

**Memorandum**

**To:** U.S. Department of Education  
**From:** Carolyn Fast, Jaylon Herbin, Adam Welle, Yael Shavit, and Deborah Cochrane  
**Date:** February 1, 2022  
**Re:** Issue Paper 6: Certification Procedures - Proposed Language

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The above-listed negotiators submit this proposed language for your review:

§ 668.14 Program Participation Agreement

(3) An institution's program participation agreement must be signed by—

(i) An authorized representative of the institution; and

(ii) For a proprietary or private nonprofit institution, by an authorized representative of an entity with direct or indirect ownership of the institution if that entity has the power to exercise control over the institution. The Secretary considers the following as examples of circumstances in which an entity has such power—

(A) If the entity has at least ~~50~~25 percent control over the institution through direct or indirect ownership, by voting rights, or by its right to appoint board members to the institution or any other entity, whether by itself or in combination with other entities or natural persons with which it is affiliated or related, or pursuant to a proxy or voting or similar agreement;

(B) If the entity has the power to block significant actions;

(C) If the entity is the 100 percent direct or indirect interest holder of the institution; or

(D) If the entity provides or will provide the financial statements to meet any of the requirements of 34 CFR 600.20(g), (h), or Subpart L of this part.

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(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, ~~and~~ State

**Commented [1]:** The 25% suggested language is consistent with 34 CFR part 600.21(a)(6)(i), which establishes reporting requirements for title IV eligible institution where there is a change in "a person's ability to affect substantially the actions of the institution if that person did not previously have that ability." The provision provides that the Secretary considers a person to have the "ability to affect substantially the actions of the institution" if that person holds at least a 25 percent ownership interest in the institution.

Similarly, 600.31(c)(2), the provision that addresses change of control for a publicly traded entity, sets a threshold at ownership of 25% of voting stock where the entity also owns "more shares of voting stock than any other shareholder."

agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, the Federal Trade Commission, the Consumer Financial Protection Bureau, and State attorneys general have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse;

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(22) It will not use transcript issuance as a tool for debt collection by, inter alia

(i) Refusing to provide a transcript for a current or former student on the grounds that the student owes a debt to the institution or any other party;

(ii) Conditioning the provision of a transcript on the payment of a debt to the institution or any other party, other than a fee charged to provide the transcript; or

(iii) Charging a higher fee for obtaining a transcript, or providing less favorable treatment of a transcript request because a student owes a debt to the institution or any other party.

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(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must -

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed the greater of -

(A) ~~One hundred and fifty percent of~~ the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located at the point of the student's enrollment, if the State has established such a requirement, or as established by any Federal agency; or

(B) The minimum number of clock hours required for training in the recognized occupation for which the program prepares the student as established in a State in the same metropolitan statistical area (MSA) as the institution adjacent to the State in which the institution is located; and

**Commented [2]:** The AG representatives propose this change to address the abusive practice of withholding or threatening to withhold students' transcripts as a debt collection practice. Schools have an extreme level of leverage over students when they can threaten to withhold transcripts that show proof of prior completed coursework. And when transcripts are withheld in this manner, students are left unable to benefit from credits they have already earned and paid. Taxpayers are also robbed of the Title IV investment they have made when schools can refuse to provide proof of completed coursework. While this practice is abusive across the board, it disproportionately impacts low-income students and students of color. Law enforcement agencies have also found the practice to be a component of unfair lending activity in violation of state and federal law. See, e.g. CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878, 915 (S.D. Ind. 2015) ("[T]he threat of withholding vital educational assets like transcripts and class credit . . . appears calculated to produce considerable leverage over ITT students, and that under certain circumstances the deployment of such leverage could fairly be termed coercive."). The practice is also illegal under certain states' laws. See Cal. Civ. Code § 1788.90-.93; Minn. Stat. § 136A.65, subd. 4(10).

The AG representatives are additionally concerned that the Department's addition of subsection (e)(1)(iii) below, which prohibits a school at risk of closure from withholding transcripts for de minimis debts may be cited as tacit permission of this abusive and damaging practice in all other contexts. We ask the Department to add proposed subsection (22) to clarify that withholding transcripts is never acceptable as a method of institutional debt collection. When the Department invests in a student's education, the school has an obligation to provide the student with proof of that education so they can use it in the job market.

