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MEMORANDUM

To: Brian Moran, General Counsel, Association of Private Sector Colleges and Universities

From: Sherry Mastrostefano Gray and Larry Gondelman

Date: November 17, 2011

Re: Memo on Clock Hour Program Measurement Under 34 C.F.R. § 668.8(k)(2)(i)(A)

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## 1. Introduction

On October 29, 2010, the Department of Education adopted a regulation, 34 C.F.R. § 668.8(k)(2)(i)(A), pursuant to the notice and comment requirements of the Administrative Procedure Act ("APA"). The regulation sets forth criteria by which a program will be considered to be a clock hour program for Title IV purposes.[1]

Despite the straightforward language of the regulation at 668.8(k)(2)(i)(A), the Department has taken a position that significantly alters and expands the impact of the regulation. The most extreme example of this is evident in a July 25, 2011 letter to the Texas Workforce Commission, wherein the Department adopts a reading of the regulation that is at odds with the unambiguous language of the regulation and thereby materially amends the regulation. However, the law is clear that such an amendment can only be made through the notice and comment provisions of the APA. The failure of the Department to follow those provisions invalidates its current position. Since there are legal consequences that flow from the

[1] Degree programs are presumed to be measured in credit hours under Department rules. Most non-degree educational programs also are measured in credit hours, including pursuant to a long standing rule regarding clock to credit hour conversions. The conversion rule is also referenced under sections 668.8(k) and 668.8(l) of the Department's rules.

Department's reading of the rule, the Department's public statements constitute final agency action that can and will be challenged under the APA if the Department does not repudiate its current position.

**2. There are Material Differences Between the Language of the Regulation and the Department's Guidance in the Preamble, its Letter to The Texas Workforce Commission and other State Agencies, and its Public Statements.**

The regulation adopted by the Department of Education, 34 C.F.R. § 668.8(k)(2)(i)(A), provides that a program is considered to be a clock hour program for Title IV purposes if the program is "required to measure student progress in clock hours . . . when receiving . . . State approval or licensure to offer the program." There are two key elements of the regulation: (1) that the program is required by the state to measure student progress in clock hours, and (2) that the requirement to measure student progress exists when the program is receiving state approval or licensure, i.e., the requirement to measure student progress in clock hours is a condition of the state approval. The majority of state agencies do <u>not</u> require schools to measure student progress in clock hours.

Certain Departmental staff have changed these elements in a material manner in both the preamble to the regulation and in correspondence with state agencies vested with the power to approve or license the program.

The Department first strayed from the plain language of the rule in the October 29, 2010 preamble's discussion of comments received in response to the proposed rule. In that discussion, the Department states that

> **any** requirement for a program to be measured in clock hours to receive Federal or State approval or licensure… demonstrates that a program is fundamentally a clock-hour program, regardless of whether the program has received Federal, State, or accrediting approval to offer the program in credit hours. As clock-hour programs, these programs are required to measure student progress in clock hours for title IV, HEA program purposes. In these circumstances where a requirement exists for the program to be measured in clock hours, this becomes the fundamental measure of that program for title IV, HEA program purposes.

75 Fed. Reg. 66855, October 29, 2010 (emphasis added). This preamble language fundamentally alters the regulation on several levels. First, it declares that a program is a clock hour program for Title IV purposes if there is "any requirement for a program to be measured in clock hours." It then proclaims that as a clock hour program, the program is required to measure student progress in clock hours.

The problem for the Department is that this is not what the regulation says. The regulation does not provide that **any** requirement that a program be measured in clock hours transforms that program into a clock hour program. The regulation says that a program is a clock hour program if the program is required by the state to measure student progress in clock hours when receiving state approval. In other words, it is **student progress** that is required to be measured in clock hours, and this requirement must exist pursuant to state rules. The Department however reads the rule to state that **any** requirement to measure the **program** in clock hours is a requirement to measure student progress in clock hours. Such circular reasoning is not supported by the plain language of the rule.

Instead, what the regulation provides is that the requirement of measuring student progress in clock hours must exist "when receiving" state approval of the program. A requirement to measure the program or student progress in clock hours that exists prior to the time that the program is "receiving" state approval is not included within the scope of the plain language of the regulation. The use of the word "receiving" is unambiguous. It does not mean "seeking" state approval. Therefore, it plainly does not encompass the application process. The regulation is only implicated when the program is receiving the approval from the state. By expanding the requirement in the discussion section of the preamble to include "any" requirement, the Department has materially altered the scope of the regulation.

