May 4, 2020

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400 Maryland Ave., SW
Mail Stop 294-42
Washington, D.C. 20202

RE: Comments to the Department of Education Regarding Proposed Rules for Distance Education and Innovation [ED-2018-OPE-0076]

To Whom It May Concern:

Thank you for the opportunity to comment on the Department's proposed regulations governing "distance education and innovation." Having closely followed the negotiations of last year, it was clear to us that the Department's agenda was overly ambitious and often deeply problematic, including many rule changes that would vastly weaken protections for students and taxpayers. We expressed substantial concern with the Department's proposed changes to the accreditation and state authorization rules last year,[1] and were dismayed that the final rules were ultimately even more dangerous for students than the proposal.

New America has long championed innovations in higher education, particularly for promising practices that are aimed at serving students whom traditional higher education has not served well. But we don't believe that any and every innovation will serve students well—and we believe that opening up the federal spigot to "innovations" that don't include robust accountability for outcomes will inevitably harm the very students who most need the benefits that a quality higher education provides.

We were particularly concerned by many of the proposals the Department brought to the table during negotiated rulemaking. For instance, allowing institutions to outsource entire educational programs to unaccredited and unaccountable bodies would undermine the very nature of the institutional eligibility requirements set out in law. Another proposal would have virtually eliminated the definition of a credit hour, releasing any grasp the federal government holds on its own purse strings and allowing colleges to inflate their credit hours and stick students and taxpayers with the bill.

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[1] Amy Laitinen and Clare McCann, "Comments on Proposed Accreditation and State Authorization Rules," New America, July 12, 2019, https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-proposed-accreditation-and-state-authorization-rules/

We also urge the Department to recognize that the current national emergency stemming from the COVID-19 pandemic should not be used to serve as the basis for, or to justify or explain, further weakening of these proposed rules. While we recognize the need for short-term, emergency-only protocols to accommodate institutions without appropriate technology, expertise, or quality protections as they move online during the pandemic, we warn that if such protocols were used in the long-term, students would be placed at significant risk of poor quality education. In fact, surveys have found that students report the quality of their online instruction post-national-emergency to be worse quality than their in-person instruction.[2] Emergency protocols are understandable under the circumstances, but do not need to be—and under no circumstances should be—codified into normal practice through these regulations.

Given the risks to the most vulnerable students, we urge the Department not to weaken the rules proposed by consensus here further in the final rule, including by reverting to its earlier proposals from negotiations, which were resoundingly rejected by negotiators.

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 strengthen quality and consumer protection in the higher education system to ensure colleges serve their students—and federal taxpayers—well.

Sincerely,

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[2] Scott Jaschik, "Will Students Show Up?," Inside Higher Ed, April 13, 2020, https://www.insidehighered.com/admissions/article/2020/04/13/survey-shows-potential-impact-coronavirus-enrollment

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The Department's Process Violates the Law and Undermines the Proposed Regulations

Since the conclusion of the negotiated rulemaking process, the Department has consistently extolled its success in achieving consensus during negotiations.[3] However, it is clear to anyone who watched the rulemaking sessions that most of those around the table 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.[4] 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.[5] 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 justify changes it knows will be deeply damaging to students. We are particularly concerned that, even after extolling its own victory in achieving consensus, the Department broke from that consensus and undermined a core compromise reached by negotiators and the Department, instead returning to a policy that had previously been rejected by negotiators on state authorization requirements for

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[3] See, for example, "Coronavirus Public Health Emergency Underscores Need for Department of Education's Proposed Distance Learning Rules," U.S. Department of Education, Press Release, April 1, 2020, https://www.ed.gov/news/press-releases/coronavirus-public-health-emergency-underscores-need-department-educations-proposed-distance-learning-rules.

[4] *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).

[5] 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

distance education programs. One negotiator noted when that final rule was published that "the Education Department has reneged on its 'historical consensus' and changed the critical distance education regulation in the final rules without sufficient factual justification."[6] The Department's rulemaking process should have established a committee that more fully included students' and taxpayers' voices and interests; its willingness to negotiate in good faith and follow applicable laws in the rulemaking process has already been proven false by its most recent rule coming from these negotiations.

Moreover, the Department has failed to follow its own protocols agreed to during negotiations. For instance, the protocols state that "if consensus is reached on the proposed regulations, the Department will provide a preamble, consistent with the proposed regulations, to the members of the committee for review and comment prior to publication of the proposed regulations."[7] However, in speaking with multiple members of the committee, it is clear that the Department failed to follow through on this commitment to which it previously agreed.

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—most did not have particular expertise on distance education or competency-based education.

Additionally, the Department states in this rule that it seeks to "limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight."[8] Yet when the Department formed the committee and selected its members, it had no state representation at all on the committee, despite receiving nominations for

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[6] "Statement of National Consumer Law Center Attorney and Negotiator Robyn Smith on U.S. Department of Education's Harmful Departure from Consensus on State Authorization Distance Education Regulations," National Consumer Law Center, November 1, 2019, https://www.nclc.org/media-center/statement-of-national-consumer-law-center-attorney-and-negotiator-robyn-smith-on-u-s-department-of-educations-harmful-departure-from-consensus-on-state-authorization-distance-education.html

[7] "Organizational Protocols, Negotiating Committee—Accreditation and Innovation 2019," U.S. Department of Education, 2019, https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/finalprotocols.pdf

[8] 85 FR 18638

state-based stakeholders.[9] In fact, the Department continued to fight 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;[10] 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. The only AG representation was a member of the non-voting distance-education subcommittee, which few of the committee's voting members followed and only one attended, affording that constituency a token, marginal, and voteless voice.

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 play a substantial role in overseeing and monitoring distance-education programs that are headquartered in their states and that operate within their borders. They are also often left to clean up the mess when accreditors, authorizers, or the Education Department fail to fulfill their oversight responsibilities – a problem likely to become much worse as a result of rules promulgated under the banner of this round of negotiations. The Department's refusal to include state AGs as voting members of the committee was little more than an attempt to block another voice for students and taxpayers from joining the table.

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.[11]

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[9] 83 FR 51906, https://www.federalregister.gov/documents/2018/10/15/2018-22506/negotiated-rulemaking-committee-negotiator-nominations-and-schedule-of-committee

[10] "Negotiator Nominations and Schedule of Committee Meetings – Accreditation and Innovation," U.S. Department of Education, October 14, 2018, https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/20181011-nominations-unofficial-fedreg.docx

[11] 20 U.S.C. 1098a(b)(1)

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."[12] 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),[13] the American Association of Community Colleges (AACC),[14] and an association of regional accreditors (C-RAC);[15] financial aid representatives from the National Association of Student Financial Aid Administrators (NASFAA);[16] student and consumer representatives from Public Citizen,[17] a coalition of 62 organizations,[18] and a coalition of legal aid groups;[19] and our own team here at New America[20] all raised concern over the broad scope of regulatory topics teed up for discussion."[21]

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. This use of subcommittees—as non-voting negotiators of substantive, open-ended issues, consisting mostly of non-committee members announced prior to

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[12] Amanda Martinez, "The Fight for the Future of Higher Education: Neg Reg 101," New America, October 22, 2018,
https://www.newamerica.org/education-policy/edcentral/fight-future-higher-education-neg-reg-101/
[13] "NAICU's Written Comments on the July 31, 2018 Notice of Intent to Establish a Negotiated Rulemaking Committee," National Association of Independent Colleges and Universities, September 11, 2018,
https://www.regulations.gov/document?D=ED-2018-OPE-0076-0027
[14] "Comments on Docket Number ED-2018-OPE-0076," American Association of Community Colleges, September 14, 2018, https://www.regulations.gov/document?D=ED-2018-OPE-0076-0109
[15] "Comment on docket ID number ED-2018-OPE-0076, Intent to establish negotiated rulemaking committee," Council of Regional Accrediting Commissions, September 12, 2018,
https://www.regulations.gov/document?D=ED-2018-OPE-0076-0116
[16] "Response to Intent to Establish Negotiated Rulemaking Committee," National Association of Student Financial Aid Administrators, September 14, 2018,
https://www.regulations.gov/document?D=ED-2018-OPE-0076-0085
[17] "Intent to Establish Negotiated Rulemaking Committee, 83 Fed. Reg. 36,814 (July 31, 2018); Docket ID ED-2018-OPE-0076," Public Citizen, September 6, 2018,
https://www.regulations.gov/document?D=ED-2018-OPE-0076-0017
[18] "Comments re: Docket ID ED-2018-OPE-0076," Coalition, September 14, 2018,
https://www.regulations.gov/document?D=ED-2018-OPE-0076-0043
[19] "Comments re: Notice of Intention to Establish a Negotiated Rulemaking Committee to PRepare Proposed Regulations on Title IV Federal STudent Aid Programs and Requirements Relating to Participating Educational Programs," Legal Aid Community, September 14, 2018,
https://www.regulations.gov/document?D=ED-2018-OPE-0076-0264
[20] "Comments on Intent to Form a Negotiated Rulemaking Committee," New America, September 5, 2018,
https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-intent-form-negotiated-rulemaking-committee/
[21] Ibid

the start of negotiations without a vote of the full committee—is unprecedented in the Department's history of negotiations. 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.[22]

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, breaking with precedent that allowed alternates and negotiators to switch at will. 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 made. 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, as has been historic practice, a clear description of and evidence for the problems it was trying to solve in the first session. Instead, the Department went straight to out-of-context regulatory language, leaving negotiators to try to read between the lines and determine the intent. Indeed, the most common refrain of the first sessions was a version of "wait, what problem are you trying to solve?". As a result, the negotiator on a given topic—which could cover a great number and variety of sub-topics—was left to repeatedly backtrack 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 "consensus" votes on multiple, individual sections of proposed language. One of the points of consensus is to get consensus on an entire package of proposals. 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 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

[22] 20 U.S.C. 1098a. Livestreaming made the content of the discussions somewhat accessible (with the exception of regular outages), but it was not possible to follow along with language proposals during the negotiations.

