NEW AMERICA

July 12, 2019

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U.S. Department of Education
400 Maryland Ave., SW
Mail Stop 294-20
Washington, D.C. 20202

RE: Comments to the Department of Education Regarding Proposed Rules for the Secretary's Recognition of Accrediting Agencies and Other Issues [ED-2018-OPE-0076-0644]

To Whom It May Concern:

Thank you for the opportunity to share my comments on these proposed regulations governing accreditation, state authorization, and other assorted issues. I write to express my concern that these proposed regulations constitute a giveaway to poor-quality accrediting agencies and institutions of higher education, at the expense of students and taxpayers.

The Department argues, throughout its proposed regulations, that it is rewriting the rules to encourage greater innovation and to foment competition in the accreditation marketplace. In reality, it removes critical requirements that prevent institutions from running amok with student and taxpayer dollars, and permits accreditors to turn a blind eye to evidence of misconduct, non-compliance, and predatory behavior.

Where the Department argues that competition will drive innovation, it ignores the obvious: that in accreditation, competition immediately becomes a race to the bottom. These proposed regulations will only speed that inevitable drop in quality, by making the lack of rigor government-sanctioned.

Accreditation today is already far too weak. Accrediting agencies don't act quickly or aggressively enough to ensure institutions cease their unacceptable behavior or improve their outcomes for students. The notion that further reducing the standards that accreditors *must* meet in order to maintain recognition could in any way improve quality of institutions or accreditors is logically flawed, ill-advised, and downright irresponsible.

Taken individually, the Department's proposed regulations are deeply problematic and likely to result in reduced oversight and poor-quality colleges run rampant. Taken cumulatively, it's likely to be even worse. The Department has created a tangled web that will simultaneously lower the bar to being an accreditor, lower the bar for institutions to obtain accreditation, and raise the bar for any well-meaning accreditor to take action against an institution that fails to meet its standards. It will create nothing short of a disaster, in which accreditors have neither the ability nor the inclination to ensure the quality of institutions they approve and the Department has no ability to police which accreditors can effectively serve, as required by the law, as gatekeepers to billions of taxpayer dollars annually.

If the Department does intend to rewrite the requirements on accreditors to the point of making accreditation utterly meaningless, it has an even greater obligation to maintain strong oversight by states, particularly the state attorneys general responsible for enforcing the law and protecting student consumers. The proposed regulations around state authorization reciprocity agreements ensure that third party organizations cannot usurp states' own authority to enforce their laws, and the Department should maintain that portion of the proposal in the final rule.

We are available to discuss these comments in greater detail if you have questions or concerns at laitinen@newamerica.org and mccann@newamerica.org. We look forward to continuing to engage the Department on ways to hold accrediting agencies accountable when they give students a false sense of institutional quality, and for ensuring that colleges are accountable for complying with federal laws and regulations to serve their students--and federal taxpayers--well.

Sincerely,

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Director
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Deputy Director for Federal Policy
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The Department's Process Violates the Law and Undermines the Proposed Regulations

The Department refers, throughout the proposed regulations, to the consensus reached by negotiators. In some cases, the fact that consensus was reached is effectively the sole justification the Department provides for a proposed change.[1] For instance, in one such case, the Department states that "in negotiating the proposed regulations, negotiators reached consensus on the processes that accrediting agencies should follow and understood that certain tradeoffs would be inevitable."[2] This language suggests a carefully negotiated balance. However, it is clear to anyone who watched the rulemaking sessions that most of those around the table not representing accrediting agencies themselves had little sense of how these rules work in practice. The Department did not provide estimates of the number of agencies and institutions that would be implicated, or of how the proposed changes could upset the existing balance of flexibility and safeguards for students and taxpayers. Federal negotiators provided few justifications around the table, and some issues were hardly even discussed due to time constraints and an overwhelming emphasis on only a handful of the proposed regulations.

The Department must comply not only with the negotiated rulemaking requirements of the Higher Education Act, but also with the requirements of the Administrative Procedure Act, including that it conduct a "reasoned" rulemaking.[3] In this case, though, the Department chose to stack the deck with an unmanageable agenda, a committee of negotiators stacked heavily in favor of industry, and by starving the negotiations of any real data or information to inform the rulemaking. It turned the negotiated rulemaking into little more than a box-checking effort to ram the process through, bullying negotiators who dared to oppose the Department's proposals and threatening others with promises of worse regulations if they refused to accede.[4] And in doing so, the Department violated the requirements of the APA, basing the proposed regulations (both during negotiations and in this Notice of Proposed Rulemaking) on little more than anecdotes, industry proposals, and ideology.

Collectively, these comments make clear, the Department failed to comply with the requirements of the law throughout this rulemaking; and is hiding behind an illegitimate vote of consensus to

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[1] See, for example, 84 FR 27443.

[2] 84 FR 27445.

[3] *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 52 (1983); *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[4] During negotiations, the Department representative noted that "it's not whatever the Department wants [in a regulation if the negotiators failed to reach consensus]-- it's whatever others around us want. It's what people at the White House want. It's what people at OMB want. It's what people at the Department of Justice want. Maybe other departments that interact with us, maybe others at the Department who aren't currently in the room…. It's out of our hands if it leaves here." (emphasis added) A negotiator quickly commented that the Department's language felt like a threat to negotiators, essentially all of whom agreed in urging the Department to maintain existing regulatory language on the topic under discussion.
https://edstream.ed.gov/webcast/Play/6f53451a9a0044809d01aadcefb3fd0d1d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8

justify changes it knows will be deeply damaging to students. It should obviate these proposed rules and relaunch a rulemaking process to include a committee that more fully includes students' and taxpayers' voices and interests.

The committee make-up was stacked in favor of institutions and accreditors.

The Department pieced together a rulemaking committee that greatly favored industry representatives from accrediting agencies and institutions of higher education, at the direct expense of students and their representatives. In total, the Department established a committee in which 13 of 17 constituencies representatives were industry or Department representatives. Three were volunteers representing interested communities; just one of those was a student. And only one consumer representative whose day job involves understanding federal rules, serving on behalf of legal aid organizations, was invited to join.

In contrast to recent negotiations, the Department declined to include a consumer representative with job responsibilities that include understanding federal regulations. That's particularly important given that--even of the four non-industry representatives--none appeared to have particular expertise on accreditation matters and were better able to engage on other, unrelated issues on the agenda.

Additionally, the Department fought to keep a representative of state attorneys general from joining the committee. It failed to include an AG constituency in the notice inviting nominations from negotiators[5]; it declined to add such a position despite receiving a nomination from AGs; and it was the sole no-vote in adding an AG to the committee when one attempted to petition on during the first day and all other members supported including an AG, at least as an alternate member of the committee.

All of this was despite--or, perhaps, because of--the fact that AGs serve an essential and distinct role from any other member of the committee as an active member of the triad with responsibility for enforcing state laws and protecting consumers. State attorneys general rely on federally recognized accreditors to verify the quality of education at an institution, and they share responsibilities with accreditors to ensure agencies and state AGs are both aware of and responsive to the need for enforcement action. This is a distinct interest from state higher education executive officers, which were also excluded from the committee initially by the Department. Given that the Department was proposing changes to accreditors' gatekeeper roles, likely increasing the need for AGs to monitor and take appropriate enforcement actions; and given the Department's proposals to change the federal recognition process for accreditors, including how the process accounts for state lawsuits and settlements with colleges initiated by attorneys general, it seems clear that AGs should have been at the table. The Department's refusal to do that was little more than an attempt to block another voice for students from joining the table. Particularly egregious, the Department refuses to even take responsibility for this action;

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[5] https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/20181011-nominations-unofficial-fedreg.docx

in the preamble of this proposed rule, it states only that "the committee did not agree to add a member representing this constituency [State Attorneys General] to the full committee…"[6] The Department should rewrite this language to indicate that the vote against adding an AG to the committee came from only one person, the federal negotiator representing the Department.

The number of topics on the rulemaking agenda was not conducive to a fulsome debate.

The Education Department created a rulemaking agenda so long and so varied that it made a reasonable debate of the issues impossible. The agenda itself included over a dozen substantive issues, requiring negotiators to have expertise in everything from program integrity policy (state authorization and accreditation) to federal oversight (the recognition process for accreditors) to financial aid policy (TEACH Grants) to constitutional law (faith-based entities). The Department itself used many different staff to address these issues with the committee, and no single member of the committee had expertise--let alone, in some cases, a passing familiarity--with every one of the issues on the agenda. That's particularly concerning given the legal requirement under the Higher Education Act that the Secretary select "individuals with demonstrated expertise or experience in the relevant subjects under negotiation" -- requiring expertise in all of the subjects, plural, not just one of the many subjects on the agenda.[7]

As New America wrote in an October 2018 blog post, "with all of those issues scheduled to take place on a single panel, it's hard to imagine how the Department will find negotiators with expertise on every one of them -- or how it will even fit a fulsome discussion into just a few sessions."[8] The Department was warned of that fact, by everyone from industry to student groups. As we wrote last year, "On top of concerns about the substance of these regulations, stakeholders from institutional associations like the National Association of Independent Colleges and Universities (NAICU)[9], the American Association of Community Colleges (AACC)[10]; an association of regional accreditors (C-RAC)[11]; financial aid representatives from the National Association of Student Financial Aid Administrators (NASFAA)[12]; student and consumer representatives from Public Citizen[13], a coalition of 62 organizations[14]; a coalition of legal aid

6 84 FR 27408
7 20 U.S.C. 1098a(b)(1)
8 https://www.newamerica.org/education-policy/edcentral/fight-future-higher-education-neg-reg-101/
9 https://www.regulations.gov/document?D=ED-2018-OPE-0076-0027
10 https://www.regulations.gov/document?D=ED-2018-OPE-0076-0109
11 https://www.regulations.gov/document?D=ED-2018-OPE-0076-0116
12 https://www.regulations.gov/document?D=ED-2018-OPE-0076-0085
13 https://www.regulations.gov/document?D=ED-2018-OPE-0076-0017
14 https://www.regulations.gov/document?D=ED-2018-OPE-0076-0043

groups[15]; and our own team here at New America[16] all raised concern over the broad scope of regulatory topics teed up for discussion."[17]

Inexplicably, the Department's solution to the problem of too many issues for negotiators to debate was to outsource the debate to mostly different, non-voting subcommittees. It established three, separate subcommittees: one on distance education issues; one on faith-based issues; and one on TEACH Grants. However, this subcommittee structure minimized some issues in front of the full committee; and took up an inordinate amount of time with other issues as the full committee struggled to understand the content, the tenor of the debate, and the recommendations (such as they were) from the subcommittees. Negotiators were physically unable to attend all of the subcommittees themselves; all three were held simultaneously, making it impossible to join them all. And the subcommittees were not open to the public, as required by the Higher Education Act.[18]

Exacerbating the problem of expertise, the Department also placed a gag order on alternate members of the committee, preventing them from moving to the table during debates. While the Department often provided language about a week in advance, it failed to provide an agenda that would suggest when each topic would be discussed or when an alternate could switch to sit at the table in place of a primary. It sometimes provided new language the morning of negotiations, once attempting to force negotiators to squint at a projector and debate the text while printed copies were being run off. While logistical challenges are par for the course in a rulemaking, the huge number and variety of issues on the agenda meant these problems were far more severe--with far more severe implications--than has typically been the case. The Department also failed to provide a clear description of why it was proposing such language in most cases, particularly during the first session, leaving negotiators to try to read between the lines and determine the intent behind the language (though this NPRM doesn't do much better in that regard). As a result, the negotiator on a given topic--which could cover a great number and variety of sub-topics--was left to identify and explain any concerns alone, in real time, as the Department presented hundreds of pages of regulatory text.

The Department's "consensus" structure broke from precedent and confused negotiations.

The Department also stated that it intended to hold multiple consensus votes. We are not aware of another time in history in which the Department has considered consensus votes binding without requiring *all* negotiators to agree on *all* issues in the final proposed language. This

[15] https://www.regulations.gov/document?D=ED-2018-OPE-0076-0264

[16] https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-intent-form-negotiated-rulemaking-committee/

[17] Ibid

[18] 20 U.S.C. 1098a. Livestreaming made the content of the discussions somewhat accessible (with the exception of periodic outages), but it was not possible to follow along with language proposals during the negotiations.

represented an unprecedented breach of norms around rulemaking, and begs the question of whether there are any limits on the Department's ability to manipulate negotiations in its favor.

Nowhere was this manipulation more apparent than in the Department's specific approach to consensus. It left the "buckets" for votes undetermined until the end of the rulemaking -- in fact, even leaving the number of buckets undefined. This gave the Department an extraordinary advantage. It could, at will, move regulations from one bucket to the next based on which way the wind was blowing. It could push negotiators harder on one bucket than another based on which issues the Department felt most strongly about. And, in the end, the Department did manipulate the buckets to its advantage in several ways.

Though the committee wound up reaching consensus on all issues, the Department did not take a final vote on the entire consensus package, meaning the structural flaws of the consensus vote remain in place. Moreover, the Department structured the order so that the final bucket was voted on with little time left to negotiate, rushing a consensus vote. The Department's language is particularly unclear about how it accomplished this; it writes that, "under the protocols, we placed the issues into three 'buckets'."[19] However, it does not clarify that those buckets remained undetermined and were not provided to negotiators and the public until the final session.

The Department continues to make unacceptable procedural choices.

All of these procedural "irregularities" represent the Department's attempts to undermine the negotiated rulemaking by denying negotiators the opportunity to debate the matters in full. As a result, the consensus votes on these regulations can be considered neither valid nor indicative of general support from any of the communities represented around the table. The process issues associated with the negotiated rulemaking implicate each of the "consensus votes" taken.

Moreover, once the Department did publish proposed rules, it did so with only a thirty-day comment period to cover nearly 100 pages of Federal Register-formatted regulations. The comment period includes weekends and overlaps with a holiday, leaving very little time for negotiators to develop comments in response to the regulations and preamble language. And the Department, on June 20--halfway through the comment period--released an updated Accreditation Handbook that appears to implement several of the changes proposed in these regulations, raising questions about the Department's compliance with *existing* laws and regulations as well as further demonstrating implications of the proposed regulatory changes.[20]

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[19] 84 FR 27408

[20] https://www.ed.gov/news/press-releases/secretary-devos-rethinks-departments-recognition-accreditors

The Department Cites Little Evidence to Support the Proposed Rules

The Department fails to present sufficient evidence that accreditation is a barrier to innovation.

The Department argues, throughout the regulations, that accreditation is currently an obstacle to institutions interested in engaging in innovation.[21] In essence, the argument goes, accreditors prevent institutions from engaging in innovative practices and programs, stifling colleges interested in pursuing promising practices. Yet the Department fails to present evidence either that institutions are currently unable to engage in innovative practices; or that any barriers that do exist in the accreditation space are unreasonable, needless, or removable without a drop in quality and consumer protection. As previously noted, all federal agencies must comply with the Administrative Procedure Act, which effectively requires agencies to conduct a reasoned rulemaking.[22] It is clear the Education Department has not done so in this case.[23]

First, the Department claims that the current regulatory environment has created "steep barriers to entry that may serve to protect market share for established educational providers..."[24] However, there is little evidence that current regulations have created any substantive barrier to innovation.

Consider, for instance, the distance-education sphere. According to available Education Department data, postsecondary institutions enrolled 1.3 million students in distance-education courses in 1997-98.[25] Those figures have increased more than four-fold since, with nearly 6.3 million students enrolled in online courses in Fall 2016.[26] Moreover, the growth of distance learning is present across all sectors and types of accreditors. An analysis of enrollment data from the National Center for Education Statistics finds that, while online enrollment is highest (over half of enrolled students) in the for-profit sector, both the public and private nonprofit sectors enroll nearly one-third of their students in some or exclusively online courses.[27] A recognized accreditor exists exclusively to review and approve online education programs.[28] Every

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[21] See, for example, 84 FR 27405; 27406; 27422; 27423; and 27444, among other instances.

[22] *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 52 (1983); *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[23] The Department appeared to acknowledge its shortcomings, stating that "everything we bring to neg-reg is not always data driven." https://edstream.ed.gov/webcast/Play/6f53451a9a0044809d01aadcefb3fd0d1d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8

[24] 84 FR 27406

[25] https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2000013

[26] https://nces.ed.gov/programs/digest/d17/tables/dt17_311.15.asp?current=yes

[27] Data analysis by the author using the Integrated Postsecondary Education Data System, Fall 2017 Enrollment Survey. The analysis shows that 29 percent of students in private nonprofit institutions, nearly 57 percent in private for-profit institutions, and 32 percent in public institutions, were enrolled in at least some online courses as of Fall 2017.

[28] Distance Education Accrediting Commission.

recognized institutional accreditor includes distance education in its scope.[29] Additionally, the competency-based education field is growing rapidly. A scan published in January 2015 found 52 institutions establishing CBE programs.[30] By the following year, around 600 colleges were in the process of developing such programs.[31] The Department itself has run an experiment to encourage colleges to test their CBE programs; as part of that, the agency shared guidance with all recognized accreditors clarifying their role in reviewing and approving CBE programs.[32] It noted that accrediting agencies are responsible only for performing a substantive change review when an institution opens its first CBE program, and for continuing its other quality assurance activities -- hardly an unreasonable barrier to innovation, and a requirement the Department is proposing to continue in its notice of proposed rulemaking.[33] Over 3,100 institutions of higher education report accepting dual enrollment credit from high school students[34], another innovation shown to increase college-going and credit accumulation among participating high school students.

On the other hand, the Department does not appear to have considered the inverse possibility: that any barriers to innovation are appropriate and effective steps accreditors require to ensure quality and protect students.

The Department cites only consideration given to proposals made by NACIQI (comprised almost exclusively of representatives from institutions of higher education); the Council for Higher Education Accreditation (an association of accreditors and institutions); the American Council on Education (the chief lobbying arm of institutions of higher education); the Senate Task Force on Federal Regulation of Higher Education (which outsourced its work of identifying deregulatory opportunities to the American Council on Education[35]); and of the participants of a Rethinking Higher Education summit convened by the Department in December 2017 (for which a list of participants is not made available, but for which we are aware of no participating advocates for or representatives of students).[36]

Notably absent from this list, however, are citations to the bevy of reports identifying accreditation as inadequately rigorous. The Government Accountability Office wrote in a December 2017 report that 11 of 18 round-table experts, including both accreditors and other

[29] https://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html#RegionalInstitutional

[30] https://www.aei.org/publication/landscape-competency-based-education-enrollments-demographics-affordability/

[31] https://www.insidehighered.com/news/2015/09/10/amid-competency-based-education-boom-meeting-help-colleges-do-it-right

[32] https://www.insidehighered.com/sites/default/server_files/files/ED%20letter%20to%20accreditors(1).pdf

[33] See proposed 34 CFR 602.22(a)(2)(iii).

[34] Data analysis by the author using the Integrated Postsecondary Education Data System, Institutional Characteristics 2017 Survey. The analysis shows that 3,138 institutions accept dual enrollment credits.

[35] https://psmag.com/news/higher-education-isnt-going-to-regulate-itself

[36] 84 FR 27406

stakeholders, "agreed or strongly agreed that inadequate accreditors' standards are a challenge for overseeing academic quality and that accreditors lack effective oversight practices for academic quality."[37] The Department's inspector general found in a June 2018 audit that the Office of Postsecondary Education "does not have adequate controls over the school information that agencies use as evidence to demonstrate that they have appropriate accreditation standards and effective mechanisms for evaluating school compliance with those standards before reaching an accreditation decision," suggesting that current processes may be too lax regarding both innovative and traditional programs.[38] The Department does not collect information from accreditors regarding their gatekeeping activities (i.e., substantive change reviews and initial applications from institutions), nor did it request such information prior to or during this rulemaking; so it cannot say whether the agencies in question fail to approve innovations that prove to be quality, or succeed in denying low-quality innovations. Numerous think tanks, policy experts, and media stories have concluded the same lack of rigor among accrediting agencies.[39]

Even lawmakers from both parties appear concerned with the state of affairs in accreditation.[40] As was written in a white paper on accreditation released by Sen. Lamar Alexander, chair of the Senate Health, Education, Labor, and Pensions Committee, "while many observers of higher education remark that the United States has the best colleges and universities in the world, that status is being put at risk by startling examples of deficiencies in collegiate instruction, academic rigor, and student success." The paper went on to cite examples of poor outcomes from institutions in student learning, academic rigor, student engagement, basic skills, student achievement and attainment, and workforce skills. And as the report notes, "some of these snapshots of student performance and quality were captured at our nation's *accredited* colleges and universities."[41] Similarly, Senate Democrats released reauthorization principles for the Higher Education Act that stated, "the 'triad' system of the federal government, states, and accreditors must be strengthened to meet its obligation to protect consumers, focus on outcomes, and promote continuous quality improvement at all institutions of higher education. In

[37] https://www.gao.gov/products/GAO-18-5

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

[39] See, for instance, https://www.americanprogress.org/issues/education-postsecondary/news/2019/02/15/466350/quality-guarantee-todays-students-recommendations-improve-college-accreditation/; http://www.ihep.org/press/news-releases/new-ihep-report-issues-recommendations-accreditors-strengthen-their-data-use; http://educationcounsel.com/?publication=new-directions-in-regulatory-reform-prospects-for-reducing-regulatory-burden-through-risk-informed-approaches-in-federal-law-governing-american-higher-education; https://www.luminafoundation.org/files/resources/watching-the-watchdogs.pdf; https://www.americanprogress.org/issues/education-postsecondary/reports/2018/04/25/449937/college-accreditors-miss-mark-student-outcomes/; https://www.nytimes.com/2016/10/20/opinion/college-accreditors-need-higher-standards.html; and https://www.wsj.com/articles/the-watchdogs-of-college-education-rarely-bite-1434594602

[40] The Education Department and accreditors themselves appear to be effectively the only ones unconcerned with the state of affairs in accreditation and the repeated failures of accreditors to adequately ensure quality at institutions of higher education.

[41] https://www.help.senate.gov/imo/media/Accreditation.pdf

particular, accreditation must be improved to serve as an effective gatekeeper of federal dollars and a centralized mechanism for improving college quality."[42]

Finally, the Department appears to have ignored the history of innovations in this country that underpin federal regulations requiring accreditor oversight.[43] The Higher Education Act in 1965 provided students with access to federal grants and loans to pursue postsecondary education -- but only at accredited institutions. In 1972, Congress broadened the institutions at which students could access grants and loans to include accredited vocational schools. At the same time, new institutions began to crop up -- many of them low-quality, some alleging to prepare students for occupations for which a degree was not required, a large number of trade schools that didn't fit the traditional model of a college, some correspondence schools, many diploma mills.[44] The law did little to direct accreditors in how they should handle the wide array of new schools -- until 1992, when Congress reauthorized the Higher Education Act and "created the first set of federal standards for how accreditors should do their job and aimed to fill gaps in oversight uncovered in investigations."[45]

To summarize, the Department has failed to provide adequate evidence that the existing regulations are, in fact, barriers to innovation -- particularly barriers to high-quality innovation. The Department has not even defined what "innovation" means in these contexts, instead simply citing the word repeatedly.[46] Nor has the Department provided evidence that these individual regulations are *unduly* burdensome or inappropriate; for instance, the Department asserts that weakening substantive change rules will solve the challenge of burdensome regulations stifling innovation, without ever providing evidence about denials of substantive changes, wait-times for agencies to approve such changes, or citing any other data or information about current substantive change policies and whether they are preventing meaningful innovations from taking hold. The Department has failed to consider a broad array of perspectives, instead deferring to the opinions of self-interested industry members who seek to reduce oversight of their own activities by both accrediting agencies and the Department. And it has failed to contend with the significant evidence that accrediting agencies today are not rigorous *enough* in reviewing institutional activities to protect students and ensure only quality programs gain access to federal dollars. Additional specific examples are given throughout these comments of the Department's failure to cite evidence.

