

September 5, 2018

VIA ELECTRONIC MAIL

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ATTN: Information Quality Request

To whom it may concern:

This is a Petition for Correction and Disclosure (“Petition”) in accordance with the Information Quality Act (“IQA”), the information and quality guidelines issued by the Office of Management and Budget (“OMB”), and the IQA Guidelines¹ issued by the U.S. Department of Education (the “Department”).²

This Petition focuses on the Department’s recent publication of a Notice of Proposed Rulemaking (“NPRM”) that proposes to “rescind” the Department’s Gainful Employment regulation.³ The NPRM includes an abundance of factual claims without disclosing the underlying sources or methodologies, a clear failure to comply with the IQA. Where the NPRM does cite sources, it still violates the IQA by repeatedly stating conclusions that are not clearly supported by the evidence. These failures render meaningless the entire purpose of the public comment period—*i.e.*, to allow the Department to properly determine how to ensure that certain institutions of higher education—as a condition of their eligibility to receive Title IV, Higher Education Act (“HEA”) program

¹ See Exh. A (U.S. Dep’t of Educ., “Information Quality Guidelines” (2002), *available at*: <https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf>) (hereinafter the “ED Guidelines”).

² The ED Guidelines do not provide clear instructions on how to submit this sort of petition. In the PDF version of the ED Guidelines (<https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf>), the Department instructs the public to submit IQA correction requests to the Principal Deputy Assistant for Management. In the non-PDF version (https://www2.ed.gov/policy/gen/guid/iq/iqg_5a.html), the Department instructs the public to submit IQA correction requests to the Director, Information Collection Clearance Division. Out of an abundance of caution, we are providing it to both recipients.

³ 83 Fed. Reg. 40,167 (Aug. 14, 2018).

funds—prepare students for gainful employment in a recognized occupation. As a result, potential commenters, including NSLDN,⁴ will not be able to provide effective feedback on the Department’s proposed rescission.

Because NSLDN stands to suffer harm from the continued dissemination of this information, it is an “affected person” under the IQA and may, therefore, submit this Petition. Although the ED Guidelines do not define “affected,”⁵ NSLDN will be harmed by the disseminated information, particularly because it uses the published information for a variety of purposes. Not only does NSLDN intend to submit written comments in response to the NPRM, but also NSLDN actively studies, researches, and proposes student-focused policies at the state and local level. By disseminating information that fails to meet the basic standards of the IQA, the Department is infringing upon NSLDN’s significant interest in ensuring that the Department relies upon and publishes only accurate and reliable data in its communications with the public.

Given the current inaccuracies in the Department’s NPRM on Gainful Employment, NSLDN requests that the Department rescind this NPRM immediately and, if the Department desires, correct and reissue it with information that complies with the IQA.

1. Background on the 2014 Gainful Employment Regulation

Finalized in 2014, the Gainful Employment regulation was expressly “intended to address growing concerns about educational programs” that “are required by statute to prepare students for gainful employment in a recognized occupation . . . [.] but instead are leaving students with unaffordable levels of loan debt in relation to their earnings.”⁶ More specifically, the Department was concerned that covered “gainful employment programs”—also known as “GE programs”—“[d]o not train students in the skills they need to obtain jobs in the occupation for which the program purports to provide training.”⁷ The Department also worried that these programs “experience a high number of withdrawals or ‘churn’ because relatively large numbers of students enroll, but few, or none, complete the program, which can often lead to default.”⁸ In other words, the Gainful Employment regulation aimed to crack down on GE programs that were both ineffective and expensive, often leaving students with debts that they could never hope to repay.

Motivated by these concerns, the Department established a regulatory framework with two key components: accountability and transparency. The “accountability framework” defined “what it means to prepare students for gainful employment in a recognized occupation by establishing

⁴ NSLDN is a non-profit, nonpartisan organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.

⁵ See generally U.S. Dep’t of Educ., “Information Quality Guidelines” (2002), available at: <https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf>.