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 less than an hour left to negotiate, rushing a consensus vote. Following negotiations, the Department further shuffled those buckets, moving state authorization regulations for distance education—the core area of a final compromise among negotiators—to a proposed accreditation rule rather than publishing it with these proposed distance-education regulations. Shuffling the topics across the pre-established buckets after the votes were taken enabled the Department to more quickly undermine the compromise it agreed to, by getting to a final rule more quickly.

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 regulations spanning at least 10 substantive areas – in the middle of a national emergency.[23] It is clear the Department has not provided a reasonable opportunity for the public to comment meaningfully. We urge the Department to reissue the proposed regulations for a longer public comment period to accommodate colleges that are unable to comment while managing a sudden, pandemic-driven transition to distance education, students who are struggling with losing their jobs, and other stakeholders managing increased household responsibilities and/or significant health and employment issues.

The Department Should Protect Students Enrolled in Online Clock-Hour Programs

34 CFR 600.2

As online learning technologies have advanced and more programs have moved their programs online, some of the clock-hour vocational programs that previously offered only in-person instruction have followed suit. Clock hours measure the amount of time that students spend attending a class (50- to 60-minute classes or faculty-supervised laboratory/training in a 60-minute period, or 60 minutes of preparation in a correspondence course).

[23] A national emergency was declared on March 13, 2020 due to the COVID-19 pandemic. The Department published the regulations for public inspection on April 1, 2020.

Yet this has raised questions about the appropriateness of fulfilling federal coursework requirements with online programs. For instance, many clock hour programs lead to licensure by a state or federal agency; and many licensing bodies preclude the use of distance-education coursework toward the requirements of the license. Many clock-hour programs are also offered in occupations where field work and real-world hands-on training are and should be required; for instance, the National Association of Career Arts and Sciences (NACCAS), a Department-recognized accreditor of cosmetology schools, requires that distance-learning students continue to "[participate] in learning activities while physically present at the contracted campus at least once every 10 business days,"[24] a requirement that reflects the importance of on-the-ground, closely supervised training for such programs.

The Department is proposing to expand the definition of a clock hour to include distance-learning programs. While we believe there are programs where such training will not be as effective, however, we appreciate the Department's and negotiators' efforts to ensure adequate monitoring of such programs. Specifically, the proposed rule specifies that:

- A clock hour in a distance education program is 50 to 60 minutes in a 60-minute period of attendance "in a synchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students";

- Institutions must be capable of monitoring students' attendance in a distance program for the purpose of verifying a clock hour has been completed; and

- Such definition of a clock hour in a distance education program only applies where the program meets all accrediting agency and State requirements and where it does not exceed an agency's restrictions on the number of clock hours in a program that may be offered through distance education.

We believe these are reasonable expectations to set for an institution. Given the time-based definition of a clock hour, accurately assessing and monitoring a student's completion of a clock hour in an asynchronous program would be virtually impossible for institutions; and any approximation schools would conduct would provide far too much divergence from the clock hour definition. Moreover, the Department would likely be unable to assess the minimum needed technology for an institution to achieve adequate asynchronous monitoring. Taxpayer dollars

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[24] "Policy VI.02 – Curriculum: Policy on Distance Education," National Association of Career Arts and Sciences, January 2020, https://naccasngo.sharepoint.com/sites/NACCASWeb/Shared%20Documents/Forms/AllItems.aspx?id=%2Fsites%2FNACCASWeb%2FShared%20Documents%2FWebsite%20Public%20Documents%2FStandards%20%26%20Policies%2FPolicies%2FPolicies%20VI%2E02%2Epdf&parent=%2Fsites%2FNACCASWeb%2FShared%20Documents%2FWebsite%20Public%20Documents%2FStandards%20%26%20Policies%2FPolicies&p=true&originalPath=aHR0cHM6Ly9uYWNjYXNuZ28uc2hhcmVwb2ludC5jb20vOmI6L3MvTkFDQ0FTV2ViL0VYejU0cnctOG05RnFxd25CMkNaZ004QlY5b0o4alpxd29RTlp3RWJ1eEdqQUE_cnRpbWU9UlFYYWN6VG0xMGc

would almost surely be wasted under such a definition, and students could be left to pay for an education they did not fully receive. Thus, we urge the Department to maintain the limitation of a clock hour to synchronous programs in the final rule.

We also urge the Department to maintain the requirements that programs meet any limitations of their accrediting agencies, states, and applicable licensure bodies. Students enroll in clock hour programs with the expectation of getting a quality education and a job in the field. Often, that means the program must meet a host of requirements, such as maintaining programmatic accreditation, setting program length restrictions, and abiding by limitations on online coursework set by licensure bodies. Institutions must ensure their students have every opportunity to earn a job in their field after graduation. Moreover, the Department states in the preamble of the proposed rule, "states and accrediting agencies may also have an interest in limiting the number of hours that students are permitted to earn through distance education or setting specific standards for hours earned through online training, particularly when the hours are associated with programs or professions that require hands-on training."[25]

These proposed changes are, as the Department notes, consistent with long-standing policy, and codify in regulation those practices.[26] It is a reasonable middle ground that will offer protection to both taxpayers and students. We urge the Department to maintain its proposed definition in the final rule.

The Department Should Protect Student and Taxpayer Dollars with a Clear Definition of a Credit Hour

34 CFR 600.2

The credit hour forms the bedrock of the federal financial aid system.[27] As the Department of Education wrote in 2010, "[a] credit hour is a unit that gives weighting to the value, level, or time requirements of an academic course taken at an educational institution." Generally speaking, if you earned a bachelor's degree, you completed at least 120 credit hours of work; if you enrolled full-time and got a Pell Grant, you took at least 12 credit hours that semester. It is the basis on which colleges award time and credentials earned toward a degree; on which accreditors assess the length of programs, as required by the Higher Education Act; and on which the federal government determines the amount of aid for which students are eligible.

The Department must maintain a clear, consistent definition of a credit hour

For those reasons, we urge the Department to retain its proposed definition of the credit hour rule in the final distance education regulations. To provide additional evidence in support of that

[25] 85 FR 18645
[26] Ibid
[27] Much of this section is copied from "Credit Hour Definition," New America, 2019, https://s3.amazonaws.com/newamericadotorg/documents/Credit_Hour_Issue_Paper.pdf

definition, we detail the history of the credit hour—and past abuses by institutions prior to its implementation—below.

The term "credit hour" grew out of an effort near the turn of the 20th century by Andrew Carnegie to provide pensions to college professors.[28] The Carnegie Foundation for the Advancement of Teaching launched a pension program for professors; to participate, institutions had to agree to use a "standard unit" of time, proposed by the National Education Association in the late 1800s, for admission of high school graduates. As colleges agreed to use the standard measure for admissions, they also began to adopt the measure for their own academic programs, and conditioned professors' participation in the pension system on faculty workload. The "Carnegie Unit" considered faculty to be full-time if they taught at least 12 credit units. Each unit equaled one hour of faculty-student contact contact time per week over a 15-week semester.

Today, the amount of federal aid for which students and programs are eligible is tied directly to their credit hour equivalents. As a result, 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 Inspector General.[29]

As a result of the 1992 HEA reauthorization, undergraduate programs had to include at least 30 weeks of instructional time, in which a full-time student is expected to complete at least 24 credit hours. Accrediting agencies were also required to set standards around program length and review institutions' compliance with the law as part of their reviews. Generally, institutions met the requirement using the Carnegie formula – one credit hour totaled about one hour of classroom work and two hours of work outside the classroom. The Department defined a week of instructional time for those programs as any in which at least one day of regularly scheduled instruction or examination occurred. While this fit pretty neatly in traditional on-campus programs with more full-time students who started in the fall semester, it wasn't a great fit for emerging

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[28] Amy Laitinen, "Cracking the Credit Hour," New America and Education Sector, September 2012, https://static.newamerica.org/attachments/2334-cracking-the-credit-hour/Cracking_the_Credit_Hour_Sept5_0.ab0048b12824428cba568ca359017ba9.pdf

[29] "Office of Inspector General: Promoting Integrity in Federal Education Programs for 25 Years," U.S. Department of Education, 2005, https://www2.ed.gov/about/offices/list/oig/misc/oig25years.pdf

"non-traditional" programs where students might start at different times and take courses in different ways, so Department had to come up with another way to define "a week of instruction." It published the 1994 12-Hour Rule, which said that for such programs without standard terms, a week of instruction was one in which at least 12 hours of regularly scheduled instruction or examination occurred. These regulations sought to strike a balance between the growth of nontraditional programs in which colleges didn't operate on the usual semester schedule, and the law's requirements around program length and credit-hour requirements.

It wasn't long before institutions offering nontraditional programs subject to the 12-Hour Rule started to complain to the Department that the regulation wasn't flexible enough for colleges and was hard to measure in distance education programs. At Congress' direction, the Department convened meetings of institutions subject to the rule; and in 2002, opted to eliminate the rule and instead adopted the One-Day Rule.[30] Under that rule, all institutions were required to provide only one day of regularly scheduled instruction during each week of an academic year – with no requirements around how much instruction they had to provide on that one day, or even what instruction meant.

Again, the Inspector General raised concerns. In 2002-2003, the IG investigated several regional and national accrediting agencies to better understand the implications of eliminating the 12-Hour Rule. It found that neither of the two regional accreditors it examined had a credit hour definition in place, and barely had defined program-length standards (both national accreditors audited did). Ahead of the scheduled 2004 reauthorization of the Higher Education Act, the IG accordingly recommended that Congress establish a statutory definition of a credit hour, noting that "[a]bsent a definition of a credit hour, there are no measures in the HEA or regulations to ensure comparable funding across different types of educational programs" and that "[h]aving a definition of a credit hour could also help with the transfer of credit issue."[31] Congress did not adopt the recommendation, and until recently, the term "credit hour" had no standard definition across institutions. In fact, many institutions had no official policies at all about how they aligned credit hours to coursework.

