

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF PRIVATE SECTOR
COLLEGES AND UNIVERSITIES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as
Secretary of the Department of Education,

UNITED STATES DEPARTMENT OF
EDUCATION,

and

UNITED STATES OF AMERICA,

Defendants.

No. 1:14-cv-01870 (JDB)

**BRIEF OF AMICUS CURIAE
THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA**

The Chamber of Commerce of the United States of America (the “Chamber”) respectfully submits this brief as amicus curiae in support of Plaintiff the Association of Private Sector Colleges and Universities (“APSCU”).

INTEREST OF AMICUS CURIAE

The Chamber is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber

regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This is precisely such a case. The Gainful Employment Rule at issue in this case will affect hundreds of thousands of students currently enrolled in programs that likely will be shuttered if the Rule is allowed to take effect. That has an immediate impact on the students themselves, who will find their efforts at professional advancement delayed, rerouted, or barred by government fiat. That is also troubling because APSCU's members serve a diverse and traditionally underprivileged population, and the programs they offer provide a means of socioeconomic achievement that might otherwise be unavailable through community college or other postsecondary options.

Most importantly, the Rule also will have significant implications for the American economy in general, and in particular for the nation's ability to reduce the "skills gap" in our workforce—that is, the difference between employers' demand for essential skills and the workforce's ability to supply job candidates who have learned and sufficiently developed those skills. The for-profit college and university sector serves an essential role in the American postsecondary educational system by preparing students for careers that our nation's liberal arts college and universities have not traditionally served. Employers count on APSCU's members to provide many of the candidates necessary to fill their hiring needs. Thus, in forcing the closure of many educational programs, the Department's Gainful Employment Rule will impede, rather than advance, the ability of America's employers to hire a skilled and diverse workforce essential to help our nation compete in the global economy.

ARGUMENT

The Department's Gainful Employment Rule threatens to punish our nation's for-profit colleges with draconian program cuts on the ground that the jobs students obtain after graduation do not pay enough to satisfy the Department's debt-to-earnings and discretionary-income metrics. The Department's approach has no basis in the statutory text of the Higher Education Act, and there is no reasoned explanation for it. "These overreaching rules are being pushed under the guise of cost control and caring. Yet they fail the most basic test of a regulation's merit—whether it does more harm than good." Thomas J. Donohue, *Regulating Higher Education: When "Helping" Hurts* (Nov. 10, 2014), <https://www.uschamber.com/blog/regulating-higher-education-when-helping-hurts>.

I. The Debt-To-Earnings Test Is Contrary To The Higher Education Act

Section 101(b)(1) of the Higher Education Act provides in relevant part that, for purposes of federal student aid programs, "institution[s] of higher education" include "any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation" 20 U.S.C. § 1001(b)(1). The word "gainful" is not defined in the statute, but in the context of the Higher Education Act it means simply "any employment that pays." Until the Department's novel interpretation, it has never been understood to mean "employment that pays more than a person made before undertaking the program." Now, the Department construes "gainful" to mean not only "more than before undertaking the program" but, indeed, "a certain percentage more, not than prior earnings, but than an educational cost ratio."

Under the Gainful Employment Rule, the Department will measure whether an educational program prepares students for "gainful" employment by comparing the estimated

annual loan payment owed by graduates of a particular program during a “cohort period” to two metrics: (1) the students’ mean or median annual earnings (whichever is higher); and (2) their discretionary income. Programs will meet this definition of the word “gainful” if the cohort debt-to-annual-earnings ratio is 8% or less or if the debt-to-discretionary-income ratio is 20% or less. As a result, a program may not “pass” as preparing students for “gainful” employment under the Department’s new test simply because the program’s graduates do not, on average, earn *enough* more—even if the students earn more, net of their repayment obligations, than they did before undertaking the program.

The Chamber agrees fully with APSCU that the Higher Education Act does not permit such a counter-intuitive construction of “gainful employment” that means not just “income-earning employment”; not just “income-increasing employment”; but “employment that earns a certain arbitrary amount over the debt investment incurred to obtain the employment.”

II. The Rule Will Have A Devastating Effect On Underserved Communities And On Many American Industries Who Would Hire Graduates From Programs That Will Become Ineligible

Under the Administrative Procedure Act, an agency’s decision-making is not reasoned unless it adequately considers a rule’s likely effects. *See, e.g., Timpinaro v. SEC*, 2 F.3d 453, 457-460 (D.C. Cir. 1993). Here, the metrics proposed by the Department will have a significant effect upon hundreds of thousands of current students. By the Department’s own admission, approximately 1,445 programs enrolling 387,000 students are likely to be dismantled. 79 Fed. Reg. 64,890, 65,064-65,065 (Oct. 31, 2014). This will in turn have a significant effect on the growth of employers throughout the economy, especially in the healthcare, information technology, cybersecurity, automotive, building design, and heating and air conditioning sectors that depend upon graduates of for-profit colleges to fulfill a significant portion of their workforce

needs. The failure of the Department to provide reasoned explanation addressing the far-reaching and devastating economic consequences of the Gainful Employment Rule renders the Department's action arbitrary and capricious.

