
Prison Education Programs Subcommittee

(Comprehensive)

Report-Out to Session Three
Negotiated Rulemaking Committee
Affordability and Student Loans
December 8, 2021

Neg. Reg. Subcommittee Members

- Consumer Advocacy Organizations: Belinda Wheeler, Vera Institute of Justice
 - Financial Aid Administrators: Kim Cary, Ozarks Technical Community College
 - Formerly Incarcerated Students: Stanley Andrisse, Howard University College of Medicine
 - Groups that Represent Incarcerated Students: Terrell Blount, Formerly Incarcerated College Graduates Network
 - Postsecondary Institutions that are Prison Education Program Providers: Terrence S. McTier, Jr., Washington University in St. Louis
 - State Correctional Education Directors: Marisa Britton-Bostwick, Montana Correctional Enterprises
 - State Higher Education Executive Officers: Angie Paccione, Colorado Department of Higher Education
 - Department of Corrections Representative: Anne L. Precythe, Director of the Missouri Department of Corrections
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Neg. Reg. Subcommittee Timeline

Session 1: October 18 through October 20, 2021

- <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/amendatorylanguagepep-508c.pdf>

Session 1 “report out” to the main committee: November 1, 2021

- <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/pepprogreout.pdf>

Session 2: November 8 through November 10, 2021

- <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/prison-education-programs.pdf> (v. 2 Document received prior to discussions)
- <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/pepsesseamendlangday3.pdf> (v.3 Document populated during discussions)
- <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/pepsess2amendlang.pdf> (v.4 Document populated at the conclusion of our discussions)
- Temperature checks were taken on the final day of the subcommittee (11/10/2021) to determine points of consensus or no consensus.
- New [v.5 Document 11/30](#) forwarded by ED to subcommittee

Session 2 “report out” to the main committee: December 8, 2021

Areas of Consensus*

- **34 CFR § 600.2 Definitions**
- **34 CFR § 600.7 Conditions of institutional ineligibility**
- **34 CFR § 600.10 Date, extent, duration, and consequence of eligibility**
- **34 CFR § 600.21 Updating application information**
- **34 CFR 668.8 Eligible Program**
- **34 CFR § 668.32 Student Eligibility – general**
- **34 CFR § 668.43 Institutional Information
(668 Subpart P – Prison Education Programs)**
- **34 CFR § 668.234 Scope and Purpose**
- **34 CFR § 668.237 Accreditation Requirements**
- **34 CFR § 668.239 Reporting Requirements**
- **34 CFR § 668.240 Limit or Termination of Approval**
- **34 CFR § 668.242 Transition to Prison Education Program**
- **34 CFR § 690.62 Calculation of a Federal Pell Grant**

* (as noted by temperature checks on the final day of the subcommittee [11/10/2021])

34 CFR § 600.2 Definitions - Consensus

Additional location: A facility that is geographically apart from the main campus of the institution and at which the institution offers at least 50 percent of a program and may qualify as a branch campus.

A Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility or other similar correctional institution is considered to be an additional location as defined under 34 CFR 600.2 even if a student receives instruction primarily through distance education or correspondence courses at that location.

Confined or incarcerated individual means an individual who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. An individual is not considered incarcerated if that individual is subject to or serving an involuntary civil commitment, in a half-way house or home detention, or is sentenced to serve only weekends.

Juvenile justice facility: A public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws -

- (1)** Are accused of committing a delinquent act;
- (2)** Have been adjudicated delinquent; or
- (3)** Are determined to be in need of supervision.