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student;

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(32) In each State in which the institution is located or in which students reside at the time of enrollment, the institution is otherwise required to obtain State approval under 34 CFR 600.9, the institution must --

(i) Ensure that each program is programmatically accredited, if such accreditation is required by a Federal governmental entity or by a governmental entity in the State(s); and

(ii) Ensure that each program satisfies the applicable educational prerequisites for professional licensure or certification requirements in the State(s) so that a student who completes the program and seeks employment in the State(s) qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter; and

(iii) comply with all state consumer protection laws, including both generally-applicable state laws and those specific to educational institutions, except for state requirements for obtaining state authorization that are inapplicable pursuant to a state authorization reciprocity agreement.

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(e) If an institution is provisionally certified, the Secretary may apply such conditions as are determined to be appropriate to the institution, including --

(1) ~~For an institution that the Secretary determines may be at risk of closure --~~

(i) Submission of a teach-out plan or agreement to the Department and to the institution's recognized accrediting agency;

(2) ~~(ii) Submission of a records retention plan to the Department of a plan for the collection and storage of records related to students' enrollment, payments, and academic progress, including student rosters containing program information and enrollment dates, ledgers documenting payments received, and transcripts; and~~

(3) ~~(iii) The release of holds on student transcripts over a de minimis amount, and the release of all holds on student transcripts in the event of a closure;~~

(24) Restrictions on the addition of new programs or locations;

**Commented [c3]:** Not all states require state authorization for online programs offered in their state by an institution located outside of the state. Accordingly, linking the professional licensure requirement to the state authorization regulation would leave some distance education students unprotected. The proposed revision would address this problem and ensure that all online students are afforded this critical protection.

**Commented [4]:** This language is proposed to address concerns that NC-SARA, the state authorization reciprocity agreement, currently requires member states to waive enforcement of education-sector-specific consumer protection laws with respect to participating schools that only offer distance education in their state. Examples of state education-sector specific consumer protection laws include: cancellation and refund provisions and student tuition recovery funds. NC-SARA distinguishes these laws from "generally-applicable" state laws, such as laws prohibiting fraud and deceptive practices.

NC-SARA's requirement that states waive enforcement of education-sector specific consumer protection laws creates a two-tiered system that leaves distance education students with fewer protections than brick-and-mortar students. It also undermines states' ability to protect students in their state.

The proposed language would address this problem by requiring schools that offer programs in multiple states to comply with all state consumer protection laws in each state where the school enrolls students. Schools would be exempt from compliance with state authorization requirements, such as requirements to submit an application to state authorizing agencies or pay a fee to a state authorizing agency. This would permit reciprocity agreements to fulfill their purpose of reducing the cost and burden on schools to obtain authorization to operate in multiple states, while ensuring that distance education students are afforded the same protections as brick-and-mortar students.

**Commented [5]:** We propose omitting this provision because we have added a provision on transcript withholding at section 22 above.

(35) Restrictions on the rate of growth in enrollment of students or of Title IV volume;

(46) Restrictions on the institution providing a teach-out on behalf of another institution;

(57) Restrictions on the acquisition of another participating institution, which may include the posting of financial surety in an amount determined by the Secretary but not less than 10 percent of the acquired institution's Title IV volume for the prior fiscal year. This surety is in addition to any other required surety;

(68) Additional reporting requirements, which may include, but are not limited to, cash balances; an actual and protected cash flow statement; student rosters; student outcome information including but not limited to retention and graduation rates; notification of adverse actions taken against the institution by accrediting agency, state authorizing agency, or other federal agency; notification of investigations by government agencies; student complaints relating to Title IV eligibility or administration, student support and career advising, or the quality of education received at the institution; and interim unaudited financial statements;

(9) Limitations on the institution entering into a written arrangement with another eligible institution or an ineligible institution or organization for that other eligible institution or ineligible institution or organization to provide between 25 and 50 percent of the institution's educational program under 34 CFR §668.5(a) or (c);

(810) For an institution alleged or found to have engaged in misrepresentations to students, engaged in aggressive recruiting practices, or violated incentive compensation rules, requirements to submit marketing and other recruiting materials for the review and approval of the Secretary;

(11) Requirements to demonstrate compliance with standards of administrative capability set forth in part 668.15, including but not limited to:

- (a) Provision of adequate financial aid counseling; career services; and opportunities for clinical or externship opportunities;
- (b) timely disbursement of funds; and
- (c) compliance with prohibitions on misrepresentations and aggressive marketing.