Those official policies from institutions might have come into play through accrediting agencies, which 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 proved to be 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**

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[30] "Student Financial Assistance and Nontraditional educational Programs (Including the "12-Hour Rule"): A Report to Congress," U.S. Department of Education, July 2001, https://www2.ed.gov/policy/highered/guid/12hourrulereport.pdf

[31] "Office of Inspector General HEA Reauthorization Suggestions," U.S. Department of Education, January 2004, https://s3.amazonaws.com/newamericadotorg/documents/2004_IG_HEA_Recommendations.pdf

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."[32] 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 an initial review to have "egregious[ly]" inflated its credits.

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.[33] While HLC raised concerns about course inflation in its initial review, it allowed the school to "restructure" the courses into two, 4.5-credit courses, rather than single, 9-credit courses, and approved AIU's accreditation.[34]

As described by then-Rep. George Miller (D-CA), chair of the Committee on Education and Labor, 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 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

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[32] Letter from Kathleen S. Tighe to the Honorable George Miller Regarding H.R. 2637, September 9, 2013, https://www2.ed.gov/about/offices/list/oig/misc/georgemillersept092013.pdf

[33] Ben Miller, "What Got the Ed Dept. So Mad About American InterContinental University and its Accreditor?" Education Sector via American Institutes for Research, April 1, 2010, https://www.air.org/edsector-archives/blog/what-got-ed-dept-so-mad-about-american-intercontinental-university-and-its

[34] HLC was subsequently required to submit several reports to the Department's advisory body on accreditation and ultimately adopted new standards, including on credit hour policies. Form 10-K for Career Education Corporation, Securities and Exchange Commission, year ending December 31, 2012, https://www.sec.gov/Archives/edgar/data/1046568/000119312513083541/d455233d10k.htm

cost and time double…"[35] (Read into the record in part here.[36]) In other words, when institutions inflate their credits, students—and taxpayers—pay, without getting what they are paying for.

In 2010, the Department adopted a credit hour definition that permits flexibility for nontraditional education programs while ensuring some minimum standardization. It also adopted regulations requiring accreditors to set policies around credit hours and oversee institutions' application of the credit hour definition. The definition approximates the original time-based Carnegie unit (one hour of classroom instruction and two hours of student work outside the classroom), but instructs colleges to evaluate that approximation based on the "amount of work represented in intended learning outcomes" as measured by "evidence of student achievement." In other words, the Department acknowledges that the amount of work spent learning and the time spent attending class aren't the same thing, suggesting that traditional 15-week semesters can be translated into "the equivalent amount of work over a different amount of time." Work was the Department's middle ground between time, an easily measured but poor proxy for quality, and learning, a difficult-to-measure but true indicator of quality.

Moreover, it carefully considers the important role accreditors can play in defining innovative programs and ensuring they meet a baseline definition. The Department's definition, as it said in a letter to institutions 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. In fact, with its consideration both for time-based and learning-based measures, the definition has proved workable for the many institutions that have launched innovative competency-based education (CBE) programs in recent years. The current credit hour rule represents a balance between innovation and oversight, a reflection of the lessons from a history of abuse, and an improved-upon version of prior regulatory efforts.

Generally, we support the consensus language from the Department to maintain the current definition of a credit hour and codify Departmental guidance regarding flexibilities institutions already have to use this metric. If the Department seeks to make any amendments to the language, we would recommend reinserting references to ensuring the proxy for the amount of work in a credit hour be "represented in intended learning outcomes and verified by evidence of student achievement,"[37] both of which provide additional safeguards and encourage institutions to engage in the kind of careful assessment of their academic rigor that they should be engaging in already.

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[35] "The Higher Learning Commission of the North Central Association of Colleges and Schools' Decision to Accredit American InterContinental University," Alert Memorandum, U.S. Department of Education, Office of Inspector General, December 2009, https://www2.ed.gov/about/offices/list/oig/auditreports/AlertMemorandums/l13j0006.pdf

[36] "The Department of Education Inspector General's Review of Standards for Program Length in Higher Education," Hearing before the Committee on Education and Labor, Serial No. 111-67, June 2010, https://www.govinfo.gov/content/pkg/CHRG-111hhrg56835/pdf/CHRG-111hhrg56835.pdf

[37] As currently included in the stem to the credit hour definition in 34 CFR 600.2

Under no circumstances do we believe the Department should remove the time-based proxy altogether or return to its proposed language from earlier sessions of the negotiating committee.[38] History is clear that looseness in the definition of a credit hour results in serious implications for and abuse of students' and taxpayer dollars. Removing the current clarity of the definition would be unwise, expensive, and at odds with the body of evidence we have around financial aid abuse; and is not necessary to accommodate and promote innovation by institutions of higher education.

The Department must maintain strong accreditor standards for credit hour policies

Additionally, in the Department's accreditation and state authorization regulations published last year, the Department eliminated all requirements for accreditors and state agencies to establish standards regarding how they review institutions' credit hour policies.[39] The Department stated that it believed 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."[40] With regard to state agencies, the Department said that "an accrediting agency should have autonomy and flexibility to work with institutions in developing and applying credit-hour policies."[41] Neither of these justifications was adequate to account for the problems that will be crafted by deleting the language. In fact, the absence of any entity proactively considering institutions' assignment of credit hours (such as an accrediting agency) would likely 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.[42] Moreover, given that accreditors are responsible for considering educational quality it is also clear that accreditors are the right party to take on that responsibility.

We also note, again, that 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."[43] The credit hour rule itself,

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[38] For instance, in January 2019, the Department proposed a definition that specified only that "a credit hour is defined by an institution and approved by the institution's accreditor and is based upon an amount of work, a unit of time spent engaged in learning activities, and/or a set of clearly defined learning objectives or competencies." This definition provides virtually no consistency across institutions and accreditors

[39] Many of the comments in this section were originally submitted through Amy Laitinen and Clare McCann, "Comments to the Department of Education Regarding Proposed Rules for the SEcretary's Recognition of Accrediting Agencies and Other Issues," New America, July 12, 2019, https://s3.amazonaws.com/newamericadotorg/documents/New_America_Comments_on_Accreditation_State_Authorization_NPRM.pdf

[40] 84 FR 27431

[41] 84 FR 27440

[42] 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. "Credit Hour FOIA," hosted by New America, documents from the U.S. Department of Education, https://s3.amazonaws.com/newamericadotorg/documents/CreditHourFOIA.pdf

[43] 34 CFR 602.24(f)

both currently and as proposed, requires only a "reasonable [approximation]" of that common practice. 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.[44] 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 Should Ensure Clear Lines Between Correspondence and Distance Education

34 CFR 600.2

While much has been made of the definition of "regular and substantive interaction between the students and the instructor"[45] in an online program, its role in protecting students and ensuring taxpayer dollars are well-spent is significant. New America has long led the conversation about the need to examine "regular and substantive interaction" in the context of competency-based education (CBE) and we agree that some of the statutory language is outdated (such as VHS tapes). But what is not outdated—and what must absolutely be preserved—is the intent of both the statutory and regulatory requirements.

The Department should recognize the historical importance of distinctions between correspondence and distance education

The story of requirements around regular and substantive interaction actually begins over 100 years ago with the rise of correspondence education.[46] For well over a century, colleges have provided education through the mail – once considered a major innovation. But with the advent of federal aid dollars after World War II through the GI Bill, fly-by-night colleges began to pop up in great numbers to get some of those dollars, offering low-value correspondence programs and wasting veterans' hard-earned benefits.[47] Around 637,000 World War II veterans took correspondence programs using the GI bill; of the 286,000 who enrolled in correspondence programs in the first five-and-a-half years after passage of the GI Bill in 1944, just 10.7 percent graduated. A 1955 Census Bureau survey of 8,000 World War II veterans found that half of correspondence graduates said they hadn't used their training "at all" in subsequent jobs.

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[44] Letter from Robert Shireman to Barbara Gellman-Danley, Elizabeth Sibolski, Mary Ellen Petrisko,and Barbara Beno, March 7, 2016, https://drive.google.com/file/d/0B7adHdBE6w3mLTFVY0x4ZUNyN2s/view
[45] 20 U.S.C. 1003(7)(A)
[46] Much of this section is copied from "Regular and Substantive Interaction in Distance-Education Programs," New America, 2019, https://s3.amazonaws.com/newamericadotorg/documents/RS_Issue_Paper_HBvefq2.pdf
[47] David Whitman, "The Cautionary Tale of Correspondence Schools," New America, December 2018, https://www.newamerica.org/education-policy/reports/cautionary-tale-correspondence-schools/

Abuses of federal dollars by correspondence programs continued to accrue over the next several decades. With the opening of federal grants and loans to low-income students in the 1970s came a recurrence of past abuses. The Inspector General at the Education Department has conducted numerous investigations into correspondence education over the years, and offered recommendations to lawmakers on the matter, and has recommended on several occasions that Congress eliminate correspondence eligibility.[48] A Senate investigation (the Nunn Commission) on abuses in the federal financial aid programs found such a significant concentration of abuses and poor quality that it recommended lawmakers eliminate eligibility for correspondence programs entirely.

While Congress did not eliminate federal aid access altogether, it did place restrictions on correspondence programs in 1992 that are still in place today. Lawmakers banned institutions that offer more than half of their courses—or enroll more than half of their students—as correspondence courses from being eligible for federal financial aid, in an effort to reduce the prevalence of fraudulent institutions that offered solely distance education programs. Additionally, correspondence programs are subject to limitations on the amount of financial aid for which their students are eligible. At the time, the Department of Education (led by then-Secretary of Education and now chair of the Senate education committee) Lamar Alexander told Congress that it supported the restrictions because "there have been many instances of student aid abuse involving correspondence courses."

