



September 9, 2010

VIA Federal eRulemaking Portal

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street, N.W., Room 8031
Washington, D.C. 20006-8502

Re: *Program Integrity Issues, Notice of Proposed Rulemaking,
U.S. Department of Education Docket ED-2010-OPE-0012*

Dear Ms. Finkel,

Kaplan Higher Education (“Kaplan”) is pleased to submit its attached Comments to the proposed rules on gainful employment set forth in the Notice of Proposed Rulemaking published in the Federal Register on July 26, 2010 (“NPRM”), 75 Fed. Reg. 43,616.

Yours Truly,

A handwritten signature in blue ink that reads "Janice L. Block". The signature is written in a cursive style with a large, sweeping flourish at the end.

Janice L. Block
Executive Vice President, General Counsel
& Chief Compliance Officer

PROPOSED RULES REGARDING GAINFUL EMPLOYMENT:
COMMENTS OF KAPLAN HIGHER EDUCATION

Program Integrity Issues
Docket ID ED 2010-OPE-0012

Kaplan Higher Education (“Kaplan”) shares the Administration’s and the Department of Education’s commitment to providing students in this country with greater access to higher education. Kaplan understands and supports the goals underlying the Department’s proposed gainful employment rules – among them, making sure that as a result of pursuing an education, students do not take on debt they will have difficulty discharging. Kaplan is committed to working with the Department to come up with rules that achieve our mutual goals of benefitting and protecting students, and of putting students first. It is, therefore, with all due respect that Kaplan urges the Department to take a hard look at the harmful impact that the proposed gainful employment rules will have on the 2.7 million students now enrolled in proprietary institutions of higher education and on our nation’s goals of expanding educational excellence and job opportunities.

Who are these 2.7 million proprietary school students that institutions like Kaplan are so focused on supporting? As explained in great detail below, the majority of them are “non-traditional” students who are most in need of educational opportunities.¹ At Kaplan, almost 40% of our students are single parents, and over 75% come from low-income backgrounds. They are primarily adult learners, with an average age of more than 30 years. While we work to ensure an environment in which these non-traditional students have a chance to excel, we should keep in mind some crucial facts: *Students at for-profit institutions graduate at a higher rate, with greater increases in salary, and at a fraction of the cost to the taxpayer than students at comparable non-profit institutions.* Contrary to recent criticism targeted at the proprietary sector, these students are not incurring unmanageable debt or somehow “failing” in life; instead, they are taking full advantage of their academic programs and are applying their education to further their career goals. And these graduates are overwhelmingly able to repay their loans. Kaplan University’s graduates’ cohort default rate was only 3.09% (based on Draft 2008 2-Yr Student Cohort Default Rates for Kaplan University Graduates).

While any student unable to repay his/her loans is concerning, it is important to understand that default rates are the product of socioeconomics, not an indicator of a program’s educational quality. The Government Accountability Office (“GAO”) has found that the level of student default rates is not related to the quality of the programs that students attend. Instead, default rates are directly tied to the type of students an institution serves. Notwithstanding the anecdotes found in the media, high default rates also often have little to do with the overall cost of an educational program. At Kaplan, the vast majority of our graduates – those who incur the

¹ The Department’s National Center for Education Statistics (NCES) defines “non-traditional” to include seven characteristics: (1) delayed enrollment, (2) part-time attendance, (3) financial independence, (4) having dependents other than a spouse, (5) working full-time while enrolled, (6) lacking a high school diploma, and (7) single parenthood.

full cost of their program – repay their loans. Those who default have an average loan debt of just over \$5,000.

We are confident that the Department does not intend the proposed gainful employment rules to diminish access to quality educational programs for non-traditional students, but that would be the unintended consequence of the rules as currently drafted. These draft rules will encourage proprietary schools to serve only more affluent, less “at-risk” students in order to meet the required thresholds. And, as multiple studies have shown, these draft rules will eliminate opportunities for millions of minority, non-traditional, and at-risk students who seek education and careers to better their lives. As described in greater detail below, with today’s multiple-year waiting lists at community colleges for needed programs such as nursing, these non-traditional yet well-deserving students will simply have nowhere to go.

A very recent Bureau of Labor Statistics (BLS) report found that “[a]ll of the increase in employment over the past two decades has been among workers who have taken at least some college classes or who have associate or bachelor’s degrees – and mostly among workers with bachelor’s degrees.” See BLS, *Spotlight on Statistics, Back to College*, September 2010, found at <http://www.bls.gov/spotlight/2010/college/home.htm>. Kaplan wants to ensure that it can continue to educate these students in a way that provides them with unquestionable value and opens new life-long employment opportunities.

The Obama Administration has recognized that the proprietary sector “has long played an important role in the nation’s system of postsecondary education and training,” that the growth of this system is critical to “President Obama’s goal of leading the world in the percentage of college graduates by 2020”, and that the President’s goal “cannot be achieved without a healthy and productive higher education for-profit sector.” 75 Fed. Reg. 43,617. Indeed, in the current economic climate with the accompanying budget challenges facing the public sector, only a vigorous proprietary sector will allow the Administration to meet its goals. As noted in Kaplan’s previously filed comments addressing the June 18, 2010 Notice of Proposed Rulemaking (“NPRM”), we urge the Department to collect data and analyze whether the disclosure requirement set forth in that NPRM can solve the problem of students taking on disproportionate debt for the value of the programs they are pursuing. The Department should not move forward with the significant and unprecedented regulatory proposals contained in this July 26, 2010 NPRM until it has made a thorough and complete analysis of the data.

Our Comments below are divided into four primary sections. The first section addresses several serious misconceptions about the proprietary higher education sector. The second section details the unintentional ways in which students would be harmed by the proposed rules and discouraged or unable to attain an education. The third section examines the Department’s authority to enact gainful employment regulations. Finally, if the Department were to move forward with the proposed rules despite the harm it will cause to students, in our fourth section, we respectfully present a series of important changes that would help mitigate this harm and prevent the rules from damaging good schools that provide valuable and necessary programs.

I. The Proposed Rules Rest On Incorrect Assumptions About Schools And Students in the Proprietary Higher Education Sector.

Kaplan is concerned about the serious misapprehensions of proprietary higher education institutions in general, and Kaplan in particular, that have been cited by supporters of the gainful employment rules. We are also concerned that some of these incorrect assumptions form part of the basis of the proposed rules and we feel that it is important to address them here.

First, there is a perception that the high default rates at proprietary schools are a direct and sole result of high tuition costs or large amounts of student debt. Some have cited Kaplan students' "repayment rate" of 28% under the gainful employment formula as evidence that Kaplan students incur unmanageable debt. As detailed below, this repayment rate formula is flawed for several reasons. The reality is that ***Kaplan University's graduates – those students who incur the full amount of tuition costs – have a cohort default rate of only 3.09%*** (based on Draft 2008 2-Yr CDR for Kaplan University Graduates). In fact, the average debt of Kaplan's former students, both graduates and non-completers, who default on their loans is \$5,184. While any student default is concerning, this is far from the overwhelming debt cited in various press reports and anecdotes put forth by proprietary school critics.

