June 4, 2024

Miguel Cardona
Secretary of Education

James Kvaal
Under Secretary of Education

U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Dear Secretary Cardona and Under Secretary Kvaal,

On behalf of the undersigned higher education organizations, we are writing to express concerns regarding the proposed changes to regulations for distance education and return to Title IV for distance education courses from the recent negotiated rulemaking sessions. As the final proposed language did not reach consensus, we hope the Department will give due consideration to our concerns and seek a balanced approach to the proposed regulations. We wish to highlight two especially problematic areas in the final proposed language during rulemaking:

- Requiring attendance-taking for all distance education courses (Issue Paper 4: Withdrawals and Return to Title IV Funds).
- Disallowing asynchronous distance education courses for clock hour programs (Issue Paper 3: Distance Education).

We also wish to support the following proposals, the last one with some caveats:

- Redefining the thresholds for "substantive change" reviews for distance education programs (Issue Paper 5: Accreditation).
- Defining a distance education course (Issue Paper 3: Distance Education).
- Categorizing distance education programs into a "virtual location" (Issue Paper 3: Distance Education).

We understand the intent of the proposals is to protect students as consumers as well as federal financial aid funds. These are intentions that we strongly support. Where we can, we offer alternate pathways to balance student protection with reducing negative student impacts and the strain on limited resources to ensure compliance at a time when so many institutions are facing immense challenges.

Overall Concerns Regarding Proposed Changes to Distance Education Regulations
We appreciate the Department's goals to ensure access to quality education. For the first two proposals listed above, we have concerns about the discussions and thinking that went into the development of the proposed language:

- *Bimodal Thinking* – The Department may be using an outdated framework that instructional modality is either distance education or it is not. In actuality, faculty employ

every combination of in-person and online modalities imaginable. Accrediting agencies have generally taken a more holistic approach in understanding that quality and student protections should be the same for all students…regardless of modality.

- *Lack of Evidence* – Despite calls for data from negotiators, the evidence of student harm or institutional noncompliance was minimal. This is concerning to us, given the real-life impact of these proposals.

Additionally, we have concerns about the practical consequences upon students and institutions should this regulatory language move forward:

- *Negative Impact on Students* – Marginalized communities may be the most affected by increased costs and reduced program availability.
- *Institutions Facing Significant Additional Compliance Requirements* – Heightened financial pressures due to increased compliance costs will result in resources that could otherwise be directed toward student support and educational innovation. This could discourage institutions from serving students or increasing the price paid by students.

Proposals that are Problematic

1. Requiring attendance-taking for all distance education courses (from the Return to Title IV issue).

> **Problem as expressed by the Department:**
> Institutions are to determine the "last date of attendance" for a student who withdraws from an institution without notice. For distance education courses, logins do not count. The institution is required to provide evidence of the student's last date of "academic engagement" (e.g., taking a test, submitting a paper, participating in an online discussion about course content). We understand the Department is concerned that:
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> - some institutions are not properly calculating the "last date of attendance," or
> - some institutions set the "last date of attendance" so that they experienced a financial gain.
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> **Proposed elements we find problematic or lacking in clarity:**
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> - Statistics on the number of institutions in non-compliance were requested by negotiators and not provided by the Department. For the organizations that developed this letter, non-compliance on "last date of attendance" has not been a commonly reported problem.
> - The claim was made that the proposed change would "simplify" the "last date of attendance" process. This seems to confuse the requirements for "regular and substantive interaction" with those of "last date of attendance."
> - In talking to numerous institutional personnel and a representative from the National Association of Student Financial Aid Administrators (NASFAA), the "simplification" appears to be true in two cases: if the institution is fully online or if the institution is already an attendance-taking institution. All others reported numerous problems including:
>   - Having to capture every instance of academic engagement in the LMS or other software.

- - Having to create new connections between the LMS and financial aid systems.
    - Having to address this requirement across multiple LMS systems at large institutions.
    - Developing and disseminating institutional policies and procedures on how to implement this requirement.
    - Developing and offering faculty and staff development on how to implement this requirement.
- In brief, this "simplification" is much more work to obtain the same piece of evidence for "last date of attendance" as is currently done. Every instance of academic engagement would need to be archived for every student rather than just finding the test, paper, or discussion post for those few students who withdraw without notice.
- Also, there is concern about the requirement to document the student's withdrawal after 14 days. Is this automatic or is the institution to contact the student? Institutional personnel reported that, with adult learners, it was not uncommon for them to not engage in coursework for a few weeks, but still complete the course successfully.
- The 14-day requirement will also create more burden for faculty to understand, administer, collect, and archive formal leave of absence notices for students who will be gone for more than 14 days. Examples of such leaves include students on temporary military duty or those experiencing health issues.
- There are academic implications, as well. To improve learning and to address academic integrity requirements, some faculty have employed "authentic assessment" techniques that engage the student in research or studies in the community or in their chosen profession. Sometimes these assignments take more than 14 days of research or fieldwork. Meanwhile, the instructor is available for questions, but the possible lapse in academic engagement will need to be documented.