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[42] https://www.help.senate.gov/imo/media/doc/Senate%20Dem%20HEA%20Principles.pdf
[43] https://www.americanprogress.org/issues/education-postsecondary/reports/2015/12/14/127200/hooked-on-accreditation-a-historical-perspective/
[44] https://www.newamerica.org/education-policy/reports/cautionary-tale-correspondence-schools/; https://tcf.org/content/report/truman-eisenhower-first-gi-bill-scandal/; https://tcf.org/content/report/vietnam-vets-new-student-loan-program-bring-new-college-scams/; https://tcf.org/content/report/reagan-administrations-campaign-rein-predatory-profit-colleges/
[45] https://cdn.americanprogress.org/content/uploads/2019/01/09072144/Substantive-Change.pdf
[46] See, for example, 84 FR 27405, 27406, 27423, etc.

The Department's desire to create "competition" among accreditors will create a race to the bottom.

The Department states that one goal of its proposed regulations is to encourage competition. It claims that "competition could allow for greater specialization among agencies to ensure a closer match with the mission of the institutions or programs they accredit," and that "greater competition (or the allowance for competition where there is none today) can mean more accountability when incumbents are being insufficiently responsive to the needs of institutions or programs and their key stakeholders such as students, faculty, alumni, or employers."[47] Similarly, the Department says that while "it is possible agencies would utilize reduced regulatory burden without redeploying resources towards greater oversight of institutions," it believes that "the more likely scenario is that this regulation will actually reduce the need to hire outside firms to prepare materials for submission to the Department." Leaving aside that these are not mutually exclusive possibilities--that accreditors both reduce oversight in the absence of a regulatory obligation to verify institutional quality *and* provide less comprehensive information to the Department--the Department provides little beyond its earnest hope to suggest that competition that improves performance will be the likely outcome.

The accreditation system is a binary one -- approval from any of the Department's recognized accreditors earns an institution access to federal financial aid dollars. Aside from whatever modest impulse exists now for institutions to select one accreditor over another, for which there is little evidence that a desire to be held more accountable drives those impulses, the market seems likely to be driven especially at the lower end of the quality spectrum by a desire to obtain accreditation quickly, easily, and/or cheaply.

ACICS provides an instructive example. At the time of ACICS' loss of recognition from the Department, it accredited nearly 250 institutions. In the 18 months that followed for institutions to obtain alternate accreditation, institutions sought to move to other accreditors. Those that could, did--even once Secretary DeVos announced she would restore recognition to ACICS prior to the expiration of the 18-month period and cancelled the deadline for institutions to move--presumably seeking stability. Those that couldn't, remain with ACICS today. A July 2018 analysis of schools[48] that remained with ACICS found that schools representing nearly half of the remaining enrollment with the agency were from the Education Corporation of American chain, which collapsed less than a year after the Secretary restored recognition.[49] Several other branches were part of the Art Institute, most campuses of which announced closure after an ill-fated, Department-approved sale to the Dream Center Foundation, an organization without expertise in higher education. Another, Florida Technical College, was caught up in allegations from the Justice Department over falsifying high school diplomas to enroll students and settled

[47] 84 FR 27415

[48] https://www.americanprogress.org/issues/education-postsecondary/news/2018/07/03/453079/85-colleges-acics-accredit/

[49] https://www.insidehighered.com/news/2018/12/06/closure-education-corporation-america-raises-questions-about-oversight-and-support

for more than half a million dollars. At a recent public meeting, ACICS acknowledged it was down by many more campuses, and running a deficit of around $2 million.[50]

In other words, it seems clear that, to the extent there is any real market in accreditation, it is a race to the bottom -- something negotiators and subcommittee members pointed out repeatedly during the meetings, and that remains unaddressed throughout the proposed rule. If the Department's regulations lower the floor for the lowest rung of accreditors--as these proposed regulations would--that race will plunge even deeper. The Department acknowledges this exactly once in the proposed regulations, saying that "increased competition among accreditors could have the unintended consequence of encouraging some accreditors to lower standards. It is therefore incumbent on the Department and NACIQI to utilize new accountability and oversight tools provided for in these regulations to properly monitor agencies and mitigate these risks."[51] Yet the Department's regulations also propose to limit what is required of the Department and what is required of (or possible for) NACIQI in its oversight of accreditors, making it unlikely and effectively impossible such oversight would occur.

The Department's Proposal Would Greatly Weaken an Already-Underperformed Role for Accreditors as Gatekeepers

Accrediting agencies already do too little to ensure the quality of the institutions they approve, and to hold them to those quality standards, and weakening existing floors for gatekeeping will further limit accreditors' effectiveness. In 2018, nearly 10 percent of all accreditor actions were to either deny or withdraw accreditation from institutions.[52] Those actions do not account for institutions that may be dissuaded from pursuing or continuing to pursue accreditation by standards that they cannot meet. Nor do they account for the fact that many poor-quality institutions are concentrated in poor-quality accreditors -- highlighting the risk that if poor-quality accreditors are permitted to serve as gatekeepers to hundreds of billions of dollars in federal money, they will use that power with the worst-of-the-worst institutions. For instance, when ACICS-accredited institutions sought alternative accreditation, 111 schools were able to receive accreditation from another agency within 18 months -- but fully 85 could not, and another 61 closed completely prior to the deadline.[53] In essence, with the poorest-quality accreditor in recent history, more than half either couldn't persuade another agency to grant them approval or succumbed to their own shortcomings and shuttered before they could seek or receive alternative accreditation.

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[50] https://www.insidehighered.com/quicktakes/2019/06/04/embattled-accreditor-projects-losses-after-closure-member-colleges

[51] 84 FR 27405

[52] Author's analysis of the CHEA Almanac. Analysis includes only institutional accreditors (both regional and national). Data available at https://www.chea.org/chea-almanac-online#summary-year2018

[53] https://www.americanprogress.org/issues/education-postsecondary/news/2018/07/03/453079/85-colleges-acics-accredit/

Gatekeeping doesn't happen as the default. In a recent article, the head of one accrediting agency said, "with the public expecting more of higher education and, frankly, more of accreditation, the commission finds itself spending more time on quality assurance," which the article notes is a reference to "who is getting accreditation in the first place."[54]

However, the Department's proposed rules would greatly reduce the limited barriers that exist now to keep poor-quality or fraudulent institutions out of the system. The Department should instead seek alternative solutions that would continue to *raise* the floor of which institutions may be considered accredited. Some specific examples follow.

The Department's proposal would allow toxic assets to proliferate once accredited--even after they have failed--in an effort to deny student loan discharges.

The Department proposes in proposed 34 CFR 600.32 to permit institutions to purchase closed campuses without accepting the liability for those institutions (beyond the current award year and a single award year prior). In contrast, current policy offers no such blanket-limitation of liability. The Department's proposed language here is premised on the notion that it is inherently better for students to have such schools continue to operate, albeit under different ownership.[55] But in reality, this would have the unfortunate effect of allowing college owners to profit off of an institution they drove into the ground by selling the remaining assets for pennies on the dollar. And at the same time, students will be duped into thinking they're being offered a new educational opportunity, potentially losing access to closed school loan discharges in the process.

The Department's reasoning for allowing institutions to purchase closed campuses with only limited liability assumes that it's always better to have such schools continue to operate, under different ownership. However, recent history shows that is not necessarily the case. In some cases, toxic assets are unsalvageable -- and allowing another entity to swoop in as the "white knight" might, in fact, mean only that more cohorts of students and more taxpayer dollars are subjected to continued poor quality.

Take, for instance, the collapse of Corinthian Colleges. Following closure of the school, ECMC Group purchased many of the campuses. ECMC's Zenith Group sought to reduce tuition, rework curriculum, provide career services, halt predatory marketing practices, and end low-performing programs. Two years and half a billion dollars later, Zenith shuttered nearly all of the remaining Corinthian campuses, saying they were unsustainable and continued to show poor outcomes for students. At the same time, students who opted to continue enrollment in the programs lost

[54] https://www.theatlantic.com/education/archive/2019/06/what-its-like-when-your-college-shuts-down/591862/?utm_source=twitter&utm_medium=social&utm_campaign=share
[55] See, for example, 84 FR 27416: "We believe that in some cases, such as when an institution is ending its participation through an orderly closure, **it is in the best interest of the students** to have an opportunity to complete their academic program at their chosen institution." (emphasis added)

eligibility for $435 million in closed school loan discharges, all for an education that still failed to pay off for many of them.[56]

The Dream Center purchase yields another recent example. EDMC sold many of its colleges--including Argosy University, the Art Institutes, and South University--to the Dream Center Foundation, a Christian organization with no expertise or experience in higher education. A year later, it announced it would close 30 of the more than 100 campuses; barely a month later, Dream Center entered receivership and shut down virtually all of its remaining campuses.[57] Analysts argued that Dream Center was simply offering the same high-cost, low-value programs and was unable to turn the business around.[58] According to Dream Center, the schools still enrolled more than 53,000 students upon filing for receivership -- likely still a huge potential liability owed to the Department of Education in the form of closed school discharges, borrower defense claims, unpaid refunds, and even as much as $16 million stolen from students' federal aid refunds by Argosy University.[59]

In short, allowing these sales of failing colleges only extended the amount of taxpayer money and the number of students who attended the schools and prolonged the school's life. But the failing schools continued to fail and the campuses still ultimately closed. The schools continued to accrue liabilities to the federal government. Students were left indebted, having wasted their time and their money. If the Department moves forward with these proposals, such examples will very likely become the norm, not the exception. More poor-quality and fraudulent colleges will be recycled into poor-quality and fraudulent colleges owned by a different company. More students will be harmed. And taxpayers will likely not come out ahead, however much it reduces closed school discharge liabilities in the short run, as new liabilities continue to accrue and additional Title IV aid continues to flow.

Yet beyond incenting colleges to purchase failed campuses, the Department has provided no justification or evidence to support its proposal -- nor does the preamble contend with this extremely recent history of failure under the exact circumstances the regulations would promote. In light of other proposals from the Education Department,[60] it seems likely that the Department's unstated but intended goal with this proposal is to provide fewer borrowers with closed school discharges by guiding them into teach-outs before they apply to have their loans cancelled. However, even if fewer closed school discharges are approved for students, the risk remains that the school will continue to accrue borrower defense liabilities, offsetting any reduction in federal liabilities and potentially even costing more in the long run.

[56] https://www.insidehighered.com/news/2017/11/09/zenith-education-will-close-all-three-its-campuses
[57] https://www.insidehighered.com/news/2019/01/21/nonprofit-dream-center-institutions-placed-receivership
[58] https://www.insidehighered.com/news/2018/12/10/dream-center-colleges-closing-years-end
[59] https://www.nytimes.com/2019/06/21/business/dream-center-argosy-university-art-institutes.html
[60] See ED-2018-OPE-0027, proposed Institutional Accountability regulations.

Given the lack of evidence in support of this proposal, and the strength of examples against it, the Department should withdraw the proposal and require that institutions accept the liability of an institution when they purchase a campus that has failed. This helps to ensure some safeguards around which institutions will be willing to purchase a closed campus, eyes wide open.

At a minimum, the Department must at least place the burden of proof on the purchasing school. The Department could require that the purchasing school accept all past liabilities for the closed location, except as determined by the Secretary on the strength of the purchasing school's application. This would at least retain some discretion for the Department to prevent inappropriate or high-risk purchases.

The Department's proposed changes to substantive change approvals will let colleges shape-shift without oversight.

Proposed changes to the approval of additional locations and branch campuses skirt Congressional intent.

The Department proposes, in 34 CFR 602.22(c), to exempt certain institutions from the requirement that they receive approval from their accreditors to open new locations. Specifically, the proposal permits institutions that have successfully competed at least one cycle of accreditation and had two additional locations approved, that are not on probation or been subject to a negative action over the prior three years, and that are not under provisional certification to open additional locations without first applying to the accrediting agency. In fact, such institutions would not even be required to notify their accreditor for as much as a month after opening the school. Nor would the accreditor be required to conduct site visits to all such campuses -- only to a representative sample of additional locations.

In crafting this proposal, the Department interprets the statute in an overly broad way. The 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.[61]

These statutory requirements grew out of a long history of problems in which for-profit colleges sought to expand rapidly and skirt other federal requirements by opening new campuses across the country. The Nunn Commission found significant evidence of these problems, reporting that "the Inspector General testified that branch campuses have been systematically used to circumvent Education Department rules that require a school to be in operation for two years before participating in federal student aid programs," and that other institutions had rapidly increased their access to federal loan dollars, noting that at one college, "many of these students were homeless street people brought by bus from other major cities…. The school closed owing refunds to many students who either were enrolled or had withdrawn previously."[62]

[61] 20 U.S.C. 1099b(c)(4) and (5)

[62] https://files.eric.ed.gov/fulltext/ED332631.pdf

The Department states that it is proposing to exempt some colleges from these requirements because the requirements are "overly prescriptive."[63] But in reality, the Department is proposing to not only perpetuate a scheme that allows colleges to skirt that statutory requirement by creating a definition of "additional location" that differs from the definition of a "branch campus," but also to exempt even those additional locations from the most basic oversight by an accreditor.

Moreover, the Department failed to provide evidence of such prescriptiveness, such as wait times for typical substantive change approvals; approval rates for substantive changes relating to the opening of additional locations; or burden estimates for the application required of institutions. Additionally, requiring approvals and site visits is an important component of oversight. As Michale McComis of the Accrediting Commission of Career Schools and Colleges (ACCSC) testified before the House Committee on Education and the Workforce in 2017, "growth of an institution, to include the additional of geographically distant campuses, should require greater oversight, not less. Accreditors should be required to visit and evaluate fully each campus or location where federal Title IV financial aid dollars may be spent by students."[64]

The 'safeguards' the Department included in the proposed language (requiring institutions to seek approval for new locations if they have been on a negative action or if they are on provisional certification with the Department) exclude many circumstances that could be deeply concerning. For instance, that language fails to account for the fact that, elsewhere under these proposed regulations, changes to the regulations mean that fewer accreditors will take such negative actions, even where colleges are out of compliance with their standards.[65] The interactive effects of simultaneously weakening accreditation requirements, reducing oversight of accreditors, and reducing oversight of institutions by accreditors will mean that accreditors rarely actually take such actions. They will be under no obligation to do so, and in some cases may lack the political and/or legal cover to take action when they deem it appropriate anyway. It also fails to account for an institution where an action has been initiated but is not yet final due to a drawn-out hearing process; or for an institution that has been sanctioned by a state. The Department proposes to require two approvals of an institution's additional locations before the school can open locations without approval; but fails to recognize that approvals of campus locations may be as--or even more--necessary for schools with many campuses, where they are scaling rapidly and poor quality or abusive practices can extend to many students and many taxpayer dollars quickly.

The Department should instead propose to require approvals of all locations, and site visits to all approved locations within six months after opening. Additionally, it should add the acquisition of any other institution, program, or location (as outlined in proposed 34 CFR 602.22(a)(2)(vii)) to the required representative sample of site visits to additional locations as proposed in 34 CFR 602.22(d).

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[63] 84 FR 27428
[64] https://edlabor.house.gov/imo/media/doc/McComis%20Written%20Testimony042717.pdf
[65] See proposed 34 CFR 602. 18(c) and 602.20(a), among other proposed changes.

Moreover, under proposed 34 CFR 602.24(a), the Department's language would exclude a description of the operation, management, and physical resources of a branch campus from the pre-approval documents that accreditors submit. That would mean only a description of the program(s) to be offered at the branch campus and cash-flow projects for the campus would be required for accreditors. But that falls short of what is required by the statute -- namely, that " any institution of higher education subject to [an accreditor's] jurisdiction which plans to establish a branch campus **submit a business plan, including projected revenues and expenditures**, prior to opening the branch campus" (emphasis added).[66] It also falls short of what could be considered, by a reasonable person, adequate information on which to judge the appropriateness of opening a branch campus or the quality of education at the campus, as accreditors are supposed to do. The Department cites only its concern with the burden of the existing requirements, noting that it believes the current requirements are "unnecessarily prescriptive,"[67] and fails to conduct any sort of cost-benefit analysis regarding the rapid pace of approvals and expansions that could occur without adequate approval.

Proposed changes to the approval of direct assessment programs violates the statute.
The Department states in proposed 34 CFR 602.22(a)(2)(xi) that accreditors will be required to conduct substantive change reviews for each direct assessment program. While we have no objection to including this language here, given that direct assessment programs do, in fact, constitute a relatively unusual and untested delivery mechanism, it is important to consider the interactions of these approvals with other regulations.

Specifically, the Department cannot permit accreditor approvals of direct assessment programs to replace the Department's own approvals of such programs. The statute requires that, for a direct assessment "program being determined eligible for the first time…, such determination shall be made by the Secretary before such program is considered to be an eligible program."[68] The Department's language as proposed during the negotiated rulemaking in proposed 34 CFR 668.10(a) and (b), the Department appears to suggest exactly that -- that the Department will not approve each direct assessment program as stated by the law and that the accreditor will, instead, be responsible for doing so. The Department should instead reread the statute and require that direct assessment programs be approved both by the accreditor *and* by the Department.

The fast-track approvals of substantive changes will mean rubber-stamping by accreditors.
In proposed 34 CFR 602.22(a)(3), the Department proposes that substantive changes regarding changes in programs or delivery methods, changes 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 be approved by accreditation staff, rather than the agency's official decision-making

[66] 20 U.S.C. 1099b(c)(4)
[67] 84 FR 27430
[68] 20 U.S.C. 1088(b)(4)

body. We are pleased to note the Department agrees that the proposed changes here are among the "most significant"[69] in this rule. However, we disagree that the Department's proposal will allow accreditors "to focus on more significant and potentially risky changes."[70] The types of substantive changes proposed in this rubber-stamp approval process are themselves exceedingly risky.

This concept downgrades substantive changes--approvals or denials of applications for a college to fundamentally change its practices--to a nontransparent and unaccountable set of staff. Accrediting agency commissions are required, by law, to include at least one public member per six members; and to exclude conflicts of interest among members.[71] There are no such requirements around the employees of accrediting agencies. Nor is there transparency into the actions of accrediting agency staff to the extent there may be for accrediting agency commissions.

The Department appears clearly interested in establishing a rubber-stamp approval process for the substantive changes named in the proposed rule. As it states in the preamble, "an institution's application may be held for several months before it can be reviewed and approved," which it states can "discourage and delay changes in programs that could otherwise be beneficial to students."[72] It also states that it is proposing these changes to "encourage timelier approvals"[73] -- not decisions, or denials, but "approvals." This suggests the Department both anticipates and supports institutions' efforts to ensure their approvals skate through.

But those are exceptionally risky changes to institutions' operations. As Kevin Carey wrote in *Highline*, for instance, online program management companies (OPMs) "are transforming both the economics and the practice of higher learning."[74] As he writes in the article, one such institution--Concordia University--was "once a small, respected Lutheran teachers college. After creating an online master's program with a Silicon Valley-based OPM called HotChalk, by 2015 Concordia had become the single biggest provider of education master's degrees in the nation. (It's currently the third-biggest provider.)" In large part, that was driven by a contract with an OPM called HotChalk, which received as much as 80 percent of the tuition revenue -- and was alleged in a whistleblower lawsuit to have run "a "classic boiler room" in which recruiters employed misleading practices to sign up students, including offering them "phony 'scholarships.'"[75]

Yet in these proposed regulations, the Department has asked not only to have accreditors approve substantive changes quickly, but even to give them an expedited, maximum timeframe for approvals in the case of outsourcing agreements--not less than 90 days, or 180 days if the staff

[69] Ibid
[70] Ibid
[71] 20 U.S.C. 1099b(b)
[72] 84 FR 27427
[73] Ibid
[74] https://www.huffpost.com/highline/article/capitalist-takeover-college/
[75] Ibid

take advantage of an extension. Accreditors may be ill-equipped to evaluate these contracts, and pressured to approve them without a fulsome review by an arbitrary deadline (supported with no justification in the proposed regulations). Moreover, the Department admits it has no clue how often these substantive changes are submitted or approved.[76] The Department should eliminate these deadlines and permit accreditors as long as they need to complete their review of outsourcing contracts and institutions' applications.

The Department should eliminate the language permitting expedited and sped-up approvals of substantive changes, given that they are neither advised nor justified. However, should the Department maintain the language, it should--at a minimum--require heightened transparency around any decisions made by staff, as well as decisions made by accrediting commissions. Specifically, the Department should require that accreditors publish all substantive changes on their websites alongside commission actions; clarify in those publications which were approved by staff and which were approved by commissioners; and report all of that information to the Database of Accredited Postsecondary Institutions and Programs (DAPIP) to ensure it is available both to the Department and to the public. Additionally, the Department should review this information closely in their reviews of accreditors' recognition proceedings to ensure oversight of staff decisions, incorporating that requirement in 34 CFR 602.32.

The Department should strengthen its teach-out protections for students.

The Department should strengthen its proposed definition of teach-out agreements.
In proposed 34 CFR 600.2, the Department proposes to add a new definition explaining what a teach-out agreement is. It also proposes to include a variety of requirements for accreditors' approvals of teach-out agreements in 34 CFR 602.24. However, those requirements should be included in the teach-out agreement definition itself. Specifically, the Department should incorporate the concepts in proposed 34 CFR 602.24(c)(6) addressing the requirements that teach-out agreements must be accompanied by a complete list of enrollees; a plan for disclosures to students regarding closed school discharges and state refund policies; a record retention plan for students; information around the number and types of credits the receiving institution will accept; and a statement to be provided to students regarding the tuition and fees and credit-transfer policies of the receiving institution. This information could be provided in both sections, using virtually the same language; and/or could be included only in the definitions section, with a cross-reference to the definition included in the accreditor procedures under 34 CFR 602.24.

Namely, this information is critical for institutions to understand. The Department has not previously included a definition of teach-out agreements, and there is not always consistency from one accrediting agency to another. As stated in a previous comment to the Department on another proposed regulation,[77] the Center for American Progress and New America recently

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[76] https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHShearing.pdf, pages 47-48
[77] https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-borrower-defense-proposed-rule/

explored the standards for all regional and national accrediting agencies related to closures and teach-out plans and agreements.[78] In doing so, it is clear that policies are not consistent across agencies, particularly where teach-out agreements are concerned. For instance, one agency provides teach-out agreements are only for those within a year of graduating; other students are considered transfer students, without the protections promised to teach-out students. Many agencies permit the institutions teaching out students to tack on extra costs and fees, provided they notify the students of those fees, meaning the program may be out of reach for many students. None of the policies expressly require in their standards that institutions arrange teach-outs in the same modality as the original program--for instance, offering brick-and-mortar teach-out options for students in a closing brick-and-mortar institution, or online teach-out agreements for a closing distance-education institution--putting students who don’t want to pursue a different modality in a difficult position. And in practice, it can be difficult to find teach-out arrangements for some more niche programs, so some students may fall through the cracks in establishing teach-out agreements. Few accreditors list standards beyond geography, costs, and program type that they consider in approving or rejecting proposed teach-out arrangements, although some regional accreditors require that teach-outs be offered by institutions with regional accreditation only.

In other words, these requirements will be new to institutions. Because they represent crucial protections for students, and may be required from accrediting agencies more often than has been the case in the past, they should be included in the definitions section, where institutions are more likely to seek guidance regarding the types of materials they must prepare for a complete and qualifying teach-out agreement.

The Department should also further strengthen that definition with the inclusion of several other components, as recommended in a proposal from an accrediting agency and a legal aid subcommittee member.[79] Specifically, the Department should add language clarifying that the institution submitting a teach-out agreement for approval must provide evidence to the accreditor that the institution providing the teach-out to students is financially sound and in good standing with the Education Department, accrediting agency, and state authorizing agency; a report that accounts for the status of any unearned tuition, account balances, and refunds due for currently enrolled students (something that takes on increased importance in light of Argosy University’s recent theft of millions of dollars in student aid dollars as the college was circling the drain); a commitment to refund any tuition and fees not used in full; and assurances that a complete academic record and official transcript will be provided to each affected student at no cost to them. The institution should also be required to set aside sufficient funds for the teach-out to ensure that students will not be expected to pay higher tuition or fees to complete the teach-out agreement than they otherwise would. For teach-out agreements to provide effective and positive opportunities for students to complete their programs after closure, without regret, these minimum conditions are critical -- and with earlier requests for agreements by accreditors,

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[78] Available from these organizations upon request.

