THE U.S. DEPARTMENT OF EDUCATION'S FINAL RULE ON INSTITUTIONAL AND PROGRAMMATIC ACCOUNTABILITY

Background

In January 2022, the Department of Education (ED) convened a group of stakeholders to serve on the Institutional and Programmatic Eligibility Committee during a negotiated rulemaking process. This committee covered an array of topics. The committee concluded the rulemaking sessions in March 2022, and a consensus vote was taken on each issue. If consensus was reached, ED made no significant modifications to the language and for the topics where no consensus was reached, ED modified the language.

Earlier this month, ED released the most substantive component from that rulemaking, on gainful employment (GE) and financial value transparency. On October 24, 2023, ED released the final rule for these remaining topics:

- Financial responsibility (no consensus);
- Administrative capability (no consensus);
- Certification procedures (no consensus); and
- Ability to benefit (consensus).

The final rule is expected to go into effect on July 1, 2024.

Final Rule Summary

Financial Responsibility

According to the Higher Education Act (HEA), institutions must be financially responsible to participate in Title IV, HEA programs. The regulations identify the criteria that public, private, nonprofit, and proprietary institutions need to meet to demonstrate that they're financially responsible. ED proposes to make the changes below to these requirements.

- An institution must meet additional requirements to satisfy its financial and administrative obligations. To meet these obligations, institutions now must:
  - ensure that Title IV credit balances are paid;
  - make all payments regarding undisputed financial obligations;
  - satisfy payroll obligations in accordance with the payroll schedule; and
  - only borrow authorized funds from retirement plans or restricted funds.
- To address possible fraud and abuse by institutions, ED has added mandatory and discretionary triggering events that may lead to a determination that an institution is not financially responsible.

  - If an institution triggers a discretionary event, such as high annual dropout rates, pending borrower defense claims, and high fluctuations in Title IV volume, then ED must determine if those events have a significant adverse effect on the financial status of the institution.

  - If an institution triggers a mandatory event, they are automatically found to fail the financial responsibility standards. Examples of mandatory triggers include the submission of a teach-out plan or agreement; whether 50 percent of Title IV revenue is received from failing GE programs; and whether the institution declares financial exigency.

- Institutions are required to provide financial protection for each mandatory or discretionary trigger.

  - If an institution is determined to not be financially responsible due to a mandatory or discretionary trigger, it will be required to provide financial protection in the form of a letter of credit or cash in escrow for each trigger. This financial protection can be released if the institution submits the audited financial statements of the two most recent fiscal years that show the administrative or financial risk caused by the event has ceased or been resolved.

- New requirements are created for institutions that go through changes in ownership.

  - When institutions undergo changes in ownership, ED establishes requirements that include items such as the submission of audited financial statements and same-day balance sheets.

- Financial responsibility for public institutions is increased.

  - Public institutions are now required to submit a letter confirming that the institution is a public institution backed by the full faith and credit of their appropriate government entity at the time of certification, recertification, after a change in ownership, and at any point ED requests.

  - Public institutions cannot be subject to either a mandatory or discretionary trigger. If public institutions meet the criteria that would result in a triggering event for private institutions, then public institutions may be placed on heightened cash monitoring, have additional reporting requirements, or have a negative action taken against them by ED (otherwise known as a finding of past performance). A public institution does not have to provide financial protection in the manner of a letter of credit or cash in escrow.

- ED is given the authority to override the documentation on audited financial statements and may decide that an institution's diminished liquidity, ability to continue operations, or ability to continue as a going concern have not been alleviated even if the financial audit indicates otherwise.

Administrative Capability

Institutions must be administratively capable of operating programs as a requirement to be eligible to participate in Title IV, HEA programs. The regulations identify the specific metrics that institutions must meet to be deemed "administratively capable." ED proposes to make the changes below to the administrative capability metrics.

- Place new requirements on institutions regarding administrative capability. Institutions are now required to:

    - provide adequate financial aid counseling;
    - provide adequate career services;
    - provide accessible clinical or externship opportunities that are related to, and required by, the program that the students are enrolled in;
    - ensure that at least half of the Title IV revenue received by an institution is not from programs that fail the GE rule and that at least half of the full-time students that are receiving Title IV funds are not enrolled in failing GE programs; and
    - not lack the ability to administer Title IV aid competently, among others.
- Clarify the requirements for evaluating a high school diploma.
    - ED proposes to define the procedures that must take place for institutions to validate a high school diploma to include obtaining documentation from the high school that confirms the validity of the diploma and, if ED creates a list of invalid high schools, making sure the school is not on the list. The rule adds a number of metrics that ED will use to determine that a high school diploma is not valid.

