



August 25, 2022

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2022-OPE-0062 (Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program)

Dear Secretary Cardona,

Thank you for the opportunity to comment on the Department's proposed regulations for Pell Grant restoration for incarcerated people and changes to the 90/10 rule. These comments are being submitted on behalf of Ithaka S+R, a not-for-profit service that conducts research on US higher education, libraries, and the arts.¹ Over the past several years, Ithaka S+R has led research projects exploring the issues and challenges inherent in increasing access to educational opportunities to incarcerated people, scaling these opportunities, and ensuring their quality.² These comments are informed by this research as well as our wider expertise in information access, credit transfer, and student success. Any questions about these comments can be directed to Dr. Kurtis Tanaka at kurtis.tanaka@ithaka.org.

We support the proposed regulations, though with several points of concern, and see opportunity for clarification and/or improvement. Our principal concerns center on:

1. The effectiveness of accreditation in ensuring quality;
2. The lack of accountability and guidance given to oversight entities;
3. The complexity of data sharing and evaluation required to meet the best interest determination;
4. The general emphasis on program outcomes as opposed to inputs in the best interest determination;
5. The complexity of credit transfer, and the lack of guidance for determining Satisfactory Academic Progress (SAP).

Additionally, we suggest the department add greater clarity regarding:

6. Eligibility criteria for incarcerated people;
7. The initial two year approvals process.

We conclude with a statement of support for the proposed changes to the 90/10 rule.

¹ See <https://sr.ithaka.org/our-work/>. Ithaka S+R is part of ITHAKA (<https://www.ithaka.org/>) a not-for-profit organization with a mission to improve access to knowledge and education for people around the world.

² See <https://sr.ithaka.org/tags/higher-education-in-prisons/>.

Principal Points of Concern

We direct the Department's attention to the following issues as major points of concern that could hinder the full implementation of Congress's intent in restoring Pell eligibility for incarcerated people.

1. The effectiveness of accreditation in ensuring quality.

While it is critical that prison education programs (PEPs) are run by accredited institutions, accreditation must be seen as a floor to quality rather than a standard or benchmark. Indeed, Ithaka S+R's research has shown that accreditation is a poor guarantor of quality and that poor performing institutions are rarely penalized by accrediting agencies as articulated in **§668.236 (e)** and **(f)**.³

Furthermore, the relationship between the accrediting agency and the oversight entity needs greater clarification. Section **§ 668.237(b)(4)** states that an accrediting agency must have:

Reviewed and approved the methodology for how the institution, in collaboration with the oversight entity, made the determination that the prison education program meets the same standards as substantially similar programs that are not prison education programs at the institution.

First, the text needs to be clarified to reflect what appears to be the Department's intent. The existing text suggests that it is the institution of higher education (IHE), rather than the oversight entity, that is ultimately responsible for making the best interest determination, which is contrary to **§ 668.241**. It should also be clarified how this requirement relates to the best interest determination and whether it is an additional evaluation or if, as is implied elsewhere, the best interest determination is meant to satisfy this "same standards" determination mentioned here.

Second, the text states that the accrediting agency will exercise review of the oversight entity in making the best interest determination and therefore, the accreditor's role in making the best interest determination needs to be more clearly articulated in **§ 668.241**. For example, if the accrediting agency does not find the oversight entity's methodology sufficiently rigorous, does it have the authority to rule the oversight entity's determination invalid? This suggests the accrediting agency will need to be engaged at multiple points in the IHE's application to become a PEP to forestall such a possibility, and the Department must provide clear directions as to process, timeline, and the appropriate role for each actor (IHE, oversight entity, and accreditor) in that process.

³ Childress, Cameron, James D. Ward, Elizabeth D. Pisacreta, and Sunny Che. "Overseeing the Overseers: Can Federal Oversight of Accreditation Improve Student Outcomes?" Ithaka S+R. Last Modified 25 May 2022. <https://doi.org/10.18665/sr.316765>.