However, in 1998, Congress created the Distance Education Demonstration Project to test the new potential of online education programs. By 2005, when the demonstration program was completed, 24 institutions of higher education were participating in the experiment, and enrollment growth increased by almost 700 percent (to over 63,000 students) for the eight institutions that participated in the program for the entire time. In its final report to Congress, the Bush Administration noted that, while it believed Congress should extend full federal aid eligibility to distance education programs, lawmakers should be careful to maintain a distinction between distance and correspondence education.[49] Specifically, the report authored by Secretary Margaret Spellings' Education Department read, "Quality standards for electronically-delivered education emphasize the importance of interaction between the instructor and student. The proposed definition of a telecommunications course acknowledges the importance of interactivity to the viability of electronically-delivered courses." Its proposed definition for lawmakers included the language that now appears in statute, requiring that distance-education programs "support regular and substantive interaction between these students and the instructor…"

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[48] See, for example, "Saint Mary-of-the-Woods College's Administration of the Title IV Programs," Final Audit Report, Office of Inspector General, U.S. Department of Education, March 2012, https://www2.ed.gov/about/offices/list/oig/auditreports/fy2012/a05k0012.pdf; and "Letter to Sens. Lamar Alexander and Patty Murray and Reps. Virginia Foxx and Bobby Scott," Office of Inspector General, U.S. Department of Education, March 1, 2018, https://www2.ed.gov/about/offices/list/oig/misc/lettertocongressonoighearecommendationsmarch2018.pdf

[49] "Third Report to Congress on the Distance Education Demonstration Program," U.S. Department of Education, April 2005, https://www2.ed.gov/programs/disted/DEDP-thirdreport.pdf

Shortly after that report was published, Congress did extend federal aid eligibility to distance education programs. And in 2008, during the reauthorization of the Higher Education Act, lawmakers adopted the Bush Administration's proposed language about "regular and substantive interaction" nearly verbatim. The Department produced regulations identical to the statute requiring "regular and substantive interaction between the students and the instructor" in distance education programs. It remains effectively the only distinction between the correspondence programs that saw significant abuse in past years and innovative distance-education programs, and any weakening of that distinction risks re-inviting abuse into online education.

The Department should maintain a strong definition for regular and substantive interaction, and for an instructor

After significant debate during negotiations, among both subcommittee members and the full committee, the committee reached what we believe is a reasonable compromise definition. Specifically, the Department defines:[50]

- An instructor as someone "responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency." We believe this adequately reflects the committee's shared goal of ensuring non-subject matter experts are not included as an instructor, and accurately reflects the commonly understood definition of an instructor as someone who is qualified to, and does, teach courses to students.

- Substantive interaction as "engaging students in teaching, learning, and assessment, consistent with the content under discussion" and that includes at least two of the following: direct instruction; assessing or providing feedback on a student's coursework; providing information or responding to questions about the content of a course or competency; facilitating a group discussion; or other instructional activities as approved by the institution's or program's accrediting agency. We believe this accurately reflects the conclusions of the negotiating committee that certain types of activities, while potentially important to student success, do not constitute substantive interaction with an instructor for the purposes of assessing Title IV eligibility because they are not specific to the subject matter of a course, or to teaching and learning.[51] For instance, coaching and mentoring of students may offer valuable additional supports, but does not replace the role of a subject-matter expert in communicating with students about course materials.

- Regular interaction as providing both the "opportunity for substantive interactions... on a predictable and regular basis," and monitoring of students' "academic engagement and success," ensuring that an instructor is responsible for promptly and proactively engaging with students when they need it, as determined by that monitoring. This also accurately

[50] 85 FR 18694
[51] 85 FR 18648

reflects the committee's discussion of the need for not just ready access to faculty when a student requests it, but also for proactive communication with students on the part of the instructor.

We are aware that, in the midst of the COVID-19 crisis, the Department has granted significant flexibility to allow programs to move online rapidly. As part of those flexibilities, the Department specified that institutions and programs may operate distance education programs during the emergency without first obtaining the necessary approvals, but that "to meet the Department's requirements for providing distance education… instructors must initiate substantive communication with students, either individually or collectively, on a regular basis."[52] The guidance goes on to specify that "an instructor could use email to provide instructional materials to students enrolled in his or her class, use chat features to communicate with students, set up conference calls to facilitate group conversations, engage in email exchanges or require students to submit work electronically that the instructor will evaluate."

While we recognize the need for short-term, emergency-only protocols to accommodate institutions' without appropriate technology, expertise, or quality protections as they move online during the pandemic, we warn that not all of this guidance meets the Department's proposed definition of substantive interaction. For instance, simply emailing instructional materials to students does not constitute substantive interaction, whereas a video class in which the instructor teaches the material to students would. Similarly, setting up conference calls is not a substantive interaction; facilitating and engaging in a group discussion during such a call is. Requiring students to submit work electronically does not itself meet requirements for regular and substantive interaction; providing substantive feedback on that work, however, does. We urge the Department not to codify such a definition in the final regulation, and would strongly object to any divergence from the proposed regulations to incorporate the kinds of pro forma activities that might have seemed acceptable to the Department strictly in the context of an unprecedented national emergency.

Greater clarity is needed as to how the definition of distance education will be applied in practice

The Department's proposed language, as already noted, provides a reasonable compromise. However, we urge the Department to provide greater clarity in the final rule as to how it expects the regulations will work in practice. Specifically, the Department states that "substantive interaction" means the institution includes at least two of the following activities, as listed in proposed 34 CFR 600.2:

[52] "Guidance for interruptions of study related to Coronavirus (COVID-19) (Updated March 20, 2020)," Electronic Announcement, U.S. Department of Education, March 5, 2020, https://ifap.ed.gov/electronic-announcements/030520Guidance4interruptionsrelated2CoronavirusCOVID19

> (4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—
>
> (i) Providing direct instruction;
>
> (ii) Assessing or providing feedback on a student's coursework;
>
> (iii) Providing information or responding to questions about the content of a course or competency;
>
> (iv) Facilitating a group discussion regarding the content of a course or competency; or
>
> (v) Other instructional activities approved by the institution's or program's accrediting agency.

However, it is unclear how exactly this will be interpreted in practice. If institutions must regularly engage in at least two of the above activities, must they regularly engage in both throughout the semester, or can they engage in one or the other of the activities at any given time to meet the Department's requirements?

How will the Department assess in program reviews and audits whether the instructional activities were approved by the institution's or program's accrediting agency? Must agencies list such activities as are approved in their standards and policies, or will the Department allow agencies to adopt a "we know it when we see it" approach, in which case it seems unlikely that any institution would ever run afoul of the rules?

Moreover, direct instruction is the core of higher education. Perhaps the Department should consider requiring that all institutions operating distance education engage in direct instruction, and that they select two of the remaining activities to fulfill the rest of the requirement for regular and substantive interaction. If the Department did so, the new language in 34 CFR 600.2 would read as follows:

> (4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion~~,~~; includes providing direct instruction; and also includes at least two of the following—
>
> ~~(i) Providing direct instruction;~~
>
> (i~~i~~) Assessing or providing feedback on a student's coursework;

> (ii~~i~~) Providing information or responding to questions about the content of a course or competency;
>
> (iii~~v~~) Facilitating a group discussion regarding the content of a course or competency; or
>
> (iv) Other instructional activities approved by the institution's or program's accrediting agency.

We believe the field would benefit from additional clarity about how the Department will interpret and apply the new regulatory requirements, and urge the Department to provide such clarity in the final rule.

The Department Must Faithfully Implement the Law on Direct Assessment Programs

34 CFR 600.10 and 668.10

The same 2005 law that permitted entirely-online institutions access to federal financial aid added a definition of direct assessment.[53] It reads, "For purposes of this title, the term 'eligible program' includes an instructional program that, in lieu of credit hours or clock hours as the measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, if such assessment is consistent with the accreditation of the institution or program utilizing the results of the assessment. In the case of a program being determined eligible for the first time under this paragraph, such determination shall be made by the Secretary before such program is considered to be an eligible program."[54] To date, we believe about 80 programs offered by 8 institutions have been approved to offer CBE programs.

Federal law requires approval of each new direct assessment program

The Department's proposed regulations would require that a first direct assessment program offered by an institution, and any direct assessment program that is offered at a different credential level, obtain approval. As is clear in the statutory language provided above, though, *all* new direct assessment programs must obtain approval. Plainly put, this proposal is not in keeping with the Department's legal obligations. Given that, we urge the Department to carefully re-read the statute and require that institutions obtain approval from the Department prior to offering a new direct assessment program.

