



August 26, 2022

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave, 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:

The Higher Education for the Justice-Involved (HEJI) team at the State University of New York (SUNY) System Administration appreciates the opportunity to comment on the notice of proposed rulemaking on Docket ID ED-2022-OPE—0062, the Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program.

SUNY's role in college in prison

The 64-campus SUNY system is the largest provider of college-in-prison programs in the state of New York. In the 2021-2022 academic year, 13 SUNY institutions enrolled more than 600 incarcerated students at 21 state correctional facilities and one federal facility, including both medium and maximum security prisons.¹ All of these institutions — except for one four-year SUNY college, which launched its own program just one year ago — are community colleges that offer associate degree programs in liberal arts, general studies, and business. These colleges participate in diverse arrangements. For instance, several partner with other higher education institutions like Cornell University, the University of Rochester, and Hamilton College. Others work alongside Hudson Link, a nonprofit organization, while some operate independently. In all, eight SUNY colleges participate in the Second Chance Pell program.

The importance of extending college opportunities to incarcerated and formerly incarcerated people led SUNY to create HEJI in 2018.² To support campuses implementing and carrying out successful programs, the HEJI team has created and disseminated guides, newsletters, principles, and other resources. HEJI has played a leading role in the New York State Consortium for Higher Education in Prison (NYCHEP). Members have made presentations and led discussions in national forums. And, the team has worked closely with the Executive Chamber, state

¹ For additional information regarding prison education programs within SUNY, see “HEJI Dashboards,” <https://www.suny.edu/impact/education/heji/heji-dashboards/>.

² State University of New York, “Higher Education for the Justice-Involved,” <https://www.suny.edu/impact/education/heji/>. The HEJI team is supported by grants from the Mellon Foundation and Jobs for the Future. Members include Thomas Gais (co-PI), Rebecca Grace, Klarisse Torriente, Phillip Ortiz, Jose Pineda, Rachel Sander (co-PI), Paul Wilner, and Katie Zuber.

Legislature, and state Department of Corrections and Community Supervision (DOCCS) on a variety of issues.

In addition, HEJI has created a nationally unique dataset that links and analyzes SUNY education and DOCCS corrections data at the individual level in a secure manner. A working paper was published in December 2021.³ An updated paper, including data through the spring semester of 2022, will be available this fall.

Our comments on the proposed rule draw from these analyses, as well as the rich experiences of SUNY institutions and our reviews of the relevant research literature.

Summary comments on the proposed rulemaking

We are delighted with the FAFSA Simplification Act’s restoration of Pell Grants for incarcerated people, and we strongly support many provisions of the administrative rule published by the Department of Education interpreting the new law, including:

- The treatment of prison education programs as additional locations of postsecondary institutions and, as such, subject to all federal and state regulations and accreditation requirements applicable to non-incarcerated students.
- The goal expressed at several points in the rule that confined and incarcerated students have an educational experience and receive educational services substantially similar to what non-incarcerated students experience and receive.
- Provisions aimed at integrating prison education programs with outside postsecondary programs and institutions through credit and student transferability requirements, as well as limits on the proportion of an institution’s students who are confined or incarcerated.
- The general goal of ensuring that prison education programs serve the best interests of the students, and the use of data to inform programs, higher education institutions, oversight entities, and the Department of Education to advance that goal.

There are some areas of the proposed rule that raise concerns that we want to draw to your attention in hopes they can be resolved prior to the final rule taking effect. These involve the (1) “best interest” assessment criteria, (2) duration of the initial approval period for prison education programs, and (3) narrowly defined “oversight entity.”

Therefore, we respectfully propose and hope you will consider the following changes in the rule:

- 1) Extend the initial two-year approval period in s. 668.236(c) to four or more years.
- 2) Change the phrase “Must include an assessment of all the following” to “May include an assessment of the following” in s. 668.241(1).

