



September 14, 2018

Aaron Washington  
U.S. Department of Education  
400 Maryland Ave. SW  
Room 294-12  
Washington, DC 20202

## **RE: Docket ID ED-2018-OPE-0076**

To Whom It May Concern:

Thank you for the opportunity to comment on the Department's recent notice articulating its intent to establish a negotiated rulemaking committee.

After careful review of the Department's notice, as published in the Federal Register on July 31, 2018, it is clear that a single rulemaking panel of this breadth and depth will not be able to cover each of the issues in a manner that each topic (and the students and taxpayers these rules are meant to protect) deserves. Twelve topics is an ambitious agenda in any configuration, but the Department's intention to address all of these incredibly detailed and disparate topics in a single panel would seem to preclude any possibility for thoughtful consideration of these critical issues. Therefore, we urge the Department to reconsider its regulatory scope and maintain the important rules discussed below. If the Department continues down the path of addressing all of these varied and extensive issues on a single panel, however, we include suggestions for the design and scope of the proposed committee, starting on page 11 of our comments.

### **Concerns with Proposed Subject Areas**

In its notice, the Department states that the purpose of this negotiated rulemaking committee is "to promote greater access for students to high-quality, innovative programs by revising the regulations related to" a dozen separate topics.

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. That robust accountability must include a functioning triad, where the federal government, states, and accreditors share responsibility for ensuring that students and taxpayers are protected and that students receive a quality education. The reality is that the triad is broken—in some cases, virtually nonexistent—for these purposes. The U.S. Department of Education gives out nearly \$130 billion in grants and loans to students to go to college, with almost no requirements that those institutions demonstrate positive outcomes for their students. It is irresponsible to further open access to federal dollars (much of which will be borne by students as debt) unless the federal government is itself willing to set some baseline consumer protection outcomes and bolster the triad. Abdicating the federal role and deferring to accreditors and the states to protect students and taxpayers hasn't worked—and it won't work this time, either.

In these comments, we address just a few of the twelve topics under consideration: accreditation, state authorization, regular and substantive interaction requirements in distance education, the credit hour definition, direct assessment, the outsourcing of educational programs to unaccredited entities, and TEACH grants. However, we are concerned with several others. For instance, the Department proposes to reopen the entirety of the Department's institutional eligibility and general provisions regulations, a mandate far too broad for a negotiated rulemaking agenda, particularly given the laundry list of other issues on the table. And we are opposed to rewriting or eliminating regulations prohibiting institutions from inflating their program lengths far beyond what states require, in practice, to obtain employment. These regulations provide important parameters for institutions to keep them from ripping off students.

## *I. Accreditation*

The Department plans to address five subtopics within the issue of accreditation: requirements for accrediting agencies in their oversight of member institutions; requirements for accrediting agencies to honor institutional mission; criteria used by the Secretary to recognize accrediting agencies, emphasizing criteria that focus on educational quality; developing a single definition for purposes of measuring and reporting job placement rates; and simplifying the Department's process for recognition and review of accrediting agencies. While reforms to accreditation are needed, comments<sup>1</sup> from

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<sup>1</sup> Kreighbaum, Andrew. "DeVos to Announce New Push for Deregulation, Innovation." *Inside Higher Ed*. July 30, 2018:

<https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>.

high-ranking officials in the Department of Education suggest that this rulemaking will not raise the quality of higher education, but instead lower it. The federal government already expects too little of accreditors, and as a result, the so-called guardians of quality provide little in exchange. We can and we should ask more of accreditors.

The current accreditation system, which oversees the quality of education at every federal financial aid-participating institution in the country, has seen some massive failures in recent years. As gatekeepers of federal financial aid, accrediting agencies have an obligation to ensure their approval indicates a baseline quality of approval. But many of them fail to consider students' outcomes in a serious way;<sup>2</sup> and some accrediting agencies fight transparency and oversight tooth and nail.<sup>3</sup> Any overhaul of the accreditation regulations should encourage agencies to focus their reviews and take serious action on poor-performing institutions; require greater transparency into how accreditors make their decisions; and hold agencies to high standards in the Department's own recognition proceedings for accreditors to ensure a rigorous system of checks and balances.

