

## Brothers, Sheila C.

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**From:** Hines, Miranda J.  
**Sent:** Friday, August 28, 2020 7:29 AM  
**To:** Brothers, Sheila C.  
**Cc:** Cramer, Aaron M.  
**Subject:** RE: [New post] Surprise! Newly Released Final Regulations

**From:** Hines, Miranda J. <[miranda.hines@uky.edu](mailto:miranda.hines@uky.edu)>  
**Sent:** Wednesday, August 26, 2020 8:22 AM  
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**Subject:** FW: [New post] Surprise! Newly Released Final Regulations  
**Importance:** High

Good morning,

The Department of Education has released its final regulations from the 2019 Negotiated Rulemaking process. These regulations go into effect on July 1, 2021, though institutions may choose to implement them early if they'd like. Areas addressed in these regulations include:

- Academic engagement
- Clock and credit hour
- Correspondence education
- Distance education
- Week of instruction
- Direct assessment
- Changes to satisfactory academic progress
- The return of Title IV Financial Aid

Below is a review of these changes as provided by WCET, our professional organization that provides guidance and support for navigating regulatory compliance, practice, policy, and advocacy of technology enhanced learning in higher education. Given that these changes can impact processes related to accreditation, Senate oversight, and reporting, I wanted to share this information with each of you to ensure you are aware and can consider implications for your areas as well.

Thank you,  
Miranda

### Miranda Hines, MS HRE

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**From:** WCET Frontiers <[comment-reply@wordpress.com](mailto:comment-reply@wordpress.com)>  
**Sent:** Wednesday, August 26, 2020 7:01 AM

To: Hines, Miranda J. <[miranda.hines@uky.edu](mailto:miranda.hines@uky.edu)>  
Subject: [New post] Surprise! Newly Released Final Regulations

**CAUTION: External Sender**

Lindsey Rae Downs posted: " On April 1st, the Department of Education released the final set of proposed regulations stemming from the 2019 Negotiated Rulemaking process (April Fools!). Back in April, WCET published three blog posts outlining the proposed regulations on April 3rd, "

Respond to this post by replying above this line

## New post on WCET Frontiers



### [Surprise! Newly Released Final Regulations](#)

by [Lindsey Rae Downs](#)

On April 1<sup>st</sup>, the Department of Education released the final set of proposed regulations stemming from the 2019 Negotiated Rulemaking process (April Fools!). Back in April, WCET published three blog posts outlining the proposed regulations on [April 3<sup>rd</sup>](#), [April 6<sup>th</sup>](#), and [April 13<sup>th</sup>](#). I know that seems like a lifetime ago but many of us have been anxiously awaiting the release of the final regulations. Well, [the Department finally decided to release those regulations](#) late Monday, August 24<sup>th</sup>.

SURPRISE!

### How and Why We Got Here



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In 2018 the U.S. Department of Education solicited public comments on the scope of a negotiated rulemaking process that might address distance education regulations, including state authorization and regular and substantive interaction. As a result of the comments it received, the Department announced it would engage in an unprecedentedly large negotiated rulemaking process in early 2019 that would include a wide variety of regulations including accreditation, distance education, state authorization, religious institutions, licensure notifications, and several other areas. In order to get this work done, the Department appointed three subcommittees that would make recommendations to the main committee of negotiators.

Given the vast scope and complexities of the proposed regulations, most of us assumed that it would be impossible for the negotiators to reach unanimous consensus. Without consensus, the Department would be able to release its own version of the regulations. However, with only minutes to spare, the negotiators reached consensus, thus requiring the Department to release the agreed upon language for public comment. Since consensus was reached on April 3, 2019, the Department released for public comment (and eventual implementation) three buckets of regulations—state authorization, accreditation, and professional licensure; TEACH grants and faith-based institutions; and yesterday’s distance education and direct assessment regulations.

If you’ve followed this saga for very long, you know that one of the key regulatory challenges for our field has been around the definition of *distance education* and, specifically, *regular and substantive interaction*. In the documentation associated with the final regulations, the Department provided the following justifications for the final regulations (page numbers refer to the draft final regulations):

1. Removal of barriers for creating and implementing “new and innovative ways of providing education to students, and also provid[ing] sufficient flexibility to ensure that future innovations we cannot yet anticipate have an opportunity to move forward” (319-20).
2. Protection of students and taxpayers from the risk of innovation by “delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors” (320).

This final group of regulations is slated to go into effect on July 1, 2021, although, much like we saw with earlier sets of regulations, institutions may choose to implement the final regulations early if they wish to do so. What follows are the highlights of the regulations as they pertain to academic engagement, clock and credit hour, correspondence education, distance education, week of instruction, and direct assessment. This last set of regulations also includes changes to satisfactory academic progress and the return of Title IV financial aid which we won’t go into detail. For more information on those regulations, follow the good work being done by the [National Association of Student Financial Aid Administrators \(NASFAA\)](#).