34 CFR § 600.7 Conditions of Institutional Ineligibility - Consensus (1 of 3)

(a) General rule. For purposes of title IV of the HEA, an educational institution that otherwise satisfies the requirements contained in §§ 600.4, 600.5, or 600.6 nevertheless does not qualify as an eligible institution under this part if -

(iii) More than twenty-five percent of the institution's regular enrolled students were incarcerated;

(c) Special provisions regarding incarcerated students -

(1) Waiver Exception. The Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section, upon the application of an institution, if the institution is a nonprofit institution that provides four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma and has continuously provided an eligible prison education program approved by the Department under subpart P of 34 CFR part 668 for at least two years. The Secretary does not grant the waiver if -

(i) For a program described under paragraph (3)(ii) of this subsection, the program does not maintain a completion rate of 50 percent or greater; or

(ii) For an institution described under paragraphs (c)(2) or (3) of this subsection—

(A) The institution provides one or more eligible prison education programs that are not compliant with the requirements of subpart P of 34 CFR part 668; or

34 CFR § 600.7 Conditions of Institutional Ineligibility - Consensus (2 of 3)

(B) The institution is not administratively capable under 34 CFR 668.16 or financially responsible under 34 CFR Subpart L

(2) *Waiver for entire institution.* If the nonprofit institution that applies for a waiver consists solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section for the entire institution.

(3) *Other waivers.* If the nonprofit institution that applies for a waiver does not consist solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section on a program-by-program basis-

(i) For the four-year and two-year programs for which it awards a bachelor's degree, an associate degree or a postsecondary diploma; and

(ii) For the other programs the institution provides, if the incarcerated regular students enrolled in those other programs have a completion rate of 50 percent or greater.

(4) *Waiver Limitations.*

(i)(A) For five years after the Secretary grants the waiver, the institution may not enroll more than fifty percent of the institution's regular enrolled students as incarcerated students; and

34 CFR § 600.7 Conditions of Institutional Ineligibility – Consensus (3 of 3)

(B) For the five years following the period described in subsection (A), the institution may not enroll more than seventy-five percent of the institution's regular enrolled students as incarcerated students.

(ii) The limitations in subsection (i) do not apply if the institution is a public institution chartered for the explicit purpose of educating incarcerated students, as determined by the Secretary, and all students enrolled in a prison education program for the institution are located in the state in which the institution is chartered to serve.

(5) The Secretary limits or terminates the waiver described in this subsection if the Secretary determines the institution no longer meets the requirements established under (c)(1) of this subsection.

(6) If the Secretary limits or terminates an institution's waiver under (c)(4) of this subsection, the institution ceases to be eligible for the title IV, HEA programs at the end of the award year that begins after the Secretary's action unless the institution, by that time –

(i) Demonstrates to the satisfaction of the Secretary that it meets the requirements under (c)(1) of this subsection; and

(ii) The institution does not enroll any additional incarcerated students upon the limitation or termination of the waiver and reduces its enrollment of incarcerated students to no more than 25 percent of its regular enrolled students.

34 CFR § 600.10 Date, Extent, Duration, and Consequence of Eligibility - Consensus

(c) Educational programs.

(1) An eligible institution that seeks to establish the eligibility of an educational program must obtain the Secretary's approval -

(i) Pursuant to a requirement regarding additional programs included in the institution's program participation agreement under 34 CFR § 668.14, ;

(ii) For the first direct assessment program under 34 CFR § 668.10, the first direct assessment program offered at each credential level, a comprehensive transition and postsecondary program under 34 CFR § 668.232, and;

(iii) For the first eligible prison education program under subpart P of 34 CFR part 668 offered at the first two additional locations as defined under 34 CFR § 600.2 at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility or other similar correctional institution; and

(iv) For an undergraduate program that is at least 300 clock hours but less than 600 clock hours and does not admit as regular students only persons who have completed the equivalent of an associate degree under 34 CFR § 668.8(d)(3).

34 CFR § 600.21 Updating Application Information - Consensus

(a) Reporting requirements. Except as provided in paragraph (b) of this section, an eligible institution must report to the Secretary in a manner prescribed by the Secretary no later than 10 days after the change occurs, of any change in the following:

* * *

(12) Its addition of a second or subsequent direct assessment program.

(13) Its establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program pursuant to 34 CFR § 668.5(c).

(14) Its establishment or addition of an eligible prison education program at an additional location as defined under 34 CFR § 600.2 at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility or other similar correctional institution that was not previously included in the institution's application for approval under as described under 34 CFR § 600.10.

