

APPEALS PROPOSAL

Submitted by Aaron Lacey | Private Nonprofit Institutions | January 6, 2026

This document proposes revisions to the appeal framework included in the draft rule presented to negotiators by the U.S. Department of Education on December 29, 2025. This draft rule would implement the accountability framework included in the “One Big Beautiful Bill Act,” which was signed into law on July 4, 2025, and became Public Law No. 119-21.¹ This statutory accountability framework, sometimes referred to as the Do No Harm (“DNH”) framework, is located in Section 454 of the Higher Education Act of 1965 (20 U.S.C. § 1087d).

As the Department is aware, in the DNH framework, Congress specifically states that a program shall not lose its Direct Loan eligibility “unless the institution has had the opportunity to appeal the programmatic median earnings of students working and not enrolled determination...”² Congress also specifies that this appeal process shall be “established by the Secretary.”³ In providing for this appeal opportunity, Congress both acknowledges that the agency’s median earnings determination may warrant reconsideration, and empowers the Department to use the appeal process for this purpose. Significantly, Congress does not specify any bases or processes for appeals, but instead entrusts the Department to establish both through the current rulemaking.

In its draft rule, the Department proposes to include a single basis for an appeal. Specifically, the agency suggests that an institution would only be permitted to appeal “if it believes the Secretary erred in the calculation of the program’s earnings premium measure under § 668.403.”⁴ The agency makes clear that this is the exclusive basis for an appeal, emphasizing that “[i]nstitutions may not dispute a program’s Direct Loan Program ineligibility based upon its earnings premium measure except as described in this paragraph (b).”⁵

At present, we fear the basis for appeal is so narrowly drawn, that in practice, it may not offer any appeal opportunity whatsoever. This would appear inconsistent with the statutory directive, and more importantly, miss an opportunity to improve the accuracy and outcomes of the proposed rule.

As noted above, the draft rule would only permit an institution to challenge the “calculation of the program’s earnings premium measure.” This calculation, we observe, involves simply subtracting one number from another. The formula, as described in the draft rule, is as follows:

$$\text{Earnings Premium Measure} = \text{Median Annual Earnings} - \text{Earnings Threshold}$$

It is our expectation that the Department will execute this calculation perfectly in every instance, with the result that there would never be a basis to question the math, so to speak.

Though not clear in the regulatory text, it may be that the agency also intends to permit institutions to question the calculation of the Median Annual Earnings and Earnings Threshold. We observe, however, that determining these values also involves virtually no calculations that likely would be available for review. The Median Annual Earnings would actually be calculated by the agency with earnings information based on the

¹ This document has been prepared and submitted by Aaron Lacey, primary negotiator representing private nonprofit institutions of higher education, including institutions eligible to receive Federal assistance under Title III and Title V of the HEA, Tribal Colleges and Universities, and Historically Black Colleges and Universities.

² 20 U.S.C. § 1087d(c)(5).

³ Id.

⁴ Draft 34 C.F.R. § 668.603(b).

⁵ Id.

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completer list sent to that agency, not by the Department. We expect that this calculation would not be available for review, given that the Department would not even have it on hand. As for the completer list, the institution already would have reviewed and certified the list pursuant to the process set forth at draft 34 C.F.R. § 668.404(b). Thus, there would be no calculation or other data to review.

On the other side of the equation, the Earnings Threshold is simply pulled from the Census Bureau. In the case of graduate programs, there may be some opportunity to confirm that the Department correctly followed its decision tree and selected the appropriate threshold. But in the case of undergraduate and certificate programs, where the Department is using either a state or national number, it seems unlikely that there would be an error.

As a practical matter, it thus appears that institutions would rarely have any cause to question the “calculation of the program’s earnings premium measure,” with the result that there would rarely be any basis for an appeal.

Our sense when reading the statutory text is that Congress felt a meaningful appeal opportunity was important, and that its intent was for a more robust. When discussing the appeal opportunity that should be provided, we note that Congress did not use the word “calculation” - which it certainly could have done - or otherwise indicate that the appeal opportunity should be focused on the accuracy of the math. Congress instead stated that institutions should have the opportunity to appeal the agency’s median earnings “**determination.**” We thus believe the intent of Congress was that institutions have an opportunity to challenge the accuracy of the determination itself, which would include the opportunity to demonstrate that the earnings data used by the Department is inaccurate or nonrepresentative. We believe an appeal opportunity of this kind would be a powerful tool for maximizing the efficacy of the Department’s proposed accountability framework, and urge the Department to use it to its fullest potential.

