



# Boot Camp for Education Legal Leadership

## Session 1: The Regulatory Landscape

### *A Dynamic and Disruptive 12 Months*

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## Today's Presentation

- Introduction to the Duane Morris Education Practice
- Impactful new regulations:
  - Borrower defense to repayment, financial responsibility, gainful employment, financial value transparency, administrative capability and certification procedures.
- Department of Education's investigations, enforcement, and other strategies.
- New regulations expected in 2024.

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Throughout its more than 100-year history, Duane Morris has fostered a collegial culture, where lawyers collaborate to leverage our collective knowledge and experience to address client needs.

Our Education Industry Group includes lawyers with a depth of expertise in federal and state higher education regulation and accreditation, privacy and data protection, and decades of federal policy experience.



Ranked a Leading  
Law Firm in Education

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# Impactful New Regulations

# Borrower Defense to Repayment

## A Landscape of Confusion

- Four versions of the rule currently being applied
- Multiple lawsuits affecting implementation
- Dept of Ed pushing claims through system to schools
- Potentially dire consequences for institutions



## Practical Steps Institutions Can Take Now

- Current claims
  - Respond to all claims individually
  - Develop internal systems or work with counsel
  - Consider audience when drafting responses
- Future claims
  - Track patterns in claims received
  - Revise or create policies (e.g. outcomes disclosures)
  - Develop evidence while students are enrolled

# Financial Responsibility

## Financial Responsibility – 34 C.F.R. § 668.15

- Eligible institutions must demonstrate that they are financially responsible
- Department bases this determination on several factors, including the institution's ability to:
  - Provide the services described in its official publications and statements
  - Properly administer the Title IV programs in which the school participates
  - Meet all its financial obligations
  - Current on debt payments
  - Continue as a going concern
  - Meet the acid test ratio
- New rule effective July 1, 2024

## Financial Responsibility – 34 C.F.R § 668.171(b)

- Must meet specific financial ratios:
  - Composite Score of at least 1.5
  - Sufficient cash reserves for required refunds such as R2T4 funds
  - Meet financial and administrative obligations, including:
    - Covering refunds and repayments
    - Make payments on undisputed financial obligations within 90 days\*
    - Satisfy payroll obligations in accordance with published schedule\*
    - May not borrow funds from retirement plans or restricted funds without authorization\*
    - Is not subject to a mandatory or discretionary triggering event\*
  - Institution nor person affiliated is subject to a condition of past performance

# Gainful Employment

“The basic economics of a college education, even if a student does not complete it, is supposed to be associated with higher earnings than if that student had not attended college at all.”

Marshall Anthony, TICAS

## What is GE 4.0?

- Applies to:
  - All certificate programs offered at all institutions
  - All degree programs offered at for-profit institutions
- Seeks to apply a ROI model to these programs by comparing:
  - Debt to earnings of program graduates (D/E Measure)
  - Earnings of program graduates to the earnings of average high school graduates in the state (Earnings Threshold Measure)
- Applies accountability measures to failing programs

## Program Accountability

- Programs that fail either test for the first time:
  - Must provide written warnings and disclosures to current and prospective students
  - Warnings will be specific and dictated by Department
- Programs that fail either test 2 out of 3 years lose eligibility for at least 3 years
- First program failures expected in 2025



# Financial Value Transparency

# Key Elements of Financial Value Transparency

- Applicability
  - All title IV eligible educational programs offered by institutions (public, private non profit and proprietary)
  - Outcomes will be posted on Program Information Website
  - Calculated each Award Year
- Financial Value Transparency- Two Part Framework
  - Debt-to-Earnings (D/E) Rates (Annual and Discretionary)
  - Earnings Premium Measure (compare graduate earnings to high school graduate earnings)

## Student Acknowledgements

- By July 1, 2026, D/E Rates and EP measures for each program will be posted to Program Information Website.
- After July 1, 2026, any institution notified by ED that a non-GE program has failed the D/E rates test, a prospective student will need to review ED website and acknowledge having seen the information before enrolling.
- Undergraduate programs are not required to make these acknowledgements.
- For non-GE programs, prospective students do not have to acknowledge failing EP measures (but they are still posted on the website).

