



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF POSTSECONDARY EDUCATION

**Issue Paper 1: Ability to Benefit**  
**Session 1: January 18-21, 2022**

**Issue:** Ability to Benefit  
**Statutory cites:** §484(d) of the Higher Education Act of 1965, as amended  
**Regulatory cites:** 34 CFR 668.2, 668.32, 668.156, 668.157

**Summary of issues:**

Section 484(d) of the Higher Education Act of 1965, as amended (HEA), requires that in order to gain eligibility for title IV Federal student aid (title IV aid), a student without a high school diploma (or its recognized equivalent) must fulfill one of the ability to benefit (ATB) alternatives:

1. Pass an independently administered, Department of Education (Department) approved ATB test.
2. Complete at least six credit hours, or the equivalent coursework (225 clock hours), that are applicable toward a degree or certificate offered by the postsecondary institution.
3. Participate in a State process approved by the Department.

A student who meets one of the ATB alternatives may use that alternative to establish title IV aid eligibility at any eligible institution where the student enrolls in an eligible career pathway program (ECPP).

**Proposal:**

The Department seeks to clarify how (1) institutions demonstrate they are offering an ECPP, and (2) States demonstrate that their "State process" application meets the statutory requirements. The Department is aware of compliance and program integrity concerns with programs that claim to offer an ECPP but do not offer all the required components, State process applications that have not provided robust data on student success, and confusion as to how to craft a successful State process.

1. **Provide clarity as to what is required to demonstrate to the Department that a program qualifies as an ECPP for the purposes of ability to benefit.** We propose codifying the definition of an ECPP from the statute and clarifying how a program meets the standards of an ECPP by establishing an eligibility certification process and providing more detail on the documentation required to demonstrate that a program meets the definition of an ECPP.
2. **Eliminate the requirement that first-time applicants for the State process must demonstrate past performance metrics and clarify quality controls for the initial approval period.** First, the Department recommends a maximum of two years for an initial trial period as States gather data but seeks input from negotiators on the length of time that the initial State process application should receive approval for. Second, the Department proposes requiring States to verify in their applications that all new students served in the State process will be enrolled in an ECPP, and the Secretary shall verify that a sample of the proposed ECPPs are eligible. Third, the

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Department proposes setting a maximum number of students to be allowed in this initial approval period or limiting an institution to one ECPP for students eligible via State process; we seek feedback from negotiators on the best approach. Fourth, we propose removing the requirement that States demonstrate past success rates for the initial trial period, given that a State will not have prior award year data. However, we are proposing to replace that requirement with initial quality metrics that would allow us to assess the effectiveness of the programs participating under the State process in the initial trial period; we seek feedback from negotiators on what those quality metrics should be. Finally, we propose requiring States to describe in their application the enrollment or admission criteria for students accessing title IV aid through the State process ATB alternative.

- 3. Provide clarity on the requirements for States that are re-applying for subsequent approval of their State process.** When a State reapplies for subsequent approval of its State process, the Department proposes to require additional data and proof of success to meet the statutory requirement to demonstrate effectiveness. First, as in the initial application, the Department proposes requiring States to verify in their applications that all students served in the State process will be enrolled in an ECPP, and the Secretary shall verify that a sample of the proposed ECPPs are eligible. Second, as in the initial application, States will have to provide the criteria used to determine that students have the ability to benefit. Unlike in the initial application process, we propose to require States reapplying to provide all of the data necessary for the Secretary to make a determination based on the statutory criteria. We propose that States must demonstrate the “cultural diversity, economic circumstances, and education preparation of populations” by reporting to ED on race, gender, age, economic circumstances, and educational attainment (e.g., 10<sup>th</sup> grade) by program, which will enable ED equity audits. Finally, we propose that States demonstrate the effectiveness of their State process by meeting certain quality indicator thresholds.
- 4. Ensure that the success rate that States must demonstrate is appropriate.** In order to demonstrate the effectiveness of a State process, the current regulation requires that the completion rate for participating students without a high school diploma, or its recognized equivalent, must be within 95% of the completion rate for students with high school diplomas. We welcome input on whether this is the most appropriate indicator and comparison population. Other alternative performance indicators to be considered include earnings, employment, credentials, credits, and postsecondary transitions. We also seek feedback on the most appropriate mechanism to hold States accountable when participating institutions do not meet success rate thresholds.
- 5. Establish the reporting needed to retain access to title IV.** Ensure that States report institutional-level data to the Department when such data are not already available to the Department through standard title IV reporting.