[79] https://s3.amazonaws.com/newamericadotorg/documents/Teach-Outs_Reg_Proposal_FINAL.pdf

they are more achievable than in the current system, where institutions are often scrambling to put together agreements while locking the doors behind themselves.

While the Department was required to discuss these proposals during the full-committee negotiations, the specific question of whether the conditions of a teach-out agreement should be included in the definitions section or in the accreditor procedures was only raised during the subcommittee. The Department revised the original proposal from the subcommittee members and shared language with the subcommittee that already lifted the above-mentioned requirements out of the definitions section. Moreover, these conditions (nor their appropriate placement) were not individually discussed in depth by the full committee, where the emphasis was on the triggering events requiring a teach-out plan or agreement and the conditions were largely skirted during the discussion. Thus, the Department must consider these suggestions individually and provide justification if it chooses not to accept the recommendations laid out in this section.

The Department should strengthen student and taxpayer protections in preaccreditation. In proposed 34 CFR 602.23(f)(ii), the Department proposes to require that accreditors insist on a teach-out plan from preaccredited institutions. However, while we support this proposed change, a teach-out plan does not adequately ensure that students will be protected in the event that the accreditor ultimately denies the school accreditation.

Instead, the Department should require a teach-out agreement is obtained, and adequate funds are set aside to implement the agreement, in the event that the school does not obtain accreditation. Preaccreditation indicates an institution may obtain full accreditation, but it does not guarantee it. A teach-out agreement would be appropriate, particularly if the agency has any concerns with the institution's compliance upon its first evaluation after granting candidacy status. The Department should amend its proposed regulations to require a teach-out agreement earlier.

Additionally, in proposed 34 CFR 602.23(f)(iii), the Department proposes to add unlawful provisions allowing preaccredited institutions to access federal aid dollars for up to 120 days after being denied full accreditation in order to complete a teach-out agreement. However, this is not appropriate; and the Department should not permit institutions that have proven themselves unable to meet accreditor standards to continue accessing federal aid dollars. Primarily, the Department does not have the statutory authority to extend Title IV dollars to unaccredited institutions; the Higher Education Act requires that institutions eligible to receive federal aid dollars be accredited and authorized by the state.[80] Once an accreditor has denied accreditation to an institution, it no longer meets the statutory requirements. Instead, the Department should require teach-out agreements from preaccredited institutions earlier, including a set-aside of

[80] 20 U.S.C. 1001 and 1002

adequate funding to complete the teach-out, to ensure students are protected in the event of a denial of accreditation.[81]

Teach-out plan and agreement requirements must be much stronger.

The Department's willingness to consider proposals from negotiators regarding changes to improve the timing and quality of teach-out agreements is commendable.[82] However, the proposed regulations as listed in the notice of proposed rulemaking fail to make meaningful changes to improve the options for students following a school closure.

The Department should be extremely familiar with the shortcomings of the current system. For instance, only a few months ago, the Education Corporation of America collapsed, leaving nearly 20,000 students in the lurch. Shortly before ECA's closure, while it was permitted to continue enrolling new students, the Department released its letter of credit despite the school remaining on provisional certification.[83] Similarly, EDMC sold many of its colleges--including Argosy University, the Art Institutes, and South University--to the Dream Center Foundation, a Christian organization with no expertise or experience in higher education. A year later, it announced it would close 30 of the more than 100 campuses; barely a month later, Dream Center (DCEH) entered receivership and shut down virtually all of its remaining campuses.[84] The Department apparently released nearly $40 million of a DCEH letter of credit *back* to the schools, including funds to support a teach-out that was not completed before the school collapsed.[85]

Given the Department's apparent interest in improving the quality of teach-outs, it must think critically about the difference between a teach-out plan and a teach-out agreement. Colleges have claimed stigma around requesting a teach-out plan or agreement -- arguing that if it is public knowledge they are required to request a teach-out, they risk losing students. The Department has an opportunity to reset that narrative and put the interests of students and taxpayers, not institutions, first, by making the requirement of teach-out agreements more common and automatic. In the absence of federal regulatory requirements, it seems clear that accrediting agencies will not step up and require such agreements themselves. The results will be better for all parties -- for the Department, for taxpayers, for students, and even for schools and accrediting agencies.

[81] The Department sometimes claims that neither it nor an accrediting agency can *require* an institution to obtain an teach-out agreement, because it requires the acquiescence of a third-party institution. However, both can condition Title IV eligibility and/or approval, respectively, on receiving a teach-out agreement; and by making that requirement earlier in the process, can give institutions more time to find a willing institution and more incentive to set aside the funding needed to establish an agreement.

[82] Proposed 34 CFR 602.24

[83] https://theintercept.com/2019/04/12/betsy-devos-for-profit-colleges/

[84] https://www.insidehighered.com/news/2019/01/21/nonprofit-dream-center-institutions-placed-receivership

[85] https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHShearing.pdf

To truly change practice, the Department must clarify when it expects an accreditor to request a teach-out plan versus a teach-out agreement, and hold accreditors accountable for taking those steps.

Specifically, the Department should move the provisions dictating what must be incorporated in a teach-out agreement to the definitions. (See comments regarding proposed 600.2, definition of a teach-out agreement.) It is critical that institutions know where to find these requirements, because they are the ones expected to identify and establish the agreements that will make them feasible. A "whisper-down-the-lane" from the accreditor standards to the institutional eligibility requirements will serve no one well.

The Department should require a plan for institutional records, as well as a retention plan for student records. These documents could provide critical information about the college's operations in the future, and should be preserved. This should be incorporated into the definition of a teach-out agreement, alongside other baseline requirements.

Finally, and most importantly, the Department should separate out for which events an accreditor must require a teach-out plan and for which are the events severe enough that a teach-out agreement should be requested. Accreditors have a bad habit of only asking for teach-out plans, until it becomes too late to identify a high-quality partnership. The Department itself acknowledged the challenge of continuing education near the end of a school's operations, noting that "a precipitous closure may be preceded by degradation in academic quality or student services."[86] A teach-out plan is too little, and often, too late.

The Department must indicate through the regulations that very severe events that are most indicative of likely closure should require a teach-out agreement. The following events were identified by an accreditor and a legal aid representative as rising to the level of indicating a need for a teach-out agreement:[87]

- **Heightened Cash Monitoring:** While the subcommittee members identified both HCM1 and HCM2 as requiring a teach-out agreement, some negotiators around the table raised concerns about the financial responsibility composite score. However, HCM2 status is a much more severe status, not precipitated solely by a failing composite score, and demands greater actions. The Department itself already flags this status for students on its College Scorecard; and numerous high-profile, now-closed institutions were on HCM2 prior to closure. Moreover, the committee agreed to add a teach-out plan requirement for a determination by the independent auditor that a private institution is a going concern, indicating an adverse opinion, or finding a material weakness related to financial stability. All of , those events arel very severe and indicative of imminent risk of closure; the same logic should hold true for any of them -- that to protect students and taxpayers, the Department should require a teach-out agreement in any of those cases.

[86] 83 FR 37627
[87] https://s3.amazonaws.com/newamericadotorg/documents/Teach-Outs_Reg_Proposal_FINAL.pdf

- **Probation or equivalent status:** The subcommittee members proposed to require a teach-out agreement in the case of probation or an equivalent status. The Department instead proposed to move that to a requirement for a teach-out plan. However, probation or show cause, or an equivalent status, is an immediate precursor to closure. The Department should require that such actions precipitate a request for a teach-out agreement, in the event that the institution is not able to remedy its non-compliance.

Records released by the Education Department regarding ACICS' email records submitted to the agency confirm why these changes are so necessary. Back in August 2014, shortly after the closure of Corinthian Colleges, the then-head of ACICS wrote that "in my opinion ACICS is quite weak in this area [closures].... The Criteria state that ACICS is to be notified 'as far in advance as possible' of plans to cease operations. That leaves much room for interpretation and the school defines 'possible'.... Again, the criteria do not specify the timing for submitting teach-out plans…. If the plan comes in the night before and we can't conduct the appropriate due diligence the campus may close without the necessary approvals."[88] In other words, left to their own devices, accreditors fall far short -- and some may even feel they don't have discretion as to how early they can require a teach-out plan or agreement. The Department has both an opportunity and an obligation to correct this lack of clarity driving colleges to close without adequate protections for students.

The Department's Proposal Would Reduce Accreditors' Enforcement Against Poor-Quality Colleges

Among institutional accreditors' actions in 2018, nearly 30 percent were to place institutions on notice/warning, probation, or show cause.[89] But given the relative rarity of accreditor actions--and especially the uncommonness with which accreditors ultimately withdraw accreditation from an institution--it is clear that the Department must set parameters around a reasonable amount of time for which an institution may be non-compliant and the length of time for which an accreditor may drag out their eligibility for federal aid by failing to take a withdrawal action.

The Department should not permit institutions to unlawfully accreditor-shop.

Current regulations prevent institutions from accreditor shopping. By and large, colleges may not change accreditors without demonstrating reasonable cause; and they may not maintain multiple accreditors without designating one as the school's accreditor for purposes of Title IV eligibility. This prevents institutions from evading oversight by accreditors by running to an accreditor with lower standards when action from their current accreditor appears imminent.

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[88] https://twitter.com/EduBenM/status/1140965852357038080

[89] Author's analysis of the CHEA Almanac. Analysis includes only institutional accreditors (both regional and national). Data available at https://www.chea.org/chea-almanac-online#summary-year2018

However, the Department's proposed changes to the regulations would permit institutions to more easily switch to a new accreditor and/or maintain a back-up accreditor, permitting them to skirt accreditors' enforcement (see proposed 34 CFR 600.11). The language would effectively require the Department to approve institutions' applications to change accreditors, or to maintain multiple accreditation, based on information submitted by the institution. In short, this will guarantee that accreditation becomes a race to the bottom, with poor-quality colleges virtually untouchable and poor-quality accreditors serving as their refuge.

These proposed changes run contrary to the statute. The law requires the Secretary *not* to recognize the accreditation of an institution seeking to change accreditors, unless the institution can demonstrate reasonable cause and submits all relevant materials.[90] And it requires the Secretary *not* to recognize the accreditation of institution that maintains accreditation from more than one agency, again unless it demonstrates reasonable cause and submits all relevant materials, and unless it designates one such agency as its accreditor for the purpose of accessing Title IV dollars.[91] In the statute, the burden of proof is clearly on the institution of higher education seeking a change -- and the Department is clearly not intended to presume "reasonable cause" without a strong justification for doing so.

On the other hand, the proposed regulations say that the Secretary will *not* determine cause to be reasonable, justifying a change in accreditors, in only a handful of circumstances -- namely, if the institution has seen its accreditation revoked or if the institution has been placed on probation within the preceding 24 months.[92] And the Department must determine an institution's multiple accreditation to be "reasonable," *unless* that institution has seen its accreditation revoked or been placed on probation or a show cause order within the preceding 24 months.[93] Under the proposed changes, the burden of proof lies with the Education Department, not the college, to demonstrate an application for change of accreditation or dual accreditation does not meet the threshold of "reasonable cause."

The proposed language will also have the effect of driving poor-quality institutions to bottom-feeder accreditors. In the current system, many institutions that wind up on probation or show cause are first under some lesser action by their accreditor (such as monitoring or a warning), which may provide the institution plenty of lead time to decide to jump ship and seek accreditation from another agency. Moreover, under other proposed changes within this notice of proposed rulemaking, accreditors are less likely to take serious actions like probation or withdrawal of accreditation than they are now.[94] At the same time, the Department is signaling to colleges with this language that it will approve virtually all requests to change or add accreditors provided they have not yet triggered the sanctions named in the regulations -- potentially even creating an incentive for institutions to accreditor-shop in the meantime. It's an

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[90] 20 U.S.C. 1099b(h)
[91] 20 U.S.C. 1099b(i)
[92] Proposed 34 CFR 600.11(a)(1)
[93] Proposed 34 CFR 600.11(b)(2)
[94] See proposed 34 CFR 602.18(c) and 602.20(a)(2), for example

open invitation to colleges to switch accreditors rather than accept a sanction designed to prevent poor-quality and non-compliant colleges from continuing to access federal aid dollars. To the extent any market exists in accreditation, it is one that favors the agencies with the lowest standards -- and will be even more so under the proposed regulations.

The Department should maintain the current requirements that set a rigorous bar for institutions of higher education to receive approval to change accreditors or maintain multiple accreditation.

If the Department fails to do so and instead proceeds with lowering the bar for approvals, it should at least align the language between both provisions (the change of accreditor and multiple accreditation) to require that the Secretary "does not determine such cause to be reasonable if" the institution has been subjection to probation, show cause, and/or withdrawal of accreditation, as currently listed in the rule.[95] The Department should not prematurely and arbitrarily limit its own discretion, given that the individual circumstances related to an institution may not be covered by the limited examples given in the proposed rules.

The Department should also make two further changes to the proposed language if it chooses to proceed with it. First, the Department should include *any* accreditor sanction on the list of circumstances precluding approval for either a change of accreditors or an addition of a new accrediting agency. Even short of probation or show cause, warnings may indicate an institution is non-compliant with accreditor standards and may be subject to such a sanction in the near future. There is little reason to permit such institutions automatic access to an exemption, particularly in the absence of any evidence of the types of 'unfair treatment' the Department cites, and given the market failures that will be exacerbated under such a system.[96] Additionally, the Department should ensure that all final accreditation materials submitted by an institution as part of a request to change or add accreditors are available to the public, whether or not the request is approved by the Department.[97] This will provide an important check on the institutions submitting information; ensure that states and other accreditors are aware of the institutions that have shopped for alternative agencies; and allow for analysis and recommendations to support future policymaking.

The proposed definition of "religious mission" means nearly any institution could claim exceptions to accreditor standards.

The Department proposes, in 34 CFR 600.2, to add a new definition of religious mission. However, it is an exceptionally broad definition, with implications for the accreditation of religiously affiliated institutions. In fact, given the proposed changes to the religious mission definition, these changes could implicate the entire accreditation system, through the cropping up of institutions

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95 The language quoted in this sentence is currently used in proposed 34 CFR 600.11(a)(1)(ii), but not in proposed 34 CFR 600.11(b)(2)(i).

96 84 FR 27414-27415

97 Providing such materials through FOIA is inadequate, given long wait times, heavy redaction, and a lack of awareness among the public as to when or which institutions have made such a request. The Department should instead provide the information more broadly.

that are religious-in-name-only. Specifically, the definition would encompass any institution with a published mission that mentions religious beliefs. According to federal data, though, that incorporates at least 900 institutions, and possibly more would qualify under the Department's even broader definition.[98] Those institutions cover everything from yeshivas and seminaries to world-class research universities like Duke University, University of Notre Dame, and Georgetown University, offering all manner of liberal arts degrees. Even an institution whose mission statement does not currently include its religious affiliation would be ill-advised not to revise the mission statement to keep the school's options open.

The definition is concerning given its applications elsewhere in the proposed regulations. In particular, the Department intends to give broad deference to religious institutions facing possible adverse action from accreditors. In proposed 34 CFR 600.11, the Department would give exemptions to religious institutions that meet this proposed definition from rules put in place to prevent institutions from accreditor-shopping, if the institution claims its accreditor didn't respect the institution's religious mission. And in proposed 34 CFR 602.18(a)(3), an accreditor cannot consider religious mission as a "negative factor" in evaluating an institution. Given the vagueness in both of these provisions, and the broadness of the definition of religious mission, an institution could have an incredible amount of leeway to exempt even the most vaguely religiously affiliated institutions from critical assessments of quality, curriculum, and non-discrimination policies. These offer a strong incentive for colleges to try to fit within the religious mission definition -- even when they are not truly the intended category of institution. A narrower definition would avoid this incentive.

The Department inaccurately justifies the definition of religious mission, saying that it is intended "to clarify related State authorization requirements…"[99] The state authorization requirements in proposed 34 CFR 600.9, in fact, use a different definition based on states' laws, though.

Additionally, the Department states in its proposed rule that "the negotiators agreed upon the definition of ''religious mission'' following extensive exploration of the issue by the Faith-based subcommittee."[100] It does not, however, note that the subcommittee was unable to reach agreement. Nor was the Department able to provide a single example of an instance in which an accreditor had used religious mission as a negative factor against any religiously affiliated institution, bringing into question why any of this is needed in the first place. The Department should reconsider its proposal, approaching the proposed rule by first identifying evidence of a problem. Doing so will lead the Department to recognize that no change to current rules is needed in this regard.

[98] Data analysis by the author using the Integrated Postsecondary Education Data System, Institutional Characteristics 2017 Survey. The analysis shows that 904 institutions reported a religious affiliation.
[99] 84 FR 27411
[100] Ibid

The Department protects religious institutions that engage in discriminatory behavior.

In proposed 34 CFR 602.18(b)(3), the Department states that accreditors may not use an institution's religious mission-based policies, decisions and practices in certain areas--curricula, faculty, facilities/equipment/supplies, student support services, and recruiting and admissions practices--as a "negative factor" in assessing the institution.

We are concerned that the Department has escalated religious mission above other types of institutional mission, which are similarly protected by the statute. This escalation seems to suggest that the Department intends to provide heightened protections to one type of mission over another, without a statutory basis for doing so. And it's particularly concerning in light of the proposed changes to drastically broaden the definition of institutions with "religious missions."[101] Moreover, the Department unnecessarily lists a handful of fields in which it believes accreditors should provide particular discretion to religious institutions. Here, again, the statute requires that accreditors consistently apply and enforce *all* of its standards in such a manner as to respect the mission of an institution of higher education.[102]

Throughout the rulemaking, the Department stated that it had no evidence of examples in which an institution had seen its accreditation withdrawn or experienced similarly inappropriate actions because of adherence to its religious mission.[103] In the proposed rule, the Department provides an example cited by a negotiator (though it's not evident whether this is an example that has actually happened) of "health care programs," in which religious mission might lead a school not to meet curricula standards.[104] However, the Department provides no examples regarding the other areas of the accreditation criteria that it cites in this section of the proposed rule.

In fact, these changes seem potentially designed to require accreditors to tolerate discriminatory and unwelcoming practices on religious campuses. For example, a recent article about one religious institution's honor code being "weaponized" has led students to push back against the institution's policies, which including preventing a student from graduating because of allegations she engaged in "sexual touching" with an ex-boyfriend, inconsistent punishments in response to violations of the code, and even punishment for victims of sexual assault.[105] While the accreditor does not yet appear to be involved in the school's honor code, this raises concerns that the proposed regulations could force accreditors to lower their standards to accommodate intolerant positions a school claims are based in religion.

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[101] See proposed 34 CFR 600.2 and comments on the definition of religious mission included elsewhere in these comments.

[102] 20 U.S.C. 1099b(a)(4)

[103] As stated during the faith-based entities subcommittee.

[104] 84 FR 27423

[105] https://www.nytimes.com/2019/04/12/us/byu-honor-code.html

The Department's proposed "alternative standards" for accreditors are unlawful and unacceptable.

The proposed "alternative standards" is both illegal and makes accreditor standards meaningless.

The Department's proposed language under 34 CFR 602.18(c) would permit accrediting agencies to use "alternative standards, policies, and procedures" in their evaluations of institutions that have "innovative program delivery approaches" or "when an undue hardship on students occurs." In other words, the Department is permitting--even encouraging--accreditors to set a separate, lower bar for programs, simply because they are innovative.

This concept carries significant problems with which the Department has not contended. To begin, the Department has not defined what an "innovative" program delivery approach is, nor what constitutes an "undue hardship on students." In the absence of further clarity, the Department could be opening the door for the Department to provide a separate, lower set of standards to virtually *any* institution. Certainly any program that attempts to use some online coursework or that uses a competency-based approach would argue it is innovative; but so might any program engaging in a reevaluation of its curricula, for instance. An undue hardship on students might mean the school would charge higher tuition to make the necessary changes to meet accreditor standards, or that the students would suffer the 'hardship' of reputational damage from a school that is placed on sanction. In other words, everything and anything could fall within these buckets; and institutions and accrediting agencies will undoubtedly interpret the language as broadly as possible.

Yet nothing in the regulations ensures that these alternative standards are adequate. The standards must only be reviewed by the agency's commission; but they need not be published (only the process for developing alternative standards is required to be published[106]). Nor is the accreditor required to name which institutions it believes will satisfy the requirement that they be "innovative" or which circumstances constitute an "undue hardship on students" in advance. In other words, an alternative standard could be developed effectively on the fly to accommodate an institution that is not or will not meet the accreditor's primary standards; that standard could be approved at the next commission meeting; and the standard could be applied to an institution for essentially arbitrary reasons.

Even after the alternative standard is approved and applied, nothing requires the accreditor or the institution to disclose where it has been used, to students, to the public, or to the Department. Nor does anything require the alternative standards or their applications to be reviewed as part of an accreditor's recognition by the Department. That means accreditors will be entirely unaccountable for how they use and abuse this alternative standards authority. Nor does the Department appear to intend any accountability or oversight; as it writes in the rule, "we intend

[106] Proposed 34 CFR 602.18(c)(3)

for [the alternative standards] to provide safe harbors for agencies to exercise responsibly their ability to support innovation and address hardship, without jeopardizing their recognition."[107]

The alternative standards proposal runs counter to the statute,, and should be withdrawn.[108] Nothing in the statute contemplates multiple, parallel sets of standards applied at will to help institutions evade accountability from their accreditors. The statute does, however, require that accreditors serve as "reliable authorit[ies] as to the quality of education or training offered by an institution seeking to participate in the programs authorized under [Title IV],"[109] and prevents the Secretary from recognizing any agency that does not meet that minimum bar. The law also requires that an accrediting agency "consistently applies and enforces standards;"[110] yet these regulations virtually guarantee that accrediting agencies will apply their standards inconsistently while making it impossible for the Department to identify whether agencies are in compliance with the legal requirement.

The Department proposes to permit accreditors to use these alternative standards across a number of criteria and requirements--including all 10 of the criteria accreditors are required to establish under the law, governing everything from student achievement, to curricula, to faculty, to fiscal capacity, to recruiting practices.[111] Yet of the 10 criteria, only one (student achievement) is permitted--by law--to establish separate standards to accommodate institutional mission. The absence of this permission in the law for any of the other nine criteria suggests Congress intentionally did not permit that leeway in any other category. (Nor does the statute suggest any special accommodations for innovative programs, specifically.) The Department lacks the statutory authority to permit accreditors to apply different student achievement criteria based on any factor other than institutional mission, and to apply different standards for any of the other nine criteria.

Should the Department move forward with this ill-advised proposal, it must require the utmost transparency and accountability. As the Department wrote in its rescission of the gainful employment rule, "part of our [the Department's] goal is to end information asymmetry between institutions and students."[112] To help accomplish this goal, and to ensure adequate oversight by the Department of accreditors' application of these alternative standards, we recommend that the Department should:

[107] 84 FR 27423

[108] In proposed 34 CFR 602.17(a)(3), the Department refers to these requirements in proposed 34 CFR 602.18(b) [sic -- the actual language appears in 602.18(c) as pilot programs, something that is absolutely not in the statute, as was pointed out to the Department repeatedly during negotiations.

[109] 20 U.S.C. 1099b(c)

[110] 20 U.S.C. 1099b(a)(4)(A)

[111] The criteria are listed in 34 CFR 602.16(a)(1)(i)-(x). The Department proposes to permit accreditors to use alternative standards for a much larger number and wider range of accreditor standards, including all of those in proposed 34 CFR 602.16, 602.17, 602.19, 602.20, 602.22, and 602.24.