34 CFR 668.8 Eligible Program - Consensus

(n) For Title IV, HEA program purposes, eligible program includes a direct assessment program approved by the Secretary under § 668.10 and, a comprehensive transition and postsecondary program approved by the Secretary under § 668.232., and an eligible prison education program under subpart P paragraph (o) of this part.

34 CFR § 668.32 Student Eligibility - General - Consensus

(c)(2) For purposes of the Federal Pell Grant Program -

(i)

(A) Does not have a baccalaureate or first professional degree; or

(B) Is enrolled in a postbaccalaureate teacher certificate or licensing program as described in 34 CFR § 690.6(c); and

(ii) If the student is a confined or incarcerated individual as defined in 34 CFR § 600.2, is enrolled in an eligible prison education program as defined in 34 CFR § 668.236.

34 CFR § 668.43 Institutional Information - Consensus

- (a) Institutional information that the institution must make readily available to enrolled and prospective students under this subpart includes, but is not limited to -
 - (5) The academic program of the institution, including -
 - (v) If an educational program is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, or is advertised as meeting such requirements, information regarding whether completion of that program would be sufficient to meet licensure requirements in a State for that occupation, including -
 - (A) A list of all States for which the institution has determined that its curriculum meets the State educational requirements for licensure or certification;
 - (B) A list of all States for which the institution has determined that its curriculum does not meet the State educational requirements for licensure or certification; and
 - (C) A list of all States for which the institution has not made a determination that its curriculum meets the State educational requirements for licensure or certification;
 - (vi) If a prison education program, as defined in 34 CFR 668.236, is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation (as described in 668.236(g) and (h)), information regarding whether that occupation typically involves State or Federal prohibitions of the licensure or employment of formerly incarcerated individuals in any other State for which the institution has made a determination about State prohibitions on the licensure or certification of formerly incarcerated individuals.

34 CFR § 668.234 Scope and Purpose - Consensus

This subpart establishes regulations that apply to an institution that offers prison education programs to confined or incarcerated individuals. A confined or incarcerated individual enrolled in an eligible prison education program is eligible for Federal financial assistance under the Federal Pell Grant program. Unless provided in this subpart, confined or incarcerated individuals and institutions that offer prison education programs are subject to the same regulations and procedures that otherwise apply to Title IV, HEA program participants.

34 CFR § 668.237 Accreditation - Consensus

- (a)** A prison education program must meet the requirements of the institution's accrediting agency or State approval agency.
 - (b)** In order for any prison education program to qualify as an eligible program, the accrediting agency must have -
 - (1)** Evaluated at least the first prison education program at the first two additional locations to ensure the institution's ability to offer and implement the program based on the agency's accreditation standards, and included it in the institution's grant of accreditation or pre-accreditation;
 - (2)** Evaluated the first additional prison education program offered by a new method of delivery to ensure the institution's ability to offer and implement the program based on the agency's standards, and included it in the institution's grant of accreditation or pre-accreditation;
 - (3)** Performed a site visit as soon as practicable but no later than one year after initiating the prison education program at the first two additional locations; and
 - (4)** Reviewed and approved the methodology for how the oversight entity made the determination under § 668.241(a)(5-7) to ensure that the prison education program meets the same standards as substantially similar programs that are not prison education programs at the institution.
 - (c)** A prison education program that does not meet the requirements of the institution's accrediting agency or State approval agency is not an eligible program under § 668.236.
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34 CFR § 668.239 Reporting Requirements - Consensus

- (a)** An institution must submit reports, in accordance with deadlines established and published by the Secretary in the Federal Register.
- (b)** The institution reports such information as the Secretary requires, in compliance with procedures the Secretary describes.
- (c)** The institution reports information about transfer and release dates of incarcerated individuals, as required by the Secretary, through an agreement with the oversight entity.

