

## 2024 Negotiated Rulemaking Program Integrity and Institutional Quality

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**To:** Program Integrity and Institutional Quality Committee  
**Date:** February 14, 2023  
**Re:** **Accreditation Provisions**

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### **Tracking Legend:**

**RED:** ED proposed language from First Session

**Yellow:** New ED language prior to Second Session

**Green:** Proposed accreditor alternative language following second session

### **600.3 Definition of Public Member**

**Rationale:** The important shared goal is that public commission members have meaningful experience and perspectives from fields other than higher education. The change to a five year separation is a positive revision to assure this objective while not unreasonably constricting the universe of potential volunteers.

The application to grandchildren and many step-level connections is overbroad. Experience by these people in higher education roles, potentially quite modest ones, are not relevant enough to undermine a person's own experience in capacities outside the field (e.g., a legal services lawyer would still bring their public perspective even if a sibling's spouse teaches or does graphic design at an institution of higher education). These restrictions are not necessary to protect against actual conflicts of interest. All agencies have conflict of interest rules that all commissioners must follow and ED monitors (602.23). It is those rules that would guard against any commissioner acting on an institution or issue as to which they had a conflict or appearance of conflict.

### § 602.3 What definitions apply to this part?

\* \* \*

*Representative of the public* means a person who ~~is currently not, or during the prior five years was not, is not--~~

- (1) ~~An A-current or former~~ employee, member of the governing board, owner, or shareholder of, or consultant to, an institution or program that either is accredited or preaccredited by the agency or has applied for accreditation or preaccreditation;
- (2) A ~~member current or former~~ member, employee, or representative of any trade association or membership organization related to, affiliated with, or associated with the agency; ~~or or of an institution or program that either is accredited or preaccredited by the agency or has applied for accreditation or preaccreditation;~~
- (3) An ~~current or former~~ employee of or consultant to the agency;
- (4) ~~(3)~~ An ~~current or former~~ employee of a member of the program integrity triad (the Department of Education; State higher education agencies or other officials or representatives of the State; and accrediting agencies); ~~or~~
- ~~(5) A spouse, parent, child, or sibling of an individual identified in paragraph (1) or, (2), (3), or (4) of this definition.~~
- ~~(5) A person who served in a capacity covered by paragraphs (1), (2), (3) or (4) of this definition in the past five years; or~~
- ~~(6) The spouse, parent, child or sibling of an individual identified in paragraphs (1), (2), (3) or (4) of this definition~~

### 602.15 Administrative and Fiscal Responsibilities

**Rationale:** Technology is a reasonable area of capacity to include specifically. The word “data” should be dropped. Consideration of data, metrics, quality and use is covered elsewhere under such concepts as assessment capacity and student achievement measures, and including it here is potentially duplicative and confusing here, and could burden the department with excessive documentation.

(a) The agency has—

- (1) Adequate administrative staff, ~~data and technology infrastructure,~~ and financial resources to carry out its accrediting responsibilities;

### 602.16 Accreditation and Preaccreditation Standards

**Rationale:** Section 496(o) of HEA prohibits ED from “promulgating any regulation with respect to the standards of an accreditation agency” (a)(5). The proposed rules attempt to regulate with respect to the core standards of accrediting agencies.

ED has wisely rejected bright lines, a conclusion consistent with both the HEA and good accreditation practice. Accreditors are developing and deploying outcome data, including disaggregated data, and using it in accreditation reviews for accountability purposes by attaching consequences to weak performance, and to promote improvement. The word “enforce” should be deleted from any version of this provision because it is dangerously close to creating bright lines.

Recent NACIQI inquiries what outcomes does the agency look at? How does the agency determine the metrics it uses? When and how does it follow up on performance? The most valuable way the Department can support the effective use of performance measures is to expedite its admirable plans to increase the availability of timely, complete (for students beyond only those aided under Title IV), well supported data.

Clear expectations for performance should apply to student achievement and not to the rest of 602.16(ii)-(x). These sections are not amenable to performance metrics taken one by one. Quality is reviewed by accrediting agencies and expert peer reviewers. Beyond that topic by topic review, these dimensions are best understood comprehensively in the degree to which they do or do not contribute to institutional or program outcomes for student achievement. Most significantly, specifying criteria for each of them separately would take accreditation backward to a time of inputs, reducing the positive emphasis on outcomes that ED and accrediting agencies agree on. placed in how the elements of an instit or program work together to generate student success.