Following, we propose two appeal concepts for the Department’s consideration. We appreciate deeply the Department’s desire to avoid appeal processes that are difficult to operationalize or that would undermine the overall efficacy of the accountability framework. This having been said, we observe that the purpose of appeals in law and regulation is to increase the likelihood that the ultimate determination is the right one. By mandating an appeal right, Congress clearly signaled that process and accuracy must, in this case, take priority over administrative efficiency. This said, we believe, if implemented, either of these proposals would make the draft framework more effective at identifying and holding accountable the programs it was designed to manage, while avoiding inaccurate assessments and unnecessary delays.

1. The Local Earnings Appeal

Pursuant to the Department’s draft rule, the median earnings for an institution’s working completers will be compared to the median earnings of working adults calculated at either a state or national level. This means that the median earnings of individuals graduating from colleges located in rural or small town markets will, in a best case scenario, be measured against the median earnings of individuals from across the entire state. Particularly for those institutions whose graduates mostly remain in and serve those rural and small town communities, this may result in a determination that very good programs should lose Direct Loan access simply because the median earnings in those communities are so much lower than statewide earnings, and without regard to the reduced cost of living in those local communities.

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Significantly, the Department has already acknowledged on record that “geography has an impact on earnings” and can render earnings-based tests inaccurate.⁶ In 2019, the agency observed “we believe the evidence is substantial that even within a given occupation, salaries can vary from one geographic region of the country to another, and yet the D/E rates measure fails to take those differences into account. This is another example of why a bright-line standard is inappropriate and invalid since the D/E rates calculation does not control for general differences in wages across States.”⁷ The agency openly regretted that the Department failed to “build in a correction factor for differences in prevailing wages from one State to the next in calculating D/E rates” and characterized this failure as “an unfortunate omission with potentially devastating impacts on students.”⁸

Recent studies have highlighted that the failure of an earnings test to account for differences in local earnings is equally destructive. In a November 2025 report titled *Calculating the Return on Investment in Postsecondary Education: Differences in State vs. Local Earnings*, a team of researchers from the University of Wisconsin’s SSTAR Lab delved deeply into this very issue.⁹ In the report, the SSTAR Lab team examined the impact of using local data as the basis for a median earnings test like the one in DNH.¹⁰ The team examined the difference between state-level median earnings and local earnings, and concluded that “[a]cross the nation, there is far more variation in earnings within states than between them, especially in larger states with several commuting zones. As a result, it is possible that colleges located in lower-income regions of a given state will have a harder time reaching ROI metrics that are tied to state-level data.”¹¹ In Texas, alone, the report determined that 51 institutions of higher education would benefit from using local earnings when applying an earnings threshold test.¹² Looking towards the current negotiated rulemaking, the report offered “[p]erhaps programs failing the state-level test can use local-level earnings upon appeal; those passing the test with local earnings could be reinstated or otherwise not penalized.”¹³

A report issued by the Urban Institute in October 2025 came to a similar conclusion. In the report, titled *How the Gainful Employment Rule Could Affect Programs and Students*, researchers considered the impact of earnings tests on programs offered at two for-profit career colleges.¹⁴ Among its various findings, the report concluded that “[a]nother factor that may affect earnings is variation in local labor markets and cost of living.”¹⁵ The report offered an example, also from Texas. “For instance, say two institutions in Texas are located in different areas, one in Austin and one in Laredo. According to the Bureau of Labor Statistics, the average hourly wage in May 2024 was \$34.32 in Austin but only \$22.63 in Laredo—a 52 percent difference. As a result, programs in Laredo may find it harder to meet the earnings test than similar programs in Austin, simply because of their location. This geographic variation can put programs in smaller or more rural areas at a disadvantage. One possible remedy would be to measure high school earnings at a more localized level.”¹⁶

⁶ Id. at pg. 31412.

⁷ Id.

⁸ Id.

⁹ See https://lrc.sstar.wisc.edu/documents/SSTAR_ROI_report.pdf.

¹⁰ The report used commuting zones to calculate local earnings. Commuting zones are “clusters of counties that share common economic and social activity and are similar to metropolitan statistical areas with one key improvement: commuting zones cover the entire United States, including rural counties outside of metropolitan areas.” Id. at pg. 6.

¹¹ Id. at pg. 9.

¹² Id. at pg. 17.

¹³ Id. at pg. 24.

¹⁴ See https://www.urban.org/sites/default/files/2025-11/How_the_GE_Rule_Could_Affect_Programs_and_Students.pdf.

¹⁵ Id. at pg. 16.

¹⁶ Id.

