

August 17, 2021

New U.S. Department of Education Regulations on Distance Education and Other Title IV Program Matters Effective July 1, 2021

On July 1, 2021, several new U.S. Department of Education (Department) [final regulations](#) resulting from its 2019-20 “Distance Education and Innovation” negotiated rulemaking went into legal effect, although certain of these requirements are currently also subject to Department waivers related to the COVID-19 pandemic. These regulations affect a range of matters related to the federal student financial aid programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV programs), including distance education, competency-based learning (CBE) programs, written arrangements to provide educational programs, satisfactory academic progress, student withdrawals and leaves of absence, financial responsibility and institutional certification. Except where noted below, the final regulations largely comport with the proposed regulations published by the Department in April 2020, [which we summarize here](#). Additionally, because these regulations were developed before the onset of the pandemic, they do not reflect various temporary regulatory waivers that the Department has promulgated with respect to the pandemic. Thus, although these final regulations took effect July 1, 2021, in certain circumstances there also is a still-effective [COVID-19 waiver](#) that may take precedence for the duration of the waiver, and we have noted those instances below. The following is an overview of the key aspects of these final regulations.

General Definitions

- **Academic Engagement:** The final regulations add a specific definition of academic engagement, which has particular relevance to determining returns of Title IV program funds when a student withdraws from an online educational program. Among other things, the definition requires “active participation” by a student in at least one of a list of specified activities related to the student’s course of study. The definition excludes various passive, non-interactive or non-academic activities, including participating in housing or meal plans, utilizing academic advising or counseling, or merely “logging in” to online forums, including classes or

tutorials, without further participation.

- **Clock Hour:** The final regulations define a clock hour for purposes of a distance education program as 50 to 60 minutes in a 60-minute period of attendance in a synchronous class, lecture or recitation where there is an opportunity for direct interaction between the instructor and students. In a change from the proposed regulations, the final regulations also permit the use of asynchronous technologies for clock-hour programs, but only those for which the applicable state or other licensing body will “count” such hours as part of the student’s total clock hour instruction obligation. The final regulations further specify that a clock hour in a distance education program must meet all accrediting agency and State agency requirements, and that it does not meet the conditions of the Department’s definition if it exceeds an accrediting or state agency’s restrictions on the number of clock hours that may be offered through distance education.
- **Correspondence Courses:** The Department previously defined correspondence courses as courses where interaction between the instructor and the student in such a course is limited, is not regular and substantive and is primarily initiated by the student. The previous definition also noted that a correspondence course is typically designed so that a student proceeds through the course at the student’s own pace. However, in its commentary accompanying the proposed regulations, the Department explained that it does not consider whether a course is self-paced when distinguishing a correspondence course from a course offered using distance education. Instead, the Department evaluates the level of interaction between students and instructors in such courses, with “regular and substantive interaction” characterizing as distance education course. The final regulations thus strike the reference to “self-pacing” from the definition of a correspondence course. Additionally, for purposes of institutional eligibility regulations that limit the number of students that a Title IV-participating institution may enroll in correspondence courses, the final regulations consider a student to be “enrolled in correspondence courses” if correspondence courses constitute more than 50 percent of the courses in which the student enrolled during an award year.
- **Credit Hour:** The final regulations largely retain the previous definition of “credit hour,” including time-based requirements relative to classroom instruction and other academic activities. The final regulations require that an institution’s accrediting agency or State authorizing agency approve the amount of work determined by the institution as appropriate in meeting the requirement for a credit hour. Additionally, the Department’s prior language that defined a credit hour, in part, as “an amount of work represented by intended learning outcomes and verified by evidence of student achievement” is modified to reference work defined by an institution that is consistent with commonly accepted practice in postsecondary education. Consistent with previous sub-regulatory guidance provided in Dear Colleague Letter GEN-11-06 (March 18, 2011), the final regulations further incorporate language clarifying that, in determining the amount of work associated with a credit hour, an institution may take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines and degree levels.
- **Full-Time Student:** Unlike traditional term-based programs, subscription-based programs do not allow

students to progress from course-to-course until demonstrating competency in a given skill or subject area. The Department therefore excludes subscription-based programs from the types of term-based programs in which a student's workload may include no more than one repetition of a previously passed course. The final regulations also assess full-time enrollment status in a subscription-based program based on whether its requirements are commensurate with a full-time course load as defined by the Department's requirements for traditional term-based programs.