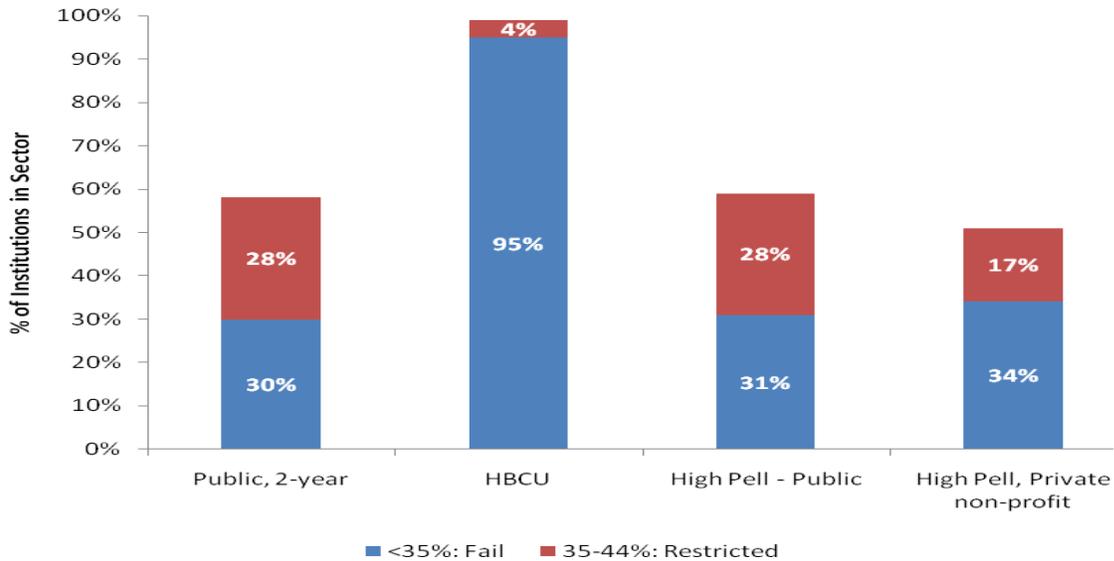
Second, the same proprietary school critics assert that default rates are higher at proprietary schools for reasons attributable to those institutions' "for-profit" status or some perceived inadequate education quality. This is also incorrect. As a recent study found:

[A]t least half of the difference in default rates between for-profit and not-for-profit schools is because they serve different types of students. For-profit schools are more likely to serve low-income students, racial and ethnic minority students, students who are first in their immediate family to attend postsecondary schooling, and students whose families have collected public assistance. Students in these groups are more likely to default on student loans after attending both for-profit and not-for-profit colleges.

See Charles River Associates, *Report on Gainful Employment, Executive Summary* prepared by Jonathan Guryan, PhD and Matthew Thompson, PhD, page 2 (March 29, 2010) (also stating that "it is possible that controlling for additional student characteristics, if data were available, would reduce the default gaps even more").

Proprietary institutions actually have default rates that are similar to rates at non-profit institutions that serve a similar non-traditional student population. Based on published institutional repayment rates, under the proposed rules 99% of non-profit Historically Black Colleges and Universities ("HBCUs") would fail to meet the proposed 45% repayment threshold. Additionally, 58% of public 2-year schools and 59% of all public schools and 51% of all private non-profit schools with high numbers of Pell Grant recipients (i.e. many low-income students) would fail. See Table 1 below.

Table 1: Percent of Non-Profit Institutions Which Fall Into “Fail” Or “Restricted” Categories Based On “Gainful Employment” Repayment Rates



The point of this comparison is that default or repayment rates “are not good vehicles for assessing the quality of institutions.” J. P. Gross, O. Cekin, D. Hossler & N. Hillman, *What Matters in Student Loan Default: A Review of the Research Literature in Journal of Student Financial Aid*, Journal of Student Financial Aid, page 27 (2009). Clearly, many of the institutions with low repayment rates, non-profit or proprietary, provide high quality education programs. For example, Howard University with a 32% repayment rate is consistently ranked as one of the best HBCUs in the country. Equally clearly, Harvard Medical School, which has a 24% repayment rate, is not a low-quality institution. The GAO recently found that default rates are a function of student demographics, not quality of programs, stating in an August 2009 report that, “[v]ariations in default rates across school sectors may reflect the characteristics of the students who attend the schools, according to academic research studies. ... [T]here are multiple demographic characteristics of borrowers that correlate with higher default rates.” GAO Report GAO-09-600, *Proprietary Schools: Stronger Department of Education Oversight Needed to Help Ensure Only Eligible Students Receive Federal Student Aid*, page 19 (August 2009).

Third, proprietary school critics base much of their criticism on an incorrect belief that proprietary schools provide low value compared to their public counterparts. The opposite is true. As indicated in Table 2 below, proprietary schools are significantly more successful than public institutions in educating minority students and students whom the Department of Education has classified as “high-risk.” Robert J. Shapiro and Nam D. Pham, *The Public Costs of Higher Education: A Comparison of Public, Private Not-For-Profit, and Private For-Profit Institutions*, page 19, (September 3, 2010).

Table 2: Graduation Rates For High-Risk And Minority Students At Two-Year And Less-Than-Two-Year Private For-Profit And Public Institutions, 2001

Students	Private for-Profit Institutions	Public Institutions	Greater Likelihood of Graduating by Attending a Private For-Profit Institution
High-Risk Students	65%	44%	48%
Minority Students	64%	36%	78%

In addition to the far greater likelihood that high-risk or minority students will graduate if they attend a proprietary school, proprietary school graduates have seen *significantly higher percentage earnings growth* than graduates at public, tax-supported institutions. See Roger Lytle, Roger Brinner and Chris Ross, *Parthenon Perspectives on Private Sector Post-Secondary Schools*, page 13 (March 12, 2010) (finding that from 2002-2005, while graduates from both proprietary and public 2-year and less institutions saw significant earnings growth, graduates from proprietary schools saw their incomes increase on average 54% compared to 36% earnings growth for graduates from the public schools).

Fourth, the Department apparently misunderstands the relative cost to federal and state governments of educating students in the public and private sectors. For example, the NPRM twice refers to a “recent study completed for the Florida legislature conclud[ing] that for profit institutions were more expensive for taxpayers on a per-student basis due to their high prices and large subsidies.” 75 Fed. Reg. 43,618 (without citation). In fact, the January 2010 report of Florida’s Office of Program Policy Analysis & Government Accountability states the opposite – namely, “that some public programs are more expensive when the state’s contribution is considered.” OPPAGA Report No. 10-18, *Public Career Education Programs Differ From Private Programs on Their Admissions Requirements, Costs, Financial Aid Availability and Student Outcomes*, page 9. In fact, the Florida legislature has found “*that strong, viable independent for-profit colleges and universities reduce the tax burden on the residents of the state.*” Fla. Stat. § 1009.891 (emphasis supplied).

This is consistent with recent major studies conducted on relative public costs for higher education. For example, a highly regarded recent study found that “total government support, direct and indirect, received by private for-profit institutions and their students, net of tax payments, is substantially less than the per-student support provided to private not-for-profit institutions and their students, and much less than the per-student support provided to public institutions and their students.” See Shapiro & Pham, *The Public Costs of Higher Education: A Comparison of Public, Private Not-For-Profit, and Private For-Profit Institutions*, page 5. The same study notes that “[f]or every \$1 dollar in direct [tax] support for private for-profit institutions, per student, from federal, state and local governments, private not-for-profit institutions receive \$8.69 per-student and public institutions receive \$19.38 per student.” *Id.*, at page 1 (emphasis supplied). The study also found that proprietary institutions and their students overall “receive less than 30 percent of the support per student from all levels of government than is provided to public institutions and their students, and 48 percent of the support per student received by private not-for-profit institutions and their students.” *Id.* Other

studies have come to a similar conclusion. See Jorge Klor de Alva, Nexus, *For-Profit Colleges and Universities: America's Least Costly and Most Efficient System of Higher Education*, August 2010 (finding that cost to taxpayers for a student at a 4-year public school averages \$9,709 while the cost to taxpayers for that same student at a proprietary school is \$99).

In short, proprietary schools, on average, do a better job educating, graduating and helping find quality employment for non-traditional or “risky” students and minority students who are most in need of educational opportunities. And, they do so at a fraction of the overall cost to taxpayers compared to public institutions.

Simply put, the proposed gainful employment rules, including the loan repayment rate thresholds, will not meaningfully assess whether a program provides value or is too expensive or, most importantly, whether the program prepares a student for “gainful employment.” To the contrary, as described below, these rules will limit opportunities for non-traditional students while failing to rein in those institutions that mislead students or provide poor quality yet high cost programs.

