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### The True Significance of 'Gainful Employment'

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WASHINGTON -- A din of commentary surrounded [the release this month](#) of Education Department regulations designed to ensure that vocational programs prepare their students for gainful employment.

Leaders of for-profit colleges -- and their supporters, [mostly Republicans](#), in Congress -- continued to [rattle their swords](#) about the rules' fundamental unfairness in singling out for-profits for scrutiny. Meanwhile, Wall Street analysts and others who watch the sector -- and were free from worry about maintaining the colleges' position in a potential lawsuit challenging the regulations -- acknowledged just how much gentler the new rules were than the earlier version.

And the consumer advocates and Congressional Democrats who had urged the department to take a hard stand on for-profit-college regulation could not hide their disappointment with the agency's backtracking, even as they tried not to criticize department officials publicly.

Largely lost in the instant analyses, pro and con, though, was the long-term significance of the department's actions. The "gainful employment" rules, as they have come to be known, represent a powerful and potentially game-changing shift in how the federal government looks at higher education. The agency has written into federal policy, for the first time, a direct (if crude) attempt to measure the *value* of an academic program, by linking a measure of student expenditure (student loan debt burden) with an outcome measure (graduates' average income).

This current approach applies only to non-liberal-arts programs at for-profit colleges and to vocational non-degree programs at public and private nonprofit colleges -- for the moment. But now that the federal government has such a tool, many observers agree, it's hard to imagine that it won't seek to apply it more broadly -- if not this administration or Congress, then a future one.

#### New Direction

The extent to which the gainful employment rules represent a stark break with past approaches was evident from the moment the Education Department first mentioned the possibility of using them, which [came in late 2009](#) during negotiations over a broad set of possible rules aimed at ensuring the integrity of federal financial aid programs.

When federal negotiators floated the idea of formally defining, for the first time, the "gainful employment" phrase that had been in the Higher Education Act for decades, college officials of all types balked, suggesting that doing so would exceed the department's regulatory authority.

"You can Google 'gainful employment,'" Anne Gross, vice president of regulatory affairs at the National Association of College and University Business Officers and one of the negotiators, said during a negotiated rule making session in 2009. "It's something that's been used for years and has a fairly well-understood definition. It's been used in the Higher Education Act for 40 years without difficulty." (Providing "an eligible program of training to prepare students for gainful employment in a recognized occupation" is one of the criteria an institution must meet to qualify to award federal financial aid as a "postsecondary vocational institution.")

Gross added: "I'm just kind of amazed at the path that we're going down without any statutory authority to do so that I can see.... Congress

is not shy about being quite prescriptive in what it puts in the Higher Education Act, and to think that Congress put in gainful employment 40 years ago because they thought it would be a good idea for us to sit here ... and write pages and pages of formulas and regulations to define it just kind of blows me away."

She was far from alone in that thinking, among officials of nonprofit and for-profit colleges alike. Yet while the department estimated that public and private nonprofit colleges sponsored the vast majority of programs that would be covered by potential new rules, the estimates also showed that the for-profit-college programs would be disproportionately hurt by the department's proposed method of implementing them.

So while leaders of and lobbyists for traditional colleges [balked loudly](#) at some of the Education Department's other program integrity regulations -- notably those that establish a federal definition of "credit hour" and expand state authorization requirements -- they generally either supported, or at least kept quiet about, the gainful employment rules. That framed the debate over the gainful employment rules, on all sides, almost entirely as about government regulation of for-profit colleges.

As that debate unfolded, paralleled by a high-visibility investigation into commercial colleges by Senate Democrats and by intense [lobbying against the rules](#) by advocacy groups for the institutions, the department staked out an aggressive position in [its first draft of the rules last July](#). The proposed regulation gave vocational programs whose students received federal financial aid two ways to prove that they were preparing graduates for gainful employment: by hitting a federal student loan repayment rate of at least 35 percent, or a debt-to-income ratio of less than 12 percent or a debt-to-discretionary-income ratio of less than 30 percent.

Only 40 percent of the 55,000 programs covered by the rule were projected to meet the standards, with about 5 percent losing eligibility for aid and the other 55 percent forced to limit enrollments or make other changes.

For-profit colleges unleashed a furious lobbying campaign that characterized the government's regulatory approach as an effort to kill the sector. Although Education Department officials insisted that was not the case, and that their aim was to reform the behavior of "bad actors" in all college sectors, their inconsistent messaging -- along with the intensely anti-for-profit tone of the closely coordinated [campaign in the Senate](#) and the rhetoric of consumer advocacy groups with which the administration was closely allied -- helped create the impression that the department had a broader anti-for-profit bias.

That perception, along with [the colleges' wooing of minority organizations and lawmakers](#), helped for-profit colleges expand their traditional base of Republican support in Congress; when the House of Representatives voted in February on a measure to block the Education Department from using federal funds to implement the gainful employment rules, 58 Democrats joined a united Republican majority in support of the bill.