A. The Rule Will Devastate An Important Sector Of The American Postsecondary Educational System

The Department estimates that over 387,000 students are in programs that will become ineligible under the new Rule. 79 Fed. Reg. at 65,064. Many of these students come from traditionally underserved and underprivileged communities. Thus, the individuals perhaps most in need of these higher education programs will be deprived of the chance to matriculate and graduate, and in turn deprived of the opportunity for social mobility that postsecondary education provides. That is because most of these students may not find alternatives at community colleges and public and non-profit colleges; and even those who do may not be served as well by those programs.

For-profit colleges and universities serve a significantly more vulnerable socioeconomic group than do non-profit colleges. As APSCU has shown, students of for-profit institutions are significantly more likely to come from the lowest income groups. Sixty-three percent of them receive Pell grants (which are reserved for the lowest income students), as compared to about 27% in the general college student body. See APSCU, *America's Private-Sector Colleges and Universities: Generating Real Value for Students & Society*, at 2 (2013), <http://www.career.org/news-and-media/press-releases/upload/APSCU-Generating-Real-Value-Final.pdf>. Eighty-six percent receive some form of student aid based on their financial needs. *Id.* And about 39% of students at for-profit universities are African American or Hispanic, 64% are women, and 67% are over 25. *Id.* Moreover, many of these students are seeking the kind of educational opportunities that can improve their earnings. And many policy makers recognize the need for

education to be related to where the jobs will be. *See, e.g.*, Sparks, E. & Waits, M.J., National Governors Association Center for Best Practices, *Degrees for What Jobs?*, at 2-3 (Mar. 2011), *available at* <http://www.nga.org/files/live/sites/NGA/files/pdf/1103DEGREESJOBS.PDF>. Thus, both consumers and state regulators already have every reason to favor educational programs that they reasonably expect will line up with employers' labor demands. But, paradoxically, the Department's Gainful Employment Rule instead would throw hundreds of thousands of students out of such programs.

The interests of students currently enrolled at for-profit universities will not be well served if these programs are terminated. According to one estimate, half to three quarters of these students will not receive an education if they are forced out of these programs. *See AR-H-074207*. There are many reasons why for-profit colleges and universities provide the only educational opportunities for many of their students. Alternatives—most notably many community colleges—often do not have sufficient capacity, do not offer programs at the times when these students could attend or access them, or simply do not offer the types of programs that lead to work in the areas of study for which these students want to prepare. In addition, these alternatives perform poorly in actually helping students graduate. The Department's National Center for Education Statistics reports that 63% of those attending a two-year private sector school graduate—significantly higher than the graduation rate for students at two-year public institutions. NCES, *Enrollment in Postsecondary Institutions, Fall 2012; Financial Statutes, Fiscal Year 2012; Graduation Rates, Selected Cohorts, 2004-09; and Employees in Postsecondary Institutions, Fall 2012*, at 12 tbl. 4 (Dec. 2013). The Department's new Rule therefore would disproportionately harm the students who are most in need of opportunity if they are not to be economically disenfranchised. And even for those who are fortunate enough to find

substitute opportunities, “Given the elimination of so many programs at once, students may face increased costs for higher education due to supply and demand.” Chamber of Commerce of the United States, GE 2014 Comment Letter, ED-2014-OPE-0039, at 2 (May 27, 2014), *available at* https://www.uschamber.com/sites/default/files/documents/files/140527_Comments_GainfulEmploymentNPRM_Duncan.pdf.

Indeed, the Department estimated that 1,445 educational programs will not pass the new metrics—more than 26% of the programs subject to the Rule. 79 Fed. Reg. at 65,064-65,065. That compares to the 193 programs that would have closed under the prior iteration of the Rule. Dept. of Educ., *Obama Administration Announces Final Rules to Protect Students from Poor Performing Career College Programs* (Oct. 30, 2014), *available at* <http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs>.

These programs, moreover, might not be able to improve their statistics and return to market, because the reasons they do not meet the Department’s new Rule are not within their control, and instead stem from the structure of our educational system and our economy—not any program-specific deficiencies. The standard by which the Department has chosen to construe “gainful” employment is based on the percentage of disposable and aggregate earnings. This, by its own nature, disproportionately affects schools serving less privileged students. If such a system were to become operative, this part of our educational system—with the particular types of vocations that it educates for—will be impaired for the foreseeable future, as will the jobs that flow from it.

