

A Busy Week for the Gainful Employment Rule

May 4, 2018

Events of the last week have reflected the Department of Education's give-a-little, take-a-little approach to the Gainful Employment Rule. The department continues to take steps to implement certain aspects of the current GE Rule that may lead it to publish a second set of GE Rates, while also arguing in court that it has acted properly in delaying certain other requirements.

ED sends institutions their draft completers lists

First, ED announced that it intended to issue the new set of student completer lists on April 30. See the [Electronic Announcement](#). These are the much-awaited draft lists, and schools now have 45 days, until June 13, to review the data and submit corrections.

This is a critical step toward issuing the second set of GE Rates, since it means that ED now believes the schools' reporting has identified all students who graduated from every GE educational during the relevant cohort period. "Believes" is the operative term. It is essential that schools carefully review the accuracy of the lists received from ED and submit corrections by the deadline, since the next step is for ED to determine the educational debt for each *confirmed* completer, which it will then use to calculate the next set of debt to earnings rates (referred to here as GE Rates). While schools will have an opportunity in the coming months to review and correct the student *debt* information, that data will be developed based on the completer lists. Inaccurately listed (or omitted) students can easily skew the GE Rates.

While the timeline for the actual issuance of the GE Rates remains uncertain, it is possible that ED will be able (and ready) to issue the second set of GE Rates in late 2018. Affected schools will then face the question of how ED will address those programs that fail for a second year, and therefore might be subject to sanctions, especially in light of the recently completely negotiated rulemaking which was replete with ED's signals that it intends, before November 1, 2018, to publish a *new* GE Rule that would, in its view, enhance disclosures while eliminating sanctions.

Recall that the first set of GE Rates published in January 2017, based on students who graduated during the 2010 through 2012 award years, identified approximately 760 programs at 240 schools that had failing rates. Therefore, those programs could be subject to loss of eligibility if they have failing rates for a second consecutive year. A larger number of programs, approximately 1,200, received first-year rates in "the zone;" however, even if those programs fail or are in the zone again, they would not be subject to sanctions yet, even under the current version of the GE Rule. However, a newly failing program would be subject to the student warnings requirements.

ED begins to act on alternate earnings appeals

In late April, ED also began issuing decisions on the *alternative earnings appeals* that many schools filed with respect to their first set of GE Rates issued in January 2017. Based on extensions of the deadline, these appeals may have been filed anywhere from June 2017 to February 2018. To supersede the Social Security Administration earnings data initially relied on by ED, a successful appeal would require detailed, verified information on how much the school's graduates actually earned in the year, using either a complicated student survey process or state managed earnings data. These updates appear on ED's [appeal status](#) page.

Schools that filed a notice of intent to appeal but then did not submit a *viable* appeal have been informed that their appeals are considered abandoned, which makes their January 2017 GE Rates final. This has a number of tangible consequences. These schools have 30 days to (1) update their GE template with the required student warning language, (2) implement the enhanced disclosure processes for failing programs, which includes delivery of specific information to enrolled students about the failing programs and the school's plan to address them, and for prospective students, warnings must be issued upon their first contact with the school, and (3) prospective students must also be provided with written warnings and a 3-day cooling-off period before enrolling in a failing program.

We know of at least one client whose appeal was inadvertently identified as abandoned when in fact an appeal had been

filed, thus we encourage schools to check ED's database and pursue relief from ED if an appeal is erroneously noted as abandoned.

At this point, ED has identified approximately 620 abandoned appeals, as well as about 65 approved appeals, but it appears that ED has not issued any denials on the merits. The ED data page still lists many programs with appeals pending, and it appears that ED is reviewing those on a case-by-case basis, as forecast in ED's [Electronic Announcement](#) of August 2017. In addition, a number of schools have contacted Cooley to indicate that ED notified them certain information was missing from their appeals, and those schools were given the opportunity to provide the missing information.