## Status and Implementation Timing

- Final FVT and GE Rules published- October 10, 2023
  - ~7500 comments submitted prior to publication
- Effective date - **July 1, 2024**
- Information Reporting Deadline – **July 31, 2024**
- Release of first set of metrics – **July 1, 2025\***
- Program Information Website - **July 1, 2026**
- First loss of eligibility for GE Programs – **after July 1, 2026**

# Mechanics of GE and FVT

## Debt to Earnings (D/E) Rate – 34 C.F.R. § 668.2

- *Annual D/E Rate*
  - Annual loan payment divided by median annual earnings
  - Rate of 8% or more fails
- *Discretionary D/E Rate*
  - Annual loan payment divided by median annual earnings (the median annual earnings x 1.5 of Poverty Guideline).
  - Rate of 20% or more fails
- A GE program becomes Title IV ineligible if it does not pass either D/E rate (i.e., fails both rates) in **2 of any 3 consecutive years for which rates are measured**
- FVT (“non-GE”) programs will have these D/E rates disclosed but no Title IV impact. Except for undergraduate programs, non-GE programs with failing D/E rates need to have prospective and current students with acknowledge failing D/E rate.

## Median Loan Debt

- Determining the median loan debt of the students who completed the program during the cohort period, based on the lesser of
  - the loan debt incurred by each student as determined under paragraph (d) of this section or
  - the total amount for tuition and fees and books, equipment, and supplies for each student, less the amount of institutional grant or scholarship funds provided to that student.

## Annual Earnings - 34 C.F.R. § 668.403

For each completer list the Department submits to the Federal agency with earnings data, the agency would return to the Department:

1. The median annual earnings of the students on the list whom the Federal agency with earnings data matches to earnings data, in aggregate and not in individual form; and
  2. The number, but not the identities, of students on the list that the Federal agency with earnings data could not match.
- The earnings data retrieved will be the reported earnings for the calendar year that is approximately three (3) years following the Award Year the student graduated. (For first set of D/E rates, for example, a 2017/2018 completer would be measured using calendar year 2021 earnings)
  - No review or appeal of earnings data



# Earnings Premium Measure - 34 C.F.R. § 668.404

- Must ALSO pass the “Earnings Premium” measure
- “Earnings Threshold” is Calculated on Census Bureau income data for a working adult (an adult who either worked during the year or indicated they were unemployed and seeking work when interviewed) who is ...
  - Aged 25-34 with a high school diploma or GED
  - In the State in which the institution is located or nationally <50% of students are in the state where the school is located
- “Earnings Premium”
  - Pass: Median Annual Earnings exceeds earnings threshold
  - Fail: Median Annual Earnings is less or equal to earnings threshold
- A GE program becomes Title IV ineligible if it fails EP Measure **2 of 3 consecutive years.**
- A Non-GE program will have EP rates disclosed on ED’s website, but no loss of Title IV. Non-GE programs do not need to have students acknowledge failing EP rates.

# Certification

## Certification - 34 C.F.R. §§ 668.13, 668.14

- The final rule provides the Department with an enhanced ability to deny initial certifications and re-certifications, to force institutions onto provisional PPAs and to impose requirements and limitations on schools as a condition of participation in Title IV.
- The Department expands the situations under which it may provisionally certify an institution.
- The Department revised the current regulations to extend the maximum period of recertification from two to three years for institutions that are placed on provisional status.
- The Department revises a previous certification requirement at Section 668.14(b)(26) that imposes a maximum Title IV eligible program length for clock-hour programs that are offered after the effective date of the regulation.

# Administrative Capability

## Administrative Capability - 34 C.F.R. § 668.16

- **Financial Aid Counseling:** The Department did make significant changes to financial counseling requirements to require that institutions provide adequate financial aid counseling with “clear and accurate information.”
- **Career Services:** The Department created a new administrative capability standard that requires that institutions provide “adequate career services” to students.
- **Clinical or Externship Opportunities:** In another new standard, the Department will require that institutions provide students, within 45 days of the successful completion of required coursework, “geographically accessible” clinical or externship opportunities related to and required for completion of the credential or licensure in a recognized occupation.

# Department of Education Investigations, Enforcement, and Other Strategies *“Whole-of Government” Approach*

# **ED's Partner Enforcement and Consumer Protection Directorate**

- **Administrative Actions and Appeals Services Group**
- **Borrower Defense Group**
- **Investigations Group**
- **Resolution and Referral Management Group**
- **Cleary Group**

# Amendment to Certification Regulations

By entering into a program participation agreement, an institution agrees that—

\* \* \*

(17) The Secretary, guaranty agencies, and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, ~~the Secretary of Veterans Affairs, Federal agencies~~, State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, and State attorneys general have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the title IV, HEA programs or any information on fraud ~~and~~, abuse, or other violations of law;

34 C.F.R. § 668.14(b)(17)



# Case Study: Grand Canyon University

- **ED**
  - Investigations Group investigation with referral to AAASG
  - Provisional PPA with conditions, including a monitor (Sept. 2023)
  - \$37.5 million fine (Oct. 2023)
  - Current open Program Review; BDR Claims, LOCs, etc.?
- **FTC**
  - Sues GCU for deceptive advertising and illegal telemarketing (Dec. 2023)
- **VA/Arizona SAA**
  - Launches risk-based audit, with findings (Oct. 2022)
  - Launches risk-based audit due to FTC complaint (Jan. 2024)