New America has previously made this comment to the Department, in response to the agency's accreditation regulations last year. We noted in those comments that "the Department cannot

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[53] Much of this section is copied from "Competency-Based Education and Direct Assessment," New America, 2019, https://s3.amazonaws.com/newamericadotorg/documents/CBE_Issue_Paper.pdf
[54] 20 U.S.C. 1088(b)(4)

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." [20 U.S.C. 1099b(c)(4)] 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."[55]

However, we do not believe the Department provided a satisfactory response to our original comment. Below is the Department's entire response to our earlier comment, with emphasis added to show both the concern that we raised and the Department's attempt at a response:[56]

> *Comments:* Three commenters opposed the revisions to the substantive change regulations, arguing the Department failed to provide enough evidence to justify the changes and to specify how we would assess whether a change is "high-impact and high risk." The commenters opined that **the changes are incongruent with statutory requirements pertaining to the approval of branch campuses and direct assessment programs**.
>
> *Discussion:* The revisions to the substantive change regulations are designed to provide accrediting agencies more flexibility to focus on the most important changes. We believe that this targeted, risk-based approach focuses the agency's decision-making body's efforts on more relevant or risky issues in a changing educational landscape, while allowing an agency to delegate lower-risk decisions to staff. The Department considers a high-impact, high-risk change to include those changes provided as examples in the regulations (§ 602.22(a)(ii)(A)-(J)), such as substantial changes in the mission or objectives of the institution or program; a change in legal status or ownership; changes to program offerings or delivery methods that are substantively different from current status; a change to student progress measures; a substantial increase in completion requirements; the acquisition of another institution or program; the addition of a permanent site to conduct a teach-out for another institution; and the addition of a new location or branch campus.
>
> **We do not believe that the changes contradict the statutory requirements for the approval of branch campuses and direct assessment programs. HEA section 498 (20 U.S.C. 1099c(j)) provides the Secretary with the latitude to establish regulations that govern the certification of a branch of an eligible institution.**

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[55] Amy Laitinen and Clare McCann, "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]," New America, July 12, 2019, https://s3.amazonaws.com/newamericadotorg/documents/New_America_Comments_on_Accreditation_State_Authorization_NPRM.pdf

[56] 84 FR 58871

The Department's response to the legal question we raised refers only to a section of the statute addressing the "treatment of branches," not relevant to the question of whether the Department has such latitude with respect to direct assessment programs. It appears, in fact, that the Department lumped our comment about direct assessment with another commenter's concern about branch campuses – and addressed only the branch campus question. As you are no doubt aware, the Department is required to "consider and respond to significant comments received during the period for public comment."[57] The Department must substantively address the concern we have raised here and in past comment periods in order to comply with both the Higher Education Act and the Administrative Procedures Act.

The Department should consider other reasonable alternatives

The Department fails, in these proposed regulations, to describe other reasonable alternatives it considered or could consider. A middle ground between the Department's desire to limit burden on institutions offering direct assessment programs and faithfully executing the statute as it is plainly written is to create a lower-lift application for additional direct assessment programs after a program at that credential level has already been approved.

The proposed regulations specify in 34 CFR 668.10(b)(2) that applications must include: a description of the educational program; a description of how the program is structured, including how the institution determines what students need to learn; a description of how learning is assessed; the number of credit or clock hours equivalent to the amount of student learning being directly assessed; the methodology used to determine the equivalent number of credit or clock hours; and documentation of approval from the institution's accrediting agency.

The Department could consider creating a two-tier application process. The first tier, applied to all new programs that are the first of their credential level, would include all of the above application elements. The second tier, for additional programs after at least one program at that credential level has been approved, would include the requirements for descriptions of the program itself and how the learning objectives are set and evaluated. But it could perhaps omit the requirement for information on the methodology for determining the equivalent number of credit or clock hours. This recognizes the elements that will vary considerably from program to program—and that open students and taxpayers to additional risk if not carefully undertaken—while relaxing some of the requirements for descriptions of financial aid calculations that are likely consistent across programs. It is also consistent with the law.

Language on Approvals of New Programs Is Unclear and Inaccurate

34 CFR 600.20

[57] Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1203 (2015)

This section of the regulations addresses mandatory notifications for institutions that intend to add an educational program, and subsequent approvals for those programs by the Department. However, the regulatory language appears to have drafting errors, and the Department's intent is confusing. If the Department's regulatory text is correct as described, it means the Department also failed to note in the preamble that it departed from the consensus language.

Commenters are unclear as to the Department's intent with this language

The Department explains proposed changes to the structure of 34 CFR 600.20 in a series of amendments in the notice of proposed rulemaking.[58] Bullets lettered (f) through (i) address changes to 34 CFR 600.20(d), notice and application. In reading through those bullets, however, it appears that there is at least one error. Bullet (h) calls for removing redesignated subparagraph (d)(1)(ii)(D)—which is (d)(1)(ii)(E) in the current regulation, relettered as subparagraph (D) in bullet (f) of the proposed regulatory text. (We have mapped the language as we believe the Department listed it in the regulatory text below.) However, this language was maintained in the consensus agreement, with no changes discussed to that element.

Additionally, we note that the amendments at 85 FR 18695 include other errors. For instance, bullet (f) redesignates current subparagraphs (C) through (E) as (B) through (E); and then bullet (h) re-redesignates subparagraphs (E) and (F) as (D) and (E). However, the language listed in full in the proposed regulatory text (in the third column of 85 FR 18695) fails to redesignate subparagraph (C) as new subparagraph (B). Bullet (h) in the amendments to this section also says to "redesignate paragraphs (d)(1)(ii)(E) and (F) as paragraphs (d)(1)(ii)(D) and (E)." However, original subparagraphs (E) and (F) were already redesignated as (D) and (E), so there is no longer a subparagraph (F); and original subparagraph (E) (redesignated as subparagraph (D)) was struck in bullet (h), making the instructions in that sub-bullet incompatible with each other. Bullet (i) revises the redesignated paragraph (d)(1(ii)(E)(1), but there is no longer an (E) or (F) that follows the instructions of bullet (h).

Proposed 34 CFR 600.20(d)
As noted above, we have attempted to map the changes listed in 34 CFR 600.20.

(d) Notice and application.

(1) Notice and application procedures.

> (i) To satisfy the requirements of paragraphs (a), (b), and (c) of this section, an institution must notify the Secretary of its intent to offer an additional educational program, or provide an application to expand its eligibility, in a format prescribed by the Secretary and provide all the information and documentation requested by the Secretary to make a determination of its eligibility and certification.

[58] 85 FR 18695

(ii)

(A) An institution that notifies the Secretary of its intent to offer an educational program under paragraph (c)(3) of this section must ensure that the Secretary receives the notice described in paragraph (d)(2) of this section at least 90 days before the first day of class of the educational program.

~~(B) An institution that submits a notice in accordance with paragraph (d)(1)(ii)(A) of this section is not required to obtain approval to offer the additional educational program unless the Secretary alerts the institution at least 30 days before the first day of class that the program must be approved for title IV, HEA program purposes. If the Secretary alerts the institution that the additional educational program must be approved, the Secretary will treat the notice provided about the additional educational program as an application for that program.~~

(B~~C~~) If an institution does not provide timely notice in accordance with paragraph (d)(1)(ii)(A) of this section, the institution must obtain approval of the additional educational program from the Secretary for title IV, HEA program purposes.

(C~~D~~) If an additional educational program is required to be approved by the Secretary for title IV, HEA program purposes under paragraph (d)(1)(ii)(B) ~~or (C)~~ of this section, the Secretary may grant approval, or request further information prior to making a determination of whether to approve or deny the additional educational program.

~~(DE) When reviewing an application under paragraph (d)(1)(ii)(B) of this section, the Secretary will take into consideration the following:~~

~~(1) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs.~~

~~(2) Whether the additional educational program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.~~

~~(3) Whether the number of additional educational programs being added is inconsistent with the institution's historic program offerings, growth, and operations.~~

~~(4) Whether the process and determination by the institution to offer an additional educational program that leads to gainful employment in a recognized occupation is sufficient.~~

(E~~F~~)

(1) If the Secretary denies an application from an institution to offer an additional educational program, the denial will be based on the factors described in paragraphs (d)(1)(ii)(D~~E~~)(2), (3), and (4) of this section, and the Secretary will explain in the denial how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation.

(2) If the Secretary denies the institution's application to add an additional educational program, the Secretary will permit the institution to respond to the reasons for the denial and request reconsideration of the denial.

If this comment has been difficult to follow, it is because the Department's language includes errors that make tracking the intended changes virtually impossible.

If the Department's intent was to remove the list of elements that the Secretary shall consider in the approval of additional educational programs, we oppose the change. While the subparagraph that appears to have been struck (current subparagraph (E), paragraphs (1)-(4)) refers to the now-struck subparagraph (B), those elements are important for any approvals the Secretary may consider. We instead urge the Department to revise current subparagraph (E) as below (note that subparagraph (C) below refers to the current subparagraph; in the proposed rules, we believe this is redesignated as subparagraph (B)):

(E) When reviewing an application under paragraph (d)(1)(ii)(~~B~~C) of this section, the Secretary will take into consideration the following:

(1) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs.

(2) Whether the additional educational program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.

(3) Whether the number of additional educational programs being added is inconsistent with the institution's historic program offerings, growth, and operations.

> (4) Whether the process and determination by the institution to offer an additional educational program that leads to gainful employment in a recognized occupation is sufficient.

The Department's proposed rule does not allow meaningful opportunities for the public to comment

If the Department did not intend to strike the subparagraph of the current regulations related to Secretarial considerations for approval of additional educational programs, we believe that is extremely unclear. We urge the Department to reissue the notice of proposed rulemaking for an additional public comment period to straighten up any confusion.

When engaging in negotiations, the Department agreed not to "substantively alter the consensus-based language of its proposed regulations unless the Department...provides a written explanation to the committee members regarding why it has decided to depart from that language." [59] Such a written explanation must include "a detailed statement of the reasons for altering the consensus-based language and [be] provided to the committee members sufficiently in advance of the publication of the proposed regulations so as to allow them a real opportunity to express their concerns to the Department." Any changes from the consensus language must also be identified "in the preamble to the proposed regulations."

As we have already established, the final consensus regulations do not contemplate any changes to subsection (d) of the current regulations at 34 CFR 600.20, other than to strike subparagraph (B); redesignate subsequent paragraphs; and remove references to the now-struck subparagraph (B) throughout the subsection.[60] However, the Department's description of the proposed regulations refers only to striking subparagraph (B) of subsection (d), paragraph (1). The Department does not identify any changes in this section from the consensus language; and it makes no reference to the elements that are considered when the Secretary does review an application for new educational programs.