34 CFR § 668.240 Limit of Termination of Approval - Consensus

- (a)** The Secretary limits or terminates approval of an institution to provide an eligible prison education program if the Secretary determines that the institution violated any terms of this subpart or that the information that the institution submitted as a basis for approval to the Secretary, accrediting agency, state agency, State agency, or oversight entity was materially inaccurate.
- (b)** If the Secretary initiates a limitation or termination action of an institution's approval to operate an eligible prison education program, the institution must submit a teach-out plan and, if practicable, a teach-out agreement(s) (as defined in § 600.2) to its accrediting agency upon occurrence of the event.

34 CFR § 668.242 Transition to Prison Education Program - Consensus

For institutions operating eligible prison education programs in a correctional facility that is not a Federal or State penal institution:

- (a)** A confined or incarcerated student who otherwise meets the eligibility requirements to receive a Federal Pell Grant and is enrolled in an eligible program that does not meet the requirements under paragraph o of this subpart may continue to receive a Federal Pell Grant until the earlier of:
 - (1)** July 1, 2029;
 - (2)** the student reaches the maximum timeframe for program completion as defined under 34 CFR § 668.34; or
 - (3)** the student has exhausted Pell Grant eligibility as defined under 34 CFR § 690.6(e).
- (b)** An institution is not permitted to enroll a confined or incarcerated student on or after July 1, 2023, who was not enrolled in an eligible program prior to July 1, 2023, unless the institution first converts the eligible program into an eligible prison education program as defined in § 668.236.

34 CFR § 668.62 Calculation of a Federal Pell Grant - Consensus

- (a)** The amount of a student's Pell Grant for an academic year is based upon the payment and disbursement schedules published by the Secretary for each award year.
- (c)(1)(i)** For a confined or incarcerated individual enrolled in an eligible prison education program, no Federal Pell Grant shall exceed the cost of attendance (as defined in section 472 of the HEA) at the institution at which that student is in attendance.
- (ii)** If an institution determines that the amount of a Federal Pell Grant for that student exceeds the cost of attendance for that year, the amount of the Federal Pell Grant shall be reduced until the Federal Pell Grant does not exceed the cost of attendance at such institution and does not result in a Title IV credit balance under 34 CFR § 668.164(h).
- (2)(i)** If a confined or incarcerated student's Pell Grant, combined with any other financial assistance, exceeds the student's cost of attendance, the financial assistance other than the Pell Grant must be reduced by the amount that the total financial assistance exceeds the student's cost of attendance.
- (ii)** If the student's other financial assistance cannot be reduced, the student's Pell Grant must be reduced by the amount that the student's total financial assistance exceeds the student's cost of attendance.

Areas with No Consensus*

(668 Subpart P – Prison Education Programs)

- **34 CFR § 668.235 Definitions**
- **34 CFR § 668.236 Eligible Prison Education Programs**
- **34 CFR § 668.238 Application Requirements**
- **34 CFR § 668.241 Best Interest Determination**

***(as noted by temperature checks on the final day of the subcommittee [11/10/2021])**

34 CFR § 668.235 Definitions – No Consensus

The following definitions apply to this subpart (668 Subpart P):

Additional location has the meaning given in 34 CFR § 600.2.

Confined or incarcerated individual has the meaning given in 34 CFR § 600.2.

Oversight entity means—

- (1)** The appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities; or
- (2)** The Federal Bureau of Prisons.

34 CFR § 668.236 Eligible Prison Education Program – No Consensus (1 of 3)

- An *eligible prison education program* means an education or training program that—
- (a)** is an eligible program under this subpart offered by an institution of higher education as defined under 34 CFR § 600.4, or a postsecondary vocational institution as defined under 34 CFR § 600.6;
 - (b)** is offered by an eligible institution that has been approved to operate in a correctional facility by the oversight entity;
 - (c)** After an initial two-year approval, is determined by the oversight entity to be operating in the best interest of students as described by § 668.241;
 - (d)** Offers transferability of credits to at least one institution of higher education (as defined in sections 34 CFR §§ 600.4 and 600.6) in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release, as determined by the institution based on information provided by the oversight entity;
 - (e)** Is offered by an institution that has not been subject, during the five years preceding the date of the determination, to—

