

September 8, 2010

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street, NW, Room 8031
Washington, D.C. 20006-8502

The Honorable Arne Duncan, Secretary
United States Department of Education
400 Maryland Avenue, SW
Washington DC 20202

Dear Ms. Finkel and Secretary Duncan:

I am responding to the request for comments from the Department of Education (the Department) on its proposed rules on *Program Integrity: Gainful Employment*, Department of Education Rulemaking Docket ID ED–2010–OPE–0012, July 26, 2010 (proposed rules).

I offer my views and recommendations as an impartial third-party observer who, for 27 years, has been deeply involved in facilitating metrics-based quality management and innovation in all sectors of higher education.

Section I – Balance of Judgment and Freedom from Financial Interest

I am the President of InterEd, Inc., a research-based consulting firm that helps colleges and universities respond to the changing landscape of higher education through innovation and improved quality management. InterEd serves all three institutional types (public, independent, and for-profit) more or less equally. While I came into this work biased in favor of traditional institutions, my work over these years convinced me that all three types of colleges and universities are essential to the vitality of our workforce, the strength of our nation's economy, and the quality of life of all Americans.

I am fortunate to count as friends and colleagues, presidents and other leaders of colleges and universities of all charters, leaders of regional and professional accrediting bodies, and previous leaders in the Department. None of these friends and colleagues, whatever their affiliation, have expressed that they believe the process or the proposed rules it produced are meritorious.

My comments and recommendations are offered for the betterment of higher education, and without regard to the potential for personal financial gain or loss. It is unlikely that the success or failure of this proposed rule will have a material impact on my work.

Section II – Longitudinal Research-based Knowledge

The company I lead possesses considerable *objective* data, information, and intelligence with respect to how and how well each of the three institutional types operates. One example of such intelligence bearing on the proposed rules is the 16 years of employer need and impact research we have conducted. The heart of this research consists of in-depth telephone conversations with senior decision-makers who create the jobs that graduates fill. As of August 2010, InterEd has

conducted more than 20,000 such interviews with the goal of obtaining unbiased information about how specific applied programs offered by local colleges and universities are meeting the needs of employers. As you might imagine, I can provide objective answers to almost any question you might ask on this matter. A second example of objective intelligence bearing on the proposed rules is InterEd's comment knowledge base containing more than five million records of students' judgments with respect to the integrity, quality, and workplace impact of their educational experiences. We also have a learner satisfaction database containing more than 10 million records and a similar database that examines how accurately expectations are set during the enrollment process. All of these knowledge systems and databases are taxonomically robust and can report by institution, institutional type, degree program, employer, and other variables of interest.

In summary, it is likely that in certain areas we possess more objective, *scientifically valid*, information bearing on the proposed rules than any other entity of which we are aware.

Caveat

While I will recommend changes with respect to certain portions of the proposed rules, I do so *not* in support of them but to be clear about the problems I see with specific portions of the proposed rules. Following my responses to the NPRM on Gainful Employment, I will recommend that the Department abandon the proposed rules in favor of a more constructive and less damaging alternative.

Section III – Comments About the NPRM on Gainful Employment

There are three categories of problems with the NPRM on Gainful Employment that lead me to the conclusion that the Department should withdraw the proposed rules.

Category 1: Rulemaking Process

- *The proposed rules do not stand for or promote equity.* Equitable regulations do not create privileged classes based on favoritism, personal bias, or even one's personal educational experiences. The proposed rules create, without rational foundation, a privileged class consisting of public and independent colleges and universities. This shameful act would still be questionable if these institutions were in some way superior in their efficiency or in how well they serve students. They are neither.

- *In framing the proposed rules, the Department gave undue attention and influence to unscientific, even irrational information. Would the Department submit to regulation based on complaints actively solicited from a handful of highly dissatisfied employees?* Human services systems considerably less complex than higher education rarely if ever achieve a 98% client satisfaction rate. Assuming they can meet this standard, this amounts to several hundred dissatisfied students in the typical university.¹ Since 1986, I have investigated the situations of the most vocal among these students and have found that their purported abuses are seldom as clear-cut or one-sided as they are presented. Yet, as I write this letter, dozens of invitations have been extended to solicit the unverified complaints of atypical students.