If the Department intended to strike the subparagraph under discussion in these comments, it failed to provide commenters with a meaningful opportunity to comment on the policy change in not following the requirement that it identify the changes in the preamble of the proposed regulations. If the Department intended to strike a different subparagraph, the same concern exists. Even if the Department did not intend to strike any subparagraph other than (B), which was discussed during the negotiations and agreed to in consensus, it has deprived commenters of the opportunity to meaningfully comment by making the proposed changes impossible to follow to the letter.

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[59] "Organizational Protocols, Negotiating Committee – Accreditation and Innovation 2019," U.S. Department of Education, 2019, https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/finalprotocols.pdf
[60] "Consensus Language 34 CFR Part 600," U.S. Department of Education, April 2019, https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/consensus600.pdf

Careful Changes for Subscription-Based Direct Assessment Programs Offer Responsible Flexibility

34 CFR 668.2, as well as associated changes in 34 CFR 668.22, 668.34, and 668.164

The Department proposes to add a new definition of subscription-based direct assessment programs to the regulations. The proposed definition clarifies that such programs are those for which institutions of higher education charge students on a subscription basis with the expectation that the student completes a specified number of credit hours during that term. We support the Department's proposed changes, and urge it not to expand the definition or weaken the nature of the flexibilities provided to such programs.

Direct assessment programs currently hold a particular place in the statute. They are defined separately from other eligible programs, and permitted leeway to access federal financial aid differently from all other programs (i.e., without using credit hours or clock hours).[61] They are required to be approved individually by the Education Department, and are subject to review by accrediting agencies.[62]

Some subscription-based programs, however, are non-direct assessment, competency-based education programs. Competency-based education programs are not defined—or, indeed, contemplated or alluded to—anywhere in the Higher Education Act, outside of direct assessment programs. As the Department notes, "the Department would prefer to allow all CBE programs to use the method, but the HEA does not provide a definition of 'CBE programs' on which the Secretary could rely for this purpose."[63]

Additionally, subscription-based programs are not without risk to students. Students in subscription-based programs pay for an "all-you-can-eat buffet" of education — whatever happens throughout the year, they are effectively committed to a single price based on the number of courses they expected to complete at the start of the semester. For some students, this may significantly speed time to completion and reduce the costs of a degree. For others, it may mean overpaying for an education the student doesn't ultimately consume.[64] Given that this subscription price is often financed largely with student debt, and students who drop out with debt but no degree are at a significant risk of defaulting on their loans, those students may stand to lose from a subscription-based model. Whereas direct assessment programs have been reviewed on a variety

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[61] 20 U.S.C. 1088(b)(4)
[62] Elsewhere in these comments, we remind the Department of its statutory obligation to approve each new direct assessment program prior to its receiving federal aid, not just some programs
[63] 85 FR 18656
[64] Robert Kelchen, "The Landscape of Competency-Based Education: Enrollments, Demographics, and Affordability," AEI, January 2015, https://www.aei.org/wp-content/uploads/2015/04/Competency-based-education-landscape-Kelchen-2015.pdf

of metrics by accrediting agencies and the Department before enrolling students, other types of CBE programs have not.

Given both the risk to students and taxpayers and the legal limitations laid on the Department, we urge that the final rule maintain the current definition of subscription-based programs, and that it not be expanded to other, non-direct-assessment programs at this time. In that narrow context, we also support the Department's proposed flexibilities to satisfactory academic progress, return to Title IV, and disbursement for such programs.

The Department should begin building evidence around its policy changes for subscription-based direct assessment programs

We believe the flexibilities granted here, in the limited context of subscription-based direct assessment programs, will provide the Department an opportunity to learn how changes to those tangential rules affect students and taxpayers in practice. The Department has so far failed to produce any findings from its competency-based education experiment, in which 17 institutions[65] are already participating and receiving many of the flexibilities granted to direct assessment subscription-based programs in this proposed rule.[66] Without any evidence of the relative risks and benefits, the Department would have no justification to extend these flexibilities further regardless. To support future policy conversations, we also urge the Department to produce the statutorily mandated reports[67] detailing the findings of its experiments, and to immediately improve the collection of data and information from participating institutions so that the CBE experiments can be of more use in the future.

The Department Must Maintain Limits on Outsourcing of Educational Programs

34 CFR 668.5

Currently, under federal rules, colleges participating in Title IV federal financial aid programs may outsource a portion of an educational program to another institution or to a non-Title IV provider.[68] It can outsource up to 25 percent of its program without any accreditor approval. If the accreditor approves, it can outsource up to 50 percent of its program to another entity. In no case, however, may a school receive federal financial aid for a program that it outsources more than 50 percent of

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[65] "Schools Participating in Experimental Sites," U.S. Department of Education, accessed April 21, 2020, https://experimentalsites.ed.gov/exp/pdf/ESIParticipants.pdf. Eight of the participating institutions are doing so with subscription-based programs specifically

[66] Clare McCann, Amy Laitinen, and Andrew Feldman, "Putting the Experiment Back in the Experimental Sites Initiative," New America, January 2018, https://www.newamerica.org/education-policy/policy-papers/putting-experiment-back-experimental-sites-initiative/

[67] 20 U.S.C. 1094a(b)(2)

[68] Much of this section is copied from "Outsourcing of Educational Programs," New America, 2019, https://s3.amazonaws.com/newamericadotorg/documents/Eligible_Programs_Issue_Paper.pdf

to another entity. In last year's published final rule governing accrediting agencies, the Department further changed those requirements by permitting accreditation staff—rather than the commissioners charged with making accreditation decisions—to approve those applications, and requiring expedited consideration of the applications.

A 50 percent cap on outsourcing is consistent with the HEA

The logic behind these requirements is straightforward. In order to receive taxpayer dollars, colleges and universities must meet a series of vetting requirements, like receiving accreditation; earning authorization in the states in which they operate; and passing financial responsibility and cohort default rate tests. While there may be portions of the curriculum that can be supplemented by experts outside of the institution's faculty, if an ineligible institution provides half—or more—of an educational program that is receiving federal aid, the institution primarily responsible for the program has not met those tests.

In other words, lifting the 50 percent threshold allows federal financial aid eligibility to become something of a shell game, in which an approved, eligible institution rents its name to another, unapproved education provider that is truly responsible for the content of the program, effectively creating a wide open back door into Title IV for unvetted educational providers. For example, a school may outsource part of its English program to an unaccredited source like the creators of YouTube's Creative Writing for Dummies, or an online institution could outsource a portion of its MBA program to Trump University.

Regulations implementing this threshold have been in place at least since 2000.[69] The primary purpose of the regulations, at that point, was limited in nature—to permit institutions to establish study-abroad programs that would allow their students to continue receiving federal financial aid while abroad, according to language in the rule. The regulations state, specifically, that Title IV-participating colleges may enter into written agreements with ineligible institutions or organizations only if:

- The unauthorized provider didn't previously participate in Title IV and have its participation revoked by the Department, a state authorizing agency, or an accreditor following certain 2 types of adverse actions, and didn't previously submit an application to participate in Title IV that was denied by the Department;

- The eligible institution grants the credential for the educational program and meets all the other requirements of a Title IV-participating college; and

- The non-Title IV institution provides 25 percent or less of the program, or provides between 25 and 50 percent of the program and is also approved by the eligible institution's

[69] 65 FR 65674 - 65675

accreditor and doesn't have common ownership between the eligible and ineligible institutions.

The Department lacks evidence to justify a policy change

More recently, the Department has explored the implications of relaxing these regulations for the growing market of unaccredited educational providers. In 2015, the Department launched the EQUIP "experiment," which laid out a rigorous framework for a limited number of institutions to engage in these types of outsourced programs. Institutions interested in participating were required to submit applications describing the program, the arrangement with the institution, and the quality assurance process that an independent review organization would follow to ensure student learning and positive student outcomes.

The Department selected eight institutions to participate in the experiment, each with an unaccredited provider and a separate quality assurance agency. The experiment was discontinued by the Education Department, without the Department ever gleaning or publishing any findings or policy considerations.[70] Yet over the course of the experiment, there were several concerning indications about the experiment and the institutions interested in participating in it:

- **Only one program passed the necessary approvals to begin offering federal financial aid through the program.** The unaccredited StraighterLine began offering associate degrees in business and criminal justice online, through Brookhaven College at the Dallas County Community College District in 2018.[71] Most other programs were unable to pass the basic tests established for the EQUIP experiment. But the willingness of multiple other providers to volunteer for the experiment suggests that, outside of an experiment that asks unaccredited providers to demonstrate their quality and positive student outcomes, many low-quality providers would gladly raise their hands to start receiving federal dollars. Meanwhile, three of the eight institutions ceased participation in the experiments before it got off the ground, suggesting institutions themselves will not be willing to serve as rigorous overseers of those unaccredited providers, either.

- **Some programs charged exorbitant rates to students.** Of particular concern is the charges students have faced for these programs. At SUNY Empire State College, for instance, students were charged the standard tuition and fees for enrolled students and given two scholarships to reduce that tuition (so a net $3,418); but they were also charged $12,000 for the Flatiron portion of the program, for a total of $15,418.[72] At University of Texas Austin, tuition is nearly $14,000 for a 13-week certificate program – a price-point the institution

[70] "Analysis Reports," Experimental Sites Initiative, Office of Federal Student Aid, U.S. Department of Education, last updated February 19, 2020, https://experimentalsites.ed.gov/exp/analysis.html
[71] Beth Dumbauld, "StraighterLine and Dallas County Community College District/DCCCD Launch New Partnership Through the Department of Education's EQUIP Pilot Initiative," StraighterLine, April 12, 2018, https://www.straighterline.com/press/straighterline-brookhaven-dcccd-equip/
[72] "SUNY Empire State College EQUIP Application," Office of Educational Technology, U.S. Department of Education, 2016, https://tech.ed.gov/files/2016/10/SUNY-EQUIP-Application-FINAL2.pdf

says Reactor Core "[was] able to lower the cost" to.[73] Especially at public colleges, students paid a hefty premium through these programs – a far cry from the "lower-cost" options Secretary DeVos promised when announcing the approvals of the first institution to participate.[74]

- **At least one unaccredited provider in the experiment was fined by its state for deceptive advertising.** One of the providers in the experiment—Flatiron School—was investigated by the state of New York and paid a six-figure settlement to "provide relief to victimized students."[75] (The settlement applied to the provider's existing programs, since its program with SUNY Empire State through EQUIP never got off the ground.) The Attorney General found that the institution had operated in the state without a license over a period of nearly four years. The AG also found that Flatiron had inflated its post-program outcomes in a predatory attempt to recruit students. Specifically, the unaccredited provider boasted a 98.5% job placement rate within 180 days after graduation, and an average salary of nearly $75,000 – the same figures reported to the Department in the college's EQUIP application.[76] But Flatiron failed to clearly explain that the job placement rate included all kinds of workers, including some who were employed for fewer than three months—and that its average salary claim only represented the earnings of full-time employed graduates, which comprised a minority of students who graduated from the online program and only 58 percent of those who studied at the provider's brick-and-mortar locations.

