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Ms. Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave, SW  
Washington, DC 20202

**Re: Program Integrity: Gainful Employment [Docket ID ED-2018-OPE-0042]**

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**Comments of the Consumer Advocacy & Protection Society (CAPS) at University of California, Berkeley, School of Law**

Dear Secretary DeVos:

The Consumer Advocacy and Protection Society (CAPS),<sup>1</sup> a student-run organization dedicated to the promotion of consumer law and consumer protection at Berkeley Law, appreciates the opportunity to testify in response to the Department's proposal to rescind the gainful employment ("GE") rule ([83 FR 40167](https://www.federalregister.gov/documents/2017/08/01/2017-15467-gainful-employment)). Aside from our prior experiences working on higher education policy issues through nonprofit organizations and Congressional offices, many of us

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<sup>1</sup> Consumer Advoc. & Protection Soc'y (CAPS) – Berkeley L.'s Consumer Hub (last visited Sept. 10, 2018), <https://consumer.berkeley.edu/>.

have also worked as clinical students or volunteers in the East Bay Community Law Center's Consumer Rights Workshop<sup>2</sup> and/or Consumer Justice Clinic,<sup>3</sup> which are legal clinics of the UC Berkeley School of Law that provide legal services to low-income consumers, including borrowers of student loans and former students at failed schools like Corinthian Colleges and ITT Tech. We believe our experience working directly with students as consumers can provide valuable insight into how the Department's GE regulations interact with student borrowers on the ground in a concrete way.

### **Introduction**

We have serious concerns about the Department's proposal to rescind current GE regulations and make three arguments against their rescission. First, the validity of current GE regulations is well-supported, not only by academic research but also by judicial analysis. Second, the existing data on debt-to-earnings ("D/E") rates under GE regulations support keeping the rules in place to protect students. Third, the proposed rulemaking undermines protections for student borrowers. In sum, we believe that the Department's proposal to rescind current GE rules lacks evidence-based justification, and thus, we believe that the current GE rules should remain in place.

#### **I. The Validity of Current GE Regulations is Well-Supported.**

The Department asserts that the D/E rates are based on inappropriate metrics and should therefore be considered invalid.<sup>4</sup> This claim is a serious misinterpretation of academic research. In Sandy Baum and Saul Schwartz's report that led to the Department's adaptation of the D/E rates,

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<sup>2</sup> *Consumer Rights Workshop*, Consumer Advoc. & Protection Soc'y (CAPS) – Berkeley L.'s Consumer Hub (last visited Sept. 10, 2018), <https://consumer.berkeley.edu/crw/>.

<sup>3</sup> *Consumer Justice & General Clinic*, E. Bay Cmty. L. Ctr. (last visited Sept. 10, 2018), <https://ebclc.org/about/the-work/economic-security-opportunity/consumer-justice/>.

<sup>4</sup> Program Integrity: Gainful Employment, 83 Fed. Reg. 40167 (proposed Aug. 14, 2018) (to be codified at 34 C.F.R. 600, 668), <https://www.federalregister.gov/d/2018-17531/p-15>.

the authors acknowledge that the eight percent of income threshold was adapted from the mortgage industry, where such a figure had long been held as the standard calculation for a reasonable debt burden.<sup>5</sup> The authors further point out that “[d]iscussions of appropriate student debt levels frequently ignore the other debts that former students are likely to incur.”<sup>6</sup> According to data from the 2002 *National Student Loan Survey* by Nellie Mae, over a third of borrowers reported having monthly payments greater than \$1,000 on debt other than for education.<sup>7</sup> When it came to debt for education alone, the survey found that higher D/E rates were associated with increased feelings of anxiety about student borrowers’ perceived debt burden: those with D/E rates between seven and eleven percent “began to express discomfort,” while rates above seventeen percent “created a significantly higher burden.”<sup>8</sup> Thus, the authors concluded that eight percent represents an “objective indicator” that can be reasonably estimated for each borrower.<sup>9</sup> Contrary to the Department’s assertion and as the authors themselves have recently argued, the research, in fact, suggests support for an even stricter standard than the current D/E rates, rather than invalidation of their use as an accountability measure.<sup>10</sup>

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<sup>5</sup> Sandy Baum & Saul Schwartz, *How Much Debt Is Too Much: Defining Benchmarks for Manageable Student Debt*, THE COLLEGE BOARD 2 (2006), <https://files.eric.ed.gov/fulltext/ED562688.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 10; see also Sandy Baum & Marie O’Malley, *College on Credit: How Borrowers Perceive Their Education Debt*, 33 J. STUDENT FINANCIAL AID 7–19, 13 (2003), <http://publications.nasfaa.org/jsfa/vol33/iss3/1>.

