

## **Negotiated Rulemaking Session**

### **Institutional and Programmatic Eligibility Committee**

#### *Recap*

The Department of Education (Department) convened key stakeholders from January to March 2022, to form a negotiated rulemaking committee, known as the Institutional and Programmatic Eligibility Committee, to focus on institutional accountability.

Negotiated rulemaking is a consensus-based process through which the Department develops a proposed rule by using a neutral facilitator and a balanced negotiating committee composed of representatives of all interests that the rule will affect, including staff from the Department. This process gives everyone with a stake a chance to try to reach agreement, also known as consensus, about the main features of a rule before the Department proposes it in final form.

When consensus is reached, the Department is bound to the agreement when releasing its draft regulations for public comment and no negotiator is allowed to express negative views of the agreed upon language. When consensus is not reached, the Department has the ability to rewrite the regulation as it wishes and is not bound to language proposed by the committee.

Of the seven topics discussed, consensus was reached by the 13 negotiators on the Institutional and Programmatic Eligibility Committee (see full list below) on just two.

It is expected that the Department will release a Notice of Proposed Rulemaking in the near future, with a final rule released by November 1, 2022. If the final rule is released by November 1<sup>st</sup>, the regulations will go into effect on July 1, 2023.

## **I. Summary of Issues on Which Consensus was Reached**

### **ABILITY TO BENEFIT**

#### Department Proposals

- *Include the definition and compliance requirements of an eligible career pathway program.* Currently, there is no definition of eligible career pathway program in the regulations, so the Department is proposing to add the definition included in the Higher Education Act of 1965 (HEA). Students are eligible to access student aid funding if they were first enrolled in an ability to benefit program prior to July 1, 2012, or in an eligible career pathway program. The proposed regulation also articulates how an institution can demonstrate compliance with the eligible career pathway program requirements.
- *Further clarify the approved state process.* An alternative way for students to prove that they have the ability to benefit from a postsecondary education is to successfully complete a process created by the state that is approved by the Secretary of Education (Secretary). The Department clarifies the requirements for states that want to offer an ability to benefit process for students.

### Committee Response

The committee agreed with the Department's final proposal and agreed to consensus on this issue topic.

## **TITLE IV REVENUE AND NON-FEDERAL EDUCATION ASSISTANCE FUNDS (90/10)**

*This rule is only for for-profit institutions.*

### Department Proposals

- *Clarify that 10% of all revenue to for-profit institutions must be from sources other than federal funds.* The Department clarifies that it is not just Title IV funds that are used in calculating the revenue percentage 90/10 ratio, but it is all federal funds.
- *Income share agreements can be considered revenue derived from sources other than federal funds.* If institutions include income-share agreements as cash in the annual audit they submit to the government, then additional criteria apply.

*Add additional requirements for institutions.* For-profit institutions are given additional requirements to adhere to when complying with the 90/10 rule.

### Committee Response

The committee agreed with the Department's final proposal and agreed to consensus on this issue topic.

## II. Summary of Issues on Which Consensus was not Reached

### ADMINISTRATIVE CAPABILITY

#### Department Proposals

- *Add additional requirements for institutions to prove their administrative capability.* The Department proposes to add the following additional actions that institutions must take to prove that they are capable of administering programs in Title IV of the HEA:
  - In regards to financial aid counseling, make clear the nature of the aid that a student is receiving, along with any instructions and applicable deadlines for accepting, declining, or adjusting award amounts;
  - Provide adequate career services to students;
  - Provide students with accessible clinical or externship opportunities that are related to, and required by, the program that the students are enrolled in;
  - Disburse funds to students in a timely manner consistent with their needs;
  - Ensure that at least half of the Title IV revenue received by an institution is not from programs that fail the gainful employment (GE) rule and ensure that at least half of the full-time students who are receiving Title IV funds are not enrolled in failing GE programs;
  - The institution must not be subject to any significant negative action by a state, federal, or accrediting agency and has not lost eligibility to participate in another federal educational assistance program; and
  - The institution must not have any principal or affiliate of the institution, or any individual who exercises substantial control of the institution, be convicted of a fraud, crime, or have liabilities to the federal government in excess of five percent of Title IV funds due to misconduct.
- *Further clarify the requirements for evaluating a high school diploma.* Current regulations indicate that institutions must follow their own procedures for validating a high school diploma, but the Department proposed to define what those procedures must be to include:
  - Obtaining documentation from the high school that confirms the validity of the high school diploma; and
  - How an institution can verify the validity of a high school diploma.

