Evaluation of Existing Regulations

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Bernard Fryshman, Ph.D.

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Bernard Fryshman, Ph.D.
1016 East Second Street
Brooklyn, NY 11230
718-253-4857

To the Secretary, Department of Education:

I greatly appreciate this opportunity to add input regarding regulations "appropriate for repeal, replacement or modification."

Even as I respond to this request for comment, I will also point to flaws in the process whereby regulations are promulgated. Often this is the problem, rather than the language of the regulations themselves. I would also point out that the accreditation recognition structure has worked only because of the good sense and understanding demonstrated by the Department's people charged with implementing these regulations.

Thank you for undertaking this long overdue process, and I hope you will call on me if there is any additional insight I can provide.

Sincerely,

Bernard Fryshman

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Process

I. Negotiated Rulemaking is Broken

Negotiated Rulemaking begins with a series of innocuous activities. There is an announcement of intent to 'develop' a regulation, and public hearings are scheduled to provide an opportunity for public input on the topic in question. Written comments are also solicited.

At this point, fairness, balance and equity end. The Department considers all the input received and is then free to completely ignore it. It proceeds to create a negotiating committee from a number of constituencies which ED decides (on its own) as "having interests that are significantly affected by the topic" in question. ED then selects as negotiators, people with "demonstrated expertise or experience in the relevant subject under negotiation." This selection process takes place behind closed doors. In essence ED selects the people on both sides of the table.

The negotiating committee must then reach unanimity in its discussions. This means that proposed language of a regulation must be supported by all the negotiators, including the committee member representing the Department. If there is even one dissenting voice, the Department is free to promulgate a regulation on its own.

Summarizing, ED selects all the people seated at the negotiating table and can, on a whim, cast a dissenting vote to throw the decision making back into the innermost chambers of the Department!

II. The Technical Review Panel (TRP) Process Must be Changed

The TRP process instituted by NCES is responsible for a great deal of the unnecessary burden experienced by schools in completing the annual IPEDS surveys.

I have served on some TRP panels, a single faculty member in a group comprised mainly of Institutional Research (IR) people. IR people are expert in gathering, analyzing and interpreting data. For the IR community, gathering data is an unalloyed good.

I saw it differently and often I was alone in advocating for a reduction in the number of data elements to be requested of schools. In the case of IPEDS I pointed out there is an immense cost (in terms of people and money) with very little benefit to the public or to faculty charged with actually teaching students.

TRP's must be broadly constituted, with faculty and the public (i.e., those who are supposed to benefit from IPEDS data) at least as numerous as IR professionals. IPEDS data elements

must be re-evaluated periodically for usefulness, and allowed to sunset if not found useful. Strategies must be found to ease the burden of IPEDS. Two examples: sampling techniques should be used where possible, and small schools should be surveyed in alternate years.

III. Preambles Must Be Respected

In the past, preambles accompanied the publication of a new set of regulations. These preambles reflected the thinking of the total community which contributed to the formulation of the language, and were intended to guide the manner in which regulations were to be interpreted and applied.

Often, these preambles are simply ignored and those affected by the regulations are taken aback at the harsh and ungiving, even legalistic manner in which regulations are applied.

Regulations which were intended to be examined in a collegial non-adversarial and even helpful manner, are now being interpreted in a legalistic manner defended by the Department's legal staff as "permissible and legally supportable." In general, no new reading of the regulations should take place without formal notice, hearings, structured input and conversations with all affected constituents.

As an example, consider how the word "effectiveness" was understood by the Department of Education when regulations were promulgated in 1999:

> *As desirable as it might be to try to define "effectiveness" in a manner that encompasses and quantifies all of these perspectives, we believe a more reasoned approach is one of seeking patterns of evidence that, taken collectively, demonstrate effectiveness.*

A decade later practice at the Department of Education has shifted markedly. Even though the Preamble language has not been replaced, a totally new reading of the regulations seems to be in place.

IV. Comments Deserve a Substantive Response

Comments by stakeholders to proposed regulations are dealt with cavalierly.Often there is no acknowledgement that a comment was made, let alone an explanation. OMB is particularly unresponsive to substantive comments.

V. There Must be an Independent Appeal Process

An aggrieved school, accreditor, or member of the public protesting a regulation or the manner in which it was applied should not have to go to court in order to obtain a neutral hearing. Protesting an Education Department action to someone who is part of the

Department is unfair. An independent ombudsman-type arrangement is in everyone's best interest.

VI. Regulations Should Be Applied In A Least Possible Burdensome Manner

While there are circumstances where appearances are necessary and attorneys consulted, there are often problems or deficiencies which can be addressed by a telephone call. The Secretary of Education should have the authority to implement every regulation in a least burdensome manner.