## II. State Authorization

Through this new rulemaking, the Department intends to regulate on state authorization issues "related to programs offered through distance education or correspondence courses, including disclosures about such programs to enrolled and prospective students, and other State authorization issues."

State authorization requirements are critical in guaranteeing all students benefit from this component of educational oversight. However, the Department has already held two negotiated rulemakings on this subject in less than a decade, and as we have stated in previous comments,<sup>4</sup> implementation of the 2016 distance education rule with guidance would be sufficient to address the issues highlighted in the Department's notice. Further deliberation on this issue would be a waste of government resources.

As the basis for the two-year delay of the 2016 state authorization rule, the Department pointed to two letters. In those letters, a few higher education organizations outlined a few

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<sup>2</sup> Fuller, Andrea and Douglas Belkin. "The Watchdogs of College Education Rarely Bite." *The Wall Street Journal*. June 17, 2015: <https://www.wsj.com/articles/the-watchdogs-of-college-education-rarely-bite-1434594602>.

<sup>3</sup> See, for example: <https://www.regulations.gov/document?D=ED-2016-ICCD-0035-0021>.

<sup>4</sup> See New America's previous comments on the delay of the state authorization rule for distance education, available here: [https://s3.amazonaws.com/newamericadotorg/documents/06112018\\_New\\_America\\_Comments\\_on\\_State\\_Auth\\_DE.pdf](https://s3.amazonaws.com/newamericadotorg/documents/06112018_New_America_Comments_on_State_Auth_DE.pdf).

concerns they had with the rule and asked for clarification on those issues. The first letter, dated February 6, expressed concern for some students who may not be eligible for student aid as their state may not have a system on which to act on consumer complaints associated with out-of-state institutions. This letter was limited to this one concern. The second letter, dated February 7, raised two administrative issues for clarification: how to determine the residency of students for purposes of the rule and the appropriate format for consumer disclosures. While both letters stated that guidance would have sufficed, the Department took the unnecessary step of delaying the 2016 distance education rule. In its delay of the rule, the Department stated these issues required further discussion and chose a two-year delay to accommodate this new negotiated rulemaking—a delay which is now the subject of a lawsuit in federal court for a possible violation of the Administrative Procedures Act.<sup>5</sup>

If the Department chooses to continue with new regulations on this subject, it should limit this squandering of taxpayer dollars by only negotiating on the three issues that it cited in the delay of the 2016 rule (consumer complaint systems, residency determinations, and consumer disclosure formatting for distance-education programs). Inclusion of topics beyond these three would call into question the Department’s true motivation for delaying the 2016 distance education rule, especially when the the two letters and organizations across the spectrum of higher education stated that guidance would have sufficed.

### *III. Regular and Substantive Interaction in Distance-Education Programs*

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 (particularly in its references to VHS tapes), but what is not outdated—and what must absolutely be preserved—is the intent of both the statutory and regulatory requirements.

The inclusion of regular and substantive interaction in the statute as a requirement for distance education programs came as a response to rampant fraud and abuse stemming from the increase in correspondence programs in the 1980s and 1990s (which came a few decades after rampant abuse in correspondence programs aimed at veterans returning from war with GI Bill dollars to use). To reduce the risk of abuse, Congress created limitations on institutions engaged in correspondence education, such as reducing the amount of federal financial aid for which they were eligible and limiting the share of correspondence students and correspondence programs institutions could offer, in the

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<sup>5</sup> “Educators, students file lawsuit against Education Department, DeVos.” National Education Association. Press Release. August 23, 2018: <http://www.nea.org/home/73914.htm>.

1992 Higher Education Act Amendments. In 2006, Congress moved to make distance education programs eligible for federal financial aid, without placing the same restrictions on those programs as on correspondence education programs, and so established a statutory definition that created a distinction between correspondence and distance education programs. That definition, as revised in the 2008 Higher Education Act reauthorization, established a requirement that distance education programs include “*regular and substantive* interaction with the instructor” (emphasis added), while correspondence programs did not require that interaction. It is the sole statutory distinction between the two, designed to prevent the recurrence of the kinds of abuses seen during the previous decades. That definition was lifted directly from a recommendation developed by the Bush Administration in the culminating report of the distance education demonstration program.<sup>6</sup>

The regulations governing regular and substantive interaction sought to clarify the distinction between distance education and correspondence education. They have effectively helped to prevent many of the abuses spotted in correspondence education, in conjunction with the credit hour and other rules. Meanwhile, the regulations do not appear to have hindered growth in distance education; between 1998 and 2012, enrollment in distance education more than tripled.<sup>7</sup> And isolated problems with individual institutions can be resolved on a case-by-case basis. Therefore, flexibilities for regular and substantive education must not be applied to all distance education programs, writ large.