#### Committee Response

The committee did not reach consensus on this topic although important compromises were reached. There was disagreement with the requirements regarding adequate career services and the requirements placed on institutions to evaluate the validity of a high school diploma. The for-profit negotiator was the only dissenting vote.

## GAINFUL EMPLOYMENT (GE)

### Department Proposals

- *Re-establish a GE rule in the regulations.* The gainful employment rule first came about in 2010 under the Obama Administration but was amended in 2014. The rule was established to hold accountable programs that were created to lead to gainful employment as indicated in the HEA. All programs at for-profit institutions and all non-degree programs at public and private, nonprofit institutions are considered GE programs. In 2019, the Trump Administration rescinded the GE rule and now the Department is proposing to have it re-established. The new proposed rule would do the following:
  - Establish a debt-to-earning (D/E) rate metric to determine the eligibility of GE programs;
  - Establish an earnings threshold based on data from the Census Bureau;
  - Base a GE program on the four-digit Classification of Instructional Programs (CIP) code; and
  - Calculate small program debt-to-earnings rates if the individual program has fewer than 30 students in the two-year and four-year cohort periods but more than a total of 30 students combined in a four-year cohort period across all programs at the institution.
- *Limit an institution's ability to appeal the GE data.* The 2014 GE rule allowed an institution to appeal the GE data at various stages in the process. This included the list of students completing the program, the earnings data, and the student loan debt data. This new proposal only allows for an appeal if the institution is seeking to terminate the GE program and only when the program has been deemed ineligible by the Department.
- *Prohibit a transitional period.* An institution would not have the ability to have a transitional period for complying with the new rule once it goes into effect.
- *Require institutions to report data for GE programs.* Institutions are required to retroactively report certain data on each student that is enrolled in a GE program to include when a student withdrew, the date the student initially enrolled in the program, and any information as prescribed by the Secretary in the Federal Register.
- *Require institutions to certify GE programs.* The most senior executive officer at each institution must certify that their GE programs are approved by a recognized accrediting agency or are included in the institution's accreditation by its recognized accrediting agency.
- *Create a disclosure website.* The Department proposes to create a centralized website and require all institutions to report additional data to be made public on the site. The intended audience for this website will be currently enrolled and prospective students. The exact information to be disclosed on this website will be articulated in a Federal Register notice. An institution must provide a permanent link to the website.
- *Add performance measures for approving an institution's program participation agreement.* In determining whether or not to approve an institution's program participation agreement (PPA), recertify a PPA, or place a PPA on provisional status, the Department is proposing to consider the following information:
  - Withdrawal rates;
  - GE debt-to-earnings rates;
  - GE small program rates;
  - GE earnings threshold rates;

- Educational spending;
- Job placement rates; and
- Licensure pass rates.

### Committee Response

The committee did not reach consensus on this issue. Outstanding concerns included the lack of an appeals process for institutions, the additional performance measures for approving an institution's PPA, the lack of clarification regarding small program rate calculations, and the overall process for considering a new GE rule. The dissenters were the negotiators for four-year private, nonprofit institutions; four-year public institutions, financial aid administrators, two-year institutions, minority-serving institutions, and for-profit institutions.

