

BRIAN E. FROSH
Attorney General



ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

July 18, 2018

The Honorable Elisabeth DeVos
Secretary
U.S. Department of Education
400 Maryland Ave. SW., Room 6W253
Washington, DC 20202

Re: Docket ID ED-2017-OPE-0090

Dear Secretary DeVos:

We, the undersigned Attorneys General of Maryland, Washington, Minnesota, Virginia, New Jersey, Pennsylvania, Connecticut, Iowa, Illinois, Hawaii, Oregon, Massachusetts, the District of Columbia, Delaware, California, New York, and North Carolina provide the following comments objecting to the Department's continued delay of certain of the Gainful Employment Rule's disclosure requirements, most recently in the Department's June 18, 2018 rule. The Department has, for the third time, issued a rule to delay implementation of the Gainful Employment Rule's provisions requiring schools to provide disclosures about the costs and outcomes of their programs directly to prospective students, and in schools' promotional materials. As stated below, the delay will unnecessarily harm student borrowers, constitutes an abrogation of the Department's responsibilities to protect students and taxpayers, is not adequately justified, and violates the rulemaking requirements of the Higher Education Act ("HEA").¹

The Department Recognized the Need for Direct Disclosures and Disclosures in Marketing Material when it Promulgated the Gainful Employment Rule

The Gainful Employment Rule was enacted to enforce the HEA's requirement that covered programs "prepare students for gainful employment in a recognized occupation" and was issued in response to growing concerns that certain educational programs "are leaving

¹ As you are aware, eighteen Attorneys General have filed suit challenging the Department's efforts to delay implementation of various aspects of the gainful employment regulation ("Gainful Employment Rule"). *State of Maryland et al. v. Dept. of Educ. et al*, No. 17-02139 (D.D.C. filed October 17, 2017). We continue to object to the Department's improper delay tactics for the reasons outlined in the Complaint, Motion for Summary Judgment, and the proposed First Amended Complaint filed in that lawsuit. *See Complaint*, 1:17-cv-02139-KBJ, Document 1, Filed 10/17/17; *Motion for Summary Judgment*, 1:17-cv-02139-KBJ, Document 33, Filed 12/26/17; *Plaintiffs' Motion for Leave to File Amended Complaint and Request for Expedited Schedule to File Supplements to Cross-Motions for Summary Judgment*, 1:17-cv-02139-KBJ, Document 65, Filed 6/22/18.

students with unaffordable levels of loan debt in relation to their earnings.” Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014). As a result, the Gainful Employment Rule restricts access to federal loans to programs that repeatedly fail to provide graduates with the tools they need to obtain employment and income sufficient to repay their student loan debt. The Gainful Employment Rule also requires covered educational institutions to provide prospective students with accurate information about their educational programs, including the total cost of the program, the average debt load, the student loan default rate, and the average earnings of program graduates. These disclosures were intended to ensure that students fully understand the financial implications of choosing to attend and to address the concern of aggressive and deceptive marketing and recruiting practices. The Gainful Employment Rule required disclosures to be provided on schools’ websites, in schools’ promotional materials, and directly to prospective students before the students make a commitment to the institution.

The Gainful Employment Rule took effect on July 1, 2015, after a negotiated rulemaking in which the Department received over 95,000 public comments from students, postsecondary institutions, state government officials, consumer advocates, and other concerned individuals and institutions. Covered institutions initially had until April 3, 2017 to comply with the disclosure requirements of the Rule. However, on March 6, 2017, the Department delayed the disclosure requirement compliance deadline until July 1, 2017 (the “First Delay Rule”). The Department failed to explain the need for the delay, stating only that the delay was “to allow the Department to further review the GE regulations and their implementation.” On June 30, 2017, the Department again delayed the deadline, this time until July 1, 2018 (the “Second Delay Rule”). On June 18, 2018, the Department delayed the deadline for the third time, this time until July 1, 2019 (the “Third Delay Rule”). As set forth below, the Department also failed to explain or justify the Second and Third Delay Rules.

In the Gainful Employment Rule, the Department itself noted the benefit of direct disclosures to students and disclosures in marketing materials – a benefit the Department now appears to overlook. The Department considered comments that were opposed to the concept of a direct disclosure requirement at the time it was drafting the Gainful Employment Rule and agreed with the commenters “who stated that it is important that prospective students receive the information in the disclosure template directly and clearly prior to enrolling in a program.” The Department further stated that it was “critical that prospective students receive the disclosure template before enrolling in a program so that the information on the template can inform their decision about whether to enroll in the program.” Similarly, as to the disclosure on marketing materials, the Department agreed “with the commenters who suggested requiring that links to the disclosure template from promotional materials be prominent, clear, and conspicuous.” At its core, the Department has recognized that the purpose of the Gainful Employment Rule is to put relevant information into the hands of prospective students so that they can make informed decisions before making a significant investment in their education.

