

Department of Education Retrospective Review Plan Report

January 9, 2012

The Department of Education (ED or the Department) submits this report in response to the memorandum dated October 26, 2011, from Cass Sunstein to the heads of executive departments and agencies requesting that agencies report on the status of their retrospective review efforts by January 9, 2012. This report will be posted on the Department's Open Government website.

Summary of Retrospective Review Efforts. Since publication of its "Plan for Retrospective Analysis of Existing Regulations" (Final Plan) in August 2011, the Department has made substantial progress in several of its efforts to analyze and review its regulations. Efforts with respect to specific regulatory actions are outlined below. In addition to those efforts, ED is currently piloting a survey to be administered to ED staff in respective program offices, the Office of the General Counsel, and Budget Service to inform the review. The Department expects to complete this pilot and finalize the survey instrument to be finalized by the end of January 2012 when it will be distributed to all relevant offices for the review of the "Initial List of Candidate Regulations for Review Over the Next Two Years" as outlined in ED's Final Plan.

Report on Specific Regulatory Actions.

1. Transitioning from the FFEL Program to the Direct Loan Program

Agency/Sub-Agency: ED/Office of Postsecondary Education (OPE)

RIN/OMB Control No.: 1840-AD05

Title of Initiative/Rule/ICR: Title IV of the Higher Education Act of 1965, as amended (HEA)

Brief Description: Proposed amendments to the title IV, HEA student assistance regulations to (1) reflect that, as of July 1, 2010, under the SAFRA Act, no new Federal Family Education Loan Program loans will be made and (2) to reflect other changes to improve the effectiveness and efficiency of the student loan programs, including the regulations governing the discharge of loans for persons with total and permanent disabilities and regulations governing income contingent repayment.

Actual/Target Completion Date: ED will be conducting negotiated rulemaking with respect to these proposed amendments beginning in January 2012. ED anticipates issuing a notice of proposed rulemaking in May 2012.

Anticipated savings in costs and anticipated changes in benefits: ED will not be able to estimate these until ED has completed negotiations of these proposed regulations.

Progress updates and anticipated accomplishments: ED has formed a negotiated rulemaking committee and will commence negotiations of these regulations in January 2012.

2. Gainful Employment Regulations

Agency/Sub-Agency: ED/OPE

RIN/OMB Control No.: 1840-AD10

Title of Initiative/Rule/ICR: Application and Approval Process for New Programs

Brief Description:

Proposed amendments to the regulations for Institutional Eligibility under the HEA to streamline the application and approval process for new educational programs that qualify for student financial assistance under title IV of the HEA and provide training leading to gainful employment in a recognized occupation.

Actual/Target Completion Date:

ED issued a notice of proposed rulemaking (NPRM) to amend these regulations on September 27, 2011 (76 FR 59864). ED anticipates issuing final regulations in April 2012.

Anticipated savings in costs and anticipated changes in benefits:

Background: Between November 2009 and January 2010, the Department held three negotiated rulemaking sessions aimed at improving integrity in the title IV, HEA programs. As a result of these discussions, the Department published two notices of proposed rulemaking, one on June 18, 2010, and one on July 26, 2010 (July 26th NPRM). The July 26th NPRM proposed measures for determining whether an educational program offered by an institution prepares students for gainful employment in a recognized occupation (Gainful Employment program), and also would have required institutions to report to the Department and obtain approval for any new Gainful Employment programs. After considering comments on the July 26th NPRM, the Department published final regulations on October 29, 2010 (Gainful Employment—New Programs), which modified the proposal to require institutions to notify the Department before offering a new Gainful Employment program. Through this notification process, the Department would screen the proposed new programs and determine when an institution would need to provide more information and wait for approval before offering the new Gainful Employment program to students receiving title IV, HEA funds.

The Department established the notification requirement out of concern that some institutions might attempt to circumvent the proposed gainful employment standards in §668.7(a)(1) of the July 26th NPRM by adding new programs before those standards would take effect. The Department explained that the notification process requirements, referred to as “interim requirements,” were intended to remain in effect until the final regulations that established eligibility measures for gainful employment programs would take effect. Specifically, the Department stated that with regard to approving additional programs, “[w]e intend to establish performance-based requirements in subsequent regulations” and that “[u]ntil those subsequent regulations take effect, institutions must comply with the interim requirements in [the Gainful Employment--New Programs final] regulations.”

