

Via eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov)

August 21, 2024

Hon. Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, D.C. 20202

**Re: Comment – American Association of Cosmetology Schools**  
**Docket ID ED-2024-OPE-0050**

Dear Secretary Cardona:

On behalf of the American Association of Cosmetology Schools (“AACS”), our member institutions, and our students that our specialized schools prepare annually for rewarding, professional careers in the beauty and wellness industry, we are pleased to submit this comment letter in response the *Program Integrity and Institutional Quality: Distance Education* [1840-AD92], Notice of Proposed Rulemaking (“NPRM”) published in the *Federal Register* on July 24, 2024. We specifically write with regard to the proposed changes to 34 CFR section 600.2, to the extent that the proposed rule would change the definition of a clock hour delivered via distance education to exclude asynchronous distance learning.

AACS represents over 550 member schools. These institutions, their students, and educators represent a passionate, creative, unique, and diverse community, with characteristics that are valuable to both higher education and our economy. Our community of learners is among the most diverse in higher education. This diverse population includes working parents and others who rely on flexibility in the context of their postsecondary endeavors.

With that flexibility in mind, we are writing to express concerns regarding the proposed changes to regulations for distance education courses from the recent negotiated rulemaking sessions. In the NPRM, the Department proposes to disallow asynchronous distance education courses for clock hour programs. This would directly impact many of our schools and students, forcing us to eliminate current asynchronous learning opportunities.

We appreciate the opportunity to respond to the 2024 NPRM. Further, we acknowledge the time and effort that the Department has undertaken to review this comment and all comments submitted as

part of this rulemaking. As part of the rulemaking process, we offer our comments and recommendations.

## I. General Comments

We recognize the Department's concern about compliance with the asynchronous learning requirements and the ability of the Department to monitor compliance. We disagree, however, that a full prohibition on asynchronous instructional activities in clock hour programs is the proper response. As noted herein, we request that the Department create a more refined solution that addresses the Department's concerns, but also allows the continued advancement of distance education.

During the negotiations, the Department provided just two examples of clock hour programs utilizing asynchronous learning; one using "YouTube" videos and the other using a sophisticated, interactive learning experience that tracked student learning and participation. The Department has acknowledged that for the latter example schools were properly tracking the clock hours spent by students in asynchronous instructional activities.

We submit that the Department's proposed change to asynchronous learning is an arbitrary and capricious application of a rule that singles out clock hour programs, is unsupported by any substantial evidence, and does not sufficiently explain the reasoned analysis conducted for this regulatory change. Accordingly, we request that the Department rescind the current proposal and retain the current definition for *Clock Hour* articulated in 34 C.F.R. 600.2. If the Department decides not to rescind the proposal, we recommend that the rule be revised to provide a path forward for asynchronous learning in clock hour programs.

## II. Asynchronous Models in Clock Hour Programs Are Working and Benefit Students

### A. Asynchronous Models Work

AACS has several member institutions that offer education in clock hour programs using asynchronous distance learning. These institutions' experience and that of their students has been uniformly positive. As discussed in detail further below, these programs are accredited, state licensed, and approved to participate in HEA Title IV programs. Having met these prerequisites and demonstrated benefits to students, it would be manifestly unfair to students and the institutions that have invested heavily in technologies to deliver this education, to now terminate HEA Title IV eligibility.

Our members' programs require theoretical (didactic) learning and lecture, not just hands-on skills development. This didactic learning is traditionally taught in a lecture format in a classroom led

by an instructor. This kind of teaching and learning are ideally suited to the asynchronous on-line learning environment, where students can take advantage of the flexibility that is only possible in these programs.

Our institutions are accredited by accrediting bodies recognized by the Department. These accreditors hold institutions accountable to outcomes metrics, including completion, licensure exam pass rates, and placement.

Our institutions are also licensed and/or approved by state agencies. These agencies, including state occupational licensing boards, regulate the delivery of distance education in clock hour programs, including asynchronous delivery. Not every state has authorized asynchronous delivery of clock hour programs to qualify students for licensure. At present, we understand that the following twenty-six states have authorized asynchronous delivery: Arkansas, Arizona, California, Connecticut, Washington, D.C., Georgia, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Maryland, Michigan, North Carolina, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah and Virginia. In each of these states, delivery by distance education is limited to the delivery of theory instruction (i.e. those portions that would be taught in a classroom, lecture style) and no more than 50% of all clock hours. In our experience, however, AACSB member schools have limited distance education to amounts well below these maximums permitted by state law. Instead, they have limited distance programs to just those providing instruction in academic subjects that would otherwise be taught in a classroom lecture style. In addition, our members report that all students must attend class at school, in person, often daily but at least weekly.