The rise of competency-based educational (CBE) programs that make use of new models for faculty, and technological advancements that allow CBE programs to design personalized, supported learning programs with proactive support from faculty, have raised new questions about regular and substantive interaction in the context of CBE programs in particular. While being separated from the instructor in a self-paced program today can still mean students are largely left to learn on their own, it doesn’t have to mean that. Moreover, the CBE community—unlike the distance education community in general—has spent several years thinking about how to fix (and not throw out or gut) the regular and substantive interaction requirement in a way that enables high-quality, cutting-edge, outcomes-driven programs that serve students well to thrive. Eliminating this

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<sup>6</sup> “Third Report to Congress on the Distance Education Demonstration Program.” U.S. Department of Education, Secretary Margaret Spellings. April 2005:  
<https://www2.ed.gov/programs/disted/DEDP-thirdreport.pdf>.

<sup>7</sup> “Distance Education at Postsecondary Education Institutions: 1997-98.” U.S. Department of Education, National Center for Education Statistics. December 1999:  
<https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2000013>; and “Distance Education Enrollment by State.” U.S. Department of Education, National Center for Education Statistics. June 2014:  
<https://nces.ed.gov/pubs2014/2014023.pdf>. Enrollments increased from fewer than 1.7 million students in 1997-98 to nearly 5.5 million in 2012.

requirement wholesale would be harmful to the field of CBE, as it could open the floodgates to unscrupulous actors that call themselves “CBE,” take students money and provide shoddy education, and ruin the reputation of the good actors in the field—ultimately destroying the credibility of CBE itself.

We believe this provision of the law is solely in the jurisdiction of Congress and should be carefully considered by Congress alone—and for CBE programs only. In fact, recent conversations around the reauthorization of the Higher Education Act have featured this issue and the creation of a statutory definition for CBE. Changing requirements for regular and substantive interaction in all of distance education (rather than just for CBE programs) would be a huge threat to quality, program integrity, and to the CBE community, which has worked diligently over the past few years to hold itself up on its outcomes, not just on its delivery method. The CBE community has been willing to (and has wanted to) be held to a higher standard. The broader field of distance education has not yet done the same, meaning that any definition that would be acceptable to such a wide group of stakeholders would need to appeal to the lowest denominator and would most likely provide even less quality assurance than we have now.

The Department can instead play a critical role in moving this conversation forward through its CBE experiment under the Experimental Sites Initiative, which is allowing CBE institutions to experiment with flexible definitions of regular and substantive interaction. Participating institutions should provide, and the Department should compile and publish, additional information to help Congress better understand the educational support and resources students need to progress through their programs; the content, activities, support, and resources needed to help students attain and demonstrate competency; to understand and address the role of faculty and faculty involvement in CBE programs, including how they effectively provide functions traditionally assigned to faculty using other staff; and to identify additional resources that may be needed for adequate oversight of CBE programs. All of this, of course, should be within the broader context of looking at the student outcomes (not inputs) in these programs. This could provide critical information that Congress uses as it considers changes in HEA reauthorization that enable innovation in the service of—rather than at the expense of—students.

#### *IV. Credit Hour and Direct Assessment*

The federal credit hour rule helps create a common currency through which the Department can disburse federal student aid dollars. As we explained in our comments on

regulatory relief to the Department last year,<sup>8</sup> the credit hour is the bedrock of virtually all calculations of students' enrollment intensity—a critical measure that affects the amount of aid for which they are eligible. So its definition holds great significance for students and in how the federal aid programs are administered.