Three considerations support this prediction. *First*, for-profit colleges do not receive the substantial subsidies that public colleges receive. Public colleges finance 53% of the cost of

educating their students through public funds (mostly from state taxpayers, but also from local community college taxing districts in some states). Lumina Foundation for Education, *College Costs and Prices*, at 1 (2014), available at <http://www.luminafoundation.org/files/resources/college-costs-and-prices.pdf>. In contrast, for-profit colleges need to internalize the real costs of providing an education; they cannot simply reduce their price to make the education they offer more affordable. *Second*, as noted, the student body of for-profit colleges for these programs tend to be from less privileged backgrounds. Overall, they tend to have received lesser-quality education in the past and face more challenging life circumstances. As a result, the educational institutions that welcome them undertake a greater risk that their students will not complete the program or will not be able to avail themselves of opportunities once they have done so. The Department itself recognizes that 44% of the variance in debt-to-earnings ratios involves factors, such as demography, that do not stem from program quality. 79 Fed. Reg. at 65,053. Others estimate that it is more. See AR-H-109059-109151. *Third*, there are a number of vocations for which advanced education is necessary, and where the increase in earnings will give more overall and disposable income to the person but where the salary is not likely to be sufficient to clear the bar on the Department's new standard. Programs for medical assistants—which are among the most vital programs offered by for-profit colleges—are a prime example. More than 82% of the degrees in medical assistant programs are awarded by for-profit colleges, and their graduates earn almost double the federal minimum wage; many of these programs, however, may not meet the Department's new metric. Charles River Associates, *Report on the Proposed Gainful Employment Regulations*, at 85-86 (May 23, 2014), in APSCU Gainful Employment 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014) (“CRA Report”), available at

<http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf>.

B. The Rule Will Impede, Rather Than Advance, Development Of The Skilled Workforce Essential For Continued Economic Expansion

Many of the skills taught by for-profit institutions are vital to the growth of the American economy as well as to the people who want to more fully participate in it. By undermining the programs of those institutions, the Department's Gainful Employment Rule is likely to have two harmful—albeit surely unintended—effects on the American economy: First, individuals who might otherwise learn the skills necessary to provide the goods and services that American customers need will not be ready to provide them, leaving consumers underserved. Second, and relatedly, the mismatch between labor supply and employer demand may impede and slow continued economic expansion.

As Cheryl A. Oldham, the Chamber's Vice President of Education Policy, recently explained,

At a time when there are 4 million open jobs across the country, partially due to a workforce that lacks the skills needed by employers, we need to be expanding options and access to higher education for students, not limiting them. Employers all across this country need the assurance that America's education system is preparing students for the 21st century economy. Not just traditional students, but *all* of those who attend institutions of higher education with the desire for a better life for themselves and their families.

Cheryl A. Oldham, *What is the Gainful Employment Rule Really About?* (Mar. 10, 2014), <https://www.uschamber.com/blog/what-gainful-employment-rule-really-about>.

The World Economic Forum and Boston Consulting Group estimated that by the end of this decade there could be a shortage of 20 million workers able to fill U.S. jobs. *See* Krell, *The Global Talent Mismatch*, HR Magazine (June 1, 2011). For-profit schools have been the most nimble at assessing where the needs are and developing programs to fill them. For-profit

institutions have the most direct relationships with businesses, and are often the first to answer the needs of employers when they require training to improve their current workforce and to obtain new employees with the appropriate skills. *See* Cheryl A. Oldham, *Gainful Employment Rule Strips Students of Opportunity* (Apr. 29, 2014), <https://www.uschamber.com/blog/gainful-employment-rule-strips-students-opportunity>. In its comments on the proposed rule, APSCU described the proportion of workers in various industries that come from for-profit schools and the expected growth in demand. For-profit colleges predominate in the health care industry, awarding over 82% of the medical assistant certificates; about 77% of the dental assistant certificates; and over 73% of pharmacy technician certificates. CRA Report, *supra*, at 86. Other areas in which large growth is expected and for which the for-profit industry produces at least a third of the workers are heating, air conditioning, and refrigeration; drafters; veterinary technologists; immediate office supervisors; auto technicians; security and fire alarm system installers; and computer network support specialists. *Id.* These functions are critical to maintaining America's economy.

Under the Gainful Employment Rule, however, these are the types of programs likely to fail under the Department's new metrics. According to data collected and analyzed by the Department, the programs most likely to fail or fall within the probationary "zone" include medical/clinical assistant associate's and certificate programs, computer systems networking and telecommunications associate's programs, general business associate's programs, graphical design bachelor's programs, and electrical technician associate's programs. *See* 79 Fed. Reg. at 65,069 (Table 2.28: Most Frequent Types of Zone or Failing Programs in the 2012 GE Informational D/E Rates Sample (by Enrollment Count)).

As a result, many open jobs at otherwise growing employers may go unfilled and services might not be provided. And in turn the economy may not grow as powerfully without (for example) the healthcare workers, drafters, computer-network, and cybersecurity specialists that our nation's employers demand. In a highly competitive global economy, American employers—and ultimately workers—may miss out on economic opportunities that instead flow to foreign countries.

CONCLUSION

For the foregoing reasons, the Chamber supports APSCU's challenge and submits that APSCU's Motion for Summary Judgment should be granted.

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Respectfully submitted,

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