Center for American Progress

1333 H Street, NW, 10th Floor
Washington, DC 20005
Tel: 202 682.1611 • Fax: 202 682.1867

www.americanprogress.org

Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave. SW, Mail Stop 294-20
Washington, DC 20202

Re: Docket ID ED-2018-OPE-0076, Accreditation

July 12, 2019

Dear Mr. Gaina,

Thank you for the opportunity to comment on the Department's Notice of Proposed Rulemaking (NPRM) to amend the regulations governing the recognition of accrediting agencies, student assistance general provisions, and institutional eligibility. This comment is submitted on behalf of the postsecondary education team at the Center for American Progress. If you have any questions about these comments, please contact Antoinette Flores at aflores@americanprogress.org.

While there are a small number of positive changes in the NPRM, we believe that through the changes proposed, the Department is abdicating its responsibility to conduct oversight of accrediting agencies and ensure they are reliable authorities of college quality by removing mechanisms to hold accreditors responsible for their oversight and weakening the ability of accreditors to ensure students are attending high quality colleges.

The Department acknowledges, in the background of its NPRM, that Congress tasked it with ensuring access while tasking accreditors with ensuring quality. However, Congress also tasked the Department with ensuring that accrediting agencies are reliable authorities of college quality,[1] a duty the Department neglects to mention, and which appears to be absent from the goals of the rulemaking and the proposals in the NPRM. The Department has a legal responsibility to ensure accreditors meet federal requirements through the recognition process and the rule changes proposed here ignore that duty.

The rule changes go beyond just tying the hands of the Department to take action against accreditors that fall down on the job. The changes also tie the hands of accreditors themselves to effectively address quality, making it nearly impossible that an accrediting agency would ever lose federal recognition if it fails in its duty, and similarly unlikely that a low-quality institution that is harming students would lose accreditation, two

[1] https://cdn.americanprogress.org/content/uploads/2019/01/09072137/Accreditor-Review.pdf

scenarios which already have happened far too rarely in the current system.[2] If an oversight system fails to rid even the worst actors from accessing or authorizing federal money, it eliminates the very meaning of relying on it at all, rendering an entire leg of the federal triad void of purpose.

The Department has reasoned that these changes are needed to strengthen the regulatory triad and allow flexibility for institutions to innovate while maintaining strict agency oversight. It has also reasoned that the changes will promote competition among accrediting agencies resulting in improved accountability and greater access. However, it is much more likely, as the Department acknowledges multiple times, that these changes will lead to weaker standards and lax enforcement.[3] Furthermore, the rules proposed and the reasoning provided, in the rare instances the Department provides justification at all, fail to provide adequate evidence that the changes are needed.

These rules will potentially leave millions more students to enroll in colleges that fail to leave them with a quality education and taxpayers to foot much of the bill by covering federal loans students will be unable to pay. We need a strengthened accreditation and accreditor recognition system, not a weaker one. Therefore, we urge the Department to withdraw its proposal.

Below, we discuss each of the changes in detail but begin with overall observations about how this rulemaking was flawed from the start.

The Department's process raises questions about the validity of consensus agreement

The Department must comply with requirements under the Higher Education Act, which require "individuals with demonstrated expertise or experience in the relevant subjects under negotiation" and the Administrative Procedure Act (APA), which requires that the Department conduct a "reasoned" rulemaking.[4] However, the process was anything but reasoned and, given the wide scope of regulations, aside from accreditors themselves, the Department failed to secure negotiators with demonstrated expertise in all relevant subjects included in the rulemaking.

---

[2] https://www.gao.gov/assets/670/667690.pdf

[3] The Department acknowledges that "Increased competition among accreditors could have the unintended consequence of encouraging some accreditors to lower standards."

[4] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*,463 U.S. 29, 30 (1983); https://prrac.org/pdf/APA.summary.ProfMetzger.pdf

Instead, the Department cut corners throughout the process abandoning all precedent in how the rulemaking was constructed. It stacked the deck with representatives of institutions and accreditors while limiting knowledgeable pro-consumer ones.[5] It limited the information it provided to negotiators, in many cases, refusing to provide data or evidence and based its changes on unsourced anecdotes. It was not clear when or why various changes were being made and the Department often handed out new changes before negotiators had any chance to review them, making it difficult for negotiators without extensive regulatory expertise to effectively weigh in on changes.[6] It jammed a packed agenda leaving little time for in-depth discussion on many of the agenda items, particularly those related to accreditation. Finally, it rushed changes through by threatening negotiators with worse changes[7] if they did not get to consensus and allowed negotiators around the table to threaten the lone consumer advocate with being removed from the rulemaking for negotiating in bad faith,[8] simply for raising concerns or asking questions about what changes meant or how the already confusing process was supposed to work.

These procedural challenges combined raise questions about whether the Department reasonably included all relevant stakeholders, knowledgeable negotiators, and whether the rulemaking meets the requirements required under the Higher Education Act and the APA, raising serious concerns about the validity of the consensus agreement. The Department should withdraw its proposed rules and restart the rulemaking process in a way that considers relevant and knowledgeable stakeholders and provides reasoned changes based on evidence. The changes below detail some of the ways in which the Department undermined the legitimacy of the consensus agreement.

The Department packed the agenda with too many issues, limiting a full discussion

The Department's widespread agenda, ranging across a broad array of issues including program integrity, institutional eligibility, federal oversight, distance education, faith-based institutions, and TEACH grants, spread expertise thin and limited full debate on the

[5] https://www.newamerica.org/education-policy/edcentral/everything-you-never-wanted-to-know-about-the-2019-rulemaking/
[6] https://twitter.com/claremccann/status/1095333558611107841
[7] Begins at 00:49 https://edstream.ed.gov/webcast/Play/6f53451a9a0044809d01aadcefb3fd0d1d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8
[8] Begins at 3:05 https://edstream.ed.gov/webcast/Play/128ddc8de9bb4e5988027198efeb62b51d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8

changes. From the start, the largest criticism the Department received from the public, including consumer groups, institutional associations, and accrediting agencies was that there were too many issues on the agenda, which would limit an in-depth discussion on any one of them.[9] Rather than limit the agenda, or conduct separate rulemakings to address each topic, the Department's response was to break up the rulemaking into a series of subcommittees that met at the same time, were not open to the public as required under the Higher Education Act, and which spread expertise thin. For example, the distance education subcommittee, which included only one negotiator representing accrediting agencies, was left to debate and decide upon the definitions related to accreditation which were entirely divorced from the actual changes proposed. Negotiators mentioned numerous times their lack of expertise on accreditation and raised concerns over how the definitions the subcommittee was charged with negotiating might be applied in changes being discussed by the main committee.[10]

The Department further limited debate and its ability to make use of expertise among negotiators by restricting alternates from freely weighing in around the table and preventing subcommittee members from voting on consensus. As a result, the main committee spent a majority of its time on understanding what was proposed and agreed upon among the subcommittees and little time on the rules proposed under accreditation. The vote was left up to a narrow group made up primarily of self-interested industry members with limited understanding of the entirety of rules they were voting on. It was clear throughout negotiations that the widespread concern was valid and hindered debate.

The negotiating committee was stacked in favor of institutions and accreditors

The Department sought a negotiating committee that favored industry representatives and lacked representation for students and their advocates. Unlike previous rulemakings, the Department neglected to propose including a state representative, a consumer representative, and a State's Attorney General, though it later agreed to add a member representing State Higher Education Executive Officers but provided no alternate.[11] The Department also was the lone no vote declining to add a State's Attorney's General, even as an alternate with a limited role in speaking. The Department should revise its language in the preamble to reflect that the committee unanimously agreed to add a state's attorney general but the Department declined to honor it.

[9] C-RAC, https://www.regulations.gov/document?D=ED-2018-OPE-0076-0116; NAICU, https://www.regulations.gov/document?D=ED-2018-OPE-0076-0027;
[10] https://www.youtube.com/watch?v=mbE8Nx497Vo
[11] https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/20181011-nominations-unofficial-fedreg.docx

The result was a committee that failed to adequately represent the interests of students and consumers and the resulting consensus lacked serious consideration to the topic of consumer protection. The stacked deck with industry representatives worked to the Department's favor when it threatened worse changes if the committee did not reach consensus. The majority of voices around the table are affiliated in some form with regional accrediting agencies, which were concerned about the changes proposed to geographic scope.[12] Just one institutional representative, an alternate, is from an institution accredited by a national accrediting agency, while the rest are associated with regional accreditors. After the Department's threat, the negotiating committee became incensed with reaching consensus by any means necessary and resulted in committee members threatening to seek to remove the legal aid rep for negotiating in bad faith and pressuring her to agree to consensus.[13]

The Department fails to justify changes and present evidence that its changes are necessary

The Department fails to present evidence, justify changes, or cite evidence supporting its claims throughout the NPRM, instead basing many changes on anecdotes and unsupported claims. Failing to present evidence violates requirements under the APA that the Department conduct a "reasoned" rulemaking.

The Department must present evidence that accreditation is a barrier to innovation

One of the Department's primary justifications for conducting the rulemaking is that the "volume of regulatory requirements limits innovation and diversity among institutions in their approach to issues such as mission, curriculum, and instructional methods." However, it presents no evidence that regulatory requirements prohibit institutional innovation. Further, it fails to specify which regulations present a barrier to innovation and instead uses the claim to justify wholesale deregulation across the full spectrum of regulations.

[12] https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/listofnegotiators.pdf

[13] Begins at 3:05 https://edstream.ed.gov/webcast/Play/128ddc8de9bb4e5988027198efeb62b51d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8 ; Begins at 4:55 https://edstream.ed.gov/webcast/Play/2eb8815ca86d4bc899dd3b3b1fdb69ee1d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8

Instead, the Department cites proposals from groups primarily or solely made up of institutional representatives including the National Advisory Committee on Institutional Quality and Integrity (NACIQI), an advisory committee made up almost entirely of institutional representatives; the Council for Higher Education and Accreditation (CHEA), a lobbying group that advocates for self-regulation and opposes government oversight; the American Council on Education (ACE), the main lobbying group for higher education; and the Senate Task Force on Federal Regulation of Higher Education, a group made of solely of institutional representatives.[14] It also cites "a diverse set of stakeholders" it convened as part of its Rethink summit, including "many innovators that [claimed] accreditation has steep barriers to entry that may serve to protect market share for established educational providers." The Department failed to publish who was in attendance to be able to discern whether it was in fact a diverse set of stakeholders. Basing claims solely on recommendations from industry representatives does not represent a diverse set of stakeholders and fails to consider student and consumer voices. A few of these citations are worth further discussion.

First, the report from NACIQI, a group primarily made up of institutional representatives, called for a careful balance of eliminating burden for high performers while focusing on colleges that pose the greatest quality concerns. It did not call for wholesale deregulation across institutions. It elaborated that the Department should pursue a risk-informed approach that would "lessen the reporting and documentation burden of campuses that perform well on key student success measures."[15] The Department neglected to consider student success in negotiating its proposals and has instead allowed flexibility across the board by allowing accreditors to create alternative standards, allowing institutions to be out of compliance with standards for a period of up to three plus years, and doubling the maximum time an institution must come into compliance. The Department should revise

[14] Keiser, A. (March 2018). Report to the U.S. Secretary of Education: 2018 Accreditation Policy Recommendations on Regulatory Reform. Retrieved from https://sites.ed.gov/naciqi/files/2018/02/Regulatory-Reform-Recommendations-FINAL.pdf; Eaton, J. (April 2017). Position Paper: Regulatory Relief for Accreditation. Retrieved from https://www.chea.org/sites/default/files/other-content/Regulatory-Relief.pdf; Broad, M. (April 30, 2015). Comments On Accreditation White Paper, American Council on Education. Retrieved from https://www.acenet.edu/news-room/Documents/Comments-Alexander-Accreditation.pdf; Senate Task Force on Federal Regulation of Higher Education (February 28, 2015). Recalibrating Regulation of Colleges and Universities. Retrieved from https://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

[15] Keiser, A. (March 2018). Report to the U.S. Secretary of Education: 2018 Accreditation Policy Recommendations on Regulatory Reform. Retrieved from https://sites.ed.gov/naciqi/files/2018/02/Regulatory-Reform-Recommendations-FINAL.pdf

its claims to consider student outcomes and how it can reduce burden for high performers while maintaining strict oversight over institutions that present quality concerns.

