

# NATIONAL COUNCIL FOR ONLINE EDUCATION

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Docket ID number ED-2018-OPE-0076

Gregory Martin  
U.S. Department of Education  
400 Maryland Ave, SW., Stop 294-14  
Washington, DC 20202

May 1, 2020

Dear Mr. Martin,

The National Council for Online Education (NCOE) is a joint effort by four leading organizations in higher education and digital learning: the Online Learning Consortium (OLC), Quality Matters (QM), University Professional and Continuing Education Association (UPCEA), and WICHE Cooperative for Educational Technologies (WCET). NCOE seeks to:

- advance research and evidence-based evaluation on the effectiveness of online learning;
- develop common terms and definitions to support common understandings relevant to online learning;
- promote and increase transparency, accessibility of research, best practices and “what works” to the community; and
- support and drive effective education policy related to online education.

The NCOE is grateful for the opportunity to comment and seek guidance on proposed regulations related to the definition of distance education that were part of the recently released proposed regulations by the Department of Education.

The NCOE is pleased that the 2018-9 Negotiated Rulemaking Committee, made up of key stakeholders, came to consensus on the issues presented. Our comments will primarily focus on concerns related to the proposed definition of “distance education” as well as support to the proposed changes associated with “academic engagement” and “week of instructional time.” We believe that the proposed changes will improve student access to affordable, high quality educational opportunities, and will improve higher education equity and access.

## 1. *General support for regulations*

The NCOE greatly appreciates the Department’s desire to “reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers.” The current regulatory definition of “distance education,” which has changed little over the last 25 years, is



ill suited for 21<sup>st</sup> century learning models. We have been long concerned that a lack of regulatory clarity has had a chilling effect on higher education innovation. While we recognize that technology alone cannot transform higher education, we believe that it can, especially when used in conjunction with distance education and other non-face-to-face modalities, improve access to high quality and affordable educational opportunities for a broader segment of students.

The NCOE is especially pleased to see the Department begin to move towards a greater reliance on educational outcomes as a measure of learning than on outdated seat time models. Furthermore, we also greatly appreciate the Department's desire to provide institutions with greater regulatory clarity on implementing innovative educational programs within the parameters created by Title IV disbursement requirements. We believe the proposed regulations will provide space for educational innovation, reduce administrative burden associated with interpreting and complying with complicated regulations, and improve educational equity by increasing access to high quality and affordable educational programs.

## 2. §600.2 Definitions

The NCOE is generally supportive of the proposed changes in this section, especially "academic engagement" and "distance education." The NCOE does believe, however, that further guidance from the Department is needed to clarify the proposed "distance education" definition.

### ***Academic engagement***

***The NCOE supports the addition of "academic engagement" to §600.2*** as this instructional concept is a critical part of the regulations governing the return of Title IV funds found in §668.22 (1)(7)(i)(A). The NCOE especially supports the inclusion of (2)(iv), "Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction." We believe that this provision will clarify the role adaptive learning and other technologies can play in providing "academic engagement." ***The NCOE requests that the Department provide specific guidance in the final regulations that clarifies that interaction may include computer-mediated instruction that responds to each student by changing the learning experience to better suit that student's needs.***

### ***Distance education***

The NCOE generally supports the proposed "distance education" definition and is appreciative of the Department and negotiators' efforts to both update the definition and address the need for a clear definition of "regular and substantive interaction."

- ***Technologies for delivery, paragraphs (1) and (2)(i-iv)***  
By updating the list of technologies found in (2)(i-iv), the NCOE believes the proposed definition will be more flexible and leaves open the possibility of yet to be widely used or new delivery technologies. ***The NCOE supports the proposed changes to paragraphs (1) and (2)(i-iv)***

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- Definition of “instructor,” paragraph (3)  
By providing a definition of “instructor” that relies on the standards used by an institution’s accreditor, the NCOE believes the proposed regulations will be consistent with recently adopted regulations, such as those related to determining faculty credentials for dual credit courses, that defer to an institution’s accreditor. **The NCOE supports the proposed definition of “instructor” found in paragraph (3) of the proposed distance education definition.**
- Definition of “substantive” interaction, paragraph (4)(i-v)  
**The NCOE supports the proposed definition of “substantive” and is pleased to see all aspects of the learning process, e.g. teaching, learning, and assessment, reflected in the proposed definition.** The NCOE is especially pleased to see the inclusion of “other instructional activities approved by the institution’s or program’s accrediting agency” in (4)(v). We believe that provision will provide institutional flexibility for innovative activities such as adaptive learning and is consistent with the proposed definition of “academic engagement.”

