

**133 C.S.R. 52. ANNUAL REAUTHORIZATION OF
DEGREE-GRANTING INSTITUTIONS**

RESPONSE TO COMMENTS

On June 13, 2022, the Higher Education Policy Commission (Commission) commenced a 30-day public comment period to accept written comments on proposed amendments to legislative rule 133 C.S.R. 52. Two commenters submitted written comments regarding the Commission's proposed amendments to the rule. The Commission addresses these comments below.

1. COMMENTER: West Virginia Independent Colleges & Universities

COMMENT A. *Authority to Continuously Authorize Public Institutions*

*The commenter states that, "The proposed changes seem to contradict the authority the Legislature has granted to the commission to evaluate all institutions and determine reauthorization. Conflict with §18B-4-7 and §18B-1-1f(e) The proposed amendments to 133CSR52 seem to be in contradiction with the WV Code §18B-4-7 and §18B-1-1f(e). Specifically, proposed changes to sections 2.6, 2.7, and 5.1 of the rule removes the requirement for reauthorization for all public institutions. The amendment to 2.6 removes the following language: 'the criteria for annual reauthorization also apply to public higher education institutions that offer degrees above the associate level in the state, and are under the purview of the Commission with the exception of Marshall University and West Virginia University.' Further, 2.7 adds the following text: 'West Virginia's public universities shall remain continuously authorized to operate unless the Legislature takes affirmative action to suspend or discontinue its operations...'. These amendments are a substantial change to public policy of the commission and seem to violate the scope of state code. West Virginia Code §18B-4-7 clearly articulates that it is the responsibility of the commission to grant authority to institutions to confer degrees. Subsection (d) states, 'Except as otherwise provided in this section, a charter or other instrument containing the right to confer degrees of higher education status may not be granted by the State of West Virginia to an institution, association or organization within the state, nor may a degree be awarded, **until the condition of conferring the degree first has been approved in writing by the council or commission, as appropriate, or by the institution's governing board in the case of the exempted schools.**'"*

RESPONSE A: The Commission appreciates the comment, but notes that the private institutions and public institutions operate under different authorities; the public institutions are established by statute and, as such, cannot be stripped of their authority to operate by act of the Commission, and the authority to confer degrees is the authority to operate an institution of higher education. The private institutions, on the other hand, exist and operate wholly outside the jurisdiction of the Commission, except for the narrow area of authorization to confer degrees. The Commission has myriad other authority over the public institutions that allows it to continuously monitor their performance and will integrate other responding processes to ensure accountability remains a central component for continuous authorization for public institutions. This deviates from the process prescribed for private institutions because oversight of operations for public institutions is

performed in a manner that is continuous and ongoing. However, such oversight is limited in scope for that which can be conducted by the Commission for non-public academic degree-granting institutions. Further, when a non-exempt public institution or a non-public institution seeks approval of an academic program to be delivered it does so by proceeding through corresponding program approval processes. Thus, the Commission continues to take official action on all appropriate academic programs at both the public and private institutions, thereby approving the ability of both public and non-public institutions to confer degrees.

COMMENT B. *Evaluation Measurements and Requirements*

*The commenter states that, “The proposed changes establish a system whereby different subsets of institutions are evaluated on different measures and requirements, yet draw the same authority to confer degrees. Further, subsection (e) states: “To retain the authority to confer degrees pursuant to this section, **each institution shall provide annually to the commission or council, as requested, all information the commission or council considers necessary to assess the performance of the institution and to determine whether the institution continues to meet the minimum standards for conferring degrees.” Section 7 of Article 4 continues to outline the authority granted to the commission to evaluate the minimum conditions for conferring degrees. It does not state that the Legislature shall make that determination. By eliminating the requirement for public institutions to follow the same process for reauthorization, and assuming public universities meet the minimum criteria, the commission is abandoning its statutory responsibility to evaluate all institutions, except for statutorily exempt institutions.”***

RESPONSE B: The Commission continues to collect data from all public institutions for both its oversight purposes and purposes related to Legislative reporting. The proposed amendments do not do away with the public institutions’ continuing obligation to provide information to the Commission upon request, but do allow data to be collected in a manner that aligns with existing processes and improves efficiency for the Commission, governing boards, and public institutions. Section 7.1 of the rule ensures that information relative to all academic degree-granting institutions, both public and private, will continue to be collected and disseminated to the public.