Traditionally, how credit hours are defined rested solely in the hands of colleges and their accreditors. But reports in 2009 and 2010 by the Inspector General (IG) of the Department of Education found insufficient oversight by the three regional accrediting agencies—in fact, none of them had established a definition for a credit hour.<sup>9</sup> Those three accreditors, which accounted for one-third of all Title IV-participating institutions, exercised inadequate oversight on credit hour assignment processes for their institutions, according to the reports. The IG documented egregious abuses that grew out of the accreditors' failures to establish minimum standards.<sup>10</sup> These abuses elevated concerns that colleges were misusing taxpayer dollars, accreditors were providing insufficient oversight, and students were wasting their limited federal financial aid dollars on worthless courses.

In response to the IG's reports and recognizing the potential scope of the problem, the Department of Education developed a regulatory definition of a credit hour that would

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<sup>8</sup> See New America's previous comments on the Department's regulatory relief evaluation, available here: <https://www.newamerica.org/education-policy/public-comments/our-public-comments-us-department-education/comments-regulatory-relief-evaluation-existing-regulations/>.

<sup>9</sup> "Review of the Middle States Commission on Higher Education's Standards for Program Length." U.S. Department of Education, Office of the Inspector General. 14 December 2009: <https://ed.gov/about/offices/list/oig/aireports/i13j0005.pdf>; "Review of the Southern Association of Colleges and Universities' Standards for Program Length." U.S. Department of Education, Office of the Inspector General. 24 November 2009: <https://ed.gov/about/offices/list/oig/aireports/i13j0004.pdf>; "Review of the Higher Learning Council of the North Central Association of Colleges and Schools' Standards for Program Length." U.S. Department of Education, Office of the Inspector General. 24 May 2010: <https://www2.ed.gov/about/offices/list/oig/aireports/x13j0003.pdf>. For more information, see: "Statement of Kathleen Tighe, Inspector General, Department of Education, Before the Committee on Health, Education, Labor, and Pensions." 24 June 2010: <https://www2.ed.gov/about/offices/list/oig/auditreports/stmt06242010.pdf>; "Statement of Kathleen Tighe, Inspector General, Department of Education, Before the Committee on Education and Labor." 17 June 2010: <https://www2.ed.gov/about/offices/list/oig/auditreports/stmt06172010.pdf>; "Statement of Kathleen Tighe, Inspector General, Department of Education, Before the Committee on Education and Labor, Subcommittee on Higher Education and Workforce Training." 11 March 2011: <https://www2.ed.gov/about/offices/list/oig/auditreports/tighestate03112011.pdf>; and "The Higher Learning Commission of the North Central Association of Colleges and Schools' Decision to Accredite American InterContinental University." Memorandum from Wanda A. Scott, Assistant Inspector General, to Daniel Madzellan, Delegated the Duties of the Assistant Secretary of Postsecondary Education." 17 December 2009: <https://www2.ed.gov/about/offices/list/oig/auditreports/AlertMemorandums/113j0006.pdf>.

<sup>10</sup> For instance, one accreditor approved an institution that granted nine credits for a 10-week course—far inflated beyond traditional colleges' usual three credits for 15-week courses. The accreditor raised concerns about the excessive granting of credits for the course but did little else; it then approved the institution's subsequent proposal of breaking the course into two four-and-a-half-credit, 5-week courses without further question.

both protect the integrity of the federal financial aid programs. It does this by allowing distinct ways of defining a credit hour. The first effectively restates historic practice: credits are awarded based on time—time spent in class and time spent on work. The other methods rely on “evidence of student achievement,” and estimating the “amount of work represented” in achieving learning outcomes. 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, difficult to measure but a 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.

That definition, with its consideration both for time-based and learning-based measures, has proved workable for the many institutions that have launched innovative competency-based education (CBE) programs in recent years. This underscores that 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.”<sup>11</sup> And while there are laws that may present some barriers to the efficient disbursement of federal aid in competency-based programs, the credit hour rule is not a barrier and its elimination would do little to accommodate new programs that seek to innovate responsibly. To the extent institutions believe they cannot engage in competency-based programs under the terms of the credit hour definition, accreditors are the ones responsible for coordinating with colleges to develop rigorous, evidence-based measures of work; the Department could and should reiterate that to accrediting agencies outside of the regulatory process.