³ Thomas Gais, Rebecca Grace, and Paul Wilner, “Access, Success, and Challenges in College-in-Prison Programs within the State University of New York,” *HEJI Working Paper*, https://www.suny.edu/media/suny/content-assets/documents/education/prison-ed/Access,-Success,-and-Challenges-in-College-In-Prison-Programs-within-The-State-University-of-New-York_202112.pdf. For a similar analysis, though it does not rely on a regularly updated administrative linked dataset, see Rebecca Silbert & Debbie Mukamal, “Striving for Success: The Academic Achievements of Incarcerated and Formerly Incarcerated Students in California Community Colleges” (Palo Alto, CA: Stanford Criminal Justice Center, January 2020), at http://risingscholarsnetwork.org/wp-content/uploads/assets/general/StrivingForSuccess_4printR1.pdf.

- 3) Clarify the authority of state governments to establish oversight entities that include decision-makers *in addition to* state departments of corrections.

We also ask that the Department of Education take responsibility for supporting research on assessment criteria, including their inter-relationships under different carceral and other circumstances, and on the costs and challenges of implementing the rule. The Department can regularly convene prison education programs, oversight entities, and relevant stakeholders to share and discuss the research findings and implications for improving the educational opportunities for incarcerated and formerly incarcerated people. Below we discuss in greater detail the reasoning behind our recommendations above.

Recommendations and reasoning

#1: Extend the initial approval period for prison education programs.

The initial two-year approval period in s. 668.236(c) is unfortunately likely to produce inaccurate, incomplete, and biased assessments of the performance of prison education programs. We believe that two years is too short a time for programs to offer a meaningful college experience *plus* observe a post-release period long enough to get an accurate estimate of whether the students will continue their education or secure employment with good earnings.

As you know, most incarcerated students — certainly at SUNY — attend part-time, and many students in associate degree programs require several years before they can finish a degree or other credential with substantial value in the labor market.⁴ Nor is it possible for many students, including those with significant college experience and credentials at the time of their release, to take full advantage of their educational achievements soon after reentering their communities. State-by-state parole requirements, for example, may demand that they take any available job, regardless of earnings, and may make college enrollment and regular attendance challenging within the first year of their release.

The two-year window may also produce misleading results, which risk undermining the Biden Administration’s long-term vision. For example, within SUNY, many prison education programs began operations with a small enrollment.⁵ In New York, where most incarcerated people serve sentences of several years or more, only a minority of students in prisoner education programs (PEPs) are likely to be released any one year.⁶ Few students can thus show significant post-release outcomes within such a brief period. Also, among the few students who have left prison,

⁴ Gais, Grace, and Wilner, “Access”: 9, 22.

⁵ On the time it takes to set up effective programs serving people in and out of prison, see Lois M. Davis and Michelle C. Tolbert, *Evaluation of North Carolina’s Pathways from Prison to Postsecondary Education Program* (Santa Monica, CA: RAND Corporation, 2019), https://www.rand.org/pubs/research_reports/RR2957.html. Also see Stephen Meyer, et al., “Implementing Postsecondary Academic Programs in State Prisons: Challenges and Opportunities,” *Journal of Correctional Education* 61, no. 2 (June 2010): 148-184.

⁶ The median minimum sentence of individuals under custody in New York State prisons in January 2021 was 102 months. New York State Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2021*, <https://doccs.ny.gov/system/files/documents/2022/04/under-custody-report-for-2021.pdf>.

results for all but the largest programs may be vulnerable to small-sample uncertainty and volatility, as well as FERPA disclosure risk.⁷

Quite simply, we would not expect data from such a short period of observation to provide reliable evidence of a program's underlying performance. We recommend that the initial approval period *be increased from two to at least four years*. The additional time will help new programs build, adjust, and improve their understanding of students' needs, their relations with the facilities, and the integration of their efforts with the institution's overall operations, faculty, and leadership.

#2: Change the criteria in the "best interest" assessment from mandatory to optional or recommended indicators.

While the criteria listed under s. 668.241(1) are reasonable as indicators of higher education quality, more research, experience, and discussion are needed to ensure that using these metrics as program gateways does not have unintended and damaging effects on justice-involved students. We therefore recommend that the Department give states greater flexibility in developing and measuring relevant measures of program quality, at least until we learn more about that largely undefined concept — "the best interest of the students" — and how it relates to program measures and student educational and employment outcomes under various circumstances.