#### **Current language for comparison:**

~~(1) The agency's accreditation standards must set forth clear minimum expectations of performance that the agency must verify and enforce for the institution or program it accredits, including by using, where appropriate, consistent and reliable data, which may include Federal data. The accreditation standards must set forth minimum expectations in the following areas:~~

Alternative:

(a)(1)(i) The agency sets forth and monitors clear performance expectations with respect to student achievement in relation to the institution's mission, which may include different expectations applicable to different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates. Student achievement expectations and student performance expectation shall be based on valid and reliable data, which may include Federal data to the extent appropriate and available.

**Note:** This language applies only to (i), “student success” and not the other standards (ii)-(x), as proposed by ED.

#### **602.20 Enforcement of Standards**

**Rationale:** To date there has not been a limit on good cause extensions. Some agencies have set durations for extensions, and two years is commonly chosen maximum period. We suggest that two years be adopted as the allowable extension period. It is worth noting that an institution would have to carry out its improvements and report on them during the one year period, and

agencies may be expected or attempt to also complete the compliance review. The effect would be that a one year extension period would actually allow far less than a year to plan and carry out improvements and report on compliance.

The alternative language for (5) simply makes the point more directly. The purpose of the reference to 'sole discretion of the agency' is not apparent and should be deleted.

**DATA REQUEST:** In response to the assertion that institutions continue to be accredited "for too long," we ask ED:

- 1) To provide information on the time from institutions being placed on sanction or adverse action to either being found in compliance or accreditation withdrawn.
- 2) Federal rules require that an institution remain accredited while an agency sanction or adverse action is under review or on appeal. Does ED have information about how long that has extended accreditation while those processes are concluded?

A suggestion was made to insert the notion of "predominant program" length to the maximum period of extension. This would introduce ambiguity and variation, requiring in some cases a complicated calculation that could shift every time an institution added or dropped one or more programs, creating constantly changing institution-specific time horizons in order to address a vague, speculative issue. Note that the period of extension is a maximum – the agency is always responsible for determining the appropriate period and can allow less than the maximum.

Alternative: (Language in red proposed by ED in 1<sup>st</sup> meeting)

~~(b) Notwithstanding paragraph (a) of this section, the agency must have a policy for taking an immediate adverse action, and take such action, when the agency has determined that such action is warranted.~~

(1) Immediately initiate **(when the agency has determined that such action is warranted),** adverse action against the institution or program; or

~~(c) If the institution or program does not bring itself into compliance within the specified period, the agency must take immediate adverse action unless the agency, for good cause, extends the period for achieving compliance **for a maximum of two additional years.**~~

.....

~~(h) Nothing in this part prohibits an agency from permitting the institution or program to be out of compliance with one or more of its standards, policies, and procedures adopted in satisfaction of §§ 602.16, 602.17, 602.19, 602.22, and 602.24 for a period of time, as determined by the agency annually, not to exceed three years unless the agency determines there is good cause to extend the period of time, and if—~~

~~...(5) An institution out of compliance as described in paragraphs (a) and (b) of this section is not permitted to the extension provided for in this paragraph (h) unless the special circumstances described in this paragraph constitute a new and independent cause for the noncompliance, and such extension is provided at the sole discretion of the agency.~~

Alternative:

(5) An extension under this provision can only be granted by the agency if the special circumstances constitute a new cause for the non-compliance.

## Sec. 602.22 Substantive Change

### 1. Written Arrangements -

**Rationale:** Institutions are responsible for compliance and outcomes for all educational activities carried out under their accreditation. The institution should be responsible for demonstrating the capacity and quality of the entity providing education components within its program, subject to scrutiny and oversight by the agency.

Current ED Proposal:

(a)(1)~~N~~(M) Entering into a written arrangement under 34 C.F.R. § 668.5 under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 and up to 50 percent of one or more of the accredited institution's institutional programs. The agency's evaluation of a written arrangement must be based on the agency's standards for executing a written arrangement with an ineligible institution or organization. At a minimum, those standards must include an assessment of the ineligible institution's or organization's administrative and financial capacity and expertise to deliver the portion of the program provided under the arrangement.;

Alternative:

(M) Entering into a written arrangement under 34 C.F.R. § 668.5 under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 and up to 50 percent of one or more of the accredited institution's educational programs. The agency's evaluation of a written arrangement must be based on the agency's requirements for executing a written arrangement with an ineligible institution or organization. Those requirements must include—

(i) A demonstration by the accredited institution that the ineligible institution or organization has sufficient capacity and expertise to deliver the portion of the program provided under the arrangement and

(ii) A requirement that the accredited institution retains the responsibility for the educational outcomes and compliance with the accrediting agency's standards and appropriate protection for enrolled students irrespective of any such arrangement.

