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How Colleges and Universities Can Bring Pell Grant-Funded Programs Back to Prisons

A new process from the U.S. Department of Education outlines how higher education institutions can receive approval to offer Pell Grant-funded programs to incarcerated students.

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Two students at the Maryland Correctional Institution for Women in Jessup, Maryland, participate in a psychology class offered through Goucher College's prison education program. (Getty/Sarah L. Voisin)

Introduction and summary

For more than 25 years, federal law has forbidden people in prison from using Pell Grants to pay for college. However, after a long, hard fight by a wide range of advocates as well as currently and formerly incarcerated students, Congress changed the law in late 2020 to give incarcerated people a second chance at a college education.¹ Once implemented, the law will likely result in the biggest expansion of prison higher education programming since the initiation of the Obama administration's Second Chance Pell (SCP) program in 2015; by one estimate, as many as 463,000 Pell Grant-eligible incarcerated people could stand to benefit from this new program.²

WHAT IS A PELL GRANT?

ARTICLE

Who Gets Pell Grants and Why It Matters

Apr 14, 2017
Ben Miller

Before Pell Grants can flow once again to students in prisons, however, colleges, accreditors, corrections agencies, and the U.S. Department of Education have a lot of work to do.

Following a negotiated rule-making process in the fall of 2021, the Education Department and negotiators agreed on draft language that will guide the implementation of the new prison education program (PEP) approval process.³ Although the final regulation is not due until November 2022, for anyone with a stake in expanding access to higher education in prison, there is no time to waste in thinking through how to implement PEP. This report offers a guide to the proposed PEP

approval process for colleges and raises questions about aspects of the process that the draft text does not address.

Once the approval process is in place, higher education institutions will need to complete four steps in order to offer college programming in prisons that students can pay for with Pell Grants:

- 1 Create higher education programs that meet the new requirements or adapt existing programs to the new requirements.
- 2 Get approval from their institutional accrediting agency.
- 3 Get approval from the entity that oversees the correctional facility where the program will be offered, such as the Federal Bureau of Prisons or a state corrections agency.
- 4 Get approval from the Education Department.

For incarcerated students, the new PEP will restore access to America's largest college financial aid grant program. For colleges and universities, it presents an opportunity to reach more students—and a new challenge in navigating federal bureaucracy.

Pell Grants in prison, then and now

Before Congress disqualified incarcerated people from Pell Grant eligibility in 1994, there were few legislative restrictions on administering Pell Grants to incarcerated students;⁴ federal grant aid was administered to incarcerated and nonincarcerated students in essentially the same ways. When Congress reversed the 25-year-old ban through the Consolidated Appropriations Act of 2020, however, it opted for a new structure for the administration of Pell Grants in prison.⁵

LEARN HOW STATE BANS HAVE BLOCKED JUSTICE-INVOLVED INDIVIDUALS FROM ACCESSING HIGHER EDUCATION

ARTICLE

Eliminating the Pennsylvania Rule That Bars Incarcerated Students From Getting Financial Aid

Aug 26, 2020
Bradley D. Custer

Beginning as soon as the fall 2023 semester, incarcerated students will only be able to access Pell Grants if they enroll in a PEP. Colleges that wish to offer a PEP must first get approval from the appropriate accrediting and corrections agencies and the Education Department. Congress designed this approval process to control for program quality; the upfront vetting and ongoing evaluation processes will make it more difficult for colleges to offer low-quality programming. Although the law now excludes for-profit institutions from PEP eligibility, they and other higher education institutions can still offer programs in prison that are not financed by Pell Grants.

Notably, Congress did not add eligibility restrictions related to students' conviction type or sentence length. This is a departure from the rules of the SCP pilot program, which is an experimental program that allows a limited number of college programs to accept Pell Grants for incarcerated students.⁶ The rules of SCP deny eligibility to students with death or life without parole sentences, but this will not be a restriction in the new PEPs. In the 2020 law, Congress also eliminated questions from the Free

Application for Federal Student Aid about selective service registration and drug convictions, which are common barriers to Pell Grant access among SCP students.⁷ These improvements will maximize federal financial aid access in prisons.