Certification Procedures

Institutions that want to participate in Title IV, HEA programs must receive approval from ED and have their program participation agreement (PPA) certified. An institution's PPA is valid for up to six years. Before this time expires, an institution must submit a materially complete application for recertification. ED proposes to make the changes below regarding the certification process.

- If the institution is not financially responsible or any owner or interest holder also owns another institution with fines or liabilities owed to ED and is not making payments regarding the liability, an institution's certification becomes provisional.
- Institutions can be provisionally certified for up to three years. Institutions are placed on provisional certification status for:
    - no more than one year upon initial certification;
    - no more than two years for reasons related to substantial liabilities owed to ED due to borrower defense claims, false certification discharges, or other consumer protection concerns;
    - no more than 18 months after an accreditor loses recognition; and
    - no more than three years due to changes in ownership, recertification, reinstatement, or similar actions.
- The rule requires an authorized representative of the institution, or any person who is an authorized representative of an entity with direct or indirect ownership of the institution if the entity is able to exercise control over the institution to sign the PPA.
- Any institution with GE programs must limit the number of hours for the program to the greater of the minimum number of hours required in the state for training in the recognized occupation or another state's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student so long as certain requirements are met. The rule also states that this does not apply to programs where state

entry-level requirements include the completion of an associate's degree or higher; where the program is delivered entirely through distance education; or where the program is entirely delivered through correspondence courses.

- An institution is required to meet state licensing requirements in the states where the institution is located. Also, an institution is required to meet state licensing requirements in the state where the student initially enrolled in the program or in the state where the student intends to work. A student is required to attest to the institution the state they intend to seek employment when they enroll in the program.

- Institutions must comply with state laws related to closure where distance education is offered. Regardless of NC-SARA participation, institutions are required to meet state laws related to closure where distance education is offered, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds.

- Transcript withholding is banned in certain situations.

    - Institutions that are provisionally certified cannot withhold transcripts if they are at risk of closure, closing, or not seen as financially responsible or administratively capable. Institutions cannot withhold transcripts if they made an error in administering a Title IV program that resulted in a student owing the institution funds or any fraud or misconduct on behalf of the institution.

    - In addition, institutions are required provide a student with a transcript, if they have received federal student aid or federal loans, for all the credit or clock hours for a payment period in which all institutional charges were paid or included in an agreement to pay.

- Additional requirements are placed on institutions regarding provisional certification. If an institution is provisionally certified, ED can:

    - require a teach-out plan or agreement;

    - require a records retention plan;

    - place restrictions on the institution providing a teach-out plan; or

    - place limitations on institutions entering into a written arrangement with another institution, among other things.

- Institutions are required to share with prospective and current students if their programs that are intended to lead to licensure meet, or do not meet, state licensing requirements.

- Institutions that are initially certified as nonprofit institutions or have undergone a change in ownership to convert to a nonprofit are required to meet certain requirements. Institutions are required to submit reports on accreditor and state authorization agency actions and any new servicing agreements. They are also required to share their tax-exempt documentation.

Ability to Benefit

This provision of the rule allows students to showcase that they have the "ability to benefit" from postsecondary education even though they did not receive their high school diplomas. Students can either pass an independently administered test that is approved by ED; participate in a state process approved by

ED; or complete six credit hours, or its equivalent, of college courses to be allowed to qualify for federal financial aid when attending postsecondary education.

ED is making the additional changes below regarding the ability to benefit provision.

- The approved state process is further clarified. A state that wants to offer a process as an alternative to passing an approved, independently administered test can do so with ED's approval. The state must submit an application to ED outlining the details of the process. If a state is applying for the first time, it could receive approval to operate its process for no more than two years. A success rate must be calculated for each institution participating.
- The definition and compliance requirements of an eligible career pathway program are included.
    - The definition of an eligible career pathway program is added, and the final regulation articulates how an institution can demonstrate compliance with the eligible career pathway program requirements.
- ED must approve at least one eligible career pathway program offered by an institution to verify compliance with the regulatory definition.
    - An institution that offers an eligible career pathway program before July 1, 2024 must apply to ED for approval of one of its programs and must affirm that the program meets certain standards.