## **FINANCIAL RESPONSIBILITY**

### Department Proposals

- *Add additional requirements for determining an institution's ability to meet its financial or administrative obligations.* The Department proposes to add the following to determine whether or not an institution meets its financial or administrative obligations:
  - *If Title IV credit balances are paid;*
  - *If an institution fails to make a payment regarding an undisputed financial obligation for more than 90 days;*
  - *If an institution fails to satisfy payroll obligations in accordance with its published payroll schedule; and*
  - *If an institution borrows funds from retirement plans or restricted funds without authorization.*
- *Add additional mandatory triggers.* In an effort to address fraud and abuse by institutions, the following are added as additional mandatory triggering events that would automatically deem an institution to not be financially responsible:
  - The submission of a teach out plan or agreement;
  - The inability to meet state licensing requirements and the state agency notifies the institution that it will withdraw its licensure or authorization;
  - If 10% of Title IV revenue is received from failing GE programs;
  - If a proprietary institution does not derive at least 10% of its revenue from sources other than federal funds;
  - The two most recent cohort default rates are 30% or greater;
  - If there is a failure to file an SEC report on time;
  - If there has been a loss in eligibility to participate in another federal educational assistance program;
  - If there was a distribution of funds in the first two quarters of a fiscal year in excess of 10% of a contribution received in the final quarter of the previous fiscal year that resulted in a recalculated composite score of less than 1.0; and
  - If, as a result of an action taken by the Department, the institution is subject to a default or other adverse condition.
- *Add additional discretionary triggers.* Much like mandatory triggering events, discretionary triggering events can determine if an institution is financially responsible.

However, the Department has the discretion to determine whether or not there is a material adverse effect before deciding that an institution is not financially responsible.

The following new triggering events have been added:

- High annual dropout rates;
  - Fluctuations in student aid funds from year-to-year;
  - Indicators of a change in financial conditions;
  - Pending borrower defense claims;
  - A discontinuation of a significant share of academic programs affecting at least 25% of enrolled students;
  - The closure of most institutional locations; and
  - The inability to meet state licensing requirements.
- *Two unresolved discretionary triggering events will trigger mandatory triggering events.* If an institution is subject to two discretionary triggering events that remain unresolved after 60 days, then the Department will consider any subsequent discretionary triggering event as a mandatory triggering event regardless of whether or not an institution actually resolved the initial two discretionary triggers.
  - *Create requirements for institutions that go through a change of ownership.* In an effort to specifically address the financial responsibility of institutions that undergo a change in ownership, the Department establishes requirements for institutions to meet to include the submission of audited financial statements, same day balance sheets, and the need to have positive net assets without donor restrictions the day after the change in ownership for private, nonprofit institutions.

### Committee Response

The committee did not reach consensus on this issue topic. The for-profit negotiator dissented due to concerns with both the mandatory and discretionary triggering events.

## **CHANGES OF OWNERSHIP AND CHANGE IN CONTROL**

### Department Proposals

- *Amend the definitions of additional location and branch campus.* The definitions of additional location and branch campus are amended to clarify that both must be a physical facility that is separate from the main campus within the same ownership structure. The definition also clarifies that additional locations are only able to participate in Title IV funding through the main campus and that branch campuses must be approved by the Secretary and be independent from the main campus.
- *Distance education courses must be associated with the main campus.* A requirement is created for institutions that offer on-campus programs and distance education programs to have the distance education programs be associated with the main campus, except for correctional institutions that are additional locations.
- *Define main campus:* A main campus is defined as the primary physical facility where the institution offers eligible programs and is certified by the Secretary and the appropriate accrediting agency to be the main campus.
- *Amend the definition of a private, nonprofit institution.* It is proposed to define a private, nonprofit institution as an institution that has no part of its net earnings benefiting any

private entity or individual and no revenue-sharing agreements with any party unless it can be demonstrated that those revenue-sharing agreements are reasonable based on the market price for such services or materials.