General Program Eligibility Matters

- **Clock-to-Credit Hour Conversion:** The final regulations revert the formula for calculating a clock-to-credit hour conversion to the regulatory methodology that was in effect from 1993 until 2011. Specifically, the minimum number of clock hours that must be included in a semester or trimester credit hour is reduced from 37.5 to 30, and the minimum number of clock hours that must be included in a quarter credit hour is reduced from 25 to 20. All references to work outside of class are removed and have no bearing on the conversion formula.
- **Direct Assessment Programs:** The final regulations simplify and clarify numerous aspects of the regulations for direct assessment programs. Among other things, in the final regulations, the Department: (1) revises the definition of “direct assessment” to state that it is a measure of a student's knowledge, skills and abilities designed to provide evidence of the student's proficiency in the relevant subject area; (2) requires an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours, which further must be consistent with the requirements of the institution's accrediting agency or State authorizing agency; and (3) clearly states that a direct assessment program that is not consistent with the requirements of an institution's accrediting agency or state authorizing agency is not an eligible program, and in order for direct assessment programs to be considered eligible programs, the agency must have evaluated the programs based on the agency's accreditation standards and criteria. Also, the Department previously required that an institution obtain its approval every time the institution seeks to add a direct assessment program to its scope of Title IV participation. The final regulations instead require an institution to obtain the Department's approval of a direct assessment program when the institution adds such a program for the first time, and when the institution offers its first direct assessment program at each new level of offering (e.g., a first direct assessment master's degree program or bachelor's degree program) than what the Department had previously approved. The final regulations then require institutions only to notify the Department regarding the second or subsequent direct assessment program at the same credential level.
- **Subscription-Based Programs:** Building upon its experimental sites initiative for competency-based education programs, the final regulations define “subscription-based program” as a standard or nonstandard-term program in which the institution charges a student for each term on a subscription basis

with the expectation that the student will complete a specified number of credit hours during that term. The final regulations further clarify that coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term, and that students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of Title IV program funds. The final regulations also require that an institution must establish a single enrollment status that applies to a student throughout the student's enrollment in a subscription-based program, except that a student may change his or her enrollment status no more often than once per academic year. Additionally, the final regulations set forth a method for determining the number of credit hours (or the equivalent) that a student in a subscription-based program must complete before receiving subsequent disbursements of Title IV program funds. Separately, the final regulations exclude subscription-based programs from certain existing requirements regarding the timing for disbursements of Title IV program funds, and instead provide that an institution may disburse funds to students in subscription-based programs no earlier than the later of (a) 10 days before the first day of classes in the payment period, or (b) the date that the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms attended.

- **Gainful Employment Program Length (Reasonable Relationship Test):** The final regulations align the Department's "eligible program" regulations (34 CFR 668.8) with existing limitations in its program participation agreement regulations (34 CFR 668.14) concerning the length of programs that are "gainful employment" programs under the Higher Education Act. Such programs include all non-degree and short-term programs at public and private nonprofit institutions, and — except for a very narrow carve-out — all programs at for-profit institutions. Under existing regulations, gainful employment programs must provide training necessary for graduates to obtain employment in a recognized field and must also demonstrate a "reasonable relationship" between the program's length and the minimum entry level requirements for that field. The final regulations cause the Department's eligible program regulations to mirror the existing program participation agreement regulations' "reasonable relationship" standard to be: (1) 150% of the minimum clock hours required for the occupation by the state in which the institution is located, or through federal agency requirements; or (2) the minimum number of clock hours required by a state adjacent to the institution's location.
- **Approval of New Programs:** The Department's regulations have long required institutions to seek its prior approval of new educational programs, in specified circumstances, before disbursing Title IV program funds to students enrolled in such programs. The final regulations require the Department to take "prompt action" in response to institutional applications that are materially complete. Additionally, in circumstances where a program requires prior Department approval for Title IV eligibility and the Department denies such approval, the final regulations require the denial to be based on existing enumerated regulatory factors (such as if the new program is inconsistent with the institution's historic program offerings, growth and operations, or, in

the case of a gainful employment program, if the institution has failed to sufficiently demonstrate that the program leads to gainful employment in a recognized occupation).