In 2012, there were about 20 competency-based programs in the U.S.; today, there are more than 500.<sup>12</sup> The credit hour rule, which took effect in July 2011, has not restrained the development of innovative programs; in fact, it has been in effect during an explosive period of growth for such programs. Moreover, until the Department of Education established a floor for the definition of the credit hour, the Department had effectively no ability to stop unscrupulous institutions from abusing the way federal aid is prorated by enrollment intensity. The rule has established a minimum standard for the amount of time or learning expected to represent a credit hour. Its presence dramatically reduces the risk

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<sup>11</sup> Ochoa, Eduardo. “Guidance to Institutions and Accrediting Agencies Regarding a Credit Hour as Defined in the Final Regulations Published on October 29, 2010.” U.S. Department of Education. DCL GEN-11-06. March 18, 2011: <https://ifap.ed.gov/dpcletters/GEN1106.html>.

<sup>12</sup> “The Competency-Based Education Ecosystem Framework.” Competency Based Education Network. December 2015: [http://www.cbenetwork.org/sites/457/uploaded/files/CBE\\_Ecosystem\\_Report.pdf](http://www.cbenetwork.org/sites/457/uploaded/files/CBE_Ecosystem_Report.pdf).



that taxpayer dollars are wasted in programs that charge more for less learning, and protects students from enrolling in programs that quickly run through their lifetime Pell Grant and federal student loan eligibility without providing them a quality education.

Congress has also provided institutions with the ability to use direct assessment “in lieu of credit hours” for the purposes of receiving federal financial aid. We see that the Department has included direct assessment on its list of topics for consideration and believe there are some sensible changes that could be made to better reflect the realities of students in direct assessment programs, such as eliminating Return to Title IV requirements for students who have completed all their coursework or changing satisfactory academic progress (SAP) requirements. We strongly caution the Department, however, from removing the requirement that direct assessment programs provide credit hour equivalencies. The equivalencies are used to calculate enrollment status and ultimately determine Title IV award amounts. In a world in which the amount of learning is known, verifiable, and transparent, eliminating credit hour equivalencies might not matter. But we do not live in that world. Without shared equivalencies, one school’s “competency unit” could require an average of two hours to complete while another school’s competency unit could require an average of thirty hours to complete—yet without credit hour equivalencies, both of these units would be eligible for the same amount of federal aid. It is critical to having some generally accepted understanding of how much work a competency consists of to ensure that students and taxpayers aren’t paying for more than they are getting.

New America has long led the charge to “crack the credit hour,” pushing the federal government to allow federal dollars to go to high-quality, non-time-based programs through direct assessments and experimental sites. However, we do not believe the credit hour regulation should be repealed. In an outcomes-based, accountability-heavy system of federal financial aid, time and delivery model wouldn’t necessarily matter. Unfortunately, in today’s environment, which is not outcomes-based and which has virtually no accountability, the credit hour serves as an important (albeit insufficient) buffer against fraud and abuse. And while we continue to push policy solutions for both the Administration and Congress to encourage high-quality, outcomes-based CBE programs—this is not the answer. Eliminating the credit hour rule in this environment would present a clear and unacceptable risk to students and taxpayers.

## *VI. Outsourcing of Educational Programs*

The Department has also proposed to reevaluate important regulations that cap the amount of an educational program that an institution can outsource as half and protect students from shoddy providers.

Institutions of higher education have an obligation to provide students with the education they are promising—and that includes a responsibility to be the primary party offering the actual education. While students and taxpayers are assured today that their hard-earned dollars are paying for a program that has at least been licensed to operate by a state, approved by an accreditor, and that has met requirements for financial stability and other requirements from the Education Department, that isn't necessarily the case if institutions are permitted to outsource most of their education to other, untested education providers. Lifting the cap to allow other programs takes skin out of the game for the college and makes it little more than an aggregator of content. Moreover, it will open the floodgates to every bad actor that knows it can't get or keep accreditation.

The Department is already engaged in an experiment on this topic, EQUIP, that incorporates minimal protections for programs that colleges outsource to other providers, including regular rigorous reviews from quality assurance entities that are mandated to consider students' outcomes and take actions on the basis of those outcomes. The Department should not regulate on this process before it has assessed any of the results from that experiment—or indeed, even approved more than one institution to begin receiving federal aid. We urge the Department to withdraw this item from its agenda.