34 CFR § 668.236 Eligible Prison Education Program – No Consensus (2 of 3)

- (i)** any suspension, emergency action, or termination of programs under this title;
- (ii)** any final accrediting action that is an adverse action as defined in 34 CFR § 602.3 by the institution's accrediting agency or association; or
- (iii)** any action by the State to revoke a license or other authority to operate;
- (f)** Is offered by an institution that is not subject to a current initiated adverse action—
- (i)** If an accrediting agency initiates an adverse action, the institution cannot begin its first or a subsequent prison education program unless and until the initiated adverse action has been rescinded; and
- (ii)** If the institution currently offers one or more prison education programs and is subject to an initiated adverse action the institution must submit a teach-out plan, as defined under 34 CFR § 600.2, to the institution's accrediting agency.
- (g)** Satisfies any applicable educational requirements for professional licensure or certification, including licensure or certification examinations needed to practice or find employment in the sectors or occupations for which the program prepares the individual, in the State in which the correctional facility is located or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release, as determined by the institution not less than annually based on information provided by the oversight entity; and

34 CFR § 668.236 Eligible Prison Education Program – No Consensus (3 of 3)

- (h)** Does not offer education that is designed to lead to licensure or employment for a specific job or occupation in the State if such job or occupation typically involves prohibitions on the licensure or employment of formerly incarcerated individuals in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release, as determined by the institution not less than annually based on information provided by the oversight entity.
- (1)** In the case of state and local correctional facilities, the postsecondary institution does not enroll any student in a prison education program that any Federal law or State law in which the correctional facility is located, bans, bars, or prohibits licensure or employment based on any criminal conviction or specific types of criminal convictions; or
- (2)** In the case of a Federal correctional facility, the postsecondary institution does not enroll any student in a prison education program that any Federal law or State law in which more than half of the individuals confined or incarcerated in such facility will reside upon release bans, bars, or prohibits licensure or employment based on any criminal conviction or specific types of criminal convictions.

34 CFR § 668.238 Application Requirements – No Consensus (1 of 3)

- (a)** An institution that seeks to offer a prison education program must apply to the Secretary to have its first prison education program at the first two additional locations determined to be eligible programs for title IV, HEA program purposes. Following the Secretary's initial approval of a prison education program, additional prison education programs at the same location may be determined to be eligible without further approvals from the Secretary except as required by 34 CFR §§ 600.7, 600.10, 600.20(c)(1), or 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.
- (b)** The institution's prison education program application must provide information satisfactory to the Secretary that includes -
- (1)** A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;
 - (2)** Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of prison education program(s) and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency;

34 CFR § 668.238 Application Requirements - No Consensus (2 of 3)

- (3)** The name of the correctional facility and documentation from the oversight entity that the prison education program has been approved to operate in the correctional facility;
- (4)** Documentation detailing the methodology including thresholds, benchmarks, standards, metrics, data, or other information the oversight entity used in making the determination that the program is in the best interest of students for all indicators under § 668.241 of this part and how all the information was collected;
- (5)** Information of about the types of services offered to admitted students including: orientation, tutoring and academic and reentry counseling. If reentry counseling is provided by a community-based organization that has partnered with the eligible prison education program, institution, or correctional facility to provide reentry services, then information about the types of services that the community-based organization offers;
- (6)** Affirmative acknowledgement that the Secretary can limit or terminate approval of an institution to provide a prison education program as described in § 668.237;
- (7)** Affirmative agreement to submit the report to the Secretary as described in § 668.239;