¹ From our research, approximately five percent (5%) of these dissatisfied students will view their situation sufficiently dire that they, if invited to do so, will write scathing letters or will appear in the media to voice their dissatisfaction.

As an individual, I care about the lives of disaffected students. As a scientist, I know that it is intellectually dishonest to attend to angry and vitriolic “testimony” as if it represented the statistical landscape of a problem. It never does. The widespread use of such “testimony” in this process can only be seen as an attempt to manipulate public opinion in ways that would not be supported by a calm appraisal of the facts.²

- *The proposed rules target all functions of all for-profit institutions based on the actions of a few enrollment advisors working in a subset of them.* The proposed rules would be more congruent if the focus were limited to publicly traded, for-profit institutions, more specifically to improper and inconsistent enrollment processes that exist within some of them. As my recommendations at the end of this document will show, I support transparency at the level of detailed performance metrics. I believe that misrepresentation of any kind in the enrollment process should be stopped and, if a pattern is detected, should be harshly penalized.

To this point, InterEd has conducted *objective* secret shopping for public, independent, and for-profit colleges and universities since 1994. We find frequent errors and omissions in all institutional types and occasional abuses in a few.³ The GAO would have learned this had the secret shopping process been impartial.

- *While the proposed rules affect more than 900 colleges and universities, most of the concerns, anecdotal data, and testimony pertain exclusively to a handful of publicly traded for-profit institutions.* In fact, the majority of for-profit colleges are not large or publicly traded. They are small and closely tied to the communities and employers they serve. The proposed rules will have a destructive effect on these small colleges and the largely disadvantaged students they serve. It will put some of them out of business.
- *The Department determined the required repayment rate in private and outside the transparent NPRM process.* By writing these proposed rules in private, the Department rejected this Administration’s promise of transparency in government and denied the quality control benefits that accrue to the open and robust exchange of information arising from different perspectives. The flaws I see in the proposed rules are the consequence of the narrow range of opinions permitted by the sequestered decision-making process that produced them.
- *The Department lacks the data logically entailed to inform its models.* The Department’s concern about the adequacy of post-graduation income in relation to accumulated debt represents the very foundation of and rationale for the proposed Gainful Employment rules. It is the bull’s-eye of the Department’s ostensive concerns. That being the case, *it is difficult to understand how complex regulations containing only partially modeled variables and*

² This practice may be acceptable in public discourse, but I expect better from the Department.

³ While the outlier errors in the for-profits tend to favor assuaging the concerns of prospective students and enrolling them, the errors in the public institutions tend to arise from not knowing anything about student issues and not caring what happens to students. For more than half of the secret shopping calls placed to public institutions in the past 16 years, we have been unable to get a knowledgeable person on the line or to get such a person to return a message or voicemail.

empirically untested outcomes can be proffered in the complete absence of a comprehensive database of post-graduation income data. When asked how the Department determined the various thresholds in the proposed rules, one former Senior Advisor for Education on the White House Domestic Policy Council described an arbitrary process and indicated, “The problem was, again, we were using proxy data. We didn’t have access to the actual income data yet. There were a lot of – they’re really sort of hedging their bets here.” (From the transcript to Morgan Stanley’s Conference Call on Regulatory and Legislative Issues in the For-profit Education Sector, August 12, 2010.)

This is not science. It is not even well supported speculation. On this basis alone, I call upon the Department to withdraw the NPRM.