## **Defining Distance Education, 34 CFR 600.2**

Perhaps the most anticipated set of regulations are the re-definitions of correspondence and distance education.

The final definition of correspondence education in 600.2 reads as follows:

*Education that uses one or more of the technologies listed in paragraphs (1)(i) through (1)(iv) of this definition to deliver instruction to students who are separated from the instructor or instructors, and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.*

1. *The technologies that may be used to offer distance education include —*
  1. *The internet;*
  2. *One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;*
  3. *Audio conferencing; or*
  4. *Other media used in a course in conjunction with any of the technologies listed in paragraphs (1)(i) through (1)(iii) of this definition.*
2. *For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by the institution’s accrediting agency.*
3. *For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—*
  1. *Providing direct instruction;*
  2. *Assessing or providing feedback on a student’s coursework;*
  3. *Providing information or responding to questions about the content of a course or competency;*
  4. *Facilitating a group discussion regarding the content of a course or competency; or,*
  5. *Other instructional activities approved by the institution’s or program’s accrediting agency.*
4. *An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student’s completion of a course or competency—*
  1. *Providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency; and*
  2. *Monitoring the student’s academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed, on the basis of such monitoring, or upon request by the student.*

### **WCET’s Suggestion Regarding “And” vs. “Or” in the “Regular” Section**



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For those of you who remember our original posts back in April you may notice that the final distance education definition is largely unchanged from the proposed language posted in April. WCET largely supported this revised distance education definition although we had hoped the Department would revert back to the subcommittee’s initial language that required institutions to either provide the opportunity for

substantive interactions on a predictable and regular basis or monitor the student's academic engagement and success. Although others made the same suggestion, the Department opted to pass on that request.

### ***Changing “Regular” to “Scheduled” in Defining “Regular”***

The Department did make a minor but significant tweak to the definition of “regular.” The originally proposed language defined “regular” as “interactions with students on a predictable and regular basis.” WCET and several others asked the Department to clarify this language by replacing “predictable and regular” with “predictable and scheduled” – a clearer definition that doesn't leave elements of the original definition open to interpretation (90). Additionally, in its explanation of this change, the Department emphasizes that the focus is on offering scheduled interactions regardless of whether or not students avail themselves of those opportunities (101).

### ***Requested Guidance on the Applying the “Substantive” Requirements***

WCET had also requested that the Department provide guidance on whether or not substantive interaction was to be determined at the instructor or the course level. The answer is more than a matter of semantics. If the regulations are applied at the instructor level and not the course/competency level it could effectively exclude some of the instructional aspects of unbundled faculty models. (Instructors who serve as assessment experts could be excluded from the definition if the Department means to define this at the instructor level.)

The Department obliged by clarifying that substantive interactions take place at the course or competency level and not at the instructor level (95). Additionally, WCET sought clarification as to whether or not substantive activities have to be initiated by the instructor or can they be initiated by students. The Department obliged by specifying that substantive activities must be initiated by instructors (103).

### ***Five Critical Factors in Differentiating “Correspondence” and “Distance” Education***

The Department also clearly articulates for the first time five critical factors that differentiate correspondence and distance education (105-106). These factors are:

1. Distance education should be delivered through an “appropriate” form of online media.
2. Distance education must use instructors that meet accreditor requirements for instruction in the subject matter.
3. There should be at least two forms of substantive interaction.
4. There must be “scheduled and predictable” opportunities for instructor/student interaction.
5. Instructors must be responsive to students' requests for support.

## **Clock and Credit Hours, 34 CFR 600.2**

Also of interest to the distance education community were changes to the definitions of clock hour and credit hour.

### ***Asynchronous Was Added as an Option for Clock Hour Instruction***

In the case of the clock hour, the definition was changed to include the possibility of asynchronous distance instruction—a significant change to the consensus language that required that distance education clock hour instruction be synchronous. In justifying this change, the Department stated:

*Our position is that the requirement for supervision of a clock hour in an asynchronous learning environment is met when the institution is capable of documenting the specific form of academic engagement associated with the activity... and the institution has technological resources and policies and procedures that are sufficient to monitor and document the time each student spends performing that activity. If either of these conditions are not met, an institution would not be permitted to include time spent on an online activity toward completion of a clock hour for purposes of the title IV, HEA programs (61).*

### ***Defining the Credit Hour and the Possible Impact on Lab and Other Courses***

Readers may also remember that the Department proposed, and ultimately adopted, the following change to the credit hour definition:

***Credit hour:*** *Except as provided in 34 CFR 668.8(k) and (i), a credit hour is an amount of student worked defined by an institutions, as approved by the institution’s accrediting agency or State approval agency, that is consistent with commonly accepted practice in postsecondary education and that:*

1. *Reasonably approximates not less than—*
  1. *One hour of classroom or direct faculty instruction and a minimum of two hours of out-of-class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or the equivalent amount of work over a different period of time; or*
  2. *At least an equivalent amount of work as required in paragraph (1)(i) of this definition for other academic activities as established by the institution, including laboratory work, internships, practica, studio work, and other academic work leading to the award of credit hours; and*
  3. *Permits an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels.*

Significantly, the Department suggested that the traditional calculus of determining a credit hour may not work for every incident of learning. By including paragraph two, the new definition allows institutions to take into consideration a number of factors beyond the traditional one hour of class and two hours of out of class work. This could, in effect, allow institutions to assign a larger number of credit hours to courses that

they can show require more student work. In its rationale for the proposed change, the Department specifically calls out laboratory courses as examples of learning experiences that often carry the same number of credit hours as non-laboratory courses but usually require a greater number of hours of student work.