Second, the report from ACE, the main higher education lobbying association, similarly treads carefully on the subject of innovation, stating that the accusation that accreditation is a barrier to innovation is an inaccurate charge. It points to numerous examples both domestic and international, of innovative institutions and programs that were quickly accepted by their accrediting agency. ACE makes clear that "some proposed initiatives are rejected rather than automatically approved is a legitimate and important feature of the accreditation process, not a flaw."[16] The Department should revise its citations to reflect that the report it cites from ACE does not believe that accreditation is a barrier to innovation.

The Department also failed to collect or present evidence throughout regarding how many applications for initial accreditation or substantive changes institutions submit, what percentage are approved, how many are rejected, and how long the approval process takes, which could have informed its rulemaking. The Department must provide evidence that the regulations are indeed a barrier by showing evidence and data supporting its claims on which these rules are based.

The Department should present evidence that supports its claims about competition in accreditation

The Department makes numerous unsupported claims about competition in accreditation. First, it presupposed that "competition" would allow for "greater specialization among agencies to ensure a closer match with the mission of the institutions or programs they accredit." Second, it incorrectly asserts there is no competition in the accrediting system today. Third, it assumes that competition would lead to greater accountability in instances where agencies are "being insufficiently responsive to the needs of institutions or programs and their key stakeholders such as students, faculty, alumni, or employers."

It presents no evidence that its proposed rules would result in increased competition, that there is a desire or need among institutions to seek alternative accrediting agencies that more closely align with its mission, or that competition would result in increased accountability. It also fails to seriously consider the alternative, which it acknowledges

[16] Comments On Accreditation White Paper, American Council on Education. Retrieved from https://www.acenet.edu/news-room/Documents/Comments-Alexander-Accreditation.pdf

and quickly dismisses, that competition could cause "some accreditors to lower standards."

While there is no evidence to support that increasing competition will result in higher standards and accountability, there is evidence to the contrary, that competition will result in lowering standards and weakening accountability.

The Department also fails to consider or acknowledge that competition already exists among national accreditors. Evidence to date suggests that this competition has resulted in a race to the bottom, with institutions that face trouble at one accrediting agency choosing to switch accreditation to an agency with weaker standards and lax enforcement.

Take for example, the Accrediting Council for Independent Colleges and Schools (ACICS), which lost its federal recognition in 2016, in part for its lax oversight and weak accountability for quality standards.[17] When other accreditors have sought to sanction institutions for failure to meet standards, those institutions have simply switched accrediting agencies to ACICS. For example, in its 2013 annual report, the then-owner of Kaplan College and Kaplan Institute, The Washington Post Company—which was later renamed Graham Holdings Company—reported that both the Accrediting Commission of Career Colleges and Schools (ACCSC) and the Council on Occupational Education, or COE, had placed its campuses on negative sanctions for failing to meet student achievement standards. In that same filing, the Washington Post Company noted that it switched all Kaplan campuses that had national accreditation to ACICS from ACCSC and COE. There was no mention in that filing of any accreditation concerns raised by ACICS, and the agency took no public negative actions against Kaplan except for deferring its accreditation decision to subsequent council meetings.[18]

In another example, Westwood College obtained accreditation from ACICS for several additional campuses in 2011. Those campuses previously had approval from ACCSC. When asked about the switch, ACCSC's executive director testified before a congressional committee that Westwood "told us directly that it was because they were unable to meet our standards particularly with regard to student achievement."[19] These examples show that competition does not lead to increased accountability, it results in the opposite. The risk that accreditation will become a race to the bottom is only exacerbated

[17] https://www2.ed.gov/documents/acics/final-acics-decision.pdf
[18] Ben Miller, "ACICS Must Go," (Washington DC: Center for American Progress, 2016), available at https://cdn.americanprogress.org/wp-content/uploads/2016/06/03145034/ACICS-report.pdf.
[19] Ibid.

by the Department weakening rules in areas throughout the NPRM. If the Department's goal is healthy competition, it should consider how it can strengthen oversight of accreditors and provide agencies with more tools to hold institutions accountable when they are not serving students well.

Arbitration (§600.4, 600.5, and 600.6)

The Department proposes changing language regarding arbitration noting that when an accreditor takes action "a lengthy and costly legal battle may result," and that relying on arbitration "could serve as a deterrent to agencies taking necessary action." The Center for American Progress agrees that lawsuits can be costly, time-consuming, and act as a deterrent to agencies taking action and have called for greater legal protection for accreditors.[20] However, in none of our many conversations with various accreditors regarding legal protection, have agencies cited arbitration as either a problem or solution. The Department states that it does not collect any data to support its claims and it also fails to do the work of collecting any evidence on how relying on arbitration will address problems more quickly and at a cost savings.

It is not clear from the Department's reasoning whether institutions have simply not been following current statute and regulation which already requires arbitration or whether arbitration is not the solution the Department claims it to be. The Department notes that institutions have engaged in lawsuits without regard for the arbitration requirements and that relying on arbitration would allow agencies to address disputes quickly and affordably. However, it does not present any evidence to suggest how frequently accreditors have faced lawsuits, how often these lawsuits go through arbitration first, how frequently disputes are resolved through arbitration preventing a lawsuit, or whether it is actually the case that arbitration is not the deterrent the Department claims and institutions routinely engage in lawsuits after arbitration fails.

The Department also should present evidence based on data acquired from agencies on the frequency of arbitration in the event of adverse actions, the percentage of lawsuits that have occurred without first going through arbitration, the percentage of lawsuits that have occurred after arbitration, and the relative costs of both arbitration and lawsuits to agencies.

---

[20] Antoinette Flores, "Watching the Watchdogs: What Happens when Accreditors Sanction Colleges," (Washington, DC: Center for American Progress, 2016), available at https://cdn.americanprogress.org/wp-content/uploads/2016/06/16111301/AccreditorActions-report.pdf.

The Department notes that institutions may still engage in legal action after arbitration which is the more likely scenario that arbitration will do nothing to stem an eventual lawsuit. By relying on arbitration, the Department also runs the risk of institutions extending the clock, allowing the institution to continue enrolling students and collecting taxpayer money throughout the proceedings only to be followed by a costly lawsuit that detracts agency attention from other institutions anyway. The Department already extends the timeline that an institution that fails to meet standards can remain accredited through its changes elsewhere and should rethink how long an institution has to prove its compliance (See Table 1).

The Department also notes that arbitration proceedings are sometimes less transparent than proceedings in court but that it believes existing requirements will ensure students are aware of disputes. However, as mentioned, the Department has not collected any information on legal proceedings. Arbitration that is not final and will result in a legal proceeding could lead the agency to cave in arbitration proceedings and allow the institution another chance to prove it can meet standards. The Department will have no insight as to whether arbitration results in agencies failing to enforce their standards in a timely and effective way. The Department should collect this information going forward, including the outcome of any arbitration proceedings.

If it is the case that institutions and agencies are not following rules in statute and regulation, the Department has a responsibility to enforce the law and does not specify its own role in doing so. The Department should clarify in its final rule, how it will ensure that institutions and agencies are meeting the requirements under this section. It should also consider how it will protect students by considering placing restrictions on enrollment or receipt of federal financial aid in the event of arbitration proceedings, since the accreditor has already ruled the institution should not be accredited at all. It is not in students' best interest to enroll and take out financial aid for a school that may soon lose its accreditation and shut down in the near term, while its accreditor has already ruled it is not fit to remain accredited.

Acceptance of the Agency by Others (§ 602.13)

The Department proposes eliminating the long-standing requirement that agencies demonstrate wide acceptance, reasoning that the requirement is vaguely defined and has been enforced inconsistently. Further, it notes that the requirement could lead institutions to believe "that a promising new program or method of delivery would run afoul of this requirement simply by being different than what most of its peers do today." This is not an adequate justification and the Department should strike this reasoning from the record.

The wide acceptance criteria is about whether other stakeholders accept an agency's criteria and has nothing to do with whether an institution believes its own programs are widely accepted.

Furthermore, the Department fails to provide adequate evidence that the requirement has been enforced inconsistently. If it believes it has, it should demonstrate which instances it is referring to. The Department fails to consider reasonable alternatives such as better defining the criteria for proving wide acceptance. It should consider alternatives to strengthening the requirements instead of deleting the requirement altogether. If it still proposes deleting this requirement, it should specify which alternatives it considered and why it did not choose each alternative.

Although the Department attempts to address acceptance elsewhere in the regulations, namely 602.32(b), the Department proposes a significantly lower bar. Wide acceptance criteria under current regulation requires that an agency demonstrate acceptance outside of individuals or institutions with a stake in the agency's recognition, such as professional licensing bodies. For example, the handbook that guides the accreditor recognition process states "it is expected that the agency can demonstrate an acceptance/support of its policies, procedures, accreditation standards and decisions by applicable group(s) (to include individuals/groups beyond those directly involved in the accrediting agency activities) in each of the categories, appropriate to the type of accrediting agency."[21] Under proposed 602.32(b), the Department would only mandate letters from educators and institutions, both of which may very well come from parties with a conflict of interest in providing acceptance of the agency if they rely on the agency's recognition. Furthermore, this requirement would only apply to agencies seeking initial recognition whereas the current requirement requires regular demonstration with the criteria. The Department should require individuals and groups beyond those with a vested interest in the agency's recognition and that the three letters cannot come from three individuals at one institution. It should also justify why this criterion should only apply to initial applicants and not those applying for rerecognition.

The only public evidence to date that the criteria under 602.13 has been applied inconsistently is in the 2018 Senior Department Official's letter recommending that ACICS regain its federal recognition. The SDO's letter found the agency in compliance with this standard in part because "In its supplemental materials, ACICS also provides letters of support from nine other accrediting agencies, including ACCET, DEAC, SACS,

[21] https://www2.ed.gov/admins/finaid/accred/agency-guidelines.pdf

WASC, ACSC, NCASC, ABHES, MSCHE, and ACCJC."[22] There are two problems with this statement. The first is that the handbook, which the SDO points to numerous times to justify compliance, does not require any mention of acceptance from other accrediting agencies. Yet, the SDO statement referencing other agencies used this information "as important evidence of ACICS's wide acceptance."[23] Second, the majority of these agencies never submitted a letter of support.[24] While the Department has since backtracked and made corrections to the SDO letter, it is clear that the SDO sought to apply the criteria inconsistent with Department guidance. This change appears to be made to directly benefit ACICS, the agency the Department recently restored in recognition, so that it will not face further issues meeting the criteria and to save the Department embarrassment for its miscategorization of evidence to protect the agency.

Administrative and Fiscal Responsibilities (§602.15(b)(2))

In 602.15, the Department proposes eliminating some of the records an agency must keep including records of conversations or interim decisions when superseded by a final decision or determination. Instead "agencies must retain decision letters regarding an institution or program's accreditation or preaccreditation and its substantive changes." The Department's only reasoning is that this change eliminates burden. Eliminating burden for the sake of itself without grappling with what would be lost in the Department's ability to conduct oversight is an inadequate justification.

An accreditor's record of conversation that led it to a decision is just as important as the final decision. This is particularly true given that the Department now proposes allowing agencies to use alternative standards in approving new programs and institutions, eliminating some of the requirements of substantive change approvals, and allowing accreditor staff to approve substantive changes in some areas. Without a record of how an agency made a decision, when the agency decided to create an alternative standard, or when it allowed staff to decide on a change without the board and what the decision entailed, the Department forfeits its ability to conduct oversight of agencies. However, maybe that is by intent. The Department should maintain the requirements in 602.15(b)(2) and if not, justify its reasoning and explain how it intends to maintain oversight in the event a decision goes wrong for students.

---

[22] http://www.acics.org/uploadedFiles/News_and_Accreditation_Alerts/News/SDO%20Response%20to%20ACICS%209.28.18.pdf

[23] Ibid.

[24] https://www.insidehighered.com/quicktakes/2018/10/08/education-department-misstated-support-acics

Application of Standards in Reaching an Accrediting Decision (§602.17)

The Department proposes in §602.17(a)(2) requiring that accreditors have standards that evaluate success at both the institutional and program levels. However, the Department provides no justification or reasoning for why this change is necessary. This change received little, if any, discussion during the negotiated rulemaking. It reflects a misunderstanding of how institutional and programmatic agencies operate. Institutional accreditors do not evaluate institutions at the program level nor are they required to. This would also suggest that programmatic accreditors are required to evaluate an entire institution. This change would be an extremely burdensome and expensive requirement for agencies. The Department should justify why this change is necessary and update its regulatory impact analysis to reflect the time and cost that some agencies may incur as a result.

