

As the Department of Education Revisits the Gainful Employment Rule California Legislators Propose a State Alternative

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Two Democratic members of the California State Assembly have introduced bills that would codify the federal GE Rule in state law or create an entirely new data collection and disclosure system under the aegis of the California Bureau for Private Postsecondary Education (BPPE or Bureau) to fill the gap. Both bills received significant support during an April 25 hearing before the Assembly Higher Education Committee.

Under the federal GE Rule, the eligibility of students enrolled in all programs offered by proprietary institutions (and non-degree programs offered by public and nonprofit institutions) to receive federal grants and loans depends on the individual program's ability to meet certain ratios that compare its graduates' earnings and educational debt (the GE Rates). ED published the first set of GE Rates in January 2017, long after the anticipated date, and there is widespread speculation about when or if ED will continue to publish rates in the future.

The California legislators are particularly concerned about ED's March 6 decision to delay, by three months, the deadlines for institutions to file their alternative earnings appeal to the first set of GE Rates and to begin using the ED-prescribed GE disclosure template. This delay has been interpreted by California consumer advocates to indicate that ED is contemplating whether simply to halt implementation of the rule going forward.

Assembly Bill 1619 would intensify the ED sanctions by prohibiting schools that are approved by the Bureau and subject to the federal GE Rule from enrolling new students in programs that receive a failing GE Rate in two out of three consecutive years, or receive a combination of failing and "zone" GE Rates for four consecutive years, rather than just limiting federal aid eligibility. And, in the event that ED ceases to publish future GE Rates, the bill would authorize the Bureau to adopt regulations that would enable the California agency to directly obtain such data and issue its own rates to enable it to impose the state-based sanction. The length of time that an institution would be unable to enroll students in a failing program is undefined in the draft bill, causing the Assembly Higher Education Committee to question the long-term impact of this proposed law.

The second proposed statute, Assembly Bill 1611, is designed to take effect if ED suspends or repeals the federal GE Rule. By establishing a state-based replacement, the bill would require BPPE-approved institutions to provide the agency and the public with student debt information for their programs in which more than half the students carry federal or private loan debt. As with the federal GE Rule, institutions offering such programs would be required to report graduates' federal and private loan debt and tuition charges, but in a new twist, the reporting would not be limited to students with federal student aid, but instead include all students and any form of debt, including extensions of credit made by the school. This bill would also place the burden on BPPE to verify federal loan debt and gather earnings data from the state Employment Development Department (rather than the US Social Security Administration, as provided under the GE Rule). The Bureau would be charged with calculating and publishing average debt and earnings levels for each program, and programs falling below the specified levels would face a range of sanctions, from student warnings about high-risk programs to restricting new "loan financed" enrollments in a program all the way to denying approval to new programs that are deemed "substantially similar" to programs with high debt burdens. None of these sanctions, as currently drafted, is defined, leaving broad discretion to the Bureau. This data gathering and processing aspect of the bill raises a very serious question: the volume and complexity of personally identifiable student data that would be required to be collected appears to be far beyond anything BPPE has managed, and considering that the Department of Education has struggled with the process, it is unclear how the Bureau could comply with the legislative mandate without a very significant increase in funding and personnel.

The underlying goals of these bills appear to have strong support in the California Legislature, and specifically with the Higher Education Committee Chair Jose Medina who expressed support for both bills at the April 25 hearing. Assuming either or both bills pass out of the Higher Education Committee, which must occur before April 28, they will need to pass through several additional Assembly committees before receiving a floor vote, after which the State Senate will have its chance. And of course, Governor Brown will have the last say (at least unless a veto is overridden). It is unclear how the Senate is likely to view these bills and what the Governor's position will be when and if they reach his desk; however, California is a bellwether of aggressive regulation. Watch for more news from Cooley as this legislation evolves.

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