## Academic Year and Week of Instructional Time

Although the Department did not make any changes to the proposed definitions of academic year and week of instructional time, it's worth calling attention to the proposed, and ultimately adopted, paragraph (ii) (A) and (B) (366).

### **Academic Year: ....**

- *A week of instructional time is any week in which—*
  1. *At least one day of regularly scheduled instruction or examinations occurs, or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs; or*
    - *(A) In a program offered using asynchronous coursework through distance education or correspondence courses, the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives; and*
    - *(B) In a program using asynchronous coursework through distance education, the institution expects enrolled students to perform educational activities demonstrating academic engagement during the week.*



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For the first time, the Department recognizes that instructional time will look and operate very differently for asynchronous instruction than synchronous face-to-face instruction. This significantly impacts most forms of distance education and the new definition removes the assumption that asynchronous distance education courses must operate as default synchronous face-to-face courses by scheduling at least one day of instruction each week.

## Direct Assessment, Competency-based Education, and Subscription-based Programs

The final regulations in 34 CFR 600.10 continue to require institutions to obtain the Department's approval for their first direct assessment program but will not require Departmental approval for subsequent direct assessment programs **at the same level**. The Department will, however, require institutions to obtain approval for the first direct assessment offering at any additional level. For example, an institution will be required to gain the Department's approval for a Bachelor of Science in Nursing if that program is the institution's first direct assessment program. The institution could add other baccalaureate level direct assessment programs without seeking the Department's approval. However, if the institution wishes to add a Master of Science in Nursing, it will be required to seek the Department's approval. Subsequent master's level direct assessment programs will not require Departmental approval; however, the institution's first doctoral direct assessment program will require Departmental approval.

The final regulations in 34 CFR 600.20 also require the Secretary to "take prompt action" in response to any initial eligibility application or reapplication. The current regulations do not include a Departmental timeline for responding to institutional eligibility requests.

The final regulations in 34 CFR 600.21 bring institutional reporting requirements into alignment with the above changes by requiring institutions to report to the Department two new types of changes: (a) second or subsequent direct assessment programs or (b) the establishment of written arrangements for an ineligible institution to provide more than 25 percent of a program under 668.5(c). Notifications must be made no later than ten days after the change occurs.

Perhaps one of the biggest changes to the April rules is a change made to the definition of subscription-based program. In the April definition, subscription-based program was defined as:

*A standard or nonstandard-term direct assessment program in which the institution charges a student for each term on a subscription basis with the expectation that the student completes a specified number of credit hours during that term. Coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term. Students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursement of title IV, HEA program funds. An institution establishes an enrollment status (for example, full-time or half-time) that will apply to a student throughout the student's enrollment in the program, except that a student may change his or her enrollment status no more often than once per academic year.*

However, after several comments that reminded the Department that there are currently non-direct assessment competency-based education programs that are subscription-based that would not be allowed under the proposed definition, the Department opted to remove the term "direct assessment" in the definition's first sentence, thus allowing for non-direct assessment subscription-based programs (156).

## **Conclusions**



There are a number of other small tweaks to the April language, but these are the most important distance education and educational technology related regulations. Much like last year's regulations related to program licensure notifications, institutions have the option of immediately implementing these regulations.

Barring immediate implementation, the regulations will go into effect on July 1, 2021, assuming that a new Department of Education does not delay implementation much like what happened with the last administrations gainful employment regulations. (But that's a blog post for another day.) And with that, the long (and sometimes painful) process of negotiated rulemaking that began in the fall of 2018 finally comes to a close almost two years later.

Watch for more updates from us as we perform further reviews and analyses.



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**Lindsey Rae Downs** | August 26, 2020 at 4:59 am | Categories: [assessment](#), [cbe](#), [competency-based learning](#), [correspondence course](#), [course design](#), [covid19](#), [credit](#), [credit hour](#), [disaster](#), [distance education](#), [faculty development](#), [HEA](#), [Higher Education Act](#), [interaction](#), [lab](#), [legislation](#), [licensure](#), [managing online education](#), [negotiated rulemaking](#), [online](#), [physical presence](#), [regulation](#), [teaching](#), [technology](#), [U.S. Department of Education](#), [WCET](#) | URL: <https://wp.me/pDS9J-3mk>

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