The Department's intention to change the published rule is amplified by a letter dated July 25, 2011 sent by the Department to the Texas Workforce Commission, a Texas agency vested with the power to approve educational programs. In this letter, the Department informs the Texas Workforce Commission that it is seeking to determine if an institution's programs are properly classified or reported correctly. The Department states that "[i]f your agency requires that clock hours **be reported**, then the program is considered to be a clock hour program for Title IV purposes and we must notify our Title IV eligible institutions." Thus, according to the Department, the mere reporting of clock hours to a state agency means that a program must measure student progress in clock hours. Of course, a reporting requirement can occur at any point in the application process and such a requirement does not mean that the Texas Workforce Commission is requiring the program to measure student progress in clock hours. Nor does it mean that the requirement exists when the program is receiving state approval. The Department's instruction in the letter to the Texas Workforce Commission constitutes an amendment of the actual rule. It shifts the substance of the rule from one that relies on a state's stated requirements when granting state approval to one that relies on a state's reporting requirements. Moreover, it completely disregards the state agency's own view of its approval requirements. This is particularly relevant in those states that require a school to list program length in clock *and* credit hours on the school's or program's application for approval, but issues the approval to the school in credit hours and permits the school to advertise its programs to students in credit hours.

The Department also has stated that even if a state agency confirms it does not require a program to measure student progress in clock hours in order to receive state approval, the Department may override the state agency's interpretation of its standards and read those standards to require measurement of student progress in clock hours. § 668.8(k)(2)(i)(A) does not grant the Department the right to interpret what requirements a state places on an educational program when approving that program. To the contrary, the rule explicitly recognizes the authority of the state agency to establish requirements to measure student progress in clock hours. That is the only possible meaning of the rule's requirement that student progress be measured in clock hours when receiving **state approval**.

The Department's position that the mere reporting of a program's clock hours to a state or federal agency renders the program a clock hour program is further contradicted by the Department's own application form. In order for a school to participate in the Title IV programs, the Department's application form requests schools to list the clock *and* credit hours for all non-degree programs. However, the Department's rules also explicitly state at 34 C.F.R §668.8(l) that a school can offer a non-degree program in credit hours by converting the clock hours in the program to credit hours under a specified formula. If the Department is correct that the mere reporting of clock hours in an application to obtain approval amounts to a requirement to measure student progress in clock hours as suggested by the Department's letter to the Texas Workforce Commission, then this would render the Department's clock-to-credit hour conversion rule at 34 C.F.R §668.8(l) meaningless because every program that lists clock hours and credit hours on the federal application would be a clock hour program and the clock-to-credit hour conversion formula would never be applicable.[2] The Department cannot read 34 C.F.R. § 668.8(k)(2)(i)(A) in a manner to render another regulation, 34 C.F.R §668.8(l), meaningless.

Finally, the Department has made public statements that this expansive reading of the rule will apply only to "gainful employment" programs. This suggestion has no basis in law. The rule by its terms explicitly applies to all undergraduate programs:

> (k) *Undergraduate educational program in credit hours*. (1) Except as provided in paragraph (k)(2) of this section, if an institution offers an undergraduate educational program in credit hours, the institution must use the formula contained in paragraph (l) of this section to determine whether that program satisfies the requirements contained in paragraph (c)(3) or (d) of this section . . . . .

§ 668.8(k)(1). This section (k) clearly applies to "undergraduate educational program[s]". All such programs are measured against subsection (k)(2) before any analysis is conducted to determine the applicability of section 668.8(l) pursuant to the plain language of the rule.

[2] This is directly relevant to the Department's reading of 34 C.F.R. § 668.8(k)(2)(i)(A) because the rule states a program is considered to be a clock hour program for Title IV purposes if the program is "required to measure student progress in clock hours . . . when receiving . . . **Federal or State** approval or licensure to offer the program." (Emphasis added.)

**3. The Statements of the Department in the Preamble to the Final Rule and in the Letter to the Texas Workforce Commission are Legislative Rules Subject to Notice and Comment. The Failure of the Department to Subject Them to Notice and Comment Invalidates the Department's Position.**

An agency can only promulgate rules and regulations after providing to the public notice of the proposed regulation and an opportunity to comment on the proposed regulation. 5 U.S.C. § 553. The Department is further subject to a requirement to engage in negotiated rulemaking under Section 492 of the Higher Education Act, 20 U.S.C. § 1098a. This statute requires the Department to obtain public involvement in the development of proposed regulations which must then be subjected to a negotiated rulemaking process. The proposed regulation that is ultimately published for notice and comment must conform to the final agreements resulting from the negotiation process. The APA requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). As the APA does not define "interpretative rules," courts have wrestled with the proper demarcation between interpretative and legislative rules. The oft-cited standard for determining the nature of an agency rule, which has been applied by a court to a Department of Education Dear Colleague Letter, states:

> Whether a rule is legislative turns on: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

*Gill v. Paige*, 226 F.Supp.2d 366, 374-75 (E.D.N.Y. 2002) (quoting *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (emphasis added). [Note: string cites omitted throughout.]

