



Federal Regulatory Activity Impacting Community Colleges, April 2022

In the first part of 2022, the federal government has undertaken several regulatory activities that will greatly impact community colleges and their students. Some of the most important are summarized below.

Institutional and Programmatic Eligibility Negotiated Rulemaking

In mid-March, the Department of Education (ED) wrapped up a series of three one-week meetings of “negotiated rulemaking” on institutional and programmatic eligibility [negreg](#). Negotiated rulemaking (better known as “negreg”) is required by the Higher Education Act for all Title IV regulations, with minor exceptions. In negotiated rulemaking, relevant stakeholders are selected by ED, with parties agreeing to negotiate in good faith to reach consensus on regulatory packages. (ED has a representative in the negotiations and leads the discussions.) If consensus is reached, ED is bound to issue a proposed rule that reflects the negotiated agreement. If there is no consensus, the regular rulemaking process ensues, with ED taking whatever position it chooses.

The negotiations involved high stakes for community colleges, centering on but not limited to gainful employment, which impacts all Title IV-eligible certificate programs. Consensus was reached on two of seven regulatory issue areas: Ability-to-Benefit and the “90/10” rule, which limits the amount of Title IV funds that for-profit institutions may receive. Consensus was not reached in five other areas: administrative capability, gainful employment, financial responsibility, change of ownership control, and certification procedures.

Community colleges were represented in the negotiations by Dr. Anne Kress, president, Northern Virginia Community College, and Will Durden, Director, Basic Education for Adults, Washington State Board for Community and Technical Colleges.

The following summarizes outcomes on some of the major issues for community colleges.

Ability-to-Benefit Students

Ability-to-Benefit or ATB students are those who lack a high school diploma or G.E.D. and are enrolled in an eligible career pathway program that allows them to qualify for Title IV aid. These students show their “ability-to-benefit” from higher education by exceeding a cut score on an approved exam, successfully completing six college credits, or by being included in a state ATB plan.

Two-year public institutions granted consensus on the ATB regulation, with some reservations, after ED offered an 85% “success rate” standard for students in state ATB plans, in contrast to the 95% originally proposed. This means that ATB students in programs covered by state ATB plans must succeed at 85% of the rate that students with high school diplomas enrolled in the same programs succeed. The success rate encompasses completion, retention, and transfer.

States wishing to develop plans for ATB students enrolled in eligible career pathways programs face some potential complications:

- The draft regulations establish an 85% “success rate” at colleges included under the state’s ATB plan. Applying the standard at individual institutions, rather than the state overall, was a change made in the third negotiating session. If 50% or more participating institutions across all states do not meet the success rate in a given year, the Secretary may lower the success rate to no less than 75 percent for two years.
- Colleges initially included in a state plan can have no greater than a 33% withdrawal rate. Community college negotiators did not oppose this. In practice, this “bright line” would not create difficulties, but it nonetheless is an arbitrary standard and policy.
- ED has proposed a 1% of enrollment cap on the number of an institution’s (rather than a state’s) students who can initially qualify for ATB under the State plan. In the negotiations, ED modified the cap to the greater of 1% of enrollment or 25 students, which may help some institutions.

The Career Pathways model outlined in the regulations is largely focused on providing opportunities for people without a HS diploma or GED, even though this is not the thrust of most career pathways programs. ED’s “success rate” formulation compares ATB students to high school graduates enrolled in the same Eligible Career Pathway Programs (ECPPs), which may result in a benchmark rate based on few students.

Under the ECPP regulatory language, all ECPPs must demonstrate “through an agreement, memorandum of understanding, or some other evidence of alignment of postsecondary and adult education providers that ensures the secondary education is aligned with the students’ career objectives.” This seems to presume that the provider of postsecondary and adult education are different entities, but presumably an integrated program offered by the postsecondary provider – i.e. I-BEST – would meet the “evidence of alignment” requirement.

The language also states that the program should be designed to “lead to a valid high school diploma.” It is unclear if and how this requirement is different than or additive to the other requirements in the ECPP definition relating to preparation for a HS diploma.

Standards of Administrative Capability

The proposed regulations did not elicit consensus and will be subject to the normal Notice of Proposed Rulemaking (NPRM) and public comment process. Community college negotiators did allow consensus, despite concerns over a new requirement that Title IV-participating institutions must provide “adequate career services” for students who receive Title IV aid. This requirement bears no rational relationship to “administrative capability” as outlined in the HEA. While it seems unlikely that community colleges would be denied Title IV eligibility on this basis, it nevertheless represents a new level of involvement by ED in institutional matters.