<sup>9</sup> Baum & Schwartz, *supra* note 5, at 4.

<sup>10</sup> Sandy Baum, *DeVos misrepresents the evidence in seeking gainful employment deregulation*, URBAN INSTITUTE (Aug. 22, 2018), <https://www.urban.org/urban-wire/devos-misrepresents-evidence-seeking-gainful-employment-deregulation> [<https://perma.cc/A3LV-U82K>].

Beyond statistical analysis, the fact remains that these metrics have been upheld after ample judicial review.<sup>11</sup> In 2012, the district court in *Association of Private Sector Colleges & Universities v. Duncan* held that:

The debt-to-income standards were based upon expert studies and industry practice—objective criteria upon which the Department could reasonably rely. That some commenters criticized those standards does not invalidate the rule, but only places a burden on the Department to respond to that criticism. The Department did so. The debt to income standards were the product of a “rational connection between the facts found and the choice made,” and the [Administrative Procedure Act] demands no more.<sup>12</sup>

The court notes that the D/E rates were based on “expert studies and industry practice,” while highlighting the fact that the Department had indeed met the imperative for responding to critique of the metrics. Likewise, in 2015, the district court in *Association of Proprietary Colleges v. Duncan* concluded that the Department’s GE rules (including the D/E rates) were the product of “reasoned decisionmaking.”<sup>13</sup>

[APC’s] argument mischaracterizes the GE Rules and the findings on which they are based. It is true that eight percent “has been a fairly common mortgage-underwriting standard.” It is equally true, however, that “the 8 percent cutoff has long been referred to as a limit for student debt burden,” and DOE not only cites to at least four studies that have accepted this standard in the context of student debt, but refers also to various states—and the National Association of Student Financial Aid Administrators—that have established their own student loan debt guidelines based on the eight percent threshold. Similarly, economists on which DOE relied in promulgating the GE Rules “proposed a benchmark for a manageable debt level of not more than 20 percent of discretionary income,” having concluded that a higher ratio would be “unreasonable under virtually all circumstances.” The annual earnings and discretionary income thresholds, in other words, “were based upon expert studies and industry practice—objective criteria upon which the Department could reasonably rely.”<sup>14</sup>

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<sup>11</sup> See *Ass’n of Private Sector Colleges & Univs. v. Duncan*, 870 F. Supp. 2d 133 (2012); *Ass’n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332 (2015).

<sup>12</sup> *Ass’n of Private Sector Colleges & Univs.*, 870 F. Supp. 2d at 153–54 (2012) (citations omitted).

<sup>13</sup> *Ass’n of Proprietary Colleges*, 107 F. Supp. 3d at 368 (2015).

<sup>14</sup> *Id.* at 366.

Underscoring the fact that the Department cited several academic studies and highlighted several states that have adopted the eight percent threshold for assessing student loan debt guidelines, the district court provided decisive reasoning that further supports the validity of the current GE rules. As noted above, various sources of academic research and ample judicial analysis have confirmed the validity of using the D/E rates to measure GE thresholds, an argument the Department itself has made in recent litigation.<sup>15</sup> As a result, to rescind the GE regulations now contradicts what the Department has argued in court and is particularly questionable, given that the Department has offered no qualified data or research that confirms the invalidity of using the D/E rates to measure GE regulation thresholds.

## **II. The Data Available Suggest GE Regulations Are Working to Protect Students.**

The Department's rationale in implementing the GE accountability measure was to help protect students from programs that saddled them with significant amounts of debt without sufficiently increasing their earning potential enough to offset that debt. The Department's own words from the 2014 promulgation of the GE rule make this clear: "We establish the D/E rates measure and the thresholds...to assess whether a GE program has indeed prepared students to earn enough to repay their loans, or was sufficiently low cost, such that students are not unduly burdened with debt, and to safeguard the Federal investment in the program."<sup>16</sup> New data suggest that the GE regulation is accomplishing that purpose.

A 2017 study examining "cohort repayment rates," the amount of debt that had been repaid within five years relative to the principal, revealed the financial danger of these high D/E programs. Schools with the highest debt-to-earnings ratios typically had repayment rates below fifteen

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<sup>15</sup> *Id.* at 343–44.