⁶ 79 Fed. Reg. 64,890 (Oct. 31, 2014).

⁷ *Id.*

⁸ *Id.*

measures by which the Department will evaluate whether a GE program remains eligible” to receive federal student aid funds.⁹ The “transparency framework” aimed to “increase the quality and availability of information about the outcomes of students enrolled in GE programs” based on the assumption that “[b]etter outcomes information will benefit . . . [s]tudents, prospective students, and their families, as they make critical decisions about their educational investments,”¹⁰ as well as the public, taxpayers, the government, and institutions of higher education.¹¹

The Department relied upon extensive peer-reviewed, statistical information to inform its design of the 2014 Gainful Employment rule. For example, the Department provided data on the high tuition costs, poor outcomes, and deceptive practices at some institutions in the for-profit sector to illustrate why its concern with GE programs at those institutions in particular was justified, rather than biased.¹² In addition, the Department relied upon multiple studies and authorities to set the D/E rates measures at twenty percent for discretionary income and eight percent for annual earnings.¹³ Finally, the Department conducted its own regression analyses to explore the influence of demographic factors—such as socioeconomic status, race and ethnicity, gender, marital status, and family history of pursuing higher education—on annual earnings.¹⁴ These analyses showed that student demographics were “not strong predictors” of which programs would pass or fail the D/E rates measures.¹⁵ Because of this reliance on peer-reviewed, scientific evidence-based research, the Department easily met its obligations under the IQA.

In addition, the Department met its obligations to engage in reasoned decision-making under the Administrative Procedure Act (“APA”). Shortly after the promulgation of the 2014 Gainful Employment rule, two separate lawsuits attacked the rule’s validity. Ultimately, both federal district courts that presided over these lawsuits, as well as the United States Court of Appeals for the D.C. Circuit that heard one of the lawsuits on appeal, upheld the Gainful Employment regulation in its entirety.¹⁶

⁹ 79 Fed. Reg. at 64,890.

¹⁰ *Id.* at 64,890.

¹¹ *Id.*

¹² 79 Fed. Reg. at 64,904-08.

¹³ *Id.* at 64,919-22.

¹⁴ *Id.* at 64,910, 65,037-74.

¹⁵ *Id.* at 64,910.

¹⁶ *See, e.g., Ass'n of Private Sector Coll. & Univ. v. Duncan*, 110 F. Supp. 3d 176 (D.D.C. 2015), *aff'd*, 640 F. App'x 5 (D.C. Cir. 2016); *Ass'n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 341 (S.D.N.Y. 2015). Two years later, however, in June 2017, a federal judge granted narrow relief to a trade association for cosmetology schools, which argued that the GE rule was arbitrarily applied to cosmetology school graduates because those graduates tended to underreport their income earned from tips. Although the judge narrowly tailored the decision to members of the association only so as to avoid “upending the entire GE regulatory scheme,” *Am. Ass'n of Cosmetology Sch. v. DeVos*, 258 F. Supp. 3d 50 (D.D.C. 2017), the Department later cited this decision to justify delaying enforcement of the entire Gainful Employment regulation, *see* 82 Fed. Reg. 39,362 (Aug. 18, 2017). That delay is currently being challenged by a group of state Attorneys General. *See State of Maryland v. Dep't of Educ.*, No. 1:17-cv-0239 (D.D.C. 2017).

The NPRM stands in stark contrast to the Department’s earlier rulemaking efforts, however. As explained further below, the Department’s proposed rescission of the 2014 rule relies upon inaccurate, misleading, and unsourced information in violation of the IQA.