### Proposed Regulations Redline

#### 34 CFR § 668.2 General definitions.

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(b)

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Eligible career pathway program: A program that combines rigorous and high-quality education, training, and other services that--

- (1) Aligns with the skill needs of industries in the economy of the State or regional economy involved;
- (2) Prepares an individual to be successful in any of a full range of secondary or postsecondary education options, including apprenticeships registered under the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.);
- (3) Includes counseling to support an individual in achieving the individual's education and career goals;
- (4) Includes, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;
- (5) Organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;
- (6) Enables an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and
- (7) Helps an individual enter or advance within a specific occupation or occupational cluster.

\* \* \* \* \*

**§ 668.32 Student eligibility - general.**

\* \* \* \* \*

- (e)(1) Has a high school diploma or its recognized equivalent;
- (2) Has obtained a passing score specified by the Secretary on an independently administered test in accordance with subpart J of this part, and either--
  - (i) Was first enrolled in an eligible program before July 1, 2012; or
  - (ii) Is enrolled in an eligible career pathway program as defined in § 668.2 of this part;
- (3) Is enrolled in an eligible institution that participates in a State "process" approved by the Secretary under subpart J of this part, and either--
  - (i) Was first enrolled in an eligible program before July 1, 2012; or
  - (ii) Is enrolled in an eligible career pathway program as defined in § 668.2 of this part;
- (4) Was home-schooled, and either--

**Commented [A1]:** The Department highlights that while this would be new to regulation, this definition is drawn from the statute.

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(i) Obtained a secondary school completion credential for home school (other than a high school diploma or its recognized equivalent) provided for under State law; or

(ii) If State law does not require a home-schooled student to obtain the credential described in paragraph (e)(4)(i) of this section, has completed a secondary school education in a home school setting that qualifies as an exemption from compulsory attendance requirements under State law; or

(5) Has been determined by the institution to have the ability to benefit from the education or training offered by the institution based on the satisfactory completion of 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution, and either--

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2 of this part.

\* \* \* \* \*

#### § 668.156 Approved State process.

(a)

(1) A State that wishes the Secretary to consider its State process as an alternative to achieving a passing score on an approved, independently administered test or satisfactory completion of at least six credit hours or its recognized equivalent coursework for the purpose of determining a student's eligibility for title IV, HEA program funds must apply to the Secretary for approval of that process.

(2) A State's application for approval of its State process must include--

(i) The institutions located in the State included in the proposed process, which need not be all of the institutions located in the State;

(ii) The requirements that participating institutions must meet to offer eligible career pathway programs through the State process;

(iii) A certification that, as of the date of the application, each proposed career pathway program intended for use through the State process constitutes an "eligible career pathway program" under § 668.2 of this part; and

(iv) The criteria used to determine student eligibility for participation in the State process.

(3) Before approving the State process, the Secretary will verify that a sample of the proposed eligible career pathway programs comply with the definition of an "eligible career pathway program" under §668.2 of this part.