Distance Education Courses

- **Regular and Substantive Interaction:** As noted above, perhaps the most critical distinction between correspondence course and distance education courses under longstanding Department regulations is that distance education courses involve “regular and substantive interaction.” That key characteristic, however, has never been specifically defined. The final regulations thus define “regular interaction” as that which, prior to the student’s completion of a course or competency: (1) provides the opportunity for substantive interactions between instructors and students on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency and (2) monitors the student’s academic engagement and success and ensuring that an instructor is responsible for proactively engaging in substantive interaction with the student when needed, on the basis of such monitoring, or upon request by the student. Further, the final regulations define “substantive interaction” as that which engages students in teaching, learning and assessment, consistent with the content under discussion, and includes at least two of the following: providing direct instruction; assessing or providing feedback on a student’s coursework; providing information or responding to questions about the content of a course or competency; facilitating a group discussion regarding the content of a course or competency; or other instructional activities approved by the institution’s or program’s accrediting agency.
- **Permitted Technologies and Media:** The final regulations eliminate references to certain specific and largely outdated media forms (including videocassettes, CD-ROMs and the like), and instead more generically permit “other media” when used, as required under current regulations, in conjunction with the internet or certain enumerated one-way and two-way video and audio communications methods. **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**

Written Arrangements to Provide Educational Programs

- **Eligible Foreign Institutions:** The Department’s previous regulations governing foreign institutions’ eligibility for Title IV participation, with very limited exceptions for certain clinical training and independent research activities, prohibited such institutions from having written arrangements with any institutions or organizations within the United States for their students to take courses from such institutions or organizations. Additionally, a foreign institution may not permit students to enroll in any course offered by the foreign institution in the United States, including research, work, internship, externship or special studies. The final regulations allow an eligible foreign institution to enter into written arrangements with eligible institutions within the United States to provide no more than 25% of the courses required for a student’s program. The

final regulations further permit students enrolled in a program at an eligible foreign institution to complete up to 25% of their program through coursework, research, work or special studies offered by an eligible institution in the United States. In a change from the proposed regulations, the final regulations allow up to 25% of a program to be completed through internships or externships with not only Title IV-eligible institutions, but also with ineligible organizations meeting the standards in 34 C.F.R. 668.5(h) (that is, the internship or externship must be governed by accrediting agency standards or, in the case of an eligible foreign institution, the standards of certain outside oversight entities). **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**

- **Agreements between Eligible Institutions:** The final regulations revise existing regulatory language pertinent to written arrangements between two or more eligible institutions that are owned or controlled by the same individual, partnership or corporation. In such circumstances, the Department currently requires that the institution granting the degree or certificate must provide more than 50% of a programs in order for the program to be Title IV eligible. The final regulations remove this requirement. **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**
- **Agreements with Ineligible Institutions or Organizations:** Under Department regulations for written arrangements between an eligible institution and an ineligible institution or organization, the ineligible entity generally may provide no more than 25% of a program offered by the eligible institution. The Department further permits an ineligible entity to provide between 25% and 50% (but always less than 50%) of an eligible institution's program if: (1) the eligible institution's accrediting agency has approved the arrangement and (2) the eligible institution and the ineligible entity are not owned or controlled by the same individual, partnership or corporation. The final regulations formally specify how these percentage limitations are to be calculated and require institutions to notify the Department within 10 days of entering into any written arrangement with an ineligible entity to provide more than 25% of a program. (The proposed regulations would have added to existing standards for entry into such a written arrangement that an ineligible institution or organization demonstrate both: (1) experience in the delivery and assessment of the program or portion of the program they will be contracted to deliver under the provisions of the written arrangement and (2) that the program has been effective in meeting the stated learning objectives; however, the Department removed these provisions from the final regulations.)
- **Aligning Programs with Workforce Needs:** The final regulations clarify that institutions utilizing written arrangements may align or modify their curriculum in order to meet the recommendations or requirements of industry advisory boards or industry-recognized credentialing bodies. This flexibility to account for established industry standards in designing programs extends to institutional governance or decision-making changes where an institution looks to such standards as an alternative to allowing or requiring faculty control or approval.