- **An institution in the experiment precipitously closed.** Failing nonprofit colleges struggling with declining enrollments and falling tuition revenue have sometimes turned to distance-education as a solution to their problems, often to catastrophic effects. Consider Morthland College, which—desperate for a new revenue source—contracted with a low-quality online education provider called KEEN and quickly lowered its admissions standards to partner with sports academies as a source of new enrollees and to balloon its online program revenue.[77] The college shuttered soon after.

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[73] "University of Texas at Austin EQUIP Application," Office of Educational Technology, U.S. Department of Education, 2016, https://tech.ed.gov/files/2016/10/UT-Austin-EQUIP-Application-FINAL2.pdf
[74] "Expanding Pathways to Success After High School, U.S. Department of Education Approves First Innovative EQUIP Experiment," Press Release, U.S. Department of Education, April 13, 2018, https://www.ed.gov/news/press-releases/expanding-pathways-success-after-high-school-us-department-education-approves-first-innovative-equip-experiment
[75] "A.G. Schneiderman Announces $375,000 Settlement with Flatiron Computer Coding School for Operating Without a License and for its Employment and Salary Claims," Press Release, New York State Office of the Attorney General, October 13, 2017, https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-375000-settlement-flatiron-computer-coding-school
[76] "SUNY Empire State College EQUIP Application," Office of Educational Technology, U.S. Department of Education, 2016, https://tech.ed.gov/files/2016/10/SUNY-EQUIP-Application-FINAL2.pdf
[77] Isaac Smith, "Morthland College Investigated by State, Federal Agencies; Fined Millions Over Alleged Mishandling of Federal Funds," *The Southern*, September 25, 2017, https://thesouthern.com/news/local/communities/westfrankfort/morthland-college-investigated-by-state-federal-agencies-fined-millions-over/article_0bd62e4f-af67-559c-b277-f863255d4f52.html

In another instance, Concordia University in Portland, Oregon, created an online master's program in a contract with an organization called HotChalk and rapidly became one of the largest awarders of online master's degrees in the country, before being hit with a whistleblower lawsuit over predatory recruiting practices and a federal investigation into the outsourcing caps already in federal law.[78] Following a settlement with the college (bank-rolled by the unaccredited provider), the program continued to operate. The school announced mid-spring semester 2020 that this would be its final semester operating, with the aggressive terms of the school's unaccredited partner undercutting the college's finances.[79]

A third example comes from a school that was participating in the EQUIP experiment. Marylhurst University applied to partner with Epicodus to offer a web development certificate program. Marylhurst's instruction-related obligation for the program was effectively only to spot-check the student progress reports and weekly institutional reports; otherwise, the education would be offered exclusively by an unaccredited entity. In exchange for the 27-week program, the school would charge $10,000 in tuition; and Marylhurst would keep 60 percent of the tuition revenue.[80] Meanwhile, the institution continued to flounder and in May 2018, announced it would close just by the end of the year.[81]

All three of these college closures occurred under the current Administration, so these stories should be very familiar to the Department. The common thread in these and other stories has been the mirage of outsourced programs as a solution to financial woes — a strategy that has repeatedly failed, often subjecting students to low-quality or predatory education in the process. These stories, and numerous others like them, are indicative of the risk to which the Department opens students and taxpayer dollars when it allows colleges to outsource their programs to unaccountable and unaccredited providers.

In an experiment of only eight, pre-vetted institutions, to see so many troubling problems with both the colleges and the unaccredited providers is certainly troubling. The Department has failed to provide any justification for changing the policy, particularly given how prevalent the risk to

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[78] Kevin Carey, "The Creeping Capitalist Takeover of Higher Education," Huffington Post, April 1, 2019, https://www.huffpost.com/highline/article/capitalist-takeover-college/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANU_TeAsaZYXUHgKeswg2zmTA5aqyY6GGoTJuTQKrGR64eJ45VxYxHOXW7pdaOxRyPijsQgtwmUjS4y6f0BkZmf4RrFW5myTCPHJKy_eaedYrimIyGWDZ-v8HSqfgYwZqhXkEDbG53eZVY3R8qJ3SnOPX8HI4vzdvbKt1rvcDAYL

[79] Phil Hill, "Concordia University Portland Closure: There's More to the Story," Phil on Ed Tech, March 1, 2020, https://philonedtech.com/concordia-university-portland-closure-theres-more-to-the-story/

[80] "Marylhurst EQUIP Application," Office of Educational Technology, U.S. Department of Education, 2016, https://tech.ed.gov/files/2016/10/MarylhurstEQUIPApplicationFINAL_Redacted.pdf

[81] Doug Lederman, "Oregon's Marylhurst University to Close," Inside Higher Ed, May 18, 2018, https://www.insidehighered.com/news/2018/05/18/another-college-marylhurst-closes-one-not-northeast-or-midwest

students and taxpayers appears to be even in a controlled setting. Moreover, while programs in EQUIP were required to seek substantive change approvals from their accrediting agencies for such programs, the Department has already revised those regulations to remove the decision from the commissioners accountable and responsible for decision-making and instead place it in the hands of unaccountable accreditation staff; and to arbitrarily speed the timeline for accreditors' reviews of those outsourcing contracts – increasing the risk even further relative to the 2015 experiment from the Department. We cannot see any justification for lifting the 50 percent cap, and urge the Department to maintain current policies.

The Department should reverse changes to accreditor approvals for outsourcing agreements

In the accreditation rules (negotiated under the same rulemaking but published last year), the Department changed federal regulations to say that substantive changes—including approvals of contracts of institutions outsourcing more than 25 percent of their programs to unaccredited providers—may be approved by accrediting agency staff, rather than the commissioners accountable for making those decisions; that certain institutions do not need to receive prior approval; and that such reviews must be rushed to either be decided upon within 90 days or (if there are "significant circumstances" present), extended to a 180-day approval.[82]

We appreciated that the Department agreed with us that the proposed changes were among the "most significant"[83] in the accreditation rule.[84] However, we disagree that the Department's changes will allow accreditors "to focus on more significant and potentially risky changes."[85] The types of substantive changes proposed in this rubber-stamp approval process are themselves exceedingly risky.

The Department's 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.[86] 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

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[82] 34 CFR 602.22(a) and (b), as revised at 84 FR 58922-58923
[83] 84 FR 27427
[84] These comments are adapted from our earlier comments to the Department. Amy Laitinen and Clare McCann, "Comments to the Department of Education Regarding Proposed Rules for the SEcretary's Recognition of Accrediting Agencies and Other Issues," New America, July 12, 2019, https://s3.amazonaws.com/newamericadotorg/documents/New_America_Comments_on_Accreditation_State_Authorization_NPRM.pdf
[85] Ibid
[86] 20 U.S.C. 1099b(b)

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."[87] It also stated that it is proposing these changes to "encourage timelier approvals"[88] — 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."[89] 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.'"[90] Earlier this year, the school announced mid-spring semester 2020 that this would be its final semester operating, with the aggressive terms of the school's unaccredited partner undercutting the college's finances.[91]

Yet in the Department's revised accreditation 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 take advantage of an extension and can demonstrate "significant circumstances." 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.[92] The Department should reverse its prior changes, eliminate these deadlines, and permit accreditors as long as they need to complete their review of outsourcing contracts and institutions' applications.

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[87] 84 FR 27427
[88] Ibid
[89] Kevin Carey, "The Creeping Capitalist Takeover of Higher Education," Huffington Post, April 1, 2019, https://www.huffpost.com/highline/article/capitalist-takeover-college/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANU_TeAsaZYXUHgKeswg2zmTA5aqyY6GGoTJuTQKrGR64eJ45VxYxHOXW7pdaOxRyPijsQgtwmUjS4y6f0BkZmf4RrFW5myTCPHJKy_eaedYrimIyGWDZ-v8HSqfgYwZqhXkEDbG53eZVY3R8qJ3SnOPX8HI4vzdvbKt1rvcDAYL
[90] Ibid
[91] Phil Hill, "Concordia University Portland Closure: There's More to the Story," Phil on Ed Tech, March 1, 2020, https://philonedtech.com/concordia-university-portland-closure-theres-more-to-the-story/
[92] "Questions Submitted by Senator Patty Murray," United States Senate, March 2019, https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHShearing.pdf, pages 47-48

The Department should reverse its language in last year's accreditation rule permitting expedited and sped-up approvals of substantive changes, particularly for outsourcing contracts, 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.

While we made the request for greater transparency in substantive change decisions in our public comments last year (virtually verbatim, the language in the preceding paragraph), we note that the Department failed to respond to that specific proposal in its final accreditation rule. Thus, we ask the Department to again consider and respond to our substantive proposal for heightened transparency regarding substantive changes, including with respect to outsourcing.