**Rationale:** Agencies consider the accreditation history, financial situation, and relevant issues in reviewing substantive change proposal. If this additional notification to the Secretary is to have value it should address situations worthy of that level of effort and opportunity for department review. The inclusion of provisionally certified institutions is overbroad (see sec. 668.13 (certification procedures for institutions), the term “negative action” is undefined, and a three-year look back is too long.

ED's additional language is not necessary as accreditors currently go through these steps, and ED reviews our decisions. While it would be better to delete this entirely, if kept, we propose the following language to focus the requirement:

(b) If the agency approves a substantive change for an institution that is on probation or equivalent status, has been subject to a negative action by the agency over the prior three academic years, or that is provisionally certified by the Secretary pursuant to one or more of the reasons set forth in under 34 C.F.R. § 668.13(c)(1)(ii)(C)-(iii), the agency must notify the Secretary within 30 days of its approval of the substantive change. With its notification, it must provide an explanation for the agency's basis for concluding that the substantive change is approvable. For why it approved the change, consistent with its standards, and describe the agency's analysis of any risks that the substantive change might pose, including as a result of the institution's status under probation or equivalent status, negative action, or provisional certification.

## 2. Site visits

**Rationale:** The value and choice of sites to visit should be determined by the agency, using risk-based approaches designed to assure sufficient review and compliance with standards. Many of the issues listed in the ED draft can be or indeed must be reviewed at the institutional level, such as financial resources, faculty role in governance, curriculum, long term planning. Agencies have authority to and do schedule additional or unannounced visits as needed to respond to general considerations for an institution or specific issues involving particular locations. The reasonableness of the sample design is a subject for ED review of the agency.

Alternative:

(c) The agency must have an effective risk-based mechanism reflecting factors such as compliance history, financial health, location-specific issues, outcomes or complaints, and other relevant factors for conducting, at reasonable intervals, visits to a representative sample of additional physical locations approved under paragraphs (a)(1)(ii)(KH) and branch campuses approved under paragraph (a)(1)(ii)(L) of this section,

## Sec. 602.23 Operating Procedures All Agencies Must Have

### 1. Posting petition on agency site:

Alternative (in green):

(b) The agency must post all materials included with an application for initial recognition or in the case of an agency seeking renewal post the agency's petition for renewal of recognition or its compliance report, with any redactions consistent with § 602.30(f)(1) and (2), on its website no later than 30-35 days after submission to the Department. The agency may redact information that the agency is required to designate under § 602.30(f)(1)(iii) from the materials before posting them on its website.

### 2. Complaints

**Rationale:** Agencies handle complaints from student, faculty, staff, and trustees. Complaint policies and practices have been revised and improved recently by many

agencies. Best practice focuses on clarity and simplicity about submission, and securing sufficient information to investigate the matter.

Five years for complaint submission is both too long – it is preferable to receive complaints as soon as reasonably possible so that the situation can be remedied or non-compliance identified and dealt with – and potentially too short, if the complainant could not have known of the facts that gave rise to the complaint. The alternative language would provide for a basic period of three years while at the same time assuring that the period required for institutional processing did not eat into the time to file a complaint and also permits filing at any time that the individual learned of the facts giving rise to the complaint.

A suggestion made during negotiation that the period be the same as the period of reaffirmation would be problematic. Some agencies affirm institutions for differing periods of time (e.g., 6, 8 or 10 years) which would have the anomalous effect of making the complaint period shorter for schools accredited for the shorter period; this would also be confusing for processing.

The language “otherwise observed” should not be included in the complaints section. Agencies are required to and do pursue information from all sources that warrant follow up into an institution’s compliance with its standards, but they should not be treated as complaints for procedural purposes.

*Time period*

Alternative:

(d)(1)(ii) Acceptance of complaints submitted within three five years after the date of the incident detailed in the complaint, or the completion of the processing or determination of the complaint by the institution, or the time that the complainant learned of the facts giving rise to the complaint

3. Third-party comments when switching accreditor:

**Rationale:** ED’s proposed language on third-party comments here is redundant. Agencies already have authority to accept comments on agency actions and to provide for methods such as hearings to receive them.

Alternative: (Delete ED’s proposed language)

(2) in considering an application of an institution that is changing accrediting agencies as a result of State legislation compelling the change, the agency must provide an opportunity for third-party comments, including from the public and the institution’s faculty, staff, and students. At the agency’s discretion, third-party comment may be received in writing, at a public hearing, or both.

## 602.24 Additional Procedures Certain Institutional Agencies Must Have

### 1. Teach Outs:

**Rationale:** Teach out plans and agreements should be required when they are needed to protect students in the planned, likely or possible situation of closure of the school or program. Agencies are required to secure teach out plans when a probation or show cause is imposed, in the case of a warning if warranted given the basis for the warning, and in all other cases [if there is plan or risk of closure -- *best way to say this?*]. And the triggers beyond current requirements—but not require all institutions to have a teach out.