34 CFR § 668.238 Application Requirements – No Consensus (3 of 3)

- (8)** Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of incarcerated individuals, which will be reported to the Department of Education; and
- (9)** Such other information as the Secretary deems necessary.
- (c)** For the second or subsequent eligible prison education program at a location, to fulfill requirements under § 600.21, an institution submits:
 - (1)** Documentation from the institution's accrediting agency noting that the institution complies with § 668.236(f) and was not subject to any final accrediting action that is an adverse action by the institution's accrediting agency or association in the last five years;
 - (2)** Documentation from the institution noting that the institution was not subject to any action by the State to revoke a license or other authority to operate in the last five years.; and
 - (3)** Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of incarcerated individuals, which will be reported to the Department of Education;

34 CFR § 668.241 Best Interest Determination – No Consensus (1 of 5)

- (a)** An oversight entity’s determination that a prison education program is operating in the best interest of students must include an assessment, with engagement from relevant stakeholders who must include, among others, incarcerated students, organizations representing incarcerated individuals, and accrediting agencies, of all of the following—
- (1)** whether the rate of confined or incarcerated individuals continuing their education post-release, as determined by the percentage of students who reenroll in higher education reported by the Department of Education, meets thresholds established by the oversight entity with input from relevant stakeholders, which must include, among others, incarcerated students, organizations representing incarcerated individuals, and accrediting agencies;
 - (2)** whether job placement rates in the relevant field for such individuals meet any applicable standards required by the accrediting agency of the institution or program or a State in which the institution is authorized. If no job placement rate standard applies to prison education programs offered by the institution, the oversight entity must define, and the institution must report, a job placement rate, with input from relevant stakeholders, which must include, among others, incarcerated students, organizations representing incarcerated individuals, and accrediting agencies;

34 CFR § 668.241 Best Interest Determination – No Consensus (2 of 5)

- (3)** whether the earnings for such individuals, or the median earnings for graduates of the same or similar programs at the institution, as measured by the Department of Education, exceed those of a typical high school graduate in the state;
- (4)** whether the rates of recidivism, which do not include any recidivism by the student within a reasonable number of years of release and which only include new felony convictions as defined by United States Sentencing Guideline § 4A1.1(a) as “each sentence of imprisonment exceeding one year and one month,” meet thresholds set by the oversight entity with input from relevant stakeholders, which must include incarcerated students, organizations representing incarcerated students, and accrediting agencies;
- (5)** whether the experience, credentials, and rates of turnover or departure of instructors for a prison education program are substantially similar to other programs at the institution, accounting for the unique geographic and other constraints of prison education programs;

34 CFR § 668.241 Best Interest Determination – No Consensus (3 of 5)

- (6)** whether the transferability of credits for courses available to confined or incarcerated individuals and the applicability of such credits toward related degree or certificate programs is substantially similar to those at other similar programs at the institution, accounting for the unique geographic and other constraints of prison education programs;
- (7)** whether the prison education program's offering of relevant academic and career advising services to participating confined or incarcerated individuals while they are confined or incarcerated, in advance of reentry, and upon release, that is substantially similar to offerings to a student who is not a confined or incarcerated individual and who is enrolled in, and may be preparing to transfer from, the same institution, accounting for the unique geographic and other constraints of prison education programs;
- (8)** Whether the institution ensures that all formerly incarcerated students are able to fully transfer their credits and continue their programs at any location of the institution that offers a comparable program, including by the same mode of instruction, barring exceptional circumstances surrounding the student's conviction;

34 CFR § 668.241 Best Interest Determination – No Consensus (4 of 5)

(9) whether the rates of completion reported by the Department of Education, which does not include any students who were transferred across facilities and which accounts for the status of part-time students, meet thresholds set by the oversight entity with input from relevant stakeholders, which must include incarcerated students, organizations representing incarcerated students, and accrediting agencies; and

(10) if applicable, other indicators pertinent to program success, as determined by the oversight entity.

(b) After the two years of initial approval under § 668.236, the institution must be determined by the oversight entity to be operating in the best interest of students, as defined in paragraph (a).

(c) Subsequent Evaluations

(1) After its initial determination that a program is operating in the best interest of students under paragraph (b) of this section, the institution must obtain subsequent final evaluations of each eligible prison education program from the responsible oversight entity not less than 120 calendar days prior to the expiration of each of the institution's Program Participation Agreements, except that the oversight entity may make a determination between subsequent evaluations based on the oversight entity's regular monitoring and evaluation of program outcomes.