- *The thresholds in the proposed rules bear no empirically demonstrated relationship to institutional quality.* The Department set arbitrary thresholds for repayment rates, taking no account of and having no access to statistical evidence of program quality. The fact that *the overwhelming majority of minority-serving institutions – public, independent, and for-profit – fail to meet the 45% threshold proposed by the Department* demonstrates the logical folly of this process. Independent analysts, whose research established – repeatedly – that between 65% and 87% of the variance in question is accounted for by variables that derive from student and family demographics and not from institutional quality, predicted this outcome.

If the Department has a rational basis for setting the thresholds at these levels, why is it not in evidence and why has the Department refused to make it known? Again, the lack of transparency should concern those on all sides of this issue.

Category 2: Consequences of Imposing these Regulations

- *The proposed rules will displace a large number of students from for-profit institutions who will have no alternative educational access.* Despite what they may say to the contrary, community and other public colleges do not want and will not admit many of the students served by for-profit colleges. I see this daily in my research. Additionally, qualified students seeking admission to popular programs face multi-year waiting lists at community colleges.
- *The Administration seems to believe that community colleges can accommodate the students pushed out of the for-profits schools. If only this were so.* It is a serious error to believe that community colleges have the organizational structure, disposition, ability, or culture to ramp up to accommodate students displaced by the effect of the proposed rules on the for-profits. Unless the President freezes prices (something I would not recommend), the stimulus under consideration would be quickly absorbed by increases in tuition and fees, leaving the disadvantaged with even less access than they had before the stimulus. We have seen this occur several times over the past 40 years.
- *The displaced population has not been served well by traditional schools.* Private sector schools largely serve “non-traditional” students⁴ including the poor, working adults, and

⁴ A widely circulated statistic is that 70% of students are “non-traditional.” I find this number unrealistically high. However, more than 40% of students are working adults who have family, career, and other adult social and civic responsibilities.

minorities. Educating this cohort of students is vital to our country's goals regarding competitiveness in the 21st century.

- *Private sector schools are largely alone in their investment in increased capacity.* As numerous public universities and community college systems react to reductions in public funding by closing needed programs, reducing student services, and reducing enrollment capacity, for-profit colleges have, until the specter of this NPRM appeared, invested heavily to increase access, capacity, and efficiency.
- *The proposed rules overreach their stated goals by applying to all programs at all for-profit schools.* Private sector higher education has evolved significantly since the initial passage of the Higher Education Act in 1965. Today, many for-profit colleges and universities are regionally accredited and offer a wide range of academic programs at all levels, including doctorates. At the same time, public institutions have established a pattern of adding career-oriented programs, once the risk of doing so has been mitigated by the for-profit schools. Despite this situation, the proposed rules apply to all programs at for-profit schools and exclude the same programs at public and independent schools. No one can call this intelligent or fair.
- *The Department's proposed process for approving new programs in advance is seriously flawed.* I strongly object to the proposed rule's requirements that for-profit schools must receive approval before offering new programs and that such approvals be based on current need in the employment market. My objection takes three forms:
 - Logically, the proposed requirement precludes innovation and other creative processes, shoehorning the future into the Procrustean bed of the present.
 - Based on more than 20,000 in-depth interviews with employers in up and down cycles within their professions, I have established beyond any doubt that, in most applied academic disciplines, employer judgment lags the identification of emerging needs and the necessary development cycle for new programs.
 - Forcing this requirement on the for-profits creates a de facto restraint of trade. The direct effect of such a requirement is to reduce the ability of the for-profits to compete in emerging programs at the leading edge of our economy. It is anti-business and anti-competition.
 - The proposed *program approval process usurps the authority of regional accreditation and in many cases professional accreditation.*
- *One of the distinctive points of superiority of for-profits is that they are often first to identify and respond not only to better ways of teaching and evaluating but also to emerging needs in applied disciplines.* In the latter case, they often drag the publics along several years later. I believe that innovation of this type must remain unfettered by government regulation.
- *Some programs providing needed professionals to our economy will be penalized by the nature of their professions or the goals of the students who enter them.* I see negative unintended consequences of the proposed rules on some the covered programs. I offer three of many possible examples of the failure of the proposed rules.