2. Grounds for Disclosure and Correction under the IQA

The IQA and its implementing guidelines require that information disseminated to the public by federal agencies be accurate, reliable, and unbiased. Indeed, the IQA—passed by Congress in 2001—directed the OMB to require that each applicable federal agency “issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information)” that the agency disseminated.¹⁷ In response to the statute, OMB issued final guidelines implementing the IQA and requiring agencies to publish their own guidelines no later than October 1, 2002.¹⁸

Similar to OMB’s Guidelines, the ED Guidelines apply to “information,” *i.e.*, “*any* communication or representation of knowledge, such as facts or data, in any medium or form” that is “disseminat[ed]” to the public.¹⁹ Exh. A at 1 (emphasis added). The ED Guidelines affirm that, “[t]o make sound decisions, the Department intends to accept and use only information that is accurate and reliable.” Exh A at 2. Furthermore, the ED Guidelines make clear that it is similarly “important that the information the Department [itself] disseminates be accurate and reliable.” *Id.* at 1.

The Department uses three factors to assess the quality of information it disseminates: “utility, objectivity, and integrity.” Exh. A at 4. As relevant here, the ED Guidelines define objectivity as follows:

Objectivity refers to the accuracy, reliability, and unbiased nature of information. It is achieved by using reliable information sources and appropriate techniques to prepare information products. Objectivity involves both the content and the presentation of the information. Content should be complete, include documentation of the source of any information used, as well as, when appropriate, a description of the sources of any errors in the data that may affect the quality of the information product.

Id. at 5 (emphasis removed). The ED Guidelines then go on to list what each dissemination of general information should include in order to be considered “objective,” such as:

- “[D]raw[ing] upon peer-reviewed, scientific evidence-based research that is appropriately documented;”

¹⁷ Consolidated Appropriations Act, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763 (2001).

¹⁸ 67 Fed. Reg. 8,452 (Feb. 22, 2002).

¹⁹ *See also* 67 Fed. Reg. at 8,453 (establishing that “information” means “any communication or representation of knowledge such as facts or data”).

- “Clearly identify[ing] data sources;” [*and*]
- “Confirm[ing] and document[ing] the reliability of the data, and acknowledg[ing] any shortcoming or explicit errors in any data that is included.”

Id. at 5. Additionally, the ED Guidelines state that, to be considered “objective,” each dissemination of research and evaluation information should:

- “Have a research study approach or data collection technique that is well thought out, designed to use state of the art methodologies in the data collection, and be clearly described;”
- Present conclusions that are strongly supported by the data;” [*and*]
- “Undergo peer review.”

Id. at 6.

Beyond objectivity, the Department has also imposed heightened requirements for information quality when that information is deemed “particularly influential.” *See* Exh. A at 9 (“Government information that is particularly influential needs to meet higher quality standards, and in particular must be reproducible.”). Per the ED Guidelines, information is “influential” if the Department determines “that the information is reasonably likely to have a clear and substantial impact on public policies or private sector decisions if disseminated.” *Id.* In the instant case, the Department has already determined that the NPRM’s proposed rescission constitutes an “economically significant regulatory action” under Executive Order 12,866.²⁰ Thus, the information contained in the NPRM is “influential.” Pursuant to the ED Guidelines, then, that information “must be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it.” Exh. A at 10.

Despite the clear standards set forth in both the ED Guidelines and the IQA, the Department’s NPRM is filled with examples of information that are not supported by sources, do not stand for the proposition cited, fail to explain the methodology used, or otherwise are not “accompanied by information that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it.”

3. Specific IQA Violations

The chart below provides a specific description of information disseminated in the NPRM that violates the IQA, as well as the basis for each IQA violation, including, where appropriate, an explanation of why a particular statement contains inaccurate, unreliable, or misleading information.

NPRM STATEMENT	IQA VIOLATION
“The first D/E rates were published in 2017, and the Department’s analysis of those rates	1. Fails to clearly describe the research study approach or data collection technique

²⁰ *See* 83 Fed. Reg. at 40,177.