COMMENT C. *Evaluation Measurements and Requirements*

The commenter further states, “Similarly, every institution in the state is given the same authority to confer degrees, yet, if the proposed changes take effect, only one subset of institutions is required to go through an evaluation process. State law does not contemplate a separate process for different institutions, except for institutions that have been exempted by state law. Thereby setting up an evaluation system whereby not all institutions are evaluated by the minimum standards outlined in state code and rule.”

RESPONSE C: State law does not prescribe renewal processes that are analogous for public and non-public institutions, and there are no “minimum standards outlined in state code (sic).” Pursuant to its oversight authority over the public institutions stated throughout Code, the Commission continues to evaluate public institutions for matters that affect student success and institutional viability, although processes by which this is achieved may be different because standards for evaluation are, indeed, different between public and non-public institutions. Non-

public institutions are not subject to most evaluation processes required by the Commission of the public institutions, such as, *inter alia*, program review and approval, program development, budgeting, auditing, approval of expenditure on capital projects, and ongoing performance reporting. Similarly, the public institutions cannot fail in the same way that non-public institutions can, because the public institutions are backed by the State of West Virginia. A public institution cannot simply cease operations and close its doors on its students, alumnae, and employees. If the Legislature discontinues the operations of a public institution, the State can intercede in a number of ways to ensure that the institution's constituencies are protected. Neither the Commission nor the State has this authority over the non-public institutions, and the statute was implemented in response to the failure of such a non-public institution. Because public and non-public institutions are inherently different with respect to governance and accountability, the methods of evaluating their performance must be different in order to be effective.

COMMENT D. *Effect of Funding Formula Legislation*

The commenter states, "As it relates to administratively exempted institutions, §18B-1-1f(e) states: "Notwithstanding any other provision of this code to the contrary, any state college and university that applies and is designated by the commission as an administratively exempted school is exempt from the following..." The subsection continues to outline the requirements from which the administratively exempt institutions are specifically exempt. What is not listed is the requirement to follow the process for reauthorization. If the Legislature wanted public institutions to be exempted from the requirements of §18B4-7, presumably it would have listed that as one of the exemptions granted – but it did not."

RESPONSE D: The comment involves statutory provisions that are beyond the scope of and not germane to the proposed amendments to this rule and, therefore, no response is required.

COMMENT E. *Timing and Submittal of Information for Reauthorization*

The commenter stated, "Timing of certain requirements in the application for reauthorization may be better suited outside of the initial application. Among the list of materials required in the application for reauthorization is the newly proposed 5.2.j, which states: 'A plan for the retention, custody, and retrieval of student records, including but not limited to academic transcripts, financial aid documents, international student forms, and tax information, in the event of closure of the institution or discontinuance of service. The plan shall include a method by which students and alumni of the institution will be able to retrieve such records upon request;' The WVICU understands the role the commission plays in ensuring protections for consumers and does not disagree that the commission may need this information. However, we do object to the timing of the submission of this information. Requiring the information upon application presumes that every private institution is in danger of closing. The commission's own process contemplates an evaluation of information and a process for extra evaluation. If the commission determines there are concerns, it is at that time the commission should require the information in 5.2.j. Subjecting institutions who are strong financially and meeting all other requirement to this extensive task is not necessary at the application stage. Therefore, we recommend the commission move this requirement to after the initial evaluation instead of being part of the application."