[112] 84 FR 31404

- Require that accreditors publish their alternative standards alongside their other standards so that they are subject to the same transparency and public accountability as other accreditation requirements;
- Require that accreditors publish a list of the institutions or programs to which those alternative standards might apply not less than annually, so that the standards cannot be applied randomly and so that institutions cannot toggle between multiple sets of standards at will;
- Require that accreditors publish, and report to the Department, alongside other commission actions when they apply an alternative standard and for which institution or program;
- Incorporate a review of the alternative standards, and the application of any alternative standards, into the recognition process, alongside the Department's regular review of the agency's standards and their effectiveness in 34 CFR 602.32; and
- Incorporate a review of any application of alternative standards into the procedures for review of agencies during the period of recognition, 34 CFR 602.33.

Alternative standards for curricula approvals seek to undermine shared governance.
The Department proposes, in 34 CFR 602.16(f)(3), to include language permitting accreditors to establish separate standards for approval of curriculum. However, the intent behind including this language--or the need for it--is unclear. Based on the Department's explanation in the preamble, it seems clear that the intent is to undermine faculty governance by encouraging accreditors to create standards for other models driven by industry interests.[113] However, the Department has not applied protections to ensure that agencies that create such separate standards apply them appropriately and consistently. Additionally, it is inappropriate and unlawful[114] for the Department to weigh in on matters of curriculum, putting its thumb on the scale so heavily on matters of academic responsibilities.

Alternative standards for dual enrollment faculty undermine quality in high school-college programs.
The Department's proposed language in 34 CFR 602.16(f)(4) would permit accreditors to maintain separate standards for dual enrollment programs. Critically, though, students in dual enrollment programs are seeking college credit -- sometimes paying out of pocket for it. Accreditors are responsible for ensuring the rigor of such programs will enable students to actually use their credits -- something the Department claims elsewhere throughout the regulations it is deeply concerned with for college students.[115] If the Department plans to weigh in on dual enrollment faculty standards at all--something it should think twice about at this time--it must consider the potential harm alternative faculty standards might cause to dual enrollment students. Alternative (lower) standards for dual enrollment faculty could create a scenario in which dual enrollment course credits are not viewed as equivalent to nearly identical courses--even perhaps at the same institution--taught by instructors who meet the current standard and,

[113] 84 FR 27421
[114] 20 U.S.C. 3403
[115] See, for example, 84 FR 27442

as a result. In this scenario, dual enrollment credits may not transfer, wasting student time and money. As noted by the National Alliance of Concurrent Enrollment Partnerships, parity between dual enrollment and college courses is very important and helps to avoid the perception that dual enrollment programs are "lesser versions" of college courses.

The Department should not drag out accreditor sanctions for non-compliance.

In proposed 34 CFR 602.18(d), the Department provides cover for poor-quality institutions to remain out of compliance with accreditor standards for three years--longer, if the accreditor desires--before the agency places the institution under sanction, provided only that the school meet any one of a large variety of circumstances. And in proposed 34 CFR 602.20(a)(2), it permits the accreditor to *keep* the institution accredited even *after* that known non-compliance for up to another four years.

Individually or cumulatively, these timeframes are far too long. In three years, three or more entire cohorts of students could have completed certificate programs; thousands of students could have enrolled or reenrolled, unaware that the school is not meeting the bar set by its accreditor -- including the even-lower bars permitted by the proposed changes to alternative standards.[116] Moreover, the circumstances the Department cites as qualifying in proposed 34 CFR 602.18(d) are extremely broad and include local or national economic changes or an undue hardship on students. In three years, those circumstances might have resolved themselves; or the institution may argue that the fact of an accreditor sanction itself could constitute an undue hardship if it creates reputational damage.

These regulations are, as the Department itself states, designed to protect accreditors that fail to take action against schools that don't meet their standards -- to "provide safe harbors for agencies...without jeopardizing their recognition."[117] It also excludes the Department-promised "guardrails to ensure careful consideration and monitoring of this flexibility and [to ensure] that it contains appropriate protections for students."[118] In reality, the proposed language specifies almost nothing that would protect students. Nothing in the proposed regulations would provide oversight of when accreditors use this leeway, how often they use it, what types of evidence underlie the decision, or how long accreditors give.

We agree, though, that if the Department does not withdraw this proposal, it should include guardrails here, both for students and for taxpayers. To that end, the Department should, at a minimum, require accreditors to report each instance in which they use this authority under proposed 34 CFR 602.18(d), on not less than a quarterly basis. The Department should assess those reports and evaluate whether the accreditor acted appropriately, based on real evidence

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[116] See comments on proposed 34 CFR 602.18(c) elsewhere in this document for more on alternative standards.
[117] 83 FR 27423
[118] Ibid

that the institution qualifies for the extended timeframe in question and with sufficient monitoring of the institution while it remains non-compliant; this monitoring should be built into 34 CFR 602.33. Additionally, the Department should require that accreditors be reviewed for their effectiveness and consistency in utilizing this authority when they come before the Department for recognition proceedings under 34 CFR 602.32. Additionally, accreditors should be required to publish instances in which they've used this authority to provide colleges with an extension online, ensuring transparency and public accountability.

With regard to the enforcement of adverse actions under proposed 34 CFR 602.20, these proposed changes are designed to--and will have the effect of--allowing colleges to continue receiving federal aid for much longer than they should. Particularly after the Department has already proposed in 34 CFR 602.18(d) to permit colleges to remain out of compliance for three years or longer before an accreditor takes action, the lengthening of the timeframe for an adverse action is particularly egregious.

The Department's proposal would double the maximum timeframe for which a school may maintain accreditation while out of compliance, from two years to four years.[119] That could mean an entire cohort of students enrolls, attends, and graduates from a school that failed to meet accreditor standards *from the day they walked in the door to the day they crossed the stage for commencement*. Meanwhile, taxpayers would have financed tens of thousands of dollars in the same subpar or non-compliant college education.

The Department fails to provide evidence that the lesser of four years or 150 percent of the length of the longest program at the institution is an appropriate threshold--and not arbitrarily or capriciously selected. Moreover, the Department did not present evidence that the current regulations--which cap the timeline for enforcement of adverse actions at two years--is inadequate or inappropriate. The Department says that "current regulations do not allow adequate time for an institution to implement curricular or other changes to allow it to come into compliance with standards,"[120] but does not explain why it is then applying this doubling of the timeline for taking adverse actions to all fields on non-compliance, and not solely the curricula criterion.[121]

The below graphic explains the great risk to students and taxpayers from the proposed changes to accreditor timelines. The first timeline, reflecting current policy, explains how agencies are currently required to take action upon identifying noncompliance; and shows that four-year institutions have a maximum of two years in which to resolve the compliance concern before the accrediting agency initiates an adverse action. Given that appeals are usually initiated before loss of aid, the loss of aid eligibility and simultaneous loss of access to federal financial aid are required to occur within only a few years.

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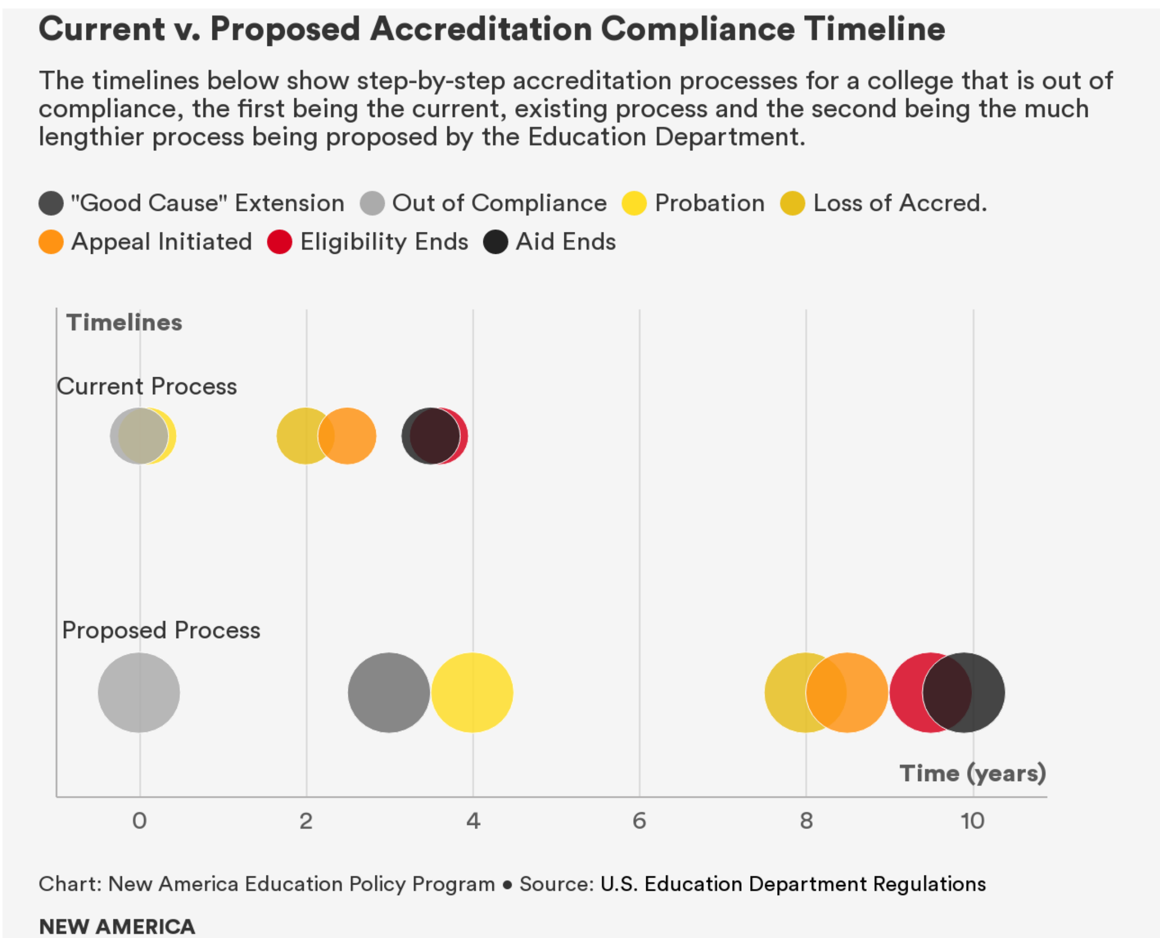
[119] See proposed 34 CFR 602.20(a)(2)

[120] 84 FR 27425

[121] 34 CFR 602.16(a)(1)(ii)

The second timeline, reflecting the Department's proposed changes, shows how institutions could easily go nearly a decade from when their noncompliance is identified to the loss of federal aid access -- more than twice the current length, subjecting many cohorts of students to the problematic institution's practices in the interim. The timeline is dragged out years and years as accrediting agencies may provide leeway to institutions where, for instance, they deem action to be an "undue hardship" on students; and even after that, the Department still proposes to *double* the current maximum timeframe before an accreditor initiates an adverse action. Even beyond that, an institution that loses federal aid eligibility is still, inexplicably and illegally, extended *more* access to federal aid dollars for another 120 days in many cases to complete a teach-out.

No question, the paths individual accreditors and institutions will take vary considerably, and some paths may be quicker or longer than the ones shown below. But in a worst-case scenario that can be considered not just possible, but likely (particularly given that accreditors will lack regulatory cover to take action sooner), the Department's proposal will extend taxpayer money, and subject students to, institutions that *do not meet accreditor standards* for far too long -- nearly 10 years. This timeline doesn't even consider the possibility that an accreditor could allow non-compliant colleges to bypass enforcement entirely by instead applying the unlawful alternative standards proposed under the regulations.



Here, again, the Department claims that this discretion in the timeframes for compliance is "balanced by strong protections for students,"[122] but the Department has clearly not done enough to ensure students and taxpayers are protected. If the Department chooses to move forward with permitting accreditors to drag their feet even longer than they do now before taking actions against poor-performing or non-compliant institutions, it should incorporate additional transparency and oversight. Specifically, the Department should require that accreditors direct institutions to provide *direct disclosures* -- not merely a posting on a website (the accreditor's or the institution's) to prospective and enrolled students regarding any actions or sanctions (including warning, probation, etc.) for any institution when it starts the clock on the timeframe in proposed 34 CFR 602.20(a)(2).

The Department should revise its proposals on the enforcement of standards.

Proposed changes requiring institutional accreditors to evaluate programs constitute a dramatic change without adequate consideration of the implications.

In proposed 34 CFR 602.17(a)(2), the Department proposes language that would require an accrediting agency to demonstrate that it evaluates, at both the institutional and program levels, whether an institution is successful in achieving its objectives. It also proposes language, which may be intended to correspond with that proposed language, in 34 CFR 602.20(d) that permits an accreditor to limit its action only to particular programs or locations of an institution, rather than taking action on an entire institution.

While it may be true, as the Department suggests, that "a major barrier to greater institutional accountability is the lack of targeted actions agencies...can take to promote compliance and continuous improvement,"[123] the Department's language does not address a fundamental inconsistency: that institutional accreditors rarely evaluate individual programs, and that to do so may be prohibitively expensive and burdensome. There was little discussion regarding this issue during the negotiated rulemaking, and it is not clear that the Department adequately sought accreditor input regarding the proposal. Nor did the Department talk through the potential implications to students and taxpayers of relegating much accountability to the program level, leaving poor-quality institutions able to continue starting and closing down poor-quality programs in perpetuity.

The Department should, if it maintains this language, clarify what it believes the effect of the change will be. For instance, it is unclear whether the proposed changes could mean that an accreditor sanctions--or withdraws accreditation--from an institution on the basis of a negative evaluation of a single program. This is a reasonable question for institutions and accreditors alike, particularly given that the Department's intent is clearly to permit accreditors to spare a college from sanctions if only some programs are implicated in the accreditor's findings.

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[122] 84 FR 27425. The Department fails to specify what any of these protections are.
[123] 84 FR 27425

The need for new language on arbitration of accreditor actions is unclear.
The Department proposes new language regarding arbitration. It says that the additional language, which clarifies that all adverse actions must be subject to arbitration,[124] will "address another barrier to agency action: the risk of costly and time-consuming litigation."[125] However, the Department fails to adequately explain how it believes current practice will change with the inclusion of this provision. The Higher Education Act already requires that "the Secretary may not recognize the accreditation of any institution of higher education unless the institution of higher education agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action."[126] It's unclear, then, whether the Department is suggesting that institutions are not actually complying with the law regarding arbitration today. This implication is particularly serious in light of the Department's heavy reliance on arbitration to calculate burden reduction estimates and savings in the regulatory impact analysis of the proposed rule. In that section, the Department notes that it "does not receive information about the number of disputes between accreditors and institutions that go to litigation or arbitration," but still asserts that the addition of the language will "potentially minimize litigation costs for accrediting agencies and institutions."[127] The Department should clarify in its next iteration of this rule whether it has any reason to believe institutions have not been complying with this statutory requirement; and if so, what enforcement actions it intends to take to ensure the Department itself is complying with its legal obligation not to recognize the accreditation of any offending institution.

The Department should not actively encourage accreditors to stick their heads in the sand.
The Department proposes, in 34 CFR 602.20(f), to clarify that accreditors are not responsible for enforcing requirements related to program participation agreements, financial responsibility for changes in ownership or control, administrative capability, reporting and disclosure of information, and security policies and crime statistics. While it is clearly true that accreditors are not directly responsible for enforcement, this language seems to actively discourage accreditors from looking at the same sorts of things that the Department does, and undermines the program integrity triad. This is particularly concerning in areas where the overlap is largest--for instance, in the requirement that accreditors (as well as the Department) look at fiscal and administrative capacity,[128] or that both consider consumer information.[129] The Department's proposed language, though, seems to create a disincentive for accreditors to remain cognizant of potential

[124] See proposed 34 CFR 602.20(e)
[125] 84 FR 27425
[126] 20 U.S.C. 1099b(e)
[127] 84 FR 27446-27447
[128] Accreditors are required, pursuant to 20 U.S.C. 1099b(a)(5)(E), to develop standards and evaluate institutions for fiscal and administrative capacity as appropriate to the specified scale of operations; this may have significant overlap with the requirements in 34 CFR 668.16 regarding Department enforcement of administrative capability requirements.
[129] Accreditors are required, pursuant to 20 U.S.C. 1099b(a)(5)(G), to develop standards and evaluate institutions for recruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising; this may have significant overlap with the requirements in 34 CFR 668.41 regarding Department enforcement of consumer information disclosures.

concerns -- rather than improving information-sharing across the members of the triad, the Department is attempting to promote head-in-the-sand behavior, presumably to protect schools. The lines of the triad aren't blurred[130] -- they're shared.

Instead, the Department should seek to strengthen accreditors' oversight of *all* potentially concerning issues related to the criteria. For instance, the Department could establish avenues for accreditors to share concerning findings at institutions that may have implications for the institutions' compliance with Department requirements; ensure institutional obligations from the Department and/or under Title IV of the Higher Education Act are clearly articulated to accreditors so that agencies know what to look for; and provide trainings to accreditors on federal aid requirements and why they exist to help accreditors understand better where a violation of a Title IV requirement might have spillover implications for how the agencies think about the institutions they approve. Providing license for accreditors to bury their heads in the sand and ignore federal aid obligations misses the purpose behind Congress' adoption of accreditation as a critical gatekeeping requirement to be permitted to access federal dollars.

Accreditors should be permitted to consider all relevant evidence to spot early-warning signs.

Additionally, in proposed 34 CFR 602.17(e), the Department states that the accrediting agency may consider information from other sources only if it is first "substantiated by the agency" when evaluating institutions' or programs' compliance with the agency standards. This language is concerning; while information from other sources (whether substantiated or not) may or may not be determinative of compliance with accreditor standards, agencies should be permitted--even encouraged--to look at all of the information available to them, as early as possible. Even where information may be unsubstantiated but likely indicative of a problem--such as a lawsuit filed by a state or federal agency that has not yet been resolved--the accreditor can identify the concerns with the school and determine whether further investigation or inquiry into institutional compliance is warranted.

The Department should require accreditors to assess institutions' credit hour policies.

In proposed 34 CFR 602.24(f) and 603.24(c), the Department proposes to eliminate all requirements for accreditors and state agencies to establish standards regarding how they review institutions' credit hour policies. The Department states that it believes the requirements are "unnecessarily prescriptive and administratively burdensome without adding significant assurance that the agency review will result in improved accountability or protection for students and taxpayers."[131] With regard to state agencies, the Department says that "an accrediting agency should have autonomy and flexibility to work with institutions in developing

[130] 84 FR 27425
[131] 84 FR 27431

and applying credit-hour policies."[132] Neither of these justifications is adequate to account for the problems that will be crafted by deleting the language.

The credit hour, New America wrote in a primer published earlier this year, "forms the bedrock of the federal financial aid system."[133] The Department itself explains that "a credit hour is a unit of measure that gives value to the level of instruction, academic rigor, and time requirements for a course taken at an educational institution."[134] Our primer continued, "since the amount of federal aid is tied to credit hours, institutions can draw down more federal aid as students take on more credits. Over the history of the federal aid programs, there have been abuses related to inflating credit hours, whether directly or through expanded "weeks of instruction" or program length, that resulted in in both legislative and regulatory actions to curb said abuses. Work by the Education Department's inspector general (IG) during the late 1980s and early 1990s turned up abuses of federal dollars related to the length of programs. Specifically, the IG found that some institutions were inflating the lengths of their programs--without increasing the amount of instruction they offered--as a way to accumulate even more federal dollars. The longer students were enrolled at the school, the more aid they eventually became eligible for, giving unscrupulous institutions an incentive to stretch out the programs without increasing their own costs of instruction. Those abuses led Congress to change both program length requirements and accrediting agency oversight requirements in the 1992 HEA reauthorization at the recommendation of the IG.[135]

"Accrediting agencies have long been required to establish standards for the program-lengths of institutions they review and approve--but without commensurate guidance on what constitutes a credit hour, there is significant risk for abuse. The IG investigated accreditors as the Department's 2009-10 rulemaking process on the credit hour began, and found that of the three regional accrediting agencies it investigated (which collectively accredited one-third of all institutions participating in the federal financial aid programs), oversight of program length was inconsistent and sometimes inadequate, and none included a definition of a credit hour. The IG said at the time that "[t]heir failure to do so could result in inflated credit hours, the improper designation of full-time student status, the over-awarding of federal student aid funds, and excessive borrowing by students, especially with distance, accelerated, and other programs not delivered through the traditional classroom format." While two of the accrediting agencies told the IG that they were instead more focused on student learning outcomes than on time-based measures, the accreditors also "provided no guidance to institutions or peer reviewers on acceptable minimum student learning outcomes…"

"In the process of the review, the IG also found a particularly egregious example of credit inflation by an institution. American Intercontinental University (AIU), a for-profit college owned by Career Education Corporation, had been found by the Higher Learning Commission (HLC) during

[132] 84 FR 27440
[133] https://s3.amazonaws.com/newamericadotorg/documents/Credit_Hour_Issue_Paper.pdf
[134] 75 FR 34811
[135] https://s3.amazonaws.com/newamericadotorg/documents/Credit_Hour_Issue_Paper.pdf

an initial review to have "egregious[ly]" inflated its credits. As described by then-Rep. George Miller (D-CA) in a congressional hearing, the policy essentially permitted a student to obtain a bachelor's degree with an associate degree plus one year of study -- far below the usual four years of study (or the equivalent work) required. The IG wrote in an alert memorandum[136] to the Department that "[t]he implication of this analysis is far-reaching for AIU, affecting degree requirements, faculty requirements, and financial aid policies… If the credits were to be properly calibrated, students who evaluated AIU's value proposition in terms of cost of degree, time to degree, may see that the cost and time double…"[137] In other words, when institutions inflate their credits, students--and taxpayers--pay, without getting what they are paying for."[138]

The accrediting agency and state agency standards regarding the credit hour were included in the existing rule because "the lack of more direct accrediting agency oversight in the assignment of credits to coursework may result in some institutions not being able to demonstrate that there is sufficient course content to substantiate the credit hours for certain programs.... [The Department] believe[s] that the potential for such abuse and the inconsistent treatment of Federal funds would be significantly alleviated by" including the accreditor standards alongside the credit hour definition.[139]

The Department has not clarified in this proposed rule why it no longer believes that to be the case. In fact, in the absence of any entity proactively considering institutions' assignment of credit hours would seem to exacerbate such abuses, because there is unlikely to be virtually any non-compliance spotted by the Department through the relatively small number of program reviews it conducts.[140]

The most egregious case of credit hour violations in recent years, American InterContinental University, was identified by the accreditor. As we wrote in a primer[141] on the credit hour rule, AIU students, primarily in the business school, took a nine-credit course every five weeks over a fifteen-week period. Students could either enroll in one class at a time for five weeks, or two classes at the same time for 10 weeks. Nine-credit classes on a quarter-system like AIU's are comparable to a six-credit class on a semester-schedule, so students were taking far beyond the typical number of credits for a full-time student--27 credits per term, compared with the more standard 18 credits. HLC, the school's accreditor, raised concerns about course inflation in its initial review. However, if anything, this case shows the need for *stronger* accreditor oversight. HLC allowed the school to "restructure" the courses into two, 4.5-credit courses, rather than single, 9-credit courses, and approved AIU's accreditation. Unsurprisingly, the Inspector General at the Education Department raised concerns that such a process is little more than rearranging

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[136] https://www2.ed.gov/about/offices/list/oig/auditreports/AlertMemorandums/l13j0006.pdf
[137] https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56835/pdf/CHRG-111hhrg56835.pdf
[138] Ibid
[139] 75 FR 34811
[140] A FOIA response from the Education Department shows that the Department has itself found only two colleges to be in violation of the credit hour rule since it took effect in 2011.
https://s3.amazonaws.com/newamericadotorg/documents/CreditHourFOIA.pdf
[141] https://s3.amazonaws.com/newamericadotorg/documents/Credit_Hour_Issue_Paper.pdf

deck chairs on the Titanic and called on the Department to take action against the accreditor. HLC was required to submit several reports to the Department's advisory body on accreditation and ultimately adopted new standards, including on credit hour policies.