<p>raises concerns about the validity of the metric, and how it affects opportunities for Americans to prepare for high-demand occupations in the healthcare, hospitality, and personal services industries, among others.”²¹</p>	<ol style="list-style-type: none"> 2. Fails to clearly identify data sources 3. Fails to confirm and document the reliability of the data and acknowledge any shortcomings or explicit errors 4. Fails to undergo peer review 5. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
<p>“In promulgating the 2011 and 2014 regulations, the Department cited as justification for the 8 percent D/E rates threshold a research paper published in 2006 by Baum and Schwartz that described the 8 percent threshold as a commonly used mortgage eligibility standard. However, the Baum & Schwartz paper makes clear that the 8 percent mortgage eligibility standard ‘has no particular merit or justification’ when proposed as a benchmark for manageable student loan debt. . . . Upon further review, we believe that the recognition by Baum and Schwartz that the 8 percent mortgage eligibility standard ‘has no particular merit or justification’ when proposed as a benchmark for manageable student loan debt is more significant than the Department previously acknowledged and raises questions about the reasonableness of the 8 percent threshold as a critical, high-stakes test of purported program performance.”²²</p>	<ol style="list-style-type: none"> 1. Fails to present conclusions that are strongly supported by the data <ol style="list-style-type: none"> a. This failure has been highlighted recently by Sandy Baum, the co-author of the 2006 study cited by the Department. In that post, Baum stated that “the Department of Education has misrepresented my research, creating a misleading impression of evidence-based policymaking. The Department cites my work as evidence that the GE standard is based on an inappropriate metric, but the paper cited in fact presents evidence that would support making the GE rules stronger.”²³ b. Baum further asserts that “[the Department is] correct that we were skeptical of [the 8 percent] standard for determining affordable payments for individual borrowers, but incorrect in using that skepticism to defend repealing the rule. In fact, our examination of a range of evidence about reasonable debt burdens for students would best be interpreted as supporting a stricter standard.”²⁴ That is because Baum and her co-author’s

²¹ *Id.* at 40,171.

²² *Id.*

²³ Sandy Baum, “DeVos Misrepresents the Evidence in Seeking Gainful Employment Deregulation,” *Urban Wire: Education and Training* (Aug. 22, 2018), <https://www.urban.org/urban-wire/devos-misrepresents-evidence-seeking-gainful-employment-deregulation>.

²⁴ *Id.*

	<p>“research set a guideline for a level of debt payments <i>no individual student</i> should exceed. Under GE, half of a program’s graduates could exceed this limit before sanctions would kick in.”²⁵</p> <p>c. A complete copy of Baum’s blog post is attached hereto as Exhibit B.</p>
<p>“Research published subsequent to the promulgation of the GE regulations adds to the Department’s concern about the validity of using D/E rates as to determine whether or not a program should be allowed to continue to participate in title IV programs.”²⁶</p>	<ol style="list-style-type: none"> 1. Fails to identify data sources, including whether it is peer-reviewed and scientific evidence-based 2. Fails to confirm and document the reliability of the data and acknowledge any shortcomings or explicit errors 3. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
<p>“[T]he highest quality programs could fail the D/E rates measures simply because it costs more to deliver the highest quality program and as a result the debt level is higher.”²⁷</p>	<ol style="list-style-type: none"> 1. Fails to identify data sources 2. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
<p>“Other research findings suggest that D/E rates-based eligibility creates unnecessary barriers for institutions or programs that serve larger proportions of women and minority students. Such research indicates that even with a college education, women and minorities, on average, earn less than white men who also have a college degree, and in many cases, less than white men who do not have a college degree.”²⁸</p>	<ol style="list-style-type: none"> 1. Fails to draw upon peer-reviewed sources 2. Fails to acknowledge any shortcomings or explicit errors in the data 3. Fails to present conclusions that are strongly supported by the data <ol style="list-style-type: none"> a. Indeed, the source cited by the Department does not draw this same conclusion. For example, the cited table appears to relate to graduates of <i>bachelor’s degree</i> programs, and not gainful employment programs. 4. Fails to “be accompanied by supporting documentation that allows an external user

²⁵ *Id.*

²⁶ 83 Fed. Reg. at 40,171.