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We do not believe it was the intent of Congress to penalize students, employees, employers, and institutions that choose to live in and serve rural and small town America. And like the Trump administration in 2019, we believe the failure to “build in a correction factor for differences in prevailing wages” would be “an unfortunate omission” with “potentially devastating impacts on students.”¹⁷ Accordingly, like the SSTAR Lab report, we believe it is essential to design a Local Earnings Appeal that would permit institutions with a program that fails the standard earnings premium test to demonstrate that the median earnings in their local markets are significantly lower than the median earnings for the state.

On appeal, the program’s earnings could be compared to the median earnings of working adults in the locality (county, commuting zone, etc.) aged 25 to 34 who only have a high school diploma or its recognized equivalent. We understand that the Census Bureau data the Department will obtain for purposes of the earnings premium test can be filtered so as to determine these local earnings thresholds. Alternatively, institutions could be required to calculate and produce the adjusted local earnings threshold for working adults, to be reviewed and certified by the Department, a state entity, or an outside auditor.

If the agency would prefer not to adjust the median earnings of working adults (*i.e.*, the threshold), the Department could instead require institutions to calculate an adjusted median earnings for their programmatic cohort that accounts for the difference between state and local earnings. The adjusted median earnings for the programmatic cohort would then be compared to the unadjusted, state-level median earnings threshold of working adults.

We emphasize that Congress expressly stated that the Secretary has the authority to design and implement the appeal process, leaving no doubt that the agency has the statutory authority to create a Local Earnings Appeal. We also emphasize that calculating a revised Earnings Threshold by filtering the Census Bureau data at a more local level should not be a process that requires significant, additional administrative resources from the Department. Finally, we note that the data set the Department released in connection with the negotiated rulemaking indicates that the vast majority of programs are located city and large urban markets. Accordingly, this appeal would not undermine the overall efficacy of the rule, while still permitting the agency to address a widely recognized and commented on concern.

2. Alternate Earnings Appeal.

As noted above, we believe strongly that Congress intended for institutions to have the opportunity to demonstrate that the earnings data used by the Department is inaccurate or nonrepresentative. As the agency is aware, a similar “alternate earnings appeal” opportunity was present in the 2014 version of the gainful employment rule. In that instance, institutions could appeal and produce alternate earnings for the Department obtained from either a survey of graduates conducted by the institution or a state-sponsored data system.¹⁸ This appeal mechanism is critical for a wide range of reasons, including to address underreported and potentially unrecognized self-employment income. The agency has acknowledged this issue, in particular, observing in 2019, “[w]hile the Department agrees that individuals who receive tip income should report that income fully and pay required taxes on that income, it is not the fault of institutions of higher education that many individuals do not.”¹⁹

We understand that the Biden administration determined not to include a meaningful appeal in its version of the rule, largely due to the considerable difficulty both the agency and schools experienced in managing such appeals under the 2014 rule, and due to concerns regarding the quality of the data included in such

¹⁷ 84 Fed. Reg. 31412 (July 1, 2019).

¹⁸ 34 C.F.R. § 668.406 (July 1, 2015).

¹⁹ 84 Fed. Reg. 31409 (July 1, 2019).

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appeals. We also appreciate that this administration is generally committed to developing a rule that is streamlined and can be successfully and timely administered (goals we strongly support).

These points acknowledged, we believe this administration must include a meaningful appeal process because Congress has specifically directed it to do so. We observe that the Biden administration was not operating under any similar statutory directive when it created the current rule and determined to exclude a meaningful appeal option from the framework. Second, we believe a meaningful opportunity to demonstrate that the earnings data is inaccurate or nonrepresentative through an alternate earnings appeal is critical to improve the accuracy of the results and to ensure adequate process. As the Department observed in the commentary accompanying its proposed 2014 gainful employment rule “we believe due process warrants allowing appeals for both failing and zone final D/E rates.”²⁰

We also believe that this administration can administer an alternate appeals process in a manner that is more streamlined and efficient, thereby avoiding the complexities, delays, and data quality concerns associated with the 2014 version. **We believe that this can be accomplished by limiting the basis for an alternate earnings appeal to the use of alternate data produced from a state-sponsored data system.** When the 2014 rule was created, the number of available state-sponsored data systems available for this purpose were limited. But over the last decade this has changed, as states, like the federal government, have worked to improve and expand their own data systems. We believe that these systems are today more widely available. They produce data that is more reliable than data from an institution managed survey, thereby alleviating concerns regarding data quality. And the administrative burden on the Department should be minimal. The agency would not have to develop the kind of extensive guidance and documentation that schools needed to understand how to carry out surveys. The timeframe required for institutions to obtain the data from state-sponsored systems also should be less than the time required to carry out a survey, meaning the appeals process should not be overly extended. Finally, we believe that if such an opportunity is included, institutions will work with states to improve their systems over time.

²⁰ 79 Fed. Reg. 16460 (March 25, 2014).