II. The Proposed Rules Will Harm Students In At Least Three Significant Ways.

A. The Proposed Rules Will Harm Students By Limiting Capacity And Diminishing Opportunities.

Kaplan’s roots as an education company go back more than 70 years. From the beginning, our focus has been on expanding access to education. Stanley Kaplan, our company’s founder, enabled immigrant families to gain entrance into competitive colleges by demonstrating merit on standardized tests. That mission is no less central to Kaplan today. Kaplan provides higher education opportunities to a broad spectrum of society, including the non-traditional students who have been ignored or underserved by more traditional non-profit institutions. See Table 3 below.

Table 3: Percentage Of Kaplan Students With Risk Factors Compared To National Population

Risk Factor	Kaplan University	Kaplan Colleges	National Population
Older than “typical” age of 18-24	95%	96%	28%
Filed taxes as independent	90%	72%	33%
Legal dependents other than spouse	65%	53%	7%
Full-time employment	35%	13%	27%
GED	10%	29%	3%
Single parent	39%	40%	7%

Kaplan, like proprietary higher education institutions overall, is particularly notable for its ability to attract and provide education opportunities for non-traditional students whose increased participation is vital to increasing the number of college graduates nationally. Yet, the proposed rules will deny these opportunities to minority and non-traditional students by limiting capacity and available programs. As Mark Kantrowitz concluded, “[t]he 8% debt-service-to-income threshold is so strict that it would preclude for-profit colleges from offering Bachelor’s degree programs. It also would eliminate many Associate’s degree programs at for-profit colleges. Even non-profit colleges would find it difficult to satisfy this standard if they were subjected to it.” Mark Kantrowitz, *What is Gainful Employment? What is Affordable Debt?*, page 1 (March 1, 2010).

A study by Charles River Associates concludes that the proposed eight percent debt-to-income standard would disqualify 18% of proprietary higher education programs from participation in Title IV programs. This, in turn, would displace hundreds of thousands of students, eliminating 18% of certificate students and 40% of students in degree programs. See Charles River Associates, *Report on Gainful Employment*, page 28 and page 1 (Executive Summary). Millions of the non-traditional students served by institutions like Kaplan’s, who otherwise would attend college, would be denied access if the gainful employment regulation goes into effect with the proposed thresholds.

The limits on capacity, moreover, will disproportionately affect lengthier programs. See Charles River Associates, *Report on Gainful Employment*, page 1. A student accumulates higher debt for longer programs, such as Bachelor’s of Nursing, Bachelor’s of Business Administration, or Bachelor’s of Teaching. See, for example, *id.* (Executive Summary) pages 1-2 (“we estimate that nearly 14 percent of Health Professional and Related Clinical Sciences, including Nursing, programs and more than 46 percent of Engineering Related Technologies/Technicians programs would not satisfy the proposed debt limit rule”). Mark Kantrowitz opined in *What is Gainful*

Employment? page 7, that the proposed rules will “make it much more difficult for Bachelor’s and advance[d] degree programs to qualify since they are necessarily more expensive due to greater program length.” These accredited programs, which based on the following statistics are desperately needed, should be encouraged by the Department. More than 582,000 new registered nursing jobs and 461,000 health aide jobs are expected to be created by 2018, according to a December 2009 analysis by the BLS. See BLS Employment Projections: 2008 – 2018 Summary, December 10, 2009. The BLS also found that students are turned away at nursing programs because of a lack of capacity. See Occupational Outlook Handbook, 2010-11 Edition, Registered Nurses, <http://www.bls.gov/oco/ocos083.htm>. An April 2010 report by National Public Radio found that the waiting list for nursing programs at California community colleges is, in some instances, three years long. Similarly, a January 17, 2010 report in the Denver Post found that Colorado’s community colleges were putting students on wait lists for 50 programs in 13 schools, including nursing.

The proposed rules – and the capacity limits they cause – will disproportionately affect minorities and economically disadvantaged students. If program eligibility turns on debt-to-income ratios or loan repayment rates, then schools will have to ensure that they are admitting students who present little risk of nonpayment. Thus, schools will have powerful incentives not to admit lower income students or students who appear to present a credit risk. This problem is exacerbated by the fact that schools lack any power to limit student borrowing. As noted above, Kaplan’s philosophy and mission is to provide higher education opportunities to a broad spectrum of society, including non-traditional students. Yet these proposed rules put our ability to continue serving this at-need population seriously in doubt.

B. The Proposed Rules Harm Students By Creating Unfairness And Uncertainty, Hampering Planning, And Deterring Investment In Programs.

In addition to the fact that the proposed repayment rate and debt-to-income thresholds are poor indicators of the quality of a program or its ability to prepare students for gainful employment, the rules will sanction and eliminate eligible schools based on student income data, which the schools do not have and cannot obtain. The Department states that it will obtain income data to determine debt-to-income thresholds from the Social Security Administration (“SSA”) or another, undisclosed federal agency. This approach is highly problematic for at least three reasons.

First, even if the Department is able to get past the various legal limitations restricting its access to such data (see, for example, 42 U.S.C. § 1306; 26 U.S.C. § 6105 (both laws imposing close limitations on sharing such data)) and obtain income information from the SSA, the IRS, or some other federal agency, it is absolutely clear that eligible institutions cannot. Thus, schools will have no way to assess whether their programs are in compliance with the proposed rules until they receive a letter from the Department informing them that their students’ debt-to-income ratios exceed the allowable limits. Without access to the relevant data in advance, schools will be unable to conform to the Department’s requirements until it is already too late. What the Department proposes is effectively retroactive sanctions for actions that schools had no way of knowing would be punishable at the time the action actually occurred. This type of retroactive punishment without notice is fundamentally unfair and violates basic principles of administrative law. As one court explained, “branding as ‘unfair’ conduct stamped ‘fair’ at the

time a party acted[] raises judicial hackles . . . [a]nd the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

Second, not only will affected institutions not have access to the income data, but they will be unable to inspect it, challenge its use or analyze its meaning. This, too, is fundamentally unfair. The information might be wrong. It might be based on partial years of work, or on years in which a student was ill. It might be based on a sharp downturn in the health of a particular economic sector, or on some other temporary cause. The likelihood that some data will need to be challenged is obvious from the simple fact that the Department's initial draft cohort default rates are often incorrect, and change following institution challenges. This process to check the income and repayment data, provide additional information, and help improve the accuracy of the conclusions is completely missing from the Department's proposal.

Third, injecting this kind of unpredictability into private education has severely damaging consequences for students and the schools they attend. Current students will be unsure whether their programs will be around tomorrow, while prospective students will be unsure whether the programs they select will be around long enough for them to complete their studies. Students cannot be expected to enroll in any program whose eligibility might be questioned. Schools will find it difficult to justify investing in program infrastructure (*i.e.*, materials, capital, facilities, equipment, etc.) when it is unclear whether and for how long that program may exist. It is little solace to students that a program may be permitted to graduate its existing students before folding; schools cannot be expected to make significant financial investments in dying programs. Instead, those programs will in all likelihood be provided only the minimal resources necessary to successfully conclude.

C. The Proposed Rules Harm Students By Stifling Innovation and Discouraging New Programs.

Proprietary schools are at the forefront of innovation, particularly innovation in the delivery of education. They are pioneers of online education and blended academic programs, of the use of data analysis to support student retention, and of new methods for measuring student learning. See, for example, Clayton M. Christensen, Scott D. Anthony, Erik A. Roth, *Seeing What's Next*, Harvard Business School Press, at Chapter Five (2004).

The Department proposes that it must approve all new programs and that any such approval would include a gainful employment analysis. See 75 Fed. Reg. 43,624. This costly approval step is redundant and unnecessary: State regulatory bodies and accrediting agencies already require approval of new programs. In fact, in the June 18, 2010 NPRM, the Department proposed to require State regulatory bodies to take an added role in program oversight. The additional administrative burden that the approval and affirmation requirements will impose on the Department and on schools will result in increased program costs. Kaplan alone implemented scores of new programs over the last year. How will the Department be able efficiently to review the anticipated numbers of programs with the speed required for educational institutions to function effectively? If it cannot, new and needed programs will be indefinitely delayed.