The new prison education program

In 2021, the Education Department used negotiated rule-making—a process of seeking agreement from appointed volunteer stakeholders on regulatory text—to write the rules that will guide the PEPs.⁸ The department convened two groups of negotiators to complete this work: the Negotiated Rulemaking Affordability and Student Loan Committee (full committee) and the Prison Education Programs Subcommittee (subcommittee).⁹ The subcommittee comprised formerly incarcerated education advocates, state agency representatives, and other experts on prison education, some of whom also sat on the full committee. They served in an advisory capacity to the department and the full committee by developing the details of the PEP draft language. Meanwhile, the full committee comprised a more diverse group of higher education policy experts and advocates who debated 12 regulations from October to December 2021, just one of which was PEP. The full committee held the authority in the rule-making process. At the end of negotiations, each full committee negotiator was asked whether they supported the draft text for each of the 12 topics; if there were no objections to a particular regulation, the committee had “reached consensus,” which is the goal of the process.

For the PEP regulation, Education Department staff wrote the first draft in October, which was then workshopped by the subcommittee over the course of six days. The subcommittee next presented their proposed draft language to the full committee, which revised it and ultimately reached consensus on it. Because the full committee reached consensus, the department must publish a notice of proposed rule-making—a substantially unchanged version of the PEP consensus language—in the spring or summer of 2022. At that time, the public will have the opportunity to submit written comments on the draft before the department publishes the final regulation. The regulation must be published by November 1, 2022, to take effect in July 2023. At the earliest, colleges could begin offering their PEPs to students in fall 2023, although spring 2024 and thereafter is more realistic due to the anticipated length of the approvals process and the many unknowns that will accompany piloting the new program.

As of now, colleges and universities will be expected to complete the following four steps before accepting Pell Grants from incarcerated students.

Step 1: Creation of a prison education program

In order to offer Pell Grants to incarcerated students, higher education institutions must first create a PEP that conforms to the new requirements.¹⁰ The 372 existing higher education programs in prisons¹¹—including the 131 and growing SCP sites¹²—must adapt to the new requirements.

One of the most significant changes from the SCP program is that PEPs will have new restrictions on career-focused programs.¹³ Congress forbade colleges from offering “education that is designed to lead to licensure or employment for a specific job or occupation in the State if such job or occupation typically involves prohibitions on the licensure or employment of formerly incarcerated individuals.”¹⁴ To comply, institutions must understand their state’s occupational laws. For example, if a college intends to offer a degree in accounting through a PEP, it must first ascertain whether state law prevents people with certain criminal convictions from obtaining an accountancy license. If such a law exists, a college may still offer the program, but it may not enroll individuals with those convictions. In that case, colleges will have to

review the criminal records of each applicant prior to enrollment. They will also have to disclose to students in those programs any state legal barriers to licensure or employment. However, more generalized programs such as an associate degree in liberal arts or a bachelor's degree in business—which are much more common than degrees designed to lead to licensed professions among prison programs¹⁵—would avoid conflicts with the requirement.

Colleges will also need to establish a pathway for their students to transfer to at least one other institution in the state where the prison is located upon their release from prison.¹⁶ Congress included this requirement to prevent colleges from offering low-quality courses that other institutions would be unlikely to accept for transfer upon an individual's release.

How will existing prison higher education programs transition to PEPs?

The committee's draft language does not address how SCP sites might transition into the new PEP structure. These programs have already been approved by accrediting agencies, officials at correctional facilities, and the Education Department. Through implementation guidance, the department must address whether SCP programs will be required to go through the new PEP approval process, or whether there will be a streamlined process for them that acknowledges their existing approvals.

