

SENT VIA EMAIL

May 8, 2024

James Kvaal
Under Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Re: Proposed Regulatory Changes Following Negotiated Rulemaking

Dear Mr. Kvaal:

The Higher Learning Commission (HLC) appreciates the U.S. Department of Education's (ED) engagement of a wide range of voices in the recent negotiated rulemaking process regarding Title 34 CFR Section 602, including that of institutional accreditors, as many of the regulatory changes being considered directly apply to them.

Since the negotiators did not reach consensus on the proposed changes to the regulations regarding recognized accreditors, HLC, as a committed partner in the Triad, is providing some additional context regarding the non-consensus language from March 7 (<https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/accr-creditation-non-consensus.pdf>).

HLC is hopeful that this context will assist ED in its goal to create regulations that focus on circumstances and institutions that pose the greatest risk to students if not properly managed. HLC supports this goal to help institutions and accreditors increase student success. HLC understands that it also will have the opportunity to provide insight through the public comment period following the publication of the Notice of Proposed Rulemaking (NPRM) and will do so as applicable.

Issue #1: Composition of Decision-Making Bodies (34 CFR 602.14)

HLC is concerned about the proposed changes that would significantly alter the composition of accreditation decision-making bodies, including placing strict limitations on the number of "executive officers" that can participate in decision-making activity.

The non-consensus language specifically defines "executive officers" to be "any non-academic executive role to include the president, chief executive officer, chief financial officer, vice presidents, managing member and general partner of the institution or any entity within its ownership structure." The individuals included within this broad definition of "executive officers" are valuable members of accreditation decision-making bodies. They bring a wholistic

understanding of institutions that is essential to quality assurance reviews. They also bring strategic vision to accrediting agencies as a driver for quality improvement across the higher education ecosystem. As the individual at an institution who is ultimately responsible for the institution's operations and accreditation, chief executive officers are especially important contributors to accreditor's decision-making activities.

HLC suggests that if the concern is that there are not enough faculty and/or administrators with faculty backgrounds on decision-making bodies, ED could consider requiring that a certain proportion of decision-making bodies be comprised of such individuals. Indeed, many of the individuals in this "executive officer" category have current faculty appointments or have previously served as faculty.

Issue #2: Student Achievement Standards (34 CFR 602.16)

HLC is a member of the Council of Regional Accrediting Commissions (C-RAC) and supports the statement put forth by C-RAC on March 28, 2024, regarding the proposed changes to the regulations in the area of student achievement standards.

However, HLC is concerned that some of the currently proposed language on this topic could be confusing or have unintentional consequences when implemented. Specifically, 602.16(a)(1)(i) requires an accreditor to have expectations as to student achievement "as established by the institution." However, the proposed 602.16(a)(1)(i)(A) then requires the agency, "[w]here feasible and appropriate," to have "minimum expectations of performance." The requirements of the proposed (B)-(C) also reinforce that the accrediting agency itself is expected to have student achievement standards. It is unclear how these two concepts would work together in practice.

HLC suggests that ED consider an approach that would require an accreditor's standards to include a requirement that an institution itself establish student achievement expectations that the institution then uses for continuous improvement.

Issue #3: Substantive Change—Contractual Arrangements (34 CFR 602.22)

In the area of substantive change, HLC is concerned that the proposed requirement in 602.22(a)(1)(ii)(M)(1) that an accreditor's review of a contractual arrangement include a "confirmation that the arrangement complies with limitations on the amount of the program" would be difficult to enforce.

HLC suggests that an accreditor be required to "review that the arrangement complies with limitations..."

Issue #4: Substantive Change—Additional Locations (34 CFR 600.2 & 34 CFR 602.22)

The proposed regulations make significant changes to the definition of "additional location" and fundamentally alter how an accreditor monitors institutional compliance with accreditation standards with respect to these locations.

Definition of Additional Location

In the expanded definition of “additional location” in 34 CFR 600.2, it is unclear what “offers 100 percent of an educational program through distance education” means in (3). This definition seemingly could include, for example, a computer lab provided by an institution at which a student *could* complete 100% of an educational program. This would be very broad, difficult to track, and would change frequently. It is also unclear in (3) of the expanded definition what “notwithstanding requirements for students to complete on-campus or residential periods of 90 days or less” means or how that would be monitored.