- Our research shows that many students of Culinary Arts programs see themselves as artists whose medium happens to be food. Earning a living wage may be a necessity for some of these students, but earning a high wage is not a consideration. As these students learn the idiosyncrasies of the culinary industry, they see that they may work for a decade at relatively low wages in positions with considerable turnover, before advancing to a stable position in the guild structure of the profession. *It would be the exception for a culinary program to graduate a student into wages that would satisfy the Gainful Employment rules as currently proposed.*
- A different kind of problem exists with respect to Medical Assistants who enter their profession earning only \$26-28K. This low wage will certainly fail the proposed Gainful Employment test, thereby creating a strong incentive for schools to drop the degree. If they do so, the impact on our economy and health care system will be negative. Medical Assistants play a vital role in health-care cost reduction plans. The shortage of them that will occur if for-profit colleges drop this program will cost the nation considerably more than the tuition costs under consideration in the proposed rules.
- While many entry-level allied healthcare careers pay wages that would trigger the proposed Gainful Employment tests, the Department seems not to realize that these individuals, many of whom are financially disadvantaged, enter an employment and social culture that is rich with opportunities for vertical or even beneficial horizontal advancement. Similar considerations apply to technical jobs where associate or even certificate-level graduates enter the culture of a large and successful organization.

In all these cases, and many more, there is more to the picture than visible in the Department's limiting approach to Gainful Employment.

- *The proposed rules are insensitive to the current high unemployment rate.* At this time, reported unemployment is approximately 9.6% (actual unemployment is significantly higher) and unemployment in many of the student sectors under consideration is 16-24%. I see no recognition or accommodation of this fact in the proposed rules. In fact, the public rhetoric surrounding the proposed rules has the appearance of exploiting high unemployment to manipulate public opinion against for-profit colleges and universities. Assuming there were no other objections to the proposed rules, the formulae should be amended to accommodate changes in unemployment rates.
- *The proposed rules do not adequately accommodate a variety of common post-graduation scenarios such as planned maternity, a spouse's service in the military, or individuals who decide not to pursue the profession for which they were educated.* A school, for-profit or public, has failed not when a graduate fails to secure a job but when a prospective employer tells the graduate that their degree has not prepared them for the appropriate job. The broad brush created by the proposed rules runs roughshod over these and many other normal life decisions.
- *The proposed rules will result in an estimated loss of 25,000 existing or new jobs over the next 12-18 months.* I estimate that the untoward effects of the current rule making process, even absent any actual changes, has already resulted in the loss of 4,500 jobs in the for-profit

higher education industry. The adoption of the proposed rules will quickly accelerate this job loss to 25,000 jobs or more.

Category 3: No Demonstrated Need for New Regulations

- *Private sector institutions cost taxpayers the least.* I have read widely of the Department's concerns with respect to taxpayer costs. On multiple occasions and in multiple venues, it has been stated or strongly implied that for-profit education costs the taxpayer more than public education. The Department cannot deny that it is on record having taken this position. The Background section of the NPRM notes, "*A recent study completed for the Florida legislature concluded that for-profit institutions were more expensive for taxpayers on a per-student basis due to their high prices and large subsidies.*"

The Department's claim is not true, in any sense, and therefore has no place in the NPRM. *First*, the Florida study (The Florida Legislature, Office of Program Policy Analysis & Government Accountability, "Public Career Education Programs Differ From Private Programs on Their Admission Requirements, Costs, Financial Aid Availability, and Student Outcomes," Report No. 10-18, January 2010) does not support this claim. *Second*, economists of all political persuasions are very clear in noting that for-profits cost the taxpayer the least money, even when factoring in loan default costs under worst-case metrics.⁵

This correction is not a defense of the for-profits. It is an expression of my concern that public policy not be based on lies or on false or misleading claims. *I urge the Secretary to remove all claims suggesting that taxpayers pay more for for-profit education and to replace those passages with the acknowledgement that for-profits result in a lower taxpayer burden. To do less is intellectually dishonest.*

