NEW AMERICA
FOUNDATION

Education Policy Program
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Brenda Dann-Messier
U.S Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2012-OPE-0008-0054 Negotiated Rulemaking Committee; Public Hearings

Dear Ms. Dann-Messier,

Thank you for the opportunity to comment on additional topics related to your May 1, 2012 request for negotiated rulemaking by the Department of Education on topics relating to Title IV of the Higher Education Act of 1965.

The New America Foundation's Education Policy Program uses original research and objective analysis to solve the nation's critical education problems.

In the context of negotiated rulemaking, we believe that the Department of Education should:

- Create robust gainful employment regulations that hold institutions accountable for the outcomes of their students and provide useful information to help consumers make informed college-going decisions
- Restrict Direct PLUS Loans to ensure students and parents don't over-borrow and to prevent institutions from using PLUS revenues to enable price increases; and
- Re-regulate on direct assessment and use experimental sites to enable more innovation in and inform future regulation of competency-based higher education.

Gainful Employment

The Department should promulgate a definition for gainful employment in its next round of regulatory work targeted at improving program integrity. Not only does the rule represent an important consumer protection bulwark, but it also shows

how good and meaningful government accountability can create the right incentives to drive good behavior.

By relying on actual earnings information from program graduates, gainful employment introduces a new and previously unavailable data source into the higher education accountability discussion. Linking real-world outcomes back to the education received creates a strong and explicit workforce connection that can cut through misleading advertising claims about likely return. It also gives students seeking a vocationally oriented education the answer to one of their most pressing questions—"how much am I likely to earn if I complete this program?", Actual earnings data are not able to be manipulated like existing metrics such as cohort default rates and the 90/10 rule, making it a much "purer" accountability measure.

The response of institutions to the initial gainful employment rule shows that a well-constructed accountability system can drive positive change and argues in favor of its continuation. In response to the pressures of gainful employment, we've seen institutions add trial periods that allow students to try out programs before incurring debt, an important step to lessening the effects of high-pressure sales tactics and hopefully resulting in fewer students dropping out with debt and no credential. They've closed poor-performing campuses and programs, experimented with new learning technologies, and even adjusted pricing. This is in sharp contrast to the way institutions responded to other regulatory and statutory changes, such as more aggressive use of deferment and forbearance to make it impossible for students to default within a new and longer cohort default timeframe.

That said, the Department should use the opportunity to re-regulate the rule to correct complications and flaws present in the version of gainful employment promulgated in 2011. In making these changes, the Department should strive to make the rule as simple as possible and presented in such a way that it will maximize accountability and also produce useful consumer information to aid decision-making. More specific recommendations for how to simplify and improve the rule follow.

Rely on measures aimed directly at the problems trying to be solved: Earnings data introduce an important dose of reality into the conversation over the return on investment for vocational programs that specifically market themselves on their workforce connections. Whether a program's graduates—those students who did every single thing asked of them—are able to earn sustaining wages to justify their debt should be the primary consideration of gainful employment. This focus on debt-to-earnings directly responds to the problems seen with students receiving credentials that have little-to-no workplace value. Use of earnings-based measures should then be paired with measures that hold programs accountable for high rates of student churn and low rates of completion. While any given student dropping out may not be attributable to program quality, programs that routinely show an inability to see significant numbers of students through to completion should not be viewed as providing gainful employment. Though the 2011 regulation tackled the

non-completion issue indirectly through the repayment rate's measurement of the experiences of all borrowers, a metric more directly targeted on this issue would be better and clearer.

Changes to income-based payment plans make the repayment rate an ineffective accountability metric

The 2011 regulation included a repayment rate to hold programs accountable for having large numbers of borrowers struggling to repay their loans. Recognizing that borrowers participating in income-based payment plans might hurt the repayment rate and create incentives to steer borrowers away from this safety net, the Department allowed programs to count up to 3 percent of borrowers on these plans as successfully repaying. This exception was not a big concern at the time, as only 1 percent of borrowers were making use of the plans.