These changes to the definition of “additional location” could deter institutions from providing equitable access to underserved populations. Consider, for example: (1) a tribal college that sets up computer labs with accessible internet at different locations on a reservation; or (2) an institution in a rural community with poor internet access that establishes a mobile classroom to visit local community centers to offer educational access.

HLC urges ED to consider limiting “virtual location” to a location at which a student is required to be present in order to gain access to virtual instruction (for example, through interactive TV or intranet-based online teaching).

Change to Visit Protocols for Additional Locations

Currently, an accreditor is required to conduct regular visits to a “representative sample” of additional locations.

HLC has well-established protocols for visiting branch campuses and additional locations, including extensive protocols for determining a “representative sample.” See HLC Multi-campus Visit Procedure (https://download.hlcommission.org/Multi-campusVisit_PRC.pdf) and Multi-location Visit Procedure (https://download.hlcommission.org/Multi-locationVisit_PRC.pdf).

These protocols provide extensive opportunity for HLC to meaningfully review institutional compliance with HLC requirements across all institutional locations.

Practically speaking, HLC already visits a large number of additional locations through its sampling protocols. Although the percentage of locations visited will vary based on the institution’s total number of locations and the type of location (additional location vs. branch campus), HLC’s current sample protocols often results in more than 65% of an institution’s locations being visited.

Adding the proposed requirements that an accreditor visit either all of an institution’s additional physical locations or, if an institution has 24 or more additional locations, that an accreditor visit the greater of either 25 of the institution’s additional locations or 50% of the institution’s additional locations, would add significant additional cost to many institutions. These costs would then likely be passed on to students.

To ensure a “representative sample,” ED could add additional requirements or characteristics that an accreditor must use to determine what is a “representative sample.”

For example: (1) a requirement that a representative sample include a certain # or certain % of institutions with various characteristics (for example: large (X # of students or greater), small (X # of students or less), specific geographic distributions, etc.); (2) a requirement that an accreditor visit all additional locations for institutions that have 2 or fewer additional locations; or (3) a requirement that a representative sample include no less than X # or X% of an institution's additional locations.

Another option would be to require an accreditor to visit all of an institution's branch campuses and additional locations for a defined period of time following a finding of concern about the institution's management of those locations as related to the accreditor's standards.

Relatedly, while additional scrutiny for all institutions that are on a sanction or have recently been on a sanction is reasonable, the look-back period of a full accreditation cycle plus three years of the previous accreditation cycle is too burdensome for institutions and accreditors and not meaningfully linked to any metric.

Issue #5: Complaints (34 CFR 602.23)

In August 2023, ED released a Dear Colleague Letter regarding accreditor handling of complaints. This letter provided numerous additional safeguards to ensure that accreditors are appropriately responding to complaints. The proposed changes to the regulations largely mirror the August 2023 guidance. However, in some respects, the proposed changes to the regulations contain different requirements that could be problematic in implementation.

For example, review of "confidential" complaints, as currently required by the August 2023 guidance, is feasible. However, review of "anonymous" complaints does not allow for an agency to communicate with a complainant, including, for example, to convey dispositions or refer to other resources which could help the complainant.

Additionally, consideration of the "circumstances [in which] an agency requires the complainant to first submit their complaint to the institutional or program in which they are enrolled," as currently required by sub-regulatory guidance, is reasonable. However, an absolute prohibition that an accreditor cannot decline a complaint because the "complainant did not first submit the complaint to the institution or program and allow the institution or program to reach a conclusion" would create a rule that would impede institutions from effectively addressing student concerns through the due process mechanisms offered by their own institutional processes, often more readily than an accreditor.

It is reasonable to require that accreditors not have a blanket "exhaustion" requirement. However, it is equally reasonable for an accreditor to determine that it would be most appropriate to first refer a complainant to an institutional process to try and resolve their issue, particularly for individual matters typically subject to an institutional grievance process. Indeed, in 2023, HLC referred 48% of complaints received back to the institution with a "courtesy forward," so that the institution could address the issue under appropriate internal processes. Determining that a complaint should first be referred back to an institution is not the same as an exhaustion requirement. Rather, it directs a complainant to the location where they might first be able to resolve their complaint most effectively.