In 602.17(e), the Department proposes that an agency can only include information from other sources in its consideration of an institution if it first substantiates the information, including from news sources and legal proceedings. The Department provides no reasoning or justification for this change which also received little if any discussion. The Department should be encouraging and even requiring that accreditors consider potentially credible information if it is directly relevant to institutional quality. Instead it is preventing it. This change would mean that an agency would be *prohibited* from using information from legal proceedings when it has direct implications on institutional quality and an impact on students and taxpayers. This is an unjustified and irresponsible handout to problematic institutions and the Department should delete this change.

Operating Procedures All Accrediting Agencies Must Have (§602.23)

In 602.23 (f)(iv), the Department proposes prohibiting an agency from moving an accredited institution or program from accredited to preaccredited status unless it first loses accreditation and reapplies for initial accreditation. The Department provides no reasoning or makes any attempt to justify this change.

The Department should not place any limits on accreditor's ability to take action against an institution as it deems necessary, including the ability to change an accredited institution to candidate status. This is especially important given that the Department wants to reduce its own expectations of the timeliness with which an accreditor is expected to take action against an institution that does not meet standards and extend the timeline for institutions that fail to meet standards. Recent events suggest that this unjustified change is targeted to address the actions of one particular agency that attempted to take action against an institution undergoing a risky change in ownership and control.

In January 2018, the Higher Learning Commission removed institutional accreditation from two Art Institute (AI) campuses, deeming them pre-accredited, which it does not consider to be an accredited status.[25] However, AI failed to inform students of the change and continued to publicly state they were accredited, leaving thousands of students without notice they were enrolled in unaccredited programs.[26] Instead of investigating the institution, the Department of Education investigated the accreditor, stating that it was not sure if the agency followed its procedures.[27] While the Department may disagree with the actions of the accreditor, it's primary responsibility is to protect students and taxpayers, not the institutions deceiving them. Instead of placing restrictions on accreditor decision-making, it should consider strengthening requirements that institutions adequately disclose their accreditation status; that accreditors widely disclose the nature of their decisions, the reasons, and the implications publicly and to students; and strengthen the Department's own role in overseeing institutions that intentionally deceive their students.

Parts of this section are plagued by logical inconsistencies that need to be addressed. For example, the Department proposes language that all credits and degrees earned and issued by an institution or program holding preaccreditation from a nationally recognized agency are considered to be accredited, according to the Secretary. It justifies this argument by asserting that an accreditor should only grant preaccreditation when the agency determines the institution or program is likely to succeed in obtaining accreditation. Likely to succeed does not guarantee it will obtain accreditation. Instead of adding protections for students in the event the institution does not obtain accreditation, the Department proposes allowing an institution to falsely maintain its preaccredited status, continue serving students, and collecting student and taxpayer money even when it is now guaranteed the institution or program will not gain accreditation.

Preaccreditation status and accredited status are fundamentally not the same and should not be considered equal. While the Department attempts to make these statuses equivalent, States, licensing agencies, and employers may not make the same judgement. To give students the perception that credits or a degree from a preaccredited institution will carry the same weight when they apply to become licensed or apply for a job would mean the Department is potentially willfully deceiving students about the likelihood their

[25] https://www.post-gazette.com/business/career-workplace/2018/06/19/Deal-under-scrutiny-Art-Institutes-accreditation-setbacks-dream-center/stories/201806140022
[26] https://www.defendstudents.org/post/students-sue-dream-center-illinois-institute-of-art-for-hiding-loss-of-accreditation
[27] https://www.republicreport.org/wp-content/uploads/2019/05/18-011280-Durbin-5-13-19.pdf

degree will have any value. It takes numerous logical leaps to allow students to remain at an institution and continue taking out federal aid for a program that has been denied accreditation by simply deeming it equivalent to. Rather than the backflips it takes to make preaccreditation equivalent to accreditation, especially in the instances its already been denied accreditation, the Department should consider alternatives to discourage preaccreditation. If the two statuses are in fact fundamentally the same, then an institution shouldn't need to be preaccredited.

The reality is they are not the same and the Department should not treat it as such. Furthermore, it should do everything in its power to protect students, including providing students with a clear understanding of the nature of preaccreditation, which may not be acceptable to a licensing agency or employer; requiring teach-out agreements, not plans; and deleting its proposal to extend eligibility and federal aid for 120 days beyond denial.

Procedures for Review of Agencies During the Period of Recognition (§ 602.33)

The Department proposes eliminating the requirement that the Department review an agency at any point at the request of the Advisory Committee. It does not mention this change among its proposed changes listed in the NPRM, provides no reasoning or justification, and appears not to have discussed this change during the rulemaking.

It is important that NACIQI retain the ability to request that the Department review agencies. This is particularly true given the Department's proposal to conduct monitoring reports without input or review from NACIQI. NACIQI acts as a check and balance ensuring that the Department considers relevant information and conducts adequate oversight. If the Department is not considering relevant outside information, NACIQI should be able to request the Department conduct an in-depth full review. The Department should maintain this ability in the proposed regulations or at least provide justification for eliminating this authority.

Changes would severely weaken Department oversight of accrediting agencies

Ensuring quality in higher education and keeping out low-quality institutions is the responsibility of accrediting agencies but it is not a role that accreditors are supposed to perform on their own. Congress tasked the Department of Education with making sure the agencies it entrusts as gatekeepers are fulfilling their job through the recognition process.

There is substantial evidence the Department is failing in this role. An investigation by the Department of Education's Inspector General found last year that, while the Department is required to evaluate accrediting agencies for federal recognition and ensure they are reliable authorities regarding the quality of education of the schools or programs they accredit, it does not have adequate control over evidence agencies submit and fails to effectively monitor agencies to ensure they consistently live up to their responsibilities.[28] While some of the changes proposed to the accreditor recognition process could be steps in the right direction, such as extending the timeline to consider additional evidence and choosing which examples it will review, the changes combined would severely weaken if not fully diminish the Department's ability to hold accreditors accountable for poor oversight. The Department should strengthen its oversight through the recognition process, not weaken it.

The Department's proposal would lower the bar for federal recognition, opening the door to more rubber stamp accreditors (Special Rules Regarding Institutional Accreditation or Preaccreditation §600.11; Link to Federal Programs §602.10; Geographic Area of Accrediting Activities §602.11; Accrediting Experience §602.12)

Link to Federal Programs §602.10

The changes proposed under 602.10 would allow unproven entities to serve as a federal gatekeeper without demonstrating adequate experience. The Department proposes allowing an agency to meet the requirements "if an agency accredits one or more institutions that could designate the agency as its link to the title IV, HEA programs, the agency satisfies the Federal link requirement, even if the institution currently designates another institutional accrediting agency as its Federal link." The Department provides little reasoning or justification for this change other than to "decrease barriers to entry and enable new agencies to more easily enter the marketplace." The Department asserts that an institution would be highly unlikely to relinquish its accreditation. It fails to provide any evidence that this is the case or explain how simply accrediting another institution accredited by a recognized agency demonstrates it can be effective in ensuring quality. The reasoning also fails to justify why an agency couldn't just maintain dual accreditation instead of needing to fully relinquish accreditation from its recognized agency based on changes the Department proposes elsewhere.

[28] https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/a09r0003.pdf

The Department should eliminate this proposal. In the event chooses to move forward, the Department should place restrictions on new agencies that gain recognition until they can demonstrate adequate experience and success in approving and reviewing programs or institutions. It should also consider any new agency's financial stability. An agency that is dependent on a small number of institutions as its revenue base creates a moral hazard. The agency has an incentive to maintain institutions among its membership that might not meet quality standards while also having an incentive to quickly approve new institutions to help build its financial base. These restrictions can include:

- A shortened recognition period instead of the full five years
- Limits on the number of institutions the agency can accredit
- Limits on growth in enrollment among the institutions it oversees
- Restrictions on the ability to approve complex substantive changes such as change of ownership or control
- Require a financial base not based solely on membership dues and fees with sufficient resources to protect against financial instability while it grows its membership.

Geographic Area of Accrediting Activities §602.11

The Department proposes changing the definition of geographic scope so that "an agency's geographic area on record with the Department would include not only the States in which the main campuses of its accredited institutions are located but also any State in which an accredited location or branch may be found."

The Department exaggerates the claims and impact of the change while failing to present any evidence the change will have the intended outcome. For example, the Department reasons, "The proposed change is intended, in part, to provide transparency and improved access to higher level educational programs, and transfer of credit for students, while honoring the autonomy and independence of agencies and institutions." The Department has provided no evidence that the change will facilitate transfer of credits. The decision of whether not to accept credits falls on the institution and it is not clear why the Department believes a regional accrediting agency clarifying it accredits branches in a given state is going to suddenly change an institution's calculus. Later, the Department claims this change would "provide increased transparency and introduce greater competition and innovation." Again, the Department has not specified how this would create competition or innovation. Unless agencies changed their practices to accredit main campus institutions outside of their region, which they have specified they do not intend to do, this change does not encourage agencies to accredit new entities outside of their scope.

The Department's proposal and justifications are inconsistent with federal law. For example, the Department notes that it "seek[s] to simplify the labeling of accrediting agencies to reflect their scope more accurately (e.g., institutional agencies, programmatic agencies, specialty agencies). Later, the Department states “we would instead include them under a combined umbrella identified as “institutional.” The Department’s use of the terms “regionally accredited” and “nationally accredited” related to institutional accreditation would no longer apply in recognition proceedings.” The Department uses the terms regional and national because federal statute requires that in order to recognized by the Secretary, the “accrediting agency or association shall be a State, regional, or national agency or association and shall demonstrate the ability and the experience to operate as an accrediting agency or association within the State, region, or nationally, as appropriate.”[29] To muddle these definitions or claim that they do not apply in recognition proceedings is not in line with federal law. The Department should delete language stating it will refer to agencies as institutional rather than regional or national in recognition proceedings since it does not have the authority to do so. Furthermore, if the Department wishes to make the argument that regional agencies are not regional because of the manner in which they operate and are instead national, it should just make that argument instead of attempting to circumvent statute.

Finally, the Department fails to consider the implications for states and licensing bodies in its impact analysis. Numerous states depend on the regional definition in state authorization, distribution of state funds, and eligibility for licensure in a given occupation. These states will have to consider potentially changing their laws to reflect changes in regulation and this could be burdensome and costly. The Department has not accounted for this impact or done any analysis to determine how many states this could impact.

Accrediting Experience §602.12

Changes proposed would eliminate the expectation that accreditors demonstrate experience as a prerequisite for recognition and expanding its scope. The Department fails to justify either change or present evidence that opening the door to inexperienced agencies is necessary under current regulation.

Under 602.12(a), the Department proposes eliminating the two-year rule when an agency is affiliated with, or is a division of, a recognized agency noting “that recognized accrediting agencies sometimes re-organize or spin off a portion of their accrediting business by setting up a separate agency.” It has provided no evidence of how frequently agencies have spun off to create a new agency or whether the agency that spun off had to wait to meet the two-year requirement. If, as the Department reasons, the two-year requirement is as much of a barrier as the Department claims, creating spin off agencies

[29] https://www.law.cornell.edu/uscode/text/20/1099b

would not be possible under current regulation. The Department should present evidence of how frequently this kind of arrangement has occurred, and in the event it has, whether the new agency had trouble meeting the two-year requirement or instead was deemed already qualified. As mentioned above, if the Department proceeds with allowing agencies to apply for recognition without the requisite experience, it should place restrictions on new agencies to ensure compliance with federal criteria in a controlled manner. It should also not allow a new agency to spin off from an agency that has had any compliance problems with the Department in its last full recognition review so it doesn't create an incentive to skirt federal recognition criteria.

The Department should also define what it means to be affiliated with a recognized agency. As is, this language could present a significant loophole allowing anyone that has been affiliated with an agency to start up a new agency without demonstrated experience, using the established agency's standards. For example, would an employee of the agency that wanted to start their own agency qualify, even if the agency it gains its experience from does not agree that it is a spin-off? Would a reviewer or commissioner that worked for the agency count as affiliated?