2. The lack of accountability and guidance given to oversight entities.

Congress invested corrections agencies as the oversight entity responsible for ensuring prison education programs (PEP's) operate in the best interest of students. Given the historic exploitation of incarcerated people and their families by bad actors in the so-called "prison industrial complex," safeguards, above and beyond what a non-incarcerated student would have, are critical and there is no question that correctional agencies need to play a central role in the process. Nonetheless, there is also no question that correctional agencies are not experts in higher education and are ill equipped to make such a determination as described in § 668.241 on their own (discussed further below). Beyond a lack of expertise, oversight entities also lack the staff capacity and resources/funding to fulfill this role, which may discourage them from supporting postsecondary programming simply due to the regulatory burden.

Moreover, correctional agencies operate from a distinctly different set of priorities, namely security and control, that may fundamentally discline them from supporting access to higher education for those in their custody. As oversight entities will exercise control over many, if not all, aspects of a PEPs functioning inside a correctional facility, they will also be a decisive factor in determining the success of the PEP, and so the Department should account for the fact that oversight entities *cannot* act as an independent evaluator of PEPs.

Thus, while the Department cannot relieve correctional agencies of their role as oversight entities due to statute, the Department should explore options to minimize the burden placed on them.

If the Department implements the rule as is currently proposed, however, we advise that, while it is neither possible nor desirable to force correctional agencies to either partner with institutions of higher education (IHEs), or with specific IHEs, the Department should, nonetheless, ensure that a minimum level of transparency, and therefore accountability, be maintained in how correctional agencies exercise their responsibilities as oversight entities. Namely, the Department should ensure that all documentation related to the oversight entities' decisions are made publicly accessible so that stakeholders and researchers may assess the quality and consistency of oversight entities' decision making. This will be especially important for programs that may be operating in more than one facility or state where different decisions might be reached about the same program. Furthermore, the publication of all documentation related to the best interest determination will also allow stakeholders and researchers to assess any divergences or discrepancies between oversight entities' methodology across multiple jurisdictions, which will help ensure a consistent standard of quality across jurisdictions.

Finally, the Department should require oversight entities to provide either an appeals process or a roadmap for reconsideration in cases where PEP programs are denied. While oversight entities cannot be forced to accept a PEP program they do not support through an appeals process, and IHE's may themselves be reluctant to avail themselves of an appeal,⁴ it will be critical to ensure

⁴ Forthcoming research from Ithaka S+R, for example, shows that in the case of media review (i.e. the process by which corrections agencies screen books, articles, and other materials), college programs never use established appeals processes to contest acts of censorship for fear of risking their relationship with the corrections agency. It therefore seems unlikely that programs would utilize an

that IHEs that receive a negative decision are provided with some form of feedback and guidance for future reapplication beyond merely a timeframe as is currently described in § 668.241(c). Compelling oversight entities to provide feedback and next steps for a denied program will hopefully also reduce the chance that programs are denied without good cause. We therefore suggest that § 668.241(c) be revised as follows:

If the oversight entity does not find a program to be in the best interest of students, it must provide the reasoning for its determination, specific guidance on how the program might improve to meet the required standard, and allow for programs to re-apply within a reasonable timeframe.

3. The complexity of data sharing and evaluation required to meet the best interest determination.

At multiple points, the proposed rule requires data to be shared between IHE's, oversight entities, and, implicitly, other state or federal agencies. Sections §668.238 (b)(8), (c)(3), and §668.239(c), for example, require IHE's and oversight entities to share data about release and transfer dates, while sections §668.241 (a)(1)(i, ii, iii) and (2)(i) require data on re-enrollment in higher education, job placement rates, earnings data, and recidivism. While the Department suggests it will itself provide data on reenrollment and earnings, job placement rates and recidivism will potentially require new data sharing agreements or systems for capturing the required data.

The Department should be aware that establishing such agreements and systems could take years to put in place and could discourage both IHEs and oversight entities from participating in the program—the opposite of Congress' intent. Moreover, for the data the Department itself will provide, for example through the college scorecard, it will be critical to assess whether such aggregate data accurately reflect the outcomes of incarcerated individuals. As it often takes incarcerated students much longer to complete their course of study, it will likely be the case that the initial evaluation periods proposed by the Department may be infeasible, or lead to misleading results. In the initial years of a PEP's implementation, PEPs should therefore be required to report:

- That all courses offered are equivalent to courses offered on the main campus, and are eligible for credit transfer;
- The share of incarcerated students accessing Pell grants who complete the course;
- The share of incarcerated students accessing Pell grants who fail to complete the course, indicating the reasons, including transfer or release.