²⁷ *Id.*

²⁸ *Id.* (citing Jennifer Ma, Matea Pender, & Meredith Welch, “Education Pays 2016: The Benefits of Higher Education for Individuals and Society,” *CollegeBoard Trends in Higher Education Series* Figure 2.4 (2016), available at: <https://trends.collegeboard.org/sites/default/files/education-pays-2016-full-report.pdf>).

	to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“[D]ue to a number of concerns with the calculation and relevance of the debt level included in the rates[,] we do not believe that the D/E rates measure achieves a level of accuracy that it should alone determine whether or not a program can participate in title IV programs.” ²⁹	<ol style="list-style-type: none"> 1. Fails to clearly describe the research study approach 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data 4. Fails to undergo peer review 5. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“[I]ncreased availability of [income-driven] repayment plans with longer repayment timelines is inconsistent with the repayment assumptions reflected in the shorter amortization periods used for the D/E rates calculation in the GE regulations.” ³⁰	<ol style="list-style-type: none"> 1. Fails to rely upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data 4. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“[A] program’s D/E rates can be negatively affected by the fact that it enrolls a large number of adult students who have higher Federal borrowing limits, thus higher debt levels, and may be more likely than a traditionally aged student to seek part-time work after graduation in order to balance family and work responsibilities.” ³¹	<ol style="list-style-type: none"> 1. Fails to rely upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data
“[I]t is the cost of administering the program that determines the cost of tuition and fees.” ³²	<ol style="list-style-type: none"> 1. Fails to rely upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data 4. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and

²⁹ *Id.*
³⁰ *Id.* at 40,172.
³¹ *Id.*
³² *Id.*

	be able to reproduce it, or understand the steps involved in producing it”
“Programs that serve large proportions of adult learners may have very different outcomes from those that serve large proportions of traditionally aged learners.” ³³	<ol style="list-style-type: none"> 1. Fails to rely upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data 4. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“[T]he first set of D/E rates, published in 2016, revealed that the D/E rates, and particularly earnings, vary significantly from one occupation to the next, and across geographic regions within a single occupation.” ³⁴	<ol style="list-style-type: none"> 1. Fails to clearly describe the research study approach 2. Fails to confirm and document the reliability of the data 3. Fails to undergo peer review 4. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“Data discussed during the third session of the most recent negotiated rulemaking demonstrated that even a small change in student loan interest rates could shift many programs from a ‘passing’ status to ‘failing,’ or vice versa, even if nothing changed about the programs’ content or student outcomes.” ³⁵	<ol style="list-style-type: none"> 1. Fails to clearly describe the research study approach and data collection technique 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data 4. Fails to undergo peer review 5. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“Table 1—Number and Percentage of GE 2015 Programs That Would Pass, Fail, or Fall into the Zone Using Different Interest Rates” ³⁶	<ol style="list-style-type: none"> 1. Fails to clearly describe the research study approach and data collection technique 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data 4. Fails to undergo peer review

³³ *Id.*
³⁴ *Id.*
³⁵ *Id.*
³⁶ *Id.*

	5. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“[T]he Department now recognizes that assigning a 10-year amortization period to graduates of certificate and associate degree programs for the purpose of calculating D/E rates creates is an unacceptable and unnecessary double standard since the REPAYE plan regulations promulgated in 2015 provide a 20-year amortization period for those same graduates.” ³⁷	1. Fails to draw upon peer-reviewed, scientific evidence-based research
“There is significant variation in methodologies used by institutions to determine and report in-field job placement rates, which could mislead students into choosing a lower performing program that simply appears to be higher performing because a less rigorous methodology was employed to calculate in-field job placement rates.” ³⁸	1. Fails to clearly describe the research study approach and data collection technique 2. Fails to clearly identify data source 3. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it”
“The Department also believes that it underestimated the burden associated with distributing the disclosures directly to prospective students. . . . A negotiator representing financial aid officials confirmed our concerns, stating that large campuses, such as community colleges that serve tens of thousands of students and are in contact with many more prospective students, would not be able to, for example, distribute paper or electronic disclosures to all the prospective students in contact with the institution.” ³⁹	1. Fails to draw upon peer-reviewed, scientific-evidence based research 2. Fails to confirm and document the reliability of the data
“The Department believes that the best way to provide disclosures to students is through a data tool that is populated with data that comes directly from the Department, and that allows prospective students to compare all institutions	1. Fails to draw upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources a. Specifically, in the 2014 rule, the Department stated that it “would

³⁷ *Id.* at 40,172-73.