- *Define change in ownership.* A change in ownership is defined as resulting in a change in control if the following occurs:
  - A person, or combination of persons, acquires at least 50% of the total outstanding voting interests or ceases to hold 50% of the total outstanding voting interests;
  - A partner in a general partnership acquires or ceases to own at least 50% of the voting interests in the general partnership;
  - A general partner or managing member holds an equity interest, any change of that general partner or managing member;
  - A person becomes, or is replaced as, the sole member or shareholder;
  - An entity that has a member or members ceases to have any members and an entity that has no members gains a member or members; and
  - The addition or removal of any entity that provides, or will provide, audited financial statements to the Department.

### Committee Response

The committee did not reach consensus on this issue topic. The main concerns of the dissenting negotiators were the definition of a private, nonprofit institution. There was also another concern regarding the need to clarify that a branch campus is also associated with the main campus when offering distance education courses. The dissenters were the negotiators for the private, nonprofit institutions, consumer advocacy groups, civil rights organizations, accrediting agencies, state authorization agencies, legal assistance organizations, state attorneys general, student loan borrowers, and veterans.

## **CERTIFICATION PROCEDURES**

### Department Proposal

- *Add additional provisional certification requirements.* An institution's certification becomes provisional if the institution is not financially responsible or any owner or interest holder also owns another institution with fines or liabilities owed to the Department and is not making payments regarding the liability.
- *Allow institutions to be provisionally certified for two years.* Institutions that were placed on provisional certification status for reasons related to substantial liabilities owed to the Department due to borrower defense claims, false certification discharges, or other consumer protection concerns are provisionally certified for no more than two years.
- *Clarify who can sign the PPA.* An authorized representative of the institution or any person who is an authorized representative of an entity with direct or indirect ownership of the institution must sign the PPA.
- *Limit Title IV eligibility for GE programs.* For Title IV eligibility purposes, any institution that has GE programs must limit the number of hours for the program to the lesser of the minimum number of hours required in the state for training in the recognized

occupation or, if at least half of the states license the recognized occupation, the national median of the minimum number of hours required for training in those states.

- *Require institutions to meet additional state licensing requirements.* Institutions are required to meet state licensing requirements in the states where the institution is located and where each student is located upon initial enrollment.
- *Require institutions to meet all state consumer protection laws where distance education is offered.* Institutions are required to meet all state consumer protection laws in the states where distance education is offered regardless of their participation in NC-SARA.
- *Ban transcript withholding in certain situations.* Institutions are banned from withholding transcripts if they are at risk of closure or if they made an error in administering a Title IV program that resulted in the student requesting the transcript owing the institution funds.
- *Add additional requirements regarding provisional certification.* If an institution is provisionally certified, the Secretary can do the following:
  - Require a teach out plan or agreement;
  - Require a records retention plan;
  - Restrict the addition of new programs or locations;
  - Restrict the rate of growth or new enrollments in programs;
  - Place restrictions on the institution providing a teach out plan;
  - Restrict the acquisition of another institution;
  - Require institutions to report additional information, which may include cash balances, student rosters, and student complaints;
  - Place limitations on institutions entering into a written arrangement with another institution; and
  - Require institutions to submit marketing and other recruiting materials if they have been engaged in misrepresentations, aggressive recruiting practices, or violated incentive compensation rules.
- *Add additional reporting requirements for nonprofit institutions.* When nonprofit institutions are initially certified to participate in Title IV programs, or undergo a change in ownership, they are required to submit reports on accreditor agency actions, state authorization agency actions, and any new servicing agreements until the Department has reviewed two complete consecutive financial statements and compliance audits. The institution also has to report on communications from the Internal Revenue Service (IRS) or any state or foreign country related to tax-exempt or nonprofit status, as long as the institution participates as a nonprofit institution.
- *Require institutions to share with students whether or not certain programs meet state licensing requirements.* Institutions are required to share with prospective and current students whether programs that lead to licensure meet, or do not meet, state licensing requirements.

