Cooley

Surprise: Accreditation and Innovation Neg Reg Reaches Consensus

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In a turn of events that seemed unlikely just weeks ago, on April 3 the negotiated rulemaking committee the US Department of Education assembled to consider rules focused on accreditation and innovation over the past four months unexpectedly reached consensus on three "buckets" of issues (defined in our January post on the rulemaking). The department plans to publish several Notices of Proposed Rulemaking based on the committee's consensus language, on which it will solicit public comment. Since the department intends to put the new rules into effect on July 1, 2020, it must publish final rules by November 1.

Reaching consensus is a significant feat in and of itself, given that previous rulemaking committees organized by the department over the course of many years have almost uniformly failed to reach consensus, leaving the department free to draft its own proposed rules. But what is even more unprecedented is how these revisions will permeate throughout all of higher education, impacting the entire regulatory triad (in addition to the department, state authorizing agencies and accreditors), institutions, service providers and students. The areas of emphasis included revisions to rules regulating the recognition and operation of accrediting agencies, distance education, state authorization and faith-based institutions. Also included are revisions affecting recipients of TEACH Grants intended to provide relief to students whose grants have been improperly converted to loans.

This is the first in a series of posts on the rulemaking that will analyze the consensus language and highlight changes of specific interest to the various affected constituencies. In this first post, we discuss changes to **accreditation rules** that are likely to impact how institutions seek, receive and retain their accreditor's approval for a range of activities. As agreed to by the negotiators, both federal and non-federal, the stated intent of the proposed revisions is to establish greater flexibility for both accreditors and institutions, as well as to encourage and foster innovation in both the process and subject matter of accreditation. Importantly, the revisions would remove many regulatory barriers to the ability of accreditors to consider and approve innovative approaches to curriculum, program delivery and other operations.

Written arrangements and other substantive changes

Among the most controversial ED proposals were changes to rules governing written arrangements between eligible institutions and ineligible entities or institutions. Initially, ED's proposal would have allowed an ineligible entity to offer 100% of a program with approval from the eligible institution's accreditor, up from the current 50%. After both the Distance Education and Learning Subcommittee and nonfederal negotiators made clear their concerns that this proposal could turn an eligible institution into a shell that outsources all of its programs to an entity that could not satisfy ED's eligibility requirements on its own, the committee reached a compromise position.

The compromise retains the limits on written arrangements in the current regulations, but also provides for faster review of and approval of written arrangements exceeding 25%, albeit still within the 50% cap.

However, current regulations consider the implementation of a written arrangement to constitute a "substantive change," which triggers the need for review by the agency's decision-making body. ED noted that because agencies' decision-making bodies meet infrequently, approval for arrangements can take several months. To address ED's concern, the committee reached consensus on revisions to 34 C.F.R. § 602.22 that permit an accrediting agency's decision-making body to designate senior staff to review and approve or disapprove written arrangements. The revisions to the rule also require an agency to make a final decision on written arrangements within 90 days, unless the agency determines that additional review is required, in which case the time frame is extended to 180 days. The negotiators agreed that both of these revisions are intended to expedite the process for approval while still maintaining limits on the amount of a program that can be outsourced.

The revisions to 34 C.F.R. § 602.22 that permit written arrangements to be reviewed by an agency's senior staff also extend to other substantive changes. Under the revised rule, an agency can designate senior staff to review substantive changes relating to:

- the addition of a program that is a significant departure from existing offerings or methods of delivery
- a change in how an institution measures student progress (e.g., a change from credit hours to clock hours)
- a substantial increase in the number of clock hours or credit hours awarded, or an increase in the level of credential for successful completion of a program
- the addition of a permanent location at the site where the institution is conducting a teach-out for students of another institution that ceased operating before all students completed their program

These changes could expedite the efforts of institutions to develop innovative models and methodologies through agreements with third parties, even though they do not change the definition of what constitutes a substantive change with respect to written arrangements. However, if the proposed regulatory language becomes final in its current form, it will still be up to each accrediting agency to adopt policies that authorize staff to make determinations on substantive change applications. Furthermore, it remains to be seen whether this approach could potentially add greater variability to the approval process if applications are reviewed and acted on by individual staff members rather than consistently by the agency commission as a whole or one of its designated multi-member committees.

Alternative standards

At the outset of the rulemaking process, the department emphasized the importance of innovation in advancing higher education access and opportunity, and offered several proposals intended to give institutions the flexibility to offer innovative programs and to provide their accreditors with regulatory cover to approve such innovative approaches. Among the proposals on which the committee reached consensus are revisions that will allow agencies to create and apply separate curriculum and faculty standards for programs that would otherwise fail to satisfy an agency's standards.

Under revisions to 34 C.F.R. § 602.16, agencies will be able to apply separate curriculum standards to programs that are designed to respond to the recommendations of industry boards, credentialing or other occupational licensure bodies, or employers in a given field. The revisions also will allow accreditors to apply separate faculty standards for instructors teaching courses within a dual or concurrent enrollment program or career education course, so long as the agency determines the instructors are qualified by work experience or education.

At the same time, a mere request by an institution that an agency employ alternative standards will not be sufficient. The regulations would require that alternative standards be based on a demonstrated need to develop the proposed approach and that the agency can affirm that an institution or program subject to alternative standards can still meet the agency's expectations and requirements, that students will not be negatively affected and in fact will receive an equivalent benefit, and that if necessary to ensure qualitative oversight, an alternative assessment approach will be created. Overall, an accrediting agency must be able to demonstrate that its approach is supported by a clear rationale and framework that will enable the agency to ensure that its quality assurance expectations are sufficiently addressed.

This proposal regarding alternative standards provides accreditors with express latitude to flexibly apply their own standards in core academic matters – latitude that agencies have always had in theory, but have been hesitant to implement in order to ensure that they could demonstrate consistent application of standards during their recognition reviews with ED.

Noncompliance

The committee also reached consensus on language that will allow agencies to extend the period of time in which institutions or programs can continue to be out of compliance with agency standards, policies or procedures while they seek remediation. Proposed revisions to 34 C.F.R. § 602.18 would permit an agency to allow an institution or program to remain accredited despite its noncompliance for up to three years (or longer if the agency determines there is "good cause" for an extension) if the institution or program can demonstrate it is out of compliance for reasons beyond its control. Importantly, this change would not require an agency to extend a period of noncompliance if it determines that more aggressive action is warranted.

For example, an institution's or program's noncompliance might be the result of a natural disaster, its acceptance of students from an institution that is closing or in teach-out, significant and documented local or national economic changes, or changes to state licensure requirements. Any grace period granted to an institution or program must be approved by the agency's decision-making body and reevaluated annually. The institution must also demonstrate that the grace period will not contribute to the cost of the program or otherwise harm students.

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Stay tuned to this series as we continue to flag some of the more significant proposals from this rulemaking.

Robin Dasher-Alston, a former senior executive of one of the largest accrediting organizations, assists clients in dealing with the complexities of the system of voluntary accreditation that is a unique characteristic of American postsecondary education.

Mike Goldstein has been a pioneer in the development of new and more effective and efficient approaches to education in general and eLearning in particular through the creation of innovative approaches to combining the resources and interests of the various sectors of the education, technology, financial and governmental communities.

Naomi Harralson May works with colleges and universities to develop effective, compliant practices – and then translate them to accreditors, state educational agencies and the DOE.

Caitlyn Shelby advises postsecondary institutions, K-12 schools and education companies on matters involving accreditation, state authorization and the provision of online education, and monitors legislative and regulatory developments in these areas.
