Comment by The National Defense Committee Regarding the Department of Education Proposed Rule (ED-2023-OPE-0089-0001) "Financial Value Transparency and Gainful Employment, Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit"

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National Defense Committee

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Questionable History of the Prior Department of Education Gainful Employment Rule Raises Serious Questions of the Efficacy of This Proposed Rule

Since the time the Obama Administration's Department of Education initiated its crusade against private proprietary schools back in the early 2010s by rolling out the first version of the "gainful employment regulation," the Department's claims of some inherent inefficacy of private proprietary schools' education were so outlandish that even *The Washington Post gave* the Department's claims *Two Pinocchios* (significant omissions and/or exaggerations, creating a false, misleading impression, (Kessler, 2017)), stating Secretary of Education Arne Duncan's claim that 72 percent of for-profit proprietary schools "produce graduates who on average earned less than high school dropouts" is "too fishy to make that case.".

The Washington Post even dove into the calculus the Department of Education used in coming up with that number, evaluating the various Bureau of Labor Statistics (BLS) hourly wage data because the Department of Labor told *The Washington Post* the Department of Education's use the high school dropout wages were incorrectly calculated and that the Department of Education cherry-picked BLS' high school dropout wage data in the Department's convoluted machinations to show for-profit proprietary school education of poor value, including all the graduates of private for-profit proprietary schools (including those not currently working), but only including the earnings of those high school dropouts that were currently working, including those who dropped out of high school decades earlier (Kessler, 2014).

But this is where *The Washington Post*'s analysis shows the extent of the Department of Education's perfidy then (that may very well be persisting today in this Proposed Rule); the *Post* was told by one Department of Education official that ALL educational institutions' graduates, regardless of whether they are State or private nonprofit or private for-profit proprietary schools, have significant portions of their graduates that earn less than high school dropouts. In fact, the gainful employment proposed regulation itself admits the "graduates of 32 percent of community college programs earn less than high school dropouts" and that "graduates of 57 percent of private institutions — a list that includes Harvard's Dental School but also child-care training programs — earn less than high school dropouts" (Ibid.).

In fact, *The Washington Post* raises a very significant point in its subsequent analysis that many students, regardless of the type of educational institution they attend, pursue educational programs or post-graduation employment programs that will, in the way the Department of Education calculated these "gainful employment" numbers, pay less than that of a high school dropout given the inflated earnings the Department gave to those earnings. Examples include graduates of predominantly private nonprofit schools who pursue degrees in philosophy, or graduates who enter military service after graduation, both of whom earn, on average, less than they do in comparison to graduates who pursue more career-oriented majors or private sector jobs. But under the Department of Education's gainful employment regulation calculus back then, graduates of schools who pursued philosophy majors or military service would be considered to have graduated from schools that did not provide those students "gainful employment" (Ibid.).

The Washington Post's final analysis of the Department of Education's 2014 gainful employment regulatory contrivances was especially damning, declaring, "In straining for a striking factoid, the Education Department went too far… the entire comparison to high school dropouts is fairly bogus" (Ibid.), and demands that the public's analysis of the latest gainful employment proposed regulation must be viewed with an especially jaundiced eye and reviewed with a fine-tooth comb for legitimacy.

<u>Efficacy of Gainful Employment Rubrics in Current Academic Environment</u>
This bears out in many other analyses done in today's academic environment within which this Proposed Rule would operate, including that of the return on investment done by Payscale, whose 2023 analysis of 1,520 schools' 20 year net return on investment, the 10 worst were all public or private nonprofit schools, including such public schools like Mississippi Valley State University with a 20 year net return on investment of -$193,000 on a total four year cost of $82,600, or such private nonprofit schools like Lindsey Wilson College in Kentucky, coming in dead last at a 20 year net return on investment of -$210,300 on a four year cost of $164,000 (Payscale, 2013, 139f).

Brainsharper also went into the Payscale analysis and found similarly disturbing results for many private nonprofit and public schools, such as the 144 year old private nonprofit school Wilson College in Chambersburg, Pennsylvania with a four year cost of $156,000, a 20-year average return on investment of $86,700, but only a 39% graduation rate, or 193 year old public Cazenovia College in New York, with a -$98,600 20 year return on investment (Hamilton, 2020), despite the school lauding itself as being, "named one of "America's Best Colleges" by *U.S. News* for nineteen consecutive years and has also been recognized by *Money* and *Washington Monthly* as a best value institution" (Cazenovia College, 2023), and despite it missing a $25 million bond payment in September 2022, leading to its December 2022 decision to close down, all of which is conveniently left off the school's website (Moody, 2023).

