



7-1-2013

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#### Recommended Citation

Mattox, Kari Ann (2013) "Transparency and Accountability: What If the Federal Gainful Employment—Debt Measures Rules Applied to Law Schools? (Perspectives on Legal Issues in Education)," *Educational Considerations*: Vol. 40: No. 3. <https://doi.org/10.4148/0146-9282.1095>

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# Transparency and Accountability: What If the Federal Gainful Employment—Debt Measures Regulations Applied to Law Schools?

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### Introduction

The purpose of this analysis is to compare current guidelines of the American Bar Association (ABA) for law schools to those of the U.S. Department of Education's Gainful Employment-Debt Measures regulations in order to assess their transparency and accountability. This analysis is relevant in a time of increasing tuition costs and record levels of student debt, particularly for those attending law school. According to the American Bar Association, the average debt for law school graduates in 2011 was \$125,000 for private institutions and \$75,700 for public institutions, representing increases of 17.6% and 10%, respectively, over the previous year.<sup>1</sup> At the same time, graduates are facing increased challenges finding employment.<sup>2</sup>

### Background

The final version of the U.S. Department of Education's Gainful Employment-Debt Measures regulations were published in the Federal Register on June 13, 2011, with the following summary:

The Secretary [of the U.S. Department of Education] amends the Student Assistance General Provisions regulations to improve disclosure of relevant information and to establish minimal measures for determining whether certain postsecondary educational programs lead to gainful employment in recognized occupations, and the conditions under which these educational programs remain eligible for the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA).<sup>3</sup>

Secretary Duncan developed these regulations under the auspices of Presidential Executive Order 13563, Section 4, as follows:

Flexible Approaches. Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens

and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.<sup>4</sup>

Undoubtedly, the primary target of these new regulations was two-year, for-profit postsecondary institutions that offer vocational programs whose students have relatively high student loan debt and high default rates. A June 2, 2011, press release issued by the U.S. Department of Education drove home this point, stating:

Students at for-profit institutions represent 12 percent of all higher education students, 26 percent of all student loans and 46 percent of all student loan dollars in default. The median Federal student loan debt carried by students earning associate degrees at for-profit institutions was \$14,000, while the majority of students at community colleges do not borrow. More than a quarter of for-profit institutions receive 80 percent of their revenues from taxpayer-financed Federal student aid.<sup>5</sup>

Further, the press release bluntly attributed “wide-spread evidence of waste, fraud” to these types of institutions.<sup>6</sup>

Nonetheless, the provisions found under this set of federal regulations also apply to public and nonprofit institutions of higher education that offer non-degree certificate programs designed to lead to “gainful employment in a recognized occupation.”<sup>7</sup> One of the major goals of these regulations is to provide prospective students with the kinds of information they need to make informed decisions about attending a particular institution’s program, for example, by requiring the institution to make available the number and percent of graduates who are successful in finding jobs in their chosen field. This requirement also allows prospective students to “comparison shop” among similar programs at other institutions in order to select the program with the highest success rate.<sup>8</sup> A second major goal is accountability; that is, holding higher education institutions accountable for providing the public with timely and accurate data. In addition, the “Debt Measures” regulations hold institutions accountable for student loan repayment rates. The ability to pay back student loans, an important predictor of default, is a concern not only for students, but also for U.S. taxpayers who fund federal student aid programs.<sup>9</sup>

The provisions found under the Debt Measures regulations are somewhat complex in nature, but overall they are designed to monitor the student loan repayment rates of an individual institution in general, and specifically with regard to students’ debt-to-earnings ratios “...where a program is now considered to lead to gainful employment if it has a repayment rate of at least 35 percent or its annual loan payment under the debt-to-earnings ratios is 12 percent or less of annual earnings or 30 percent or less of discretionary income.”<sup>10</sup> According to these regulations, institutions that do not meet these benchmarks for transparency and accountability will be given opportunities for improvement by the U.S. Department of Education, but ultimately they risk losing eligibility for fed-

eral financial aid under Title IV of the Higher Education Act if they do not improve.<sup>11</sup>

It should be noted that the Gainful Employment-Debt Measures regulations do not apply to degree-based undergraduate or graduate programs even if they might be considered career-oriented.<sup>12</sup> This returns us to the opening of the section where it was noted that these regulations were designed primarily to address concerns related to for-profit post-secondary institutions. One might ask why not apply these principles of transparency and accountability to career-oriented degree programs? In the next section, I look more closely at how these concerns are being addressed by the American Bar Association, a major accreditor of law schools in the United States.