Furthermore, in making the determination of whether an institution is providing adequate career services, the Secretary is to consider “the share of students enrolled in programs designed to prepare students for gainful employment in a recognized occupation.” Because most non-GE programs are also designed to prepare people for a career, singling out GE programs seems punitive to community colleges, who have a much higher percentage of these programs than other public or nonprofit institutions.

Under the regulations, institutions must provide students with accessible clinical or externship opportunities related to and required for completion of the credential or licensure in a recognized occupation within 45 days of the completion of other required coursework. Community college negotiators did not believe that this would present substantial problems for most institutions.

Gainful Employment

The proposed gainful employment regulations were opposed by all six institutional representatives. AACC’s general position in the negotiations was that any new regulations should be substantially similar to those promulgated in 2014 and subsequently rescinded by the Trump administration. The Department did not take this position; and, among non-profit higher education, non-community college groups were much more critical of the regulations than in the two previous iterations.

The regulatory packages were generally not well supported with data and other supporting information by ED, and important questions about how they would be implemented remain. Parts of the regulations of note include:

Earnings threshold: The regulation created a new earnings threshold that a GE program’s completers’ median earnings must exceed. Community colleges believe this is highly problematic, both in its concept – a rigid standard, despite some concessions by ED in the negotiations – and its implementation (among other things, including people who choose not to work after completing a program in the calculation). The threshold proposed by ED is, based on data from the Census Bureau, the median annual earnings for a working adult aged 25-34 with only a high school diploma (or GED) in the State in which the institution is located (or nationally, if fewer than 50 percent of the students at the institution are located in the State where the institution is located).

Definition of GE program: A four-digit CIP code is used to classify programs, as opposed to the six-digit code used previously. This will provide a less accurate analysis of program outcomes, though there will be bigger cohort sizes. (Presumably the reason why ED took this approach.)

Small program rates: Programs that have fewer than 30 completers, and therefore do not receive their own earnings rates, are lumped together with other such programs and given aggregate debt-to-earnings ratios (D/E) and earnings threshold calculations – thus blending the outcomes of wildly disparate programs. Conceptually, this is a big problem, though it is not possible to know how much it will impact institutional eligibility. A failing small program rate doesn't affect the eligibility of the individual programs, but ED may consider the rate in granting institutional certification.

Metrics: AACC has not taken positions on the proposed D/E metrics themselves, largely because under the previous regulations almost no community college programs were negatively impacted. That said, while there are similarities to the 2014 regulations, these regulations are different, both in the standards themselves (elimination of the "Zone") and in the processes used to calculate the rates, which give institutions less ability to intervene to make sure that they are correct.

Reporting: The reporting requirements do not reflect the basic problem with GE and community college course-taking patterns – it is quite common for students to enroll in a *degree* program but ultimately receive a *certificate* from a GE program, or they enter one certificate program and receive a certificate from another. This enrollment pattern creates substantial administrative complications for institutions.

Also, colleges are required to cite a particular date of withdrawal, and this can be difficult to identify. There is no evident reason why the date of withdrawal is necessary. The date of completion is generally more straightforward.

The retroactive data gathering that will be necessary to provide information to calculate the current GE cohorts will present substantial administrative burdens for community colleges. Institutions will be asked to retrieve data for GE reporting from cohorts beginning seven years previously. This will enable ED to apply the GE metrics immediately. Institutions are also being asked to provide some data on non-completers that would only be used if the Secretary decided to include it in the disclosure website. This is a significant administrative burden that has the sole purpose of providing information of dubious value to prospective students.

The final draft regulations include language stating that "for any award year, if an institution fails to provide all or some of the information required under paragraph (a) of this section [relating to GE reporting compliance], the institution must provide to the Secretary an explanation, acceptable to the Secretary, of why the institution failed to comply with any of the reporting requirements." AACC welcomed this language and asked that it be enhanced in the final draft, to no avail. Therefore, the benefit of this language is unclear.

New disclosure website: The GE regulations would establish a new disclosure website for all Title IV programs, not just GE programs. The regulation lists certain data that “may” be included on this website but leaves to ED’s discretion which of them will be required. This leaves its impact ambiguous. However, if implemented as envisioned, it marks a significant change in regulatory policy.

Certification procedures – Supplementary performance measures: Within the context of the GE regulations, ED is reserving the right to reject institutional certification based on withdrawal rates, D/E rates, earnings threshold measure, small program rates, education spending, job placement rates, and licensure pass rates.