Additionally, the proposed rule requires multiple assessments, either by accrediting agencies or oversight entities, yet the latter have no experience in evaluating higher education programs. The Department sought to support oversight entities by listing and requiring seven metrics in

appeals process in this case as, even if the appeal is successful, they will start their partnership out on a bad footing. For more information about the project see:

<https://sr.ithaka.org/blog/increasing-access-to-quality-educational-resources-to-support-higher-education-in-prison/>.

§668.241 (a)(1), largely taken from *suggested* metrics in the statute. However, the Department has given no guidance on what acceptable thresholds should be for each metric, effectively telling oversight entities *what* to assess by not *how* to assess it.

There are multiple options for providing greater support to oversight entities in making the best interest determination. The Department itself could set acceptable thresholds for each metric, the Department could encourage oversight entities to work with a third party evaluator, or leave it to the oversight entity and IHE to negotiate directly. As noted above, however, neither the IHE/PEP nor the oversight entity can act as neutral evaluators. Regardless of which option or options the Department pursues, it should nonetheless provide greater guidance and support to oversight entities in making this determination. To do this, the Department will need to invest in and support more research and evaluation of prison education programs and the PEP application process going forward.

Finally, the Department should not “lock in” oversight entities to these metrics through regulation, but, building on lessons from the Second Chance Pell experiment,⁵ incorporate flexibility so that, if certain metrics are determined to be unfit for purpose, or too difficult to assess, the Department is able to make adjustments. It is also the case that appropriate thresholds will be difficult to set initially, given the limited data about the impact of PEPs on the outcomes measured by the metrics. After several years of data, the metrics/thresholds should be revisited and adjusted to better measure accountability across PEPs.

4. The general emphasis on program outcomes as opposed to inputs in the best interest determination.

A significant issue with the metrics proposed in **§668.241 (a)(1)** is that they are principally concerned with program outcomes as opposed to inputs, that is, elements of a prison education program that might reasonably be said to be commensurate with quality and result in positive student outcomes.⁶ The rule gestures towards such elements in **§668.241 (a)(1)(iv)** and **(vi)** where it requires oversight entities to assess PEPs based on the qualifications of faculty, their turnover rate, and the availability of academic and career advising, but these are by no means the only elements that determine quality, not to mention equity.

⁵ As the Department itself notes elsewhere: “Rather than dictate these data items through regulation, the Department proposes to notify institutions of data requirements through notices in the Federal Register, which would allow the Department to periodically add, subtract, or modify requests for certain information. Our experience with the Second Chance Pell experiment has been that revisions to data collection requirements may be necessary to ensure the collection of current and accurate data reflective of the experiences of incarcerated students, to obtain valuable new types of data that may become available due to statutory or regulatory changes or changes in recordkeeping practices at prison facilities or postsecondary institutions, and to address challenges related to data-sharing or burden that were unanticipated or that have evolved since establishing the data requirements.” Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program, 87 Fed. Reg. 45448, (July 28, 2022).

⁶ See Erzen, T., Gould, M.R., Lewen, J. (2019). “Equity and Excellence in Practice: A Guide for Higher Education in Prison.” St. Louis, MO: Alliance for Higher Education in Prison and San Quentin, CA: Prison University Project. Retrieved from the Alliance for Higher Education in Prison website: www.higheredinprison.org.

We therefore strongly encourage that the Department expand subsection **(vi)** to include access to support services and academic resources generally, including access to career and academic advising, tutoring (as is, in fact, suggested in **§ 668.238(b)(5)**), library resources and services, and technology.⁷ Recognizing the challenges of providing all these services in the carceral environment, the Department may not wish to require all of these services and resources, but should enumerate them to provide guidance for oversight entities. We therefore recommend the following revision to **§ 668.241 (a)(1)(vi)**:

*Whether the prison education program's offering of **student support services and resources, which may include academic and career advising, tutoring, library resources and services, and technology**, 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.*

Giving more attention to the elements of a program rather than just student outcomes will be especially important in the initial years of a program's implementation since no outcomes data will be available. Furthermore, given that it can take incarcerated students much longer to complete a course of study, or may complete their degree years before release, it may be difficult to measure the proposed student outcomes in a way that can provide timely data for program evaluation, making program inputs all the more important in ensuring program quality and equity.