Additionally, the proposed rules appear to require that schools obtain local businesses' support to demonstrate the demand for any new program. 75 Fed. Reg. 43,624; Proposed Section 668.7(g)(ii) & (iii). The requirement that an institution must prove that there are projected job vacancies or that employers are predicting that they will experience certain levels of demand for those occupations at their businesses does not fall within any reasonable understanding of the statutory requirement that programs prepare students for gainful employment. Not only that, the proposed rules do not adequately explain how the process of employer affirmation will be conducted or how the Department will verify or review that affirmation. The rules also do not discuss how this requirement would be applied at on-line or other national schools. Because this requirement lacks any defined objective metric that the Department must use to determine whether or not a program is acceptable, it leaves the Department with vague and arbitrary ultimate power to approve or deny a program.

Finally, the proposed rules effectively make the Department – not the demands of the economy or students – the arbiter of postsecondary offerings. Such a system will not only be costly and inefficient, it also is not designed to result in programs that will best serve students and our national economic interests.

Clearly, from the above, these rules will have significant consequences for millions of students. For these reasons we again respectfully urge the Department to reconsider its approach to trying to limit excessive student debt and misleading or ineffective programs.

III. The Proposed Rules Exceed the Department's Authority To Regulate Under The Higher Education Act ("HEA").

A. The Department's Definition Of "Gainful Employment" Results In Tuition Price Controls Beyond The Scope Of The Department's Authority.

The HEA requires proprietary institutions, as well as non-profit institutions that offer vocational programs, to provide "an eligible program of training to prepare students for gainful employment in a recognized occupation," (see sections 101(b)(1), 102(b)(1)(A)(i) and (c)(1)(A)); but it does not define "gainful employment." The proposed rules do not give "gainful employment" its customary meaning – "[w]ork that a person can pursue and perform for money." *Black's Law Dictionary*, Bryan Garner, 9th edition, page 545. They also do not utilize the Social Security Administration's description of gainful employment as "work activity that the claimant does for pay or profit." See 20 C.F.R. § 416.972(b).

These common conceptions of gainful employment are likely what Congress had in mind in using that terminology in the HEA. And, courts generally interpret statutes based on their plain meaning. See *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). The proposed rules, however, define gainful employment based on whether or not a particular program meets certain debt-to-income or federal loan repayment thresholds. As one prominent analyst stated, "the proposals focus exclusively on affordable debt for the definition of gainful employment." Kantrowitz, *What is Gainful Employment?*, page 2. The analyst also found that the rules "fail to consider other reasons for pursuing a college education, such as lower unemployment rates, more job prospects and greater job security." *Id.* See also *id.* at page 21 (detailing lower unemployment rates, greater employability, better job security, increased flexibility, lower stress,

and greater fulfillment of graduates). The consequences of the new interpretation of the phrase “gainful employment” show how far that interpretation is from the words’ plain meaning. Under these rules, a student prepared for nursing at one school may be engaged in “gainful employment” while an equally well-prepared student from another school in an identical program may not be – based not on the relative quality of the academic programs, but on the students’ respective tuition costs or the relative affluence of the student bodies.

Even the Administration seems to understand the limitations of the proposed rules in truly defining whether a program prepares students for gainful employment. As Mary-Ellen McGuire, a former White House Domestic Policy Aide with knowledge of the development of the gainful employment rules, explained as recently as August 12, 2010, the repayment threshold was selected at least in part because the White House feels that the repayment levels (35% and 45%) would eliminate the correct number of programs and exclude from proprietary higher education the number of students that the “market” could handle while the government works to increase community college capacity. She stated:

We see, sort of, what percentages may be in terms of who falls into the category and we think about what we believe the market can bear. And really what I mean – market, when I talk about it, is from a student perspective. There is certainly some worry if that – if we go above a certain threshold – and we have, maybe, 20% of these institutions that are identified. Where will these students then go if they no longer can attend these particular institutions? We certainly need some time – a little bit more time, to build our community college system. So the 35% and 45% is really just the result of running numbers and deciding that those made a bit of sense.

Transcript of Morgan Stanley Call on Regulatory and Legislative Issues in the For-Profit Education Sector, August 12, 2010.

Certainly increased capacity at community colleges is a laudable goal, however, the Department should ensure that the purpose of the rules is not to simply eliminate a certain number of programs or move students from proprietary schools to public schools, but to rein in the programs that truly fail to provide value to students.

Additionally, “the proposed definition of gainful employment represents a kind of implicit price control since affordable debt restrictions translate into caps on the average cumulative debt at graduation, and that in turn limits the amount a college can charge for tuition since there are limits on the amount of non-debt resources available to students to pay the college bills.” Kantrowitz, *What is Gainful Employment?*, page 21. Of course, if Congress wants to regulate the total debt that any student receiving education loans may take on or wishes to deny education loans to students who are poor credit risks, it may enact legislation doing so. But Congress has never taken this approach to college tuition costs. Instead, it has enacted legislation that requires transparency about such costs. See, for example, 20 U.S.C. § 1015 (requiring the Department to collect cost data and make it available and to study college costs); § 1015a (requiring the Department to create a website providing information about tuition and fees and requiring schools with the largest increases in costs to explain those increases and their efforts to reduce costs).

While Congress has considered enacting price controls on tuition, it has declined each time to take this course of action. For example, a House of Representatives Report accompanying the College Access and Opportunity Act of 2005 (which was not enacted) observed that college education should be affordable, but that “the Federal government does not currently have the authority to dictate tuition and fee rates for institutions of higher education.” House Report 109-231, page 159 (2005). It is impermissible for the Department to set tuition pricing. See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress”).

This attempt at tuition control has one additional defect. Proprietary institutions are statutorily required to derive no more than 90 percent of their income from Title IV funds. This artificially raises tuition at proprietary schools that serve many students who qualify for the maximum amount of aid. The gainful employment rules require these same schools to lower tuition to meet debt-to-income thresholds, putting the schools in a catch-22 where they are unable to comply with both the “90/10” statutory requirement and the gainful employment regulatory requirement. The gainful employment rules thus contradict the “90/10” statute.

B. The Department’s New Definition Of “Gainful Employment” Contradicts Its Prior And Current Definitions Of “Gainful Employment.”

The Department contends that its current regulations “do not define or further describe the meaning of the phrase ‘gainful employment.’” 75 Fed. Reg. 43,619 (citing 34 C.F.R. §§ 600.4(a)(4)(iii), 600.5(a)(5), and 600.6(a)(4)). However, both the Department’s current and prior regulations dating back to 1994 have defined “gainful employment” in an entirely different manner from the definition proposed in the NPRM.

First, the Department’s “eligible program” regulation defines several types of eligible programs including requiring that shorter programs containing between 300 and 600 clock hours of instruction prepare a “student for ***gainful employment in a recognized occupation***” (34 C.F.R. § 668.8(d)(3)(emphasis supplied)). These rules go on to require, in part, that the programs have placement rates of at least 70% (34 C.F.R. § 668.8(e)). To calculate the placement rate, the institution must:

determine the number of students who, within 180 days of the day they received their degree, certificate, or other recognized educational credential, obtained ***gainful employment in the recognized occupation*** for which they were trained or in a related comparable recognized occupation and, on the date of this calculation, are employed, or have been employed, for at least 13 weeks following receipt of the credential from the institution. [Emphasis supplied.]

The rules go on to require that the institution “document” that its students obtained gainful employment by providing, for example, “[a] written statement from the student’s employer; Signed copies of State or Federal income tax forms; and, Written evidence of payments of Social Security taxes.” 34 C.F.R. § 686.8(g). The regulation simply requires a student to have obtained “gainful employment” and defines this as a job in the occupation for which the program trained the student. It also more specifically defines evidence of satisfactory

“gainful employment” to include an employer’s written statement, signed copies of tax forms, or written evidence of Social Security tax payments. The regulation contains no reference – and has contained no reference during the last 16 years – to debt-to-income ratios or loan repayment rates. The regulation reaffirms the commonly understood meaning of “gainful employment” discussed above: “work that a person can perform and pursue for money.”

