

# Department of Education Defends Its Actions in GE Rule Lawsuit

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The debate over the current and future Gainful Employment Rule continues in all three branches of the federal government: the administration, Congress and the federal courts.

After the new administration took office in January 2017, Secretary DeVos essentially put full implementation of the GE Rule on hold. We have reported on these delays in a series of [CooleyED posts](#). This triggered a [lawsuit](#) filed in October 2017, in the federal District Court for the District of Columbia, by 17 Democratic state attorneys general seeking to compel the department to enforce the existing rule that was [issued by the Obama administration](#) in October 2014. The briefing in the case is set to be completed in late March with the likelihood of a ruling this spring or summer. Indeed, the district court's ruling on the implementation of the current rule might coincide with the issuance of a new Notice of Proposed Rulemaking setting out a revised GE Rule, which the department would need to issue prior to November 1, 2018, in order for the rule to take effect in July 2019.

With one set of debt-to-earnings rates published in the waning days of the Obama administration in January 2017 and [a new deadline of April 6, 2018, for institutions to publish GE disclosures](#), the stakes could be high. If the district court orders the department to accelerate its enforcement of the current rule, the department may publish a second set of D/E rates, which could ultimately result in the loss of eligibility for programs that had failing rates two years in a row. Of course, appeals from a district court decision would be expected no matter what the outcome, which could further delay its effect. However, as we have seen repeatedly in education matters, making assumptions about how the courts – and the litigants – will behave is perilous.

The legal parrying between the states and the department is in full swing. Right now, no one is debating the merits; the proceedings are focusing on basic principles of administrative law, with the primary issue being whether the states have the legal standing to bring the lawsuit in the first place. The Department of Justice, which represents the Department of Education in court, is arguing strenuously that the states lack standing, and therefore the court does not need to consider the merits of their claims. According to DOJ, the states cannot claim standing to sue on behalf of their residents or show a direct injury that might arise from the Department of Education's actions or non-actions with respect to the GE Rule.

In addition, the DOJ asserts that the department's electronic announcements and other notices postponing the effective date of certain aspects of the GE Rule are not "final agency action," so it is premature for the states to seek relief in federal court. For anyone who has tried to sort out when an agency has taken an action that is sufficiently final to be appealable in court, this is familiar turf. Federal agencies can take a wide range of actions, and determining which qualify as "final" in any given situation can be challenging even for the experts. In this case, DOJ argues that postponing certain elements of the GE Rule while allowing other elements of the rule, such as certain disclosure requirements, to remain in place, and while the appeals of the first year rates remain under review, is not sufficiently final to be subject to challenge.

Similarly, DOJ argues that announcements of postponement are neither the equivalent of a rulemaking that requires notice and comment nor, as asserted by the AGs, arbitrary and capricious. On this subject, DOJ relies on a June 2017 [ruling](#) in a lawsuit filed by the American Association of Cosmetology Schools to justify the department's actions. The ruling in the AACS case was tailored to bar the department from enforcing certain aspects of the GE Rule regarding the measurement of tip-related income against AACS member schools, but the Department of Education [determined](#) that the AACS decision had a broader impact on its ability to enforce the GE Rule against other institutions as well.

The GE Rule lawsuit needs to be considered in the context of a number of similar actions brought against other federal agencies that are seeking to implement the Trump administration's broad rollback of Obama-era regulations. That resulted in several rulings that have supported state interventions, including a 2017 case that concluded states did indeed have standing to challenge the Environmental Protection Agency's decision to stay certain portions of the greenhouse gas emissions rules put into effect under the prior administration. In the current case, DOJ maintains that the Department of Education's position on the GE Rule is different, which includes an argument that the department has not permanently stayed any portion of the GE Rule.

While the states and the department have been doggedly slugging it out in a DC courtroom, the department has held two sessions of negotiated rulemaking on changes to the GE Rule. The sessions have highlighted fundamental disagreements

among the negotiators, with the final session, including the vote to determine if the negotiators can reach consensus, set for March 12-15. If no consensus is reached, which seems a virtual certainty, the department will be free to promulgate its own revised GE Rule.

Meanwhile, putting an initial stake in the ground for the long-delayed reauthorization of the Higher Education Act, the House *Committee on Education and the Workforce* has voted out a bill, the [PROSPER Act](#), that would, among many other things, prohibit the department from regulating in the area of gainful employment. That of course is just a starting point, because legislation only needs a majority of votes to move forward in the current Republican-controlled House. The almost equally divided Senate is another matter, because its rules require 60 votes for passage of HEA reauthorization. Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Alexander and Ranking Minority Member Murray have yet to circulate their legislation, which is very likely to have a more bipartisan slant to survive a potential filibuster. This makes the inclusion of an outright ban on regulating gainful employment unlikely, although what emerges is more likely to be incorporated in a more broadly based focus on accountability for federal student aid.

Watch this space for future updates, and please let us know if you have questions on these subjects.

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