



Sifting Through the Education Department’s Alphabet Soup

Negotiated rulemaking around ATB and GE represent areas of importance for community colleges.

By Carrie Warick-Smith

WASHINGTON IS KNOWN FOR ITS “WONK talk” — including acronyms (POTUS), initialism (FBI), backronyms (AMBER Alert), and shorthands (“the Hill”). The U.S. Department of Education (just “the Department” to those of us who work in the education field) is no stranger to this trend. And a just-completed process of consequence to community colleges is an alphabet soup of phrases and acronyms.

Negotiated rulemaking, also called “neg reg,” is the process by which the Department amends regulations for programs in Title IV of the Higher Education Act, which oversees federal student aid. The Department recently hosted a series of sessions with an Affordability and Student Loans Committee and an Institutional and Programmatic Eligibility Committee.

The latter group tackled seven topics over three months, with two of key importance of community colleges: Ability to Benefit (ATB) and Gainful Employment (GE). Anne Kress, the president of Northern Virginia Community College, served as the negotiator representing two-year public institutions, with William S. Durden from the Washington State Board for Community and Technical Colleges serving as an alternate.

How Does “Neg Reg” Work?

Before diving in on ATB and GE, a quick review of how the negotiated rulemaking process works might be useful. First, the Department sets issue areas and announces them in the Federal Register. Next it accepts public nominations for negotiators to represent stakeholders. Negotiators represent each sector of higher education, including students,



consumer advocates, and financial aid administrators. The Department also has a voting representative.

At the end of the process, negotiators then vote on each of the issue areas discussed. If no one dissents (absence or non-voting do not count as dissent), then the rule is introduced as proposed in the Notice for Proposed Rulemaking (NPRM), where it is open for public comment.

In the case where the negotiators do not reach consensus, the Department then drafts its own version of the rule for public comment, with an option — but not a requirement — to use language discussed during the negotiations.

After a public comment process, final

rules are issued. Final rules issued by November 1 take effect on the following July 1.

Reaching Consensus: Ability to Benefit

Negotiators were able to reach consensus on the ATB topic. To qualify as eligible to participate in federal student aid programs, a student must have received a high school diploma or its equivalent, participated in a qualifying homeschool program, or qualify as an “Ability to Benefit” student. Students receive ATB designation by passing a preapproved test, completing at least six credit hours or 225 clock hours, or completing a state-defined process approved by the U.S.

Secretary of Education. Students in ATB must be enrolled in an eligible career pathway program.

The new rule includes an eligible career pathway definition and outlines the process by which a state will apply for approval as a state-defined process to grant program eligibility. Institutions wishing to participate must be included on the state application, and in their first listing ensure that their included programs do not have a dropout rate exceeding 33 percent per year. Once participating in the state-defined process, a program's students must have a success rate that is at least 85 percent of the level demonstrated by students with high school diplomas who are in the same program. The 85 percent threshold is lower than the originally proposed 95 percent, and the change allowed the committee to reach consensus.

High Levels of Institutional Dissent: Gainful Employment

On GE, however, negotiators were unable to reach consensus. Students attending non-degree programs at public or private non-profit institutions, or any program at a for-profit institution, are only eligible to receive federal student aid if the program prepares students for gainful employment in a recognized occupation. Gainful employment, however, is not defined in statute. Therefore, the Department uses regulation to set this definition. As community colleges offer many Higher Education Act Title IV non-degree programs that prepare students for

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recognized occupations, the impact of this term on program eligibility for programs like the Pell Grant is significant.

During the 2014 “neg reg” process, the Department set a requirement based on a debt-to-earnings ratio. During this round of “neg reg,” the Department proposed adding an earnings threshold. Based on this draft language, programs would have to meet both the debt-to-earnings and the earnings threshold to remain eligible.

The earnings threshold would be set to the median income in the program's state for high school graduates aged 25-34. Concerns about this rule discussed during

the session include data limitations, a lack of grace period for outcomes during the COVID-19 pandemic, and the lack of ability for programs with participants that earn cash wages or tips where earnings are possibly underreported.

Notice for Proposed Rulemaking

The Department will now issue a “Notice of Proposed Rulemaking” (NPRM). For the ATB rule, it will be published as agreed upon and only those not involved in the negotiations are able to comment in a critical light. For the GE rule, the Department will release its draft rule for public comment, and anyone can participate.

Responding to these public comments is an important part of the regulatory process. ACCT will be participating and encourages our member trustees and institutions to participate as well. Given that the Department must consider every comment, this is a situation where there is power in numbers.

To stay up to date on this issue and others ACCT is following around Washington, email publicpolicy@acct.org to sign up for the Electronic-Latest Action in Washington (E-LAW – because as a Washington organization, we like to make our own acronyms too).



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