Second, the Department’s program participation agreement regulation discusses “gainful employment” requirements without any reference to debt-to-income ratios or loan repayment rates. 34 C.F.R. § 668.14(b)(26). The regulation requires a Title IV participating institution to sign a program participation agreement with the Department and to agree to a list of items, including the following:

(26) If the stated objectives of an educational program of the institution are to prepare a student for *gainful employment* in a recognized occupation, the institution will—

(i) 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. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.”

34 C.F.R. § 668.14(b)(26) (emphasis supplied). This regulation also imposes requirements related to gainful employment and has done so since July 1, 1994. See 49 Fed. Reg. 22,348, 22,427. However, the regulation focuses exclusively on the relationship between the length of the program and the entry level requirements for the occupation and on the need for training provided by the course to obtain employment in the occupation. Again, like section 668.8 described above, this regulation contains no reference – and has contained no reference during the last 16 years – to debt-to-income ratios or loan repayment rates.

In guidance, the Department has explicitly stated that the “gainful employment” requirement relates to the preparation for a job, not the ability to obtain some level of salary or the cost of the particular program. The Department stated, “[i]t is implicit that the statutorily intended goal or result of such a program be preparation for gainful employment in such an occupation; not that such a goal or result be potentially derived or incidentally available at the conclusion of the program.” *E.g., In re Academy for Jewish Educ.*, No. 94-11-EA, 1994 WL 1026087, at 3 (Dep’t of Educ. Mar. 23, 1994); *see also In the Matter of Bnai Arugath*, No. 94-73-EA, 1994 WL 1026098, at 2 (Dep’t of Educ. June 16, 1994).

The Department cannot depart dramatically from its historic practice – as the proposed gainful employment rules clearly do – without a reasoned explanation for this change. *Motor*

Vehicles Manu. Ass'n v. State Farm, 463 U.S. 29 (1983). The Department has failed to comply with this requirement in promulgating the proposed gainful employment rules.

C. The Department's Application Of The Proposed Rules To Each Program, Rather Than To Each Institution, Contravenes The HEA.

The HEA does not authorize the Department to require *all* programs offered by a proprietary institution of higher education to prepare students for “gainful employment” in a recognized occupation. The Department cites the definition of a proprietary institution of higher education in section 102(b) of the HEA as authority for this requirement. See 75 Fed. Reg. 43,619, 43,640. However, section 102(b) requires proprietary institutions of higher education to provide “*an eligible program of training* to prepare students for gainful employment in a recognized occupation.” 20 U.S.C. § 1002(b)(1)(a)(i) (emphasis supplied). The provision does not require “*all* educational programs of training” at a proprietary institution to prepare students for gainful employment. The provision only requires “*an* eligible program of training” – *i.e.*, at least one such program.

Furthermore, section 102(b) establishes requirements for an institution to qualify as a Title IV eligible proprietary institution, but not separate eligibility requirements for each of the institution's educational programs. Such institutions qualify for Title IV eligibility because section 102(a)(1)(A) deems a proprietary institution to be an “institution of higher education” for purposes of Title IV. In turn, section 487 authorizes “institutions of higher education” to participate in the Title IV programs (“[i]n order to be an eligible institution for the purposes of any program authorized under [Title IV], an institution must be an institution of higher education or eligible institution and shall ... enter into a program participation agreement.”). None of these provisions establishes separate “gainful employment” requirements for each educational program, and the rules requiring schools to meet this standard are inconsistent with the statute.

D. The Rule's Definition Of “Gainful Employment” Violates The General Education Provisions Act.

The proposed rules also would exceed the Secretary's statutory authority by instituting a system by which the Department would effectively control what programs of instruction are provided by colleges. Congress expressly prohibited the Department from taking such action when it enacted the General Education Provisions Act, which reads as follows:

Sec. 1232a. Prohibition against Federal control of education

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution,

20 U.S.C. § 1232a (emphasis supplied). See also *Wheeler v. Barrera*, 417 U.S. 402, 416 (1974), *modified on another ground*, 422 U.S. 1004 (1975) (Congress's “concern was directed primarily at the possibility of [federal agencies] assuming the role of a national school board”).

The program eligibility standards and related restrictions in the proposed gainful employment rules would effectively federalize the criteria by which postsecondary educational institutions select, institute, and maintain their educational program portfolios. Postsecondary educational institutions will no longer have the ability to determine independently what programs best serve their students and communities. Instead, institutions will look to federally dictated formulas and matrices in determining what educational programs are to be offered. Additionally, as detailed above, the Department will now have total and final say on any new programs that proprietary schools and many public schools offer. This outcome is precisely what Congress prohibited when it barred the Department from exercising “*any* direction, supervision, or control over the curriculum, program of instruction” of postsecondary educational institutions. In seeking to promulgate a definition of gainful employment that would exercise control over institutional program choice, the Department has proposed a regulatory scheme that is forbidden by Congress.

IV. If The Department Proceeds With These Proposed Rules, The Rules Should Be Altered To Ensure Quality Programs Are Not Unintentionally Impacted And Students Are Not Harmed.

If the Department decides to move forward with these proposed gainful employment rules, Kaplan offers, in the alternative, the following specific suggestions regarding adjustments needed to prevent the calculations under the rules from unintentionally harming quality programs and students.

A. The Proposed Rules Have Some Basic Substantive And Procedural Defects That Must Be Corrected.

Kaplan respectfully submits that the following three substantive and procedural defects must be corrected.

1. The Gainful Employment Rules Should Not Apply To Degree Programs.

The proposed rules should not extend to degree programs offered by proprietary schools. The benefits conferred by degree programs, such as higher lifetime earnings, higher income growth rates, greater employability, better career advancement and job stability, do not readily lend themselves to a formulaic approach to measuring value based on early career earnings. As mentioned above, a recent BLS report found that a degree is almost necessary to ensure continuing job opportunities in tough economic times. The BLS went on to state that,

Business cycles run their course and the economy goes from expansion to recession – but regardless of whether the economy is booming or contracting, an inverse relationship exists between education and unemployment: more education is associated with less unemployment. In 2009, the unemployment rate for workers with college degrees was 4.6 percent. The rate for workers without a high school diploma was 10 points higher.

BLS, *Back to College*, <http://www.bls.gov/spotlight/2010/college/home.htm>.

The value of opportunity and stability, especially in periods of economic downturn, cannot be well quantified by these rules. The Department seemingly recognized these facts when it excluded degree programs at non-profit institutions from the gainful employment requirement in the June 18, 2010 NPRM. The Department should not apply the gainful employment rules to degree programs in the same manner they apply in the more traditional vocational school setting.

2. Schools Should Not Be Sanctioned Based On Data They Have Neither Reviewed Nor Had Any Chance To Challenge.

Under the proposed rules, the Department will determine both the relevant debt-to-income ratios and repayment rates based in significant part on data that the schools have not had any opportunity to review or challenge. Kaplan respectfully submits that affected institutions be entitled to certain minimum due process protections before they are subject to penalties. The Department should provide an opportunity for affected institutions to review and challenge the data the Department is using and the calculations that the Department makes based on that data. In addition, the Department should provide institutions with a right to appeal from any adverse determination about the accuracy and reliability of the data used.

3. The Department Should Not Require Employer Affirmations For New Programs, Or, Especially, For Online Programs.

The Department should not adopt the employer affirmation requirements in connection with its approval of new programs. These requirements are onerous and unduly burdensome and will frustrate innovation and increase costs. At the very least, the Department should make clear that local employer affirmations are not required when schools are offering on-line or other distance based programs. The local requirement simply makes no sense in this context since online programs attract student from across the country and around the world.

