AMERICAN ASSOCIATION OF COMMUNITY COLLEGES
LEAD ADVOCATE ADVANCE

U.S. Department of Education,
Office of Postsecondary Education, 400
Maryland Avenue SW, 2nd Floor,
Washington, DC 20202

Re: Docket ID ED-2022-OPE-0062

August 26, 2022

The American Association of Community Colleges (AACC) is pleased to submit comments on the July 28, 2022, Notice of Proposed Rulemaking (NPRM) for Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program. AACC represents the nation's 1,039 community colleges and their students.

Community colleges have long provided prison education programs (PEPs) as part of their mission to serve all segments of society, particularly those who traditionally have faced steep barriers to participating in postsecondary education. The termination of Pell Grant eligibility for incarcerated individuals in 1994 impeded those efforts, but community colleges still developed means to continue offering PEPs even when inmates themselves could not pay for them—by using state, private, available institutional funds, or other resources. In 2019-20, almost half, or 222, of all academic institutions affiliated with prisons were community colleges. Of the 196 institutions participating in the Department of Education's (ED) experimental sites program, 113 are community colleges.

The social, economic, and human benefits of prison education have long been apparent. AACC consistently advocated for restoration of prisoner Pell Grant eligibility since its elimination in 1994, and community college officials were elated by the new program established in the Consolidated Appropriations Act of 2021.

The statute creating Pell Grant eligibility for prisoners places more conditions on program eligibility than other Title IV-eligible programs, with the possible exception of gainful employment programs, where ED has broad regulatory license. Most significantly, the law creates a central gatekeeping role for oversight entities (OE) that is added to existing Title IV quality assurance mechanisms, which includes accreditation. Furthermore, the law requires reporting from institutions and ED that exceeds that for other programs. These new procedures were adopted even though for-profit institutions, often a source of concern to policymakers, are not eligible for the program.

The following comments reflect AACC's perspective that the new subpart P regulations should generally refrain from creating requirements that exceed those mandated by the already

exacting statute. In some cases, additional specifications are necessary for smooth implementation procedures not laid out in the law. In others, however, they represent discretionary, fundamentally ad hoc regulatory policymaking that was not anticipated by Congress and that may prevent some worthwhile PEPs from becoming eligible. This is particularly the case with OEs, as described below.

Section 668.236 Eligible Prison Education Program

Subsection 668.236(c)

This subsection stipulates that PEPs shall be approved for an initial two-year period by the OE before undergoing the more rigorous "best interest" determination by the OE. This period is insufficient for the program to generate data and related contextual information that the OE needs to make adequately informed judgements about program success in time to meet the other requirements for program eligibility. The initial two-year period should be extended to four years, which should allow for two full years of educational programming to occur followed by time to gather the relevant data and forward it to the OE. The OE would then make its "best interest" determination in time for the institution to prepare its subsequent application to ED. The two-year timeframe in the NPRM is far too tight for the full framework to operate effectively.

ED should allow for an initial four-year approval period for PEPs by oversight entities.

Section 668.241 Best Interest Determination and Proposed Appeals Process

Subsection 668.241(a)

Community colleges oppose the NPRM's general requirement that oversight entities *must* develop and apply quantitative or other standards in their "best interest" determination. This directive is not authorized by the statute; the law simply says that the oversight entity "may" consider a variety of variables in making its assessment. The NPRM would further require that specific standards be determined for certain indicators, or that standards developed by ED be used by the OEs. AACC urges ED to rethink this policy. In many cases, oversight entities cannot effectively develop and apply the criteria as required by the NPRM.

Oversight entities should play—and in most places already do play—an essential role in approving prison education programs. They will continue to determine which program or programs best suit a given population in a particular setting, though this is ideally, and usually, done in collaboration with college officials. In making quality assessments, OEs will in part use

the very same entities that are now responsible for determining Title IV eligibility as guideposts: accreditors, state licensure bodies, and the Department itself.

We also note that for many prison education programs, the number of student completers is likely to be very small, therefore making it inadvisable to reach reliable determinations about the quality of education programs on the basis of such a small sample.

The following discussion of the various assessments will not repeatedly address the undesirability of the NPRM changing a statutory "may" into a regulatory "must," but this same perspective would apply to all the following items found in Subsection 668.241.

AACC has no reservations about the regulation requiring that, as delineated in statute, the OEs be clearly authorized or even encouraged to examine each of the items cited in the statute. It is going beyond this that is problematic.

In general, the final rule should reflect the statute's definition of the role of the oversight entity.