Academic Year Requirements

- **Week of Instructional Time:** As pertains to an institution's definition of its “academic year,” the final regulations revise the definition of a “week of instructional time” into two parts: one that applies to traditional postsecondary programs and one that applies to programs using asynchronous coursework through distance education or correspondence courses. The definition for traditional programs remains unchanged. For purposes of a program using asynchronous coursework through distance education or correspondence courses, a week of instructional time is defined as a week in which the institution makes available the instructional materials, other resources and instructor support necessary for academic engagement and completion of course objectives. **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**
- **Required Academic Engagement:** Additionally, the final regulations require students in a program using asynchronous coursework through distance education (not a correspondence course) to perform educational activities demonstrating academic engagement during each week of instructional time. The revised definition also removes current regulatory references to vacation periods and homework, and instead refers to scheduled breaks and activities not included in the separate definition of “academic engagement.”

Satisfactory Academic Progress

- **Maximum Time Frame — Assessing Student Pace of Completion:** The final regulations revise the requirements for an institution's Satisfactory Academic Progress (SAP) policy to specify the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, such that this requirement applies only to credit hour programs using standard or nonstandard-terms that are not subscription-based programs. For those programs, institutions have, in addition to dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted, the option of calculating pace by determining the number of hours that the student should have completed at the evaluation point in order to complete the program within the maximum timeframe. **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**
- **Maximum Time Frame — Calendar Time Option for Undergraduate Credit Hour Programs:** The final regulations continue to require that an institution's SAP policy specify, for all programs, a maximum timeframe within which students must complete the educational program in order to be eligible to receive Title IV funds. However, the final regulations permit the maximum timeframe for an undergraduate program measured in credit hours to be a period expressed in calendar time, as well as measured in credit hours (which is the only current option) that is no longer than 150% of the published length of the educational program.

Institutional Certification and Program Participation Agreements

- **Review of Certification Applications:** The final regulations provide that if the Department does not make a determination to grant or deny institutional certification within 12 months of the expiration date of an institution's current period of Title IV participation, the institution will automatically be granted renewal of certification, which may be provisional for cause, but not automatically provisional because the Department failed to make an affirmative decision within the 12-month time frame.
- **Graduation and Employment Statistics:** The final regulations clarify the Department's Title IV program participation agreement (PPA) requirements by specifying that institutions must make available to prospective students the most recent data available concerning employment statistics, graduation statistics, and any other information to substantiate the truthfulness of its advertisements that used job placement rates as a means of attracting students.
- **Teach-Out Plans:** The final regulations revise current PPA language regarding teach-out plans and explicitly requires an institution to update its existing teach-out plan if the Department initiates a limitation, suspension or termination of the institution's participation in the Title IV programs; the institution's accrediting agency acts to withdraw, terminate or suspend the accreditation or pre-accreditation of the institution; the institution's state licensing or authorizing agency revokes the institution's license; or the institution otherwise intends to cease operations.

Financial Responsibility

- **General:** The final regulations codify prior Department policy that it may deny an institution's application for certification or recertification to participate in the Title IV programs if it determines that an institution is not financially responsible under the standards set forth in 34 CFR Part 668 Subpart L, or if the institution does not submit its financial and compliance audits by the date permitted and in the manner required under 34 CFR 668.23. **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**
- **Past Performance:** The Department's financial responsibility regulations have generally provided, subject to certain limited exceptions, that an institution is not financially responsible if a person who exercises substantial control over the institution, or any member of that person's family: (1) owes a liability for a violation of a Title IV program requirement that is not being repaid; or (2) exercises or exercised control over another institution with an outstanding liability that is not being repaid. The regulations also define the term "ownership interest" as a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of, the operation of an institution, an institution's parent corporation, a third-party servicer or a third-party servicer's parent corporation. Those provisions also indicate that a person is considered to

exercise substantial control over an institution or third-party servicer if the person directly or indirectly holds at least a 25% ownership interest in the institution or servicer, holds at least a 25% ownership interest in the institution or servicer, represents at least a 25% ownership in the institution or servicer, or is a member of the board of directors, a general partner, the chief executive officer, or other executive officer as designated by institution, or an entity that holds at least a 25% ownership interest in the institution. Among other things, the final regulations: (a) replace the term “substantial control” in these regulations with “substantial ownership or control;” (b) revise the regulations to clarify that these past performance concerns extend not only to individual persons but also to any legal entity with substantial ownership or control; and (c) consider an institution to not be financially responsible if a person or entity who exercises substantial ownership or control over the institution, or any member or members of that person’s family, alone or together exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement that was both approved by the institution’s accrediting agency and faithfully executed by the institution.

