

A Summary of Key Provisions in the Department’s Distance Education NPRM

By Sean Beller

On April 2, 2020, the U.S. Department of Education (“Department”) issued a Notice of Proposed Rulemaking (“NPRM”) that proposed regulatory edits on a number of topics, and predominantly distance education and direct assessment (including subscription-based) programs. The NPRM, which can be found [here](#), is the product of negotiated rulemaking surrounding a number of accreditation-related issues that occurred in 2019 and resulted in consensus on the Department’s proposed regulations. The NPRM invites the public to submit comments on the proposed regulatory revisions, and any such comments must be received on or before **May 4, 2020**. Comments may be in support of the NPRM or can suggest revisions. Please contact Powers if you would like any assistance in preparing comments.

The NPRM proposes revisions to 25 different regulations. Below, we summarize the most substantive of these changes:

- *Distance Education*: The NPRM modifies the existing definition to broaden the list of technologies through which an institution may offer distance education, define a distance education instructor, clarify what activities constitute substantive interaction with students, and insert a requirement that an institution ensure regular interaction between instructors and students. Many of these revisions are relevant to previously unclear provisions in the regulations that resulted in compliance findings and provide additional flexibility to schools.
 - An instructor, for distance education purposes, is an individual responsible for delivering course content who meets institutional accreditor qualifications for instruction.
 - Substantive interaction is defined as engaging students in teaching, learning, and assessment and *also* includes at least two of the following: direct instruction, assessing student coursework, providing information about course content, facilitating group discussion, or other instructional activities approved by an institutional or programmatic accreditor.
 - Institutions ensure regular interaction between instructors and students by providing the opportunity for substantive interaction on a predictable and regular basis, monitoring the academic engagement of students, and ensuring the instructor is responsible for proactively engaging in substantive interaction when needed.
 - The NPRM proposes a number of other revisions related to distance education, including:
 - Defining “academic engagement” as active participation in instructional activity in accordance with State and accreditor requirements and including lists of activities that do and do not fit within the definition.
 - Adding a definition of a clock hour in a distance education program as 50 to 60 minutes in a 60-minute period of attendance in a synchronous class where

there is opportunity for direct interaction between the instructor and students. A clock hour in a distance education program does not meet this definition if it does not meet all State and accreditor requirements or exceeds agency restrictions on maximum clock hours that can be offered via distance education. Institutions must be able to monitor student attendance in 50 out of 60 minutes for each clock hour.

- Revising the definition of a “week of instructional time” in 34 C.F.R. § 668.3 to include, in the case of distance education programs, a week in which the institution makes available instructional materials, other resources, and instructor support necessary for academic engagement *and* in which the institution expects students to perform educational activities demonstrating academic engagement.
- *Direct Assessment:* The NPRM proposes several modifications to the regulation governing direct assessment programs (34 C.F.R. § 668.10), including the addition of a requirement for institutions to establish a methodology to equate each module with credit or clock hours, providing that a direct assessment program not consistent with accreditor or State requirements is not an eligible program, and clarifying that a direct assessment program is only eligible if the institution’s accreditor has evaluated the program based on accreditor standards, included the program in the scope of accreditation, and approved the institution’s claim of equivalence in clock or credit hours.
 - An institution would only be required to obtain Department approval of the first direct assessment program it offers or the first direct assessment program offered at a different credential level, unless the institution is otherwise required to seek approval of programs (e.g., the institution is provisionally certified). Institutions would have to report – but not seek approval for – subsequent direct assessment programs to the Department.
 - Title IV funds may not be disbursed for any portion of the direct assessment program awarded on the basis of prior learning.
 - If an institution has received initial approval to offer direct assessment programs, it can use Title IV funds to provide previously prohibited coursework (e.g., remedial coursework) using direct assessment.
 - Student progress can be measured using a combination of credit hours and credit hour equivalencies or clock hours and clock hour equivalencies.
- *Subscription-Based Programs:* The NPRM proposes adding a definition of “subscription-based program” as a standard or nonstandard term direct assessment program in which an institution charges a student for each term on a subscription basis with the expectation that the student will complete a specified number of credit hours in that term. Coursework need not begin or end within a specific timeframe in each term, but students must complete a cumulative number of credit hours during or following the end of each term before receiving subsequent Title IV funds, much like clock hour disbursements.
 - Institutions must establish a single enrollment status applicable to a student throughout their enrollment and such status may change no more than once per academic year.