ED defends its action in oral argument in federal court

ED also went to court on May 1 to present oral argument defending its actions in implementing the current GE Rule, with the judge allowing an extended hearing that explored a number of procedural and substantive issues. The plaintiffs in this case are 18 State Attorneys General – all Democrats – who filed suit on behalf of their states claiming that ED's delay of the original implementation date of July 1, 2017 for certain aspects of the rule was improper and contrary to the Administrative Procedure Act. Last year, on the eve of the July 1, 2017 implementation date, ED extended the deadlines that would have required schools to publish GE program disclosure templates in promotional materials (or a direct link thereto) and to individually distribute the GE templates to students, as well as allowing more time for the filing of alternate earnings appeals. Additionally, the AGs challenged ED's own delay in issuing the draft completer lists. See [Last Minute Reprieve in GE Rule](#). As expected, the AGs asked the court to compel ED to issue the GE completers lists and proceed to publish the second set of GE Rates.¹

Over the course of nearly three hours of lively debate, Judge Ketani Brown Jackson heard arguments from both sides in what she called a "remarkably complex" administrative challenge.

Much of the hearing was devoted to the threshold question of whether the plaintiffs, all of which are states, have standing to challenge ED's conduct. The core question is whether the states can establish that they are being injured and therefore have standing to seek relief in federal court; if they cannot, then the case would be dismissed without reaching the merits.

The AGs argued that ED's conduct injured them in three ways

First, they argued that the states are required to spend additional resources investigating fraudulent activity, primarily by for-profit schools, which might otherwise close if ED implemented the GE Rule. However, Judge Jackson expressed some doubt, noting that the states were already enforcing their consumer protection laws and, further, that it was difficult to establish this type of injury. Second, the AGs argued that they were injured because states give grant and loan money to schools that would otherwise be ineligible for federal student aid or would have reduced enrollment if the GE Rule were enforced. Judge Jackson suggested that this injury was "self-inflicted" to the extent that states opted to tie their student aid provisions to decisions of the federal government. Third, the AGs asserted that they were injured by the loss of additional tuition that would be paid to state institutions if the GE Rule was enforced and for-profit programs shut down. Here, Judge Jackson suggested this was speculative and lacked any evidentiary support as to where students might enroll if their programs or schools closed. In sum, Judge Jackson was clearly skeptical of the states' claims – although one must quickly note that what a judge says in the course of argument may have little or nothing to do with her decision.

With regard to the merits, and the AGs' complaint that ED improperly delayed issuing the GE draft completer lists, Judge Jackson noted that ED very recently issued such lists, questioning if that issue was now moot. While the AGs contended that the court could still order ED to complete the process of calculating and publishing the second set of GE Rates by a date certain, Judge Jackson expressed reluctance about issuing an order regarding something that was no longer in controversy or based on the presumption that ED would not act in the future.

As for ED's delay of certain disclosure requirements, Judge Jackson questioned why ED did not go through formal notice and comment proceedings. ED argued that the decision to delay was not final agency action and was procedural in nature, and therefore did not require notice and comment proceedings. This is a more technical argument that undergirds a number of actions at ED and elsewhere that is yet to be clearly ruled on by the courts.

Finally, with regard to ED's delay of the deadline for earnings appeals, ED argued that it had good cause in light of the June 2017 ruling in *American Association of Cosmetology Schools (AACS) v. DeVos*, Civil Action No. 17-0263, D.D.C., in which another federal judge ordered ED to provide new appeal processes for AACS-member schools. ED argued that the rationale in the AACS case applied to industries beyond cosmetology, and that ED should be permitted to delay the

alternative appeals deadline while ED works out the issues raised in the AACCS decision, rather than waiting to be sued by representatives of other types of higher education programs outside the cosmetology field. Judge Jackson appeared receptive to this argument, asking the AGs why this was not a sufficient rational basis for ED's decision.

At the end of the three-hour long argument Judge Jackson took the parties' conflicting motions under advisement. She did not indicate when she might rule.

We will continue to follow updates in this case and developments related to the GE Rule. Feel free to contact us with any questions.

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1. *State of Maryland, et al., v. United States Department of Education, et al.*, Case No. 1:17-cv-02139-KBJ (D.D.C. Oct. 17, 2017) (Judge Ketani Brown Jackson).

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