Under 602.12(b), the Department proposes allowing an agency to expand their scope without demonstrated experience. It states that it seeks to solve the problem where an agency must demonstrate experience in order to be approved for an expansion of scope while institutions may be unwilling to seek accreditation in the area of the expanded scope until it has been approved, noting this conflict makes it difficult for agencies to expand their scope. The Department failed to present any evidence that current application procedures and evidentiary bars prevent agencies from expanding their scope.

The decision to expand an agency's scope is one that presents risk to both students and taxpayers. In most instances where an agency has sought an expanded scope, it has been to offer master's or doctorate degrees, and in more cases than not, the expansion has been approved.[30] Offering a higher level degree without experience presents risk because institutions offering these degrees are able to charge significantly more and typically result in students taking on expensive loans for a program that may not have demonstrated it is a quality option. The Department itself notes this concern. To be clear, while this comment highlights the expansion to graduate education, any expansion of scope presents equal risks for students and taxpayers and should be undergo approval. The Department has not demonstrated that an expansion of scope is a problem to accrediting agencies or presented any data to support weakening the experience required.

[30] https://sites.ed.gov/naciqi/archive-of-meetings/

Given potential risks, the process to expand an agency's scope is too low of bar and should be strengthened. Under the current process, the Department requires a pilot for as little as one institution over the course of just one year as meeting the experience requirement. Take for instance, the Accrediting Bureau of Health Schools (ABHES). In June 2011, the agency applied and was approved to expand its scope to offer bachelor's degrees with no discussion of its experience during its meeting before NACIQI, even though it had compliance issues.[31] In 2015, it began the process to expand its scope to graduate degrees. The Department of Education worked with the agency as it piloted approval to just one of its institutions.[32] The Department recommended approving the expansion of scope roughly one year later, even though the new Master's degree program was barely off the ground.[33] The Department did not evaluate the agency's success with approving bachelor's degrees.[34] Having reviewed just the start of one institution's Master's degree program hardly counts as evidence that the agency can be successful in authorizing Master's degree programs.

Requiring that an agency pilot approval of a new program and demonstrate its ability is a reasonable safe measure for the Department. The Department should maintain the requirement that an agency demonstrate experience but require that an agency pilot multiple programs successfully before it can receive approval. It should also raise the requirements for agencies expanding their scope to include an evaluation of outcomes and the actions taken at its other degree levels.

Special Rules Regarding Institutional Accreditation or Preaccreditation §600.11

In 600.11, the Department proposes allowing institutions to maintain multiple accrediting agencies. The Department reasons that it wants to "maintain guardrails to ensure that struggling institutions cannot avoid the consequences of failing to meet their current accrediting agency's standards by attaining accreditation from another agency, while maintaining recourse for institutions that have been treated unfairly or have reasons for seeking multiple accreditation unrelated to compliance with accrediting agency quality standards."

[31] https://sites.ed.gov/naciqi/files/naciqi-dir/spring-2011-report.pdf; https://sites.ed.gov/naciqi/files/naciqi-dir/2011-spring/6-8-11-naciqi-transcript.pdf
[32] https://sites.ed.gov/naciqi/files/2017/03/022217NACIQI-2.pdf
[33] https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=9&mid=71
[34] https://sites.ed.gov/naciqi/files/2017/03/022217NACIQI-2.pdf

As mentioned earlier in this comment, in regards to creating competition among accrediting agencies, the ability of institutions to switch accreditors when facing sanction under one agency represents a significant loophole that creates a race to bottom.

We are concerned that the Department's exceptions create a potential loophole that encourages accreditor switching and a race to the bottom. To remedy this, in the event an agency seeks multiple accreditations and has been subject to any kind of action, the Department should require that a problem raised by one should trigger automatic review by the other agency with a higher evidentiary bar to show why a similar sanction should not be applied. This should also apply if one of the accreditors takes action while the agency maintains multiple accrediting agencies. The Department has not created a valid standard to determine when an agency "has been treated unfairly," and requiring both agencies to review the institution and validate the others claim while requiring a higher evidentiary bar will help ensure that one agency is not rubber stamping to maintain an institution among its membership. This is especially important given that the Department wants to allow for new accreditors who will be more eager for and more reliant on each of its institutions in order to be able to maintain a stable financial base.

Ensuring Consistency in Decision-making (§ 602.18)

Changes proposed under 602.18 would weaken the expectation that accreditors ensure quality, create loopholes in enforcement of standards, and diminish the Department's ability to take action against an agency that fails to act when necessary. These changes tie the hands of the Department of Education in conducting oversight and create significant risks for students and taxpayers

In 602.18(b)(3), the Department creates carve outs that extend specialized treatment to institutions with a religious mission. The Department asserts that it wants to provide more direction to agencies regarding respect for an institution's religious mission. Throughout the rulemaking and in the NPRM, the Department failed to provide any evidence that agencies currently do not respect religious mission. While it cites negotiators mention of health education, there was disagreement among negotiators about whether religious institutions should be exempted from standards. For example, one negotiator cited concerns that because of religious opinion on the subject of abortion, an institution might use that opinion to refuse to train students on basic women's health options. The Department also presents a list of areas accreditors should exempt from consideration if it applies to the institution's religious-based policies, decisions, and practices across a range of practices including admissions and curricula. This proposal potentially allows institutions with a religious mission to discriminate against students in particular instances and should be eliminated.[35]

This proposal is only exacerbated by the very broad definition of religious mission proposed in 600.2 which proposes "to define "religious mission" as a published institutional mission that is approved by the governing body of an institution of postsecondary education and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings." This definition is overly broad and could allow institutions to skirt accreditor standards simply by referring to religious beliefs in its mission, even if that is not the focus of the institution.

The Department should present evidence this proposal is needed and present evidence that accreditors are sanctioning or removing accreditation based on an institution's religious beliefs. Without evidence, it should eliminate this proposal in its final rule.

In 602.18(c), the Department proposes allowing agencies to set "alternate standards, policies, and procedures to satisfy recognition requirements in the interests of innovation or addressing undue hardship to students, provided that the alternative measures, and selection of participants, are approved by the agency's decision-making body." Again, it provides no justification or reasoning for why this change is needed other than to state "to provide safe harbors for agencies to exercise responsibly their ability to support innovation and address hardship, without jeopardizing their recognition." A safe harbor to innovate is not justification, particularly when agencies already have the ability to innovate while ensuring that institutions meet standards.[36] It instead creates concern that the Department is abandoning its responsibility to ensure it is only recognizing agencies that meet recognition criteria.

The proposal creates a dangerous loophole allowing accreditors to create new standards in the event a program or institution cannot meet current standards. The Department reasons that it has included guardrails but these guardrails are essentially meaningless. It requires the agency to publish the process by which it creates alternative standards but does not require it to publish the alternative standards themselves or to specify when the agency is using alternative standards. This would create challenges for the Department in its own ability to conduct oversight and ensure that an agency is not skirting rules to accommodate risky institutions.

[35] https://www.nytimes.com/2019/04/12/us/byu-honor-code.html
[36] See ACE report.

This proposal also conflicts with statute which requires that an agency consistently apply and enforce its standards. Creating alternative standards to accommodate individual programs or institutions would not amount to consistent application and enforcement. Accreditors should create standards that ensure quality that all institutions must meet, not create standards to meet the needs of individual institutions.

Confusingly, the Department refers to this proposal numerous times as the ability to create pilot programs. A pilot program is typically a small-scale, short-term experiment that evaluates whether a particular approach is feasible and evaluates impact. What the Department has proposed here is not a pilot program and the Department should delete all such references.

For these reasons, the Department should not move forward with this change. However, if the Department presents evidence the change is needed and wants to create an opportunity to pilot alternative standards it should:

- Require accreditors demonstrate a need to create alternative standards that apply to more than just one institution;
- Require prior approval from the Department;
- Publish the alternative standards on the agency's website;
- Publish which institutions it applies the alternative standards to;
- Notify students;
- Limit the number of institutions that can apply;
- Evaluate outcomes after a set period of time

Finally, in 602.18(d), the Department essentially forfeits its ability to hold accreditors accountable by eliminating the requirement that an agency take action against an institution failing to meet standards for seemingly limitless amount of time. The Department proposal would permit "an institution or program to remain out of compliance with policies, standards, and procedures otherwise required by those regulations, for a period of up to three years, and longer for good cause shown." As one example, the Department states that this exception could apply in the event of significant and documented local or national economic changes. Again, it fails to justify this change or present any evidence the change is necessary. It also fails to define what categorizes significant or documented economic changes. Without defining what this entails, it presents a significant loophole for low-quality institutions to skirt accountability. It could, for example, show that institutions are losing accreditation because of circumstances beyond their control. It could present evidence that institutions have trouble meeting particular standards in an economic downturn. It could justify why three additional years are needed, on top of all of the other time already afforded to institutions. It provides nothing.

In reality, proposal creates a scenario for any institution to credibly argue against meeting an accreditors standards. Accreditors will be more likely than not to afford the institution the extended time, o face a costly and time-consuming lawsuit, a scenario the Department already acknowledges is a challenge. The change extends the timeline with which an institution can be out of compliance with standards beyond what the institution already receives which includes time on warning, notice, and monitoring, show cause probation, appeals, arbitration, and potential lawsuit which could go on for years (See Table 1). The Department must provide some justification for why the current time and due process measures afforded to institutions are not enough and evaluate the interaction of the various other changes its proposed throughout this NPRM in conjunction with this change. This is a get-out-of-jail free card for both institutions and accreditors.

This change not only affords more time to institutions that fail to meet standards, it also makes it difficult for the Department of Education to ever hold an agency accountable. With this rule in place, an agency does not have to take action when there are serious problems and the Department will have a difficult time making the case that an agency is not enforcing its standards when it fails to act. The Department should delete this proposal from its final rule.

In the event the Department intends to keep this ill-advised proposal, it should consider serious guardrails:

- Require an agency to report to the Department, State agency, the public, and current and prospective students that the institution does not meet standards and that the agency is using this flexibility
- Re-evaluate the extension on a recurring six-month basis for progress toward compliance and publish its determination
- Place limits on enrollment while the institution is out of compliance
- Restrict substantive changes to the institution
- Limit the good cause extension to 6 months
- Place the institution on public warning
- Evaluate the use of this flexibility in the Department's recognition review of the agency

The Department's proposal on substantial compliance is against the law (§602.3, 602.31- 602.37)

The Department's proposal to create a new definition of substantial compliance is against the law. Federal statute under the Higher Education Act is clear: an agency is either fully compliant or out of compliance with federal criteria. If it is not in compliance, the agency has a maximum of 12 months, except with a good cause extension, to demonstrate it is fully compliant.[37] In contradiction to federal law, the Department of Education proposes a new definition for substantial compliance: "The term would signify that an agency has demonstrated to the Department that it has the necessary policies, practices, and standards in place and generally adheres with fidelity to those policies practices and standards, or has policies, practices, and standards that need minor modifications to reflect its generally compliant." Statute, however, contemplates no middle ground.

The Department's proposal fails to adequately define what it means to be substantially compliant and evidence suggests the Department intends to use the definition to refer to all matters of non-compliance. Under the Department's definition, substantial compliance "would signify that an agency has demonstrated to the Department that it has the necessary policies, practices, and standards in place and generally adheres with fidelity to those policies practices and standards, or has policies, practices, and standards that need minor modifications to reflect its generally compliant practices." This status could and has applied to more serious concerns.

For example, in November 2018, the Department restored recognition to ACICS, finding it substantially compliant in four areas. These areas include issues of serious concern: Administrative and Financial Resource, Student Achievement, Recruiting and Admissions, and Monitoring.[38] On the issue of administrative and financial resources, new reporting shows the agency has serious financial challenges. According to ACICS, the agency is operating at a $2 million dollar deficit as a result of having lost so many of its schools among its membership. What was once the largest national accreditor is now the smallest. It is in the precarious position of needing to ensure it doesn't lose any more institutions while also needing to grow its membership to make up for the shortfall. Desperation for membership is a risky position for an accreditor to be in and creates a moral hazard where there is a disincentive to remove accreditation even in a worst case scenario while creating an incentive to accredit institutions that otherwise would be rejected. Still, the Department found the agency to be in substantial compliance with standards. The Department's reasoning cannot be trusted. This creates a loophole that allows accreditors to remain recognized even when they do not meet standards, an

---

[37] https://www.law.cornell.edu/uscode/text/20/1099b
[38] http://www.acics.org/uploadedFiles/Hot_Topics/16-44-O%20Final%20Decision%20of%20the%20Secretary.pdf

authority that statute never contemplates. The Department should delete this proposal from its final rule.