- Institutions would measure student completion of credit hours (or equivalent) by determining the number of credit hours associated with the institution’s minimum standard for the student’s enrollment status (at least one credit hour for a student enrolled less than half-time) and then adding together the credit hours determined for each term the student enrolled in and attended, excluding the current and most recently attended terms. The NPRM contains an illustration of how disbursements would work for a subscription-based program.
- The proposed regulations apply only to subscription-based programs and not all competency-based education programs.
- The NPRM proposes a number of other revisions related to subscription-based programs, including:
 - Revising the definition of “full-time student” to exclude students enrolled in a subscription-based program from the provision that a student’s workload can include repeating coursework.
 - Revising the R2T4 regulation to insert provisions specific to withdrawal from a subscription-based program.
 - Revising the SAP regulation to clarify that institutional SAP policies need not include the pace at which a student must progress through a subscription-based or non-term program.
 - Revising regulatory provisions related to early disbursement to include standards applicable to students enrolled in a subscription-based program.
- *Written Arrangements:* The NPRM proposes revising the regulations governing written arrangements between eligible institutions and other entities, both generally and as specifically applied to eligible foreign schools.
 - The definition of a “foreign institution” would now allow written arrangements between foreign institutions and eligible institutions within the U.S. to provide up to 25 percent of the courses in an eligible program. Students enrolled in an eligible foreign institution could complete up to 25 percent of an eligible program by enrolling in coursework, research, work, internship, externship, or special studies offered by an eligible U.S. institution.
 - ***The Department seeks comments*** regarding whether these proposed revisions should be applied to arrangements between eligible foreign schools and domestic entities that are not eligible institutions.
 - The preamble to the NPRM notes that while the existing regulatory provision allowing a student enrolled in an eligible foreign institution to perform independent research in the U.S. for not more than one academic year if it is conducted during the dissertation phase of a doctoral program under the guidance of faculty, and the research can only be performed in a facility in the U.S. will remain, it would not be permissible for such a student who completed any portion of the doctoral program by taking coursework in the U.S. prior to the dissertation phase to later conduct independent research in the U.S. that would cumulatively exceed 25 percent of the program.
 - ***The Department seeks comments*** regarding whether this limitation should be broadened to allow such doctoral students an additional full academic year to

- conduct independent research despite having already completed 25 percent of his or her eligible program by taking coursework in the U.S.
- Eligible foreign institutions would be allowed to enter into written arrangements with ineligible foreign institutions for the provision of 25 percent or less of a program if the ineligible foreign institution is legally authorized by an education agency in its country to provide postsecondary education and awards credentials recognized in its country.
 - In written arrangements between eligible institutions and ineligible organizations, the ineligible organization must demonstrate experience in the delivery and assessment of the portion of the program it will deliver, and that the program has been effective in meeting learning objectives.
 - ***The Department seeks comments*** regarding whether this requirement would be difficult to meet.
 - In written arrangements between two commonly-owned eligible institutions, the institution that grants the credential would no longer have to provide more than 50 percent of the program.
 - The proposed revisions would clarify that institutions may use written arrangements to align or modify curricula to meet recommendations of industry advisory boards (including employers who hire graduates) or requirements under widely recognized industry standards or industry credentialing bodies.
 - The proposed revisions describe how the percentage of a program offered by an ineligible organization should be calculated (i.e., by dividing the number of semester/trimester/quarter credit hours or clock hours offered by the ineligible organization by the total number of hours required for program completion). The revisions also provide that an ineligible organization offers a course if it has authority over the design, administration, or instruction in the course, and includes as examples establishing completion requirements, delivering instruction, or assessing student learning.
 - The proposed revisions clarify that the written arrangement requirements do not apply to acceptance of transfer credits or internships/externships if the internships/externships are governed by accreditor standards requiring institutional oversight.
 - The NPRM proposes a new notification requirement: institutions would need to report to the Department any written arrangements with an ineligible organization to provide more than 25 percent of a program. The Department will use this information to ensure institutions have accreditor approval for such arrangements.
- ***Other Provisions:*** While not an exhaustive list, the NPRM also proposes revisions on the following topics:
 - **Correspondence Course:** A student is considered to be enrolled in a correspondence course for purposes of institutional eligibility criteria if more than 50 percent of the courses in which the student was enrolled during an award year were correspondence courses.
 - **Credit Hour:** The NPRM revises the definition of “credit hour” to mean the amount of student work defined by the institution and approved by the institution’s

accreditor or State approval agency consistent with commonly accepted practice in postsecondary education. A credit hour must still reasonably approximate one hour of direct instruction and two hours of out-of-class work over a period of time that corresponds to the type of credit hour (i.e., semester, trimester, or quarter), but institutions may take into account delivery method, measurement of student work, academic calendars, disciplines, and degree levels when determining the amount of work associated with a credit hour.