Certification Procedures

Community college negotiators did not grant consensus on proposed certification procedures regulations because ED continues to propose capping Title IV eligibility for students in GE programs (but not for other programs) that prepare students for a recognized occupation to the *lesser of*: the state standard for program length; or, if at least half the states license the occupation, the national median of the minimum number of hours of training required. Community colleges strongly oppose this federal overlay on state policy. Additionally, there is no logical reason why this regulatory policy shouldn’t apply to all programs, rather than only GE programs.

For an institution to be certified, it must ensure that it “complies with all State consumer protection laws, including both generally applicable State laws and those specific to educational institutions, except where State requirements for obtaining authorization are inapplicable pursuant to a State authorization reciprocity agreement.” This means that institutions can continue to receive approval to operate in multiple states through a single application and fee, but they will have to comply with each state’s consumer protection laws, rather than the single set of NC-SARA’s consumer protection requirements agreed upon by the participating states. This could disrupt the present NC-SARA arrangements.

The regulatory language adds to the required academic program information that an institution must make readily available to enrolled and prospective students. Specifically, institutions must provide a list of all states where it operates an education program designed or advertised to meet educational requirements for a particular professional license or certification necessary for employment in a given occupation. As a part of that list, institutions must indicate in which states the program does and does not meet such requirements. At minimum this could be immensely difficult, and in some cases impossible.

New Pell Grant Eligibility for Incarcerated Students

The second pandemic relief belief bill passed by Congress, known as “CRRSSA,” established Pell Grant eligibility for incarcerated individuals for the award year beginning July 1, 2023. ED officials have stated that the law will be implemented on time. The reinstatement of the eligibility that was eliminated in

1994 was something of a political miracle, resulting from years of steady advocacy and a sudden shift in perceptions of the criminal justice system.

The new eligibility should help community colleges substantially bolster this key aspect of their mission. Even without Pell support, many institutions had been able to develop substantial prison education programs, relying on state, private, and other sources of support. Community colleges accounted for slightly more than two-thirds of all the “Second Chance” Pell Grant eligibility experimental sties established during the Obama Administration and continued under President Trump.

As with all Title IV regulations, the Second Chance Pell Grant rules were subject to negotiated rulemaking. A subcommittee focusing on this topic convened twice, in October and November of 2021, as part of an Affordability and Student Loans Subcommittee and reached consensus on draft regulations [PEP - Consensus Language \(ed.gov\)](#). Two-year institutions had a seat on this subcommittee, though that person was not nominated by AACC and did not have contact with the association during negotiations.

ED will soon issue a formal notice of proposed rulemaking that tracks the agreed-to regulations. There are two issues in the forthcoming regulations that have drawn AACC’s attention.

First, accrediting agencies will have one year to perform a site visit at the corrections institutions designated as one of the first two “additional locations” where a college initiates prison education programs. The accrediting community has expressed its reservations about this requirement, which was not required by the statute.

Second and more importantly, the regulations state that the “oversight entity,” i.e., a state or other corrections agency that approves prison education programs, must determine that a prison education program is operating in the “best interests” of students based on an “an assessment” of the criteria listed below. Critically, this “must” requirement was established through the negotiated rulemaking process, when the statute only says that they “may” take these factors into account. These standards are of a “bright line” nature not imposed anywhere else in the Higher Education Act:

- “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;”
- “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;”

- “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;”
- “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;”
- “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;”
- “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, 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;”
- “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
- “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.”

The oversight may include an assessment of all the following:

- “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
- “other indicators pertinent to program success as determined by the oversight entity.”

Depending on how they are interpreted by corrections agencies and the activity of a variety of other parties, including ED, the looming regulatory requirements on “oversight entities” could have a sharply negative

effect on the establishment or expansion of prison education programs. In the rulemaking process, AACC will strongly assert that corrections agencies should not be required to use numerical outcomes or other standards in determining whether a program acts in the “best interest” of students, because this is not required by the law itself. AACC will work to ensure that other organizations make similar comments.

Fair Labor Standards Act – Modifications to Overtime Rules

The Biden Administration has begun a formal review of the Fair Labor Standards Act’s (FLSA) annual earnings overtime threshold. Employees paid below this amount cannot be classified as doing “executive, administrative, and professional” work, and therefore must be paid on an hourly basis with overtime. Faculty are exempt from regular overtime and minimum wage laws.