Given that the Department is not changing the credit hour rule--either in this notice of proposed rulemaking or in the consensus language the Department itself agreed to during recent negotiations--it seems obvious that there must be some entity responsible for ensuring the credit hour rule is being followed. Given that accreditors are responsible for considering educational quality it is also clear that accreditors are the right party to take on that responsibility.

Moreover, accreditors *do* already have significant leeway under the current rules to work with institutions to develop and apply credit hour policies. The regulations require only that the accreditor make "a reasonable determination of whether the institution's assignment of credit hours conforms to commonly accepted practice in higher education."[142] And the credit hour rule itself requires only "an amount of work represented in intended learning outcomes and verified by evidence of student achievement that is an institutionally established equivalency that reasonably approximates" that common practice.[143] The Department's definition, as it said in a letter to institutions[144] following rulemaking, "does not emphasize the concept of 'seat time' (time in class) as the primary metric," nor does it prevent a barrier to institutions that seek to innovate responsibly, many of which have launched innovative competency-based education programs under the existing rules.[145] To the extent the Department believes institutions have been prevented from developing such approximations in other ways, it should provide guidance to the accreditors as to how the Department interprets the requirements, as suggested by third party stakeholders.[146] However, the Department has not provided evidence during this rulemaking or in this notice of proposed rulemaking that the credit hour rule is unworkable, overly prescriptive, or non-essential -- and prior statements by the Department and recent examples of non-compliance actually confirm the opposite.

The Department cannot and should not extend federal aid dollars to closed schools.

In proposed 34 CFR 668.26, the Department proposes to permit federal aid dollars to go to schools even after closure to complete a teach-out for any of the school's students who may be able to complete within 120 days. This proposal is both ill-advised and unlawful.

The Department's proposal would permit a college to continue accessing federal dollars--even after its eligibility for federal aid has ceased. This would be a violation of the Higher Education

[142] 34 CFR 602.24(f)
[143] 34 CFR 600.2, definition of a credit hour
[144] https://ifap.ed.gov/dpcletters/GEN1106.html
[145] Paraphrased from New America's credit hour primer, available at https://s3.amazonaws.com/newamericadotorg/documents/Credit_Hour_Issue_Paper.pdf
[146] https://drive.google.com/file/d/0B7adHdBE6w3mLTFVY0x4ZUNyN2s/view

Act, which requires that institutions of higher education be accredited, authorized by the state, and have entered into an agreement with the Education Department in order to access federal aid dollars.[147] It does not permit that institutions be eligible to receive federal aid dollars if they *recently* met all of these criteria -- once accreditation or authorization has been withdrawn, or a program participation agreement with the Education Department has been terminated, that institution no longer meets the federal, statutory definition of an institution and thus no longer qualifies for federal aid dollars.

Moreover, the Department's proposal leaves open the possibility of an unqualified or poor-quality institution being rewarded with taxpayer dollars and permitted to continue educating students--even after regulators have identified that the institution is ill-equipped to do so any longer. This is particularly concerning given the fact that the quality of instruction may decline near the closure of a school, so even an institution that lost accreditation, authorization, or Department approval for reasons unrelated to quality may still have issues with quality during a post-closure teach-out. This already presents challenges for students struggling to decide whether to accept a teach-out or apply for a closed school discharge; as the Department has said, "although instruction may be seriously deteriorating, students may feel compelled to complete the program at the closing school, unaware that they have a right to withdraw within 120 days of the closure and receive a closed school discharge."

The Department has not clarified how this provision would relate to borrowers' eligibility for closed school discharge. Namely, given that students must have been enrolled with a particular window (120 days[148] prior to closure) to be eligible for a closed school loan discharge, the Department has not clarified the eligibility of students who fail to complete within the 120 days *after* closure, while Title IV continues to flow; or for students who leave the school, say, 121 days prior to the expiration of Title IV (but one day prior to the school's actual closure). The Department should clarify that it is not attempting to exclude students from closed school discharge eligibility, if that is its intent; or should revise its policy to ensure students remain eligible if they leave school within 120 (or 180) days prior to closure *or* within 120 days after closure, while federal dollars continue to follow, if that is the intent. As the Department has previously stated, "although public policy generally favors higher rates of program completion, it is not always in the individual borrower's best interest to continue a program through graduation. In a closed school situation, the value of the degree the borrower obtains may be degraded, depending on the reasons for the school closure. Borrowers at closing schools may incur unmanageable amounts of debt in exchange for relatively low-value degrees."[149]

The Department should eliminate this proposed language in 34 CFR 668.26(e). Other proposals, to encourage accreditors to request--and institutions to obtain--teach-out plans and/or agreements earlier, prior to closure, will have the effect of ensuring more institutions have teach-

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[147] 20 U.S.C. 1001 and 1002

[148] The Department has proposed to extend this window to 180 days, but those rules are not yet final. 83 FR 37328

[149] 81 FR 76034

outs in place and executed before they close, rendering this proposal both unnecessary and likely to benefit only colleges that close precipitously without appropriate preparations.

If the Department does choose to move forward with this unlawful proposal, it must at least institute some common-sense protections for students and taxpayers. At minimum, the Department should clarify that this extended period of federal financial aid eligibility after closure is not available unless an institution has voluntary withdrawn from participation in the federal aid programs in good standing. In particular, institutions should not be eligible to continue accessing federal aid if their accreditation has been withdrawn; their authorization to operate by the state has been revoked; the Department terminated their program participation agreements; or the institution has a letter of credit or other financial protection posted with the Department, indicating a record of concern with the institution's performance.

Proposed Changes to the Accreditor Recognition Process Render Departmental Oversight Effectively Meaningless

The Department's proposed overhaul of compliance is unlawful and nontransparent.

The Department created the unlawful concept of "substantial compliance" out of whole cloth.

The Department proposes, in 34 CFR 602.3(b), to permit accreditors to retain recognition if they meet a newly proposed definition of "substantial compliance," rather than requiring them to be compliant with all applicable standards. However, this proposed definition is inconsistent with the statute, and makes it virtually impossible for the Department to hold an accreditor accountable when it fails to perform.

The Higher Education Act requires that the Secretary find an accreditor out of compliance if it "has failed to apply effectively the criteria in this section, or is otherwise not in compliance with the requirements of this section." For agencies out of compliance, the Department may not take an action other than to limit, suspend, or terminate the agency's recognition; or to require that the agency come into compliance within 12 months.[150] Yet the Department's proposed definition would create a third category, not contemplated by the statute, in which the agency either has the necessary policies but does not always apply them effectively or "with fidelity," or in which the agency does not have appropriate standards in place but follows "generally compliant practice."[151] Such exceedingly squishy terms open the door to non-compliant agencies being permitted to skirt the legal requirement that they be compliant with laws and regulations; and makes it virtually impossible for the Department to *ever* take action against a poor-performing accrediting agency.

[150] 20 U.S.C. 1099b(l)

[151] Proposed 34 CFR 602.3

Importantly, the language the Department uses in this definition is so vague as to cover all manner of non-compliance. The Department claims that "agencies that achieve [substantial compliance] are in compliance except with respect to minor technicalities and in the Department's view warrant recognition for that level of achievement."[152] Nothing in the language, however, limits this to "technical" concerns; the particular areas of partial compliance could be ones that matter greatly to students or taxpayers, or the Department's interpretation of 'generally compliant" or application "with fidelity" could be too liberal to adequately protect students.

In fact, we already have a case study to illustrate the shortcomings with this policy proposal. The Department appears to be already utilizing this concept, despite the fact that it is not currently in regulation nor permitted under the law.[153] When Secretary DeVos re-reviewed the application of the Accrediting Council of Independent Colleges and Schools (ACICS), she wrote that, "in the opinion of the [Senior Department Official],[154] ACICS is currently, and in many cases was in 2016, **substantially compliant** with all of these criteria."[155] (emphasis added)

Yet the areas of 'substantial' compliance that the Secretary did find--administrative and financial resources; student achievement standards; recruiting and admissions practices; and monitoring [of institutions]--are deeply concerning. For instance, ACICS acknowledged only about a month ago that it faces a $2.1 million budget shortfall this year.[156] In addition to the possibility of imminent collapse, that leaves the agency highly vulnerable to the loss of dues from member institutions. It gives the agency both an incentive not to cut off any problematic institutions in its portfolio and an incentive to further limit its review for any new institutions to try to earn their business; the agency acknowledged it needs to add 10 new institutions per year for the next three years if it hopes to break even by 2023. The agency also acknowledged a loss of staff; a 39-person organization as of May 2016,[157] it now has fewer than 10 FTE staff.[158] The Department's career accreditation staff agreed; in a draft staff report, the agency found ACICS was out of compliance and had not demonstrated adequate evidence that staffing levels were sufficient to ensure quality across all ACICS-accredited schools.[159] If the Department's leadership did not see this agency as non-compliant, but rather "substantially compliant" with the requirement that the agency have "adequate administrative staff and financial resources to carry out its accrediting

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[152] 84 FR 27417

[153] It is not clear what statutory authority the Department believes it has to use a regulatory concept that doesn't yet exist in regulation.

[154] Diane Auer Jones served as the SDO for this case, and is also overseeing this rulemaking.

[155] https://www.insidehighered.com/sites/default/server_files/media/ACICS%20FAD%2011.21.2018.pdf

[156] https://www.insidehighered.com/quicktakes/2019/06/04/embattled-accreditor-projects-losses-after-closure-member-colleges

[157] ACICS litigation against the Education Department, Exhibit A to ACICS' Motion to Supplement the Administrative Record. Filed March 31, 2017.

[158] https://www.insidehighered.com/quicktakes/2019/06/04/embattled-accreditor-projects-losses-after-closure-member-colleges

[159] https://production-tcf.imgix.net/app/uploads/2018/06/08174207/ACICS-draft-and-written-comments-060818_1.pdf

responsibilities," the Department's interpretation of what constitutes "technical issues" can hardly be trusted.

Given that the Department appears unable to provide clear, objective criteria for what constitutes a "technical" issue versus one that requires a full-fledged compliance report, it should strike this proposal from the regulations. At a minimum, it should consider requiring that non-compliance with certain criteria--like the student achievement criterion,[160] the application of standards,[161] monitoring and reevaluation of accredited institutions,[162] and the enforcement of standards,[163] among others--automatically trigger a full compliance report. These issues are all at the heart of accreditors' responsibilities and have significant bearing on protections for students and taxpayers.

In light of the significant risk to students and taxpayers, as well as the lack of statutory basis for this proposal, the Department should strike the concept of "substantial compliance" from the proposed regulations. That includes eliminating the definition in proposed 34 CFR 602.3, as well as removing the concept of substantial, rather than full, compliance from the Department's recognition proceedings in proposed 34 CFR 602.32(h)(4), reviews during the recognition proceeding in proposed 34 CFR 602.33 (where the issue overlaps with monitoring reports), NACIQI reviews of agencies in proposed 34 CFR 602.34, and the senior Department official's decision in proposed 34 CFR 602.36(e) and (f).

The addition of secretive "monitoring reports" runs counter to the law and allows problematic accreditors (and the Department) to evade public accountability.

The Department's proposed changes to incorporate monitoring and compliance reports overlaps considerably with the above comments related to the proposed concept of "substantial compliance." In proposed 34 CFR 602.3, the Department proposes to add a definition of a monitoring report (to be used when an agency is substantially, but not fully, compliant) that requires only documentation and reporting to the Education Department. It is clear from the proposed language that the Department is attempting to craft a definition out of thin air in order to shield accrediting agencies from the transparency and accountability of NACIQI and the public. Such monitoring would not be subject to NACIQI review (unless the Department itself decides otherwise), nor would it be subject to a public comment period as is the case for all other recognition proceedings.

Pursuant to the Higher Education Act, the National Advisory Committee on Institutional Quality and Integrity (NACIQI) is intended to "advise the Secretary with respect to the recognition of a specific accrediting agency or association."[164] Yet the regulations note that the changes would "provide mechanisms for Department staff to reinstate NACIQI, senior Department official, and

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[160] 34 CFR 602.16(a)(1)(i)
[161] 34 CFR 602.17
[162] 34 CFR 602.19
[163] 34 CFR 602.20
[164] 20 U.S.C. 1011c(c)(2)

Secretarial review during the recognition period if the deficiencies noted escalate or if the agency does not address them."[165] It does not consider that monitoring reports will always go through the NACIQI review as required by statute. The statute does not consider that NACIQI should advise the Secretary only on *some* recognition proceedings; all issues of non-compliance require review by NACIQI.

Moreover, the law also states that the Secretary must require an accrediting agency to come into compliance within 12 months. Specifically, if the Secretary determines that an accreditor has "failed to apply effectively the criteria" or is "not in compliance with the requirements" for accreditors, the Department must require the agency to come into compliance within a timeframe not to exceed 12 months.[166] Yet the monitoring reports, as defined in the proposed regulations, do not appear to be subject to any particular time constraint,[167] meaning an agency could be out of compliance in perpetuity, contradictory to the statute. And in proposed 34 CFR 602.33(c)(4), the Department says that it will review information, including monitoring reports, submitted by the non-compliant accrediting agency -- but may elect simply to continue monitoring, with no apparent time limit.

In reviewing these regulations, there are effectively no assurances that the Department will, as it assures the reader, use the substantial compliance and monitoring report definitions in tandem only for "minor technicalities."[168] As noted above, the Department is already applying this concept to the Accrediting Council of Independent Colleges and Schools (ACICS), about which the Secretary wrote that she would "heed the [Senior Department Official]'s recommendations regarding specific **monitoring goals** for ACICS going forward."[169] (emphasis added) As noted earlier in these comments, the fact that the Department was willing to use monitoring reports with ACICS, for which career employees found evidence of non-compliance with *fifty-seven* of the criteria for accrediting agencies, indicates the Department cannot be trusted to use these monitoring reports only in cases of minor or technical compliance concerns. That's particularly true given that the Department is already circumventing the law and the regulations to keep ACICS in good standing and out of sight from NACIQI and the public.

During the recent negotiations on this rule, the Education Department asserted that, of 57 recognition proceedings it looked at, it found 17 that were given compliance report requirements. Of those, it believes 10 would still require compliance reports under this definition, while five would require a monitoring report (i.e., would fall within the definition of substantial compliance) and two would require both. Of the seven that the Department believes meet the substantial compliance definition in part or in full, the Department should provide more information about the numbers and types of shortcomings those agencies had; and should clarify

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[165] 84 FR 27417
[166] 20 U.S.C. 1099b(l)
[167] See, for example, proposed 34 CFR 602.32(h)(4)(ii)
[168] 84 FR 27417
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https://www.insidehighered.com/sites/default/server_files/media/ACICS%20FAD%2011.21.2018.pdf

whether it includes ACICS' recent monitoring reports in the tally. Additionally, it should clarify the number of monitoring reports it believes would still have been subject to NACIQI review and which would have been subject only to Department staff review. And it should provide greater detail on the criteria it used to determine which compliance concerns it believed warranted a compliance report versus a monitoring report. Depending on their bases, those criteria should perhaps be built into the regulations to ensure the Department cannot abuse the vagueness of the definition, and to ensure that all substantive issues require a full compliance report.

The Department should eliminate the concept of monitoring reports from its proposed regulations. The proposal is unlawful; and the Department has no clear way to distinguish between substantive issues that should require a normal compliance report process and the so-called technical issues it claims would be reserved for monitoring reports. This means eliminating the proposed monitoring report definition in proposed 34 CFR 602.3, as well as the construction of a process around monitoring reports as outlined in the expansions of scope in proposed 34 CFR 602.12; the agency application process in proposed 34 CFR 602.31; the Department recognition process in proposed 34 CFR 602.32; the review of agencies during the recognition period in proposed 34 CFR 602.33; the NACIQI evaluation of agencies in proposed 34 CFR 602.34; and the senior Department official's decision in proposed 34 CFR 602.36.

If the Department does move forward with the monitoring report structure, it should:

- Require that non-compliance with certain criteria--like the student achievement criterion,[170] the application of standards,[171] monitoring and reevaluation of accredited institutions,[172] and the enforcement of standards,[173] among others--automatically trigger a full compliance report. These issues are all at the heart of accreditors' responsibilities and have significant bearing on protections for students and taxpayers.
- Limit monitoring to 12 months, at which time agencies must be fully compliant. This maintains a parallel structure between the compliance report and monitoring report structures, and also ensures that at least the timeline for monitoring reports does not violate the Higher Education Act.[174]
- Require that monitoring reports be subject to both a review by NACIQI and a public comment period. This could help to limit the scope of review such agencies are subject to if they face technical issues, but ensures adequate transparency and public accountability.

In addition, the Department must make monitoring reports available to the public. The Department said repeatedly throughout the rulemaking that the monitoring reports would be publicly available "through FOIA." As any researcher knows, however, FOIA is neither a realistic

[170] 34 CFR 602.16(a)(1)(i)
[171] 34 CFR 602.17
[172] 34 CFR 602.19
[173] 34 CFR 602.20
[174] 20 U.S.C. 1099b(l)(1)(B)(i)

nor reasonable way to ensure access for the public.[175] In fact, the federal government itself acknowledges this; an FAQ about FOIA from the Justice Department notes that FOIA.gov permits people to "make a request for information that is not yet publicly available."[176] If the information were publicly available, then, members of the public would not have to submit a FOIA request; and if the monitoring reports are not public, they cannot be considered transparent or accessible to the public. Nor is FOIA timely enough to be useful when necessary; if an agency has up to 12 months to come into compliance, a two-year time period--or longer--for the Department to release a monitoring report that may be so heavily redacted as to not be useful is not instructive as to ongoing issues with that agency. Furthermore, a temporary restraining order issued by a court last year acknowledged that the Department's decision to withhold applications during a comment process meant that members of the public would "be effectively barred from meaningful public engagement…"[177] Absent public comment, this transparency would still be essential to ensure appropriate public accountability exists and to provide a greater sense of validity to the Department's oversight of the accrediting agencies in question.

Automatic extensions for non-compliant accreditors are illegal.

In proposed 34 CFR 602.36 incorporates a structure that would automatically permit the Department to assign a non-compliant accrediting agency a timeframe for resolving compliance concerns that exceeds 12 months. This proposal is plainly an attempt to skirt the law and buy more time for accrediting agencies that cannot come into compliance within the expected timeframe -- and will have particularly severe effects coupled with the Department's other proposals to shield non-compliant accreditors from the oversight of NACIQI and public accountability and comments by labeling them "substantially compliant" and requiring only a "monitoring," rather than a "compliance," report.

The Higher Education Act requires that the accreditor "take appropriate action" to come into compliance "within a timeframe specified by the Secretary, except that… such timeframe shall not exceed 12 months unless the Secretary extends such period for good cause."[178] This clearly suggests that the Department cannot and should not provide longer than 12 months from the initial determination of non-compliance. On the other hand, it indicates that the Department must require a 12-month timeframe, at which point the Secretary may choose to extend the period -- and even then, only "for good cause."[179]

The Department notes that it would only provide a deadline longer than 12 months "based on a finding of good cause and extraordinary circumstances," to include the Department's opinion that "some areas of non-compliance require more than 12 months to address."[180] Yet the Department

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[175] For instance, New America has one FOIA that has been outstanding for nearly two years since August 2017 (FOIA number 17-02499-F).

[176] https://www.foia.gov/faq.html

[177] https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2018/02/16104012/TRO-Decision.pdf

[178] 20 U.S.C. 1099b(l)(1)(B)(i)

[179] Ibid

[180] 84 FR 27437

fails to identify the circumstances it believes would be extraordinary or the areas of non-compliance it expects would warrant a longer time-frame. Nor does the Department explain how, from the day it identifies non-compliance in an agency, it can already have evidence of good cause.

Plainly and simply, the Department cannot maintain language permitting the Senior Department Official to establish a deadline more than a year out at the time the SDO is identifying an agency as failing to meet or effectively apply the criteria.

The Department implies it will not take lawsuits or complaints against accreditors seriously.

In proposed 34 CFR 602.32(d)(2), the Department says it will review complaints or legal actions against an institution or program accredited by the agency up for recognition proceedings, but notes those actions are “not necessarily determinative of compliance.” While it is obviously true that an agency’s entire compliance determination should not and will not rest on the legal actions against its colleges, the language the Department uses seems to imply the Department may not truly consider the evidence at all.

And these complaints and legal actions can provide valuable evidence. Consider, for instance, the scandal at University of North Carolina, in which UNC athletes were accused of academic fraud through a complaint from the NCAA. That initial complaint later implicated an entire department at the university, as the school released in a 2012 independent report.[181] The school’s’ accreditor, SACS, read the report and requested additional documentation, but didn’t place the institution on probation or any other sanction until June 2015.[182] For another agency, the Accrediting Commission of Independent Colleges and Schools (ACICS), the number of lawsuits is almost too many to count. As one commenter wrote to the Department prior to the agency’s 2016 loss of recognition, “at least 17 colleges or chains of colleges accredited partially or entirely by ACICS have been subject to investigations, settlements, and lawsuits from state and federal officials. In most cases, there has been no finding or admission of fault by the college. … Additionally troubling is the fact that ACICS appears to have taken minimal to no action against most of these colleges or chains except for occasionally deferring an accreditation decision until its next council meeting.”[183]

The Department should rewrite the language in this sentence to indicate the Department takes complaints and legal actions against accredited institutions seriously, and that it will evaluate them with the appropriate weight during agency recognition proceedings.

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[181] https://carolinacommitment.unc.edu/files/2013/01/UNC-Governor-Martin-Final-Report-and-Addendum-1.pdf

[182] https://oira.unc.edu/files/2017/07/SACSCOCLetterJuly1-2015.pdf

[183] https://cdn.americanprogress.org/wp-content/uploads/2016/06/03145034/ACICS-report.pdf

The Department should clarify its terminology around agencies subject to compliance reports.

The Department proposes throughout the regulations to standardize the terminology around renewals of recognition by referring to them as a "continuation" of recognition.[184] This includes cases in which agencies are required to submit compliance reports and return to have their compliance verified by the Department the following year. However, in cases involving compliance or monitoring reports, the Department is only conditionally extending recognition and will require subsequent evidence to approve the agency for a full period of recognition. The more appropriate term, then--and one used by other bodies like the Council for Higher Education Accreditation[185]--is a "deferral" of recognition, until such time as the compliance concerns have been resolved and recognition is continued. We recommend the Department use the term "deferral" in place of "continuation."

The Department should redefine a final accrediting action.

In proposed 34 CFR 602.3(b), the Department proposes to define a final accrediting action as one made by the agency "at the conclusion of any appeals process." As the Department is no doubt aware, the appeals and arbitrations available to institutions are extensive and can take a significant amount of time before the actions become final. But failing to call an action final until all appeals are complete would have real implications. It means that students at the institution are notified of the action later, and are thus kept in the dark about a known issue--and subsequent sanction--at an institution. It could mean that states and other accreditors, or even the Department itself, takes action later, only after waiting for appeal. An *Inside Higher Ed* article last year noted that "some accreditors allow colleges and universities to appeal the vote placing them on probation on procedural grounds -- and they don't share news of that probation until the appeal is off the table. The setup prevents higher ed institutions from being harmed by news breaking about a probation that will later be struck from the record in the rare case of a probation being overturned."[186]

The Department also claims that the changes to this definition "would not change current practice."[187] However, it proposes to delete existing language that says final accrediting actions are not appealable. It is therefore unclear--and the Department should specify in the final rule--whether final accrediting actions under this definition would be further appealable; and how they might be appealed (i.e., through arbitration or litigation). The Department should also clarify whether this is current practice among all accrediting agencies or only some; and whether the Department itself has issued guidance on the matter.

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[184] 84 FR 27437

[185] https://www.chea.org/revised-chea-recognition-policy-and-procedures-0

[186] https://www.insidehighered.com/news/2018/09/18/summer-probations-raise-question-when-accreditor-should-disclose-colleges-status

[187] 84 FR 27417

The Department's changes open the door to unqualified bottom-feeder accreditors.