³⁸ *Id.* at 40,173.

³⁹ *Id.*

<p>through a single portal, ensuring that important consumer information is available to students while minimizing institutional burden.”⁴⁰</p>	<p>conduct consumer testing” to determine how to make student disclosures as meaningful as possible.⁴¹ The NPRM fails to acknowledge whether such testing occurred, including the results of that testing. The NPRM also fails to state any other basis for the Department’s conclusions.</p>
<p>“[T]he Department does not believe it is appropriate to attach punitive actions to program-level outcomes published by some programs but not others. In addition, the Department believes that it is more useful to students and parents to publish actual median earnings and debt data rather than to utilize a complicated equation to calculate D/E rates that students and parents may not understand and that cannot be directly compared with the debt and earnings outcomes published by non-GE programs.”⁴²</p>	<ol style="list-style-type: none"> 1. Fails to draw upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources
<p>“The Department has reviewed additional research findings, including those published by the Department in follow-up to the Beginning Postsecondary Survey of 1994, and determined that student demographics and socioeconomic status play a significant role in determining student outcomes.”⁴³</p>	<ol style="list-style-type: none"> 1. Fails to identify data sources <ol style="list-style-type: none"> a. Specifically, the website cited by the Department links to the Beginning Postsecondary Survey of 1994’s findings, and not the “additional research” mentioned by the Department, including the Department’s own “follow-up.” 2. Fails to confirm and document the reliability of the data 3. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and

⁴⁰ *Id.*

⁴¹ *See, e.g.*, 34 C.F.R. §§ 668.410(a)(3), 668.412(a). *See also* 79 Fed. Reg. 64,890, 64,966 (Oct. 31, 2014) (“The regulations include text for the student warnings. The Secretary will use consumer testing to inform any modifications to the text that have the potential to improve the warning’s effectiveness. As a part of the consumer testing process, we will seek input from a wide variety of sources[.]”); *id.* at 64,969 (noting that while “direct delivery” of warnings to students “make it most likely that students receive . . . and review” the information, the Department would conduct consumer testing regarding the “most effective delivery methods”).

⁴² 83 Fed. Reg. at 40,174.

⁴³ *Id.*

	be able to reproduce it, or understand the steps involved in producing it”
“The GE regulations failed to take into account the abundance of research that links student outcomes with a variety of socioeconomic and demographic risk factors.” ⁴⁴	<ol style="list-style-type: none"> 1. Fails to identify data sources 2. Fails to confirm and document the reliability of the data
“The GE regulations underestimated the cost of delivering a program and practices within occupations that may skew reported earnings. According to Delisle and Cooper, because public institutions receive State and local taxpayer subsidies, ‘even if a for-profit institution and a public institution have similar overall expenditures (costs) and graduate earnings (returns on investment), the for-profit institution will be more likely to fail the GE rule, since more of its costs are reflected in student debt.’ Non-profit, private institutions also, in general, charge higher tuition and have students who take on additional debt, including enrolling in majors that yield societal benefits, but not wages commensurate with the cost of the institution.” ⁴⁵	<ol style="list-style-type: none"> 1. Fails to present conclusions that are strongly supported by the data <ol style="list-style-type: none"> a. The Delisle and Cooper study cited by the Department does not support its conclusion that the GE regulations “underestimated the cost of delivering a program and practices within occupations that may skew reported earnings.” 2. Fails to identify data sources
“In the case of cosmetology programs, State licensure requirements and the high costs of delivering programs that require specialized facilities and expensive consumable supplies may make these programs expensive to operate, which may be why many public institutions do not offer them. In addition, graduates of cosmetology programs generally must build up their businesses over time, even if they rent a chair or are hired to work in a busy salon.” ⁴⁶	<ol style="list-style-type: none"> 1. Fails to identify data sources 2. Fails to confirm and document the reliability of the data
“[S]ince a great deal of cosmetology income comes from tips, which many individuals fail to accurately report to the Internal Revenue Service, mean and median earnings figures produced by the Internal Revenue Service underrepresent the true earnings of many	<ol style="list-style-type: none"> 1. Fails to present conclusions that are strongly supported by the data <ol style="list-style-type: none"> a. The IRS tax gap study cited by the Department does not support the Department’s specific conclusions about cosmetology graduates. The