In our members' experience, the delivery of asynchronous clock hour education offers several advantages over in-person learning. Our members also report higher levels of completion, licensure, and placement rates in programs using asynchronous distance learning. We believe that these improved outcomes are a result of increased student satisfaction and learning. However, the larger issue here is that there has not been enough time to study these positive impacts: we understand that most schools did not start using asynchronous learning until 2022, the students did not graduate until 2023, and therefore will not be included in annual reports to state authorities and accreditors as outcomes until Fall of 2024. In short, by changing the rule now, the Department is doing so without the benefit of any reliable outcomes data that would show whether the current rule is effective or not.

Distance education also allows our members to monitor student engagement and ensure compliance with regulators' requirements, including those of the Department. Curriculum providers have developed technology designed to accurately track hours and student engagement during asynchronous distance learning while complying with all student data privacy laws. Time records and student activities are well documented. Students are required to maintain active

engagements with software, or they are clocked out. Students that fail to maintain active engagements with software do not get credit. Finally, the technology tracks student engagements better than a teacher could track student engagement on-campus or in synchronous online learning because the software is designed to allow tracking of engagement in as short as one-minute intervals. This gives institutions control and visibility over both the syllabus and learning paths for students.

In the NPRM, the Department asserts that “...institutions have difficulty adequately monitoring the amount of time that students spend on asynchronous activities.”<sup>1</sup> This is simply not the case. Current technology for asynchronous courses enables instructors and institutions to fully monitor and track student engagement. As an added point, we note that this same software is utilized, and accepted as compliant, for credit hour programs, including programs that are teaching identical curriculums and leading to licensure upon graduation.

The Department also argues that asynchronous clock hour education involves “scrolling and watching”. This is categorically untrue. The technology requires student engagement.

#### B. Asynchronous Education Benefits Students

Asynchronous education benefits students in several ways. As a preliminary matter, we note that students receive the same educational materials as those who attend class in-person. The curriculum, which is frequently mandated under state occupational licensing laws and regulations, in most cases dictates the topics to be covered and the clock hours spent in each topic.<sup>2</sup> As a result, students who attend via distance and receive clock hour credit are eligible for state occupational licensure exams to the same extent as those that attend in person.

However, students who attend on-line note significant advantages to attending in a hybrid modality. School administrators and educators have easy access to visual tools and reports within the learning platform that enable them to report on student time and engagement. Importantly, the platform provides multiple touchpoints within the learning path for the student to engage with the educator via discussion boards, group chats, instant messaging and email. Within this construct, we note three key benefits.

First, the level of student engagement and satisfaction with the educational programs is higher. Students are used to (and expect) distance learning at all levels of education today. They generally do not want to be taught while sitting in a lecture-style classroom. This is particularly true for cosmetology and barbering students (and other hands-on trades), where students are drawn to a

---

<sup>1</sup> 89 Fed. Reg. 60262.

<sup>2</sup> The detail of state laws on these issues varies from state to state. Some states, e.g. New York, provide a highly proscriptive level of detail for course curriculum compared to others.

field that is more “hands on” than theoretical. Students appreciate the dynamic on-line learning environment, as well as the flexibility of learning from home or another convenient location at a time that fits with their schedules. This leads to higher educational attainment (i.e. grades) and knowledge retention because academic instruction can be tailored to reinforce difficult concepts where reinforcement or remediation is required. Finally, we note that many state licensure examinations are now delivered via distance, requiring students to be familiar with an on-line environment to increase the chances of success on the licensure exam.

Second, attendance is improved because students do not need to miss school due to illness or family/personal problems, such as childcare emergencies or car problems. In clock hour programs, these attendance issues create higher burdens on students because their attendance is measured in 50–60-minute increments. Thus, if a student is late to class because of a childcare issue, she may be required to make that time up on a different day—frequently a weekend or in the evenings. This issue is avoided completely for asynchronous learning because students can log in and attend in their own time.

Third, the economic burden on students is reduced for several reasons. Asynchronous distance learning permits students to maintain employment, thus reducing the need to borrow during school and to support their families. Students with children and elderly parents also report that it allows them to meet child and parental care obligations, thus avoiding the need for costly third-party care services. And, even if the distance education option is only available for part of the educational programs, the benefits are still material. Students also recognize additional cost savings from not having to commute to school—these cost savings include fuel, public transit passes, and meals, which can be prepared and eaten at home instead of at school. Finally, institutions are able to pass on cost savings to students, who benefit from reduced physical plant overhead at the schools, such as a reduced physical footprint (resulting in lower rents), reduced utilities, and savings on other costs associated with the need for a larger physical school facility.