In addition, institutions should have some ability to appeal a decision by the OE if it determines the proposed program does not meet the "best interest" standard. As mentioned, community colleges generally work in a collaborative fashion with the OEs, but there may be instances where, from the college's perspective, the OE has decided not to approve a meritorious program. Therefore, in the final rule, we encourage ED to develop an appeals process by which institutions can have a second review of their program approval application. Without it, oversight entities may unfairly reject PEPs, and institutions of higher education (IHEs) will be forced to reapply, an expensive and cumbersome process.

When an oversight entity rejects a PEP application, at the minimum, the oversight entity must be required to provide an explanation for the rejection. After that, if an IHE believes additional action is required, the oversight entity must re-review the application and issue a new decision with explanation. Another option is for another entity (such as ED) to review the decision and provide feedback to the oversight entity on their decision-making process. These steps would help to ensure a transparent and fair approval process.

ED should develop an appeals process for PEPs not approved by oversight entities.

Subsection 668.241(a)(1)(i)

Requiring a threshold standard for the rate of continuing education post-release is not advisable. There is no commonly accepted standard of this nature for community colleges generally, and continuation rates vary wildly due to many factors, including the diversity and

complexity of academic programs; students and student intentions; and the different structures of state systems of higher education. Predicting or expecting a given continuation rate, particularly considering the many life challenges individuals face post release, is neither desirable nor possible.

ED should retain the statutory language in this area.

Subsection 668.241(a)(1)(ii)

This subsection concerns post-release job placement rates. As with other items in this subsection, it diverges from the authorizing statute and is particularly confusing. The language as written states that the OE must assess whether job placement rates in a program's relevant field meet any applicable standards required by either the accrediting agency for the institution or program, or the state in which the institution is authorized. However, it is unclear why the OE is asked to do this because in both cases, the designated entity would act correspondingly if it did not meet its standards. In other words, this requirement is redundant.

The NPRM also states that in cases where there is not an existing job placement standard as just described, the OE must define and the institution must report a job placement rate. We oppose this requirement. First, as drafted, it is unclear if the OE is simply intended to require the generation of *a* job placement rate, or whether it must also require that rate to meet or at least aspire to a specific numerical standard. If the intention is simply to require the generation of a job placement rate, it still is unwarranted. For many reasons, the generation of job placement rates is a daunting challenge for IHEs, which is partly why such a requirement is not generally included in the Higher Education Act. ED itself has deliberately eschewed requiring a job placement rate in the gainful employment regulations—which might have been a logical place for such a requirement—relying instead on wage data matches. This decision implicitly acknowledges the challenges of accurately calculating job placement rates.

If it is ED's intention to require not only that an OE define how job placement rates are to be calculated but what standard they should meet, it again must be emphasized that OEs, even with relevant stakeholders, lack the sufficient expertise and context to make a subjective determination of this nature, assuming that reliable data could be provided. Even regulatory agencies with a specific focus on education and/or job training generally refrain from making assessments in this area. Setting a standard for post-release individuals, who obviously face acute challenges in the job market, would be an even more problematic undertaking. Returning citizens often have other pressing concerns facing them upon release that will deter them from seeking employment in the short-term. It is appropriate to have OEs examine relevant data in this area if they find it of use—and that is what the final rule should state.

ED should retain the statutory language in this area.

Subsection 668.241(a)(1)(iii)

This subsection requires OEs to assess whether the earnings for formerly incarcerated individuals, or the median earnings for graduates of the same or similar program at the institution, as measured by ED, exceed those of a typical high school graduate in the state.

This requirement gives ED the responsibility to calculate the earnings as described above. It is not clear how this would be done since ED would not be able to obtain sufficient information to do this for all the individuals in a PEP. The requirement is made even more problematic by extending its scope to potentially include all the graduates of a program that is the "same or similar" to a PEP that is also offered by the college. Here as well, the data necessary to make this calculation is unavailable. The NPRM also does not state on which basis ED might decide to make its earning calculation on the narrower or broader student population.

Attempting to build upon this unstable data foundation, the NPRM then directs OEs to determine whether the earnings of the relevant individuals exceed those of a typical high school graduate in the state. High school graduates often have been in the workforce for decades longer than those completing college programs and will often have higher earnings simply because of their age and job tenure, regardless of the nature of their employment work. This would be the case even for recent graduates without the challenges faced by recently released individuals. ED's proposed standard is inappropriate and should be dropped.

ED should retain the statutory language in this area.