The Department proposes to remove a requirement that accreditors demonstrate their worth as gatekeepers to federal aid.

In proposed 34 CFR 602.10, the Department proposes to change existing language requiring accreditors that seek recognition to cite at least one institution that uses the agency as a gatekeeper for federal dollars. This change could mean an influx of brand-new, low-quality accreditors to serve as gatekeepers to over $100 billion annually in federal student aid, all without any evidence the agency can, and has, adequately and effectively reviewed and approved institutions for federal financial aid purposes. The Department says that its proposed changes are "designed to decrease barriers to entry"[188]-- surely a likely outcome of such a proposal. However, it fails to explain or justify why it believes that simply *sharing* an institution with an accreditor recognized as a gatekeeper to federal aid qualifies a brand-new accreditor to immediately gain access to full gatekeeping authority. Effective gatekeeping does not "rub off" on an accrediting agency; nor does a shared institution that is approved to receive federal aid provide evidence that a new agency is capable of approving other institutions for federal aid purposes.

Given other proposed changes in these regulations, it is also unclear why the Department's main justification--that "until a new agency is recognized, it is highly unlikely that an accredited institution would relinquish its current accreditation that enables it to meet title IV institutional eligibility requirements in order to attain accreditation from that new agency"[189] should have as much merit. For instance, proposed changes in 34 CFR 600.11(b) would more easily permit an institution to maintain multiple accreditors. The Department could, for instance, require an accreditor to identify an institution for which it *will* serve as a gatekeeper, prior to obtaining gatekeeper status. In other words, an agency applying to act as a gatekeeper to federal aid dollars should be required to provide evidence from at least one institution notifying the Department that it intends to switch from its current gatekeeper accreditor to instead designate the new agency as its gatekeeper when that new accreditor receives recognition. The Department should also require follow-through by the institution in redesignating its gatekeeper accreditor to the Department to ensure this requirement has teeth; specifically, it should clarify in 34 CFR 600.11 that, if the agency gains recognition, the institution must designate the new agency as its accreditor for federal aid purposes.

The Department should also apply limitations to new agencies that seek gatekeeper status through an initial application. For instance, the agency could be limited to accrediting no more than 5 institutions, within a particular volume of federal financial aid dollars (such as $10 million annually) until it has gone through a full recognition cycle as a gatekeeper and been determined by the Senior Department Official to be compliant with all criteria. This would help to ensure that accreditors--particularly inexperienced and/or poor-quality ones--do not come to scale too

[188] 84 FR 27418

[189] Ibid

quickly, and that the Department has a true body of evidence with which it can evaluate the new accreditor and ensure full compliance with all standards before removing any such restrictions.

The Department's justification for changing geographic scope allowances for accreditors falls short.

The Department's explanations for its proposed changes to the geographic area(s) in which accrediting agencies may operate fall short. The Department fails, for example, to contend with the fact that many states rely on the existing delineations of regional and national institutions for state authorization and other purposes. In some states, this could create problems as the state legislatures will be unable to convene and change their laws accordingly prior to the presumed effective date of these regulations.[190]

A loophole in accrediting experience will open the door to unqualified new accreditors and create financial incentives for existing accreditors to rent their names for profit.

In proposed 34 CFR 602.12, the Department proposes to permit new accrediting agencies to draw on the experience of another organization to gain access to over $100 billion per year in federal aid dollars, rather than requiring them to demonstrate their own experience. This is an ill-advised proposal, and an unnecessary one.

The Department indicates that it intends to make these changes because "recognized accrediting agencies sometimes re-organize or spin off a portion of their accrediting business by setting up a separate agency for it."[191] However, in recent examples--such as with the New England Association of Schools and Colleges (NEASC)--the agency does not appear to have been asked to complete an initial application when it restructured, and continues to accredit institutions.[192] If the Department believes such spin-offs to be a common occurrence, it should provide more details about the recognition histories of such agencies, and the leadership and staff changes during the restructuring, in the final rule.

It does seem, however, that the Department could be opening the possibility of a loophole in which current accrediting agencies rent their name and experience to help a new, unqualified entrant gain quick and easy access to gatekeeping taxpayer dollars. Consider, for instance, an agency that sets up a side business "incubating" new agencies for a fee -- lending their affiliation without any genuine relationship between the companies. While the Department says that it has "[mitigated] risk by adding additional requirements to ensure agencies meet appropriate quality standards,"[193] in reality these proposed regulations cut back significantly on quality standards, as well as the requirement for evidence that agencies (new and old) meet those standards. Taken in totality, the proposed regulations are a recipe for disaster: The entrance of new, unqualified

[190] https://wcetfrontiers.org/2019/06/14/new-federal-regulations-ready-for-your-comments-accreditation-related-regulations/

[191] 84 FR 27419

[192] https://www.neasc.org/about

[193] 84 FR 27419

accreditors, held to lower standards by the Department, will leave the growth of poor-quality institutions virtually unconstrained.

The Department should strike this language and maintain the current rules requiring two years of experience, as it was strongly urged to do even by many industry representatives during the negotiated rulemaking.[194]

However, if the Department decides to move forward with its language, it must narrowly define the term “is affiliated with or is a division of” as it is used in proposed 34 CFR 602.12. The definition should require that the spinoff agency has the same policies, staff, and financial and administrative capability as the original agency; or that it otherwise meet the requirement for two years of accrediting experience in its own right. This must serve not as a loophole to shuttle new accrediting agencies in the door, but as a genuine measure of whether or not an agency is considered “new” for the purposes of recognition. Additionally, any new agencies should not be permitted to use the newly proposed and unlawful “alternative standards” unless and until they have gone through at least one full recognition cycle and received full re-recognition and compliance with all the criteria required by the Department.

Similarly, the Department proposes in 34 CFR 602.12(b)(2) to eliminate the requirement that accrediting agencies have standards, policies, and experience for the types of institutions or programs for which the agency seeks an expansion of scope. Instead, the Department notes only that agencies *without* such experience may face limitations on the number of institutions or programs they may accredit and/or be subject to additional monitoring.

The Department should absolutely and unequivocally require all accreditors to have experience, with the types of institutions or programs they plan to accredit, prior to applying for an expansion of scope with the Department. Without such experience, the Department cannot adequately evaluate whether the agency should be approved for an expansion of scope -- nor should the agency be permitted access to serve as arbiters of quality in a space in which it lacks experience.

If the Department opts to move forward with the current language eliminating requirements that agencies have experience in order to expand their scope, it should at least specify that such agencies *will*, not *may*, be limited in the number of institutions to which it may grant accreditation. Agencies should not be permitted to approve more than 5 institutions or programs, within a particular volume of federal financial aid dollars (such as $10 million annually), until they have completed a full recognition cycle and demonstrated they are effective assessors of quality. This would help to ensure that accreditors--particularly inexperienced and/or poor-quality ones--do not come to scale too quickly, and that the Department has a true body of evidence with which it can evaluate the new accreditor and ensure full compliance with all standards before removing any such restrictions.

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[194] https://edstream.ed.gov/webcast/Catalog/catalogs/default.aspx

Limiting the requirement for acceptance of accrediting agencies radically reduces the minimum bar for agencies.

The Department proposes, in 34 CFR 602.13, to eliminate a requirement that accrediting agencies show their standards, policies, procedures, and decisions to grant or deny accreditation are "widely accepted" by educators, institutions, licensing bodies, practitioners, and employers. It should maintain--and strengthen--this requirement instead.

However, the Department has not adequately explained why the original rationale for including this requirement no longer applies. When the Department added this language in 1998, it noted that the acceptance of an agency by others was important because "in conjunction with the issue of accrediting experience, the Secretary notes that 1998 amendments replace the phrase "accrediting agency approval" with "accrediting agency recognition" and generally refer to agencies as "recognized" rather than "approved." The Secretary believes these changes simply clarify that the Secretary does not "approve" agencies; i.e., grant them permission to operate, conduct accrediting activities, and make accrediting decisions. Rather, the Secretary "recognizes" them for having demonstrated, as a result of their accrediting experience, that they are in fact reliable authorities regarding the quality of education or training provided by the institutions or programs they accredit."[195]

Additionally, the Department explains that it believes these "current regulations impose a ''widely-accepted'' standard that statute does not require, is too vaguely defined, and has been enforced inconsistently in the past."[196] However, it offers no alternative beyond eliminating the requirement entirely. The Department could, for instance, provide further clarity on the types of entities from which it seeks support (such as current documentation from state licensing agencies and employers, and evidence that students in institutions accredited by that agency are able to pass state licensure exams or earn certification in their fields). It could clarify what will be required of institutions to demonstrate wide acceptance (such as evidence from entities without conflicts of interest or available not upon the request of the agency). And it could spell out more clearly in the regulations what it believes will demonstrate adequate acceptance.

Instead, the Department eliminates this section entirely and claims that it is replaced by new language in another section--proposed 34 CFR 602.32, where the Department has proposed to require initial applicants to submit letters of support from at least three institutions; three educators; and three employers or practitioners (if appropriate), as well as one institution that will seek accreditation from the agency. However, each of the entities named in the proposed language in 34 CFR 602.32 (with the possible exception of the optional employers or practitioners) has a vested interest in the approval of the agency. In other words, not only will the agency be permitted to cherry-pick schools and educators to fulfill this requirement, but the livelihoods of those submitting letters will depend on the agency earning approval. This is neither valuable nor an appropriate metric for agency quality. Additionally, for an initial agency that does not meet any of the requirements in proposed 34 CFR 602.10 through 602.15, the Department

[195] 64 FR 34466-01
[196] 84 FR 27419

must require the agency to withdraw its application and reapply later.[197] The requirements for acceptance should be an initial eligibility measure, included in those sections of the regulations, rather than merely a box-checking exercise for initial applicants.

The Department also states that it believes the current wide acceptance requirements "could benefit incumbents at the expense of equally well-qualified new entrants and could leave even well-established institutions reasonably believing 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."[198] But surely, if the Department truly believes that the proposed language in 34 CFR 602.32(b) is duplicative of these requirements, it would feel the same way. The Department's argument does not hold water.

In reality, it's clear that the Department's impetus for making these proposed changes is rooted in a recent experience: ACICS. The notorious accreditor of very poor-quality institutions was found to be out of compliance with the wide acceptance requirements in 2016.[199] But when the Department reconsidered its application in 2018, it reversed course on that determination -- and stated that nine other accreditors had submitted evidence of support for ACICS.[200] The Department was later forced to rescind and reissue its Senior Department Official determination, removing mention of those agencies, when most of them confirmed they had never provided a letter of support.[201] Such "error[s] in the editing process"[202] may carry some embarrassment for the Department, but do not indicate the presence of inconsistent enforcement the agency uses as justification for rescinding this requirement.

The Department should maintain the existing requirement for wide acceptance. If it does not, it should include language like that in proposed 34 CFR 602.32(b) in current 34 CFR 602.13 instead, and ensure that the documentation required to demonstrate support is not merely from those with clear interests in ensuring the agency receives Department approval.

The Department's proposal strips requirements for the maintenance of records to ensure transparency and accountability.

Accreditors should be required to maintain adequate records to back up their decisions.
In proposed 34 CFR 602.15(b)(2), the Department proposes to limit the documentation that accreditors must maintain from their accrediting actions. Specifically, the Department proposes to require that accreditors maintain only full accreditation review documents and issued documentation letters.

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197 See proposed 34 CFR 602.32(g)

198 84 FR 27419

199 https://blog.ed.gov/files/2016/06/ACICS.pdf

200 https://www.politico.com/newsletters/morning-education/2018/10/05/education-dept-overstated-endorsements-of-for-profit-college-accreditor-363214

201 https://www2.ed.gov/about/offices/list/ope/correctedresponsefinal.pdf

202 https://www.politico.com/newsletters/morning-education/2018/10/05/education-dept-overstated-endorsements-of-for-profit-college-accreditor-363214

Importantly, the Department should explicitly require that accreditors maintain records on commission votes, as well as underlying documentation about the accrediting agency's decisions. Commission votes and staff decisions regarding substantive changes and other actions are particularly important given that the Department has proposed to permit staff--not commissioners--to approve many types of changes, including some of the highest-risk changes.[203] The Department or other law enforcement agencies may very well need that information. This is an opportunity to promote, rather than foreclose, information-sharing among members of the triad, who may need the on-the-ground information accreditors have collected to inform and support their oversight work. At minimum, the Department should add those approvals and/or commission votes to the list of required documentation. However, the Department should also ensure that agencies maintain documentation beyond only decision letters, which may prove critical; for instance, the Department recently cited to documentation contained in an ACICS submission that included much more, including internal emails[204] regarding the oversight of institutions, in reviving that agency.[205] Such information would not be covered by the proposed regulations here, presenting a missed opportunity.

The Department must maintain sufficient records to permit an independent evaluation of the evidence.

The Department proposes, in 34 CFR 602.32, to revise the current accrediting agency recognition process to focus more on site visits and file reviews. At the same time, the Department is proposing to limit the amount of information agencies must submit in the petition. We are concerned that the end result of this change will be to drastically limit the amount of information included in the administrative record, making it impossible for NACIQI to adequately review all the relevant materials and shielding the Department from public accountability for its oversight.

Specifically, the Department proposes that, aside from a list of institutions or programs that an accreditor approves, its review of agencies will constitute only: site visits to the accreditor; site visits to at least one institution the agency approves; a file review of documents at the accrediting agency; a review of comments submitted by the public; and a review of complaints involving the agency. The Department may consider, but does not base a finding of non-compliance on, complaints against an institution or program approved by the agency.[206]

In other words, an accrediting agency will submit little on paper. And the Department will maintain only records that it deems "needed for inclusion in the administrative record."[207] As this was described by the Department during negotiations, accreditation staff for the Department

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[203] See comments regarding proposed 34 CFR 602.22(a)(3)(i)
[204] https://www.ed.gov/accreditation/acics-part-ii-submission
[205] https://www.insidehighered.com/sites/default/server_files/media/ACICS%20FAD%2011.21.2018.pdf
[206] See proposed 34 CFR 602.32(d) and (e)
[207] Proposed 34 CFR 602.32(d)(1)(iii)

would require accreditors to upload documentation following the final review only "if we found issues."[208]

Yet when NACIQI reviews an accrediting agency, the petition and the Department staff's report are effectively all they have to consider regarding an accrediting agency. If the Department includes only those documents that it believes constitute a potential area of non-compliance, however, NACIQI will be unable to determine if there are areas of non-compliance the Department may have missed. 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,[209] 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.[210]

The Department should amend the proposed regulations to require that the agency retain all records reviewed during the site visits and/or file reviews to ensure adequate oversight and transparency by other entities. NACIQI's role will be limited in a way Congress did not intend, and its review will be far from independent of the agency's own review of accreditors, if the Department fails to ensure that members have access to adequate information beyond what the Department staff identified in their own review.

This kind of transparency is required by the statute. The Higher Education Act requires that the Secretary "maintain sufficient documentation to support the conclusions reached in the recognition process…"[211] The Department has not described how it could possibly be able to support the conclusions it reaches if the agency did not maintain all records it reviewed, to support each of its decisions--whether they are findings of compliance or non-compliance (or substantial compliance). In essence, NACIQI would have no way to weigh in on possible areas of non-compliance beyond those already flagged by the Department.

Relatedly, the Department should provide further clarity into how it selects the institutions for which it requests further documentation. The proposed regulations note only that accrediting agencies must submit "a list of all institutions or programs that the agency plans to consider for

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

[209] 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)

[210] 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)

[211] 20 U.S.C. 1099b(n)(4)

an award of initial or renewed accreditation over the next year or, if none, over the succeeding year, as well as any institutions or programs currently subject to compliance report review or reporting requirements."[212] The Department should require more information alongside these lists to facilitate smart choices of which institutions it looks into the accreditation of. Specifically, it should request a list of all institutions, their accreditation histories (including dates and the nature of all actions taken, similar to what is available through DAPIP), and any other actions or issues the agency is aware of for each agency (including relevant dates and the nature of Department sanction, state action, action by another accrediting agency, and investigations, lawsuits, or settlements with state or federal agencies).

The Department should also note in the regulations that it will consider institutions where the agency did or should have taken appropriate and timely action in reviewing the accreditor. This could include a review of the accrediting histories and other actions per institution to be collected in the above paragraph; a review of outcomes data available to the Department; a review of Department sanctions like Heightened Cash Monitoring 2 and provisional PPA status; and other information available to the Department staff.[213] Additionally, the Department should consider (among other factors) the extent to which an institution participates in Title IV as part of its oversight, ensuring that agencies are particularly capable of effectively overseeing those institutions that put the most students--and the most taxpayer dollars--at risk.

The Department needs to ensure adequate oversight of accreditors that may, recognizing that they are on a regular recognition cycle with the Department, shift their most problematic schools to be reviewed in off-cycle years, effectively preventing the Department from diving more deeply into those accrediting processes under the proposed regulations. And to be responsive to concerns like those in recent reports from both the GAO and the Inspector General's office, it should do more to ensure the Department's review of accreditors will--endorsed and enforced through regulation--be systematic and less subject to cherry-picking.[214] The Department's proposed changes would actually exacerbate the challenges identified by the GAO and others,

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[212] See proposed 34 CFR 602.32(a)

[213] As noted by the Government Accountability Office, "[the Department has] not used sanction information for oversight because current regulations do not have specific criteria that require them to do so. While Education is not required to use sanction data or analyze accreditor sanctions as part of the recognition process, **it could be useful for Education to consider these data when evaluating whether agencies meet prescribed criteria**, such as whether accrediting agencies consistently apply and enforce standards. **Federal internal control standards call for federal agencies to track data to help them make decisions**, as well as conduct ongoing, consistent monitoring to identify weaknesses. The fact that Education does not broadly examine data for a given accreditor also **makes it harder for the department to comprehensively identify potential risks and analyze them for possible effect, as required by federal internal control standards.** Not all of this information is available to the public, which uses the database to obtain high-level information on whether a specific school is accredited. In addition, Education's own strategic plan calls for better use of data. (emphases added) https://www.gao.gov/assets/670/667690.pdf

[214] https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/a09r0003.pdf; and https://www.gao.gov/assets/670/667690.pdf

risking the Department's ability to correct for known deficiencies in the recognition process in the future.

The Department is foreclosing the opportunity for substantive public comment on accreditor recognition.

In proposed 34 CFR 602.32(c), the Department states that during recognition proceedings, it will publish a notice of an agency's application in the Federal Register to seek public comment on the agency's compliance with the criteria. However, without publishing that application itself alongside relevant records, the public has little ability to provide meaningful and useful comments to the Department regarding compliance. Most accrediting agencies provide few windows into their accrediting activities and processes, let alone staff qualifications and organizations' financial circumstances. Yet the recognition process requires that the Department assess those exact types of materials and information to evaluate agencies' compliance. Without it, the public cannot be expected to write the kind of quality comments that might help to inform the Department's analysis.

Throughout the rulemaking, the Department suggested that in place of transparency, it would make various materials publicly available "through FOIA." As any researcher knows, however, FOIA is neither a realistic nor reasonable way to ensure access for the public.[215] And as noted elsewhere in this document, the federal government itself acknowledges this; an FAQ about FOIA from the Justice Department notes that FOIA.gov permits people to "make a request for information that is not yet publicly available."[216] Nor is FOIA timely enough to be useful when necessary; doubtless, the Department will not publish a comment period for accrediting agencies that lasts for the year or more required to receive a FOIA response. Furthermore, a temporary restraining order issued by a court last year acknowledged that the Department's decision to withhold applications during a comment process meant that members of the public would "be effectively barred from meaningful public engagement…"[217] The Department should ensure that the information submitted by an accrediting agency and other relevant materials the Department has within its possession are made publicly available alongside--or before--the issuance of the request for public comment. Moreover, the Department should ensure adequate time (at least 60 days) for the public to review the materials and provide comments.

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[215] For instance, New America has one FOIA that has been outstanding for nearly two years since August 2017 (FOIA number 17-02499-F).

[216] https://www.foia.gov/faq.html

[217] https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2018/02/16104012/TRO-Decision.pdf

The Department should increase, not eliminate, its expectations of accrediting agencies to ensure they are effective.

The Department's proposed changes would make requirements around accreditor standards a meaningless activity.

The proposed regulations in 34 CFR 602.16(a)(1) require that the accreditor set forth standards that "set forth clear expectations" for institutions or programs they accredit on ten criteria outlined in the law. However, the proposed language eliminates the very important requirement that "the agency must demonstrate that it has standards for accreditation, and preaccreditation, if offered, that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits. The agency meets this requirement if -- (1) The agency's accreditation standards **effectively address** the quality of the institution or program…"[218] (emphasis added)

The only explanation given for eliminating this language is that the Department believes it is a "vague description."[219] However, accreditors' expectations can be clear without being effective. And with over $130 billion each year in federal financial aid available to institutions by the grace of accreditors' approval, it is absolutely essential that those expectations meet a minimum bar for educational quality and student success. The Department's proposed change is a substantive one, which requires the agency only to have clear policies in place, however low the bar the agency sets for its institutions or programs. To be reliable evaluators of quality, as required by the law, accreditors' standards must also be effective in setting the bar for institutions. If the Department simply believes the language of "effectiveness" is unclear, it should clarify the term using more words--not simply eliminate the term altogether.

The Department's proposed changes would make accreditor recognition proceedings a box-checking exercise.

The Department also eliminates a consideration of accreditors' effectiveness in other places in the proposed regulations. In proposed 34 CFR 602.31(a)(2), the Department eliminates a requirement that accrediting agencies submit not only documentation of compliance with the recognition criteria, but also evidence that the agency "effectively applies those criteria." The Department is silent on the justification for these proposed changes in its preamble, not even noting that the change was made.[220] Yet this is an exceedingly important distinction; the statute requires that the Secretary limit, suspend, terminate, or require an agency to come into compliance if she "determines that an accrediting agency or association has failed to apply effectively the criteria in this section."[221] It is not enough, under the law, for an accrediting agency to have the right policies on paper, if those policies are not applied and enforced by accreditors in a way that ensures they are followed in practice. With billions of taxpayer dollar son the line

[218] See 34 CFR 602.16(a)

[219] 84 FR 27421

[220] See the absence of a discussion on 84 FR 27434

[221] 20 U.S.C. 1099b(l)

and millions of students' futures at risk, accreditors must both have, and apply--effectively--sufficient criteria to meet a minimum bar of quality.

Similarly, in proposed 34 CFR 602.32(d), the Department proposes to evaluate an agency's "consistency" in applying the criteria, but eliminates a consideration as to its "effectiveness." And here, again, the Department is silent on the change it made, perhaps hoping that no one would notice.[222] But while evaluating the consistency of an accreditor's application of the criteria may be important (and is required by law[223]), so, too, is a consideration of the effectiveness of that application.[224]

And in proposed 34 CFR 602.36, the Department eliminates the requirement "effective application" of the criteria primarily to insert the new (and unlawful) concept of "substantial compliance." It notes again that the phrasing of effectiveness is "too vague" and "may invite inconsistency or conflict with the proposed standard of 'substantial compliance.'" And it argues that its new language penalizing an agency that "fails to comply" with the recognition criteria "sets a workable and sufficient standard."[225] However, as noted elsewhere in these comments,[226] the concept of substantial compliance is impermissible under the Higher Education Act, which also requires that agencies "apply effectively the criteria" in order to maintain recognition with the Department.[227] And "failure to comply" may look different on paper and in practice, necessitating further language (like 'effective application') to differentiate between the concepts. If the Department believes the current language is too unclear, it has an obligation to further explicate -- but it does not have permission under the law to remove the concept of effectiveness entirely.

The Department's accreditation staff should continue to make recommendations to staff.