Alternative: (c) Teach-out plans and agreements.

(1) The agency must require an institution it accredits to submit a teach-out plan, as defined in 34 CFR 600.2, to the agency for approval upon submitting an application for initial or renewal of accreditation.

(2) The agency must require an institution it accredits to submit a teach-out plan, as defined in 34 CFR 600.2, to the agency, or update its teach-out plan to the agency for approval upon the occurrence of any of the following events and annually until the issue has been resolved:

(i) For a nonprofit or proprietary institution, the Secretary notifies the agency of a determination by the institution's independent auditor expressing doubt about the institution's ability to operate as a going concern or indicating an adverse opinion or a finding of material weakness related to financial stability.

(ii) The agency acts to place the institution on probation or equivalent status or takes any other formal action against the institution related to its financial health.

(iii) The Secretary notifies the agency that -

- (A) the institution's participation in is participating in title IV, HEA programs has changed from full to provisional certification pursuant to one or more of the reasons set forth in 34 C.F.R. § 668.13(c)(1)(C)(i)-(iii) under a provisional program participation agreement and the Secretary has required a teach-out plan as a condition of participation. or
- (B) the institution has pending claims for borrower relief discharge that, if approved could total 5 percent or more of the institution's annual title IV, HEA volume.

### 2. Closed institutions

(d) Closed institution. If an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and the appropriate State agency to assist students in finding reasonable opportunities to complete their education without additional charges, including actions such as —



(i) Working with institutions to secure teach-out agreements that meet the requirements of §602.24(c)(9);

(ii) Where a teach-out agreement cannot be arranged, working with institutions identified in the teach-out plan to secure transfer options with those institutions that meet the requirements of §602.24(c)(9);

(iii) Making teach-out or transfer options, the terms of such options, and information on obtaining transcripts, loan discharges, and reimbursement publicly available on the agency's website; and (iv) Sharing such information with appropriate State agencies and, as applicable, with other recognized accrediting agencies.

### 3. Transfer of credit

**Rationale:** While increasing information about transfer policies and student outcomes can be helpful ~~the reporting and categories contemplated by these new requirements~~ ~~ED would require~~ ~~is~~ ~~are~~ potentially very confusing and would not be useful of help to students and prospective students.

(e) *Transfer of credit policies.* The accrediting agency must confirm, as part of its review for initial accreditation or preaccreditation, or renewal of accreditation, that the institution has transfer of credit policies that—

(1) Are publicly disclosed in accordance with §668.43(a)(11);

(2) Include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution;

(3) Include information on the average time to completion for transfer students;

(4) Include information on the share of transfer students enrolled at the institution; and

~~(3)~~(5) Include information on credit transfer acceptance rates;

(6) Are designed to be consistently and fairly applied and which do not discriminate on the source of accreditation; and

(7) Include an assessment of the equivalency of the credits being requested for transfer

## 602.26 Notification of Accrediting Decision

**Rationale:** Agency decision letters vary and may not provide information in a form that is useful for this purpose. This language would better suit the purpose of the requirement to indicate the substance of the decision in a clear, useful form.

(b) Provides the decision letter or clear notice of the basis for a final decision of a probation or equivalent status or an initiated adverse action to the Secretary, the appropriate State licensing or authorizing agency, and the appropriate accrediting agencies at the same time it notifies the institution or program of the decision and requires the institution or program to disclose such an action within seven business days of receipt to all current and prospective students;

## §602.27 Other information an agency must provide the Department.

**Rationale:** It seems odd to be asked to provide the Department with a list of institutions that have recently been approved by it to apply to change accreditors. To the extent that ED wants to understand the scale of institutions seeking initial accreditation from an agency for reasons relating to capacity, agencies could be asked to indicate the number of (US? All?) institutions in the queue from which they have accepted applications. (However, one risk that has been suggested is that schools on such a list might overstate the chance of their accreditation, or the list might suggest to the public that their prospects for approval were good). Instead, a simple number of institutions seeking accreditation or pre-accreditation should be adequate to serve ED's stated purpose of monitoring when increased scale of applications might warrant inquiry into agency capacity.

(2) A list, updated semi-annually, of any institution eligible for or participating in title IV, HEA programs that has applied for initial accreditation to the agency and for which the agency has accepted or acknowledged the application for processing;

Alternative:

(2) the number, updated annually, of [US? all?] institutions that have applied to the agency for initial accreditation and have been accepted for processing.