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

<p>workers in this field in a way that institutions cannot control.”⁴⁷</p>	<p>study is from 2012 and covers tax year 2006 only.</p> <ol style="list-style-type: none"> 2. Fails to confirm and document the reliability of the data
<p>“While the GE regulations include an alternate earnings appeals process for programs to collect data directly from graduates, the process for developing such an appeal has proven to be more difficult to navigate than the Department originally planned. The Department has reviewed earnings appeal submissions for completeness and considered response rates on a case-by-case basis since the response rate threshold requirements were set aside in the AACCS litigation. Through this process, the Department has corroborated claims from institutions that the survey response requirements of the earnings appeals methodology are burdensome given that program graduates are not required to report their earnings to their institution or to the Department, and there is no mechanism in place for institutions to track students after they complete the program. The process of Departmental review of individual appeals has been time-consuming and resource-intensive, with great variations in the format and completeness of appeals packages.”⁴⁸</p>	<ol style="list-style-type: none"> 1. Fails to present conclusions that are strongly supported by the data <ol style="list-style-type: none"> a. Despite asserting that the alternate appeals process is “time-consuming and resource-intensive, with great variations in the format and completeness of appeals packages,” the Department then “estimates that it would take Department staff [only] 10 hours per appeal to evaluate the information submitted.”⁴⁹ 2. Fails to “be accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it” <ol style="list-style-type: none"> a. Since March 2018, NSLDN has attempted to obtain copies of institutions’ alternate earnings appeals.⁵⁰ To date, the Department has not provided such information.
<p>“We believe that the analysis and assumptions with respect to earnings underlying the GE regulations are flawed.”⁵¹</p>	<ol style="list-style-type: none"> 1. Fails to draw upon peer-reviewed, scientific evidence-based research 2. Fails to confirm and document the reliability of the data
<p>“There are student costs and benefits associated with enrollment in a program that would have otherwise lost eligibility to participate in the title IV, HEA programs under the GE regulations; however, the actual</p>	<ol style="list-style-type: none"> 1. Fails to draw upon peer-reviewed, scientific evidence-based research 2. Fails to identify data sources 3. Fails to confirm and document the reliability of the data

⁴⁷ *Id.*

⁴⁸ *Id.* at 40,174-75.

⁴⁹ *Id.* at 40,179.

⁵⁰ *See generally*, Complaint, *Nat’l Student Legal Def. Network v. U.S. Dep’t of Educ.*, No. 1:18-cv-01209-TSC (D.D.C. May 23, 2018).

⁵¹ 83 Fed. Reg. at 40,175.

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outcome for students enrolled in failing or zone programs under the GE regulations is unknown.” ⁵²	
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Given the importance and immediacy of the public comment period for the NPRM proposing to rescind the Gainful Employment regulation in its entirety, and the lack of quality information that the Department is disseminating as a part of that process, NSLDN requests that the Department rescind the NPRM immediately and, if the Department desires, correct and reissue it with information that complies with the IQA.

Sincerely,

Robyn Bitner, Counsel⁵³

⁵² *Id.* at 40,178.

⁵³ Ms. Bitner is a member of the New York Bar only. She is currently practicing in the District of Columbia under the supervision of members of the D.C. Bar while her D.C. Bar application is pending.