<sup>16</sup> Program Integrity: Gainful Employment; Final Rule, 79 Fed. Reg. 211, 64891 (Oct. 31, 2014) (to be codified at 34 C.F.R. pts. 600, 668).

percent.<sup>17</sup> A student on track for full repayment under a standard ten-year repayment schedule would have repaid approximately forty percent of the loan, meaning that these students are in especially poor shape, and in fact, the cohort is unlikely to repay completely, even after twenty years.<sup>18</sup> The poor financial outcomes associated with these low-performing, high D/E ratio institutions were particularly pronounced for low-income students, those whose families had annual incomes below \$30,000. Over forty percent of low-income students from those institutions with the worst D/E ratios defaulted on their loans within five years of entering repayment.<sup>19</sup>

Some critics of the GE regulation have argued that it unfairly targets for-profit institutions; yet, new research from the Brookings Institution helps illuminate this critique. In a careful analysis that controlled for differences in student demographics as well as employment sectors, the authors found that among non-degree certificate students, those in for-profit programs earned \$2,100 less per year than their counterparts at public institutions despite taking out \$5,000 more on average in loans.<sup>20</sup> Further, they found that students in the for-profit sector had higher debt in ninety-two percent of program fields and for-profit students had both higher debt *and* lower earnings in seventy percent of program fields.<sup>21</sup>

Perhaps even more strikingly, the authors found that students in these for-profit programs would have been better off never attending at all; earnings gains from attending these for-profit programs are at most about \$365 per year, and “even in the best case -- the increased earnings of

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<sup>17</sup> Tiffany Chou, Adam Looney, & Tara Watson, *Measuring Loan Outcomes at Postsecondary Institutions: Cohort Repayment Rates as an Indicator of Student Success and Institutional Accountability* 34 (Nat'l Bureau of Econ. Research, Working Paper No. 23118, 2017), <http://www.nber.org/papers/w23118.pdf>.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> Stephanie R. Cellini, *Gainfully employed? New evidence on the earnings, employment, and debt of for-profit certificate students*, BROOKINGS INST., Feb. 9, 2018, <http://brook.gs/2FY1sMK> [<https://perma.cc/VYK3-53WP>].

<sup>21</sup> *Id.*

for-profit certificate students are not enough to offset their debt and interest payments.”<sup>22</sup> Other research has similarly found that nearly seventy-five percent of borrowers at for-profit institutions owed *more* on their loans two years into repayment than they did when repayment began.<sup>23</sup> As the data show, career education programs at for-profit institutions disproportionately produce borrowers with greater debt loads than their peers at non-profit institutions yet without correspondingly higher earnings to manage said debt. Thus, based on evidence of misconduct at for-profit institutions offering career education programs, the Department’s focus on career education programs across sectors in promulgating the GE rule was wholly justified.

Others have criticized the GE regulation by claiming that the only way it protects students from these poor outcomes is by preventing them from accessing higher education altogether. They charge that eliminating access to Title IV funds for programs that fail the GE standard will reduce the number of options available to students, leading to large segments of the population being shut out of the market for education. Yet, the Department’s own data from the implementation of the GE rule reveals that this argument is baseless. Less than three percent of the programs that fell under the rule actually failed the GE standard.<sup>24</sup> Clearly, this rule is not drastically reducing the options available to students; rather, it is identifying those programs most likely to leave students worse off financially than they were before attending. Strikingly, ninety-eight percent of the programs that did fail were offered by for-profit institutions.<sup>25</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 1–68, 47 (2015), <https://www.brookings.edu/wp-content/uploads/2015/09/LooneyTextFall15BPEA.pdf>.

<sup>24</sup> Press Release, U.S. Dep’t of Educ., Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs (Jan. 9, 2017), <https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs>.