(9) Such other conditions as the Secretary deems necessary or appropriate.

(f) If a proprietary institution seeks to convert to nonprofit status or public status following a change in ownership, the following conditions will apply to the institution following the change in ownership, in addition to any other conditions that the Secretary may deem appropriate—

(1) The institution must continue to meet the requirements under §668.28(a) and §668.28(b) until the Department has accepted, reviewed and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years with passing 90/10 reporting under its new ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later;

(2) The institution must continue to meet the gainful employment requirements of Subpart Q of this part until the Department has accepted, reviewed, and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years under its new ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later;

(3) The institution will be prohibited from identifying itself as a nonprofit or public institution in its marketing and recruiting until the Department approves the institution's request to convert to nonprofit or public status; and

(34) The institution will be required to submit regular and timely reports on agreements entered into with its former for-profit owner or affiliated or related persons or entities, so long as the institution participates as a nonprofit or public institution.

(g) If an institution is initially certified as a nonprofit institution or a public institution, or if it has undergone a change of ownership and seeks to convert to nonprofit status or public status, the following conditions will apply to the institution upon initial certification or following the change in ownership, in addition to any other conditions that the Secretary may deem appropriate:

(1) The institution will be required to submit ~~regular and timely~~ reports on accreditor and state authorization agency actions and any new servicing agreements within 14 days of the action or agreement until the Department has accepted, reviewed and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years following initial certification, or two complete fiscal years under its new ownership or until the Department approves the institution's request to convert to nonprofit status, whichever is later; and

**Commented [6]:** Changed "regular and timely" to "within 14 days of the action or agreement"

(2) The institution will be required to submit ~~regular and timely~~ reports on communications from the Internal Revenue Service or any state or foreign country related to tax-exempt or nonprofit status within 14 days of the communication so long as the institution participates as a nonprofit institution.

**Commented [7]:** Changed "regular and timely" to "within 14 days of the communication"

(he)

(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

~~(if)~~

(1) Except as provided in paragraphs (g) and (h) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(2) An institution may terminate a program participation agreement.

(3) If the Secretary or the institution terminates a program participation agreement under paragraph (f) of this section, the Secretary establishes the termination date.

~~(jg)~~ An institution's program participation agreement automatically expires on the date that -

(1) The institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of § 668.26(a) (1), (2), (4), or (7).

~~(kh)~~ An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

§ 668.43 Institutional information.

(a) Institutional information that the institution must make readily available to enrolled and prospective students under this subpart includes, but is not limited to -

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(5) The academic program of the institution, including -

(i) The current degree programs and other educational and training programs;  
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(ii) The instructional, laboratory, and other physical facilities which relate to the academic program;

(iii) The institution's faculty and other instructional personnel; and

(iv) Any plans by the institution for improving the academic program of the institution, upon a determination by the institution that such a plan exists; ~~and~~

(v) If an educational program is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, or is advertised as meeting such requirements, information regarding whether completion of that program would be sufficient to meet licensure requirements in a State for that occupation, including -

(A) A list of all States for which the institution has determined that its curriculum meets the State educational requirements for licensure or certification;

(B) A list of all States for which the institution has determined that its curriculum does not meet the State educational requirements for licensure or certification; and

(C) A list of all States for which the institution has not made a determination that its curriculum meets the State educational requirements for licensure or certification.

(vi) If an educational program is designed to meet educational requirements for a specific profession for which there are program-specific or graduate-specific certifications that are not required for employment but increase employability in the field, whether the program meets the educational requirements for such certifications and if not, any limitations that arise from the lack of certifications.

**Commented [8]:** The Department proposed to eliminate disclosures concerning professional licensure because of proposed language in 668.14(32) which would require schools ensure that a program meets requirements for professional licensure in all states where it enrolls students. However, students may intend to seek employment in states other than the state where they are residents. Accordingly, it is important to disclose whether a program meets requirements in each state.