



MEMORANDUM

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TO National Association of Independent
Colleges and Universities

FROM Hogan Lovells US LLP

DATE February 18, 2022

By Electronic Mail

SUBJECT 2021-22 Negotiated Rulemaking -- Administrative Capability High School Diploma Issue

I. Issue

- The U.S. Department of Education (“ED”) proposes in its 2021-22 Negotiated Rulemaking to define when a “high school diploma” is invalid for Title IV purposes. Essentially, ED’s proposal (as of the second negotiating session) is that a diploma is invalid if either (1) it was awarded by a diploma mill, or (2) it “is not recognized” or “does not meet the requirements established by” the “appropriate State agency in which the high school is located.”
- Part (2) is deeply flawed. As ED’s Office of Non-Public Education currently acknowledges, regulation of nonpublic high schools is a State law question and varies widely by State. Part (2) fails to take adequate account of that reality. Many private schools are not subject to mandatory State agency oversight, as ED has long recognized. Under ED’s proposed language diplomas from rigorous private high schools with a demonstrated ability to prepare students for success in Title IV-eligible programs could be deemed invalid.

II. Legal Background

- A high school diploma is relevant to both student and institutional eligibility to participate in Title IV programs. However, there is no clear statutory or regulatory definition of “high school diploma” or “valid” high school diploma. The Higher Education Act itself refers without elaboration to “a certificate of graduation from a school providing secondary education.”¹ ED

¹ 20 U.S.C. § 1001(a)(1) (institutional eligibility); 34 C.F.R. § 600.7; 20 U.S.C. § 1091(d) (student eligibility).

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regulations do not offer a straightforward definition, although they do define the “equivalent of a high school diploma” and, in the higher education context, “diploma mill.”²

- ED’s current Negotiated Rulemaking proposal relies primarily on State law to identify whether a high school diploma is valid. But ED has elsewhere recognized that “[n]ot one of the states regulates private schools in exactly the same way as another.”³ Each State approaches “accreditation/licensing/approval,” among other topics, differently as a result of the “unique circumstances concerns, and policy perspectives in each state.”⁴ ED has published a summary table underscoring that some States do not regulate private high schools at all, others have optional registration or approval processes, and others require some private schools to obtain approval.⁵ In some States multiple agencies oversee or evaluate private high schools, including for purposes of determining student eligibility for state postsecondary financial aid programs.
- Given the variability in State law, ED’s proposal requires revision. At a minimum, any prescription of a valid or invalid high school diploma should be clear that a State agency’s determination or requirements apply only where the agency has mandatory jurisdiction under State law.
- Because some States have optional registration processes for private high schools and others do not regulate private high schools at all, ED should also acknowledge other ways for a high school diploma to qualify as valid. For example, in the past ED has encouraged financial aid administrators to consult with each other regarding the validity of high school diplomas. ED recognized that such peer review was “especially useful for similar types of institutions in the same State, where differing levels of oversight by State departments of education will have a significant effect on what procedures an institution might establish.”⁶ ED explained that it did “not plan to second-guess the decisions of college administrators in these matters, such as moving a high school from a ‘good’ list to a ‘bad’ list (or vice versa), as long as they are reasonable.”⁷ ED could build off that approach here – and ease the burden on colleges and universities – by allowing colleges and universities to rely on recognition of the high school by a State agency for State student financial aid or other educational purpose or by permitting ED-recognized accreditors to create lists of acceptable private high schools.

III. Proposed Solution

- To address the issues described above, ED should:
 - Clarify the circumstances under which a Title IV participant must confirm or obtain documentation from a State agency (i.e., only where the State agency has mandatory jurisdiction under State law).

² See 34 C.F.R. § 600.2.

³ See <https://www2.ed.gov/admins/comm/choice/regprivschl/index.html>.

⁴ See <https://www2.ed.gov/admins/comm/choice/regprivschl/index.html>; see also

⁵ See <https://www2.ed.gov/about/inits/ed/non-public-education/files/permission-to-operate-comparison-chart.pdf>.

⁶ 75 Fed. Reg. 66,832, 66,877 (Oct. 29, 2010) (Final Rule).

⁷ *Id.* at 66,891.