<sup>25</sup> *Id.*

Furthermore, recent research suggests that, even when a program is sanctioned for violating the Department's accountability measures, that sanction does not block students' access to education but simply redirects them toward higher-performing institutions. A recent analysis of the Department's cohort default rate ("CDR") sanctions found that although for-profit institutions that lost Title IV eligibility due to high CDRs did suffer a drop in enrollment over the subsequent ten years, a corresponding uptick in enrollment at nearby public institutions covered nearly ninety percent of the drop, notwithstanding other increases at private non-profits or unsanctioned for-profits in the area.<sup>26</sup> This suggests that the use of accountability measures like the CDR and GE standards does not leave some students unable to access education; rather, those measures function as intended, channeling students away from low-performing institutions that are likely to put them at financial risk. After all, as the district court noted in its 2015 decision, "DOE has a strong interest in ensuring that students—who are, after all, the direct (and Congress's intended) beneficiaries of Title IV federal aid programs—attend schools that prepare them adequately for careers sufficient for them to repay their taxpayer-financed student loans."<sup>27</sup>

Taken together, the data paint a clear picture. The GE rule is working to identify those programs with the highest D/E ratios, which are almost exclusively at for-profit institutions, because they are associated with such poor financial outcomes that the average student would likely be better off never attending. It is instead directing those students to higher-performing institutions that give them better opportunities to achieve financial success. Quite simply, the GE rule is working exactly as it should be.

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<sup>26</sup> Stephanie R. Cellini, Rajeev Darolia & Lesley J. Turner, *Where Do Students Go when For-Profit Colleges Lose Federal Aid?* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 22967, 2016), <http://www.nber.org/papers/w22967.pdf>.

<sup>27</sup> *Ass'n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 354 (2015).



### III. The Proposed Rulemaking Undermines Protections for Student Borrowers.

By rescinding the GE regulations, the Department would be effectively moving protections for students back in time, undoing progress made over the past three decades. In 1988, President Reagan’s Secretary of Education, William J. Bennett, sent a letter to the late Senator Edward M. Kennedy of Massachusetts, chairman of the Senate Labor and Human Resources Committee (now the Senate Health, Education, Labor, and Pensions Committee), urging Congress to act in light of rampant abuse of federal student aid programs, particularly among proprietary schools.<sup>28</sup> Secretary Bennett wrote that, in his Department-funded report, the committee members would “find accounts of semi-literate high school dropouts lured to enroll in expensive training programs with false hopes for a better future cruelly dashed.”<sup>29</sup> He further noted, “The pattern of abuses revealed in these documents is an outrage perpetrated not only on the American taxpayer but, most tragically, upon some of the most disadvantaged, and most vulnerable members of society.”<sup>30</sup> In response to Secretary Bennett’s call to action, the Department moved to institute CDR thresholds to hold schools participating in Title IV funding accountable for ensuring their students graduated with gainful employment, eventually curbing two-year national student loan default rates from a high of 22.4% in FY 1990 to 4.5% in FY 2003.<sup>31</sup>

In the past two decades, however, we have seen another upswing in student loan default rates, and it comes as little surprise that these numbers coincide with an increase in student

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<sup>28</sup> Robert Rothman, *Bennett Asks Congress To Put Curb On ‘Exploitative’ For-Profit Schools*, EDUC. WEEK, Feb. 17, 1988, <https://www.edweek.org/ew/articles/1988/02/17/07450039.h07.html>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> FED. STUDENT AID, U.S. DEP’T OF EDUC., FY 2011 2-Year National Student Loan Default Rates (last visited Sept. 7, 2018), <https://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html>.

enrollments, particularly among for-profit institutions.<sup>32</sup> In part, this explosive increase in undergraduate student enrollment came on the heels of new regulations announced by the Department in 2002, allowing colleges to offer incentive payments to admission recruiters.<sup>33</sup> Benefiting greatly from this regulatory change as a result of aggressive recruitment strategies, for-profit colleges since then have received a disproportionate share of federal student loans as enrollment has increased.<sup>34</sup> As Iowa Attorney General Tom Miller remarked regarding measures to relax oversight of for-profit institutions, “It was the green light, it said the sky’s the limit. From that point on is when we had this huge explosion in fraud.”<sup>35</sup> In 2009, student enrollment at for-profit institutions represented roughly eleven percent of postsecondary student enrollment overall; yet, that segment of the postsecondary education industry also received twenty-six percent of all federal student loan disbursements.<sup>36</sup> Even more strikingly, for-profit institutions accounted for nearly fifty percent of student loan defaults in the same year.<sup>37</sup> The overwhelming evidence over the past three decades makes clear the necessity of implementing and maintaining the current GE regulations.

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<sup>32</sup> *Id.*; see NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., UNDERGRADUATE ENROLLMENT 3 (2014), [https://nces.ed.gov/programs/coe/pdf/Indicator\\_CHA/coe\\_cha\\_2014\\_05.pdf](https://nces.ed.gov/programs/coe/pdf/Indicator_CHA/coe_cha_2014_05.pdf). Undergraduate student enrollment increased by 325% between 2000 and 2010, compared to 20% at nonprofit and 30% at public institutions during that same timeframe.