The regulation as written is without a doubt a legislative rule under factors 1, 2 and 3 above. Without the rule, there would not be a basis for any Department action based upon the distinction between a clock hour program and a credit hour program. The rule is intended to affect the measurement of program length and therefore the amount of Title IV financial aid a student can obtain depending on the classification of the program as clock hour or credit hour. Moreover, the Department published the rule in the Code of Federal Regulations as part of negotiated rule making, thus explicitly invoking its general legislative authority.

Given the material differences between the rule as written and the rule as reflected in the preamble, public statements, and in the Texas Workforce Commission letter, and given that these

differences would provide a basis for Department action, the differences are similarly legislative in nature. Therefore, the changes to the regulatory language also were subject to the notice and comment requirements of the APA.

Critical to an evaluation of the impact of the preamble, letter, and other public statements is whether these statements are merely the Department's interpretation of ambiguous language in the rule. If the language is ambiguous, then the preamble, letter and other public statements are 'interpreting" that ambiguity and deference is owed to the Department's interpretation. However, if the rule's language is not ambiguous and the preamble, public statements and letter's reading of the rule are different from the unambiguous language of the rule, they constitute an amendment of the rule. As such, they must be subject to the notice and comment provisions of the APA. The case law is clear that unambiguous language in a "legislative" as opposed to an "interpretive" regulation cannot be changed without going through notice and comment.

As the court noted in *National Family Planning and Reproductive Health Association Inc. v. Sullivan,* 979 F.2d 227, 234-35 (D.C. Cir. 1992) (emphasis added):

> Similarly, an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked…[The agency] may not alter, without notice and comment, the [regulation] unless such a change can be legitimately characterized as merely a permissible interpretation of the regulation, **consistent with its language** and original purpose…It is a maxim of administrative law that: 'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.'

The analysis in section 2, above, establishes that the preamble, letter and other public statements are not merely clarifying the language in the rule. To the contrary, they change its substance. The Department changed the requirement from one to measure student progress in clock hours when receiving state approval to a mere reporting requirement. These substantive changes mean that the Department cannot base any action in connection with the award of Title IV funds upon the standards laid out in the preamble, public statements or letter. It cannot mandate the classification of a program as a clock hour program merely because at some point in the application process the state agency requested the program to report clock hours in addition to credit hours.

**4. The Preamble to the Final Rule and the Letter to the Texas Workforce Commission Constitute Final Agency Actions that Can and Will Be Challenged in a Lawsuit Under the Administrative Procedures Act if not Withdrawn by the Department.**

The APA only allows an aggrieved party to challenge final agency actions. The Department cannot defend its action by claiming that the preamble, public statements and letter

do not constitute final agency action for purposes of the APA because case law makes it clear that preambles or other guidance documents may constitute final actions.

In *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, 88 F.3d 1191, 1222-23 (D. C. Cir. 1996), the Court stated that there is not a categorical bar to judicial review of a preamble. "The question of reviewability hinges upon whether the preamble has independent legal effect, which in turn is a function of the agency's intention to bind either itself or regulated parties. Absent an express statement to that effect, we may yet infer that the agency intended the preamble to be binding if what it requires is sufficiently clear."

As the D.C. Circuit further explained in *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D. C. Cir. 2000), an agency cannot escape judicial review under the APA by labeling its action an "informal" guideline. Not surprisingly, it is the substance of the guidance document that governs. "[A] guidance document reflecting a settled agency position and having legal consequences for those subject to regulation may constitute 'final agency action' for the purpose of judicial review. For finality to be found in these cases two conditions had to be satisfied: 'First, the action must mark the 'consummation' of the agency's decisionmaking process, … it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" The Court also noted that final agency action "may result 'from a series of agency pronouncements rather than a single edict.'" The Court specifically advised that a preamble plus a guidance letter plus an enforcement letter could crystallize an agency position into final agency action within the meaning of the APA. *Id.* at 49. *See Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). The finality of the Department's actions in the instant case is apparent from the Texas Workforce Commission letter. In this letter, ED has indicated an intention to tell institutions that their programs are clock hour programs if the schools are required to report clock hours to the Texas Workforce Commission. Merely declaring that the programs are clock hour programs requires a recalculation of the aid to be awarded and disbursed to students and requires schools to track hourly attendance. ED also has indicated its intention to determine the credit or clock hour status of programs during the ED application process. Thus, the letter makes it abundantly clear that the Department will be taking action based upon the rule as it has rewritten it.