VII. Regulations Must Be Applied Intelligently

The givens of higher education should govern the manner in which regulations are interpreted. Thus, the description of courses in college bulletins are guides rather than legally actionable contracts. Thus, too, students showing promise who slip, are offered an opportunity to redeem themselves. Initiative, experiment, good sense and free and easy conversations characterize the postsecondary atmosphere. Similarly, the relationships between accreditor and school, and between government and accreditor, should exhibit the same kind of rigor, tempered by wisdom.

Similarly, size must be taken into account. A regulation which makes sense when applied to a school with an enrollment of 40,000 could crush a school enrolling 400. An accrediting agency recognizing 1,500 schools has a very different set of challenges and opportunities than an agency serving 50 schools. Regulations must be applied with understanding and intelligence. Monitoring a small community of schools is much simpler than it is for a large group. Gathering representative documentation for a large accrediting body is simple. For a small entity it might be impossible.

VIII. Regulations Should be Subject To A Sunset Provision

All regulations should be reviewed periodically by the Department of Education for reliability, validity, and relevance. Circumstances change and the Department should not be forced to mindlessly apply a regulation which is widely recognized as superfluous.

IX. Context

Data elements are often misunderstood because they lack context. Schools share facts and figures openly and in good faith, and should be able to offer context through a link or associated context box to every data element.

The Regulations

34 CFR §602.3 (Compliance Report)

There is nothing in the statute which specifies that an agency has to submit a **written** report. The word 'deficiencies' could mean an agency's compliant procedure didn't include contact information – or it could mean that the agency's finances are in a precarious state.

For the former, sending in a copy of an updated Handbook containing the missing information should suffice. For the latter, NACIQI (the body charged with reviewing regulatory compliance) will probably want to have an appearance by, and conversation with, the agency.

The Department should explicitly reserve the right to agree to a less formal response (e.g., an office action), if staff feels that this would constitute a full response.

34 CFR §602.10 – 602.13

The Department has wisely recognized that it is unnecessary for experienced accrediting agencies seeking renewal of recognition to respond to these regulations each time they appear. A note to this respect should appear in the regulations themselves.

34 CFR §602.15(a)(1)

The phrase **"credentials and qualifications"** is troubling. Credentials and qualifications are useful in establishing a pool of candidates during the hiring process. But there are no "credentials" which are either necessary or sufficient to establish that staff has the ability to **"administer the agency's accreditation activities in an effective manner."** Competence is important, credentials not necessarily so.

In general, the Department should ensure that an agency has **"adequate staff and financial resources"** but it is not in a position to dictate how this is to be established. The onus should be on the agency to demonstrate that it does in fact have adequate staff and finance – and to do so in its own way.

34 CFR §602.15(a)(2)

There is nothing in the statute or in the regulations which even remotely suggests that training be **"recurring, structured, consistent, and systematic."** Such a prescriptive phrase ignores the wide variety of agencies, of responsibilities within each agency, and the background and experience of people who need training.

More to the point, the Department is not in a position to judge matters relating to "competent and knowledgeable individuals." Once again, the agency should be asked to establish, in its own way, that its people are suitable for the accreditation process in effect.

34 CFR §602.15(a)(3)
34 CFR §602.15(a)(4)

It is not within the competence of the Department to specify the composition of an agency's decision making body. It is appropriate for agencies to be asked to establish that their evaluation, policy, and decision making bodies are properly constituted.

34 CFR §602.15(a)(5)

There are many "publics" interested in accreditation – including students, faculty, legislators, and journalists. A member of the public is not by any means a "representative" of the public. This regulation should be repealed.

34 CFR §602.16(a)(1) – General Guidance

This section must be completely revised. The Department has exceeded its authority by insisting upon expectations which are neither in statute nor in regulation. For example, the staff looks to see whether a Standard **"appears to be written with sufficient clarity and/or specificity to be understood by others."**

An accrediting agency works with professionals in the schools and programs within its field; standards are written consistent with the nature and requirements of the field and imposing this "understood by others" requirement is simply inconsistent with good practice.

Similarly, the Department staff is instructed to look to see **"whether the standards and criteria appear to be appropriate for the type of institution or educational program and level being accredited."** The Department staff is not competent to make decisions regarding the appropriateness of an accrediting agency's standards and criteria. This determination is made by accrediting schools and the field or discipline being served.

The same comment applies to the requirement that staff determine whether there is **"a reasonable basis for concluding that the standard is an effective measure of quality."** It is completely in order for the Department to ask the accrediting agency to establish that its standards are effective measures; it is not appropriate for the Department itself to make such a determination.