In proposed 34 CFR 602.32(h)(4), as well as proposed 34 CFR 602.33(c)(2), the Department proposes to eliminate the current requirement that Accreditation Group career staff at the Department make a draft recommendation to the accrediting agency regarding its recognition. The Department provides no rationale for (and in fact is silent on) this proposed change.[228] We believe the Department should maintain the existing draft staff recommendation requirements.

The recognition process is run largely by the accreditation career staff at the Education Department. Particularly given the proposed broadening of who can serve as the Senior Department Official under 34 CFR 602.3 of the NPRM, the career staff members' words will carry

[222] See the absence of a discussion on 84 FR 27436
[223] 20 U.S.C. 1099b(a)(4)
[224] 20 U.S.C. 1099b(l)
[225] 84 FR 27439
[226] See comments elsewhere in this document, listed under "The Department's proposed overhaul of compliance is unlawful and nontransparent."
[227] 20 U.S.C. 1099b(l)
[228] See the absence of discussion at 84 FR 27436

substantial weight with both accreditors and with the SDO and the Secretary. In most instances in recent memory, the staff recommendation aligned with the SDO decision.[229] It seems reasonable that accrediting agencies get a heads-up as to what those career staff initial determinations are, particularly given that the Department has lengthened the recognition process and is allowing agencies more time to respond and demonstrate compliance, if they are able.

[229] https://opeweb.ed.gov/aslweb/finalstaffreports.cfm

The Department's Proposed Regulations Are Inappropriately Responding to the Single Case of ACICS

Throughout these comments on the proposed regulations, we have identified flaws with the Department's proposals, including a lack of evidence to justify the proposed changes, unlawful proposals that are inconsistent with the statute, and other proposals that fail to adequately weigh the costs to students and taxpayers against the questionable benefits of reduced oversight. However, it is also true that the Department cannot be said to have conducted a reasoned rulemaking if it operates on the basis of a single case.

That does appear to be the case throughout these proposed regulations -- many of the proposed changes seem to be a direct response to circumstances that have arisen over the past three years regarding the Accrediting Council for Independent Colleges and Schools (ACICS) and the institutions it approved.[230] What follows is a non-exhaustive summary of the proposed changes that respond to the direct issue raised with respect to ACICS in recent memory.

Relaxing Requirements that Accreditors Enforce Their Standards in a Timely Way. The Department proposes to double the maximum timeframe during which an institution can remain out of compliance, as well as to insert a new three-year timeframe (with a possible good-cause extension) before an accreditor takes *any* action. (See proposed 34 CFR 602.18(b) and 602.20) This was one of the large problems the Department identified with respect to ACICS in 2016. As the Department wrote in its staff report:[231]

> "[It] is not clear that the agency's review of student achievement meets the enforcement timelines as required by this section.... while it is permissible to defer decision when an agency needs additional information to determine compliance, that cannot be done when an institution is clearly out-of-compliance with not only the agency's benchmarks, but its standards, as reflected in this example. Under the requirements of this section, any program of less than one year should face adverse action at the end of "year 1," absent an extension for good cause.... The agency's narrative, & its ACICS Student Achievement Webpage, clearly indicate that ACICS provides a time period longer than regulations allow to return to compliance for an institution that is not meeting the agency's student achievement standards.
>
> "Based on the narrative throughout the petition, ACICS appears to be confused with the application of the regulation with regards to its review of student achievement. Although the agency's student achievement standards have a clear bright-line for retention & placement rates, the agency appears to only determine an institution out-of-compliance after given time to improve.... The agency's interpretation of this regulation in regards to its review of student achievement is incorrect & must be

> revised to reflect enforcement as soon as the institution or program's rates are reported below the agency's published standard."

Rather than continue to enforce the existing requirements, the Department is simply rewriting the rules to erase the problems that ACICS experienced.

Eliminating Requirements that Accreditors Be Widely Accepted. The Department's proposed changes would rescind a provision of the regulations that requires accrediting agencies to demonstrate their standards and accrediting decisions are accepted by educators, institutions, practitioners, employers, and licensing bodies. (See proposed rescission of 34 CFR 602.13)

However, ACICS has a complicated history with this provision. In 2016, the Department noted that the agency failed to submit current documentation demonstrating acceptance from nursing accreditors and a state system of higher education, and that it claimed to be in good standing with all state approval agencies despite a comment submitted to the Department urging withdrawal of recognition by 13 attorneys general.[232] A Senior Department Official recommended that Secretary DeVos reverse the decision in 2018, instead finding the agency to meet the wide acceptance requirement -- but cited letters of support from nine other accreditors that did not exist. In reality, eight of the originally named agencies--ACCET, DEAC, SACS, WASC, ACSC, NCASC, MSCHE, and ACCJC--submitted no such letters of support.[233] The Department was later forced to rescind and reissue its Senior Department Official determination, removing mention of those agencies, when most of them confirmed they had never provided a letter of support.[234]

By eliminating the requirement, the Department is white-washing over its "error," and ensuring ACICS will never again have to contend with the provision.

Reducing Focus on Ensuring Accreditors Are Actually Effective. The Department proposes to change a current requirement that accreditors' standards "effectively address the quality" of an institution, and instead require that the agency "set forth clear expectations." (See proposed 34 CFR 602.16(a)(1)) The Department also proposes to eliminate a requirement that agencies submit evidence that they "effectively appl[y]" the Department's criteria, instead requiring only that agencies show documentation of compliance with the accreditation criteria. (See proposed 34 CFR 602.31(a)(2)) This was a common critique of ACICS in the Department's 2016 career staff report. The staff reported challenges in verifying the effectiveness of ACICS' standards on

[230] Diane Auer Jones served as the SDO for ACICS in 2018, and is also overseeing this rulemaking.
[231] https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=15&mid=68
[232] https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=15&mid=68
[233] https://www2.ed.gov/about/offices/list/ope/correctedresponsefinal.pdf
[234] https://www.politico.com/newsletters/morning-education/2018/10/05/education-dept-overstated-endorsements-of-for-profit-college-accreditor-363214

student achievement, fiscal and administrative capacity, recruiting and admissions practices, resolution of complaints, and compliance with Title IV requirements. Staff also found the agency was ineffective in monitoring institutions, writing:

> "the large number of substantial settlements agreed to by ACICS-accredited institutions in qui tam actions and actions by State attorneys general indicate that ACICS is not effective in its monitoring. Its monitoring regime appears insufficient to deter widespread misconduct regarding placement, recruiting and admissions. The actions discussed in Section 602.16(a)(1)(i) also indicate that the agency does not act on the information obtained through its monitoring."[235]

The Department is, again, eliminating the critique not by requiring all agencies to meet a minimum bar for their effectiveness -- but by eliminating the notion of effectiveness entirely. This would essentially make the entire recognition process a paperwork exercise, rather than an assessment of an agency's reliability as an arbiter of quality for the purposes of serving as a gatekeeper for federal financial aid -- but it also shields ACICS from further critique.

Limiting Consideration of Lawsuits against Institutions in Accreditor Recognition. The Department proposes to insert language stating that the review of complaints or legal actions against an institution or several colleges approved by a particular accreditor may be considered, but are not necessarily determinative of the agency's compliance. (See proposed 34 CFR 602.17(e), 602.32(d)(2), and 602.36(e)(1))

That such complaints are solely determinative of accreditor compliance has never been the case. But in 2016, the overwhelming stack of litigation against ACICS-accredited schools was noted in the staff report as a significant compliance concern. For instance, career staff at the time noted that "the agency's track record related to verifying self-reported information has been problematic." Staff also noted that:[236]

> "ACICS further asserts that there is "no available evidence to date to confirm fraudulent behavior by member institutions" and that placement rate litigation settlements have not admitted liability. ACICS' assertions ignore the findings made by the Dept. and the California Attorney General confirming widespread placement rate fraud at institutions nationwide accredited by ACICS well into 2015.... Such findings of misconduct, subsequently upheld in a California court.... were such as to compel the Dept. to agree to discharge millions of dollars of federal student loans. In addition**, it is not plausible to dismiss multiple settlements, that impose very substantial obligations, monetary and otherwise, and that result from claims filed in the public interest by state attorneys general, as if they were materially lacking in substantiation**." (emphasis added)

[235] https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=15&mid=68
[236] Ibid

The Department did not make clear why it would wish to minimize the presence of lawsuits, settlements, and complaints against institutions approved by a particular accreditor, particularly given the substantial costs both to students (through tuition payments and student loan debt) and to taxpayers (through federal aid dollars and increased borrower defense and closed school liabilities) -- except inasmuch as this language covers ACICS.

Eliminating Career Staff Recommendations on Accreditation. The Department proposes to eliminate an existing requirement that career staff develop a recommendation to the senior Department official responsible for issuing a determination on recognition of accreditors and share that draft recommendation with the agency in advance of a final staff report. (See proposed 34 CFR 602.32(h)(4) and 602.33(c)(2))

Again, ACICS has a sordid history with this policy. In December 2016, then-Secretary King affirmed the Department would withdraw recognition from ACICS in light of the overwhelming evidence that the agency could not come into compliance within 12 months. In March 2018, a court directed the Department to consider additional materials from the original decision. However, in Fall 2017, the agency had already submitted a brand-new application for initial recognition in an attempt to gain recognition that way. That meant the Department staff were already well underway in their review of the initial petition by the time, in October 2018, the Senior Department Official recommended Secretary DeVos restore recognition to ACICS.

That recommendation came, however, in spite of a draft staff recommendation against approving the initial application. According to the draft staff report, ACICS was out of compliance with 57 of the 93 statutory criteria.[237] The Department attempted to bury the draft staff recommendation, but were forced by a Freedom of Information Act lawsuit to release the report.[238] By revising the language in the regulations requiring a draft staff report, the Department is instead seeking to ensure career staff cannot again contradict political appointees on ACICS or other future agencies.

Permitting Accreditors to Reach Only Substantial, Not Full, Compliance, and Subjecting Agencies to Non-Transparent Monitoring. The Department proposes to require that accrediting agencies meet a lower bar for recognition--substantial, rather than full, compliance with the criteria--and notes that the Department may opt to review progress on the non-compliant elements through secretive "monitoring reports" only shared with the Department and exempt from the public accountability processes of NACIQI approval and public comment. (See proposed 34 CFR 602.23 and elsewhere in the proposed regulations)

But in point of fact, the Department is already using these fabricated concepts, despite the fact that they aren't yet included in final regulations. When Secretary DeVos re-reviewed the

[237] https://www.politico.com/story/2018/06/09/devos-for-profit-college-accreditor-report-611935
[238] https://www.nsldn.org/news/new-lawsuit-seeks-ed-report-on-for-profit-college-accreditor-acics

application of the Accrediting Council of Independent Colleges and Schools (ACICS), she wrote that, "in the opinion of the [Senior Department Official], ACICS is currently, and in many cases was in 2016, **substantially compliant** with all of these criteria."[239] The Secretary also wrote that she would "heed the [Senior Department Official]'s recommendations regarding specific **monitoring goals** for ACICS going forward."[240] (emphasis added)

This is particularly concerning that the areas of non-compliance that the Secretary did find with ACICS--administrative and financial resources; student achievement standards; recruiting and admissions practices; and monitoring [of institutions]--are deeply important elements of accreditors' responsibility. Using the substantial compliance and monitoring definitions proposed in these regulations (and used in practice with ACICS) protects ACICS from heightened public scrutiny and a potential negative NACIQI review moving forward.

Unlawfully Extending Access to Federal Aid for Failed Schools. The Department proposes to permit colleges continued access to federal aid after a loss of accreditation and/or termination of federal aid eligibility so that the offending college can complete a teach-out of its students. (See proposed 34 CFR 668.26) This was a specific request made of Congress, and reported on publicly,[241] shortly before the start of the rulemaking, in the wake of the collapse of ACICS-accredited Education Corporation of America. In a letter to several lawmakers,[242] a for-profit lobbyist requested that:

> "at a minimum, we should provide the Department of Education authority to provide continued access to Title IV financial aid, if necessary, to maintain the continued academic programs serving their students. Today, in the case of ECA closures we know that many financially stable schools have sought to take over such school operations in ways that maintain staff and continue serving students. But the current federal regulations prevent this from happening!"

The letter-writer appears to be relaying a professional opinion that this would require a statutory change to be legal. Additionally, it emphasizes the influence that ACICS and ACICS-accredited institutions have over the Department in this rulemaking.

Easing Purchases of Failed Schools. The Department also proposes to permit colleges to more easily acquire closing campuses, by reducing the requirements on the purchasing institution and limiting the liability the purchaser must accept. (See, for instance, proposed

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239 https://www.insidehighered.com/sites/default/server_files/media/ACICS%20FAD%2011.21.2018.pdf
240 Ibid
241 https://www.educationdive.com/news/for-profit-trade-group-urges-democrats-to-ease-takeovers-of-troubled-colleg/545389/
242 http://www.career.org/uploads/7/8/1/1/78110552/warren.cummings.bonamici_1-3-19.pdf

changes in 34 CFR 600.32(c) and (d)) This was an ask of Congress, and perhaps the Department, in the same letter as is referenced in the previous item. The letter-writer wrote:[243]

> "The only way we [closed schools] can currently continue educational services to the students without interruption is if a new owner/operator; a.) accepts all liability from the previous owner's participation in Title IV; b.) assumes all liabilities of the previous owner to current and former students.... we believe the Department of Education should be able to authorize continued operations at such site and immediate access to Title IV to continue the students' academic studies through a new owner approved by both the Department and the accreditor.
>
> Quite simply, the current regulations prevent other institutions from immediately assuming the academic operations at a site closed or scheduled for closure. As you will determine in your review of the current closures, when a school abruptly closes the procedures prioritize the Department's and the accreditor's relationship with the closed school ownership. We need to create a process that ensures students' continued education!"

Here, again, the Department appears to be re-writing the regulations to accommodate the specific requests of the for-profit industry in response to the closure of an ACICS-accredited school.

The Department Should Maintain Strong Provisions on State Authorization

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.

The Department should narrow its exemptions to state authorization to exclude colleges with only slight religious affiliations.

Under proposed 34 CFR 600.9(b), the Department proposes to exempt colleges from state authorization requirements "if it is exempt as a religious institution from State authorization under the State constitution or by State law." Yet this exemption is much broader than under current rules, which apply only to institutions owned, controlled, operated, and maintained by nonprofit religious organizations and that award only religious degrees or certificates.[244]

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[243] Ibid

[244] Current 34 CFR 600.9

Even with such significant daylight between the two versions, though--daylight that might permit, say, a liberal arts college with the vaguest of associations to a religion to evade consumer protection requirements--the Department provides virtually no justification for the proposal.[245] For instance, in the Department's last round of regulations, the Department described this change, noting that the narrow definition was in response to the recommendations of commenters who "felt strongly that a religious exemption must be tailored to prevent loopholes for abuse…"[246]

Moreover, the Department has failed to provide any evidence that the current law and regulations represent a problem for religious institutions. More than 900 institutions boast a religious affiliation;[247] yet the Department was unable to find a single example of a religious institution that had struggled to comply with federal law in this area.[248]

The Department should ensure states protect their residents.

In proposed 34 CFR 600.9(c)(1)(ii)(A)-(C), and elsewhere in the proposed regulations, the Department proposes to determine students' state of residence (for purposes of state authorization) using "the state in which a student is located," rather than the state in which a student resides. It argues that "use of the concept of 'residence' has led to confusion and barriers to compliance."[249]

Yet as we wrote to the Department in a 2018 letter[250] that went both unanswered and unacknowledged, this 'confusion' (noted in only a single letter to the Department[251]) could be clarified easily through guidance. The 2016 rule explained how institutions could comply with the regulation, in accordance with common institutional practice. Specifically, the rule states that, "in general, when determining the State in which a student resides, an institution may rely on a student's self-determination unless the institution has information that conflicts with that determination."[252] The state authorization regulation for distance education programs has been in effect for several months, and the Department has failed to issue any information to schools through Dear Colleague Letters, notices on the Information for Financial Aid Professionals website, FAQs, or any other avenue the Department has. The Department can't, then, say that these issues of confusion still exist -- or that they can't be resolved by a simple clarification of how an institution determines of which state a student is a resident.

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245 See the absence of discussion on 84 FR 27413-27414
246 84 FR 66867
247 Author's analysis of IPEDS data, available upon request
248 As witnessed during the faith-based entities subcommittee meeting.
249 84 FR 27413
250 https://na-production.s3.amazonaws.com/documents/03262018_State_Authorization_Letter_Final.pdf
251 https://wcet.wiche.edu/sites/default/files/WCET-SARA-DEAC-Letter-2-7-18_0.pdf
252 81 FR 92236

Instead, the Department adopts "location" in favor of students' state of residence, and permits states to establish their own processes for defining location. We are concerned that this could lead to significant inconsistencies and give states the ability to minimize their own obligations, at the expense of student protections. While the Department says that its proposed change to "location" will "ensure that students who have not established legal or permanent residence in a state benefit from state requirements for an institution to offer distance education and correspondence courses in that state,"[253] the Department has not explained how it will avoid the risk that some students will wind up in a confusing jurisdictional middle ground. This requirement should be clarified by states to ensure appropriate coverage, rather than left to institutions to define.

If the Department does move forward with the assessment of location, it should strengthen the proposed language that gives institutions discretion to determine location however and whenever they choose. Instead, the Department should require that institutions determine location for all enrolled students not less than annually. And it should require that the institution update its determination of location "upon formal receipt of information from the student" (as already required) as well as when the institution reasonably should have known about the change in location. Students are unlikely to be aware they must formally notify an online college of a move across state lines, but colleges may well be aware of the student's move from a host of other updates the student informally provides. This is a loophole begging for evasion.

The Department should strengthen its definition of state reciprocity agreements.

The Department proposes, in proposed 34 CFR 600.2, to include a definition of a state authorization reciprocity agreement that looks very similar to the previous rules promulgated on this issue.[254] However, the Department should strengthen its justification in support of the relevant language. The Department provides virtually no justification in the proposed rule as to why it proposes the maintain the definition of a reciprocity agreement. For instance, it lists nothing in the "reasons" section of the preamble regarding that definition, noting only that "the committee agreed to maintain the definition of ''State authorization reciprocity agreement'' as it was established in the Program Integrity and Improvement regulations published in the Federal Register on December 19, 2016 (81 FR 92232)."[255]

Importantly, the language in that definition of a reciprocity agreement carefully balances the desire of institutions to access easier processes for applying for authorization in multiple states with the authority of states to enforce their own higher education laws. The National Council for State Authorization Reciprocity Agreements (NC-SARA), the largest of such agreements, "was established in 2013 in order to provide much-needed structure and consistency to the growing online postsecondary education market, at a time when states had barely begun to grapple with

[253] 84 FR 27413
[254] 81 FR 92232-92263
[255] 84 FR 27411

approvals and oversight of institutions outside of their borders."[256] However, as it took effect in the midst of a regulatory vacuum between Department efforts to clarify state authorization requirements for distance education and correspondence programs, in some ways it overstepped its boundaries, exploiting states' lack of familiarity with oversight of out-of-state institutions to impose inappropriate terms that "undermine states' authority to protect their own residents."[257]

The 2016 regulations the Department is proposing to maintain sought to correct the imbalance by permitting states to outsource authorization processes to reciprocity agreements, but requiring that such agreements maintain states' authority to enforce their own consumer protection laws.

The Department made a strong case for the need for these regulatory clarifications in the 2016 final rule. It stated, "we disagree with the recommendation by some commenters that the term "consumer protection laws" be clarified to only refer to the laws that apply to all entities doing business in the State, not just institutions of higher education, so that the resulting outcome would be that laws that applied only to institutions of higher education would be displaced by a State reciprocity agreement. Rather, we believe that **if a State has laws that are specific to postsecondary institutions, the State's laws should not be preempted by a reciprocity agreement that does not recognize those State laws**. (emphasis added) Thus, we believe that the definition of a State authorization reciprocity agreement should encompass a State's statutes and the regulations interpreting those statutes, both general and specific, including those directed at all or a subset of educational institutions. We decline to further specify the content of State statutes and regulations, and we also decline to require specific State policies and procedures." The Department added, "we agree that States should be active in protecting their own students, and thus, agree that the word "participating" should be replaced with "any" when referring to reciprocity agreements, so that a State authorization reciprocity agreement does not prohibit any State from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions. We would expect States to work together to implement a reciprocity arrangement to resolve conflicts between their respective State statutes and regulations and the provisions of the State authorization reciprocity agreement."[258]

The Department further clarified in a letter to NC-SARA that "the regulation does not allow State reciprocity agreements to supersede other State laws if there are conflicts within state law that have not been resolved by the States themselves by making amendments to statutes or regulations," and pledged to "coordinate with States, institutions and state reciprocity agreements to ensure the inconsistencies are resolved."[259]While some have attempted to claim that the letter permits reciprocity agreements to foreclose states' authority to enforce their own consumer protection laws once those states have joined the agreement, this wild interpretation

[256] https://ticas.org/sites/default/files/pub_files/going_the_distance.pdf
[257] Ibid
[258] 81 FR 92234
[259] https://wcet.wiche.edu/sites/default/files/Ted-Mitchell-Reciprocity-Response.pdf

fails to recognize the Department's clear prohibition (above) on that exact edict in the very next sentence of the letter.

Neither the Department nor negotiators during the rulemaking made a compelling case for revising that change, and all unanimously agreed to maintain the 2016 rule. Since then, a court has found that the Department illegally delayed implementation of the 2016 rule, and it has taken effect.[260] The Department has issued no guidance to institutions or reciprocity agreements, and so we assume that the agency has every intention of standing by the state authorization reciprocity agreement definition from the 2016 rule.

States must be permitted to enforce other laws on the books for colleges. Reciprocity agreements are not an avenue for institutions to skirt accountability or transparency requirements that state legislators have opted to put in place. Nor do they supplant the requirement in law that states participate in the authorization of institutions that operate within their borders. Instead, they are designed to ease paperwork burden. The final rule must reflect these principles and maintain the current language regarding the definition of a state authorization reciprocity agreement.

The Department should strengthen requirements for complaint systems.

In proposed 34 CFR 600.9, the Department struck an existing requirement that institutions offering distance or correspondence education in a state other than where the school is physically located must ensure there is a state process for reviewing and acting upon complaints in each state where enrolled students reside, and/or through a state authorization reciprocity agreement.[261] The Department explains this change as a requirement that is already and separately documented in 34 CFR 600.9(a)(1), which addresses the requirement for a complaint process in only states in which the institution is physically located.

These are two separate requirements, however. The Department seems to acknowledge this; it goes on to say that "the change will ensure that students who are located in states without a complaint process for students enrolled in distance education or correspondence courses are not prevented from receiving title IV, HEA assistance."[262] The flip side of that argument, however, is that students will not all have access to a complaint system in the state where they reside; and the state in which the institution is located may lack jurisdiction to take the actions needed to protect that resident and help resolve his or her complaints. In other words, the language that the Department eliminated removes a critical protection for students.

The Department's statement also appears to suggest it believes states are currently not complying with the requirement that they have a complaint process for students attending an out-of-state school online. However, the Department presents no evidence as to how many states

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[260] *National Education Association, et al v. Betsy DeVos* (2019), https://www.nsldn.org/post/educators-students-win-lawsuit-against-secretary-devos-and-department-of-education
[261] See current 34 CFR 600.9(c)(2)
[262] 84 FR 27414

or students it believes are affected by this non-compliance; nor does it appear to have taken any steps to enforce the 2016 state authorization rule in the interim, which it must where it has knowledge of institutions that do not meet the requirements. California was raised as an example of one such state during the negotiations, but California recently added the necessary complaint process; all other states are participants of NC-SARA, which includes a complaint process for online students. Without evidence of a problem, the Department cannot simply strike this language, removing a central protection of the state authorization rule. If it does choose to strike this language, it must instead incorporate it into proposed 34 CFR 600.9(a)(1), to clarify that online students attending an out-of-state college must also be covered by the complaint process.