But policies and circumstances have since changed. Recent modifications to income-based repayment have reduced both the share of a borrower's income that must be used for loan payments and the time it takes to have the balance forgiven, meaning that even borrowers that could easily repay their loans would now be better served to take advantage of income-based repayment. As a result, significantly more students (especially those with high amounts of graduate debt) would be wise to avail themselves of these programs. The result is that the repayment rate will no longer be able to effectively differentiate programs with high numbers of borrowers needing the safety net because their program did not properly prepare them for gainful employment from those who could repay their loans but are choosing to take advantage of the generous income-based plan. Choosing to count either everyone or no one who is on an income-based payment plan as "repaying" would thus artificially inflate or deflate repayment rates, while an allowance for an arbitrary amount of income-based plan utilization as was done last time would make the number opaque and less useful from a consumer standpoint. Given these concerns, we recommend removing the repayment rate as an accountability measure and instead using it for disclosure purposes.

Allow for improvement, but only to a point: The 2011 regulations focused on the lowest-performing programs and provided three chances at failure before losing eligibility. That is altogether too long for programs whose performance is one and a half times worse than the minimum acceptable levels. Instead, the Department should adopt an accountability structure similar to what is used in cohort default rates—one that allows middling programs to improve but also clearly states that at some point a program's performance is so bad that it is in the best interest of students and taxpayers to shut it down immediately.

Such a construct could operate as follows: programs whose performance is more than 150 percent of the minimum acceptable levels would lose eligibility immediately after a single failure. This swift penalty is justified on the grounds that they far exceed even a reasonable tolerance for poor performance and by the time this rule is enacted, institutions would have had many years to improve in response

to initial data provided. Meanwhile, programs whose results fall between 100 and 150 percent of the acceptable levels would receive three years to improve their results. Such a tolerance acknowledges that these programs may be able to meet the established benchmarks, but should not be able to strive to do so indefinitely.

Metric calculations should be simple and reflect actual student experiences: The 2011 regulations allowed for a number of tweaks and alternatives that moved the debt-to-earnings and repayment rates away from the real experiences of students and added complexity in the process. To avoid this problem again, a new gainful employment accountability system should:

- **Use one earnings period set three to four years into repayment:** Alternative earnings window calculations only add complexity and make it harder for students to compare data across programs. All programs of a similar type should thus use the same measurement years.

- **Use only real third-party data specific to the programs:** The final regulations allowed for the use of Bureau of Labor Statistics data as a temporary measure. But these data do not reflect the real earnings of students in particular programs at particular institutions and are unnecessary now that programs have received earnings information from the Social Security Administration. The 2011 regulations also allowed for the use of survey data as long as it was approved by the National Center for Education Statistics. Obtaining high-quality earnings data through a survey would be next to impossible, so we recommend only using earnings data obtained from a third-party, governmental entity, such as SSA or a state unemployment insurance database. These data will be of much higher quality and be calculated in a consistent and comparable manner than any other source could be.

- **Assume a single repayment timeframe for all loans**: The standard repayment plan for a loan is 10 years and most borrowers need extremely high levels of debt to get on a longer plan. But the final rule assumed a repayment period longer than what most borrowers face. The result is an unnecessary and unrealistic deflation in the annual required payment amounts. This makes a significant difference in the likelihood of passage or failure on the metrics. Consider a bachelor's degree program with an average original loan balance of $15,000 and an interest rate of 6.8 percent. Under a 10-year term, students will make average payments of approximately $173 a month, which would require median earnings of at least $17,262 to pass the debt-to-earnings test. But if those loans are judged under a 15-year term (the time period used for bachelor's degree programs in the final rule) then the median earnings would only have to be $13,315—over 20 percent lower than allowed under the shorter timeframe. That is a significant difference

and amounts to letting programs whose average graduate is impoverished to be considered a success.