The Department published the final regulations establishing the gainful employment eligibility measures on June 13, 2011 (Gainful Employment—Debt Measures). In those regulations, the Department established measures for gainful employment programs that are intended to identify the worst-performing programs. The Gainful Employment—Debt Measures final regulations also place restrictions on when an institution may reestablish the eligibility of an ineligible program or a failing program that was voluntarily discontinued, or establish the eligibility of a new program that is substantially similar to an ineligible program.

The Department believes that when these new provisions go into effect on July 1, 2013, the notification process for all new gainful employment programs established in the Gainful Employment—New Programs final regulations will no longer be needed. Thus, in the September 27, 2011, NPRM, the Department is proposing to eliminate the notification process for new gainful employment programs by amending the Gainful

Employment—New Programs final regulations to establish a smaller group of gainful employment programs for which an institution must obtain approval from the Department.

Costs and Benefits: The Department believes that the changes proposed in the NPRM will significantly reduce burden on institutions and the Department while still ensuring the effectiveness of the debt measures established in the Gainful Employment—Debt Measures final regulations.

As outlined in the NPRM, following issuance of the Gainful Employment—New Programs final regulations, the Department continued to review the estimates of new programs that would be subject to the notice requirement in those regulations. Based on that analysis and specifically, an increase in the estimated number of new program applications, the Department revised the estimated burden of the Gainful Employment—New Programs final regulations from 3,591 hours to 12,343 hours. Based on a wage rate of \$25.35, this results in a revised estimate of \$312,895 for complying with the Gainful Employment—New Programs final regulations.

The changes proposed in the NPRM are expected to reduce burden by 7,068 hours to an estimated 5,275 hours, primarily by restricting the application requirement to programs that are the same as or substantially similar to failing programs voluntarily discontinued or ineligible programs, or the same as a failing program. Thus, the estimated cost is also reduced to \$133,721.

More specific detail regarding the burden estimates can be found in the NPRM. The estimated cost savings are expected to occur annually and will affect institutions proposing to offer certain new gainful employment programs, including small institutions.

Progress updates and anticipated accomplishments:

ED received 16 comments on the NPRM and is currently reviewing those comments and preparing the final regulations.

3. IDEA Part B Program

Agency/Sub-Agency:

ED/Office of Special Education and Rehabilitative Services

RIN/OMB Control No.:

1820-AB64

Title of Initiative/Rule/ICR:

Assistance to States for the Education of Children with Disabilities

Brief Description:

These proposed regulations would implement changes regarding the use of public benefits or insurance under Part B of the Individuals with Disabilities Education Act (IDEA)--Assistance to States for the Education of Children with Disabilities Program.

Actual/Target Completion Date:

ED issued an NPRM proposing to amend these regulations on September 28, 2011 (76 FR 60310). ED anticipates issuing final regulations by June 2012.

Anticipated savings in costs and anticipated changes in benefits:

Background: Under current regulations, public agencies are required to obtain informed written consent from parents to use a child's or parents' public benefits or insurance to pay for services identified in the child's individualized education program. Consent must be obtained for a specified type (e.g., physical therapy, speech therapy) and amount of services (e.g., number of hours per week) for a specified period of time

(e.g., a year). If the type or amount of service changes, or if the amount charged for services changes, the public agency must obtain parental consent covering the change in services or costs to be charged to the child's or parents' public benefits or insurance. The proposed regulations would permit public agencies to use public benefits or insurance programs in which a child participates to provide or pay for services required under Part B of IDEA without obtaining parental consent each time it seeks access to those benefits or insurance. Instead, public agencies would be required to provide parents a written notification about the circumstances in which the public agency may use public benefits or insurance programs to provide or pay for services under Part B of IDEA, including the public agencies' obligation to meet the parental consent requirements imposed under the Family Educational Rights and Privacy Act and 34 CFR §300.62. These changes would allow public agencies to save the administrative and postage costs necessary to obtain written consent from parents, but they would add a requirement that public agencies provide a written notification to parents prior to accessing public insurance funds to inform them of their rights and protections under IDEA.