The Department’s Third Delay Rule Harms Student Borrowers and is Not Legally Justified

The Department has failed to provide an adequate explanation for the need for a delay of the disclosure requirements. The only justifications advanced by the Department in the Third Delay Rule are the Department’s intention to “develop proposed regulations that would replace

the GE regulations” and its continued evaluation of the “efficacy of these disclosures to students.” The Department failed to provide any discussion of the evaluation of the disclosures that it promised to undertake in the Second Delay Rule and failed to explain why the need to develop replacement Gainful Employment regulations necessitated the delay of the disclosure requirements. The Department’s claimed rationale does not adequately justify depriving student borrowers of critical protections established by the Gainful Employment Rule. Moreover, the Department fails to provide any sort of lawful basis for the Third Delay Notice.²

Delaying disclosures to students about the high debt load and poor outcomes for graduates of certain programs harms prospective students who are considering whether to enroll in those programs. The disclosures enable student to compare programs and make an informed decision about whether or not to enroll in a program. The Third Delay Rule fails to mention or account for the harm caused to students by delaying the disclosure requirements and fails to state why information that is already being disclosed on programs’ websites should not be directly disclosed to students or disclosed in promotional materials. In fact, other than its claim that it will continue to evaluate the efficacy of the disclosures to students, the Department only references students once in the Third Delay Rule – a description of a comment received in response to the Second Delay Rule claiming that the disclosures were confusing to students, without discussing the merits of the comment in any way. The Department, it appears, has wholly failed to consider the impact of the Third Delay Rule on students. This is particularly concerning because of the noted, negative consequences on students of the failure to provide these disclosures.

The Third Delay Rule Violates the HEA’s Negotiated Rulemaking Requirement

In issuing the Third Delay Rule, the Department did not engage in the required notice and comment rulemaking and failed to provide an opportunity for the public to submit written data, views, or arguments regarding its delay of the required disclosures. Although the Department invited comments on its action, the Third Delay Rule stated that any comments would be used “in determining whether to take any *future* action in connection with the implementation of the disclosure requirements.” This is identical language to what was included in the Second Delay Rule, and while the Department identifies some of the comments made in response to the Second Delay Rule in the Third Delay Rule, the Department fails to describe how the comments provided in response to the Second Delay Rule affected the Third Delay Rule. Regardless of how the comments will be or have been used, there is no reasonable basis for this unilateral delay, which is tantamount to a rescission of that part of the Gainful Employment Rule. The Department simply does not provide a basis for circumventing procedures intended to ensure that stakeholders are given an opportunity to weigh in on regulatory changes. Delaying, yet again, the direct disclosure requirements of the Gainful Employment Rule by another year without waiting to even accept and review comments is patently improper. Such a significant action on the part of the Department must be exposed to the full public consultation and negotiated rulemaking procedures established by the HEA.

² A group of Attorneys General provided comments on August 4, 2017 objecting to the June 30, 2017 delay of disclosure deadlines. We reiterate that comment, in which it was stated that the delay lacked legal authority because a desire to replace the current disclosure requirements through negotiated rulemaking is not an authorized basis for delay pursuant to the Administrative Procedure Act or any other law.

Students count on the Department to protect their interests and ensure that schools participating in the federal student loan program treat them fairly and give them accurate information to assist them in their decisions. In addition, taxpayers count on the Department to ensure accountability from schools that receive federal funds. The Gainful Employment Rule was designed to increase transparency and to hold institutions accountable if they fail to provide students with the tools necessary to earn enough to repay their obligations. We call on the Department to fulfill its responsibilities to students and taxpayers and cease its efforts to postpone a critical deadline for the issuance of disclosures required by the Gainful Employment Rule.

Sincerely,



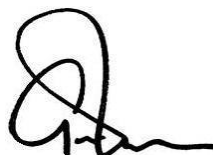
Brian E. Frosh
Maryland Attorney General



Josh Shapiro
Pennsylvania Attorney General



Bob Ferguson
Washington State Attorney General



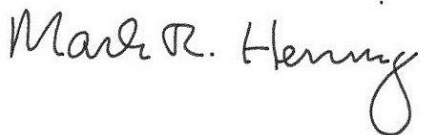
George Jepsen
Connecticut Attorney General



Lori Swanson
Minnesota Attorney General



Thomas J. Miller
Iowa Attorney General



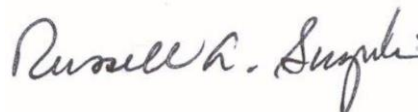
Mark R. Herring
Virginia Attorney General



Lisa Madigan
Illinois Attorney General



Gurbir S. Grewal
New Jersey Attorney General



Russell A. Suzuki
Hawaii Attorney General

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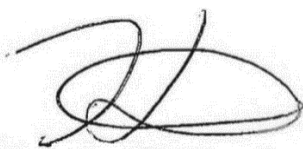
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Ellen F. Rosenblum
Oregon Attorney General



Maura Healey
Massachusetts Attorney General



Karl Racine
Washington, D.C. Attorney General



Matthew P. Denn
Delaware Attorney General



Xavier Becerra
California Attorney General



Barbara D. Underwood
New York Attorney General



Joshua H. Stein
North Carolina Attorney General