### Committee Response

The committee did not reach consensus on this issue topic. The dissenters were concerned about the minimum hour requirement for GE programs, the lack of clarity regarding the requirement that licensure programs meet the state licensing requirements in the states of the students' location, the requirement that institutions meet all state consumer protection laws, and the lack of a complete prohibition on transcript withholding. The dissenters were the negotiators for the private, nonprofit institutions, civil rights organizations, legal assistance organizations, student loan borrowers, for-profit institutions, and two-year public institutions.

### III. Negotiated Rulemaking Committee Members

- Federal Negotiator – Greg Martin
- Office of General Counsel (non-voting) - Steve Finley, Donna Mangold, Denise Morelli, Alejandro Reyes, and Ron Sann
- Facilitators (non-voting) – Cynthia Jeffries, Brady Roberts, Rozmyn Miller, and Kevin Wagner, Federal Mediation and Conciliation Service
- Non-Federal Negotiators
  - Accrediting Agencies
    - Jamiene S. Studley, WASC Senior College and University Commission (WSCUC) (primary)
    - Laura Rasar King, Council on Education for Public Health (alternate)
  - Civil Rights Organizations and Consumer Advocacy Organizations
    - Carolyn Fast, The Century Foundation (primary)
    - Jaylon Herbin, Center for Responsible Lending (alternate)
  - Financial Aid Administrators at Postsecondary Institutions
    - Samantha Veeder, University of Rochester (primary)
    - David Peterson, University of Cincinnati (alternate)
  - Four-Year Public Institutions of Higher Education
    - Marvin Smith, University of California, Los Angeles (primary)
    - Deborah Stanley, Bowie State University (alternate)
  - Legal Assistance Organizations that Represent Students and/or Borrowers
    - Johnson Tyler, Brooklyn Legal Services (primary)
    - Jessica Ranucci, New York Legal Assistance Group (alternate)
  - Minority-Serving Institutions
    - Beverly Hogan, Tougaloo College (retired) (primary)
    - Ashley Schofield, Claflin University (alternate)
  - Private, Nonprofit Institutions of Higher Education
    - Kelli Perry, Rensselaer Polytechnic Institute (primary)
    - Emmanuel A. Guillory, National Association of Independent Colleges and Universities (NAICU)(alternate)
  - Proprietary Institutions of Higher Education
    - Bradley Adams, South College (primary)
    - Michael Lanouette, Aviation Institute of Maintenance/Centura College/Tidewater Tech (alternate)
  - State Attorneys General
    - Adam Welle, Minnesota Attorney General's Office (primary)
    - Yael Shavit, Office of the Massachusetts Attorney General (alternate)
  - State Higher Education Executive Officers, State Authorizing Agencies, and/or State Regulators of Institutions of Higher Education and/or Loan Servicers
    - Debbie Cochrane, California Bureau of Private Postsecondary Education (primary)
    - David Socolow, New Jersey's Higher Education Student Assistance Authority (HESAA) (alternate)

- Students and Student Loan Borrowers
  - Ernest Ezeugo, Young Invincibles (primary)
  - Carney King, California State Senate (alternate)
- Two-Year Public Institutions of Higher Education
  - Anne Kress, Northern Virginia Community College (primary)
  - William S. Durden, Washington State Board for Community and Technical Colleges (alternate)
- U.S. Military Service Members, Veterans, or Groups Representing them
  - Travis Horr, Iraq and Afghanistan Veterans of America (primary)
  - Barmak Nassirian, Veterans Education Success (alternate)
- Advisors (non-voting)
  - Compliance Auditor with Experience Auditing Institutions that Participate in the Title IV, HEA Programs
    - David McClintock, McClintock & Associates, P.C.
  - Labor Economist or an Individual with Experience in Policy Research, Accountability, and/or Analysis of Higher Education Data
    - Adam Looney, David Eccles School of Business at the University of Utah

#### **IV. Committee Meeting Dates**

- Session 1: January 18-21, 2022
- Session 2: February 14-18, 2022
- Session 3: March 14-18, 2022