- **Changes in Ownership or Control:** Although the Department substantially revised its requirements for institutional financial responsibility in 1998, and adopted a series of new standards — including the composite score ratio test – at 34 CFR 668.171-176, it never formally rescinded its previous financial responsibility requirements as set forth at 34 CFR 668.15. In fact, the Department’s continued practice has been to apply certain aspects of 34 CFR 668.15 when determining the financial responsibility of an institution after a change in ownership or control. The proposed regulations would have codified this practice by retitling 34 CFR 668.15 as “Factors of financial responsibility for changes in ownership or control,” and also revising language within 34 CFR 668.15 to make clear that an institution must satisfy the requirements of that section “to begin and continue to participate in any Title IV program after a change in ownership or control.” The Department decided, however, not to include these revisions in the final regulations, noting that it intends to conduct future rulemaking on financial responsibility standards, including those applicable to changes of ownership.

Student Withdrawals and Leaves of Absence

- **Standard Term Programs Offered in Modules:** The final regulations add standard term and nonstandard term academic calendar programs (except for subscription-based programs) to the types of programs in which students must be considered withdrawn if they have ceased attendance and are not scheduled to begin another course within a payment period for more than 45 calendar days after the end of the module they ceased attending.
- **Non-Term and Subscription-Based Programs:** The final regulations clarify that a student in a non-term program or a subscription-based program is considered withdrawn if the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing

attendance, unless the student is on an approved leave of absence.

- **Determining a Student Withdrawal:** Among numerous revisions to previously existing regulations regarding student withdrawals prior to program completion, the final regulations add to the existing exceptions to requirements for determining a student has withdrawn, specify additional circumstances in which a student must be considered withdrawn even if the institution has written confirmation of future attendance, and require that students enrolled in subscription-based programs may only avoid withdrawal through a written confirmation of future attendance if they indicate that they plan to resume attendance during the same payment period or period of enrollment.
- **Leaves of Absence:** The final regulations add subscription-based programs to the types of programs that do not require the institution to permit the student to complete coursework he or she began prior to the leave of absence to grant an approved leave of absence. **(Note: Certain COVID-19 waivers also remain in effect as of this date.)**

Final Audit Determinations and Final Program Review Determinations

- **Deference to Triad Agencies for Distance Education Classifications and Assignment of Credit Hours:** The final regulations clarify that if a final audit determination or final program review determination includes liabilities resulting from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Department must rely on the requirements of the institution's accrediting agency or state authorizing agency regarding qualifications for instruction and whether the work associated with the institution's credit hours is consistent with commonly accepted practice in higher education. The Department further explains this proposal as requiring that a final audit determination or final program review determination, to the extent it involves such topics, to specifically reference the accrediting agency or state authorizing agency requirements that are the basis for the Department's finding of noncompliance.

In addition to the above key provisions, the final regulations contain a number of other less significant and technical regulatory revisions. This summary of the final regulations most significant provisions should not be construed to constitute legal advice with respect to the Department's final regulations, nor with respect to any other education regulatory matters. Please do not hesitate to contact the authors if you have any questions regarding these or other education regulatory matters.

MEET THE AUTHORS



Jonathan D. Tarnow

Partner

+1 202 354 1357
Washington, D.C.
jonathan.tarnow@faegredrinker.com



John R. Przypyszny

Partner

+1 202 842 8858
Washington, D.C.
john.przypyszny@faegredrinker.com



Cindy Irani

Counsel

+1 312 569 1052
Chicago
cynthia.irani@faegredrinker.com



Sarah L. Pheasant

Associate

+1 202 230 5675
Washington, D.C.
sarah.pheasant@faegredrinker.com

Services and Industries

Government & Regulatory Affairs

Education