### **American Bar Association Standards for Law Schools**

On March 14, 2011, approximately three months prior to the release of the final U.S. Department of Education rules and regulations referred to as “Gainful Employment—Debt Measures,” the American Bar Association (ABA) released a memorandum from the Subcommittee on Standard 509 (Consumer Information) to the Standards Review Committee proposing a revised standard for employment data published by law schools.<sup>13</sup> The subcommittee prefaced this change, as follows: “Over the past few years, there has been a great deal of criticism directed at law schools for their public presentation of employment information. Much of this criticism is warranted. Too much information is presented in a potentially misleading fashion.”<sup>14</sup> Specifically, the memorandum outlined changes to standard 509(b) which would “provide more meaningful and consistent employment information to prospective students” and “assist prospective students in making informed decisions about whether to go to law school or which school to attend.”<sup>15</sup> To that end, the subcommittee proposed that employment rate of graduates be based on the entire graduating class, not just those who respond to the law school’s survey. The latter approach, according to the subcommittee, likely inflates the employment rate given that nonrespondents are likely not employed. Second, the subcommittee proposed that law schools disaggregate employment data by the various categories of jobs graduates hold. Third, the subcommittee proposed that the reporting of salary data include the number of respondents and the percentage of graduates they represent. In addition, the subcommittee developed a sample spreadsheet for law schools that captured all of the above data elements.<sup>16</sup> The changes described in this paragraph, which represented a radical change from previous reporting requirements referred to in Standard 509 as “basic consumer information,”<sup>17</sup> were approved December 3, 2011.<sup>18</sup>

Approval of the revisions came after consultation with and suggestions from the National Association for Law Placement (NALP), whose leadership provided for its graduate placement survey to be equivalent to that of the ABA. With the changes, law schools are now required to report their placement data for each graduate directly to the ABA. Prior to this, law schools reported the information to NALP, which then summarized the information and reported it back to law schools which then used the information to answer the ABA


annual questionnaire.<sup>19</sup> In addition to this change, the Section on Legal Education also accelerated the collection and reporting of the data so that the employment data would be available approximately one year after a class graduated instead of two years.<sup>20</sup> With these changes, the Section was hopeful that applicants would be better informed about their opportunities of employment.

By March of 2012, the Section's Council voted unanimously to recommend changes to Accreditation Standard 509. The Council also suggested stronger penalties for noncompliance.<sup>21</sup> The changes proposed would require that law schools publish their graduate employment data in a uniform chart that was provided by the Council, in agreement with instructions and definitions that the Council approved.<sup>22</sup> Furthermore, the Council proposed that the information must be gathered and published by March 31 of each year for the most recent graduating class, thus, providing current and prospective law students a more detailed outlook on the employment information.<sup>23</sup>

Finally, at its meeting in August of 2012, the ABA House of Delegates agreed to changes proposed by the Council of the Section to Standard 509 and Rule 16 of the ABA Standards and Rules of Procedure for Approval of Law Schools, which became effective immediately.<sup>24</sup> The changes made the obligations of law schools clearer in regard to the reporting and publication of consumer information mandated by Standard 509, and the changes also strengthened the range of sanctions through Rule 16 of the Rules of Procedure of Law Schools that could be enforced for violations of the Standard.<sup>25</sup>

## Conclusion

The major goals of the Gainful Employment—Debt Measures regulations are transparency and accountability, particularly as they relate to the practices and performance of for-profit institution's vocational programs, in order to protect students and taxpayers. At first glance, it may seem that law schools have nothing in common with these types of institutions, but upon closer examination, there emerge common concerns around student debt and the ability of students to find employment commensurate with their education. Because the source of federal financial aid is taxpayer revenues, participating higher education institutions, both private and public, need to be transparent with regard to gathering and reporting data relevant to the outcomes of their career-oriented programs. They also need to be held accountable for high student failure rates with regard to ontime completion of education programs and high student loan default rates because, at the most basic level, these represent the misuse of taxpayer money, not to mention the squandering of the human capital of students who seek to better themselves through higher education. When law schools are examined through the lens of transparency and accountability, the application of the principles embodied in the Gainful Employment—Debt Measures regulations seem relevant, and the recent actions of the ABA to require ABA-accredited law schools to make obvious employment rates is a step in the right direction.

However, recent events call into question whether or not these federal regulations will ever be implemented. According to the final rules as published in the June 13, 2011, Federal Register, the provisions of the Gainful Employment—Debt Measures regulations were scheduled to go into effect July, 2012. On June 30, 2012, the U.S. Department of Education suffered a set-back when a core element was vacated by the U.S. District Court for the District of Columbia.<sup>26</sup> Judge Rudolph Contreras held that the debt-repayment benchmark of 35% of a program's graduates be repaying their student loans was "arbitrary and capricious."<sup>27</sup> Under this provision, a program's failure to meet this benchmark could eventually result in loss of federal financial aid. Judge Contreras held that the Department did not provide evidence to support this as a "meaningful performance standard," stating: "The Department does not identify any expert studies or industry practices indicating that a repayment rate of 35 percent would be a 'meaningful performance standard,' but rather emphasizes that the number was chosen because approximately one quarter of gainful employment programs would fail a test set at that level."<sup>28</sup> A subsequent appeal by the Department was unsuccessful.<sup>29</sup> However, Judge Contreras had confirmed the Department's authority to regulate and provide funding to schools that "prepare students for gainful employment in a recognized occupation." So, at this point, it remains unclear as to whether the Department will attempt to revise this portion of the Gainful Employment—Debt Measure's regulations so that it can enforce the entire measure. 