Monitoring Reports (§602.3, 602.12, 602.31- 602.37)

In conjunction with its proposal on substantial compliance, the Department proposes a new definition for a monitoring report, which would allow an undetermined amount of time for an agency that is in substantial compliance to meet federal recognition criteria without transparency. The concerns highlighted above under substantial compliance also apply to monitoring reports. Federal statute only contemplates an agency that is fully compliant or out of compliance with a limited amount of time to demonstrate that it meets federal recognition criteria. Unlike the current process for an agency that is not in compliance, which must submit a compliance report reviewed by both the Department and NACIQI, include publication in the federal register and accept third-party comment, monitoring reports would only undergo review by the Department of Education with no public reporting.

Federal statute does not contemplate an agency that does not meet criteria undergoing review solely by the Department. It assumes that NACIQI will advise the Department in all instances of recognition. When an agency is out of compliance, it must undergo a public hearing and submit a report the Department that considers third-party comments. Similarly, as mentioned above, the proposal provides no limits on timeline, while statute only contemplates 12 months of noncompliance with good cause extension. In the case of ACICS, the Department is requiring the agency to submit monitoring reports on its finances for three years, even though this authority doesn't currently exist in statute or regulation. Again, the Department states that this would only apply to technical issues. However, the areas of non-compliance with ACICS are anything but technical.

This proposal creates a loophole that is not consistent with federal law, the Department has failed to justify these changes, and failed to demonstrate it would only apply the status to address minor issues. Therefore, the Department should delete this proposal from its final rule.

If it chooses to proceed, it should

- Require publication in the federal register that allows for third-party comment
- Require review by NACIQI either after Department review or include the report, communication, and Department decision in the agency's five-year recognition review
- Limit the monitoring report period to 12 months
- Place restrictions on the agency while it is under monitoring
- Only place the agency on monitoring if both the Department and NACIQI recommend monitoring

- Elevate the monitoring report to a full compliance report in the event of any concerning changes

Senior Department official's decision §602.36

The Department's proposal in 602.36(e)(1)(i) which allows agencies to be in compliance if they have a standard but have not yet implemented it is against the law. Federal statute under the Higher Education Act requires "that any agency that has failed to apply effectively the criteria in this section, or is otherwise not in compliance with the requirements of this section" shall take appropriate action within a period of 12 months or lose its recognition. Under the Department's proposal, any agency that has "demonstrated compliance or substantial compliance when an agency has the necessary policies and procedures, but has not had the opportunity to apply them," would receive "additional flexibility because accrediting agencies should not be penalized when implementing new policies and procedures." In other words, any agency that has adequate standards on paper but has not actually applied them would be deemed in compliance. Federal law requires not only that an agency have standards, but effectively apply those standards.

Creating the ability for an agency to be in compliance even though it has not demonstrated it can apply it standards is a significant loophole. This is especially true since the Department has proposed extending its recognition review to a period of two-years. In areas the Department determines the agency does not have an adequate standard, the agency could simply create a new standard that meets federal recognition criteria, whether or not it has effectively applied it. In effect, no agency would ever be found to be out of compliance as long as it has standards in place. This is a dangerous extension that limits the Department from taking action against an agency. As long as it has a standard in place, legally the Department will have a hard time ever proving the agency is not effective in the event it fails to apply its standards. The Department should delete this proposal from its final rule.

Final Accrediting Action (§602.3)

The Department proposes changing the definition of final accrediting action to clarify that the final determination of an accrediting agency regarding an institution or program can only be made after the institution or program has exhausted its appeals process. It should instead prohibit institutions from the opportunity to appeal a final action before it is final. Differences across accrediting agencies have created significant loopholes for institutions some of which have the opportunity to appeal an action before it is ever made public. If there is a problem at an institution, current and prospective students deserve to know of the problem.

For example, in August 2018, Lincoln College of New England was placed on probation by its accreditor. By December, 2018, the institution closed. However, because its accreditor allows an institution to appeal a final action before it is made public, private investors were informed as early as May that the action was coming, and again in early August before it was announced to students. As a result, investors controlling the purse strings of the institution were informed of the problems twice before students.[39] Students and parents deserve to have all important information at their disposal before making a decision to enroll and spend money at a college. This policy protects the interests of institutions over those of students and is not the case for most other accrediting agencies.

The Department should clarify that actions should be made public before the institution appeals to protect the best interests of students, particularly given all of the other flexibilities the Department proposes affording to low-quality institutions (see Table 1).

Changes would hamstring accreditors from taking action against low quality institutions

The federal purpose of relying on accrediting agencies has always been to keep out low-quality educational providers and fraud from the aid system. However, there is ample evidence that accreditation is failing in that role. For example, in 2014, the Government Accountability Office, found that accreditors "sanctioned about 8 percent of schools for not meeting accreditor standards. They terminated accreditation for about 1 percent of accredited schools, thereby ending the schools' access to federal student aid funds."[40] The same report found that "schools with weaker student outcomes were, on average, no more likely to have been sanctioned by accreditors than schools with stronger student outcomes." In fact, this is an openly admitted fact among accreditors themselves. According to a recent report based on interviews with accreditors, one accreditor representative stated, "We're not well-equipped to deal with bad actors. We are used to dealing with idealistic, highly committed institutions who are doing their best for their student population. Who can get better by learning from each other. So, I understand the need from a policy point of view to actually arm us also with ways to identify the bad actors that may be entering this field for other reasons."[41]

Accreditors need to be better equipped to deal with bad actors and low-quality institutions. However, the changes proposed in this NPRM would restrict accreditors'

[39] https://www.insidehighered.com/news/2018/09/18/summer-probations-raise-question-when-accreditor-should-disclose-colleges-status
[40] https://www.gao.gov/assets/670/667690.pdf
[41] http://www.ihep.org/sites/default/files/uploads/docs/pubs/ihep_informing_improvement_full.pdf

ability to take action against even the worst performing actors. Combined with all of the other deregulatory proposals in this NPRM, such as allowing in new accreditors without experience, limiting when accreditors must take action against institutions, and weakening the federal recognition process, proposals that extend low-quality institutions additional flexibility in meeting standards raise serious concerns for the well-being of students and taxpayers.

Enforcement of Standards (§ 602.20)

Given the evidence to date that accreditors rarely take action against institutions and even more rarely remove an institution from accreditation, it is mind-boggling that the Department proposes in 602.20, to double the timeline an institution has to come into compliance with accreditor standards to a maximum of four years. That is, in addition to the proposal to allow an agency to be out of compliance without sanction for a period of three years, allowing accreditors to create alternative standards to meet the needs of "innovative" institutions, providing liberty to a very broad category of institutions with a religious mission, extending aid to institutions and programs that have been removed from federal or accreditor recognition, enforcement of arbitration, additional due process in the event of a final accrediting action, and making it easier to sell an institution that is about to close. The lengths the Department has gone through to extend every opportunity to failing institutions is irresponsible and ensures that few if any institutions would ever lose accreditor recognition (only 1% lose recognition today).

Once again, the Department has failed to provide any justification or evidence that this change is necessary. For example, the Department's reasoning for this change is that it wants to "remove overly prescriptive timelines for taking action that often require agencies to place a greater importance on acting." It presents no evidence that the current timeline is too aggressive or overly prescriptive. It fails to consider this change in conjunction with all of the other changes afforded to institutions to come into compliance. And it fails to put adequate protections for students in place while the institution that does not meet minimal quality standards is allowed to continue enrolling students and collecting taxpayer money.

The Department calls the current regulations overly prescriptive, but evidence suggests otherwise. Although institutions are held to a two-year standard, the process an accreditor takes to sanction an institution can result in institutions remaining accredited for a much longer period of time. Accreditors have numerous actions at their disposal including deferring action, additional review, shortened accreditation periods, monitoring, notice, warning, reporting, probation, show cause, and numerous appeal processes. While an accreditor may believe an institution is out of compliance, it approaches the subject with an abundance of caution and may take numerous lesser actions such as deferred action, shortened review, follow up, reporting, monitoring, notice, or warning before taking a more serious action of probation or show cause. The actions of probation and show cause are the actions that in many cases start the two-year clock.

Take for instance, the institutions owned by the Center for Excellence in Higher Education. For over 7 years, the accreditor has placed campuses or the system on a series of escalating actions over concerns of non-compliance. These actions include deferred action, various reporting measures, investigations of legal action against the schools, show cause and probation. To date, the school remains accredited and on sanction.[42]

In another instance, the accreditor of the International Culinary Center was aware of problems and placed the institution on numerous and escalated sanctions. Over the course of four years, these included reporting, monitoring, warning, probation, and finally loss of accreditation which the institution then appealed. Four years later, the institution remains accredited and is able to enroll students and continue collecting taxpayer money.[43]

The Department provided no evidence throughout the rulemaking and presented false and misleading justifications to negotiators. For example, in Session 2, comments to negotiators stated the reason for this change was that "Students' interests are best served when institutions or programs have time to implement a teach-out plan, enter into teach-out agreements with other institutions or programs, and help students move to a new institution to complete their programs. For students close to completion, it may be preferable to complete the program prior to the implementation of the adverse action. Oftentimes, institutions lose accreditation due to financial instability, not insufficient academic quality or institutional integrity. In such cases, it may cause unnecessary harm to students to force an institution into a precipitous closure."[44] The Department presented no evidence that institutions are closing because of aggressive accreditor actions. It's efforts to point to the lack of a teach-out agreement in the event an institution does close are not adequate. The responsibility to obtain a teach-out plan or agreement falls on accreditors and the lack of one suggests the Department should spend its time strengthening teach out requirements, ensuring accreditors are doing their job, and protecting students, not giving poor-performing institutions additional time when they already have more than enough. The Department should consider the undue harm

[42] http://www.accsc.org/UploadedDocuments/2018/Probation-Letters/CEHE-System-Wide-SAL-09-2018-Probation-Redacted.pdf
[43] http://www.accsc.org/UploadedDocuments/2019-Public-Notices/Revocation/International-Culinary-Center-2019-Redacted.pdf
[44] https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/602accreditationredlinessession2.pdf

enrolling and attending an institution that does not meet quality standards causes to students.

Without adequate evidence, and plenty of evidence disproving the Department's reasoning, it should strike this proposal from its rulemaking. The timelines under regulation are not overly prescriptive, but not prescriptive enough, and the Department should strengthen them.

End of an Institution's Participation (§ 668.26)

Inexplicably, and seemingly against federal law, the Department proposes extending federal aid to institutions that are deemed no longer fit to participate in Title IV HEA programs. This is an irresponsible proposal that would extend federal funds to institutions that do not meet quality standards and are ineligible to participate in Title IV. Under the Department's proposed changes in 668.26, the Department would, "permit the institution to continue to originate, award, or disburse funds under a title IV, HEA program for no more than 120 days following the end of the institution's participation in the title IV, HEA programs."

The Department provides inadequate justification for why this extension should be allowed. It states it would approve these extensions to allow institutions to "teach-out its own students and continue to receive title IV funds for a limited time to allow students to complete their academic program." The Department has not demonstrated that this action is in the best interest of students. The ability to finish their studies may be attractive and would discourage students from pursuing closed school loan discharges, but given that the institution has already been unfit and is likely on a path toward closure, completing at a low-quality institution may have no economic payoff when a student enters the job market. The Department rarely removes an institution's authority to participate in Title IV and only in instances where it is clear students are at risk of harm. The Department has not provided any examples or placed limits on when this type of extension would be inappropriate or grappled with the potential risks to students.

Given the Department's other changes that strengthen teach-out agreements for students and ensure they have a place to finish their studies, this change to allow students to stay at a failing institution does not make logical sense. Students should be able, and even encouraged, to finish their degree at a stable, high-quality institution that will have value in the job market. To encourage them to instead continue studies and extend taxpayer money to an institution without value is unconscionable. The Department should eliminate this proposal from its final rule, without exception.

If it chooses to proceed with this change, the Department should make clear in its final rule that students are not forced to remain at the school to finish their studies, and should be fully informed on their options to pursue a closed school discharge, participate in a teach-out elsewhere, or transfer their credits if they so choose.