In this section an example is given of how to address a standard relating to adequate faculty. The Department seems to think that this standard is met by **"the involvement of faculty in curriculum planning and staff development."**

Although the general guidance was intended to be helpful, it includes a number of unfortunate phrases. It should be rewritten.

34 CFR §602.16(a)(1)(i) – Student Achievement

Success with respect to student achievement often has nothing to do with course completion, state licensing and job placement. Higher Education is only partially vocational/occupational in nature. The mission of most postsecondary institutions is the transformation of the individual and learning for its own sake. Success is measured in the intellectual and personal growth of the individual and not by largely irrelevant quantitative indicators.

This regulation as currently interpreted has caused grievous harm to countless individuals and has sometimes replaced peer review by a blind reliance on numbers which are neither reliable or valid. The regulation should be rewritten.

The Department looks to see whether **"the agency uses multiple methods/approaches for evaluating student achievement, including information external to the institution/program."** There is nothing in statute or regulation which speaks to such a requirement, nor has it been established that this requirement is reliable or valid. It should be removed.

Similarly, the agency is expected to evaluate **"any institutional data (both quantitative and qualitative) it collects in the context of compliance with agency accreditation standards."** This too exceeds regulation and law. The Department should not seek to determine how an agency establishes compliance with its standards. For some agencies quantitative data is useful, for others it is not.

The regulation itself is in order. The Departmental guidance which signals how the recognition is to be interpreted goes beyond law and recognition. Corrective action is needed.

34 CFR §602.16(a)(1)(ii) – Curricula

The Department's instructions to staff in assessing this area border on a ministerial function. The Department of Education should not be judging the contents of standards, their structure and whether there is a correlation between curricula and mission. A school's curriculum is strictly the province of its faculty. Whether the curriculum is effective is a matter for the accreditor to judge. The Department's role is to enable the accrediting agency to establish that its standards for review of curriculum enable it to make a judgement as to effectiveness and quality.

34 CFR §602.16(a)(1)(iii) – Faculty

The review elements are too prescriptive. Judging faculty effectiveness and quality is a function of the school itself. Judging whether the school is carrying out this function properly is a matter for the accreditor to judge.

As stated, the Department of Education has imposed specific accreditation standards which are not justified.

34 CFR §602.16(a)(1)(iv) – Facilities /Equipment/Supplies

Once again the Department has imposed restrictions which are inconsistent with regulation and statute. Thus the review elements include factors such as **"written plans exist to maintain and upgrade facilities, equipment and supplies."**

Similarly, whether budgets reflect the resources allocated for facilities is a matter for a school to decide for itself. The accreditor might make a recommendation in this direction but it is certainly not the role of the Department to signal a need for such standards.

34 CFR §602.16(a)(1)(v) – Fiscal /Administrative Capacity

Once again the Department has overstepped its appropriate role. For example, good practice in education does not require **"written policies that clearly delineate the duties and responsibilities of administrators."**

Requiring small institutions to have written policies relating to the duties and responsibilities of administrators and to fiscal and budgeting processes can be costly, unnecessary, and sometimes compromise the flexibility which enables small institutions to offer an outstanding educational program with a small administrative overhead. Accrediting agencies should ensure that an institution is administered effectively; the Department should, in turn, assure itself that accreditors are looking for this effectiveness. Anything more becomes unduly prescriptive.

Similarly, it is up to a school or program to determine whether individuals in leadership and managerial roles are qualified.

Sometimes determinations are made on the basis of education, sometimes by experience, but other times considerations such as character, reputation and other qualifications play a key role.

These are areas which require insight and judgement of an operation which the Department should not be approaching.

34 CFR §602.16(a)(1)(vi) – Student Support Services

The Department's expectations introduce concepts which could prove troublesome. Academic advising doesn't always "encourage academic success" and establishing this is well beyond the capability of most institutions, big and small. Academic advisement often is focused on character growth, which is sometimes viewed as important an outcome in American Higher Education as success in course work.

34 CFR §602.16(a)(1)(vii) – Recruiting and Other Practices

The Department cannot expect that accrediting agencies have standards which exceed their own competence. Specifically, an accreditor cannot dictate to its accredited institutions/programs what to publish or otherwise release to the public. The accrediting agency should have standards

relating to accuracy, but clarity and accessibility are strictly a matter of choice for the institution itself.

In general, this regulation should be restructured, given the role of the internet in the daily lives of students and parents.

34 CFR §602.17(a)(1)(2)(3)

The regulation, while well intentioned, does not take into account the fact that a comprehensive university with a multitude of degree programs and as many as five or six different organized schools might have correspondingly many missions. Requiring specified educational objectives can be seen as preventing innovative approaches.