### III. The Department Lacks Proper Justification for Proposed Change

#### A. Policy Concerns

During the 2020 Negotiated Rulemaking on *Distance Education and Innovation*, the Department advocated for asynchronous clock hours for many reasons and provided public comment responses in support of asynchronous clock hours. Clock hour programs often serve students from disadvantaged backgrounds and provide a path to licensure in critical trades that support the economy.

In fact, the Department recognized that “[a]synchronous learning allows students to design their own learning schedules around the demands of work and family that often interfere with class

activities offered only at prescribed times. This flexibility can also greatly benefit students with health concerns for whom participation is contingent upon treatment schedules and feeling well enough to perform required tasks.”<sup>3</sup>

Throughout the preamble discussion, the Department highlighted the benefits of asynchronous learning and recognized the vital importance of innovation and the adoption of new technology in the postsecondary setting.

The Department also directly addressed the ability for regulators to monitor compliance:

“The existence of the “regular and substantive interaction” requirement related to clock hours offered through distance education and the requirement that clock hours meet the requirements of an institution's accrediting agency and State provide the safeguards that ensure that students have access to quality instruction and instructor support. Given these baseline requirements, it is not necessary to require students to interact with instructors synchronously to earn clock hours.”

“We also believe that commenters have made a strong case that, given current technology, clock hours completed asynchronously can be adequately supervised and monitored, provided the institution maintains the appropriate technological resources and internal controls. We disagree with commenters who indicated that learning technology is not yet capable of monitoring student engagement in this manner, especially since the Department has already reviewed and approved clock hour programs that used online learning platforms that are capable of the required monitoring.”

“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—for example, asynchronous participation in an interactive tutorial or webinar online or a learning activity involving adaptive learning or artificial intelligence—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.”

Given the Department’s prior, and recent stance, on the use of asynchronous learning in lock hour programs, we do not believe that the Department’s proposed change, and the evidence provided to date are sufficient to meet the regulatory burden within the context of the

---

<sup>3</sup> 85 F.R. 54742, 54752.

Administrative Procedures Act (“APA”), that requires the Department to provide justification for policy reversals such as this.

The Department has failed to provide sufficient evidence or rationale for its proposed rule. Two anecdotal examples offered during negotiated rulemaking are an insufficient basis to support the proposed change. Further, statistics on the number of institutions in non-compliance were requested by negotiators and not provided by the Department.

We would suggest that the existing system is proven to be working with measurable outcomes indicating student success. In fact, asynchronous programs are already closely monitored by state regulators, accreditors, and Title IV auditors

### B. Disparate Treatment of Clock Hour Programs

In proposing this rule, the Department of Education singles out clock hour program without providing any justification and reasoning. As an initial matter, we note that these programs have met all the prerequisites to participate in HEA, Title IV programs, including accreditation, state approval/licensure, and the Department’s own regulations. Further, these institutions have invested heavily in technology and capital infrastructure to deliver this education via distance, a form of delivery that students increasingly demand. Finally, the Department has failed to identify even a one legitimate reason to single out the delivery of didactic, classroom style learning in these programs just because they are offered in a program measured in clock hours instead of credit hours.

All AACCS member institutions that offer these programs are accredited and do so in states that have authorized our member institutions to offer asynchronous distance education for these clock hour programs. The accreditors—who have responsibility for institutional and programmatic quality assurance in the “Triad”—have determined that asynchronous clock hour learning is appropriate. Moreover, state agencies, include occupational licensing boards set standards for professional licensure, including the quantity and quality of the clock hours required to qualify for the state licensure examinations. These state agencies are best positioned to evaluate and determine the appropriateness of whether asynchronous distance education meets the needs of students in their states. As a matter of policy, the Department should not override the accreditors and states’ authority in this area. As a matter of law, it lacks the authority to do so.

AACCS members offering distance education in this area have invested substantial resources in technology, infrastructure, and personnel to deliver this education to students. Institutions have purchased technology, including software, hardware, and related materials. Working with partners, they have developed curriculum and invested in LMS systems designed to monitor student engagement at the minute-to-minute level. They have trained faculty and staff to deliver



instruction and work with students to ensure the best possible experience. Investments by AACSB members are reported to be as much as \$450,000 to \$500,000 per institution. If the rule goes into effect as proposed, these substantial investments will be lost. Many specialized staff will have to be terminated or retrained and these investments cannot simply be converted to synchronous learning. The technology required for synchronous learning is different than asynchronous learning because it relies on audio visual equipment, installations, and ongoing IT support for each classroom. Institutions will have to spend more limited resources if they want to continue offering distance education. However, it is more likely that they will simply close these distance programs due to reduced student interest. This will lead to the loss of the entire institutional investment.