Costs and Benefits: The Department estimates that the proposed regulatory changes would result in a net cost savings and provide an economic benefit to a number of local educational agencies (LEAs) in many States. More specifically, the Department estimates that the net savings upon adoption of these proposed regulatory changes would be \$14,144,000 to \$40,622,000 in the first year after adoption and then \$15,231,000 to \$41,423,000 annually thereafter. The estimates are based on ED's analysis of the cost of complying with the current regulations as compared to the anticipated costs for complying with the proposed regulations. These cost savings will affect LEAs and public agencies.

Progress updates and anticipated accomplishments:

ED received approximately 500 comments in response to the NPRM and is currently reviewing those comments and preparing final regulations.

4. ESEA Flexibility

Agency/Sub-Agency:

ED/Office of Elementary and Secondary Education

RIN/OMB Control No.:

N/A

Title of Initiative/Rule/ICR:

Flexibility to Improve Student Academic Achievement and Increase the Quality of Instruction under the Elementary and Secondary Education Act of 1965, as amended (ESEA)

Brief Description:

The Department is offering State educational agencies (SEA) the opportunity to request flexibility on behalf of the State, its LEAs, and schools, in order to better focus on improving student learning and increasing the quality of instruction.

Actual/Target Completion Date:

ED issued the invitation to SEAs to submit requests for ESEA flexibility on September 23, 2011 (see <http://www.ed.gov/esea/flexibility>).

Anticipated savings in costs and anticipated changes in benefits:

This voluntary opportunity will provide educators and State and local leaders with flexibility regarding specific requirements of the ESEA in exchange for rigorous and comprehensive State-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction. This flexibility is intended to build on and support the

significant State and local reform efforts already under way in critical areas such as transitioning to college- and career-ready standards and assessments; developing systems of differentiated school and district recognition, accountability, and support; and evaluating and supporting teacher and principal effectiveness.

Progress updates and anticipated accomplishments:

The Department has received 11 requests for flexibility, which are currently under review.

5. Safeguarding Privacy and Using Data Effectively

Agency/Sub-Agency:

ED/Office of Management

RIN/OMB Control No.:

1880-AA86

Title of Initiative/Rule/ICR:

Family Educational Rights and Privacy Act

Brief Description:

The Secretary is amending the Department's regulations under section 444 of the General Education Provisions Act, which is also known as the Family Educational Rights and Privacy Act of 1974, as amended (FERPA). Among other items, these amendments strengthen enforcement provisions under FERPA to cover additional recipients of information and clarify how States can effectively develop and use data in statewide longitudinal data systems (SLDS), authorized under the American Recovery and Reinvestment Act of 2009 (ARRA), while ensuring protection of individual privacy under FERPA.

Actual/Target Completion Date:

ED issued final regulations on December 2, 2011 (76 FR 75604).

Anticipated savings in costs and anticipated changes in benefits:

These final regulations facilitate the disclosure, without written consent, of students' personally identifiable information (PII) from education records for the purposes of auditing or evaluating Federal- or State-supported education programs and enforcing or ensuring compliance with Federal legal requirements related to these programs. In evaluating the costs and benefits of these final regulations, the Department examined the extent to which the changes add to or reduce the costs of educational agencies, other agencies, and institutions in complying with the FERPA regulations prior to these changes, and the extent to which the changes are likely to provide educational benefit. Allowing data-sharing across agencies, because it increases the number of individuals who have access to PII from education records, may increase the risk of unauthorized disclosure of PII from education records. However, the Department does not believe that the staff in the additional agencies who will have access to PII from education records are any more likely to violate FERPA than existing users, and the strengthened accountability and enforcement mechanisms reflected in the regulations will help to ensure better compliance overall. While there will be administrative costs associated with implementing data-sharing protocols that ensure that PII from education records is disclosed in accordance with the limitations in FERPA, the Department believes that the relatively minimal administrative costs of establishing these protocols will be off-set by potential analytic benefits. Based on this analysis, the Department has concluded that the amendments reflected in these final regulations will result in savings to entities and have the potential to benefit the Nation by improving capacity to conduct analyses that will provide information needed to improve education.

As outlined in greater detail in the final regulations, we estimated only a minor increase in information collection burden for LEAs and institutions

in complying with the provision in §99.35(a)(3), which requires FERPA-permitted entities to use a written agreement to designate authorized representatives other than agency employees.

Progress updates and anticipated accomplishments:

N/A.