The regulation needs to be carefully reexamined and rewritten keeping in mind the changes that are taking place in Higher Education.

The key indicators mentioned are, except for student portfolios, all quantitative in nature and largely not relevant to much of Higher Education's objectives. Worse, by focusing on such quantitative features as retention rates or enrollment data, the Department has inadvertently diverted Higher Education institutions from their fundamental mission to one of producing satisfactory numbers.

Institutions and their faculties have expended inordinate energies to produce numerical outcomes at the expense of time and energy which should have been focused on issues such as the gap which continues to characterize so much of American Higher Education.

This element should be removed.

34 CFR §602.17(b)

The regulation speaks of an "**institution's or program's continuing efforts to improve educational quality.**"

But in spite of American Higher Education comprising over 3,000 institutions and several million faculty members, all focused on student success, improvements in educational quality are few and far between.

While regulations can have an aspirational feature, it is important that they remain closely attached to reality.

34 CFR §602.17(c)

Asking for a training guide for site visit team evaluators is unwarranted. That evaluators be trained is of course important. How they are to be trained is strictly a function of the accrediting agency which may or may not elect to prepare a training guide.

34 CFR §602.18(a)

Why is it necessary that an agency's standards be **"readily available, and easily understood."**

Similarly, why is it necessary to provide **"sample(s) of significant correspondence from institutions/programs (seeking accreditation or under review) commenting on the clarity of the agency's standards/criteria."** These elements add nothing, they are not required by either law or regulation and should be removed.

34 CFR §602.18(b)

The following element too should be removed: **"Having different groups within its decision-making body(ies) evaluate the same institution or program to see if they come to the same conclusions regarding compliance."** It is unnecessary and inconsistent with good practice.

34 CFR §602.19(b)

It is quite reasonable to expect the agency to demonstrate a set of monitoring and evaluations approaches. It is not appropriate for the Department to specify **"periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of §602.16(f)."** This part of the regulation should be removed.

It is appropriate to expect an agency to monitor; it is not appropriate for the Department of Education to dictate how the monitoring should take place. Several of the bullet points should be revisited here.

34 CFR §602.21

602.21 is largely irrelevant for agencies which have been in existence for 25 years or more. In that period of time an agency's policies, procedures, standards and criteria have been applied a number of times and where there were problems, addressed.

Practice has shown that while comprehensive review of standards have made changes at the edges, the fundamental nature of an agency's interactions with its schools has not changed materially.

Rather than the Department mandating that there be this kind of review, the Department should require that the agency canvas its member institutions/programs on a regular basis to determine whether the field itself sees the need for a comprehensive review of standards.
This regulation should be repealed.

34 CFR §602.24(c)

It is not always possible to get an institution which ceases operations, or has had its recognition withdrawn to cooperate in the manner intended. Staff has implemented this difficult recognition

wisely, but the Department should make it clear that a good faith effort by the agency will suffice.

34 CFR §602.24(f) – Credit Hour Policies

The regulation speaks of **"reliability and accuracy"** of an institution's assignment of credit hours. It is not clear how the words reliability and accuracy relate to the assignment of credit hours nor are there **"policies and procedures for determining credit hours"** because such a determination requires faculty consideration of structure, time, level, challenge, rigor, pre- and co-requisites among many other factors.

There are no **"commonly accepted practices in Higher Education"** which characterizes the assignment of credit hours, except insofar as the amount of time associated with a credit hour.

The fact that the Department needed three full pages of guidance to try to provide guidance on this issue is ample evidence that this regulation needs to be completely revisited and probably, repealed.

34 CFR §602.25(f)(1)(iii)(iv) – Due Process

"In a decision that is implemented by or remanded to the original decision-making body, that body must act in a manner consistent with the appeals panel's decisions or instructions."

This regulation instructs the decision making body to **"act in a manner consistent with the appeals panel's decisions or instructions."** In essence, the appeals panel becomes a decision making body. This in turn could challenge the ability of a recognized accreditor to act in accordance with its standards, and to applying its policies and procedures uniformly to all applicant institutions.

Unless there is a new set of regulations promulgated, specifying the qualifications, training, appointment, and monitoring of the members of the appeals body and their procedures, it is inevitable that decisions will be rendered which are inconsistent and often indefensible. Accreditation standards cannot be applied effectively if there is an appeals body which can second guess the agency.

It is not clear why the Department has proposed a regulation which goes beyond the statute. Is there some reason to expect an appeals board to be more knowledgeable, more objective, or fairer than the decision making body?

The statement should be repealed.