Subsection 668.241(a)(1)(iv)

Again, the NPRM exceeds the statute by first requiring, rather than recommending or permitting, OEs to examine certain characteristics of prison education instructors. The NPRM requires that a comparison be made to determine whether the "experience, credentials, and rates of turnover or departure of instructors" from prison education programs are "substantially similar to other programs at the institution," after taking into account the nature of providing prison education. This represents another regulatory reach into the role of the OEs that is not anticipated in the statute. There are many reasons why programs delivered in the prison context may be quite different from those provided overall by a college. Therefore, this proposed policy hardly compares likes-to-likes and even if it did, it is not in the law and should not be placed into regulation.

ED should retain the statutory language in this area.

Subsection 668.241(a)(1)(v)

This subsection also exceeds the statute in its regulatory micromanagement. It alters the statutory language which simply suggests that the OE examine "the transferability of credits for courses available to confined or incarcerated individuals and the applicability of such credits toward related degree or certificate programs" and instead requires that the transferability of such credits be "substantially similar" to those at similar programs at the institution. However, it also states that OEs should consider the "unique" aspects of prisoner education programs and other factors in making its assessment. This formulation is illogical—stipulating that a specific comparison be made, but then implicitly stating that it likely could not be made—and is another reason why making it a hard-and-fast requirement is flawed public policy. Credit transfer is of paramount importance to all community college students, and it remains a high priority for institutions, but it is not helpful to address it in this context.

ED should retain the statutory language in this area.

Subsection 668.241(a)(1)(vi)

This subsection addresses the academic and career advising services provided to confined or incarcerated individuals. These services are essential, both while students are taking courses and in a post-release context. Institutions have a responsibility to provide these services to the maximum possible extent to incarcerated students and, indeed, to all students. However, the NPRM again would place a responsibility on OEs and by implication, the institutions offering PEPs, that is not envisioned in the new law. The NPRM proposes that the relevant services should be "substantially similar to those at other similar programs at the institution, accounting for the unique geographic and other constraints of prison education programs." As explained in addressing Subsection 668.241(a)(1)(v), this is a confusing, almost meaningless standard. These services absolutely should be examined by OEs, but only along the lines envisioned in the law, rather than this broadened regulatory policy.

ED should retain the statutory language in this area.

Subsection 668.241(a)(1)(vii)

This subsection requires that the OE ensure that the institution fully accepts the credits in the institution's other programs if credits from programs similar to the PEP are accepted. This is an appropriate requirement and AACC supports it.

ED should retain the proposed regulatory language.

Subsection 668.241(a)(2)(i), (ii)

In these subsections, the OEs "may" consider recidivism rates or completion rates in making its "best interest" determination. These are appropriate variables for OEs to at least consider, and AACC supports this policy, recognizing that, in both cases, it can be extremely difficult to determine what might be an appropriate standard.

ED should retain the proposed regulatory language.

Subsection 668.241(a)(2)(iii)

This subsection specifically authorizes the consideration of "other indicators pertinent to student success as determined by the oversight entities." AACC strongly endorses this language and its allowance for OEs to set appropriate evaluative metrics for PEPs.

ED should retain the proposed regulatory language.

Subsection 668.241(b)(2)

This subsection is critical because it unambiguously states that the oversight entity should make its "best interest" determination "in light of the totality of circumstances." This should permit oversight entities to approve or disapprove PEPS irrespective of the other portions of Subsection 668.241 and the data provided on prison education programs. We strongly urge retention of this language, which is also reflected in the statute.

ED should retain the proposed regulatory language.

Subsection 668.241(e)(1)

This subsection requires an institution to obtain final evaluations of each PEP not less than 120 days before the expiration of the institution's Program Participation Agreement (PPA). No provision is made for delays in action by the OE. Language should be included that permits approved programs to continue to be approved if the institution provides all required materials to the OE for approval 240 days in advance of the expiration of the PPA—putting some onus on the OE to act in a timely fashion.

ED should require a reasonable timeframe for OEs to evaluate PEPs.

Subsection 668.241(e)(2)(i)

This subsection requires institutions to submit data on "all" students for the OE's determination of continued approval. We urge deletion of the word "all," because in limited circumstances, data simply may not be available to the institution or relevant to the agency. The final language simply should say "students" rather than "all students," giving OEs and institutions alike reasonable leeway, which is particularly important given the nature of the prison environment and population.

ED should modify the scope of the reporting requirements for PEPs.

AACC thanks the Department for its consideration of these comments. Please contact David Baime (dbaime@aacc.nche.edu), Senior Vice President for Government Relations, if you have any questions related to it.

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