B. The Debt-To-Income Formula Should Be Revised.

Kaplan respectfully recommends the following five modifications be made to the debt-to-income threshold calculations.²

1. The Debt-To-Income Percentage Thresholds Should Be Higher And Indexed To Program Type.

The Department's proposed debt-to-income eligibility range of 8-12% is unsupported by the majority of relevant data. As the study relied on by the Department in the NPRM notes, the 8% rule "arose from mortgage underwriting standards," not from standards related to student or personal loans. Sandy Baum & Saul Schwartz, *How Much Debt Is Too Much, Defining Benchmarks for Manageable Student Debt*, page 3. The authors of that study are critical of the 8% threshold and instead suggest a 10% threshold for borrowers with median income. Those authors indicate that *the 8% rule "has no particular merit or justification,"* and that education

² Kaplan supports the Department's decision to give colleges an alternative measure based on the debt service's percentage of discretionary income above 150% of the poverty level. See 75 Fed. Reg. 45,619.

debt should not be evaluated in isolation. *Id.* (emphasis supplied). The Charles River *Report on Gainful Employment* (Executive Summary), page 3, further states that “no scientific or data-driven rationale has been presented for an 8 percent limit as opposed to any other number. No evidence has been presented, for example, that loan default rates increase dramatically as student loan payments cross this threshold.”

Moreover, as noted above, in an August 12, 2010 call with Morgan Stanley, former White House Domestic Policy Council and Senior Education Advisor MaryEllen McGuire suggested that the debt level threshold was not based on well-accepted underlying data, when she stated that “the 12%, quite honestly, is just 50% more than the 8%. That was just a number that the Department felt made some bit of sense.” See Transcript of Morgan Stanley Call, August 12, 2010.

Instead, financial aid experts, based on studies of aid repayment rates urge a ratio of 10-15%. See Mark Kantrowitz, *What is Gainful Employment?*, page 11. For example, the widely respected website finaid.org has used the 15% repayment standard on its loan payment calculator for over a decade. This conclusion is based in part on Mr. Kantrowitz’s study of loan repayment rates which found that as a general “rule of thumb” the level of appropriate debt-to-income is a 13.8% ratio of total annual student loan payments to annual adjusted gross income.

Kaplan urges the Department to consider the fact that the current proposed ratios of 8-12% are not well supported and should be increased based on the recommendation of the studies cited above, including the study on which the Department relies. Kaplan suggests a maximum debt-to-income ratio of 15% for degree programs over a 20-year repayment period as outlined in Table 4 below.

2. The Annual Loan Payment Period Used Should Be 15 or 20 Years Depending On Program Type.

In determining student income and discretionary income for purposes of the debt-to-income ratios, the Department proposes to consider income for the first three years after graduation. However, the study the Department relies on to develop its ratios found that, “evaluations of student debt levels that focus only on borrowers’ financial status while in school or in the first years after entry into the labor force may lead to underestimates of reasonable levels of borrowing for education.” Baum and Schwartz, *How Much Debt Is Too Much?*, page 2. See also Kantrowitz, *What is Gainful Employment?*, page 11. “[The] use of the 10-year repayment length is another way that the regulation would overweight the early costs of education and ignore the future benefits.” Charles River *Report on Gainful Employment*, pages 4-5.

In light of this reality, the proposed rules contemplate an arbitrarily short repayment period of ten years. The Department’s unsupported reliance on a historical standard of a 10-year repayment period, particularly in today’s more challenging economic environment, should be reconsidered. The reality is that many students today opt for much longer repayment periods averaging 20-25 years for students who consolidate loans. See Mark Kantrowitz, *What is Gainful Employment?*, page 20.

Kaplan thus urges the Department to increase the loan term in the loan payment calculation from 10 years to 15 or 20 years depending on program. See Table 4 below.

3. Schools Should Have The Option Of Using BLS Income Data For Relevant Occupations For Debt-to-Income Calculations.

Kaplan further proposes that the Department offer institutions the option of using either the SSA data or BLS data for salaries for particular occupations (*i.e.*, one of the Department’s original proposals in the negotiated rulemaking). Doing so will allow colleges to have some certainty about whether their programs will be able to meet the debt-to-income ratio, because the BLS data – unlike the data from the SSA – is publicly available. In addition, the BLS data is not affected by mid-year graduations, part-time employment, leaves for illness or pregnancy or other personal reasons that result in the under-reporting of income.

Critically, however, if the Department insists on applying the proposed rules to degree programs, it should compare student debt for those programs to the median salary in an occupation, and not to the lowest quartile, as the Department previously suggested in Negotiated Rulemaking. Degree programs pay dividends financially and in terms of professional satisfaction over a lifetime; and, accordingly, salaries increase at a rate faster than those of diploma programs. See BLS, *Back to College* (study quoted above finding that degree holders have significantly lower unemployment, higher wages, and more opportunity over a lifetime than people without degrees). Thus, Kaplan respectfully requests that the Department offer schools the option of determining debt-to-income ratios based on either income data under the current proposal or on BLS data and that in using the BLS data, the Department consider median income for a particular occupation for degree programs. See Table 4 below.

Based on the above, Kaplan recommends the following graduated metrics, in Table 4 below, which would impact “outlier” programs while not eliminating quality student opportunities and be consistent with studies on appropriate student debt thresholds:

Table 4: Indexed Debt-to-Income Metrics

Program Level	Debt-to-Income Threshold (Ineligibility)	BLS Percentile	Years in Repayment
Non-Degree (Diploma)	12%	25 th	15
Associate’s Degree	15%	50 th	20
Bachelor’s Degree and Above	15%	50 th	20

4. In Calculating Actual Income, Student Earnings Should Be Annualized And Regularized.

Regardless of the debt-to-income threshold used or the repayment period, if the Department proposes to rely on income data from the SSA or IRS, the Department should account for anomalies in that data. Students' actual income data for the first three years after graduation does not provide a good or reliable measure of the overall salary level. Many students graduate from school mid-year. Many students will not be fully employed in their first year for numerous reasons unrelated to the quality of their programs; as examples, they might choose to work part-time, or become ill, or give birth, or choose to take a vacation or do community service before beginning their careers. They might experience a delay in extracting themselves from an existing job. There might be a sharp downturn in the relevant economic sector or in the relevant geographic region. Under the proposed rules, schools bear the full risk of this initial under-reporting of income for particular occupations. The rules make no effort to determine full-time equivalency or otherwise to regularize the income data of program participants.

If the Department enacts rules basing debt-to-income ratios on student earnings the first three years after graduation from a program, it must take steps to annualize the data and to correct it for these extremely common types of discrepancies. In addition, as recommended above, the Department should allow the option to utilize BLS data as an alternative to account for such income data discrepancies.

5. In Calculating The Loan Amount, Only Institutional Charges Should Be Included.

Further, in calculating the loan amount for purposes of determining a debt-to-income ratio, the Department should use only the loan amounts directed to institutional charges, *i.e.*, tuition and direct costs. An institution has no power to limit students' borrowing and students often borrow amounts in excess of that necessary for tuition and fees. It is unfair for the Department to penalize schools for students' imprudent borrowing where schools have absolutely no ability to limit that borrowing. In the June 18, 2010 NPRM, the Department proposed rules that will provide the information necessary to determine the tuition and direct costs of programs. The "annual loan debt" calculation in proposed rule section 668.7(c)(2) should be revised to include only loan debt that pays for institutional charges.

C. The Repayment Rate Thresholds Should Also Be Revised.

If the Department proceeds with the gainful employment rules, Kaplan supports the Department's decision to provide institutions with an alternative method of satisfying them – namely, the repayment rate thresholds. However, as currently drafted, these proposed rules, like the debt-to-income ratios, have the following flaws that should be corrected.

1. Only Graduates Should Be Considered In Determining The Repayment Rate.

In determining an institution's repayment rate, the Department proposes to include not only graduates, but also students who fail to complete a program. Because the repayment rate is being used as a proxy for determining whether *the program* prepares students for gainful employment, the relevant group under these rules should be those students who successfully complete the program. The question is whether the program has prepared graduates for gainful employment – *i.e.*, whether graduates have received the capabilities needed to succeed in a particular occupation. Students who fail to finish a program cannot be used to measure that program's efficacy. See, for example, 34 C.F.R. § 668.8(g)(1)(i) (in determining the placement rates required to determine if certain educational programs comply with eligible program requirements, the Department includes only students who received the credential awarded for successfully completing the program).