Eligibility of Additional Locations (§600.32)

In 600.32, the Department proposes allowing an institution to purchase a school that engaged in a disorderly closure without accepting full liability of the school owed to students and taxpayers. This change creates an incentive for an unscrupulous provider to start a school, enroll as many students as possible, drive the school into the ground, and then further profit on the sale of the school. It encourages the resurrection of toxic assets that have failed to provide students with a high-quality education. And it allows institutions to continue enrolling students and collecting taxpayer money without any guarantee of quality.

Current regulations limit liability in only very strict circumstances in the event an institution wants to add a closed school as an additional location if the school conducts a teach out and the closing school was subject to a limitation, suspension or termination action by the Secretary. These guardrails exist with good reason. The Department of Education should not allow a school that engaged in a precipitous closure leaving its students high and dry the ability to profit from selling the school. The Department proposes broadening these limited circumstances in several ways. First, it would limit the liability a purchaser must cover to the current award year and a single award year prior. This limited liability would now apply to any type of closure, not just ones in which the Secretary took action and would apply whether or not the purchasing school conducts a teach-out. Second, it would exempt a purchaser that conducts a teach-out for any type of closure from being responsible for any liability at all.

The Department provides no evidence or justification for why this change is needed and fails to consider the risk to students and taxpayers. The Department claims its goal is to provide educational opportunity and community investment by keeping institutions open. This assumes that access, even if it is low-quality and resulted in harm to students and taxpayers is good enough. Access without a guarantee of quality is not access. The Department also claims that remaining at a failed institution may be in the best interest of students because attending another institution leads to disruption. However, the Department does not consider the alternative, that the chaos that can come with a change of ownership or graduating from a college that no longer exists also creates disruption in a student’s ability to continue their studies or get a job afterward.

The reality is that this change could result, and may be designed, in limiting the likelihood of student applications for closed school discharges. While the Department hopes to decrease costs through fewer closed school discharges, it may also be increasing taxpayer liability by allowing more students to enroll and take on debt for an institution that may not be any better in the long run. Recent events are evidence that this is the more likely scenario.

Take for example, the Dream Center Foundation. The Department approved the sale of campuses from EDMC, including the Art Institutes, Argosy University, and South University, to the Dream Center, an organization with no background or experience operating institutions or providing education. EDMC faced years of declining enrollment, precarious finances, trouble maintaining accreditation, and dozens of lawsuits and investigations and lawsuits into its recruitment and marketing practices.[45] Rather than wind down operations through an orderly closure, in 2017, the Department of Education gave initial approval to the sale of many of EDMC's campuses to the Dream Center with no restrictions on the sale.[46] Within months, the Dream Center realized it was in over its head and could not fill the budget shortfall so it began offloading campuses.[47] A short time later, it entered into receivership, millions in student aid dollars went missing, and it shut down the majority of its remaining campuses. The results for students were catastrophic including reports of widespread evictions and homelessness. The Department and its decision to sell the campuses to an inexperienced provider bears full responsibility for the tragedy that resulted in thousands of students lives. Very few of those students have transferred, less than 1 percent according to federal data.[48] Others are being denied closed school discharges based on errors by student loan servicers and the Department of Education.[49]

This example played out during the Department's negotiated rulemaking and the Department heard the stories of numerous public commenters urging the Department to strengthen accreditation requirements and heed the lessons of the Dream Center's collapse. With this proposal, it demonstrates it has not learned the lessons of its previous

[45] https://www.educationdive.com/news/timeline-how-dream-centers-higher-ed-bid-went-off-the-rails/550339/
[46] https://www.insidehighered.com/news/2019/04/03/another-profit-giant-collapses-critics-dream-center-deal-wonder-why-feds-didnt-seek
[47] Ibid.
[48] https://www.insidehighered.com/quicktakes/2019/06/19/few-students-defunct-profit-chains-have-transferred
[49] https://www.chronicle.com/article/Former-Dream-Center-Students/246526; https://predatorystudentlending.org/news/blog/servicers-are-wrongly-denying-closed-school-discharges-to-art-institute-of-phoenix-students-why/

failings and has a greater interest in ensuring institutions remain open than protecting students from low-quality institutions.

Instead of providing new life to low-quality institutions, the Department should focus on strengthening its teach-out proposal to require teach-out agreements from institutions that exhibit risk factors if they are to remain in the aid system. Strengthening teach-out agreements with institutions that can meet a high bar of quality would make this proposal unnecessary.

Without evidence that this proposal would result in better outcomes for students, the Department, without question, should delete this proposal from its final rule.

If it does proceed with this ill-advised proposal, it should ensure that in the event of a sale, students are presented with all of their options, ensure students are not restricted from high-quality teach-out and transfer opportunities, and are provided detailed information on their options to file for closed school discharges and borrower defense. It should place restrictions on the new owner, including obtaining a letter of credit, placing limits on enrollment, and only allowing institutions that meet a high bar of quality without demonstrating risk factors to engage in teach-out opportunities.

Substantive Change (§602.22)

In §602.22, the Department requires an agency's definition of "substantive change" to cover "high-impact, high-risk changes," and would identify required elements of an agency's definition of "substantive change." However, the Department provides no analysis or explanation of how it determines whether a change is high vs. low risk.

At least one category the Department determines to be low-risk, the approval of branch campuses and additional locations, should be reconsidered as a high-risk change. In 602.22(a)(2)(ix), the Department would require agency approval of the addition of each new location or branch, *except* if the institution completed at least one cycle of accreditation, had two additional locations approved, is not on probation or been subject to a negative action over the prior three years, and is not under provisional certification. The Department would also exempt these campuses from its requirement that the agency conduct site visits at a representative sample of additional locations.

This change is seemingly against statute and presents significant risk to students and taxpayers. Federal law requires that any institution of higher education must pre-apply to its accreditor before opening a branch campus; and that accreditors must conduct site visits of all branch campuses within 6 months of it opening. This assumes that agencies would review additional locations, not simply submit a piece of paper without review.

According to the 1994 rulemaking that first established substantive change regulations, the Department reasoned, the Secretary "cannot be a reliable authority … if the agency does not assess those new or substantively changed programs."[50]

These statutory requirements and regulations were created to correct for one of the common tactics used by for-profit colleges to skirt federal and accreditor oversight—the practice of branching. Schools avoided rules by establishing branch campuses that would gain accreditation through the main campus and avoid review by an accrediting agency. For example, one accrediting agency that accredited a cosmetology school extended accreditation to programs that the school offered in jet airplane mechanics and air conditioning and refrigeration without evaluating the quality of those programs—even though the programs were unrelated.[51] In another example, the American Masonry Institute (AMI), which offered courses on brick and tile laying, was established as a branch campus of a barber school even though the two were unrelated. Over a period of 10 months after it was established, the AMI enrolled more than 600 students with a loan volume of more than $3 million. It was alleged that the school bussed in students from other major cities who were homeless. Shortly after, the school suddenly shut down.[52]

Given this history, the Department should categorize branching and additional locations as a high-risk change and require review without exceptions. Additionally, the Department should require regular site visits for all branches and additional locations, not just a representative sample. This change is supported by at least one national accreditor. In testimony submitted to the Ed & Labor Committee, the Executive Director of the Accrediting Commission of Career Colleges and Schools recommended requiring site visits of all additional locations, stating that "growth of an institution deserves more oversight, not less."[53]

In 602.22 (a)(3), the Department also proposes allowing an agency to utilize its senior staff to review certain substantive change requests in order to reduce burden on its decision-making body and allow that body to focus on more significant and potentially risky changes. These changes include changes in programs or delivery methods, changes

[50] U.S. Department of Education, "34 CFR Part 602: Secretary's Procedures and Criteria for Recognition of Accrediting Agencies; Proposed Rule," Federal Register 59 (15) (1994), available at https://www.govinfo.gov/content/pkg/FR1994-01-24/html/94-1459.htm.

[51] U.S. Department of Education, "34 CFR Part 602 Proposed Rule."

[52] U.S. Department of Education Office of Educational Research and Improvement, "Abuse in Federal Student Aid Programs: Report Made by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate" (Washington: 1990), available at https://files.eric.ed.gov/fulltext/ED332631.pdf.

[53] https://edlabor.house.gov/imo/media/doc/McComis%20Written%20Testimony042717.pdf

in clock- or credit-hour measurements or changes in using time-based or non-time-based methods, an increase in clock or credit hours awarded or credential levels, the addition of permanent locations at which an institution is adding teach-outs, or where institutions are outsourcing educational programs to unaccredited providers. Again, the Department provides no evidence that these changes are any less risky than changes requiring full approval and presents no evidence of how frequently these changes occur as a way to establish risk.

Evidence suggests that some of these changes represent significant risk, namely, the move that is becoming increasingly common, of outsourcing education program to unaccredited providers. In an article by Kevin Carey in Highline on the rise of online program management companies (OMPs), he writes, "OPMs are transforming both the economics and the practice of higher learning. They help a growing number of America's most-lauded colleges provide online degrees—including Harvard, Yale, Georgetown, NYU, UC Berkeley, UNC Chapel Hill, Northwestern, Syracuse, Rice and USC, to name just a few. The schools often omit any mention of these companies on their course pages, but OPMs typically take a 60 percent cut of tuition, sometimes more. Trace Urdan, managing director at the investment bank and consulting firm Tyton Partners, estimates that the market for OPMs and related services will be worth nearly $8 billion by 2020. What this means is that an innovation that should have been used to address inequality is serving to fuel it. Instead of students receiving a reasonably priced, quality online degree, universities are using them as cash cows while corporate middlemen hoover up the greater share of the profits."[54] Kevin Carey's account of OMP's provides perhaps more information on these types of arrangements than the Department knows of the companies itself. In a request from a member of Congress, the Department states that since institutions are not required to report written arrangements to the Department, it has no data on how common or widespread these arrangements are or the terms of the arrangements.[55]

These changes represent significant risk and the Department can provide no information. Before opening the floodgates to more of these arrangements and fast-tracking their approval by accreditor staff, the Department should begin requiring all such arrangements and details on the terms, including a copy of each application and the accreditor's review, be provided to the Department so it can begin collecting data on their use. Without this information, the Department should not move forward with this change.

[54] https://www.huffpost.com/highline/article/capitalist-takeover-college/
[55] https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHShearing.pdf

The move to allow accreditor staff to approve changes raises other concerns. It undermines the very concept of peer-review upon which accreditation is based. According to the Council of Regional Accrediting Commissions, or C-RAC, "regional accreditation is built around a rigorous peer-review process that helps ensure fiscal and educational integrity. We rely on experts in higher education, business, and management to analyze institutional performance using sophisticated tools and reliable data."[56] The process of institutional review and approval is intended to be consultative. The Department states it "recognizes the evolution of agencies into increasingly complex organizations with diverse expertise that they can apply to specialized tasks." However, the Department has provided no evidence to justify the claim that agencies have diverse expertise or for why it would undermine the very nature of accreditation itself by eliminating the concept of peer review or why staff are better equipped to evaluate such changes. It decreases accountability for decision-making since an agency could always blame a bad decision on rogue staff. Without justification, it should eliminate this proposal from its final rule.

The Department needs to explain and provide justification for why believes that an increase in the level of credential is a high-risk substantive change but adding programs generally at a new credential level is not. This difference is not well explained and does not make logical sense. For example, in 602.22(a)(vi), the Department identifies as an additional substantive change an increase in the level of credential awarded. Later, it states "for insubstantial changes to its mission or objectives, or adding programs at a new credential level, other than the addition of graduate programs," which seems to suggest that if an institution that offers certificates wanted to offer bachelor's degrees, this would not be a substantive change, but if it wanted to raise the credential level of one of its existing programs to a level higher, this would be a substantive change. In its regulatory impact analysis the Department asserts that modifications to substantive change would "allow institutions to respond quickly to market demand and create undergraduate programs at different credential levels." The Department needs to clarify when creating new credentials need approval and when they do not and how preventing "credential inflation" differs from quick approval of credentials that meet market demand. It appears to be both asserting that credential inflation is something to be discouraged in some instances and encouraged in others.