Clock-to-Credit-Hour Conversions Should Protect Taxpayers from Abuses

34 CFR 668.8

Federal regulations specify that undergraduate educational programs are required to use the clock-to-credit-hour conversion formula outlined in the regulations unless they are at least a two-year degree program, or are acceptable for credit toward a two-year degree program in which students enroll and graduate.[93] However, the Department has proposed to remove the requirement that schools demonstrate students enroll in and graduate from a degree program, and instead only "demonstrate that at least one student was enrolled in the program during the current or most recently completed award year."

The Department provides no explanation or reason for this change in the preamble of the proposed rule. However, it appears to provide enormous leeway to institutions of higher education. Institutions would be permitted to exempt their programs from the clock-to-credit-hour conversion requirement simply by claiming any certificate program applies toward a general studies program, even if no students are actually enrolled in such a program. In fact, institutions could effectively invent a nonexistent program to use as a back-door way to avoid the conversion formula.

This is particularly concerning given that the Department has also relaxed the conversion formula itself. The new proposed formula reverses changes previously made by the Department to more

[93] 34 CFR 668.8(k)

accurately reflect the fact that the definition of clock-hour programs is intended to include only in-class instruction and the definition of credit-hour programs includes both in-class and out-of-class work. As a result, the rules for conversions will be somewhat loosened, schools will receive more funding for less instructions, and the taxpayers will be the ones who pay.

The Department must ensure that it is responsibly shepherding taxpayer dollars, including by requiring programs to apply by the rules. If institutions can so easily evade federal regulations, it will be unable to enforce those rules. Especially given the leeway the Department is already providing to clock hour programs, at an absolute minimum, we urge the Department to return to its original language and revise proposed subparagraph (k)(2)(ii) to read as follows:

> (k) * * *
>
> (2) Each course within the program is acceptable for full credit toward completion of an eligible program offered by the institution that provides an associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that—
>
> (i) The eligible program requires at least two academic years of study; and
>
> (ii) The institution can demonstrate that ~~at least one~~ students ~~was~~ enroll~~ed~~ in, and graduate from, the degree program ~~during the current or most recently completed award year~~.

Institutions Should Not Be Permitted to Inflate the Lengths of Their Programs

34 CFR 668.14

In 1994, then-Secretary of Education Lamar Alexander published regulations that sought to prevent institutions of higher education from inflating the lengths of their programs. The regulations specified that gainful employment programs must demonstrate a "reasonable relationship" between program length and the entry-level requirements for the occupation for which the program prepares students. They also clarified that such a relationship was not reasonable if the number of clock hours in the program exceeded the minimum number required by a state or federal agency. The regulations specifically said the new rules were necessary because "then Secretary [now Senator Alexander] believes that the excessive length of programs requires a student to incur additional unnecessary debt."[94]

The law and regulations were changed in response to a long history of course-stretching by programs to either gain access to federal student aid or to remain eligible, but skirt completion and job placement requirements. A Senate investigation in 1991 found that "some proprietary schools

[94] 59 FR 9548

have falsified information regarding the length of their courses and/or deliberately stretched courses beyond the level needed to train students for employment. According to the Inspector General, course-stretching can result in a proprietary school student's paying as much as 38 times the tuition charged by other postsecondary institutions, such as a local community college, for the same training."[95]

Institutions should clearly demonstrate 'reasonable relationships' between program length and entry-level requirements

During negotiations, negotiators agreed to allow programs to further lengthen beyond the current regulations. That's on top of being permitted to inflate their programs to the greater of either 50 percent more than the minimum number of clock hours required by the state or a federal agency, or the minimum number of clock hours required by an adjacent state.

However, we are still concerned that this could allow institutions to arbitrarily increase their program length even when the school and its subsequent labor market is not contiguous or overlapping with another state's. Therefore, we propose that the Department allow for program length to be based on an adjacent state's minimum entry requirements if the institution resides in a metropolitan statistical area that includes the neighboring state and offers in-person instruction;[96] or if the institution attests to, and can demonstrate if asked, that it has enrolled a student who lived in that state within the preceding three years or that recent graduates are gainfully employed in that state.

We know the Department shares our concern that licensing bodies have created barriers to workers in many ways.[97] But the Department cannot respond to that concern effectively by allowing colleges to inflate their programs and charge more money, forcing students to take on more debt, without adequate justification for doing so. Our proposed solution would allow institutions to meet the labor market needs of their students, without unduly burdening students with the added costs of doing so.

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[95] "Abuses in Federal Student Aid Programs," Report, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 1991, https://files.eric.ed.gov/fulltext/ED332631.pdf

[96] Hundreds of localities are in a cross-state metropolitan statistical area. For instance, Washington, D.C. falls in the Washington-Baltimore-Arlington MSA, which includes DC, Maryland, Virginia, West Virginia, and Pennsylvania.

[97] As the Department writes in the proposed regulations, "A number of occupations, such as massage therapy and cosmetology, are subject to varying licensure requirements from one State to another. This can present a difficult challenge to both institutions and students…. Students who reside in and attend a program in one State may seek to be employed in an adjacent State where the minimum number of hours required for licensure is at least 150 percent of the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located." 85 FR 18664

The Department Should Improve Data on Distance-Education Programs

The Department currently has little available data about distance-education programs; and the data that are available are disjointed and insufficient to provide students with reliable information. Data reported to the Integrated Postsecondary Education Data System (IPEDS) only reflect the number of students enrolled in distance education and the number of completions in distance-education programs, and data are significantly lagged, with the most recent publicly available data from 2018. [98] Sample surveys conducted by the National Center for Education Statistics provide more detail, but cannot be narrowed to particular institutions or programs. The College Scorecard provides no options for students to search for online institutions or to view the outcomes of students who are enrolled online, those enrolled in brick-and-mortar programs, and those who utilize both modalities; and lists even exclusively online colleges by the urbanicity of their headquarters address, providing little helpful information to prospective students.[99]

The Department itself has seen the problems this causes very recently. When Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in March 2020, it directed the Department to allocate funding to institutions of higher education based on the share of full-time equivalent students who were not exclusively enrolled in distance education courses prior to the coronavirus emergency.[100] Unable to adequately report those data because of the lag in reporting through IPEDS and the lack of distance-education information in the National Student Loan Data System (NSLDS), the Department instead had to resort to a complicated formula that jury-rigged the two systems together (emphasis added):[101]

> The first factor was approximated as follows. The number of undergraduate students awarded Pell grants as reported in IPEDS was adjusted based on the institution's share of total Pell recipients as reported by FSA for the 2018/19 award year. The FTE enrollment of these Pell recipients was approximated by looking at the ratio in IPEDS between 2017/18

[98] Distance-education data through IPEDS are collected only through the Institutional Characteristics survey (does the institution offer distance-education programs or courses at the undergraduate and/or graduate levels?); the Fall Enrollment survey; and the Completions survey.

[99] For instance, Western Governors University is listed as a "suburban" institution, but no information on its College Scorecard profile mentions that it is a distance-education institution; and no data of hybrid institutions are separated out to provide the outcomes of online and brick-and-mortar students.

[100] Sec. 18004 of P.L. 116-136 reads, "The Secretary shall allocate funding under this section as follows: (1) 90 percent to each institution of higher education to prevent, prepare for, and respond to coronavirus, by apportioning it—(A) 75 percent according to the relative share of full-time equivalent enrollment of Federal Pell Grant recipients **who are not exclusively enrolled in distance education courses prior to the coronavirus emergency**; and (B) 25 percent according to the relative share of full-time equivalent enrollment of students who were not Federal Pell Grant recipients **who are not exclusively enrolled in distance education courses prior to the coronavirus emergency.**

[101] "Methodology for Calculating Allocations per Section 18004(a)(1) of the CARES Act," U.S. Department of Education, April 9, 2020, https://www2.ed.gov/about/offices/list/ope/heerf90percentformulaallocationexplanation.pdf

FTE undergraduate enrollment and 2017/18 undergraduate headcount enrollment. In order to approximate FTE enrollment of Pell Grant recipients who were not enrolled exclusively in distance education, **the estimated FTE enrollment of Pell Grant recipients was multiplied by the percentage of fall 2018 undergraduate degree/certificate-seeking students not enrolled exclusively in distance education as reported in IPEDS**.

The second factor was estimated by subtracting the approximated FTE enrollment of Pell Grant recipients (if any) from the total 2017/18 FTE enrollment of students as reported in IPEDS and then **multiplying the difference by the percentage of fall 2018 undergraduate, graduate, and professional students not enrolled exclusively in distance education as reported in IPEDS**.

Better data collection on distance-education status will promote innovation

The Department should ensure it has the ability to assess, evaluate, and promote innovative programs by updating its systems to keep pace with current progress. To that end, it should incorporate a new reporting requirement to NSLDS, asking about the distance-education status of each enrolled federal financial aid recipient. Doing so will allow the Department to produce new information for the College Scorecard, provide flexibility from certain reporting requirements, and support internal research efforts, among other benefits.

Suggested language for such an addition is below. We believe there are several appropriate places in the regulations where it could be adapted for inclusion, including in 34 CFR 600.2, in the definition of a distance-education program, or in 34 CFR 668.14, as an addition to program participation agreements.

> All institutions offering distance education programs must establish a new location with the Department for exclusively-online students.

> For all programs in which at least one course can be completed online, the institution must report whether each Title IV student is enrolled exclusively online, exclusively as a brick-and-mortar student, or as a hybrid student in both online and brick-and-mortar instruction, in accordance with the Department's reporting requirements.

Fifteen years after Congress permitted institutions to operate more than half online, with nearly 7 million students enrolled in at least some online courses, the Education Department still cannot answer basic questions about those students, their usage of federal financial aid, how online learning has helped speed their time to completion, their post-college outcomes, or any number of other pressing questions. This simple fix will bring the Department up to date and recognize the increased role that online learning plays in the federal financial aid system.