RESPONSE E: The information is not required at the application stage, as initial authorization of degree-granting institutions is governed by 133 C.S.R. 20. Further, the Commission appreciates the commenter's understanding that it requests this information for the protection of all students and their families. It seeks not to make false assumptions regarding the ability of institutions to ensure these items are accounted for on a continual basis. As a result, consistency is achieved with respect to how and when this information is requested by embedding it within the annual reauthorization process. Further, waiting to require the institution to evaluate these items until after concerns arise puts at risk the ability of both the institution and the Commission to plan accordingly and puts at risk the Commission's ability to effectively assist institutions and their constituent groups who may find themselves in need of the Commission's support. Finally, once the plan is developed, presumably it will remain the plan for succeeding reauthorization cycles. If necessary, updating the plan while the institution remains viable saves it from having to develop such plans while in the throes of academic and/or financial crisis and ensures a more workable and effective plan.

2. COMMENTER: Bethany College

COMMENT A. *Reauthorization Process*

The commenter stated, "In June 2022, the Commission reauthorized Bethany College, but publicly declared such authorization as provisional requiring the College to submit additional to the Commission. Bethany College is committed to operating in good faith and providing full transparency with the Commission. However, such a public declaration presents potential material damage to an institution by negatively impacting public perception, enrollment, philanthropy, approval of new programs by the HLC, and talent acquisition. When the College expressed its confusion over the existence of a 'provisional' status and concerns regarding the negative impact such a public declaration of provisional authorization (sic) could have, it was explained to the College that the Commission was working within the constraints of the current rules and was challenged to find legislative ways to seek additional information from institutions it believed warranted such a request."

RESPONSE A: The Commission appreciates the comment; however, the comment involves activities that are beyond the scope of the rulemaking process and, therefore, requires no response. It is important to note, however, that the Commission has the authority to require institutions to submit additional information when the information submitted in support of an application for reauthorization is not sufficient to inform the Commission as to the ability of the institution to continue providing uninterrupted services to its students.

COMMENT B. *Reauthorization Process*

The commenter stated, "Our understanding is that the Commission is currently charged with approving or denying the reauthorization of postsecondary institutions. It is our opinion that this binary authority serves neither the Commission nor the individual postsecondary institution well. Such a binary process seems impractical and unproductive as both the Commission and individual institutions would benefit from a multi-tiered approach wherein an institution may remain fully authorized while also subject to private administrative disclosures with the Commission to ensure

certain standards are met. It seems reasonable to suggest postsecondary colleges could receive one of several authorization statuses, with increasing levels of Commission monitoring. As an example, a potential rubric could include:

- *Status 1: Fully authorized – unqualified – no additional action by the institution*
- *Status 2: Fully authorized – with a private, administrative process where the Commission can require additional information from schools in a way that isn't public*
- *Status 3: Fully authorized – with a private, administrative process where, in addition to requiring additional information from institutions, the Commission may require the institution to engage a professional firm to conduct an audit, offer and implement recommendations, etc.*
- *Status 4: Provisionally authorized – a public process whereby the Commission seeks to bring an institution into compliance*
- *Status 5: No authorization – an institution is denied authorization.*

An institution always would be aware of the essential criteria accompanying each status.”

RESPONSE B: The current rule does not designate “levels” or “tiers” of reauthorization, and the current amendments do not propose to do that, as the current rule and the proposed revisions that are the subject of this rulemaking allow the Commission to exercise flexibility and discretion throughout the reauthorization process. As needed, the Commission can take various actions as intermediate steps prior to making a final decision on reauthorization. This allows for the Commission to respond appropriately to the unique circumstances of each institution as they arise. It is also important to note that, as an agency of State government, the Commission cannot act “in a way that isn't public.”