**The NCOE would like the Department to issue guidance related to two aspects of the proposed definition.** *We believe that the Department needs to clarify the level at which “substantive” interaction should take place.* Is “substantive” interaction expected to happen at the instructor level or the course or competency level? The answer is more than a matter of semantics. If “substantive” interaction is determined solely on the instructor level, it could inadvertently exclude important aspects of instruction that are facilitated by qualified instructional staff including but not limited to subject matter experts, librarians, and/or assessment experts working in an “unbundled” instructional model. We believe the Department means for “substantive” interaction to be taken at the course/competency level but guidance should make that explicit.

Additionally, past Departmental guidance issued in its December 19, 2014, Dear Colleague letter indicated that regular and substantive interaction must be initiated by instructors and that “Interaction that occurs only upon the request of the student (either electronically or otherwise) would not be considered regular and substantive interaction.” *The NCOE would like the Department to clarify if “substantive” interaction must be initiated by an instructor or if student-initiated activities can be considered as “substantive.”*

- Definition of “regular” interaction, paragraph (5)(i-ii)  
In its recommendations to the negotiated rulemaking committee, the Distance Learning and Educational Innovation subcommittee recommended that “regular” interaction could be fulfilled through either (5)(i) **or** (5)(ii). In other words, an institution would be compliant if substantive interaction with students took place **either** on a “predictable and regular basis” **or** “promptly and proactively engaging” with students “when needed on the basis of such monitoring, or upon request by the student.” The intent of the

subcommittee's recommendation was to allow institutions to choose the type of "regular" interaction best suited for the academic program and recognized that some institutions have in place sophisticated technologies that monitor student engagement and success and alert instructors when students are either no longer engaged or are struggling with material or a competency.

The NCOE is concerned, however, that when negotiators changed the **or** to **and** they created a requirement that institutions must adhere to a strict instructional schedule that runs counter to emerging instructional modalities such as competency-based education and direct assessment or even more traditional asynchronous distance education. Additionally, the decision to require both (5)(i) and (ii) set up an unexpected outcome where institutions are expected to closely monitor and evaluate student engagement. This means that even for those institutions that have chosen to focus on delivering "predictable and regular" instruction they would also be expected to actively monitor and evaluate student engagement and success on a continuous basis. For institutions that have invested in often expensive learning analytics and student success tracking systems such monitoring will not be difficult. However, for smaller institutions or those that have not invested in such software, such a level of student monitoring in addition to "predictable and regular" instruction may be difficult.

Finally, although the intent of the proposed regulations are to provide institutions with greater clarity that will make innovation easier, the NCOE is concerned that the language used in (5)(i) does not significantly clarify the definition of "regular." By opting to define "regular" interaction as interaction that takes place on a "regular and predictable basis" the Department still has not clarified what constitutes "regular." We recognize the difficulty in this task and the desire to provide institutions with the greatest flexibility possible. A possible alternative would be to replace "regular and predictable basis" with "scheduled and predictable basis." Failing a change, more guidance is requested.

**The NCOE is asking the Department to revert to the subcommittee's recommended language and change the "and" found between (5)(i) and (ii) to "or" so institutions can fulfill requirements for "regular" interaction through (i) or (ii). The NCOE also requests that the Department change "regular and predictable basis" found in (5)(i) to "scheduled and predictable basis." Failing a change, the NCOE asks that the Department provide guidance as to what constitutes "regular and predictable" interactions.**

### 3. §668.3 Academic year

#### *Week of instructional time*

The NCOE supports the inclusion of the new paragraph (2)(ii) in the definition of "week of instructional time." This paragraph makes it clear that instructional time for asynchronous coursework

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is directly tied to making instructional materials, resources, and instructor support available to students. In so doing, the Department signals a recognition of the unique nature of many distance education modalities and the flexibility that they can provide students. Furthermore, by tying “week of instructional time” directly to activities related to “academic engagement,” these changes also reflect a shifting focus away from time to learning.

The NCOE thanks the Department for this opportunity to seek guidance and share our comments. We believe that the proposed changes will improve student access to affordable, high quality educational opportunities and will improve higher education equity and access. We would be very pleased to offer further assistance to the Department and to assist with communications related to final regulations.

Sincerely,



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