Educational and Career Efficacy of Private For-Profit Proprietary Schools

While the Department of Education continues to wrap itself up in these new argumentative contortions to prove, at any cost, for-profit proprietary education is a bad deal, the data still shows it is a good deal, and that's why students, especially veteran students, continue to enroll. While one researcher found in his meta-analysis of the relationship between the source of school funding (federal financial aid, GI Bill benefits, and private funding), the specific availability of VA educational benefits, and veteran graduation rates and academic success, that research found that while "transitioning to college life is a great challenge for veterans" (Lopez, 2019, 21), citing five other studies, his quantitative analysis found veteran graduation rates of 41%, and grade point averages of around 2.6, well within the expected statistical variation with non-veteran students (Ibid., 52). In looking at the meta-analysis of academic studies to date, Lopez' analysis found a positive relationship between the use of VA funding and veteran graduation rates and GPAs, regardless of the type of institution (Ibid., 56). But his own statistical analysis of veteran academic success found "no statistically significant relationship between VA benefit funding and veteran student …graduation rates" (Ibid., 59), and "no statistically significant relationship between school funding for veteran student program funding and…GPA" (Ibid., 60f).

Instead, researchers Alschuler and Yarab note it was factors outside source of funding or the type of educational institution the veteran attended that most influenced veteran academic success, such as military mobilization and deployments for veteran students still in the military Reserves or Guard, medical or psychiatric issues, not feeling part of the campus environment, attitudes about non-veteran peers and faculty, and the conflicts older students face in managing multiple roles and responsibilities that more influence veteran student retention and success, while also finding a veteran graduation rate of about 50%, "comparable to the national average and above that for nonveterans at the same university" (Alschuler and Yarab, 2016, 47).

Efficacy of the Negotiated Rulemaking Process

While the Department relies heavily on the fact the Negotiated Rulemaking process reached some form of consensus, the membership of the Negotiated Rulemaking Committee was unjustly biased in favor of a gainful employment regulation that unfairly targets private for-profit proprietary schools. For example, the two Consumer Advocacy Organization participants, The Century Foundation and the Center for Responsible Lending have both written extensively on, and advocated consistently for, greater punitive regulations and controls on private for-profit proprietary schools. Same thing for the two U.S. Military Service Members, Veterans, or Groups Representing Them members, with both Iraq and Afghanistan Veterans of America and Veterans Education Success consistently and repeatedly advocating against such institutions. But for the Proprietary Institutions of Higher Education, no representative of any of their educational institution associations, nor any of the larger proprietary institutions participated, even though the Public and Private Nonprofit Institutions were represented by some of the largest schools and their professional associations. So too with the State government representatives, none of which were from States with Republican Governors or Republican controlled legislatures (Department of Education, 2023) Given this, it does not appear that this Negotiated Rulemaking Committee was representative at all of the stakeholders at stake with this Proposed Rule, and therefore violated both the Administrative Procedures Act's and Negotiated Rulemaking Act of 1996's requirements that Negotiated Rulemaking Committee's be representative of the stakeholders, something over which the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB – OIRA) has previously raised significant concerns (Balla and Dudley, 2014, 23).

Conclusion

The justification for the Department's Proposed Rule is capriciously thin at best, and an arbitrary, unjust, and discriminatory exercise of regulatory power against private for-profit proprietary schools at worst. The Department's justification is based upon the overly broad concerns that "many programs fail to effectively enhance students' skills or increase their earnings", that a "significant number of instances where institutions shut down with no warning" and that those students "tend to have high [student loan] default rates", that some institutions operate "without the administrative capability necessary to successfully serve students," and that some institutions maintained their federal student aid certification even though they exhibited undefined "material problems" (Department of Education, 2023).

And despite the 211 pages of the *Federal Register* consumed by this Proposed Rule, the Department's Economic Impact analysis is cursory and insufficient to either justify the Proposed Rule, nor to evaluate the impact on all the schools so regulated.

The Department should withdraw this regulation, reconvene the Negotiated Rulemaking Committee, and ensure the Committee represents in size and distribution the distribution of educational institutions that would be subject to the Proposed Rule, and representative of the students who would attend those institutions so subject to the Proposed Rule.

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