Finally, on the issue of timing, it is appropriate to require that accreditors ensure due process by not requiring that a complainant only raise a complaint within a reasonable time frame and to require that an accreditor provide some necessary flexibility with respect to timeline for submission of a complaint, based on unique circumstances such that may have not been known or may not have been fully-developed. However, a firm requirement that accreditors uniformly accept complaints that occurred in the past five years is unwieldy. Our experience with older complaints has demonstrated that they are difficult to address due to incomplete information to assess current compliance with an accreditor's standards through information that is five years old.

In general, HLC suggests that the regulatory language on the issue of complaints be aligned with the August 2023 guidance.

Issue #6: Teach-Out (34 CFR 602.24)

Requiring institutions to proactively plan for potential closure through the establishment of teach-out plans is an essential tool to protect students.

However, HLC is concerned that the inclusion of provisional certification as a trigger for a teach-out plan, coupled with the requirement for an annual update to that plan, creates a large administrative burden that is not related to protection of students and may actually confuse students. Some institutions remain on provisional certification for lengthy periods of time for compliance issues that do not threaten the viability of the institution (for example, a large public flagship university that is on provisional certification for an administrative financial aid compliance issue).

HLC suggests that ED require that accreditors mandate that institutions on provisional certification engage in some additional contingency planning, short of a full teach-out plan. This could include, for example, planning regarding disposition of student records or initial due diligence regarding identifying teach-out partners.

HLC appreciates ED's willingness to work together on these critical topics and looks forward to continued conversations as the process continues. HLC is happy to provide more detail or specific examples demonstrating these concerns should there be any questions.

Issue #7: Rules Regarding Change of Accrediting Agencies (34 CFR 600.11)

As a matter of quality assurance, it is understandable that ED would set forth clear guidelines for when an institution does or does not have reasonable cause to change its accreditor.

However, the requirement that "the effective date of [an institution's] new accreditation [with another accreditor] cannot be before the end of the current accreditation cycle unless the institution wants to maintain both agencies" as accreditors could result in increased, and more complex, instances of "double accreditation." These situations are costly, procedurally complex, and, ultimately, potentially confusing to students and the public. Specifically, the proposed regulation could lead to an increased number of situations in which an institution would be

required to undergo multiple evaluations and meet the standards and procedural requirements of multiple institutional accreditation agencies for potentially lengthy periods of time.

With the changes in scope for historically regional accreditors, HLC has both received interest from institutions that are choosing to pursue accreditation with HLC; and, likewise, HLC has had member institutions choose to pursue accreditation with other accreditors.

HLC's experience has demonstrated that students rely on the transparency of accreditors to provide clear information about the accreditation relationship with institutions. The effect of differing procedural approaches, nomenclature, timelines, or additional standards between accreditors will complicate and confuse students, rather than clarify an institution's accreditation relationship.

For example, within the parameters provided by applicable regulations, institutional accreditors may have different nomenclature and requirements for sanctions. This could result in an institution being placed on a particular sanction with one accreditor but not the other, or being subject to different requirements as the result of that sanction.

Similarly, institutional accreditors might have different processes and timelines for managing changes to organizational structures as related to accreditation. This could result in an institution potentially having to navigate different procedures and timelines for changes.

While the possibility of these types of situations is not new, if it is required in this instance, the frequency and complexity of the situations would increase due to "double accreditation" for lengthy periods of time and involving more institutional accreditors.

Ultimately, the end result will be increased costs, added complexity, and, most problematically, confusion for students and the public.

HLC appreciates ED's ongoing engagement on these critical issues.

Sincerely,

A handwritten signature in black ink that reads "Barbara Gellman-Danley". The signature is written in a cursive, flowing style.

Barbara Gellman Danley
President

Cc: Nasser Paydar, Assistant Secretary for Postsecondary Education, U.S. Department of Education
Herman Bounds, Director, Accreditation Group, U.S. Department of Education
Elizabeth Daggett, Analyst, Accreditation Group, U.S. Department of Education
Marla Morgen, Vice President and General Counsel, Higher Learning Commission