Finally, the Department has stated that its primary reason for terminating eligibility of asynchronous clock hour programs is because these programs are occupational in nature and typically involve occupations that are “hands on”, therefore requiring hands on training from a live instructor, in person. As discussed during the negotiations, this view is surprisingly narrow and ignores the reality of how education is delivered in these programs. It is true that occupational training such as cosmetology and barbering is primarily hands-on—up to two-thirds of a typical cosmetology program is done in a laboratory or clinical environment with mannequins, live models, or members of the public under an instructor’s supervision. However, significant portions of the programs are taught in a traditional, classroom style lecture. Subjects taught in these lectures include anatomy and physiology, chemistry, electricity, skin diseases and disorders, nutrition, health and safety, sanitation, theory of hair and color, and similar topics. These subjects are perfectly suited to be taught via distance in an asynchronous modality. They are no different than classes taught in credit hour programs covering these same subjects, for which the Department proposes no restrictions on asynchronous distance learning.

### C. Proposed Change Unsupported by Evidence

As discussed above, the Department lacks sufficient evidence to assess the compliance of asynchronous learning in clock hour programs. Further, the evidence cited by the Department, even if deemed valid, is inconclusive at best. In fact, the Department noted that they observed some institutions had gone to considerable effort and expense to employ software and develop processes to closely track clock hour engagement. Yet, these institutions would be punished along with those not in compliance.

Accordingly, we request that the Department conduct further analysis prior to pursuing the development of a final regulatory package.

### D. Alternatives Were Proposed During Negotiated Rulemaking



During the Negotiated Rulemaking, the Department declined to fully consider proposed alternatives. The Department's unwillingness to discuss and consider options presented during the negotiations does not meet the requirement of negotiating in good faith.

It is our hope that the Department will reconsider the impact these regulations will have upon students attending our institutions which:

- remain predominately small businesses, operated by families and independent owners;
- specifically measure program length in clock hours;
- have program lengths dictated by state entities authorized to recognize programs beyond the secondary level; and
- provide education and training which leads directly to state licensure which is once again regulated and overseen by external state entities.

#### IV. Proposed Revised Language

The Department expects institutions to measure the amount of time spent on learning activities. During in-person instruction, the instructor is trusted to monitor student activity and the minutes of student engagement. No direct evidence is collected or required. For online instruction, direct evidence is required. That evidence is tied to time on task, independent of any assessment of actual learning.

If the Department decides it needs this direct evidence, we recommend that those who can provide it should be allowed to continue to do so. Many institutions would unlikely be able to meet that standard, but those who have invested the time and effort to track student engagement should still be eligible to use asynchronous instruction.

Consistent with the efforts of many during the negotiated rulemaking, we recommend that the Department consider the following options:

##### A. Retain Current Regulations

Ideally, the Department would retain the current definition of a Clock Hour under Part 600.2 Definitions to include asynchronous distance learning in clock hour programs. This would allow for research and study of the effectiveness of the current rule, which was only adopted three years ago. Insufficient data exists currently to support the Department's decision to terminate eligibility for these programs. Allowing the current rule to remain would allow time for the Department to do so.

##### B. Modify Proposed Regulations to Allow for Asynchronous Distance Learning in Clock Hour Programs with Guardrails.

The Department raised several concerns in the negotiated rulemaking sessions and in the NPRM that can be addressed by modifying the current regulatory language instead of terminating eligibility. To that end, AACCS supports the proposal below, which was tendered to the Department during negotiated rulemaking, as a compromise to address the Department's concerns while maintaining flexibility for students and institutions.

## Part 600.2 Definitions

Clock hour:

- (1) A period of time consisting of—
  - (i) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;
  - (ii) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period;
  - (iii) Sixty minutes of preparation in a correspondence course; or
  - (iv) In distance education, 50 to 60 minutes in a 60-minute period of attendance in—
    - (A) A synchronous or asynchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students; or
    - (B) An asynchronous learning activity involving academic engagement in which the student interacts with technology that can monitor and document the amount of time that the student participates in the activity.
- (2) A clock hour in a distance education program does not meet the requirements of this definition if:
  - (i) it does not meet all accrediting agency and State requirements, or
  - (ii) if it exceeds an agency's or State's restrictions on the number of clock hours in a program that may be offered through distance education, or
  - (iii) if it exceeds more than 50% of the total clock hours required to graduate under section (1)(iv)(B) of this definition.