In fact, if students who fail to complete the program are included in the calculation of the repayment rate, then the regulation appears instead to rewrite the HEA's cohort default provision. The HEA already establishes a cohort default rule for institutional eligibility. If the Department bases eligibility on repayment rates that are simply a proxy for a different cohort default rule, it is unlawfully substituting its judgment for Congress's on the appropriate cohort default level.

Kaplan respectfully submits that if the Department wishes to use repayment rates as a proxy for whether a full program prepares a student for gainful employment, the Department should consider only the repayment rates for program completers.

2. Treating Students Who Are Meeting Their Loan Obligations As Not Repaying Is Unfair To Students And Inconsistent With The Department's Current And Prior Statements.

Any student who is making payments on his or her loan should be considered in repayment status, and particular omissions from this group are arbitrary and unreasonable. Most incongruous is the proposed rules' provision that students who are in income-based repayment plans that require only payments of interest and those that entered deferment or forbearance even though they have previously paid down significant principal in prior years, will be treated as not repaying their loans. 75 Fed. Reg. 43,619, 43,622. The proposed rules' calculation of the repayment rate fails to account for the fact that a student may not be paying principal because he or she has entered into a personally beneficial, and government promoted, arrangement, not because the program failed to prepare the student for gainful employment or because the student could not make additional payments if needed.

For years, the government has supported students by offering deferral, forbearance and income-based repayment plans. See, for example, 34 C.F.R., Part 668 Appendix D (1988) (encouraging institutions to, among other things, counsel students regarding "[t]he borrower's right to deferment" and "the availability of forbearance"). The proposed rules thus represent a turnabout in Department policy. Just over a year ago Secretary Duncan touted income-based-repayment stating in a press release on July 1, 2009, that "[w]e know many graduates are

concerned about their ability to repay student loans in the current economic environment, This new plan addresses the issue head on by giving them the option of a monthly payment tied to their income.” It is unfair to penalize schools when students take advantage of programs that the Department and Congress had, until now, not only supported but, in many cases, encouraged.

Kaplan’s situation provides an excellent illustration of this point. As mentioned above, only 28% of Kaplan’s students are “repaying” their loans under the Department’s gainful employment calculation. But, a significant portion of Kaplan’s former students are actively and currently repaying their loans while not yet reducing principal – in part because they may be in an income-based repayment plan or may have consolidated their loans into plans requiring only interest payments initially. These students should be considered as repaying their loans, because, they are in fact meeting their loan obligations. It is critical to note that this group of students is in no way in arrears on their obligations; they are simply taking advantage of a government program promoted by the Department.

Additionally, a number of Kaplan students in deferral or forbearance have paid down some principal on their loans prior to entering those statuses. These are students who were successfully meeting their repayment obligations, in many cases for years after leaving Kaplan, but who may have lost their jobs in the recent economic downturn or experienced some personal reason totally unrelated to the quality of their program that explains their inability to continue repaying. In fact, over 10,000 former Kaplan students each have reduced principal by over \$1,500, but could still be counted against Kaplan in the proposed gainful employment calculation.

Surely, the government should not be penalizing schools when their students participate in government programs that assist them such as income based repayment plans, or take necessary deferments, such as for medical residencies. Notably, if medical schools were required to meet this repayment rate, many would fail “because medical students routinely use the economic hardship deferment and forbearances during residencies and internships.” Mark Kantrowitz, *What is Gainful Employment?*, page 2, note 2. Medical school graduates also regularly consolidate their loans which result, many times, in a period of interest only payments. Since they are not paying down principal in the initial years of their loans, they are deemed not to be repaying. Highlighting the incompleteness of the Department’s formula for loan repayment rates – according to the Department’s calculations, only 24% of Harvard Medical School students repay their loans.

It is unfair to punish schools for outcomes that the Congress and the Department support and encourage. The Department should treat students who are in forbearance, deferral or income-based repayment plans as in repayment status when calculating a program’s repayment rate.

3. Students Who Pay Down Recapitalized Principal Should Be Counted As Paying Down Principal During The Relevant Fiscal Year.

There is another inaccuracy embedded in the method for calculating repayment rates which results in significant under-counting of the students who are repaying their loans. Under the proposed rules, students who repay principal during a fiscal year are generally considered to

be repaying their loans. However, because of the accident of when a fiscal year begins and ends, a significant number of students who repay some principal during a fiscal year may not be treated as repaying under the rules. For example, students who are in deferral or forbearance have the interest payments they are not making capitalized and rolled into the principal amount of their loans. Thus, a student who receives forbearance or deferment (and has the interest rolled into principal) may pay principal prior to the forbearance or deferment, but may end the year with a higher principal balance than he or she began the year due to capitalized interest during the forbearance or deferment period, and thus not be considered in repayment. This is true even for some students who enter deferment for non-financial reasons, for example military or in-school deferments.

If interest is capitalized, then the Department should consider the recapitalized principal in determining whether the student borrower paid down principal in the most recent year. The Department should clarify that the recapitalized interest becomes part of the principal for repayment calculation purposes when the student comes out of forbearance or deferment and re-enters repayment.

D. The Department Should Suspend The Implementation Of Its Gainful Employment Rules Pending Evaluation Of The Effectiveness Of The June 18, 2010 Proposed Rules Or, At The Very Least, Phase In The New Rules To Avoid Penalizing Schools For Past Actions.

Kaplan shares the Department's concern about student over-borrowing, but there are alternative ways to address this issue without the harm done by this proposal. The Department's June 18, 2010 NPRM proposes to require institutions (i) to collect and report substantial amounts of data relevant to this concern, and (ii) to disclose to students the information students need to make informed decisions prior to taking on debt. As noted above, Kaplan urges the Department to wait and assess whether these disclosures, along with the other measures ultimately promulgated based on the June 18, 2010 NPRM, address the problem of student over-borrowing without the unprecedented intrusion the bulk of the proposed gainful employment rules represent.

Finally, the Department should phase in the application of any new gainful employment rules to allow eligible institutions time to conform to the new standards. In calculating debt-to-income ratios and repayment rates, the Department proposes to use data from past years when neither institutions nor students were on notice that the Department would be evaluating eligibility based on the data at issue. As a matter of notice and fairness and to ensure that institutions have an opportunity to come into compliance, the Department should not apply a debt-to-income ratio or a repayment rate test until it can obtain sufficient data based on institutional actions that occur once the new rules have been finalized. Accordingly, at the very least, the Department should propose a substantial transition or phase-in period for enforcement of the rules so that schools have the opportunity to satisfy these new regulatory standards.



ANDREW S. ROSEN
Chairman and CEO

September 8, 2010

The Honorable Arne Duncan
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-0008

Re: Docket Number ED-2010-OPE-0012

Dear Mr. Secretary:

Readers of recent news reports and casual observers might conclude that private sector (“for-profit”) colleges and the federal government are adversaries, with different views about the needs of our students. I believe the contrary is true.

I write to you from the point of view of someone who shares your dedication to expanding access to high-quality education. I believe there are far more similarities in our goals than points of contention. Neither of us wants to see students take on debt they will have difficulty discharging, nor taxpayers bearing undue burden. We both want to provide access to underserved students, especially low-income working adults who may have been left behind by traditional post-secondary institutions. We both believe deeply that all students deserve consistent access to educational excellence. And we both recognize the value that competition can continue to play in creating a world-class higher education system. None of us claim to have all of the answers, but I think we both see how new learning approaches and innovation strengthen our country’s education system.

Kaplan Higher Education has graduated more than a quarter-million students over the past ten years, and I’m consistently moved when I see at our graduations the pride and sense of accomplishment in our students’ faces. Frequently the voices of celebration in the audience are those of our graduates’ children, who look upon their parents as role models for the proposition that hard work and study really matter. Our graduates – often from limited means – have taken their place as important contributors to the American story.