- **Don't remove high-debt borrowers when matches with SSA do not occur:** The 2011 regulation included a condition that each time an individual record sent over to the Social Security Administration could not be matched with earnings data in its system then the individual with the highest remaining student loan debt amount would be removed from the calculation of the numerator of the debt-to-earnings ratio. In other words, if 34 individual records from a program were sent to SSA but only 32 matches occurred, then the students with the two highest debt figures would be removed, thereby reducing the size of annual debt payments. While it is impossible to remove the debt attached to the specific individual that did not match since SSA only returns a mean and median figure, there is no reason to believe that the borrower that did not match had the highest amount. Instead, the Department should consider adopting a system aimed at removing extreme debt amounts at other end by alternating dropping the highest and lowest debt amounts. This ensures that such a change does not arbitrarily reduce the median level by only dropping high-debt borrowers.

- **Set a clear standard for in-school exclusion:** Borrowers currently enrolled in other programs rightfully should not be considered as part of the program's gainful employment metrics since being enrolled in school detracts from current earnings. But the 2011 rule did not set a standard for what degree of attendance is required to be considered "in school." We recommend the Department consider defining in-school enrollment as being enrolled at least half-time for a period of at least 60 days. Doing so would reflect conditions similar to what is necessary to receive Title IV aid and is easily measurable using information that is already collected.

Disclose additional consumer information: A significant benefit of the gainful employment regulations is that they put heretofore unavailable information into the hands of students. But a few additional disclosure metrics would provide even more support to help students make more informed decisions. To that end, we recommend that any new gainful employment regulations also require programs to disclose the following items:

- **The utilization rate of income-based payment plans:** The idea behind income-based payment plans is to provide borrowers with a safety net in case they find themselves with excessive debt levels compared to their earnings. Though changes to the income-based plans may have made them more a generous benefit and less a social safety net, widespread usage of these plans should still be seen as a sign to potential students that they may find themselves with debt in excess of their expected return on the degree. Publishing the share of borrowers that make use of these plans would be

instructive to potential students. A utilization rate is also significantly more transparent in displaying how IBR is used than including it in the Department's repayment rate metric because of concerns mentioned earlier about whether borrowers on an income-based plan should be treated as successfully repaying or not.

- **Earnings for non-completers:** It is very important to know how much graduates are likely to earn. But if a program has a low completion rate, it is just as important to know how much non-completers earn. This can be helpful for potential students to judge whether they should consider enrolling in a program with low completion rates. Such information could be given either as a separate earnings rate for just non-completers, or a joint measure that includes all students. That said, debt-to-earnings is likely not a useful measure for non-completers because they accumulate less debt, thereby allowing lower levels of earnings to pass the measures.

Definition of "Adverse Credit" for the Direct Parent PLUS Loan Program

The federal student loan program exists to invest in human capital and provide access to higher education. Without a federal program, many students would not have access to loans, since the private market would not lend (at least not at reasonable rates) to students with limited credit histories and/or incomes. The federal government provides students with the capital they need to invest in a college education that will pay both individual and societal dividends. For this reason, federal student loans are a critical part of a social equity and human capital agenda.

Parent PLUS Loans are different. They aren't a direct investment in the student—they allow parents whose children are already eligible for student loans to borrow even more.. In this case, parents are investing in the future of their child, not their own human capital. This means that parent earnings—and the ability to repay loans—are largely unchanged by their child's education. Since parents don't receive direct financial benefits from the loan in terms of increased income, taking on Parent PLUS Loans they cannot afford saddles them with debt they can't pay off, that is seldom dischargeable in bankruptcy, and doesn't qualify for the protections of other federal student loans, including a lower interest rate and income-sensitive repayment plans. While it makes sense for the federal government to provide students access to loans without consideration of their ability to pay, this should not be the case for parents.

Add "Ability to Pay" to Parent PLUS Credit Check: Recently, the Department of Education tweaked the minimal credit standards for PLUS loans. This small change has resulted in an increase in loan denials from 28 percent last year to 38 percent this year. As a result, these slight—but opaque—changes to the PLUS Loan credit

check have frustrated thousands of borrowers who were approved one semester for a PLUS loan, and denied the next.