- *The proposed rules penalize schools for things beyond their control.* Rational and equitable regulations allow the entities being regulated to have control over the dimensions of regulation, especially when harsh penalties are associated to non-compliance. The proposed rules fail this test and, in doing so, create a bizarre notion of accountability. While effected colleges and universities will be held accountable for the satisfactory discharge of (federally insured) total debt on the part of their students, these institutions control only the portion of that debt traceable to tuition, books, and fees. On its face, this requirement is inequitable, especially given that the institution is permitted no role in setting the amount borrowed by students.

⁵ Because they make different assumptions and use different periods, economists differ in their estimates of the taxpayer costs associated to for-profits education. Currently, the range is from negative \$550 (taxpayers receive net \$550) to positive \$1,750 per student per year. In contrast, no economist has determined the taxpayer cost of public institutions to be less than \$10,500 per student per year. This figure rises to \$16,500 when forgone taxations are included. One recent study places taxpayer costs of the for-profits as high as \$4,500 based on an allocation of defaulted loan collection costs that is no longer valid because student loans are no longer administered by the private sector. Again, assumptions change actual ratios, but there can be no doubt that for-profits cost taxpayers less.

- *The proposed rules do not provide schools the opportunity to influence or control student debt, absolutely or in relation to income and payback potential; yet, student debt is the most significant variable in the default equation. Pertaining to the variables “total debt” and “debt/income,” I assume that the Department has run a variety of regression analyses and understands the strong relationships between total debt, debt/income ratios, and payback and default ratios. I also assume that the Department shares our concern that so many students borrow greatly in excess of tuition, in effect borrowing for living expenses unrelated to their education. At the least, the Department should revise the current formulae to weight payback responsibility for the proportion of debt accounted for by total tuition and fees. Such a weighting indirectly addresses time-to-degree costs, which can be substantial in an equitable version of these regulations that would apply uniformly to all institutional types.*
- *Independent analysts have demonstrated that the Department has yet to advance a problem statement for which the enforcement of existing regulations is not a solution. I urge the Department to put an end to the common practice of adding new regulations as a distracting solution to a failure to enforce current regulations, thereby begging the question of how the new regulations will be enforced.*

Section IV – Related Comments

- I believe the Department is making a costly mistake with the near-exclusive focus on for-profits in the proposed rules. Based on the objective, longitudinal information I possess, I believe that the for-profits do *not* have more problems or more significant problems than the other institutional types. However, I do see consistent differences in the nature of the problems according to institutional type.

My professional judgment, one that I can support with considerable evidence, is that the greatest returns to students, taxpayers, and the economy would be accomplished by reform of public colleges and universities. Our public universities are grossly inefficient and growing more so with each passing year. They are wasteful, out-of-touch with the needs of students and employers, cannot deliver degrees on time, prioritize programs that interest faculty over those needed by the market, lack modern information systems with which to manage their enterprise, co-mingle research, education, and “professional” sports functions, and are largely controlled by a self-interested faculty. Perhaps the most ubiquitous and destructive problems displayed by the publics are:

- Their faculties teach and evaluate the same ways as their grand-professors, out of 1906 teaching playbooks and 1945 evaluation playbooks. They knowingly, often proudly, reject decades of important cognitive, learning, brain, and evaluation sciences that would permit them to accelerate learning by as much as 50% while producing broader and more generalizable learning outcomes. Conservatively, the combined production and opportunity costs of this professional incompetence amount to tens of billions of dollars annually.
- Their culture stifles innovation, often aggressively and punitively. While there are many innovative teachers within the public colleges and universities, the fact that the majority of the professoriate still practices the 1906 teaching model consisting of, “sit in this seat for Carnegie time/read this chapter/listen to me lecture/take this (scientifically invalid)

multiple-choice test” is testimony to the inability of traditional higher education’s culture to incorporate modern sciences into its practices.