Alternate Pathways for Improving "Last Date of Attendance" Compliance
According to the *2023-24 Federal Student Aid Handbook, Volume 5* states under "Documentation of a withdrawal date": "*A school must document a student's withdrawal date and maintain that documentation as of the date of the school's determination that the student withdrew. The determination of a student's withdrawal date is the responsibility of the school,* not the student. *A student's certification of attendance that is not supported by institutional documentation is not acceptable.*"

The responsibility of the institution is clear. The Department should not dictate the method of compliance. Instead, we would be happy to work with the Department to develop examples of good practices in complying with this regulation. Additionally, the Department could issue guidance and Q&As on practices that it will flag as being non-compliant. These alternatives will be far more cost-effective than what is proposed.

2. Disallowing asynchronous distance education courses for clock hour programs (from the Distance Education issue).

Problem as expressed by the Department:
We understand from the Department that the concern is that several institutions were not properly tracking the clock hours spent by students in asynchronous instructional activities. Since aid is disbursed by the clock hour, it is unclear if the student is involved for the proper amount of time or if the requisite learning is occurring.

Proposed elements we find problematic:

- Statistics on the number of institutions in non-compliance were requested by negotiators and not provided by the Department.
- The Department noted that they observed some institutions had gone to considerable effort and expense to employ software and develop processes to closely track clock hour engagement. Yet, these institutions would be punished along with those not in compliance.
- The professional and practical programs that will be affected commonly enroll students eligible for Pell grants and those in communities not well-served by traditional higher education.
- Additionally, one negotiator expressed concern that asynchronous clock hour programs were merely "learning through YouTube" and, therefore, should be ineligible for financial aid. This comment does not reflect quality asynchronous learning. We are concerned that a broad brush was used to impugn all asynchronous distance education and are deeply disappointed that such a generalization went unchallenged.

Alternate Pathway to Address Asynchronous Clock Hour Programs
This is quite a conundrum as the Department's hands are statutorily tied to an anachronistic form of measuring instruction and learning. The Department expects institutions to measure the amount of time spent on learning activities. During in-person instruction, the instructor is trusted to monitor student activity and the minutes of student engagement. No direct evidence is collected or required. For online instruction, direct evidence is required. That evidence is tied to time on task, independent of any assessment of actual learning.

If the Department decides it needs this direct evidence, we recommend that those who can provide it should be allowed to continue to do so. Many institutions would unlikely be able to meet that standard, but those who have invested the time and effort to track student engagement should still be eligible to use asynchronous instruction.

We also believe that there are rubrics that equate the activity in a clock hour in-person course to those taught asynchronously. We understand the Department feels that it can only trust systems that track every student for every minute. If that is the case, then we wonder why the same requirement is not placed on in-person instruction.

Proposals that We Support

1. Redefining the thresholds for "substantive change" reviews for distance education programs (from the Accreditation issue).

> The current "in whole or in part" standard for accreditation reviews of distance education was ill-conceived and unenforceable. For most institutions, it would be hard to find a program where a student cannot take an online course. The proposed standards are reasonable and save the accrediting agencies from the untenable requirement currently placed upon them. However, by defining a "distance student" as one who takes at least one distance course, institutional leaders have told us that the vast majority of institutions will pass that threshold. We are not sure if that was the Department's intent.

2. Defining a distance education course (from the Distance Education issue).

> The Department has many official or functional definitions of "distance education," "distance education programs," and "distance education courses." Tying the course definition to the familiar interpretation used by IPEDS helps institutions in classifying their courses and simplifying their compliance efforts.

3. Categorizing distance education programs into a "virtual location" (from the Distance Education issue).

> With the substantial caveat stated below, we agree with the Department's goals of a) increasing student access to closure protections if an institution drops all of its distance programs and b) collecting more data on distance education programs.
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> A CAVEAT: We worry that the Department is using dated bimodal thinking in considering "distance education" vs "in-person education." The current reality is that the use of digital learning technologies is a spectrum with courses at every point along the way. We also have witnessed distance education critics and (sometimes) Department staff make a correlation vs causation error in reviewing research of distance education outcomes. Students often choose online learning due to time constraints, work obligations, or personal or family commitments. Those issues are factors in their outcomes.
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> Modality is not the only variable for positive or negative student outcomes. A recent University of Florida study was featured in *Inside Higher Ed* with the title: "Report: Online Education Completion Lags Behind Face-to-Face Instruction." Unfortunately, the article failed to note an important caveat cited in the actual report (pp. 24-25, underlining added):
> *"A disproportionate share of exclusively online students face time- or location-based constraints that can make them less likely to graduate from college—regardless of medium of instruction...However, <u>we encourage readers to interpret our findings as another piece of evidence suggesting that online education can have a negative influence on students' academic outcomes, but that does not necessarily suggest that enrolling in an exclusively online degree program is the sole cause of a given student's decision to leave college without a degree</u>."*

Although we agree with the Department that more research on distance education is needed, we trust the Department to refrain from conflating correlation with causation regarding student outcomes in distance education courses, especially in light of most studies and meta-studies demonstrating there is "no significant difference".

We thank you for your attention to this letter. We respectfully request that the Department of Education consider these points carefully as it works to develop proposed regulations. Any new regulations must strengthen, rather than weaken, student access to high-quality distance education programs.

We appreciate your attention to these serious concerns and are available to discuss these issues in more detail at your convenience. Our aim is to collaborate constructively to develop regulations that fully support the advancement of quality and accessible higher education for students regardless of location, time constraints, or traditional barriers to postsecondary success.

Sincerely,

WCET
UPCEA
OLC
QM
American Association of Community Colleges
Distance Education Accrediting Commission