That political reality -- along with threats of a lawsuit to block the rules that many legal observers saw as credible -- put intense pressure on the Obama administration to show that its officials had seriously considered the many objections raised by critics of the draft regulation, both to build a potential defense in a lawsuit and to try to win over enough skeptical members of Congress to avoid a blockade.

In unveiling the new rules this month, Education Secretary Arne Duncan repeatedly stated that department officials had "listened to lots and lots of folks" and tried to take a "thoughtful and reasonable" approach; it was not hard to hear his comments as a trial run for testimony at a potential lawsuit challenging the department's regulatory approach.

### **Softer But Still Striking**

The end result -- unveiled by the department on June 1 and [formally published today](#) in the *Federal Register* -- inarguably softened the department's approach, by its own admission. ([An earlier article](#) on *Inside Higher Ed* lays out the various differences between the two versions and the ways in which it will make it easier for vocational programs to pass muster.) While many for-profit-college officials (and some of their supporters in Congress) continued to criticize the rules as unfair, others credited the department for the concessions it had made.

"While we do not yet know the full impact of the gainful employment rule, the Obama administration deserves real credit for having responded to a number of important comments and for having made improvements to the rule," said Jonathan A. Kaplan, president of Walden University, whose programs -- most of which are at the graduate level -- may fare better because of some of the changes the department made in the final rule.

Many of the strongest advocates for the Education Department's regulation of for-profit colleges said the department had backed down too much, with Campus Progress, a left-leaning student group affiliated with the Center for American Progress, arguing that the final gainful

employment rule ["lets many schools off the hook."](#)

"I understand compromise, but this is not a minor tweak, some Solomonic revision of competing interests," Barmak Nassirian, associate executive director of the American Association of Collegiate Registrars and Admissions Officers, said in an interview. He argued that the department had now set the bar for full compliance so low that the Obama administration will have put its stamp of approval on practices that many critics of for-profit higher education -- and some administration officials -- have long challenged.

"One could argue that it now implicates the Obama administration in the mess that it found as a result of the Bush administration's terrible policies" on for-profit colleges, Nassirian said.

But other observers said they believed criticisms like that failed to recognize just how big a change the department has made by putting in place a new regulatory mechanism such as gainful employment. While the government made a start in this direction in the late 1980s by holding colleges accountable for their student loan default rates, gainful employment goes much further. By tying the debt a vocational program's students accumulate to the income they eventually earn, gainful employment gives federal officials their first-ever tool for measuring the value of academic programs in terms of income and employability, said Anthony P. Carnevale, director of Georgetown University's Center on Education and the Workforce.

"People have made this a political fight when it's really a systems change," he said. And while he said he understands why fans of aggressive regulation might be disappointed by the department's backtracking, "on something like this you go slow, because we have to learn our way into the system."

For-profit colleges, meanwhile, are "crazy" not to go along with the government's final version of the rules, Carnevale said, because the regulations give them the "ability to cherry-pick which programs they want to have," with the chance to focus on those that are profitable and produce graduates who are employable. "If [for-profit colleges] can't pick the ones that make them money and figure out how to outrun the publics, then they're really not very good at what they do," he said.

Carnevale also said he believes the new rules have "much broader implications for higher education." One way or another, the idea implicit in gainful employment -- that in an era when the government is "shoveling money out" to higher education, "students have right to know what the outcome is in terms of employability" -- is likely to be applied to all programs and institutions, he said.

For-profit-college officials and their backers in Congress have consistently argued that the scrutiny the department has focused on their institutions should be applied broadly; "we support the administration in its efforts to create policies that improve overall institutional accountability -- and we continue to believe that such policies should apply to all institutions of higher education, be they public, private nonprofit, or for-profit," Kaplan, of Walden University, said via e-mail.

Holding liberal arts or other traditional college programs accountable for the labor market outcomes of their graduates doesn't necessarily make sense, given that "for a lot of programs out there, there just isn't a tight linkage between the program and the expected jobs," said Donald E. Heller, professor of education and director of the Center for the Study of Higher Education at Pennsylvania State University.

And Education Department officials say they have no plans to employ the gainful employment metrics for non-vocational institutions.

"We're concerned about the problems of unaffordable debt or inconsistent quality at all institutions, and particularly with the Pell Grant situation we're in, there's a compulsion to be sure every dollar we're spending is spent well," an administration official said in an interview.

"But that doesn't mean that the same tools would be appropriate to use for all institutions, or that these are the right outcomes to be thinking about. It's a little clearer [for these vocational programs] that the intended benefits of programs are supposed to be monetary" than it would be for many liberal arts or other programs at traditional institutions.

That may be, said Kevin Carey, policy director at Education Sector, a Washington think tank. But the program-level salary data that the Social Security Administration will produce for the Education Department as part of gainful employment, he said, puts higher education "on the cusp of a new era of widely available data about how much college graduates earn and what kind of jobs they take."

"It just seems like a huge camel's nose under the tent of post-graduation outcomes," he said via e-mail. "Once a government agency starts gathering certain kinds of data and asking certain kinds of questions, it never stops. The hard part is getting the machine up and moving, but once it moves, inertia takes over."

— **Doug Lederman**