34 CFR § 668.241 Best Interest Determination – No Consensus (5 of 5)

(2) Each subsequent evaluation must—

(i) Include the entire period following the prior determination and be based on the factors described under paragraph

(d) Records

(1) The institution must obtain and maintain documentation of the methodology by which the oversight entity made each determination under paragraph (a) of this section and § 668.236(b) for review by the institution's accrediting agency, submission of the application to the Department for the approval of the first program at the first two additional locations, reporting to the Department, and for public disclosure.

(2) The institution must maintain the documentation described in (1) for as long as the program is active or, if the program is discontinued, for three years following the date of discontinuance.

Updated amendatory language from ED (11/30/2021)

ED provided new language for the subcommittee on 11/30/2021.

(See v. 5 of the document on ED's [web page](#).)

Most of the new language offered by ED addressed many of the subcommittee's language concerns in these areas:

(668 Subpart P – Prison Education Programs)

- 34 CFR § 668.235 Definitions
- 34 CFR § 668.236 Eligible Prison Education Programs
- 34 CFR § 668.241 Best Interest Determination

Also, while ED did not provide any new language for section

- 34 CFR § 668.238 Application Requirements

the feedback and/or re-application process listed in 34 CFR § 668.235 and 34 CFR § 668.241 addresses the subcommittee's previous concern.

Updated 34 CFR § 668.235 Definitions (11/30/2021)

Advisory Committee is a group established by the oversight entity that provides nonbinding feedback to the oversight entity regarding the approval and operation of a Prison Education Program within the oversight entity's jurisdiction.

Confined or incarcerated individual has the meaning given in 34 CFR § 600.2.

Feedback Process is the process developed by the oversight entity to gather nonbinding input from relevant stakeholders regarding the approval and operation of a Prison Education Program within the oversight entity's jurisdiction. A feedback process may include an advisory committee.

Oversight entity means—

- (1) The appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities; or
- (2) The Federal Bureau of Prisons.

Relevant Stakeholders are individuals and organizations that provide input as part of a feedback process to the oversight entity regarding the approval and operation of a Prison Education Program within the oversight entity's jurisdiction. These stakeholders must include representatives of incarcerated students, organizations representing incarcerated individuals, state higher education executive offices, and accrediting agencies and may include additional stakeholders as determined by the oversight entity.

Updated 34 CFR § 668.236 Eligible Prison Education Programs (11/30/2021)

(h) Does not offer education that is designed to lead to licensure or employment for a specific job or occupation in the State if such job or occupation typically involves prohibitions on the licensure or employment of formerly incarcerated individuals in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release, as determined by the institution not less than annually based on information provided by the oversight entity.

(1) [...]

(3) Prohibitions to offering education to a confined or incarcerated individual do not include local laws, screening requirements for good moral character or similar provisions, State or Federal laws that have been repealed, even if the repeal has not yet taken effect or if the repeal occurs between assessments of the institution of higher education by the oversight entity, or other restrictions as determined by the Secretary.

Updated 34 CFR § 668.241 Best Interest Determination (11/30/2021) (1 of 3)

(a) An oversight entity's determination that a prison education program is operating in the best interest of students—

(1) must include an assessment with ~~engagement from relevant stakeholders, who must include, among others, incarcerated students, organizations representing incarcerated individuals, and accrediting agencies,~~ of all of the following—

(i) whether the rate of confined or incarcerated individuals continuing their education post-release, as determined by the percentage of students who reenroll in higher education reported by the Department of Education, meets thresholds established by the oversight entity with input from relevant stakeholders, ~~which must include, among others, incarcerated students, organizations representing incarcerated individuals, and accrediting agencies;~~