The draft language does address another type of program transition. Currently, people incarcerated in a local or county jail are eligible for Pell Grants; the Pell Grant ban applied only to federal and state facilities. Under the new regulations, however, all incarcerated people—including those in local and county jails—will have to enroll in a PEP to access Pell Grants. Acknowledging this change, the Education Department gave students who are already enrolled in programs in local and county jails until 2029 to continue using Pell Grants. Students in jail who enroll in a higher education program after July 2023 must attend a PEP.¹⁷

Step 2: Accreditation

After creating a PEP, colleges must seek approval from their institutional accrediting or state approval agencies.¹⁸ Colleges currently cannot offer programs at sites external to their main campus—called “additional locations,” including prisons—without approval from their accreditor.¹⁹ The draft language states that accreditors must “evaluate” the PEP for approval “based on the agency's accreditation standards.”²⁰ As there is no additional explanation for how accrediting agencies must do this, it is reasonable to expect that they will apply their existing procedures for adding program offerings at new locations.

Accreditors must evaluate and approve the first two prison sites where a college intends to offer its PEP. A college does not need the accreditor's approval to offer the PEP at additional prison locations beyond these two sites to obtain Pell Grant eligibility. However, colleges must continue to follow the accreditor's normal process for adding campus locations, which typically requires an application for each new site.²¹

Additionally, within one year of a PEP's initiation, the accreditor must visit the first two prison sites. Because there are no requirements for what the site visits should entail, accreditors will likely conduct their visits following normal procedures. Some

accreditors already make prison site visits voluntarily, but the federal requirement is new.

If a PEP does not meet the accreditor's standards, the college cannot advance in the PEP approval process. In that case, colleges presumably will be able to amend their application in order to meet the accrediting agency's standards.

How will accreditors work with oversight entities to evaluate program standards?

In addition to the responsibilities outlined above, the draft language also requires accrediting agencies to have:

reviewed and approved the methodology for how the institution in collaboration with the oversight entity, made the determination that the prison education program meets the same standards as substantially similar programs that are not prison education programs at the institution.²²

Through this provision, the Education Department directs accreditors to ensure that a degree program offered at a prison meets the same standards as a program offered on a college's main campus.²³ While accreditors likely already do this, the department is now moving to require the accreditor to work with the institution and the oversight entity to make that determination. This is unusual because evaluating accreditation standards is usually outside the scope of the oversight entity such as a state corrections agency. If this rule is maintained in the final regulation, the Education Department will need to explain its intent and how it wants the three parties to complete this step.

Step 3: The oversight entity and the best interest determination

The most novel aspect of the PEP approval process is the role of the oversight entity. Congress has given PEP approval authority to the "appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities, or by the Bureau of Prisons."²⁴ During negotiated rule-making, Education Department staff developed the term "oversight entity" as shorthand to encompass the approving agencies.²⁵ For example, if the facility where a college wants to offer a PEP is a federal prison, then the oversight entity is the U.S. Department of Justice's Bureau of Prisons. For a state prison, the oversight entity would be the state corrections agency, and for a jail, it would be the county or municipal government.

Receiving approval from the oversight entity entails a new process outlined by Congress called "the best interest determination."²⁶ The oversight entity will determine whether an existing PEP is "operating in the best interest of students" by evaluating data against a set of metrics.²⁷ (The process for new programs is described below.) Congress delineated seven metrics that oversight entities *may* use in their evaluations, and during negotiated rule-making, the committee settled on a slightly different list of seven metrics that oversight entities *must* use in their evaluations:

¹ The rate at which PEP students reenroll in higher education upon release from prison

- 2 Post-release job placement rates
- 3 The earnings of released students compared with the typical earnings of high school graduates
- 4 The experience, credentials, and turnover or departure rates of PEP faculty
- 5 The transferability of credits and the applicability of those credits toward degree programs at other institutions
- 6 The availability and quality of academic and career advising services
- 7 The ease with which an institution's former PEP students will be able to transfer their credits and enroll at another location of the same institution to continue their program of study upon release²⁸

The draft language also includes two optional metrics, and the oversight entity may add others:

- 1 Recidivism rates of PEP students after release
- 2 Program completion rates

Importantly, it is up to the oversight entity to set the thresholds for each metric. The draft language does not dictate how oversight entities should do this, but the thresholds must be established before a PEP applies. For example, the first metric involves the percentage of students who participated in a PEP who continue their postsecondary education after release from prison. The oversight entity must set a threshold against which to measure program quality and success. If the oversight entity establishes that at least 25 percent of former PEP students should be reenrolling in higher education upon release, for instance, then it will use that as a benchmark for evaluating the program. Because each oversight entity sets its own metrics, metrics will likely vary considerably across the country, which adds complexity, especially for colleges that plan to offer PEPs in multiple facilities with different oversight entities.

According to the draft language, the oversight entity uses these metrics to make its determination “in light of the totality of the circumstances,”²⁹ suggesting that even if a PEP fails to meet one or more metric, the oversight entity may nevertheless find that a PEP is operating in the best interest of students.

Although Congress gave approval authority to the oversight entity, subcommittee negotiators sought to bring more people into the decision-making process. They successfully negotiated language that requires the oversight entity to consider “input from relevant stakeholders” when making the best interest determination.³⁰ By definition, relevant stakeholders:

must include representatives of incarcerated students, organizations representing incarcerated individuals, state higher education executive offices, and accrediting agencies and may include additional stakeholders as determined by the oversight entity.³¹

The oversight entity can choose to form an “advisory committee” to solicit the feedback from those stakeholders, or it may solicit feedback from them in other ways. However, there is an important caveat: Because Congress gave the oversight entity sole approval powers, the Education Department determined that the stakeholder input would be nonbinding.³² Therefore, while the oversight entity must gather and consider input from all the required stakeholders, it can reach a decision that diverges from the stakeholders' feedback.

For existing prison higher education programs, the oversight entity will review information the college provides to make the determination of best interest. For new programs that do not yet have outcomes data, the oversight entity can approve a PEP on a conditional basis. The Education Department created an initial approval process for this situation, but the regulations do not explain what exactly the initial approval should include, only that the oversight entity must collect data and make the full best interest determination two years after initiation.

To ensure that the oversight entity monitors program quality, the best interest determination is also a regular evaluation process. The oversight entity must make new determinations for each PEP prior to the expiration of a college's program participation agreements, or about every six years.³³ The evaluations "include the entire period following the prior determination."³⁴

Once a college receives approval from its accreditor and the oversight entity, it can proceed to the final step: applying to the Education Department.

Who holds oversight entities accountable for their approval decisions?

On the last day of subcommittee meetings, one negotiator proposed an appeals process to give another entity, such as the Education Department, the option to review an oversight entity's decision if it rejects a PEP application. Although the department supported this idea, it rejected the proposal on the grounds that it did not have sufficient time at that stage in the rule-making process to develop an appeals process.³⁵ Instead, the department required the oversight entity to allow colleges to reapply for PEP approval "within a reasonable timeframe," which prevents an oversight entity from permanently denying a PEP.³⁶ However, this solution does not resolve the concern that an oversight entity might use improper or flawed reasoning to determine that a program is not in the best interest of students. Neither Congress nor the department included accountability measures to ensure that oversight entities make their decisions to reject a program in good faith. The Education Department will only review an oversight entity's methodology for making the determination when it reviews the college's complete application for PEP approval.

Step 4: Application to the Education Department

As the final step in the PEP approval process, an institution must apply to the Education Department by submitting the following:

- 1 A description of the program
- 2 Documentation of accreditation approval
- 3 The name of the correctional facility where the PEP will be delivered and documentation of oversight entity approval
- 4 Documentation of the methodology used by the oversight entity to make the best interest determination
- 5 A description of the services that will be provided to students
- 6 Acknowledgment that the Education Department can limit or terminate the PEP's approval

7 Agreement to submit an annual report

8 Any other information the Education Department requests³⁷

The Education Department may limit or terminate a PEP's approval if any of the information in the application is "materially inaccurate."³⁸ The draft language does not, however, suggest that staff can make subjective assessments about PEPs. For example, the Education Department has no apparent authority to overturn an accrediting agency's or oversight entity's decision to approve the program. Rather, the Education Department will approve the PEP if a college demonstrates through the application that the PEP meets the statutory and regulatory requirements.