Our uncertainty about the validity, current feasibility, and generality of the required "best interest" measures are based on several observations:

- *The criteria proposed to assess the "best interest of the students" have minimal support from research.* Much of the research on prison education programs has focused on program participation's effects on recidivism, with some studies on employment.⁸ Only recent research has studied the rate of individuals continuing their education post-release.⁹ In contrast, virtually no rigorous analyses have been done on instructors' experience, credentials, or rates of turnover or academic and career advising services, on student outcomes. Among SUNY programs, for example, faculty arrangements vary widely, especially among multi-institutional partnerships. Some excellent faculty only teach from time to time, and some are hired as part-time adjuncts by the degree-granting college even though they have tenured positions at another institution.
- *The concept of the "best interest of the students" remains vague.* The list of mandatory criteria identifies no core idea defining the "best interest of the students." It would thus be impossible to test, for example, whether instructor turnover is a reasonable measure because no separate, general definition of student "best interest" is articulated. Also, some of the criteria can work against each other. Is it in the best interest of the students to hold full-time jobs and maximize earnings after their release rather than continue their education? And,

⁷ Privacy Technical Assistance Center, U.S. Department of Education, "Frequently Asked Questions—Disclosure Avoidance," https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FAQs_disclosure_avoidance_0.pdf.

⁸ Robert Bozick, Jennifer Steele, Lois Davis, Susan Turner, "Does Providing Inmates with Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States," *Journal of Experimental Criminology* 14 (2018): 404.

⁹ Gais, Grace, and Wilner, "Access": 23-24.

some program characteristics — such as face-to-face instruction, peer interaction, and access to updated text books and research materials, adequate space and technology, and complete course offerings for degree requirements — are not included in these criteria, even though they are often treated as significant features among on-campus programs.

- *The criteria do not apply with equal validity to programs and people in all circumstances.* Our research reveals large differences in the challenges and opportunities of students in different carceral conditions.¹⁰ Continued education post-release and credit transferability to outside campuses are critical for programs serving students with shorter sentences in medium-security prisons, while completion rates are more reasonable indicators for students serving long sentences in maximum-security facilities. Outcomes may also be affected by individual student circumstances, such as the types of employment and proximity of affordable colleges in the communities to which they return — an increasingly important factor as a growing number of New York students come from both urban and rural upstate communities. Although the rule suggests that all “best interest” criteria are of equal relevance to students in all circumstances, oversight entities have little research to guide their decisions about aspiration levels for different programs and groups of students.
- *The criteria do not measure student access, a traditional and core measure of performance in higher education.* Nor are there measures of equitable access, i.e., equal accessibility for students of different races, ethnicities, nationalities, and communities, or gender equity, which would require a system-level rather than a program-level metric. It would be possible for institutions to offer higher education to only a small number of potentially Pell-eligible people that are likely to fare well according to the proposed criteria, while leaving out many interested and capable people from the higher education system because they come less-well prepared. In New York, DOCCS estimates that about 12,000 incarcerated people are eligible for postsecondary programs. But only about one out of nine of these individuals are enrolled in college. Pell Grants will surely improve access, but their full effect could be impaired by incentives to de-select students who would need the most preparation and assistance.
- *Applying the criteria to many common prison education situations will be challenging and requires additional research, experience, and judgment.* How should the outcomes of students who are transferred between college-in-prison programs be treated in assessments? As a student of the first program, the subsequent program, or both? How will non-Pell students in a program be treated in the program's evaluation? Will they need to be separated out in data submitted for assessment, or should they be included as their outcomes reflect on the overall program?
- *Criteria relating to reentry may require services not covered by Pell Grants.* Much of the proposed assessment criteria, such as re-enrolling in higher education, job placement rates, and potential earnings, rely on robust reentry support services, and the Department recognizes the need for the college to provide or partner with reentry services. But services for reentering citizens cover a wide range of needs and activities, including housing, employment services, mental and physical health services, and many others that are not considered costs of attendance that are covered by Pell Grants.

¹⁰ Gais, Grace, and Wilner, “Access”: 24-27.