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~~(b) The Secretary approves a State's process if—For a State applying for approval for the first time, the Secretary may approve the State process for a two-year initial period if—~~

~~(1) The State administering the process can demonstrate that the students it admits under that process without a high school diploma or its recognized equivalent, and who enroll in participating institutions, have a success rate as determined under paragraph (h) of this section that is within 95 percent of the success rate of students with high school diplomas; and~~

~~(2) The State's process satisfies the requirements contained in paragraphs (a), (c), and (d) of this section.~~

~~(1) The State administering the process can demonstrate that the students it admits under that process without a high school diploma or its equivalent, who enroll in participating institutions have a success rate as determined under paragraph (h) of this section that is within 95 percent of the success rate of students with high school diplomas; and~~

~~(2) The State's process satisfies the requirements contained in paragraphs (c) and (d) of this section.~~

~~(c) A State process must require institutions participating in the process to provide each student they admit without a high school diploma or its recognized equivalent with the following services—~~

~~(1) Allow the participation of only those students eligible under § 668.32(e)(3) of this part;~~

~~(2) Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process;~~

~~(3) Require corrective action if an institution is found to be in noncompliance with the State process requirements; and~~

~~(4) Terminate an institution's participation in the State process if the institution refuses or fails to comply with the State process requirements.~~

~~(1) Orientation regarding the institution's academic standards and requirements, and student rights.~~

~~(2) Assessment of each student's existing capabilities through means other than a single standardized test.~~

~~(3) Tutoring in basic verbal and quantitative skills, if appropriate.~~

~~(4) Assistance in developing educational goals.~~

~~(5) Counseling, including counseling regarding the appropriate class level for that student given the student's individual's capabilities.~~

~~(6) Follow-up by teachers and counselors regarding the student's classroom performance and satisfactory progress toward program completion.~~

~~(d) A State process must—~~

**Commented [A2]:** The Department proposes removing this requirement and replacing it with upfront quality metrics that better align with the data programs and states will be able to provide.

Specifically, the Department seeks feedback as to the quality metrics we should consider for initial applications to demonstrate "effectiveness." Because states will not be able to show that the program is yet effective for students enrolled through an ATB state process, we are considering metrics such as:

--Whether the median earnings for students who have a high school degree or equivalent and are already enrolled in the program at the institution exceed those of the typical high school graduate in the state; or

--Whether the withdrawal rate exceeds the rate required of initial institutions by administration capability regulations (34 CFR 668.1), or 33 percent, for students who have a high school degree or equivalent and are already enrolled in the program.

Additionally, the Department proposes setting an appropriate maximum number of students to be allowed in this initial approval period or limiting to one ECPP per institution for students eligible via the state process; we seek feedback on this approach.

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~~(1) Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process;~~

~~(2) Require corrective action if an institution is found to be in noncompliance with the State process requirements; and~~

~~(3) Terminate an institution from the State process if the institution refuses or fails to comply with the State process requirements.~~

~~(ed)~~(1) The Secretary responds to a State's request for approval of its State process within six months after the Secretary's receipt of that request. If the Secretary does not respond by the end of six months, the State's process is deemed to be approved.

(2) An approved State process becomes effective for purposes of determining student eligibility for title IV, HEA program funds under this subpart--

(i) On the date the Secretary approves the process; or

(ii) Six months after the date on which the State submits the process to the Secretary for approval, if the Secretary neither approves nor disapproves the process during that six-month period.

~~(e) After the initial two-year period described in paragraph (b) of this section, the State must reapply for continued participation and, in its application --~~

~~(1) Demonstrate that the students it admits under that process have a success rate as determined under paragraph (g) of this section that is within 95 percent of the success rate of students with high school diplomas;~~

~~(2) Demonstrate that the State's process continues to satisfy the requirements in paragraphs (a), (c), and (d) of this section; and~~

~~(3) Report information to the Department on the enrollment and success of participating students by program and by race, gender, age, economic circumstances, and educational attainment, to the extent available.~~

(f) The State must calculate the success rates as referenced in paragraph ~~(b)~~(e)(1) of this section by-

(1) Determining the number of students with high school diplomas who, during the applicable award year described in paragraph ~~(g)~~(1) of this section, enrolled in participating institutions and--

(i) Successfully completed education or training programs;

(ii) Remained enrolled in education or training programs at the end of that award year; or

(iii) Successfully transferred to and remained enrolled in another institution at the end of that award year;

**Commented [A3]:** The Department seeks feedback as to whether the current threshold in regulation is the right threshold for success.