The Department's evidence lacks citation and fails to justify the changes proposed. For example, as reasoning for why substantive change regulations should be weakened, the Department states, they are "burdensome for agencies to review, but also often require an institution to pay costly fees and wait many months for a decision. Costs for agency

[56] https://www.c-rac.org/frequently-asked-questions

review of substantive changes can be as high as $66,000 plus the expenses associated with any required site visit." The Department provides no citation for this cost and failed to do any analysis on accreditor fees, how the costs factor into which changes should be lessened as a result, or how these changes will result in lower costs. In 2016, the Center for American Progress analyzed the fees accreditors charge, including for substantive changes.[57] These fees vary significantly across agencies and by the type of change the institution is seeking. In an analysis of substantive change fees across the main institutional accrediting agencies, we found charges range from a low of $200 to a high of $20,000 plus potential legal costs and site visit fees. On average, most changes had fees significantly lower than what the Department quotes. The highest charges most commonly apply to changes in ownership or control, which require extensive legal review. Given that there are no changes to these types of reviews, the Department's proposal will do little to stem the higher cost fees agencies charge. The Department should cite the charge it quotes, conduct an analysis of substantive change fees, and include this in its justification and regulatory impact analysis.

The Department fails to justify its claims about the length of review and the timeline providing additional flexibility is inconsistent with other timelines proposed throughout the NPRM. For example, the Department justifies its modifications to substantive change requirements by stating that timeliness is a challenge for institutions: "agency boards generally meet infrequently, meaning that an institution's application may be held for several months before it can be reviewed and approved. This can discourage and delay changes in programs that could otherwise be beneficial to students." The Department has provided no justification or evidence to support any claims about how long approvals take. It claims that a few months wait for approval is too long of a period and could be beneficial to students. However, elsewhere it gives an inordinate amount of time to institutions that fail to meet standards, including in 602.18(d) which provides institutions up to three plus years it can remain out of compliance with standards, and in 602.20, which allows institutions up to a maximum of four year it can remain out of compliance. In other words, an approval that takes a few months is too burdensome for an institution but a maximum of 2 years to come into compliance is not enough time. As a result, an institution could receive up to 7 plus years to demonstrate compliance with standards before facing serious consequences. This reasoning is illogical, unjustified, and irresponsible. If the Department intends to provide institutions with flexibility to make changes, it should demand that institutions meet a high bar of quality and demonstrate compliance in a timely manner. Furthermore, the Department should consider the

[57] See Table 6 and corresponding citations. These charges were confirmed with each accrediting agency before publication. https://www.americanprogress.org/issues/education-postsecondary/reports/2017/03/29/427955/getting-pay-quality-assurance/

resulting risk to students since it factors in the benefits from expediting approvals by a few months.

The Department should remove each of the above changes in its final rule.

Additional Procedures Certain Institutional Accreditors Must Have (§602.24)

The Department should be commended for considering and including parts of a proposal submitted by negotiators to strengthen teach-out requirements, secure teach-out agreements, and put protections in place for students enrolled in schools at risk of closure. The Center for American Progress has called for requiring that accreditors obtain high-quality teach-out agreements when a school is at risk of closure and holding accreditors accountable when they fail to heed the warning signs and protect students.[58] Given the Department's intimate experience with the ineffectiveness of accreditors in securing teach-out agreements in the recent closures of campuses owned by the Education Corporation of America, Vatterott College, and the Dream Center Foundation, it is concerning that the Department initially did not have any proposals of its own and only intended on ensuring protections for schools by easing sales and extending taxpayer money to failed schools.[59] However, the proposal in the consensus agreement does not go far enough in guaranteeing students will have high-quality teach-out options in the event their school closes. The Department should require teach-out agreements, not make them optional and it should be clear to distinguish when an agreement is needed instead of just a plan.

The Department should require accreditors to secure teach-out agreements when schools exhibit particular risk factors. It should make it mandatory, not optional. The Department is well aware of the ineffectiveness of teach-out plans. While they may be helpful in beginning the work of finding a teach-out partner, until an agreement is secured, a teach-out plan is meaningless when it comes to students. In the event of precipitous closure, accreditors have routinely requested nothing more than teach-out plans when an institution exhibits warning signs. That is because under current regulation, securing a teach-out agreement is optional at the discretion of the accreditor. That discretion almost never results in agency request of a teach-out agreement. Take for instance, the Education

---

[58] https://www.americanprogress.org/issues/education-postsecondary/news/2019/02/15/466350/quality-guarantee-todays-students-recommendations-improve-college-accreditation/

[59] https://www.insidehighered.com/news/2019/04/03/another-profit-giant-collapses-critics-dream-center-deal-wonder-why-feds-didnt-seek; https://fox2now.com/2018/12/17/vatterott-college-ceases-operations-nationwide/; https://www.insidehighered.com/news/2018/12/06/closure-education-corporation-america-raises-questions-about-oversight-and-support

Corporation of America accredited by ACICS. ACICS was well aware of ongoing problems including that ECA entered into receivership, was on heightened cash monitoring 2 status, and had already announced the closing of over a dozen campuses. Given all of that information, ACICS issued a show cause and requested teach-out plans for all of its campuses.[60] When ECA shut its doors overnight, any teach-out plans the agency secured had no meaning for students and came with no guarantee that they would have a high-quality option to transfer their credits.

Instead, students had nowhere to turn other than ECA itself, which within days began listing unvetted transfer options on its website.[61] Many of the institutions listed and the guarantees offered should raise red flags. At the top of ECA's list is the New England Business College, the only remaining campus of ECA that remains open. Many of the other options are online for-profit colleges, some of which themselves are on heightened cash monitoring, and many of which offer students attractive discounts on tuition especially for ECA students. For example, Ultimate Medical Academy promises students can enroll and complete their studies at **no cost.** Or MyComputerCareer, offering a special enrollment grant available up to $7,308 for ECA students. The details and fine print or whether these promises are actually guaranteed are uncertain. Given previous failures to request and secure formal teach-out agreements, the Department should make this requirement mandatory.

The Department has the opportunity to change the outcomes for thousands of students across the country if it changes the nature in which closures happen and institutes protections for students in the event of a precipitous closure. To ensure that accreditors do their part, it should consider measures to hold accreditors accountable in the event they do not request or secure teach-out agreements despite obvious warning signs such as heightened cash monitoring or receivership. These measures could include conducting a review of the agency's practices and limiting an agency's recognition by placing restrictions on approving new institutions are substantive changes until it can demonstrate its standards and processes are adequate.[62] It could also place restrictions on institutions that do not secure teach-out agreements when required.

[60] https://web.archive.org/web/20181216011743/http://www.acics.org/uploadedFiles/Actions/00016224_ECA-VC_FinAdv-SC%20(Revised).pdf

[61] http://www.ecacolleges.com/transfers/

[62] https://www.americanprogress.org/issues/education-postsecondary/news/2019/02/15/466350/quality-guarantee-todays-students-recommendations-improve-college-accreditation/

The Department should improve communication with accreditors in the event the Department becomes aware of certain risk-factors. In the case of Dream Center, the situation evolved quickly and changed daily and it was not clear that accreditors were always informed of developments. In the event the Department is aware of risk factors, it should request the agency begin the process of securing teach-out agreements as a safe measure.

The Department should consider strengthening prohibitions on misrepresentation in the event of a school closure. For example, it should prohibit an institution that closed precipitously from directing students to transfer options that have not been formally approved by a member of the federal triad and prevent institutions from advertising discounts and other special considerations to students of closed schools that have not been approved by a state agency or accreditor. Students from closed schools are left to navigate figuring out transfer options on their own and risk being taken advantage of twice. They should not be left to rely on unvetted options provided by the school that betrayed their trust. Institutions that seek to profit off of school closures by offering promises to students of the closed school without approval by an accreditor should be penalized. The Department should do everything in its power to ensure that students are only offered high-quality options that have been formally vetted and provide a guarantee of equal treatment.

The Department should also consider barring any executive or administrator responsible for a precipitous closure that aided in and profited from direct harm to students from being affiliated with any institution receiving Title IV aid going forward. These closures often come after institutions, and the people that own and run them, have profited from millions of dollars—in some cases, billions of dollars—in federal financial aid. Corinthian Colleges received about $1.4 billion in federal aid annually in its final years of operation,[63] while the ECA took in a quarter-billion dollars[64] in the 2017-18 school year alone. Even the much smaller Vatterott received nearly $59 million last year alone, according to U.S. Department of Education data.[65] Kevin Mondany, the former head of ITT Technical Institute, made as much as $3 million per year,[66] as did Jack Massimino at Corinthian.[67] This must change. Any executive from a college that closes precipitously

[63] https://www.washingtonpost.com/local/education/corinthian-colleges-details-plan-to-sell-85-campuses-close-12-others/2014/07/07/46504eb2-0609-11e4-8a6a-19355c7e870a_story.html?utm_term=.0d301558ef96
[64] https://www.warren.senate.gov/imo/media/doc/Letter%20to%20ACICS.pdf
[65] https://studentaid.ed.gov/sa/about/data-center/student/title-iv
[66] https://www.indystar.com/story/money/2018/07/09/top-itt-executives-kevin-modany-daniel-fitzpatrick-settle-sec-charges/769582002/
[67] https://www.help.senate.gov/imo/media/for_profit_report/PartII/Corinthian.pdf

should be permanently barred for damage done to students and taxpayers and the Department should consider ways to take back money paid to school executives in salary or bonuses and instead use it to cover the cost of loan forgiveness and refund tuition paid by students who can't otherwise get their money back.[68]

Finally, the Department should strengthen its definition of teach-out plans and agreements and move them to 602. As written, teach-out plans and agreements apply to a planned closure or a school that has already closed. This is not in alignment with how accreditors use teach-out plans and agreements or with what the Department has proposed in 602.24. Teach-out plans and agreements are not just for orderly closures, they are protections for when a school is at-risk of closure and may close precipitously. Therefore, the language should reflect that both teach-out plans and agreements apply when a school is at risk of closure. The Department should move both definitions to the top of 602 so that the requirements are clear to accreditors and institutions.

The Department allows low-quality institutions to remain in aid programs for an extensive amount of time

These comments have highlighted the many multiple ways a low-performing institution that fails to meet a minimum bar of quality could remain in the aid system, undermining the purpose of relying on accreditation as a gatekeeper to Title IV aid. At no point has the Department considered the interactive effects of these regulations and how they add up to make it possible that a low-quality institution could reasonably remain accredited for an indeterminate amount of time, while still having the opportunity to continue its access through a sale to another institution. Each of these changes has an additive effect making it possible for a scenario where an institution never loses accreditation at all. See Table 1.

First, the Department allows institutions a period of up to 3 plus years, with an unlimited extension for good cause, that it could be permitted to meet standards without penalty. It allows accreditors the ability to create new alternative standards to accommodate "innovative programs" to meet individual institution's needs, which could be a way to skirt accountability for poor performers. It doubles the timeframe an institution might remain out of compliance before it faces any threat of a loss of accreditation. It mandates an appeal process if an agency takes an adverse action before it is final. It pushes for arbitration that does nothing to reduce the likelihood of an eventual lawsuit. It allows an

[68] https://www.americanprogress.org/issues/education-postsecondary/news/2019/03/19/467366/college-executives-need-pay-schools-close-abruptly/

extension of federal aid for an additional four months if an institution's participation ends. It then eases the likelihood that an institution will be resurrected through a sale, if none of the above works in its favor.

The Department has to consider the interactive effects of each of these components, the impact on the timeline in considering the likelihood that an institution loses accreditation (which only occurs in 1% of cases as is), consider the risk of the proposals in their entirety to taxpayers, and the undue harm this places on students.

Table 1: Actions that extend the likelihood an institution ever loses accreditation

Regulation	Impact
602.18(d)	Allows non-compliance for a period of three years with extension for good cause
602.18(c)	Allows creation of alternative standards so an institution would be marked compliant
602.20	Extends time an institution can remain out of compliance to a maximum of four years
602.3	Appeals process prior to a final accrediting action would allow additional time out of compliance
600.4, 600.5, 600.6	Arbitration further extends the timeline an institution remains accredited while it appeals
600.4, 600.5, 600.6	The institution has the opportunity to sue the agency to further contest adverse action which extends the timeline
668.26	Ability to extend Title IV aid an additional 120 days
600.32	Allows the institution at risk of closure to sell campuses for pennies on the dollar by limiting liability and broadening types of closures that apply

The Department Should Maintain Strong Provisions on State Authorization

On state authorization, we fully support the comments submitted by the New America Foundation in their entirety, which read: State authorization is a central piece of the program integrity triad, responsible for the oversight of institutions of higher education and a precursor to accessing taxpayer dollars. The Department can, and should, maintain strong requirements around what constitutes authorization and what is expected of institutions if it hopes to safeguard taxpayer money.[69]

The Department should:

- Narrow its exemptions to state authorization for colleges with the slightest religious affiliation;
- The Department should ensure states protect their residents;
- The Department should strengthen its definition of state reciprocity agreements; and
- The Department should strengthen requirements for complaint systems.