5. The complexity of credit transfer, and the lack of guidance for determining Satisfactory Academic Progress (SAP).

Credit transferability is an imperative for all postsecondary students, and presents specific challenges when it comes to serving students in carceral facilities. As outlined in the proposed regulation, ensuring that, upon release, students would be able to transfer their credits to a proximate postsecondary institution is a key step to making sure that students can translate their educational experiences into credentials after they are released.

However, as transfer credits may only be accepted as elective credit, credit transferability does not necessarily lead to advancement towards a degree, which Pell is presumably meant to fund.⁸ (This also makes credit transferability a poor lever for quality assurance, which the Department implies is its goal in requiring information on credit transfer at **§ 668.236(d)** and **§ 668.241(a)(1)(v,vii).**) From our own conversations with incarcerated and formerly

⁷ For the importance of library services and technology see: Tanaka, Kurtis and Danielle Cooper. "Advancing Technological Equity for Incarcerated College Students: Examining the Opportunities and Risks." Ithaka S+R. Last Modified 7 May 2020. <https://doi.org/10.18665/sr.313202>.

⁸ Patel, Pooja, Cindy Le, Martin Kurzweil, Alexandra W. Logue, Christopher Buonocore, and Christopher Vickery. "Archiving Degree Audit Data to Measure and Reduce Lost Transfer Credit." Ithaka S+R. Last Modified 2 February 2022. <https://doi.org/10.18665/sr.316373>.

incarcerated students, it is increasingly clear that people are leaving prison having earned a significant number of credits but have no pathway to an actual degree and no Pell funding left—a concerning trend. In applying to become a PEP, therefore, IHE's should be required to submit to the Department and oversight entity a curricular plan that details how the program's course offerings will lead to a degree. We therefore recommend that § 668.238(b)(1) be updated to read:

A description of the educational program, including the educational credential offered (degree level or certificate), the field of study, and curricular plan or pathway for degree completion.

We also suggest that such a plan be required by oversight entities at the outset of the program's implementation.

Additionally, the Department should require in § 668.241 (a)(1)(vii) that IHEs that offer programs in prisons must transcript those credits in the same way that they would transcript courses offered to students who are not incarcerated (without any notation identifying them as having been completed while imprisoned or confined). This is important for two reasons:

- if a student chooses to continue their credential at that same institution post-release, they can be sure all of their in-facility coursework will apply fully, and
- when a student provides their transcript to another institution or a potential employer, they can maintain privacy.

Finally, it is likely the exception and not the rule that a student's timeline for release, inter-facility, or intra-facility transfer and the end of the academic term will coincide. As the regulation is currently constructed, there is very little guidance on how postsecondary institutions should deal with situations where the timing of the academic term does not align with student release or transfer, or if a student is transferred to another facility mid semester. It will be critical for the department to provide guidance and protect students from failing the Satisfactory Academic Progress (SAP) should they be unable to complete courses due to reasons beyond their control.

Points in Need of Additional Clarification

In addition to these major points of concern, we advise the department to provide greater clarity regarding the following:

1. Eligibility criteria for incarcerated people.

Congress did not impose any eligibility criteria for incarcerated students when restoring access to Pell Grants in the statute.⁹ This was in contrast to the Department's Second Chance Pell experimental sites initiative and so should be seen as a purposeful act. While the language of the

⁹ Consolidated Appropriations Act of 2021, Public Law 116-260, 116th Cong., 2nd sess. (December 27, 2020), available at <https://www.congress.gov/bills/116th-congress/house-bill/133>.

proposed rule does not specify eligibility criteria for incarcerated students, the general emphasis on student outcomes in the best interest determination, sections **§ 668.241 (a)(1)(i, ii, iii)** and **(2)(i)**, implicitly, but strongly, suggests that people within a few years of release are the intended beneficiaries of Pell restoration, contrary to Congress's intent. **We therefore strongly encourage the Department to make it clear that neither Congress nor the Department intend for there to be any limitations on eligibility for Pell funding based on sentence length/release date, conviction type, facility type, or any other dimension of a person's incarceration.**

2. The initial two year approvals process.

The Department needs to add greater clarity as to how the initial approval period will operate and how oversight entities are to determine which programs to allow in their facilities and embark on the PEP application process. As written, the rule only gives guidance as to what oversight entities are to assess at the end of the two year period and gives no guidance as to what standards oversight entities should require of IHEs at the outset. Above (4) we called attention to the need for greater consideration of program inputs, as opposed to outcomes, and we suggest the Department use those metrics to provide oversight entities with a basis for making the initial two year approval. We also recommend that IHEs be required to provide a curricular plan that outlines pathways to degree completion, as recommended in (5) above.