While it's understandable that the Education Department wants to prevent lending to families for whom repayment will be a struggle, they must be more transparent when making changes to eligibility requirements. For this reason, instead of small tweaks to a backward-looking credit check, the credit check should include a forward-looking "Ability to Pay" measure. Adding "Ability to Pay" to the credit check would help protect parents from over-borrowing at whatever cost to send their child to school. An "Ability to Pay" metric could consist of looking at parents' indebtedness (with or without PLUS Loans) relative to their earnings. In designing this "Ability to Pay" metric the Education Department should also consider exemptions for families who have suffered a sudden and catastrophic financial hardship such as a medical emergency that may have affected a parent's debt-to-earnings ratio.

Cap Parent PLUS Loans: As colleges—especially four-year institutions—have become increasingly expensive, Parent PLUS Loans are covering the gap between the maximum federal student loan amount and the amount charged by the institution. Depending on the cost of an institution, this can result in significant PLUS Loan debt. For example, a copy of a financial aid award package obtained by New America Foundation shows that Morehouse College included over $30,000 in Parent PLUS Loans for one student for one academic year. At that rate, in four years the student's parents would have borrowed more than $120,000 *after* the student borrowed approximately $27,000 in Federal Stafford Loans for his education. And since institutions largely set their own costs, relatively easy access to unlimited PLUS revenues prevents institutions from figuring out how to lower their costs.

Currently, Parent PLUS loans are only capped at the Cost of Attendance for a college or university. Cost of Attendance is not regulated by the Department of Education; it is determined by the institution.. Therefore, schools have a lot of flexibility when determining their Cost of Attendance, especially when setting limits for books, travel, and living expenses. Currently, the Education Department caps lifetime total dependent undergraduate Stafford Loans borrowing at $31,000 to prevent over-borrowing. In fact, dependent undergraduate students are only permitted to borrow $5,500 to $7,500 per year.

It is important to note that when the parent of a dependent student is denied a PLUS Loan, the student is able to borrow at the independent student loan limits. This amounts to an extra $4,000 to $5,000 per academic year depending on where the student is in their academic career. Parent PLUS Loans should be capped at that same independent limit. Not only does this prevent parents from over-borrowing, it also removes any incentive for institutions to increase their revenue by raising their Cost of Attendance and funding the increase through Parent PLUS Loans.

Prohibit institutions from Including Direct PLUS Loans in financial aid award packages: Current financial aid award letters make it difficult for all but the savviest of students to figure out their financial aid. Many schools package scholarships, grants, work-study, and loans together yielding one seemingly gigantic "award," even though students will have to pay the loans back. Some letters are riddled with jargon and acronyms, making it almost impossible for students to understand whether the aid is a loan or a grant. Packaging loans together with grants is bad enough, but Direct PLUS Loans (both Grad and Parent) should never be packaged *anywhere* within a student's financial aid award. A loan that is not a guarantee should not be presented so easily to a student or his parent as a way to fund his education. For this reason, Direct PLUS Loans should be prohibited from inclusion in financial aid letters. Institutions should be encouraged to adopt the Education Department's Financial Aid Shopping Sheet as their aid letter. This common disclosure allows students to understand their financial aid packages and gives them the ability to compare their packages more easily among institutions. PLUS loans are only mentioned as another financing option on the Shopping Sheet and students are encouraged to contact their financial aid office for more information.

Release data on the Direct PLUS Loan program including disaggregating data on Grad PLUS/Parent Plus, lifetime default rates, and cumulative default rates: If the public is going to weigh in on potential regulatory action, the Education Department should release more detailed information on PLUS Loans, broken out by loan type (Parent versus Grad PLUS) with overall information about institution-level performance. Right now we are operating blind when it comes to understanding whether and how PLUS Loans are creating a problem. Without better information as to the nature of the problem, it is difficult to craft thoughtful solutions. The Education Department should release the following data by institution, sector, and overall:

- PLUS lifetime (20- or 30-year) default rate, separated by Grad and Parent
- PLUS cumulative default rate data by cohort starting with the year 2007, separated by Grad and Parent