How will the Education Department process PEP applications?

The Education Department will need to issue guidance on how colleges, accrediting agencies, and oversight entities should carry out their responsibilities in the PEP approval process, including how to document and submit each of the application requirements. At that time, the department should also answer any questions about the process that will not be directly addressed in the regulations. To do so, it must first dedicate staff with specialized knowledge of financial aid and prison education to operate the rollout of the new PEP.

READ ABOUT HOW THE BIDEN ADMINISTRATION CAN IMPROVE OPPORTUNITY FOR PEOPLE WITH CRIMINAL RECORDS

ARTICLE

3 Ways the Biden Administration Can Give Second Chances to Justice-Impacted College Students

Apr 19, 2021
Bradley D. Custer

Conclusion

It is not clear how long the entire PEP approval process could take. There is no language in the draft text to suggest that each party should act expeditiously or on a specified deadline. For colleges, therefore, now is the time to begin consulting with accrediting agencies and oversight entities about their plans. As each party is dependent on the cooperation of the others to gain the Education Department's approval, building these relationships is critical for the success of PEPs and ensuring that an affordable, high-quality college education will finally be in reach of incarcerated students.

Acknowledgments

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Endnotes

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- 1** For a discussion of why Congress blocked incarcerated students from receiving Pell Grants and how advocates succeeded in getting the ban reversed, see Bradley D. Custer, “The History of Denying Federal Financial Aid to System-Impacted Students,” *Journal of Student Financial Aid* 50 (1) (2021): 1-16, available at <https://ir.library.louisville.edu/jsfa/vol50/iss1/2>.
- 2** Patrick Oakford and others, “Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison” (New York: Vera Institute of Justice, 2019), available at <https://www.vera.org/publications/investing-in-futures-education-in-prison>.
- 3** U.S. Department of Education, “PEP – Consensus Language” (Washington: 2021), available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/concenlang.pdf>.
- 4** Bradley D. Custer, “Federal Financial Aid for College Students With Criminal Convictions: A Timeline,” Center for American Progress, December 17, 2020, available at <https://www.americanprogress.org/article/federal-financial-aid-college-students-criminal-convictions/>.
- 5** Consolidated Appropriations Act of 2021, Public Law 116-260, 116th Cong., 2nd sess. (December 27, 2020), available at <https://www.congress.gov/bill/116th-congress/house-bill/133>.
- 6** Allan Wachendorfer and Michael Budke, “Lessons from Second Chance Pell: A Toolkit for Helping Incarcerated Students Complete the Free Application for Federal Student Aid” (New York: Vera Institute of Justice, 2020), available at <https://www.vera.org/downloads/publications/lessons-from-second-chance-pell-toolkit.pdf>.
- 7** U.S. Government Accountability Office, “Actions Needed to Evaluate Pell Grant Pilot for Incarcerated Students” (Washington: 2019), available at <https://www.gao.gov/assets/gao-19-130.pdf>.
- 8** For documents, meeting recordings, and meeting transcripts from the fall 2021 subcommittee sessions, see U.S. Department of Education, “Negotiated Rulemaking for Higher Education 2021-22,” available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html> (last accessed March 2022). For more information on the negotiated rule-making process, see U.S. Department of Education, “The Negotiated Rulemaking Process for Title IV Regulations – Frequently Asked Questions,” available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html> (last accessed March 2022).
- 9** U.S. Department of Education, “2021 Negotiated Rulemaking Affordability and Student Loan Committee,” December 2021, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/revcommistdec.pdf>.
- 10** Implied in this step is that colleges will follow their own processes for creating a new program or offering a program at a new location, which might include getting approval from the board of trustees. After approval, colleges must also add the new program and/or location to their program participation agreements with the Education Department before financial aid can be processed.
- 11** Caisa E. Royer and others, “The Landscape of Higher Education in Prison, 2019-2020” (Denver: Alliance for Higher Education in Prison, 2021), available at <https://www.higheredinprison.org/publications/the-landscape-of-higher-education-in-prison>.
- 12** U.S. Department of Education, “U.S. Department of Education Announces It Will Expand the Second Chance Pell Experiment for the 2022-2023 Award Year,” Press release, July 30, 2021, available at <https://www.ed.gov/news/press-releases/us-department-education-announces-it-will-expand-second-chance-pell-experiment-2022-2023-award-year>.
- 13** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.236.
- 14** Consolidated Appropriations Act of 2021.
- 15** Alliance for Higher Education in Prison, “National Directory of Higher Education in Prison Programs,” available at <https://www.higheredinprison.org/national-directory> (last accessed March 2022).