AACS also supports modifications that were tendered by committee members during the negotiated rulemaking that include the following concepts:

1. Require institutions to limit the allowance for asynchronous distance education delivery methods to only those portions of the programs that do not include hands-on learning.
2. Require institutions to demonstrate that the asynchronous distance education delivery methods are comparable to synchronous distance education delivery methods in terms of student engagement, objectives, effectiveness, and educational outcomes.

3. Require institutions to use student identity practices in accordance with 34 CFR §602.17(g), including secure login and pass code, proctored examinations, and new or other technologies and practices that would be most effective in verifying student identity for purposes of tracking attendance and engagement.

Finally, we note that the proposed rule does not include any allowance for a transition period between the current regime and the proposed ban on asynchronous distance learning. If the Department moves forward with the proposed rule, a transition period is necessary for students and institutions. Students currently enrolled in asynchronous distance education programs did so with the understanding that they could complete a certain amount of their program in this modality. Many may not be able to continue with their studies in either on-ground or in-person classroom learning due to conflicts with personal schedules, work, obligations at home, or other issues. It would be manifestly unfair to those students to force them to choose between completing their programs in a different modality or losing Title IV aid. Finally, students may simply choose not to proceed with their education in a different modality, leading to students dropping with outstanding loans and having used limited Pell Grants for programs that the Department will no longer authorize for participation.<sup>4</sup>

Similarly, institutions will require time to adjust. Colleges will need to change levels of staffing to have sufficient instructors to teach classes either in person or by distance in a synchronous modality. They will also need new equipment and technology—such as cameras, computers, and software capable of synchronous instruction. They will need classroom space for programs changing to in-person learning, which may require leasing or building space to accommodate more students.<sup>5</sup>

Finally, we note that both the students and institutions would have relied on the Department's current approval and support of asynchronous distance education. Students will have done so in electing to enroll in these programs and use federal (and other) educational benefits to attend. They will also have spent their time in the programs, which cannot be recovered. Institutions have relied

---

<sup>4</sup> To the extent that students do not complete their programs due to these changes imposed by the Department, we note that it would be unfair to institutions to have borrower defense liabilities assessed against the institutions. We hope that the Department would recognize that this change would be beyond the institution's control. Of course, to the extent that the Department elects to discharge these loans, then the taxpayer would be harmed by the failure of students to repay loans.

<sup>5</sup> We remind the Department that all these changes will require approval by other regulators prior to implementation. Accreditors, state occupational licensing boards, and other governmental agencies (e.g. municipal building departments) will have to grant approval. Additionally, institutions may have to negotiate with landlords and other private parties. Adding students to on-ground education will have impacts on these constituencies in ways that may be unforeseen or underappreciated at this stage. For example, schools may not have adequate parking facilities for additional students. Similarly, changes to school locations and facilities is often a substantive change under relevant accreditor standards, requiring full commission review and approval, as well as a possible site visit depending on the nature and extent of the changes. As some accreditors only meet two times per year, this will require at least 8-12 months for submission, review, and approval.

upon the Department's current approval to invest limited financial resources in obtaining infrastructure and human capital to deliver this education to students. To pivot to a new reality, both students and institutions will need time.

For this reason, we ask the Department to consider a transition period of one year to allow for students and institutions to adjust to these changes. We propose that the effective date of the new definition be no earlier than July 1, 2026.

#### V. Directed Questions

We also submit Directed Questions to the Department regarding the proposed regulations. We appreciate, in advance, the Department's full responses to these questions.

*Directed Question #1* – The Department has declined to provide a comprehensive and complete assessment of the current use of asynchronous learning. What justification can USDE provide that substantiates the proposed prohibition?

*Directed Question #2* – How does the Department reconcile prior admissions that innovations technology present in 2020 was sufficiently advanced as to provide the technological capabilities to properly track asynchronous learning?

*Directed Question #3* – Upon what evidence has the Department relied to develop different rules for asynchronous learning within the context of clock hour versus credit hour programs?

*Directed Question #4*—Upon what authority does the Department rely for treating classroom taught, theory-based education in clock hour programs differently than those in credit hour programs for purposes of permitting or disallowing asynchronous distance education?

### III. Conclusion

We remain committed to working with both the Administration and the Department on the development of fair and equitable regulations, regulations which protect the integrity of the student financial aid programs, address needed reforms, and promote access to a quality higher education for all students. Unfortunately, this prohibition on asynchronous learning in clock hour programs is short-sighted and fails to recognize the innovations that are moving post-secondary education forward. This would be a step backwards.

Sincerely,

*Cecil Kidd*

Executive Director