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Time for a Re-Do on "Gainful Employment"

When I first became involved as an attorney and public advocate for the for-profit career colleges who are the target of the Department of Education's "gainful employment" (GE) regulations, I believed - as a liberal Democrat - that there was a basis for reasonable regulation of excessive student debt and abuses.

In an earlier commentary about the GE regulations, I warned that the rules, as currently written, would have a paradoxical effect on the progressive Obama administration. I also detailed many of the problems with GE at some length, including an explanation of how the regulations would disproportionately hurt minorities and lower income students who predominantly attend for-profit career colleges.

So many actions, or omissions, by the DOE have left a strong impression of bias -- of a stacked deck by the DOE targeting just "for profit" career colleges, ignoring or distorting facts and data, choosing non-transparency over transparency, and an unavoidable impression of anti-business, anti private sector animus. Rightly or wrongly, that is the appearance; they matter, especially when an executive agency decides to regulate, rather than let congress do the legislating, on a matter that, as here, affects millions of students and tens of thousands of jobs.

Just take a look at this process. Step-by-step the Department simply lost its way:

- First, the panel of negotiators involved in developing the "gainful employment" regulations with the Department, included only one representative out of 14 members -- a panel that the law empowers to write the regulation if there is "consensus." Why the imbalance? Is there any surprise that the regulation that emerged focused only on setting standards to student debt and repayment that applied only to for-profits, and not to not-for-profit and public colleges who see themselves as competitors of for-profit colleges?
- Then proponents of the Department's rules claimed that students at for-profit schools default on their student loans at a higher rate. The truth is that within the same demographic, there is no perceptible difference based upon the type of schools attended. The default rates are related almost entirely to the socio-demographic cohort. In other words, defaults are about the socio-economic status of the students -- not the tax status of the schools. Isn't that obvious?

The DOE (and several outspoken for-profit college critics in the U.S. Senate) also claimed incorrectly that these defaults make the for-profit colleges more costly to taxpayers. The opposite is true. As pointed out in a recent research report by Charles River Associates, community colleges cost tax payers a minimum of \$25,000 more per graduate than the for-profits. In fact, taking into account the approximately \$1 billion in income taxes for-profits pay to all levels of government each year, for-profits cost taxpayers substantially less per student at four-year institutions than not-for-profits and public colleges.

- The Department then stated that it plans to eliminate job training programs using statistics schools and the public cannot access. The Department originally considered using publicly available, transparent median Bureau of Labor Statistics (BLS) data to determine the likely income from jobs in the program in which the student was enrolled. Then, in the final proposed regulation, the transparent BLS data was replaced by non-transparent data derived from IRS or Social Security Administration records, which are not publicly accessible due to privacy laws.

In short, by substituting non-transparent data, for-profit career colleges will have no way of improving their programs, the original goal of the regulations. Without access to transparent metrics, there also is no recourse for a school that believes the metrics are not accurate, which raises serious due process issues.

So the question is: Why would DOE withdraw transparent data and substitute non-transparent data? Doesn't this look as if the real goal is not reform and incentivising better behavior but harming and possibly destroying a business sector - the for-profit career colleges?

- In addition, the Department's drafted rules propose that only loans in which principal payment reductions are occurring will be deemed to be in compliance. That is contrary to the government's menu of loan repayment options -- such as interest only and income based -- that recognize that an education's value is realized over time or hardship deferrals or forbearance. The proposed rules would catch the majority of non-profits serving minority students and medical schools were it applied across the board. Is it just to penalize those with a for-profit tax status?

As if the process alone isn't reason to call for a "do-over," here is the greatest irony of all: through this proposed regulation, the Department will be making law that shuts out the very students who have the most to gain through their access to the programs offered by career colleges -- and in some respects form the core of President Obama's political base.

That would explain the broad expression of unease about the Department's plans among progressive Democratic voices such as mine and many others, including: Congressional leaders such as Reps. Alcee Hastings, Debbie Wasserman Schultz, Edolphus Towns, Yvette Clarke, Donald Payne, and Robert "Bobby" Scott; to community leaders such as Rev. Jesse Jackson and Rev. Al Sharpton.

When Secretary Duncan justified the focus on just for-profit colleges and not an across-the-board reform approach, his explanation was that the Department did not have the authority to regulate not-for-profits and public universities who also rely substantially on federal student loans and grant programs for many of their students. That may be debatable -- it is ironic that the DOE is quite liberal in taking a shred of statutory authority to issue these wide-ranging, policy-making GE regulations and claim they have a legal basis, yet they become "strict constructionist" when it comes to applying these regulations across-the-board, knowing that there are abuses at not-for-profits and public institutions too.

But in any event, this is just one of the reasons -- in addition to the many actions leading to the appearance of bias and an unfair regulatory process cited above -- why it would be wise for Secretary Duncan to go to congress to seek legislation and reform of abuses across-the-board, affecting not-for-profits and public colleges, not just for-profits. The best solution is for congress to seize control, and legislate -- seeking national solutions for student debt and financing, especially for those at lowest end of economic ladder and working people who can't afford to go to college full time.

Certainly the Secretary should not -- cannot -- "rush to regulate" and push these far-reaching proposals through and make them "law" before the newly elected congress can weigh in and DOE has more of an opportunity to re-think the entire issue.

As Harry C. Alford, President and CEO of the National Black Chamber of Commerce wrote recently, "student debt is a national problem, one that must be addressed, but imposing regulations on schools that are effectively educating students is unnecessary." He also wrote:

Without access to Title IV financial aid, the Department of Education will effectively eliminate the ability to gain a college degree for young Black men and women which as the Joint Economic Committee show, is the only proven route out of high unemployment for that most vulnerable segment of the American population. For this reason, I hope the Department will abandon this proposed rule.

I agree completely. Thus the answer is to stop the GE regulation and hit the reset button and let congress, Republican and Democratic elected officials representing all the American people, take on this issue for the reasons Mr. Alford states.

That is the best way to address the serious issues of student debt and abusive practices and achieve real reform at all colleges, rather than an anti-business, anti-private sector agenda to harm just for-profit career colleges.

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