## Endnotes

<sup>1</sup> Debra Cassens Weiss, "Average Debt of Private Law School Grads is \$125,000," *ABA Journal*, March 28, 2012, [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m).

<sup>2</sup> National Association for Law Placement (NALP), "Law School Class of 2012 Finds More Jobs, Starting Salaries Rise— But Large Class Size Hurts Overall Employment Rate," Press Release, June 20, 2013, [http://www.nalp.org/uploads/PressReleases/Classof2012SelectedFindingsPressRelease\\_june2013.pdf](http://www.nalp.org/uploads/PressReleases/Classof2012SelectedFindingsPressRelease_june2013.pdf).

<sup>3</sup> Federal Register, "Program Integrity: Gainful Employment—Debt Measures," <https://www.federalregister.gov/articles/2011/06/13/2011-13905/program-integrity-gainful-employment-debt-measures>.

<sup>4</sup> Federal Register, Presidential Documents, Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, Vol. 76, No. 14, Friday, January 21, 2011, 3821-3823, <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

<sup>5</sup> U.S. Department of Education, "Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs," Press release, June 2, 2011, <http://www.ed.gov/news/press-releases/gainful-employment-regulations>.

<sup>6</sup> Ibid.

<sup>7</sup> Federal Register, "Program Integrity: Gainful Employment–Debt Measures," 34386.

<sup>8</sup> Ibid., 34387. This requirement builds upon an earlier regulation from October 2010 that required institutions "...to disclose key performance information about each program on their Web site and in promotional materials to prospective students. The required elements include the program cost, ontime completion rate, placement rate, median loan debt, and other information for programs that prepare students for gainful employment in recognized occupations."

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., 34388.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., 34389.

<sup>13</sup> Memorandum, from Standard 509 (Consumer Information) Subcommittee to Standards Review Committee, "Revised Standard Regarding Employment Data," March 14, 2011, <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/April%202011%20Meeting/Report%20of%20Subcommittee%20on%20Consumer%20Information.pdf>.

<sup>14</sup> Ibid., 1.

<sup>15</sup> Ibid.

<sup>16</sup> American Bar Association, "Class of ---- Employment Report at 9 Months after Graduation," [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/actions/20120124\\_src\\_action\\_s509\\_placement\\_data\\_worksheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/actions/20120124_src_action_s509_placement_data_worksheet.authcheckdam.pdf).

<sup>17</sup> Memorandum, "Revised Standard Regarding Employment Data," 1.

<sup>18</sup> American Bar Association, "Council Approves Changes in Collection of Employment Data," *Syllabus* 43, 2 (Winter 2011-2012), [http://www.americanbar.org/publications/syllabus\\_home/volume\\_43\\_2011-2012/winter\\_2011-2012/council\\_approveschangesincollectionofplacementdata.html](http://www.americanbar.org/publications/syllabus_home/volume_43_2011-2012/winter_2011-2012/council_approveschangesincollectionofplacementdata.html).

<sup>19</sup> American Bar Association, "Council Approves Changes in Collection of Employment Data."

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid. Suggested changes to Rule 16, provided for sanctions for violation of Standard 509 if law schools provided incomplete, inaccurate or misleading employment data (consumer information). Among the sanctions included were monetary penalties, public censure, and loss of accreditation.

<sup>23</sup> Ibid.

<sup>24</sup> Memorandum from Barry Currier, Interim Consultant on Legal Education, American Bar Association Section of Legal Education and Admissions to the Bar, to Deans of ABA-Approved Law Schools et al., "Amendments to Standard 509 (Consumer Information), Rule 16 (Sanctions), and Foreign Program Criteria," August 29, 2012, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012\\_august\\_standards\\_revisions.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012_august_standards_revisions.authcheckdam.pdf).

<sup>25</sup> The revised Standard 509 requires consumer information that a law school reports, publicizes or distributes must be complete, accurate and not misleading to a "reasonable" law school student or applicant, and that violations could result in sanctions under Rule 16 which provides for possible probation and removal from the list of approved law schools.

<sup>26</sup> *Association of Private Colleges and Universities v. Arne Duncan and United States Department of Education*, U.S. District Court for the District of Columbia, Civil Action 11-1314 (RC), June 30, 2012.

<sup>27</sup> Ibid., 1.

<sup>28</sup> Ibid., 29.

<sup>29</sup> *Association of Private Colleges and Universities v. Arne Duncan and United States Department of Education*, U.S. District Court for the District of Columbia, Case 1:11-cv-01314-RC, March 19, 2013.