(ii) whether job placement rates in the relevant field for such individuals meet any applicable standards required by the accrediting agency of the institution or program or a State in which the institution is authorized. If no job placement rate standard applies to prison education programs offered by the institution, the oversight entity must define, and the institution must report, a job placement rate, with input from relevant stakeholders, ~~which must include, among others, incarcerated students, organizations representing incarcerated individuals, and accrediting agencies;~~

(iii) whether the earnings for such individuals, or the median earnings for graduates of the same or similar programs at the institution, as measured by the Department of Education, exceed those of a typical high school graduate in the state;

~~(4) whether the rates of recidivism, which do not include any recidivism by the student within a reasonable number of years of release and which only include new felony convictions as defined by United States Sentencing Guideline § 4A1.1(a) as “each sentence of imprisonment exceeding one year and one month,” meet thresholds set by the oversight entity with input from relevant stakeholders, which must include incarcerated students, organizations representing incarcerated students, and accrediting agencies;~~

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- [...] (vii) Whether the institution ensures that all formerly incarcerated students are able to fully transfer their credits and continue their programs at any location of the institution that offers a comparable program, including by the same mode of instruction, barring exceptional circumstances surrounding the student’s conviction; **and**
- (viii) whether the rates of completion reported by the Department of Education, which does not include any students who were transferred across facilities and which accounts for the status of part-time students, meet thresholds set by the oversight entity ~~with input from relevant stakeholders, which must include incarcerated students, organizations representing incarcerated students, and accrediting agencies;~~ **and**
- ~~(10) if applicable, other indicators pertinent to program success, as determined by the oversight entity.~~
- (2) may include an assessment of all the following—
- (i) whether the rates of recidivism, which do not include any recidivism by the student within a reasonable number of years of release and which only include new felony convictions as defined by United States Sentencing Guideline § 4A1.1(a) as “each sentence of imprisonment exceeding one year and one month,” meet thresholds set by the oversight entity; **and**
- (ii) other indicators pertinent to program success as determined by the oversight entity.
- (b) An oversight entity makes the best interest determination—
- (1) Through a feedback process that considers input from relevant stakeholders; **and**
- (2) In light of the totality of the circumstances.
- (c) If the oversight entity does not find a program to be in the best interest of students, it must allow for programs to re-apply within a reasonable timeframe.
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(e) Subsequent Evaluations

(1) After its initial determination that a program is operating in the best interest of students under paragraph (c) of this section, the institution must obtain subsequent final evaluations of each eligible prison education program from the responsible oversight entity not less than 120 calendar days prior to the expiration of each of the institution's Program Participation Agreements, except that the oversight entity may make a determination between subsequent evaluations based on the oversight entity's regular monitoring and evaluation of program outcomes.

(2) Each subsequent evaluation must—

(i) Include the entire period following the prior determination and be based on the factors described under paragraph (a) of this section for all students enrolled in the program since the prior determination;

(ii) **Include input from relevant stakeholders through the oversight entity's feedback process;** and

(ii) Be submitted to the Secretary no later than 30 days following completion of the evaluation.

(f) Records

(1) The institution must obtain and maintain documentation of the methodology by which the oversight entity made each determination under paragraph (a) of this section and § 668.236(b) for review by the institution's accrediting agency, submission of the application to the Department for the approval of the first program at the first two additional locations, **the input of relevant stakeholders through the oversight entity's feedback process described in paragraphs (b)(1) and (e)(2)(ii),** reporting to the Department, and for public disclosure.

(2) The institution must maintain the documentation described in (1) for as long as the program is active or, if the program is discontinued, for three years following the date of discontinuance.

Recommendations by the Subcommittee to the Main Committee

1. Areas of consensus:

The subcommittee strongly encourages the main committee follow our lead and vote in favor of the proposed amendatory language.

2. Areas of no consensus (11/10/2021) and ED's new 11/30/2021 language:

Had the subcommittee had the chance to complete another temperature check prior to this meeting, we feel confident that the subcommittee likely would have reached consensus on ED's 11/30/2021 amendatory language document. We, therefore, strongly encourage the committee to vote in favor of the proposed amendatory language.

Questions?