Kaplan’s roots as an education company go back more than 70 years. From the beginning, our focus has been on expanding access to education. Stanley Kaplan, our company’s founder, enabled immigrant families to gain entrance into competitive colleges by demonstrating merit on standardized tests. That mission is no less central to

Kaplan, Inc.

6301 Kaplan University Avenue, Fort Lauderdale, FL 33309

Kaplan today. Our entry into post-secondary education ten years ago was based on serving non-traditional students who found traditional college pathways poorly suited to their needs. Over 60 percent of our post-secondary students are low-income. Many are the first in their families to pursue a college education.

I am writing this letter because of the recent Notice of Proposed Rulemaking of “Gainful Employment” rules. While I applaud the efforts of the Administration and the Department of Education to improve higher education standards and I welcome the Department’s oversight, I am confident there are better ways of accomplishing the Department’s goals.

There has been a lot of talk about “good actors” and “bad actors” in for-profit education, without a clear definition of what those references mean. What this talk frequently fails to consider is the fact that diverse student populations exist among institutions. In the non-profit world, what might constitute excellence on certain metrics at Chicago State University, for example, might be far below expectations at DePaul University or Northwestern University. This differentiation holds true at for-profit institutions as well

I would suggest that a “good actor” is one that consistently delivers strong metrics when compared to institutions with similar student populations. Institutions whose students average fewer than two of the Department’s “risk factors”¹ should be compared to other “low risk” institutions; those with students averaging between two and four of the “risk factors” with other “medium risk” institutions; and those with more than four with a “high risk” cohort. Within these cohorts, this common yardstick would distinguish among those institutions that are serving their students well and those that are coming up short. Comparisons within cohorts on a range of metrics – graduation, placement, default, income change, etc. – would be appropriate.

I would, argue that all institutions, regardless of tax status, should be compared by cohort on these same metrics. After all, to the extent the goal of regulation is to protect students, it should not matter whether an institution is non-profit or for-profit. Even so, to the extent the political environment dictates that you focus only on for-profits, at least the determination of whether the institution is a “good” or “bad” actor should take into account how that institution performs relative to all providers serving similar populations.

I would further suggest that a “good actor” is one that ensures that students have an informed understanding of the program of study they are undertaking – including, among other things, cost, anticipated debt burden, and likely outcomes – and an opportunity to knowingly agree to those expectations. At Kaplan Higher Education, we are absolutely committed to furthering these goals, and we have recently taken significant steps to reduce the chances of any individuals violating that commitment. I would welcome the opportunity to discuss these steps with you or members of your staff.

¹ The Department’s National Center for Education Statistics (NCES) defines a high-risk student as having four or more of the following factors: (1) delayed enrollment, (2) part-time attendance, (3) financial independence, (4) having dependents other than a spouse, (5) working full-time while enrolled, (6) lacking a high school diploma, and (7) single parenthood.

Kaplan's goal, however, is to go even further by making an introductory portion of our program "risk free" to our students. That is, we want to enable any students who choose to enroll in our programs to have a multi-week period, depending on the length of their program, in which they can assess whether the program is right for them. If they decide for any reason it is not, we will refund all tuition payments to the student or to the Department of Education. This approach, assuming it meets with regulatory and other approvals (and we invite your office's help to ensure that it does), will not only let students get a real experience with our courses before incurring any expenses or future debt, but will diminish any motivation to "oversell" students into programs. While this approach will be expensive for us to implement, it will help us meet our goal of ensuring that every one of our students is in class because he or she is committed to being there after fully understanding the commitment he or she is making. At the same time, it will serve as an important protection for taxpayers.

I believe these are more appropriate ways to discern the difference between "good" and "bad" actors than the proposed Gainful Employment (GE) regulation, which serves primarily to punish institutions that have taken on the task of serving high-risk populations. Private sector institutions would be pushed by this regulation to seek to serve the same more-affluent student populations that are already well-served in the marketplace, rather than the more needy students who can most benefit from our help.

Kaplan Higher Education will submit its formal Comments to the July 26, 2010 Notice of Proposed Rulemaking, and I refer you to those Comments. However, I wish to make the following brief comments about the reasons we think the proposed Gainful Employment regulation will lead to unintended and unwanted consequences:

- **GE will dramatically reduce educational options for low-income students.** The correlation between violations of the GE standards and low-income student population is very high, suggesting on its face that the proposed regulation serves less to distinguish between good and bad actors, and more to distinguish between those who welcome under-served students and those who do not.
- **GE will result in significantly higher costs for taxpayers.** Several recent studies have concluded that for-profit education is the most tax-efficient of all sectors of higher education. Public institutions receive between 90% (at two-year institutions) and 590% (four-year institutions)² *more* in combined federal, state and local taxpayer support per student than do for-profit institutions. Any attempt to shift students from private sector to public institutions will require dramatically higher taxpayer contributions – at a time of significant pressure on government resources.
- **GE will diminish educational outcomes for the reduced number of students who are able to continue their education.** Even for those students forced out of private sector schools who are able to find slots in public institutions, the

² "Taxpayers' Costs to Support Higher Education: A Comparison of Public, Private Not-for-Profit, and Private For-Profit Institutions," Robert J. Shapiro and Nam D. Pham, September 2010.

prospects are not promising. Recent studies have demonstrated that graduation rates for students at two-year for-profit institutions are nearly triple that of community colleges,³ and earnings increases for private sector students outpace those of public two-year institutions.⁴

- **GE will reduce competition and innovation in higher education.** The American higher education system became the best in the world when our funding system put money in the hands of students, so they could choose the institutions that best served their needs. That approach has made students the winners as institutions innovate and compete for student loyalty. Overriding student choice through the regulatory process will only weaken American higher education and reduce the healthy competition that has been central to its success.
- **GE will place the Department in the uncomfortable and inappropriate position of setting tuition prices, determining which programs schools can offer, and dictating which students schools can accept to remain compliant.** The proposed regulations are troubling in the extent to which they turn the Department into a decision maker in areas that previously were assumed to be – and that Congress expressly wanted to be – within the prerogatives of students or institutions. Beyond the questionable legal basis for such a step, this move toward federalizing higher education is very poor policy, and will undermine the vitality of institutions America needs to retain its economic pre-eminence.

I believe that Kaplan’s goals and those of the Department are aligned in most areas. Although I disagree strongly with some of the approaches presented in the NPRM as a way to achieve those goals, I am fully committed to the proposition that in addition to educational excellence, students deserve a full understanding of their responsibilities and obligations; they should never be matched with programs unsuited to their skills or aspirations; and students should never be encouraged to take out loans that they will not be able to repay.

We embrace the challenge of helping President Obama meet his goal of restoring our country to leadership in educational attainment. We believe his goal is achievable, can be realized at a price our country can afford, and will have very important positive implications for our society and economy in coming decades. At Kaplan, we have invested significantly in technology, pedagogy, and research into student learning, all of which we think can be helpful in achieving this goal, and we are eager to share our experience, research, data and capabilities to assist you. To reach important goals like this, our country needs all of us pulling together. I urge you to slow down the sprint to implement regulations that are so contrary to the President’s goals, and instead substitute new regulation that would encourage “good actor” institutions to continue their good

³ NCES: Enrollment in Postsecondary Institutions, Fall 2008; Graduation Rates 2002 and 2005 Cohorts; and Financial Statistics FY 2008, Published April 2010, page 14.

⁴ The Parthenon Group: Perspectives on Private Sector Post-Secondary Schools, Do They Deliver Value to Students and Society?; Robert Lytle, Roger Brinner, Chris Ross; February 24, 2010.

work across all of our country's student populations and become full partners in the effort to achieve our nation's pressing goals.

Sincerely,

A handwritten signature in black ink that reads "Andrew S. Rosen". The signature is written in a cursive, flowing style.

Andrew S. Rosen

Cc: The Honorable Anthony Wilder Miller
Ms. Jessica Finkel