

Is a Kinder, Gentler Gainful Employment Reg in the Works While ED Announces Steps to Publish New Rates?

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Keeping up with the Gainful Employment Rule has been a full time job in recent months. Between new Department of Education actions to prepare a second set of GE rates, negotiated rulemaking to write a new rule, a lawsuit against the department for not implementing the current rule and proposed legislation in Congress – it is hard to keep track of it all. And for now, like those of us watching this unfold like episodes of *Stranger Things*, you may also be wondering what it all means.

New ED Announcement Signals Steps to Publish Second Set of Rates

ED has now [announced](#) that it plans to release the draft “completers lists” later this spring in preparation for the second round of GE rates. The first set of rates was issued in January 2017, and there has been considerable speculation as to if and when ED would issue the second round of rates. Under the existing rule, this second round of rates could result in the loss of eligibility for any program that failed in the first and second years. This announcement also encouraged institutions to review and correct the data they reported for the 2011/2012 and 2012/2013 award years (and as far back as 2009 if the cohort is less than 30) before March 30.

Preparing the completers lists is the first step in the process for ED to issue the next set of debt-to-earnings (D/E) rates for gainful employment programs. This step is followed by a challenge period, ED’s release of draft debt data, another corresponding challenge period and finally, the second round of GE rates, followed by their own appeal period. Thus, it remains difficult to say when ED will conclude all of these actions to actually issue the second set of rates but, if the first round process is any indication, the second set of GE D/E rates might be issued in late 2018 or early 2019.

This timing is critical for a number of reasons. The lawsuit by a group of Democratic state attorneys general (discussed below) specifically cites the delay in releasing the completers lists as one basis for their claim, so ED’s new action could be motivated in part by the department’s desire to bolster its defense. In addition, the negotiated rulemaking (also discussed below) should lead ED to publish a new rule no later than November 1, 2018. If ED issues a second set of rates after that date, resulting in the loss of eligibility for some programs, one wonders if ED will actually implement sanctions against failing programs or treat the rates as informational, only under the argument that a new rule is imminent and it would make no sense to take such action under a soon-to-be-replaced rule.

Speaking of that “new rule”...

Negotiated Rulemaking Completed

Shocking no one, 12 days of intense negotiation over how to revise the GE Rule resulted in deadlock. The polite term is “lack of consensus,” but these negotiations confirmed profound disagreements in the regulatory philosophy of the current administration and many of the school- and consumer-related negotiators, who failed to reach agreement on a single one of the eight position papers. Without consensus, ED is now free to write its own GE Rule. If the proposals discussed at the final rulemaking session are indications of ED’s intent, we will likely see a rule that will significantly change both the scope and impact of the GE Rule.

Most significant would be requiring *all* institutions – including public and nonprofit, as well as proprietary – that participate in the Title IV Programs to calculate and disclose GE information. However, in response to widespread concerns about applicability to graduate, education applicability would be limited only to *undergraduate* programs. It is also likely that ED will propose using only federal student loan debt to calculate the D/E ratios and will add a programmatic repayment rate measure as well.

As to impact, ED has signaled that it would emphasize transparency (that is, disclosure) in place of penalties, with loss of program (or even institutional) eligibility limited to situations where an institution with failing programs is also found to exhibit a lack of administrative capability or other serious compliance concerns.

ED's position during this round of rulemaking has represented a complete reversal of the Obama administration's stance that failing programs should not be eligible for student aid, and that to best protect students, they should not be able to receive Title IV assistance while enrolled in a "poor performing" program. Instead, the current administration's approach is to make uniform data available to all prospective students so that they (and their parents) can make informed decisions. We anticipate that a proposed rule will be published for comment in the late spring and a final rule issued for publication before November 1, the last day for issuance to allow the rule to come into effect July 1, 2019. You can review the issue papers published by ED for the rulemaking [here](#).

While there is relief that the most draconian aspects of the GE Rule appear unlikely to persist, the department's apparent position continues to be vigorously opposed by consumer advocates who have long argued that federal taxpayers should not be subsidizing programs that don't prepare students for gainful employment and that students should not be encouraged to enroll in such programs by the availability of federal loans and grants.

But wait. There's more.

Attorneys General Sue ED Over Implementation of the GE Rule

In a recent [post](#), we discussed the status of the lawsuit brought by 18 state attorneys general alleging that ED has violated both the Higher Education Act and the Administrative Procedures Act by delaying implementation of various requirements of the GE Rule, which the AG's argue is a "de facto rescission." In response, the Department of Justice argues 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. In this case, DOJ makes a forceful argument that the postponement of certain elements of the GE Rule, while other elements of the rule such as disclosure requirements remain in place and while the appeals of the first year rates remain under review, is not sufficiently final to be subject to challenge. And now, based on ED's plan to issue the draft completers lists, they can argue that this part of the rule is in the process of being implemented as well.

The department's final brief is due March 27, with a court hearing set for May 1, 2018.

Meanwhile on Capitol Hill

Since our last update, there has been little movement around the House Education Committee's PROSPER Act, and the Senate has continued to convene hearings and take public comments to discuss the reauthorization of the Higher Education Act. To date, the Senate has not released legislative language and, with the Democrats seeming more and more confident of their ability to win a majority of seats in at least one house of Congress in the November midterm elections, it will be difficult for the Senate HELP committee to report a bill with the bipartisan support needed to gain the 60 votes required to avoid a filibuster in the Senate. It looks increasingly likely that the immediate future of the GE Rule rests with the judicial and administrative maneuvers described above, with a shrinking prospect of substantive action by Congress, at least not until a Senate version of a reauthorization measure appears – which could be in a very different political environment.

Cooley continues to track all of the maneuvering around the GE rule. Please contact us if you have questions or need assistance on this or any other regulatory issue.

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