- Each year, as four-year degrees stretch to 5.0 or 5.5 years, public universities demonstrate that they can teach supply chain management but cannot practice it. These delays cost the typically delayed student \$10,000 in additional tuition and fees, and \$45,000 in job opportunity costs.

These are not trivial matters. If physicians, dentists, engineers, or pilots were to reject the scientific foundations of their professions so blatantly, they would be severely sanctioned. A comprehensive GAO audit would reveal these deficiencies in our public system of higher education.

Section V – Recommendations

- *Enforced Transparency.* I recommend that the proposed rules pertaining to Gainful Employment be dropped.

In their place, I urge the Department to draft *Enforced Transparency* requirements and to apply those requirements to *all* institutions whose students receive Title IV support.

I recommend this approach for the following reasons.

- It places all institutions on a level playing field with respect to prospective students.
- It empowers responsible personal decision-making, the proper role of government (as opposed to the proposed rules’ effect of limiting student choices).
- It facilitates and rewards intelligent consumer choice (the current proposed rules are a weak substitute for transparency and imply an undiscriminating incapable prospective student body).
- It facilitates continuous quality improvement on the part of the colleges and universities and prospective students.
- *Enforced Transparency Metrics.* Following are metric types (not actual metrics) that would address the Department’s concerns over and above those fully subsumed by current regulations.
 - Cohort graduation rates by degree and program
 - Cohort time-to-degree by degree (median & range excluding elective delays)
 - All-in student cost-to-degree by degree
 - All-in total cost-to-degree by degree (student plus taxpayer cost)
 - Opportunity costs of average delay by degree
 - Loan repayment and default statistics, controlling for student socio-economic status
 - Job placement rates by degree
 - Average salaries by degree (one, three, and five year intervals)

- Initial Experience Assessment (examines the accuracy of expectations set during the enrollment process)
- Student satisfaction indices by degree
- Alumni satisfaction indices by degree
- Employer impact Level III (workplace behavioral impact)
- Employer impact Level IV (ROI of behavioral impact)

For most of these metrics, values should be provided for current, three, and five-year cumulative averages.

- *GAO audit of all institutional types.* I recommend that the GAO conduct an audit on all three institutional types. The focus of the audit should be to secure baselines on the above or similar metrics.

I am aware of the barriers to cooperation the Department has encountered in the past when seeking the cooperation of public colleges and universities in the process of becoming more transparent. Their excuses are seemingly endless. Yet, these difficulties do not justify ignoring 88% of the industry while over regulating the 12% that can be forced to comply.

In summary, the proposed rules:

- Are tainted by an uninspiring, one-sided, and at times secretive and provably dishonest political process.
- Create a privileged class of colleges and universities by affording them economic, market, and programmatic advantages.
- Cannot be complied with intelligently or consistently based on available data or proposed available data.
- Have not adequately modeled the range of possible inputs and outcomes associated to the proposed solution or have done so with restricted, proxy, or hypothetical data.
- Demand compliance with metrics over which the regulated schools have no control and into which they may lack visibility.
- Demonstrate disdain and disregard for the opportunities and choices of economically disadvantaged students for whom for-profit schools are the best and often only opportunity.
- Demonstrate a lack of understanding of the adaptive capabilities of public colleges and universities.
- Punish the only type of college and university known for its innovation, efficiencies, and ability to adapt to the changing needs of the market.
- Produce impossible or illogical outcomes with common scenarios.
- Produce unintended negative consequences.

- Instantiate variables for which there currently exist little or no comprehensive data or even accurate sample data and for which actual data may be unavailable as demanded by the models.
- Add regulations to one of the most heavily regulated industries to solve problems created by failing to enforce current regulations.

For these reasons, I urge the Department to withdraw the NPRM on Gainful Employment and, instead, seek to establish metrics for and enforce truth telling and transparency on the part of all institutions of higher education.

Respectfully submitted,



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 President
 InterEd, Inc.

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