- 16** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.236.
- 17** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.242.
- 18** The order of the draft language implies that the next step is to seek approval from institutional or state approval agencies. However, it is also possible that institutions can work on this step simultaneously to step three—seeking approval from the oversight entity—or even after. See U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.237.
- 19** Legal Information Institute, “34 CFR § 668.14 – Program participation agreement,” available at <https://www.law.cornell.edu/cfr/text/34/668.14> (last accessed March 2022).
- 20** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.237.
- 21** Likewise, if a college currently offers its prison program via face-to-face instruction and wishes to add a distance education modality, the new regulations would require accreditor approval of the first site where the new method of delivery occurs. Again, the accreditor may already require this for each change in method of delivery.
- 22** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.237.
- 23** The Education Department proposed this language during the last day of negotiated rule-making at the request of the accrediting agencies representative on the committee. See U.S. Department of Education, “Negotiated Rulemaking Session 3, Day 5, Afternoon, December 10, 2021” (Washington: 2021), available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec10pm.pdf>. Originally, the Education Department proposed that accreditors “review and approve the methodology for how the oversight entity made the determination [of best interest].” The representative objected by pointing out, “[W]e don’t accredit Bureaus of Prisons or Departments of Corrections, we accredit institutions. So anything that the accreditor is expected to do should be with the institution.” See U.S. Department of Education, “Negotiated Rulemaking, Session 3, Day 3, Afternoon, December 8, 2021” (Washington: 2021), available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec8pm.pdf>. The new language removes any reference to the determination of best interest and avoids the implication that accreditors should have direct oversight over the oversight entity.
- 24** Consolidated Appropriations Act of 2021.
- 25** U.S. Department of Education, “PEP – Consensus Language,” section 34 CFR § 668.235.
- 26** Consolidated Appropriations Act of 2021.
- 27** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.241.
- 28** Ibid.
- 29** Ibid.
- 30** Ibid.
- 31** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.235.
- 32** Ibid.
- 33** Legal Information Institute, “34 CFR § 668.14 – Program participation agreement.”
- 34** U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.241.
- 35** During the afternoon negotiated rule-making session on November 10, 2022, the Education Department addressed the appeal process topic: “We appreciate and agree with the overall interest in ensuring that institutions have some ability to appeal the determinations of their oversight entities. We are concerned, though, that we haven’t had time to thoroughly vet any language, including with our federal partners at the Bureau of Prisons. At the federal level, there are substantial legal requirements surrounding how that appeals process can be treated, and we will need to coordinate with the Bureau of Prisons to better understand how any language might affect the agency.” See U.S. Department of Education, “Prison Education Programs Subcommittee, Session 2, Day 3, Afternoon, November 10, 2021,” (Washington: 2021), available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/nov10pm.pdf>.

- 36 U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.241.
- 37 U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.238.
- 38 U.S. Department of Education, “PEP – Consensus Language,” Section 34 CFR § 668.240.