The Department should strengthen requirements for public members to counteract conflicts of interest (Purpose and Organization §602.14)

The Department should make improvements to 602.14 to balance conflicts of interest and strengthen the role of public members. Although Congress relies on accrediting agencies as a quasi-regulator, their status as membership associations created, run, and funded entirely by the colleges they oversee creates conflicts of interest. This arrangement creates inherent conflicts where an accreditor is both a membership organization beholden to the institutions that pay for its continued existence, and an oversight body that influences and enforces the standards schools must meet to become accredited, tasked with overseeing the schools and evaluating their quality as gatekeepers for the federal government. These conflicts might result in weaker standards and lax enforcement than if the members had no ties to institutions the agency oversees.

However, the public member role in many cases is not serving the purpose it was intended. An independent voice is critical when you've tasked a membership association as a regulatory body. A review by the Center for American Progress found that six of the 14 main accrediting agencies fill the spot with more than one person with ties to institutions the agency accredits.[70] This includes two public commissioners that run trade associations, represent, and have lobbied on behalf of private nonprofit colleges in states that agency oversees. These individuals receive a salary from schools accredited by the

[69] Comments submitted by Clare McCann, New America Foundation.
[70] https://www.americanprogress.org/issues/education-postsecondary/reports/2019/06/06/470650/bolstering-public-voice-accreditation/

agency. Many of agencies fill their public member seats with retired academics or administrators from the schools they oversee including one member serving on an accrediting commission as a school representative switching to a public commissioner role just one year later. Or multi-decade school owners serving as public commissioners on the commission that used to approve their institution.

Requirements for the public member role should ensure that individuals serving are truly independent and serve the public interest. In particular, the requirements for a public commissioner should mirror and improve upon the best practices already in place at many accreditation agencies. The Department should improve the current definition to:

- **Prevent newly retired administrators or professors from holding public commissioner positions.** All public commissioners should not have worked primarily in higher education for at least 10 years. This time limit should also apply to anyone who has owned equity in an institution of higher education.
- **Stop individuals who previously represented schools on commissions from serving as public commissioners.** Anyone who has served as an institutional representative on a commission should be prevented from serving as a public commissioner on any commission.
- **Address broader conflicts of interest.** The new definition should expand the ban on what constitutes employment connected to an institution in order to include individuals with any association to higher education institutions or organizations—not just individuals affiliated with the accrediting agency.

Adopting these commonsense guidelines would send a clear message that public commissioners need to truly represent public interests. Improving public commissioners is an important first step toward making the decision-making bodies of accreditors more inclusive of other voices that are also invested in the outcomes of higher education.

The Department should strengthen the federal recognition process, not weaken it

We agree that Department should extend the period over which it conducts recognition evaluations, consider more evidence, and choose which examples the institution provides rather than allowing the accreditor to cherry-pick what the Department evaluates. Beyond that, however, we are concerned that these changes undermine the Department's recognition process, a process that is already far too weak in evaluating the strength of accrediting agencies, and which is ineffective in determining whether an agency meets federal recognition criteria.

According to the first rulemaking outlining the Department's role, the purpose of recognition was to ensure that federal aid is "opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest" and to assure that the process "results in the identification of institutions that should not be eligible to participate in the Title IV … programs."[71] The intent behind the rule-making was to provide the Education Department with the ability to make a thorough and independent analysis that did not rely "solely on written submissions from the accrediting agency or on announced visits" but that included unannounced visits and third-party information to ensure the review was comprehensive, accurate, and unbiased and included student outcome data developed by the department on a national level.[72]

Unfortunately, this rulemaking does the opposite. It affords institutions every opportunity to gain and maintain accreditation and would likely result in very few instances of institutions losing recognition. Given all of the flexibilities the Department provides to institutions, it should significantly strengthen its recognition process to ensure accrediting agencies are fulfilling their role as the gatekeepers to federal dollars.

The Department should ensure the effectiveness of accreditor standards and that standards are effectively applied in recognition proceedings (§602.16, 602.31, 602.32, 602.36)

Accreditation and preaccreditation standards (§602.16)

In 602.16, the Department eliminates the requirement that accreditor standards effectively address the quality of the institutions or programs the agency accredits and replaces it with a requirement that the agency set forth clear expectations. With this change, and with others, the Department eliminates the concept of effective application of standards. In other words, the Department only requires that accreditors have clear standards, not whether they effectively apply those standards. The Department provides no justification for such a significant change in how the Department evaluates accrediting agencies other than to say the terminology is vague.

Aside from the lack of justification, this change is seemingly against the requirements in federal statute which requires effective application of standards as the basis for loss of

[71] U.S. Department of Education, "34 CFR Part 602: Secretary's Procedures and Criteria for Recognition of Accrediting Agencies; Final Rule," Federal Register 59 (82) (1994), available at https://www.govinfo.gov/content/pkg/FR-1994-04- 29/html/94-10147.htm.

[72] Ibid.; U.S. Department of Education, "34 CFR Part 602: Secretary's Procedures and Criteria for Recognition of Accrediting Agencies; Proposed Rule," Federal Register 59 (15) (1994), available at https://www.govinfo.gov/content/pkg/ FR-1994-01-24/html/94-1459.htm.

recognition: "If the Secretary determines that an accrediting agency or association has failed **to apply effectively the criteria**…"[73]

This change, combined with others in this section, indicates that the Department has no intention of ensuring that accrediting agencies are fulfilling their role. It should delete this change from its final rule.

Agency Submissions to the Department (§ 602.31)

In 602.31, the Department eliminates evidence as part of the application process, replacing it with documentation, and eliminates the provision that the agency demonstrate it effectively applies the criteria required under federal law. The Department fails to state that eliminated the language or provide any justification why it should be eliminated.

Like the concept above, federal statute requires not only that the agency have criteria in place, but that the agency effectively applies its standards.

Procedures for Department Review of Applications for Recognition or for Change of Scope, Compliance Reports, and Increases in Enrollment (§602.32)

In 602.32 (d), the Department again eliminates the effectiveness in applying standards and replaces it with consistency while providing no mention or justification for the change. The concept of effective application is required under federal law and the Department should delete this change.

Senior Department official's decision §602.36

Finally, the Department proposes in 602.36, as mentioned earlier in this comment, to eliminate the requirement that the Senior Department official consider the agency's effective application of standards in the final decision, closing the loop on eliminating the full concept of effective application from the regulations entirely. Under the Department's proposal, any agency that has "demonstrated compliance or substantial compliance when an agency has the necessary policies and procedures, but has not had the opportunity to apply them," would receive " additional flexibility because accrediting agencies should not be penalized when implementing new policies and procedures." This change is against the law and the Department should delete it from its final rule.

[73] https://www.law.cornell.edu/uscode/text/20/1099b

The Department should ensure the adequate maintenance of records in the recognition process (§602.32)

The Department has proposed moving a number of pieces of the recognition process to an on-site review. The Department provides very little explanation of how it will ensure adequate maintenance of records other than to say, "that Department staff will review documents on-site and record their findings accordingly." During the negotiated rulemaking process, Herman Bounds, Director of the Accreditation Group, stated that the Department would only incorporate documents into the public record if it found an agency to be out of compliance with a standard.[74] This is concerning for several reasons. First, the advisory committee is required to weigh in on recognition decisions, review evidence, and offer a recommendation. Without the inclusion of evidence in the public record, NACIQI will not have the ability to substantiate the Department's claims. Secondly, this would severely limit the public record and public transparency, shielding the Department of Education from accountability. The Department will have winnowed the administrative record to such a narrow subset of materials as to be virtually unusable by external third parties. Because NACIQI is a Federal Advisory Committee and subject to associated public records requirements,[75] this has related implications for public accountability. This will also leave an inadequate record to permit oversight of the Department's accreditation processes by the Inspector General of the agency, in violation of the law.[76]

Perhaps the greatest indication that the Department has no intention of conducting any meaningful oversight of accrediting agencies or incorporating documents into the public record at all is in the Department's regulatory impact analysis. The Department anticipates that it would take only six hours to conduct a site review at the agency location: "A file review at the agency would be incorporated into the review of agency applications. Currently, the Department reviews approximately 10 accrediting agencies for initial or renewal applications annually and we expect a file review would take Department staff 6 hours at a GS-14 Step 1 hourly wage rate of $43.42." Under current

[74] https://edstream.ed.gov/webcast/Play/e0818c9c2037481da1573d8447e2d3401d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8, beginning around 6:15:00.

[75] 5a U.S.C. 10(b) requires that, "subject to section 552 of Title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee **shall be available for public inspection** and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist." (emphasis added)

[76] The Inspector General Act of 1978 authorizes IGs "to have timely access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials available to the applicable establishment which relate to the programs and operations with respect to which that Inspector General has responsibilities." (Sec. 6(a) of the Inspector General Act)

recognition proceedings, the Department has previously stated that it takes an analyst a minimum of one month to review an agency's application and can take as much as 2 months.[77] The Department's recently released handbook for accrediting agencies, suggests that Department intends to move a significant portion of the evidence an agency provides to the on-site review.[78] Either the Department's estimate is dramatically understated, or the Department does not intend to conduct a thorough review or incorporate any information into the public record.

Given this, combined with the entirety of the Department's changes, it should delete its proposal to move to an on-site review. If it chooses to move forward with this proposal, it needs to provide evidence and justification that it will incorporate all of the documents it reviews in the public record.

Transparency (602.31)

While we are thrilled that the Department of Education is making efforts to ensure access to public records and proposes requiring agencies to redact PII to better facilitate access, the Department is not currently following federal law related to the advisory committee and requirements under the Federal Advisory Committee Act.

The Federal Advisory Committee Act requires that the "records...which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee… until the advisory committee ceases to exist."[79] The Department also noted, in its most recent notice announcing the NACIQI meeting on June 10th, 2019 (as in prior meeting announcements), that "[p]ursuant to the FACA, the public may also inspect the materials at 400 Maryland Avenue SW, Washington, DC, by emailing aslrecordsmanager@ed.gov…".[80]

In May 2018, I followed this procedure in requesting to view accreditor recognition materials. I followed up on this request on May 14, 2018. For reasons that are unclear, the Department instead provided a FOIA response (not a FACA response) on June 20, 2018. In that initial determination letter, the FOIA offices noted that my "request was forwarded to the appropriate offices within the Department for any responsive documents they may have." (FOIA request number 18-01916-F). When I responded that I had requested the materials under FACA, not FOIA, the FOIA office simply stated on July

[77] https://sites.ed.gov/naciqi/files/2017/03/022417NACIQI.pdf
[78] https://www2.ed.gov/admins/finaid/accred/accreditation-handbook.pdf
[79] 5 USC App. §10(b)
[80] https://sites.ed.gov/naciqi/files/2019/06/2019-12123.pdf

27, 2018, that the "request that we are processing here is being handled under the Freedom of Information Act FOIA 5 U.S.C. §552.," noting that "this is the law that governs the release of federal agency records"—a confusing contradiction to the Department's language in its NACIQI meeting announcement, which directs members of the public to request records under FACA. This is also in direct contradiction to a previous experience requesting to review NACIQI documents under FACA. Following the February 2017 NACIQI meeting, I requested to review documents in person for the Accrediting Bureau of Health Schools (ABHES). I was granted that request and full access to the application and review documents within one week of the request. Almost a full year later, I finally received the documents in question with many pieces missing.

As part of this rulemaking, I again requested to view documents to be able to adequately respond in public comment following the same directions the Department recently posted in the Federal Register. The Department indicated that it needed final approval from the accrediting agency and provided the agency with the date with which the formal approval would be needed. The Department also indicated it would email me the documents once they were reviewed to ensure they did not contain PII instead of allowing me to view the documents in their entirety in person. Conveniently, the accrediting agency missed the deadline and I was unable to review documents pertaining to this rulemaking.

The Department is breaking the law in failing to make available documents for public inspection and copying at a single location in the offices of the advisory committee as required under the law. The Department should accurately detail the process it expects members of the public to follow as part of the requirements under FACA. If this process is no longer the same as the process it posts in the Federal Register, it should detail the process in an update published to the Federal Register to ensure adequate access to public records of the advisory committee.