- Incarcerated Student: The definition now includes a new defined term, “juvenile justice facility,” but clarifies that, for Pell eligibility purposes, a student incarcerated in a juvenile justice facility or in a local or county facility is not considered to be incarcerated in a Federal or State penal institution (regardless of whether the facility is Federal or State run).
- Department Review of Applications: The program approval regulation is revised to require prompt action from the Department on materially complete applications and removes the provision that a school that provides notice to the Department of intent to offer a new program need not obtain approval unless informed by the Department at least 30 days before the first day of class. The requirement of prompt Department action also specifically applies to recertification, change of ownership, and change of status applications.
- Clock/Credit Hour Conversion: Conversion formula will revert to original ratios (reducing semester/trimester credit hours from 37.5 to 30 clock hours and reducing quarter credit hours from 25 to 20 clock hours) and the revisions remove reference to work outside of class.
- Renewal of Certification: If the Department has not made a determination on an application for recertification within twelve months of the expiration date of an institution’s current period of participation, the Department automatically grants the institution a renewal, which may be provisional. This automatic renewal is distinct from the month-to-month extension of eligibility while the Department considers an application (i.e., an institution’s certification would be renewed and not merely extended).
- Reasonable Program Length: Institutions may establish the reasonable length of a gainful employment program if the program is no longer than 150% of the minimum clock hours required by a State for that occupation or 100% of the minimum clock hours required by an adjacent State.
- Updated Teach-Out Plans: Institutions that submit a teach-out plan to their institutional accreditor in accordance with 34 C.F.R. § 602.24(c) must submit an update to the teach-out plan upon the occurrence of the events listed in 34 C.F.R. § 668.14(b)(31) (i.e., the Department initiates a limitation, suspension, or termination action, the institution’s accreditor or state authorizing agency acts to suspend or revoke approval, or the institution intends to close a location or cease operations).
- Withdrawn Students: Students are not considered withdrawn if 1) they complete all graduation requirements before completing days or hours they were scheduled to complete, or 2) in a program offered in modules, students complete (i) a module that includes 50% or more of the number of days in a payment period, (ii) a combination

- of modules that when combined include 50% or more of the number of days in a payment period, or (iii) coursework greater than or equal to coursework required under the institution’s definition of a half-time student for the payment period.
- Academic Attendance: The NPRM removes activities previously listed in the defined terms “academic attendance” and “attendance in an academically-related activity” and these terms now cross-reference the new defined term “academic engagement.”
 - FADs/FPRDs: If a final audit determination or final program review determination results from an institution’s classification of a course or program as distance education, or the institution’s assignment of credit hours, the Department will rely on the accreditor or State requirements regarding qualifications for instruction and whether work associated with credit hours is consistent with commonly accepted practices in higher education when applying the definitions of “distance education” and “credit hour.”
 - Denial of Certification: The Department may deny an application for certification or recertification if it determines that an institution is not financially responsible or has not timely submitted its financial or compliance audits.
 - Past Performance: The NPRM revises the portion of the financial responsibility regulation related to the past performance of individuals with substantial control of an institution to clarify that both individuals and entities can exercise substantial control and changes references to “substantial control” to “substantial ownership or control.” The NPRM revisions would add a provision that an institution is not financially responsible if an individual or entity that exercises substantial ownership or control of the institution exercised substantial control over another institution that closed without a viable teach-out plan approved by its accreditor and faithfully executed by the institution.

We at Powers work diligently to stay current on all proposed revisions to regulations applicable to our clients. This article is provided as a summary of the proposed revisions in the NPRM and is not intended to provide legal advice. For specific questions, please contact the Powers attorneys or professionals with whom you work (listed below):

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