## Takeaways

- ED is rapidly expanding its Whole-of-Government Approach
- GCU is ED's exemplar for investigations of institutions
- New regulations provide more authority to ED to take action
- Allegations by one agency beget investigations by others
- Per recent amends to PPA requirements, expect greater coordination with more federal agencies and state AGs
- Institutions can and will face multiple enforcement actions, and multiple punishments, for the same acts



## **New Regulations Expected in 2024**

***Now Under Active Negotiated Rulemaking ....***

**<https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/index.html>**

*“The Biden-Harris Administration remains committed to ensuring that higher education institutions and programs are held accountable for delivering on their **promise of a better future for students** and our financial aid programs are **helping students accomplish their goals**,” said U.S. Under Secretary of Education James Kvaal. “These efforts are another step in improving the higher education system and ensuring colleges are providing all students with **high-quality opportunities for upward social and economic mobility**.”*

– Jan. 2, 2024 U.S. Department of Education Press Release

## Cash Management - 34 C.F.R. §§ 668.162, 164, 167, 168

- Changes may impact the amount of Title IV derived funds that institutions can maintain including:
  - Requiring return of remaining funds from Title IV recipients' flex plan meal accounts to students instead of "sweeping" them (§ 668.164(c)(1)(i)).
  - Eliminating the provision allowing institutions to include the cost of books and supplies as part of tuition and fees (§ 668.164(c) and (m)).
  - Requiring institutions to issue a credit balance to any student that receives Title IV aid and has any amount of aid in excess of tuition and fees (§ 668.164(h)(1)) (even where that excess results from non-Title IV funds).

## State Authorization - 34 C.F.R. §§ 600.2, 600.9

Proposals under consideration may impact institutions by:

- Removing or further restricting “licensure by means of accreditation” as a means of state authorization for Title IV purposes.
- Requiring reciprocity agreements like SARA to collect and report, and require participating institutions to have a system to report, all student complaints to the State in which the student resides.
- Requiring that the governing board of any entity that oversees a State authorization reciprocity agreement consist solely of representatives from States and independent members of the general public (separate from and independent of States, institutions, and accrediting agencies).

## Distance Education - 34 C.F.R. § 600.2

Department seeks better data for students enrolled online, to protect students in the event of college closures, and to strengthen the Department's ability to oversee distance education programs.

- Proposal to create a virtual Title IV “location” for institutions that includes all students who are being instructed primarily through distance education.
- Proposal to remove the allowance for clock-hour programs provided via distance education to be offered through asynchronous learning.
- Proposal to specifying in the definition of “a week of instructional time” that asynchronous coursework via distance education is limited to credit-hour programs.

## Return of Title IV Funds – 34 C.F.R §§ 668.21, 668.22

The Department seeks to:

- help withdrawn students repay their credit balances;
- increase the accuracy and simplicity of performing R2T4 calculations;
- address unique circumstances for what constitutes a withdrawal; and
- codify longstanding policies into regulation.



## Accreditation – 34 C.F.R. Part 602, 604

These proposals address the federal regulations that the Department uses to recognize accrediting agencies. The Department seeks to:

- implement a system of risk-based review of accrediting agencies;
- increase the rigor of accreditation; and
- support accreditation as a critical pillar of the program integrity triad.

## **Accreditation** – 34 C.F.R. Part 602, 604 (continued)

Proposals include, among others –

- Requiring that public members serving on agency decision-making bodies are independent of agencies, associations, and institutions.
- Requiring accreditors to take action more quickly when they identify areas of non-compliance.
- Revising substantive change requirements to focus on changes of greatest risk.
- Better aligning the accreditation regulations with Title IV eligibility regulations.

## More to Come in 2024?

- Title IV Third Party Servicer Guidance (34 C.F.R. §§ 668.2, 668.23, 668.25) – 10/2024 NPRM Target – now revised guidance expected instead of NPRM
- Title IX – Final Rule Stage – 3/2024 Final Rule Target
- Documentation for Foreign Source Gifts and Contracts – Proposed Rule Stage – 6/2024 NPRM Target
- Student Loan Relief – Proposed Rule Stage – 5/2024 NPRM Target
- FERPA (AI impacts) – Proposed Rule Stage – 5/2024 NPRM Target

*<https://fsapartners.ed.gov/knowledge-center> houses sub-regulatory guidance (Dear Colleague Letters, Electronic Announcements), Federal Register notices, and other important information.*



# Next Boot Camp Session

## Session 2: Key Campus Policies: Compliance and Best Practices for Catalogs

### February 28, 2024

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