The Obama Administration did a similar review in 2014, ultimately increasing the previous standard of \$23,660 annually to \$47,660, with inflationary increases every three years. However, that policy was later revoked by court order. The Trump Administration then established the exemption floor of \$35,568 that is now in effect. The Biden Administration is expected to propose a floor greater than the Obama Administration’s initial plan of \$50,440, well above the current level.

The Obama Administration’s nullified minimum exemption policy of \$47,660 in annual salary would have substantially increased costs and required other staffing changes at many community colleges. Differences in regional cost-of-living and related compensation obviously played a role in its impact. Clearly, however, many colleges would have been forced to re-classify certain employees as non-exempt, or possibly change job responsibilities and attendant salaries. A “ripple effect” was also anticipated, in which employees not directly impacted by the change nonetheless would have likely had their salaries adjusted. By virtue of putting on the table a higher threshold than President Obama proposed, the Biden Administration’s proposals may create an even more acute situation.

AACC raised the sector’s perspectives on March 29 with representatives from the Department of Labor on this issue at a formal “listening session.” AACC has also formally gone on record with the Department of Labor on potential changes.

While the Biden Administration continues to listen carefully to community colleges, broad forces with great influence with the Administration are pushing for a significant increase in the exemption cap. AACC will represent the sector in the ongoing activity, but campus voices will also be necessary to secure a satisfactory outcome.

DOL is holding a series of listening sessions to hear views on possible revisions to the regulations. The Department will hold five regional sessions to hear from regional, state, and local employers and employer representatives.

AACC encourages its members to participate in the appropriate regional listening sessions. DOL is seeking input on issues such as:

- the appropriate salary level above which the exemptions for bona fide executive, administrative, and professional employees may apply;
- the costs and benefits of increasing the salary level to employers and employees, including increasing wages and reducing litigation costs;
- the best methodology for updating the salary level, and the appropriate frequency of updates;
- whether other changes to the overtime regulations are warranted.

Below is the regional breakdown and registration links to each of the sessions:

- **Northeast Employer Regional Overtime Listening Session**
When: Friday, May 13, 3:30 PM - 4:30 PM ET
Northeast Region: *Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, Virginia and West Virginia*
- **Southeast Employer Regional Overtime Listening Session**
When: Tuesday, May 17, 2:00 PM - 3:00 PM ET
Southeast Region: *Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee*
- **Midwest Employer Regional Overtime Listening Session**
When: Friday, May 20, 2:30 PM – 3:30 PM CT (3:30 PM - 4:30 PM ET)
Midwest Region: *Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin*
- **Southwest Employer Regional Overtime Listening Session**
When: Friday, May 27, 2:00 PM – 3:00 PM CT (3:00 PM - 4:00 PM ET)
Southwest Region: *Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming*
- **West Employer Regional Overtime Listening Session**
When: Friday, June 3, 12:30 PM – 1:30 PM PT (3:30 PM - 4:30 PM ET)
West Region: *Alaska, American Samoa, Arizona, Commonwealth of the Northern Marina Islands, California, Guam, Hawaii, Idaho, Nevada, Oregon, and Washington*

Please email OTSessionInquiries@dol.gov with any questions.

Mandatory Federal Campus Climate Survey

The sweeping FY 2022 appropriations bill enacted in March included a reauthorization of the Violence Against Women Act (VAWA). The VAWA reauthorization included a requirement [VAWA survey](#) that

institutions of higher education administer biennially a new survey designed to obtain information regarding postsecondary student experiences with domestic violence, dating violence, sexual assault, sexual harassment, and stalking.

The legislation would require the U.S. education secretary to lead an interagency effort to develop the survey tool. The law requires that colleges and universities that receive federal assistance ensure, to the maximum extent practicable, that an “adequate, random, and representative” sample of students (as determined by the secretary) completes the survey tool. The legislation would require ED to issue a report every two years compiling institutional data.

The required survey questions cast a wide net. Very generally, it aims to determine the number of incidents as specified in law, as well as some aspects of their effect on those involved with them, and their subsequent handling within institutional and legal contexts. It also aims to determine aspects of campus climate. Questions are to be trauma informed.

All survey responses are to be anonymous, though colleges would have to publish the resulting information on their websites. Institutions could add their own questions to the survey, subject to approval by the Secretary. This is particularly important since many institutions of higher education already undertake campus climate surveys. In addition, more than 10 states also prescribe such surveys. The integration of these surveys with the potential federal mandate is unclear.

AACC will keep its members informed about implementation in this key area.

For more information contact David Baime dbaime@aacc.nche.edu, Jim Hermes, jhermes@aacc.nche.edu, or Alexis Gravely, agravely@aacc.nche.edu