Moreover, the Department should strengthen the existing requirements to ensure clarity about the review and resolution of claims.[263] States should have the authority, under the rule, to accept, investigate, and act on complaints from their residents attending school in another state, and from students located and enrolled in colleges within their own borders. The Department can--and should--clarify in these regulations that the complaint process in 34 CFR 600.9(a)(1) requires states in which an institution is located to share a copy of complaints with other states whose residents are enrolled at that institution. This will facilitate better information-sharing across members of the triad, and ensure states are all able to work off the same information.

The Department Should Strengthen, Not Weaken, Disclosures, Ensuring Students Are Not Left in the Dark

The Department's proposed elimination of placement rate disclosures is problematic.

In proposed 34 CFR 668.41(d), the Department proposes to eliminate some required job placement rate disclosures. Specifically, it deletes existing language requiring that institutions disclose any placement rates they calculate,[264] and eliminates a requirement that institutions identify the source, timeframe, and methodology behind the job placement rates they do disclose.[265]

Job placement rates represent important consumer information. As New America found in conducting a nationally representative survey that included both nontraditional and traditional recently-enrolled students and students planning to enroll within a year, more than nine in 10 students said "improving my employment opportunities" was a key reason they were going to college. Seventy-eight percent of respondents said that "how many graduates find full-time employment in the field within six months" was important to them in identifying a college to go to.[266]

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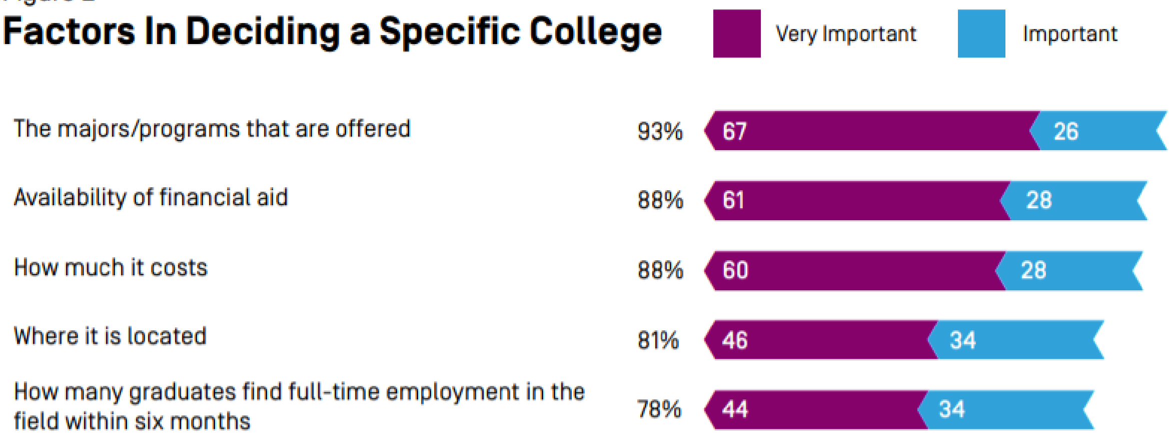
263 https://ticas.org/sites/default/files/pub_files/going_the_distance.pdf
264 34 CFR 668.41(d)(5)(iii)
265 34 CFR 668.41(d)(5)(ii)
266 https://www.newamerica.org/education-policy/policy-papers/deciding-to-go-to-college/

Figure 2

Factors In Deciding a Specific College



Source: New America College Decisions Survey

Eliminating the requirement that institutions publish any placement rate they calculate--rather than just those they are willing to advertise--leaves open the likelihood that institutions will knowingly have programs with very poor outcomes, and keep students in the dark about that. The Department explains that it does not believe "the methods used for internal analysis...meet the standard of rigor required for published placement rates."[267] It does not, however, explain why the Department does not strike a middle ground. For instance, the Department can (and should) require that any job placement calculated at the behest of a state authorizer or accrediting agency must be disclosed, as it proposes in a less direct disclosure under proposed 34 CFR 668.43(a)(14).[268] Such a requirement ensures minimal methodological standards are in place, and counter the inclination poor-performing schools will have not to release the information otherwise. Moreover, it is information that *should* help to inform students' decisions, since it is apparently a factor in the oversight of the institution by its regulators.

The Department, perplexingly, does not attempt any justification of its proposed deletion of the requirements that institutions provide source and methodology information alongside disclosures of placement rates published or used in advertising.[269] This information is exceedingly important to contextualize placement rates, particularly given the wide variation the Department notes in the quality of placement rates. The Department claims to be concerned about the degree to which placement rates are helpful to students; yet this proposed regulatory change would actively deprive them of critical information.

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[267] 84 FR 27441

[268] 84 FR 27443

[269] The Department does mention the change, but not at all in the "reasons" section of the proposed rule. See absence of discussion on 84 FR 27441

The Department should maintain strong disclosure requirements for institutions.

Licensure disclosures help level the information playing field between students and institutions.

The Department proposes, in 34 CFR 668.43, to require that institutions disclose to students the states in which an educational program meets the state's requirements for licensure, as applicable. We strongly support this proposed disclosure and urge the Department to maintain the language in its final rule. As the Department notes, these proposed disclosures would "encourage institutions to conduct research regarding whether its programs would fulfill requirements for state licensure in the fields for which the programs prepare students," and "it is vitally important that students have as much information as the institution at which they are enrolling regarding whether their educational program will meet state licensure requirements."[270] The Department proposes this language in 34 CFR 668.43, which requires that disclosures be "readily available," but should instead propose the change in 34 CFR 668.41, which requires the information be shared through "appropriate publications, mailings or electronic media." The Department should move the accreditor and state placement rate disclosures to the more specific disclosures in 34 CFR 668.41 to give students the best chance to access the information; this is particularly important given the already-poor compliance of institutions with respect to placement rates. If the information must only be "readily available," research shows institutions will make it much more difficult for students to access.[271]

As a non-federal negotiator wrote to the Department in a rulemaking last year, "licensure requirements can have significant implications for students and workers themselves. Unlicensed workers also fare worse in the workplace than licensed workers, earning 28 percent less on average. And while in some cases, licensure requirements place undue burdens on workers, those requirements are a reality of today's workers, with more than one in four U.S. workers across 1,100 occupations requiring a license for their work today."[272]

She continued, "Some institutions of higher education have been found to suggest, intimate, or misrepresent to students that their education will lead to employment, when in actuality the fact that they do not meet students' home state licensure requirements forecloses the possibility that those students will find employment in the field for which they sought education. For instance, in 2015, the Iowa Attorney General settled a lawsuit with an institution that offered an online teacher preparation program that students believed would lead to their being certified as a public school teacher. According to the Attorney General's office, graduation from that program is not sufficient to obtain initial teacher licensure in any state, in large part because its programs do not offer student teaching experience."[273]

[270] 84 FR 27443
[271] See, for example, , https://www.air.org/sites/default/files/Higher-Education-Disclosure-Laws.pdf
[272] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/memoissue8metune.docx
[273] Ibid

Given how consequential the answer to this question--will my program meet the requirements for licensure in my state?--is for individual students, the Department should require that all programs *do* meet licensure requirements, not merely disclose when they do not. During the gainful employment rulemaking, non-federal negotiators who tended to disagree on other aspects of the rulemaking came together and developed joint language recommending changes to this section. Therefore the Department should clarify in the regulations that institutions must certify they meet licensure requirements for all of their students, in all states in which they operate.[274]

If the Department fails to make it a basic eligibility requirement that programs meet licensure requirements, it should at least consider moving from making these disclosures "readily available," where they may be buried on a website with a lengthy list of other disclosures, to making direct disclosures to prospective and enrolled students if the program does *not* meet licensure requirements. As the Department wrote in its rescission of the gainful employment rule, "part of our [the Department's] goal is to end information asymmetry between institutions and students."[275] Even burying the information on a website is better than the status quo -- but the Department will need to go much further to eliminate the massive information asymmetry that exists in higher education..

In short, these provisions are the least institutions can and should do, given that millions of students enroll in college each year with the primary goal of improving their skills to increase their career potential.

As a suggestion that is outside the scope of these regulations, the Department could also consider how best to help institutions comply with this requirement. For instance, it could request that states provide information on licensure requirements directly to the agency, where it can construct a public database that would also aid states themselves in understanding where their licensing requirements are situated and how well institutions enrolling their residents are complying. Or it could work with state higher education executive officers, or the largest state authorization reciprocity agreement, to help compile this information. The Department could serve a useful coordinating role here, and may wish to do so outside of the regulations moving forward.

Teach-outs are requirements students have the right to know about.

The Department proposes to require a disclosure to students if the institution is required to maintain a teach-out plan, and the reasons for such requirements, in proposed 34 CFR 668.43(a)(14). We strongly support these disclosures.

[274] For more, see our comments submitted for the proposed gainful employment rule, beginning on page 52. https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-proposed-gainful-employment-rule/
[275] 84 FR 31404

Teach-out plans and agreements are an important tool accreditors and other regulators use to identify institutions that potentially face risk of closure. Given the continuous cycle of closures--often abrupt and without warning to students--we have seen from colleges in recent years, it seems clear that the Department and institutions need to do more to ensure students can make a decision about re-enrolling in a particular institution of higher education with their eyes wide open. Improving teach-outs is one part of the Department's focus and apparent goals for this regulation, and ensuring students have a window into that process, *before* the school closes, is an important part of that improvement.

We support disclosures of both teach-out agreements and plans. But at an absolute minimum, these disclosures should be required for schools asked to maintain a teach-out agreement. The request for an agreement typically indicates that the accrediting agency sees an even larger risk of closure, and of a potential inability of the college to finish educating its students itself. Those very-high-risk schools should be subject to transparency for their students. It is the least the school could do for them.

Students need to know about investigations, actions, and prosecutions at their colleges.
The Department proposes in 34 CFR 668.43(a)(20) to incorporate a disclosure to students anytime it is aware of an ongoing investigation, action, or prosecution by a law enforcement agency for issues related to academic quality, misrepresentation, fraud, or other severe matters. This would be a huge improvement over the status quo, in which colleges can stay quiet until the consequences arrive.

Today, students too often don't know about significant issues at their institutions until it is too late -- and many of them express regret after the fact, wondering if they would have made a different decision had they been notified. In the meantime, the school continues to enroll students, subjecting more of them to the violation in question and potentially racking up larger borrower defense liabilities or leading to larger settlements by the school down the line. At a minimum, students have the right to as much information as investors get about their companies -- as soon as the information becomes available.

Regulatory Impact Analysis

The Department greatly underestimates the costs of these regulations.

The increases in loan volume and Pell Grants will be substantial.
In estimating the costs of these regulations, the Department assumes an increase in loan volume and Pell Grant recipients of, at most, 2 percent by 2029.[276] In total, then, the Department assumes a net increase in Pell Grants of $3.8 billion over the next decade, with a low-end estimate of $3.1

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[276] 84 FR 27454

billion and a high-end prediction of $4.5 billion.[277] But plenty of evidence suggests the costs will actually be much greater.

First, the Department talks throughout the proposed regulations about the need to promote innovation as a justification for the proposed changes to the rules.[278] But the Department underestimates how expensive innovation is. Consider the history of other "innovations." From 1997-98 (prior to the passage of a demonstration project that allowed institutions to move entirely online) to Fall 2017 (after the law was changed to permit entirely-online institutions), enrollment in distance education programs increased four-fold, from 1.3 million students to more than 6.5 million students.[279]

Competency-based education provides another example of how rapidly innovations may take off. As noted elsewhere in these comments, research into CBE shows that the field is growing rapidly. A scan published in January 2015 found 52 institutions establishing CBE programs.[280] By the following year, around 600 colleges were in the process of developing such programs.[281]

In particular, these costs are likely to be amplified by the interactive effects of the many proposed provisions weakening various rules. Adjusting a single lever--say, weakening the entry requirements for new accreditors--would create significant problems and carry significant taxpayer costs on its own. But combining those weakened standards with less oversight by the Department of accreditor standards, such that the federal government will find it virtually impossible to later withdraw recognition from an agency failing to effectively ensure quality, greatly magnifies those costs. And combining both of those provisions with the other proposed provisions--making it harder for accreditors to axe Title IV eligibility for failing colleges, exempting colleges from federal oversight on vague bases of religious affiliation or innovative programs, dragging out the timeline for accreditors' enforcement of their standards to give non-compliant colleges nearly a decade before being cut off, limiting approvals of substantive changes by colleges, permitting institutions to accreditor-shop, and encouraging accreditors to set separate, lower bars for institutions at will -- will carry a massive cost to students and taxpayers.

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[277] Ibid; Table 3

[278] See, for instance, 84 FR 27444

[279] https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2000013; https://nces.ed.gov/pubs2019/2019021REV.pdf. Note that, following the demonstration program, the Department issued a report that estimated the 10-year costs of lifting the 50% limit on the amount of an institution that could be online at less than $1 billion ($697 million), a number that was quickly surpassed once Congress did make the change. https://www2.ed.gov/programs/disted/DEDP-thirdreport.pdf. In AY 2017-18, Western Governors University and Capella University together received nearly $893 million in student loans--for a single award year, more than the entire 10-year estimated cost of the change. https://studentaid.ed.gov/sa/about/data-center/student/title-iv

[280] https://www.aei.org/publication/landscape-competency-based-education-enrollments-demographics-affordability/

[281] https://www.insidehighered.com/news/2015/09/10/amid-competency-based-education-boom-meeting-help-colleges-do-it-right

Yet the Department provides no basis for its estimate that Pell and loan receipt will increase by no more than 2 percent under these proposed regulations, except to note that it believes accreditation is still too burdensome to be worth educational programs' time in many cases.[282] The recent past shows that 2 percent is likely a significant underestimate. Instead, the increase is likely to be much, much larger -- an order of magnitude in federal expenditures beyond the President's Budget baseline figures. Given the potential for new accreditors, new providers, and new programs eligible for federal money under the proposed regulations, the Department should assume a much, much larger increase in costs to taxpayers.

The Department fails to adequately consider costs associated with reduced oversight.
The Department also does not appear to consider all the likely costs of these proposed regulations, beyond the extension of federal aid dollars to programs that otherwise would not receive them, or that would not receive them for as long.

To begin, these proposed regulations are likely to greatly increase borrower defense claims to the Department that will arise from institutions operating without strong oversight from accreditors--and continuing to operate under new ownership after closure of an institution. Data released through a FOIA to The Century Foundation,[283] mapped[284] to information about those institutions' accreditors, are instructive in estimating the likely scale of potential costs:

Top Generators of Borrower Defense Claims

Parent Company	Number of Claims	Institutional Accreditor(s)
Corinthian Colleges (Everest Colleges, Heald College, WyoTech)	75,343	ACCSC, **ACICS**, HLC, WASC
ITT Educational Services, Inc. (ITT Tech, Daniel Webster College)	7,348	**ACICS**
American Career Institute "ACI"	2,892	ACCET
Education Management Corporation "EDMC" (The Art Institutes, Argosy University, South University, Brown Mackie College)	2,224	**ACICS**, HLC, SACS, WASC
Adtalem Global Education, Inc., f/k/a DeVry Education Group Inc. (DeVry University, DeVry College of New York,	1,905	ACCJC, CAAM-HP, HLC

[282] 84 FR 27454
[283] https://tcf.org/content/report/college-complaints-unmasked/
[284] https://ope.ed.gov/dapip/#/home

Carrington College, Chamberlain University -- College of Nursing, Keller Graduate School of Management, Ross University)		
Apollo Education Group (University of Phoenix, Western International University)	1,372	HLC
Career Education Corporation "CEC" (American InterContinental University, Briarcliffe College, Brooks Institute, Colorado Technical University, Harrington College of Design, Le Cordon Bleu College of Culinary Arts, Missouri College, Sanford-Brown College)	1,285	ACCSC, **ACICS**, HLC, Middle States
InfiLaw Corporation (Charlotte School of Law, Arizona Summit Law School, Florida Coastal School of Law)	522	ABA
Alta Colleges, Inc. (Westwood College, Redstone College)	462	**ACICS**
Graham Holdings, Inc. (Kaplan University, Kaplan College, Kaplan Career Institute, TESST College of Technology)	450	ACCSC, **ACICS**, HLC
Globe Education Network (Globe University, Minnesota School of Business, Duluth Business University, Broadview University, Institute of Production and Recording)	372	ACCSC, **ACICS**

Sources: TCF 'College Complaints Unmasked' report; Education Department's Database of Accredited Postsecondary Institutes and Programs

The data show a heavy concentration of borrower defense claims from a handful of accreditors. (Note that it is not possible to say which institution was accredited at the time of the event triggering the borrower defense claim, because of insufficient data about the claims.) More than 87,000 claims come from a college company that held accreditation from ACICS, at least for one of the covered institutions. They also show a heavy concentration in institutions that were engaged in misrepresentations about job placement rates, aggressive recruiting practices, financial mismanagement, and include several institutions that should have closed, but instead were sold to new owners before collapsing -- all practices that will be easier for institutions to do, without strong accreditor oversight, under the proposed regulations.

And recent experience provides a powerful example for why the Department's proposed changes greatly increase the risk of borrower defense liabilities, in particular. ACICS, an agency that (however briefly) lost its recognition from the Department as a direct result of its failures to effectively apply its standards. Given that the Department is now proposing to reduce its own oversight of accreditors (by reducing the standards to which agencies are held, requiring only that standards exist and not that they be effectively applied, by permitting non-compliant agencies continued approval to serve as gatekeepers well beyond the current timelines, and more), and to reduce accreditor oversight of colleges (including reductions in oversight of branch campuses, fast-tracked substantive change approvals, lower standards for certain institutions designated by the accreditor, and longer timeframes before enforcement), the effects will make these scenarios even more common among even more accrediting agencies.

The Century Foundation submitted comments to the Department regarding ACICS that highlight the risk -- both of poor-quality accreditors and of subsequent borrower defense and closed school discharge claims:[285]

> There is evidence in the exhibits and in the public record that ACICS frequently takes action when it receives notification from a government agency about a possible problem. However, to have "effective mechanisms" and to be a "reliable authority" means that **the agency must be able to ferret out problems itself and then take action, not wait for a government agency to act**. (emphasis added) In our review of the evidence so far we do not find that ACICS has demonstrated that it is capable of leading rather than following, and it certainly has not done so for the past two years.
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> When ACICS the accrediting agency has taken adverse actions over the past year, it has been too late and well after federal and state agencies moved to bring charges or enforcement actions against institutions. For example, on April 20, 2017, ACICS brought an action to withdraw accreditation by a suspension action against the main campus and seven branch campuses of Illinois-based Computer Systems Institute (CSI). This was over a year after the Department announced its decision to deny recertification to CSI on January 29, 2016. The Department even noted at the time that its decision to end CSI's eligibility for Title IV Federal Student Aid funds was due to the Department's findings that "CSI submitted false job placement rates to its students, ED, and its national accreditor, the Accrediting Council for Independent Colleges and Schools." Even after these findings were released, ACICS did not end CSI's accreditation for over a year while it had knowledge that students were defrauded. ACICS also made the decision on August 4, 2017 to renew accreditation of three American National University campuses in South Bend, IN, Pikeville, KY, and Florence, KY. This was even after ACICS had full knowledge that in 2016, the Kentucky Court of Appeals upheld a $147,000 sanction by the Franklin Circuit Court against American National University for failing to comply with a subpoena issued by the Kentucky Attorney General during an investigation of the Kentucky

[285] https://production-tcf.imgix.net/app/uploads/2018/03/02120010/TCF_ACICSComments_Final.pdf

Consumer Protection Act. The Kentucky Attorney General brought civil fraud charges against American National University for violating the Kentucky Consumer Protection Act by advertising misleading information about the job success of its graduates. ACICS has still failed to take any meaningful action to address these issues while it continues to accredit American National University, other than issuing a "compliance warning."

Globe University and the Minnesota School of Business were sued by the Minnesota Attorney General in 2014 for advertising programs that lacked the credentials graduates needed to qualify for jobs in their fields and for misrepresenting the transferability of credits to other institutions. These legal violations occurred even while ACICS placed the company on its "Honor Roll" in 2012. Remarkably, ACICS waited until September 14, 2016 to even issue a show-cause directive to ACICS. The Hennepin County District Court ruled in September, 2016 that Globe University in Minnesota and the Minnesota School of Business committed fraud and the Department denied recertification of Globe University and the Minnesota School of Business's participation in Title IV Federal Student Aid programs on Dec. 21, 2016. However, even after the court ruling of fraud and the federal government denial of recertification, ACICS continued to accredit Globe and the Minnesota School of Business. On December 21, 2016, ACICS merely continued the show-cause directive for review during the Winter 2017 cycle.

Exhibit 135 provides a sobering window into the inadequacy of ACICS's accreditation mechanisms. The Bay Area College of Nursing (BACN) was initially accredited by ACICS in 2013. ACICS made that decision despite problems that had been raised by the State Board of Vocational Nursing (SBVN), a licensing agency, ever since the school's opening in 2007. In February 2016, the SBVN prohibited any new enrollments in BACN's nursing program due to problems that it had identified in the program. The very next month, in March 2016, an ACICS visiting team reported nothing about the licensing board's actions or its finding, but instead faults BACN for having an inadequate advisory board. In May, ACICS took action to continue BACN's accreditation until August. By August, the licensing board had decided to withdraw approval for the school's nursing program. The school now appears on ACICS's list of closed institutions. The BACN is apparently not an isolated incident. In September 2017, less than six months ago, Department staff flagged that ACICS had, "just in the last day or two," approved new programs for a campus of the Delta Career Education Corporation location that had ceased taking new enrollments.

The Department should factor in increased annual costs assuming more students will be subjected to practices that make them eligible for borrower defense relief. These costs will likely counter-balance some share of the projected savings from institutions that don't close and therefore at which students don't receive closed school discharges. Because the Department has not re-issued its borrower defense changes yet, it must also assume these costs based on the 2016 borrower defense rule that is currently in effect.

Moreover, the Department must also assume an increase in new accreditors. While the Department does not currently receive many proposals each year for new accrediting agencies, the bar would be greatly lowered under these proposed language. To that end, the Department must consider the landscape of quality assurance bodies, thinking about all those who might apply. For instance, a regulatory effort at the Labor Department has proposed to create "standards recognition entities" (SREs) that will function as pseudo-accreditors to approve apprenticeship programs. DOL's proposed information collection request stated that it expected 300 applications, of which 100 will never have worked in the accreditation space and 200 will have some experience.[286] Given the lowered bar to entry among Department of Education accreditors, and the fact that DOL SREs (particularly those without a business model) will likely be in search of sources of funding to support their work, the Department should assume a much more significant increase in applicants for Department recognition than it does.

And the Department should also assume an expansion of institutions that would otherwise not receive federal aid dollars. For instance, at a recent public meeting, ACICS acknowledged it was down by many more campuses, and running a deficit of around $2 million.[287] It stated that, to break even within a few years, it needs to add 10 institutions per year. Thus, the Department should assume some of the lowest-quality accreditors approve as many as 70 institutions that shouldn't be eligible for Title IV (and failed to find accreditation elsewhere) and that they continue to grow over the 10-year budget period.

The Department's estimates seem far too low in the context of other types of costs.

The Department's estimates are too low--and fail to pass a basic sniff test. At the same time the Department is projecting $3.8 billion in costs for regulatory changes that affect every corner and sector of the higher education landscape, it is projecting $6.2 billion in costs from rescinding the gainful employment regulations.[288] Yet gainful employment programs include only proprietary school programs and non-degree programs at public and nonprofit institutions. Only 27 percent of programs are gainful employment ones; and only 11 percent of students are enrolled in GE programs.[289] In other words, the magnitude of costs alone does not make sense. The Department should revisit its estimates and revise them substantially upwards.

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[286] https://s3.amazonaws.com/newamericadotorg/documents/New_America_Comments_on_IRAP_ICR_-_11.19.2018_o9vufIM.pdf

[287] https://www.insidehighered.com/quicktakes/2019/06/04/embattled-accreditor-projects-losses-after-closure-member-colleges

[288] 84 FR 31447

[289] New America analysis of College Scorecard program-level data on student debt.