**Commented [A4]:** The Department seeks feedback on whether completion rates are the right indicator to measure program effectiveness. Alternatives may include earnings, employments, credits earned, or others.

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(2) Determining the number of students with high school diplomas who enrolled in education or training programs in participating institutions during that award year;

(3) Determining the number of students calculated in paragraph (h)(2) of this section who remained enrolled after subtracting the number of students who subsequently withdrew or were expelled from participating institutions and received a 100 percent refund of their tuition under the institutions' refund policies;

(4) Dividing the number of students determined in paragraph (h)(1) of this section by the number of students determined in paragraph (h)(3) of this section; and

(5) Making the calculations described in paragraphs (h)(1) through (h)(4) of this section for students without a high school diploma or its recognized equivalent who enrolled in participating institutions.

(g)(1) For purposes of paragraph (f) of this section, the applicable award year is the latest complete award year for which information is available that immediately precedes the date on which the State requests the Secretary to approve its State process, except that the award year selected must be one of the latest two completed award years preceding that application date.

(2) If no students are enrolled in an eligible career pathway program through a State process, then success rate reporting will not be required in the subsequent application as described in paragraph (f) of this section.

(h) A State must submit reports on its State process, in accordance with deadlines and procedures established and published by the Secretary in the *Federal Register*, with such information as the Secretary requires.

(i) The Secretary approves a State process as described in paragraph (e) of this section for a period not to exceed five years.

(j)(1) The Secretary withdraws approval of a State process if the Secretary determines that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(2) The Secretary provides a State with the opportunity to contest a finding that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

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### § 668.157 Eligible Career Pathway Program.

(a) An institution demonstrates to the Secretary that a student is enrolled in an eligible career pathway program, as required under 668.156(a)(3) of this part, by documenting that--

(1) The student has enrolled in or is receiving both--

(i) An eligible postsecondary program as defined in § 668.8 of this part; and

**Commented [A5]:** The Department seeks feedback on whether success should be measured in comparison to 1) all other students not participating in Title IV through an ability to benefit provision; 2) all other students participating in Title IV through an ability to benefit provision; 3) to all postsecondary students with their high school equivalency, or 4) to those with no postsecondary education, but with a high school degree or equivalency.

The Department notes that the relevance of the comparison population will depend on the indicator used.

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(ii) Coursework, training, or other support services that enable an individual to attain a secondary school diploma or its recognized equivalent;

(2) The program aligns with the skill needs of industries in the State or regional labor market in which the institution is located, based on research the institution has conducted, including--

(i) Government reports identifying occupations with the greatest hiring demand in the State or regional labor market; or

(ii) Surveys, interviews, meetings, or other information obtained by the institution regarding the hiring needs of employers in the State or regional labor market.

(3) The skill needs described in paragraph (a)(2) of this section align with the specific coursework and postsecondary credential provided by the postsecondary program or other required training;

(4) The program provides career counseling services that assist students in obtaining jobs aligned with skill needs described in paragraph (a)(2) of this section, and identifying the individuals providing the career counseling services;

(5) The education is offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster; and

(6) The program is designed to lead to a valid high school diploma as defined in § 668.16(p) of this part or its recognized equivalent.

(b) For eligible career pathway programs that do not enroll students through a State process as defined in § 668.156 of this part, the Department will verify the eligibility of eligible career pathway programs for title IV, HEA program purposes. The Secretary provides an institution with the opportunity to appeal any adverse eligibility decision.

**Commented [A6]:** Other proposed changes to the Administrative Capability regulations would renumber this section as § 668.16(t).