Additionally, the Department should provide guidance as to what will happen in the event that an IHE does not become approved as a PEP provider at the end of the initial two years. As students will have used a considerable amount of their lifetime Pell allotment, the Department should be clear as to how students will be protected from wasting their Pell funds given that the IHE may not have implemented the credit transfer agreements required to become a PEP at this initial stage.

Statement of Support for Changes to the 90/10 Rule

Ithaka S+R has conducted research on veterans and their experiences accessing higher education.¹⁰ Based on this research, we strongly support not including federal aid for veterans in the 10% revenue test as proposed in **§668.28**.

Since the 10% revenue test is meant to be a way of proving the value of the program offered that is eligible for Title IV government funding to prevent the waste of government resources, it is a mistake to allow revenues earned on non-Title IV programs to count toward the 10%. This significantly reduces the incentives of the 90/10 rule to improve the quality of the programs eligible for Title IV funding, and encourages for profit institutions to aggressively pursue the

¹⁰ Hill, Catharine B., Martin Kurzweil, Elizabeth D. Pisacreta, and Emily Schwartz. "Enrolling More Veterans at High-Graduation-Rate Colleges and Universities." Ithaka S+R. Last Modified 10 January 2019. <https://doi.org/10.18665/sr.310816>.

veteran population.¹¹ The proposed rule change will therefore uphold the original intent of the rule and discourage the exploitation of student veterans.

Conclusion

The Department's efforts to restore Pell funding to incarcerated people and guard against exploitation by bad actors is commendable, but to realize Congress's intent the Department must ensure that the proposed level of oversight does not discourage oversight entities and programs from participating. Of principal importance is reducing the burden placed on oversight entities, which have neither the capacity nor expertise to fulfill this function as is currently outlined in the rule. While the oversight entity will have to play an important role, the Department should look for options that reduce the evaluation burden placed on them and increase transparency and accountability by requiring that records of their decision making be made publicly available.

The outcomes metrics the Department is proposing will be challenging to collect, may not provide timely information given the time it may take incarcerated students to complete a degree or be released, and may not accurately reflect the outcomes of incarcerated students. For this reason the Department should be flexible in setting these guidelines and not lock them in through regulation. Additionally, because such metrics may take years to collect, more attention should be paid to program inputs (e.g. advising, access to library resources, etc.).

Finally, the Department should ensure that credits earned using Pell funds actually lead to degrees. While the existing rule places much focus on credit transfer, this on its own does not guarantee that those credits will help students advance to a degree. More attention should, therefore, be paid to curricula and degree pathways rather than credit transferability alone.

Ithaka S+R thanks the Department for the opportunity to comment on the proposed rule and for its consideration of these recommendations. We look forward to further engaging on these issues as the Department rolls out its final guidelines for Pell restoration for incarcerated students.

Sincerely,



Catherine Bond Hill, Ph.D.
Managing Director, Ithaka S+R

¹¹ Walter Ochinko, "Department of Education Data Shows Increased Targeting of Veterans and Service members, Highlighting Urgency of Closing 90/10 Loophole," *Veterans Education Success*, November 2017, <https://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5a043bdfc83025336298845f/1510226911840/VES+90%3A10+Report+-+FINAL.pdf>; Karina Hernandez, "Military Veterans Decry Debt, Useless Diplomas from For-Profit Colleges," *The Hechinger Report*, June 7, 2018, <https://hechingerreport.org/military-veterans-decry-debt-useless-diplomas-from-for-profit-colleges/>.

A handwritten signature in blue ink, appearing to read "Kurtis Tanaka".

Kurtis Tanaka, Ph.D.

Program Manager, Justice Initiatives, Ithaka S+R