<sup>33</sup> Anne Marie Borrego, Stephen Burd, & Dan Carnevale, *Education Department Seeks to Ease Rules on Student Aid*, THE CHRONICLE OF HIGHER EDUC., Aug. 16, 2002, <https://www.chronicle.com/article/Education-Department-Seeks-to/2377>.

<sup>34</sup> David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSP. 139, 151 (2012), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.26.1.139>.

<sup>35</sup> Jillian Berman, *State attorneys general take aim at the Trump administration’s student loan agenda*, MARKETWATCH (June 7, 2018), <https://www.marketwatch.com/story/state-attorneys-general-take-aim-at-trump-administrations-student-loan-agenda-2018-06-07>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 153.

The Department has proposed replacing the GE regulations with no required disclosure at all, instead potentially allowing schools to post voluntarily unspecified information about average earnings via the College Scoreboard or some other informational entity, while arguing that submitting D/E rates poses an undue burden on institutions that fall under the GE regulations. Yet, the Department’s proposal contradicts its own concern about creating additional burdens by shifting that burden from institutions onto students. A model that relies solely on students making informed decisions as consumers fails to account for the complex set of factors that impacts a student’s decision making.<sup>38</sup> Research shows that these factors manifest in concepts of “alignable assortments” (decisions along a single dimension) and “non-alignable assortments” (decisions along multiple dimensions).<sup>39</sup> “Alignable assortments” might include making a decision between laptops differing only in screen size, while “non-alignable assortments” are complicated by a variety of factors that must be considered in making a decision.<sup>40</sup> Clearly, choosing a college is not nearly as simple as choosing which laptop to buy. Consumers want to know that the products they consider will not ultimately cause them more harm than good, particularly when the potential for harm is known. The GE regulations impact only those institutions likely to cause students more harm than good. To eliminate hard-fought safeguards designed to protect students from underperforming if not unscrupulous institutions is not only to permit student exploitation, but also to *participate* in it. This is akin to selling defective appliances known to explode, only to disclaim responsibility under the reasoning that consumers must bear their own risk.<sup>41</sup> Selling exploding

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<sup>38</sup> John Beshears, James J. Choi, David Laibson & Brigitte C. Madrian, *How are Preferences Revealed?* (Nat’l Bureau of Econ. Research, Working Paper No. 13976, 2008), <http://www.nber.org/papers/w13976.pdf>.

<sup>39</sup> Judith Scott-Clayton, *The Shapeless River: Does a Lack of Structure Inhibit Students’ Progress at Community Colleges?* 13 (Cmt’y. Coll. Research Ctr., Working Paper No. 25, 2011), <https://ccrc.tc.columbia.edu/media/k2/attachments/shapeless-river.pdf>.

<sup>40</sup> *Id.*

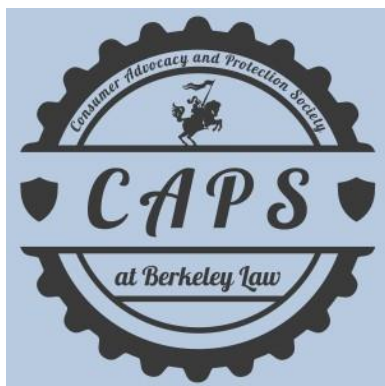
<sup>41</sup> See *cf.* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY JOURNAL (Summer 2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/>.

appliances is unconscionable and violates the basic principles of consumer protection; likewise, allowing students to enroll in predatory programs that will likely leave them with a ticking time bomb of student debt evokes a similar assessment.

### **Conclusion**

The Department has both the authority and the mandate to protect students. It was with these in mind that the Department developed the gainful employment rule over almost a decade, helping to protect students from predatory institutions that would saddle them with debt that they could not repay. The Department employed a sound and reasonable rationale in setting the standard, and the data show that the rule is working as designed to protect students. Rather than holding these low-performing and predatory institutions accountable, rescinding this rule will instead shift the burden onto students and make them more vulnerable to fraud and abuse. Rescinding the gainful employment rule would convey a turning-away from an interest in students' well-being and a disregard for the genuine struggles and dreams of students across this country.

For the reasons stated in this comment, we urge the Department to reconsider its proposed rule and to keep the current gainful employment regulations in place.



Sincerely,

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