome to institutions, likely to disadvantage some students, and unlikely to affect meaningful change.

After considering student debt and repayment rate information, the Department of Education in June of 2017 announced a three-pronged effort to review the 2014 GE Rule which included 1) a call for written comment, 2) notice of public hearings, and 3) an intention to establish negotiated rulemaking committees to develop proposed regulations to revise the 2014 GE Rule. Similar to this process in 2013, the negotiated rulemaking process failed to result in consensus, thus placing the responsibility and authority to craft new or modify existing regulations with Department staff.

Subsequent to these initiatives, in August of 2018, the Secretary of Education released a Notice of Proposed Rulemaking. The stated purpose of this rulemaking process was to "rescind the [2014] GE regulations and remove them from subpart Q of the Student Assistance and General Provisions in 34 CFR part 668", and to "remove the D/E rates calculations and the sanctions and alternate earnings appeals related to those calculations for GE programs, as well as the reporting, disclosure, and certification requirements applicable to GE programs".

As published in the Federal Register on July 1, 2019, the Department of Education announced new gainful employment regulations (the "2019 GE Rule"), thus rescinding prior gainful employment regulations—the 2014 GE Rule—entirely. Although the 2014 GE Rule remains in effect until July 1, 2020, the Department is offering to institutions the ability to implement these regulations immediately. Institutions that elect early implementation are not required to comply with the requirements of the prior Rule (2014), including as an example, submission of data for the 2018-2019 award year to the National Student Loan Data System.

In addition to these efforts, the Department announced its intention to expand information provided in the College Scorecard to include both program- and institutional-level information. Among this data is the following: program size; estimated median earnings; median Stafford, Graduate PLUS, and Parent PLUS loan debt, and the monthly payment associated with that debt based on a standard repayment period; student loan default and repayment rates; admissions selectivity; student demographics; and student socioeconomic status.

The purpose and intention of such reporting requirements is rooted in the current administration's assertion that the disclosure of certain information is intended to enhance transparency and accountability for prospective and current students, as issued in the Executive Order of March 21, 2019. In practice, the College Scorecard provides a centralized access point that enables students and families to compare outcomes without visiting multiple institution or program websites, with the certainty that the data was produced by a Federal agency. It is the Department's intention to enable the functioning of a market-based accountability system, thus

helping taxpayers to “understand where their investments have generated the highest and lowest returns,” according to page 31394 of the Federal Register.

Supplementary Guidance

Helpful information and resources related to the current gainful employment regulations is provided through the website Information for Financial Aid Professionals (IFAP). The site includes links to the regulations themselves, all applicable “Dear Colleague” letters issued by the U.S. Department of Education, FAQs, training information, and other resources. Individuals and institutions wishing to learn more are encouraged to consult these resources.

The Role of Accreditation

The gainful employment requirements are federal regulations and not accreditation standards. The arts accrediting associations are providing this information in order to apprise institutions of regulations, and regulatory and legislative developments that could affect one or more of their programs.

Conclusion

The National Office of the arts accrediting associations will continue to monitor this issue. While the associations are willing to respond to general inquiries about the gainful employment regulations, definitive information should be sought directly from USDE staff and/or the Title IV officer at your institution.