COMMENT C. *Clear and Consistent Criteria and Process for Authorization*

The commenter stated, “In the event the Commission decided to not reauthorize a postsecondary institution, such an action would present an immediate existential threat to the viability of the institution. Given this, it seems reasonable that postsecondary institutions fully understand the criteria and process by which an institution receives full reauthorization, and that such criteria be defined and equally applied to all postsecondary institutions within the State, public and private. Currently, Bethany College is unaware of any rubric, criteria set, or quantitative measures that constitute a minimum standard for reauthorization. Rather, it seems such discretion is left to the Commission, which presents as arbitrary and disallows the institutions an opportunity to meet or exceed a set of defined criteria. In addition, a process whereby the institution is in consistent dialogue with the Commission seems reasonable.”

RESPONSE C: The criteria the Commission evaluates during the reauthorization process are listed in the rule. The proposed amendments seek to make these reporting requirements less onerous for the institutions by revising the list of requested information to include only what the Commission needs to make a sound decision on the continuing viability of the institutions. However, there is no one-size-fits-all approach to the evaluation of this information, as the Commission must take into consideration the unique roles, scopes, and missions of the various institutions in the State.

COMMENT D. *Equal Treatment of Public and Private Colleges*

The commenter stated, “The Commission’s recent decision to provisionally authorize Bethany College was based on one criterion – the Composite Financial Index (CFI). More specifically, the Commission relied on 2020 data that illustrated Bethany College’s CFI fell below 1.0, whereas more recent data has the College’s CFI above 1.0. This same data revealed several public colleges with CFI’s below 1.0. However, these schools were not placed on provisional reauthorization and avoided the negative media attention related to such. This appears to be an unequal application of a criterion whereby private, religious based organizations are being unfairly singled-out by the Commission. Bethany College does not believe it’s the Commissions intent to single out such institutions but has yet to receive a reasonable explanation as to why public institutions with CFI’s lower than Bethany’s received full, unqualified reauthorization.”

RESPONSE D: Specific reauthorization decisions are outside the scope of the rulemaking process and, therefore, require no response. It is important to note, however, that public institutions are financially backed by the State of West Virginia and do not maintain the same risk of failure faced by private institutions. Thus, the Commission sought additional information to ensure the continuing viability of private institutions for the 2022-2023 reauthorization cycle. The manner in which the Composite Financial Index (CFI) score is utilized for reauthorization purposes is consistent across all private institutions. All institutions report their CFI scores to the Commission each year at the same time for the evaluation cycle, and those scores may improve after the information submittal deadline. As necessary, the Commission may follow-up with institutions (and institutions may follow up with the Commission) to clarify any submitted data, and the Commission can request additional information in response to potential issues elucidated by the analysis of submitted data. This process is applied the same way to all institutions and allows the Commission to develop greater context for certain trends and observations (e.g., decreasing enrollment or completion rates, increased tuition costs or loan defaults, lower CFI scores, etc.) and provides institutions with an opportunity to describe how they are addressing any such concerns.

COMMENT E. *Use of Composite Financial Index*

The commenter stated, “For the 2022-2023 reauthorization, the Commission has chosen to use of the Composite Financial Index (CFI) as the sole determiner as to whether an institution receives full or provisional reauthorization. Bethany College agrees with the Commission’s staff that use of the CFI as the sole criterion is problematic. The CFI, though of some value in assessing postsecondary institutions, is widely considered to be a lagging indicator, can change substantially year over year, and is inadequate in accurately conveying an institution’s actual circumstances. A more comprehensive set of criteria is warranted.”

RESPONSE E: The Commission agrees with the comment and acknowledges that, although the CFI score is a commonly accepted gauge for assessing the financial health of an institution of higher education, there may be other measures to consider that offer a more complete picture of an institution’s financial condition. Thus, the rule allows the institutions to submit “The latest financial statement for the most recent fiscal year compiled and audited by an independent certified public accountant, including any management letters provided by the independent auditor[.]” §5.9.e.1. The rule also provides both the Commission and the institutions with the flexibility to submit “any additional information or data as deemed necessary.” §5.4.n. The Commission will

continue to work with institutions to ensure that they submit all appropriate data to allow the Commission to make an informed decision on reauthorization.