With more research and experience, we think that many of these questions can be answered in the short run, [and?] there is little evidence to support the rule’s mandatory “best interest” criteria. We therefore recommend that the criteria be made voluntary until more data and research are collected, analyzed, and integrated into a clearer understanding of that general concept. We encourage the Department to support research and convene discussions, conferences, and other means of disseminating evidence and sharing practices among prison education programs and their parent higher education institutions.

#3: Clarify the authority of state governments to establish oversight entities that include decision-makers in addition to state departments of corrections.

State corrections agencies have the final say regarding whether a college or university may operate a program in their facilities. The new unilateral evaluative role assigned to the DOC as the “oversight entity,” a role in which decisions are to be guided by higher education data and aspiration levels, is of concern due to the departments’ lack of expertise in this area. While the rule includes a “feedback process” involving diverse stakeholders, the DOC is not required to take the advice. Such a governance structure over a challenging higher education function is concerning for the following reasons:

- *DOCs lack the mission, expertise, and resources to perform such a role, and neither the statute nor the rule mitigates any of these deficiencies.* In New York, we are fortunate that the state department of corrections has long been supportive of higher education.¹¹ Yet, the agency’s primary responsibility is public safety and security, and it has no experience to assess higher education programs in the way that state and federal education agencies have long done. In New York’s state department of corrections, two professional staff have responsibility over all education programs, including adult basic education, high school equivalency, and postsecondary programs. There is no funding to cover the significant costs of the proposed addition to the mission and function of state correctional agencies, nor is funding available to support the feedback process and the participation of stakeholders.
- *A state DOC should not serve as an independent evaluator because their policies and practices affect the performance of those programs, including student access, educational outcomes, and program activities.* Prison transfers affect student persistence and completion in college programs.¹² The actions of correctional staff affect whether classes are held without interruption and on time. Competing programs and responsibilities of incarcerated people affect how many classes students can take. DOC policies may inhibit continued education and advisement for students after release. And, DOC restrictions on space, materials, technology, and other aspects of a higher education program can constrain a program’s effectiveness.

We suggest that the Department make clear that states may assign assessment decisions regarding Pell-eligible prison education programs to entities with the necessary competence, capacity, and independence for the task. Active involvement by and approval from state correctional agencies must be required to comply with the statute. But, state flexibility in

¹¹ Max Kenner, “The Long History of College in Prison,” in *Education for Liberation: The Politics of Promise and Reform Inside and Beyond America’s Prisons*, edited by Gerard Robinson and Elizabeth English Smith (Lanham, MD: Rowman & Littlefield, 2019): 9-29.

¹² Gais, Grace, and Wilner, “Access”: 26.

designing decision-making procedures around this requirement is fair, as states will be fully responsible for financing these functions. In addition, the Department could ask states to submit descriptions of their oversight entities, including the participants, the procedures, and the decision rules. In the case of the Federal system, the Department may consider working with the Bureau of Prisons to develop a process through which they can make informed, transparent joint decisions over Pell-eligible programs operating in Federal facilities.

Conclusions

We thank you for your leadership and applaud the Department for all of the work that has taken place in making progress on the proposed rule. We kindly recommend that draft language be revised as needed to permit states to use their own discretion in collecting, assessing, analyzing, and reporting data on programs and student outcomes to develop a more coherent understanding of student needs. Establishing effective and practicable oversight criteria for prison education programs will require more experience and research. To help advance this effort, we encourage the Department and its Institute for Education Sciences to support and disseminate research on such programs, including measures of incarcerated students' educational outcomes, interests, and needs.

Finally, we believe that allowing states more flexibility in designing oversight entities that represent expertise, values, and perspectives that go well beyond state correctional agencies is more likely to produce the outcomes you are working to achieve. Educational institutions, higher education experts, formerly incarcerated people, and other stakeholders can help to inform decisions regarding Pell-eligible prison education programs, and that states should, at their discretion, be able to make them active decision-makers along with departments of corrections. States may still choose to give departments of corrections exclusive authority to assess prison education programs, but states that seek to establish oversight arrangements with broader representation, participation, and control may do so.

Thank you

Once again, thank you for your ongoing efforts to help provide educational opportunities to incarcerated individuals. We appreciate your consideration of our proposed changes, and, as always, would be happy to help in any way.