Consider including Direct PLUS Loans in Cohort Default Rates: At minimum, the Education Department should publish PLUS Loan 3-year default rates by institution. In addition, Grad PLUS Loans should be considered for inclusion in Cohort Default Rates, as institutions should be held accountable to their graduates' ability to repay. Additionally, the rulemaking committee should explore whether institutions should be held accountable for the repayment of Parent PLUS Loans, by including these loans in the institutions' Cohort Default Rate calculations. Since parents take on these loans, not students themselves, it may not be feasible for the Education Department to hold institutions accountable for whether a parent repays. But if institutions are charging so much that institutions are exhausting their federal student loans and their parents are subsequently taking tens of thousands of dollars

in debt they cannot afford, institutions need to be held accountable for defaults in some way.

Direct Assessment

We applaud the Department's efforts to strengthen the integrity of the financial aid programs while also allowing for greater experimentation with competency-based higher education. Competency-based education has the potential to provide degrees of increased and knowable quality at potentially decreased costs to both students and taxpayers. Recent federal regulations to define a credit hour did allow for federal financial aid to be awarded on a basis other than time, but this authority is not widely understood or used and is complicated by the historical, time-based, notion of credit hours.

While we are encouraged by the recent steps the Department has taken to encourage competency-based education—including a Dear Colleague letter released earlier this year and some budget proposals in the First in the World Fund, we believe there is more the Department could and should do, within existing authorities, to encourage innovation in this space.

Eliminate or reexamine the credit-hour equivalency requirement: The rulemaking committee should rethink current regulations that require credit hour equivalencies be established for all direct assessment programs. This requirement undermines the intent of the statute, which states that direct assessment is to be made "in lieu of credit hours." Given that most of higher education runs on the credit hour, completely eliminating the requirement for a credit-hour equivalency may not be feasible, or even desirable, but this should not preclude the Department from encouraging a variety of competency-based approaches, including those that are able to more fully separate the questions of time and learning.

Establish quality principles that accreditors should use for direct assessment programs: HERA calls for both the accreditor and the Secretary to approve direct assessment programs. If the Department were satisfied that accreditors were doing an acceptable job at ensuring quality at higher education institutions, Departmental approval could rightly focus on technical questions involving financial aid disbursement, compliance with other regulations, etc. But the fact that the Department decided in 2009 to regulate on the credit hour, which previously had been the sole province of accreditors, demonstrates a belief that accreditation does not provide sufficient quality assurance. Direct assessment offers an opportunity, for those who wish to participate to experiment with a much more robust quality assurance process.

It is currently unclear how the Department will make determinations as to the eligibility of programs for direct assessment and whether it will consider any quality measures or leave quality solely in the hands of accreditors with no additional guidance. If there are no regulations to establish quality guidelines or principles,

direct assessment could fall prey to the weak quality control mechanisms that prompted the Department to regulate on the credit hour in the first place. A negotiated rulemaking committee, comprised of leaders from the field, could help create quality principles that accreditors would use for direct assessment programs that are broad enough to support innovation and a rich diversity of meaningful learning expectations, yet stringent enough to prevent abuse.

At a minimum these principles would be that programs should be based upon *externally validated learning outcomes*. Competency based education should shift from the current practice of lone professors setting their own standards and measuring student performance against those singular standards. This practice has resulted in rampant grade inflation and emerging evidence of little learning. Competency based education, by contrast, must be tied to reasonable expectation and demonstration of learning. How will the federal government determine what students should be learning and how we should be measuring their success? **It won't—and it shouldn't.** But the standards must be validated by those who have a real stake in ensuring that the knowledge promised by passing a course actually means something. This could be done in any number of ways and involve various groups of experts, including faculty, disciplinary bodies, industry groups, or employers. Two faculty-driven efforts worth exploring as a committee adopts principles around learning outcomes are the Degree Qualifications Profile and the Tuning projects.

