

# A Department of Education Proposed Rule Could Impact Career and Technical (Including Allied Health) Education



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**O**n May 19, 2023, the United States Department of Education (USDE) issued a Notice of Proposed Rulemaking (NPRM) that would impose new requirements on academic programs that “prepare students for gainful employment in a recognized occupation”<sup>1</sup>—including allied health professions such as medical assisting. (Note: In this article the word *occupation* will encompass *profession* as well as *occupation*.) Programs that do not meet the requirements of the proposed rule would be in jeopardy of losing their eligibility to participate in programs under Title IV of the Higher Education Act (HEA). This would mean that students in these programs would not be eligible for federal financial assistance, including scholarships. Needless to say, losing Title IV financial aid eligibility for students would be a serious blow to most programs.

Three elements of the proposed rule are of particular significance to allied health education programs: gainful employment, state licensing/certification requirements, and limitations on the length of programs.

## Gainful Employment: Earnings Premium Test

The USDE proposed rule would establish two gainful employment tests: (1) the debt-to-earnings (D/E) test and (2) the earnings premium (EP) test. This article will address the EP test.

In simple terms, the EP test consists of a comparison of (1) the median earnings of graduates of an occupational program at a school with (2) the median earnings of high school graduates with no college education from the same cohort. The median earnings of high school graduates are labeled as the “earnings threshold.” Because of differences in earnings from state to state and within different areas of a state, the comparison is based on earnings of program graduates and high school-only individuals in the

same region of a state. The NPRM offers the following explanation:

### § 668.404 Calculating earnings premium measure.

(a) *General.* ... For each award year, the Secretary [of Education] calculates the earnings premium measure for a program by determining whether the median annual earnings of the title IV, HEA recipients who completed the program exceed the earnings threshold.

(b) *Median annual earnings; earnings threshold.* (1) The Secretary obtains from a federal agency with earnings data, under §668.405, the most currently available median annual earnings of the students who completed the program during the cohort period; ... and

(2) The Secretary uses the median annual earnings of students with a high school diploma or GED using data from the Census Bureau to calculate the earnings threshold.<sup>1</sup>

To pass the EP test, the median annual earnings of program graduates must exceed the earnings threshold. The Notice of Proposed Rulemaking states the following:

### § 668.402 Financial value transparency framework.

...

(e) *Outcomes of the earnings premium measure.* (1) A program passes the earnings premium measure if the median annual earnings of the students who completed the program exceed the earnings threshold.

(2) A program fails the earnings premium measure if the median annual earnings of the students who completed the program are equal to or less than the earnings threshold.<sup>1</sup>

A program that fails the EP test (and the D/E test or both) is in jeopardy of being declared ineligible for participation in Title IV programs. Note the following from the NPRM:

### § 668.603 Ineligible GE programs.

(a) *Ineligible programs.* If a GE program is a failing program under the D/E rates measure in § 668.402 in two out of any three consecutive award years for which the program’s D/E rates are calculated, or the earnings premium measure in § 668.402 in two out of any three consecutive award years for which the program’s earnings premium measure is calculated, the program becomes ineligible and its participation in the title IV, HEA programs ends.<sup>1</sup>

## State Licensing and Certification Requirements

Some gainful employment occupations are regulated by the states. State laws require entrants into certain occupations to fulfill education and testing prerequisites to be employed. The USDE expressed grave concerns in this NPRM about gainful employment programs that fall short of the mandated state education. If a gainful employment program does not meet state minimum requirements, graduates are not eligible to become licensed or certified and must repeat the program at a different school that meets the state requirements if they want to work in their chosen occupation.

Obviously, the hardship on students who must retake a program can be significant. And, from a governmental perspective, the USDE does not want to use taxpayers’ dollars to subsidize gainful employment programs that do not provide a direct path to employment!

The USDE proposed rule would cut off Title IV scholarship funding for programs in schools that do not qualify students for state licensing or certification exams. The following excerpt from the NPRM alerts schools to the obligations they must meet to continue to have their students be eligible for Title IV financial assistance:

### § 668.14 Program participation agreement.

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# Legal Eye On Medical Assisting



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(32) In each State in which the institution is located or in which students enrolled by the institution are located, as determined at the time of initial enrollment ... the institution must determine that each program eligible for title IV, HEA program funds—

(i) Is programmatically accredited if the State or a Federal agency requires such accreditation, including as a condition for employment in the occupation for which the program prepares the student, or is programmatically pre-accredited when programmatic pre-accreditation is sufficient according to the State or Federal agency;

(ii) Satisfies the applicable educational prerequisites for professional licensure or certification requirements in the State so that a student who completes the program and seeks employment in that State qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.<sup>1</sup>

## Limitations on the Length of Programs

Thus, gainful employment programs that do not teach everything required by state law would be ineligible for Title IV financial assistance for their students. However, some occupational programs are longer than necessary and include courses not required by state law for individuals to meet licensing or certification requirements. The NPRM would prohibit Title IV funds from being used to pay for courses not needed for entry into the occupation. Note the following:

### § 668.14 Program participation agreement.

...

(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must—

(i) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student; and

(ii) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student by limiting the number of hours in the program to the greater of—

(A) The required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by any Federal agency or the institution's accrediting agency; or

(B) Another State's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, if certain criteria is [*sic*] met.<sup>1</sup>

## New USDE Website

Section 668.43(d) of the NPRM would provide for a USDE website for the posting of information about gainful employment programs in each school. This website would create a central repository of information about occupational programs for prospective and current students. The specifics of this proposed website are not contained in this NPRM. However, the proposed rule lists information that could be mandated for posting in this website:

(1) The primary occupations that the program prepares students to enter, along with links to occupational profiles on O\*NET ([www.onetonline.org](http://www.onetonline.org)) or its successor site;

(2) The program's or institution's completion rates and withdrawal rates for full-time and less-than-full-time students, as reported to or calculated by the Department [of Education];

(3) The length of the program in calendar time;

(4) The total number of individuals enrolled in the program during the most recently completed award year;

...

(8) The total cost of tuition and fees, and the total cost of books, supplies, and equipment that a student would incur for completing the program within the length of the program;

...

(11) The median earnings, as provided by the Department [of Education], of students who completed the program or of all students who completed or withdrew from the program;

(12) Whether the program is programmatically accredited and the name of the accrediting agency.<sup>1</sup>

## Future of the NPRM

After reviewing the many public comments submitted in response to this NPRM, the USDE is planning to promulgate a final rule by Nov. 1, 2023. The final rule may be different from the proposed rule. As has been the case with previous USDE rules on gainful employment, it is likely that the rule will be challenged in court. Perhaps most importantly, the outcome of the 2024 national elections could determine the future of this proposed rule and the regulatory ideology and practice it embodies. ♦

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Questions? Contact Donald A. Balasa, JD, MBA, at [DBalasa@aama-ntl.org](mailto:DBalasa@aama-ntl.org) or 800/228-2262.

## References

1. Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB). *Fed Regist.* 2023;88(97):32300-32511. 34 CFR §600 and 668.