- Given the variability in State oversight of private high schools, add alternatives to measure the bona fides of a high school diploma, such as that a high school is accredited (as the Department has recognized in connection with its proposal), recognized by a state agency for an educational purpose, or that an ED-recognized accreditor has determined the high school is acceptable.
- Replace proposed (t)(2)(i) and (ii) with a cross-reference to (t)(1).
 - ED's proposed (t)(2)(i) is unnecessary because the definition of a valid high school diploma includes an affirmative determination by a State agency that regulates or oversees the high school.
 - This approach provides a standard by which the determination of invalidity in (t)(1)(ii) would be made. The language in the original proposal, which would render a high school diploma invalid if it "[h]as been determined to be invalid by the Department, the appropriate State agency in which the high school was located, or through a court proceeding", is procedural rather than substantive. It could give *carte blanche* authority to determine whether a high school diploma is valid without reference to any substantive standard. Congress could not have intended such result.
 - Alternatively, clarify in both (t)(1)(i) and (ii) that "appropriate" means that the high school is subject to mandatory State regulation or oversight.

Revisions to the language ED proposed⁸ follow in clean (showing only the revised version, not ED's original), and redline (showing the changes to ED's proposal for the second negotiating session). In both cases, highlighting shows changes from the current regulations.

Clean Version with Proposed Revisions:

(t) Develops and follows adequate procedures to evaluate the validity of a student's high school diploma if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

(1) Adequate procedures to evaluate the validity of a student's high school diploma must include--

(i) Obtaining documentation from the high school that confirms the validity of the high school diploma, including at least one of the following—

(A) Transcripts;

(B) Written descriptions of course requirements; or

(C) Written and signed statements by principals or executive officers at the high school attesting to the rigor and quality of coursework at the high school; and

(ii)

(A) If the high school is regulated or overseen by a State agency, confirming with or receiving documentation from that agency that the high school is recognized or meets requirements established by that agency;

⁸ See Issue Paper 2: Standards of Administrative Capability Session 2: February 14-18, 2022, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/2admincap.pdf>.

(B) Confirming or receiving documentation that the high school has been recognized or accepted by a State agency for State student financial aid or other educational purpose;

(C) Confirming with or receiving documentation from an accrediting agency that the high school is accredited; or

(D) Confirming with or receiving documentation from an accrediting agency recognized by the Secretary that the high school is nonprofit and offers a program of studies deemed acceptable by the accrediting agency for admission to postsecondary institutions of higher education accredited by the accrediting agency and that students who graduate from that high school have demonstrated success in post-secondary institution(s) accredited by that accrediting agency.

(2) A high school diploma is not valid if it—

(i) Does not satisfy the standard in (t)(1)(i)–(ii) and has been determined to be invalid by the Department or through a court proceeding;

(ii) Was obtained from an entity that requires little or no secondary instruction or coursework to obtain a high school diploma, including through a test that does not meet the requirements for a recognized equivalent of a high school diploma under 34 CFR 600.2; or

(iii) Was obtained from an entity that—

(A) Maintains a business relationship or is otherwise affiliated with the eligible institution at which the student is enrolled; and

(B) Is not accredited.

Redline Showing Changes from ED's Proposal to Proposed Revisions:

(p) Develops and follows adequate procedures to evaluate the validity of a student's high school diploma if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

(1) Adequate procedures to evaluate the validity of a student's high school diploma must include--

(i) Obtaining documentation from the high school that confirms the validity of the high school diploma, including at least one of the following—

(A) Transcripts;

(B) Written descriptions of course requirements; or

(C) Written and signed statements by principals or executive officers at the high school attesting to the rigor and quality of coursework at the high school; and

(ii)

(A) If the high school is regulated or overseen by a State agency, confirming with or receiving documentation from that agency that the high school is recognized or meets requirements established by that agency;

(B) Confirming or receiving documentation that the high school has been recognized or accepted by a State agency for State student financial aid or other educational purpose;

(C) Confirming with or receiving documentation from an accrediting agency that the high school is accredited; or

(D) Confirming with or receiving documentation from an accrediting agency recognized by the Secretary that the high school is nonprofit and offers a program of studies deemed acceptable by the accrediting agency for admission to postsecondary institutions of higher education accredited by the accrediting agency and that students who graduate from that high school have demonstrated success in post-secondary institution(s) accredited by that accrediting agency.

(2) A high school diploma is not valid if it—

~~(i) Is not recognized or does not meet the requirements established by the appropriate State agency in the State where the high school is located;~~

(i) Does not satisfy the standard in (t)(1)(i)–(ii) and has been determined to be invalid by the Department or through a court proceeding;

~~(ii) Has been determined to be invalid by the Department, the appropriate State agency in the State where the high school was located, or through a court proceeding;~~

~~(iii) Was obtained from an entity that requires little or no secondary instruction or coursework to obtain a high school diploma, including through a test that does not meet the requirements for a recognized equivalent of a high school diploma under 34 CFR 600.2; or~~

~~(iv) Was obtained from an entity that—~~

~~(A) Maintains a business relationship or is otherwise affiliated with the eligible institution at which the student is enrolled; and~~

~~(B) Is not accredited.~~

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