A second principle would be that programs should have *transparent learning outcomes and assessments*. Different institutions and regions value different things, so learning outcomes will and should vary. But everyone should *know* what students are getting. Institutions should make public, at a fairly granular level, what students in specific courses are expected to learn, and what they actually learn. This does not mean merely posting syllabi on the Internet. The competencies, validators, and assessments must be public, too. Graded student work (with the identities of the students shielded for privacy purposes), including papers, projects, and tests, should be made publicly available so that others can see how students are assessed against the set of learning outcomes.

Principles like those listed above would ensure that direct assessment programs avoid some of the quality assurance problems that plague time-based higher-education.

Re-Regulate Direct Assessment to Include Remediation: The Department should re-regulate direct assessment in order to better meet the needs of students and the spirit of the statute. In particular, the Department should use this re-regulation to address how remedial education is treated in direct assessment programs. Remedial education, the Bermuda Triangle of higher education, is one of the areas that could most benefit from moving away from time and instead focusing on learning. If students were allowed to progress as they learn the material, rather than on the

professor and class' schedule, it could save them valuable time and increase the likelihood that they stick with higher education. Yet current direct assessment regulations issued in 2006 specifically preclude remediation. This should be changed. The 2006 regulations pointed to the fact that dollars authorized under direct assessment must be used to pay for coursework that is part of a program of study. Remedial education is not considered, for the purposes of direct assessment, programs or part of programs. Yet remedial classes are, for many students, prerequisites for credit-bearing courses and are eligible for federal aid under the credit-hour rule. The Department should allow federal financial aid to cover remediation, regardless of whether that is under credit hour or direct assessment regulations.

Use Experimental Sites authority to enable more innovation and inform future regulation of competency-based higher education for competency-based education: Given the absence of competency-based higher education at any significant scale, it is understandable that the Department would be wary of creating regulation that might open opportunities for fraud and abuse. There may not be enough information yet to take regulatory change as far as it needs to go (although there is still much that can and should be done, as is noted above). It is with this in mind that we recommend the Department use the Experimental Sites authority provided under Section 487A of the Higher Education Act to experiment with competency-based education to inform future regulatory and statutory action. Experimental sites, conducted with a limited and voluntary set of institutions, could be used to waive existing regulatory constraints (e.g. allowing remedial students to receive federal financial aid in a program measured using direct assessment).

Experimental sites could also allow for the waiver of statutory requirements, such as those that require that direct assessment programs be instructional programs. Experimental sites would not allow for non-institutional providers to receive federal financial aid (as is envisioned in a program proposed in the President's 2014 Budget), but it could allow accredited institutions to offer financial aid to students who either learn or receive credit for learning in the absence of traditional faculty-student interaction. Frequent and substantive student-faculty interaction is a central part of financial aid eligibility, since this can be measured and provides a modicum of protection against fraud. This requirement, however, doesn't take into account the emergence of new learning technologies, such as those used by Carnegie Mellon's Open Learning Initiative, which result in equal or greater learning outcomes as those in traditional classrooms—but with no traditional faculty interaction. If students are learning—and this learning is demonstrated, financial aid should be allowed to pay for it, providing it is part of a program of study. Waiving the requirement for an "instructional program," would also allow the Department to experiment with paying to assess prior learning, which has shown to be a large incentive for adult students to take college courses and complete a degree. The higher education landscape is changing rapidly and federal financial aid policy should enable innovation, instead of being a barrier. Lessons from these

experiments can be used to inform Congress as it considers reauthorizing the Higher Education Act.

The Department has at least two potentially powerful tools at its disposal that it can use right now to encourage innovations that could provider higher quality and lower cost higher education to many more students: re-regulating on direct assessment and using experimental sites to explore the potentials and pitfalls of using federal financial aid to pay for competency-based education. These steps, combined with the Department's recent and ongoing efforts to promote competency-based education, would go a long way towards enabling responsible innovation.

Conclusion

We appreciate the opportunity to submit these comments and hope they are instructive as the Department works to finalize its list of topics and suggested regulations for upcoming negotiation sessions.