## ***VI. TEACH Grants***

We agree that the TEACH Grant program needs to be improved and simplified in order to minimize inadvertent grant-to-loan conversions and improve outcomes for grant recipients. This program promises grant aid to participants in exchange for strict service requirements, but has not delivered the intended outcomes. However, we do not believe it should be included on this particular rulemaking agenda due to two concerns: 1) that the expertise required to identify problems and develop policy solutions within the TEACH Grant program is inconsistent with the other issues on the agenda, and 2) that this rulemaking session will not be able to dedicate adequate time and attention to improving the TEACH Grant program with so many other topics on the agenda. The complexity of the program, coupled with the onerous certification requirements and potential high cost to recipients of unintended conversions, creates a process that is high-stakes for current and future teachers. As such, this issue should not be considered as simply an add-on to an already overwhelming portfolio of issues that the Department intends to include in this negotiated rulemaking.

The Department’s recent report<sup>13</sup> on TEACH Grants points to the complexity and challenges of the program, particularly the high rate of recipients’ grants being converted to loans—in some cases erroneously. According to the report, 63 percent of TEACH Grant recipients who were required to begin their teaching service before July 2014 wound up with a loan by June 2016. Grant recipients failed to meet their service obligation for a variety of reasons, such as teaching in a field that doesn’t qualify, experiencing issues with the annual certification process; or they may have been filling financial aid gaps with the grant.

These findings, which involve issues with loan servicing and program administration by institutions, not only call for more effective management, but for rethinking the program as a whole to ensure that highly qualified students enter the teaching profession and are incentivized to work in high-need schools. The Department’s report—along with a 2015 Government Accountability Office report<sup>14</sup>—shed light on findings regarding the conversion rates of the program, but further research is needed to fully understand the types of changes that would actually benefit participants, as even the “best practices” identified by the Department’s study seem to make only a marginal difference in the share of grants converted to loans for alumni of the institution. In the meantime, the Department should use the servicing contract process to make reforms that prevent erroneous conversions and improve outcomes for TEACH Grant recipients going forward.

But if the Department does include TEACH Grants as part of this negotiated rulemaking committee, it should narrowly target its focus to the development of a clear process for how TEACH grant recipients can dispute grant-to-loan conversions that have already been processed. It should also include, among other things, a mandatory deadline by which the Department will respond to disputes and a commitment to cease all involuntary collection of converted loans while a dispute is under review. This is an area in which progress can be made, while more fundamental policy changes are considered through the reauthorization of the Higher Education Act.

## Process Concerns

In addition to our concerns around the subjects highlighted above, there are a number of deeply concerning process-related errors in the design of this rulemaking. Since the

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<sup>13</sup> U.S. Department of Education. “Study of the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program.” March 2018. Available at: <https://www2.ed.gov/rschstat/eval/highered/teach-grant/final-report.pdf>.

<sup>14</sup> U.S. Government Accountability Office. “Higher Education: Better Management of Federal Grant and Loan Forgiveness Programs for Teachers Needed to Improve Participant Outcomes.” February 2015. Available at: <https://www.gao.gov/assets/670/668634.pdf>.

beginning of the Trump Administration, the Department has pursued several regulatory actions removing important protections for students and taxpayers. For example, the Department took regulatory action to weaken access to loan relief for students defrauded by their institutions; the Department took regulatory steps to gut protections ensuring graduates of career college programs are gainfully employed upon completion; and the Department delayed a rule respecting state sovereignty and oversight of distance education. In each instance, the Department demonstrated a limited capacity to regulate; and more than a year after providing notice, two of these regulatory processes are still ongoing with hastily drafted, inadequately justified proposals. It is also striking that, given the president's promise to limit regulations under this Administration (Executive Orders 13771 and 13777), the Department has published nearly thirty rules in the Federal Register to date.<sup>15</sup> We do not believe the Department has the capacity to manage another rulemaking in compliance with the Administrative Procedures Act and other statutory and regulatory requirements.

Moreover, given the limited slots for negotiators, it is impracticable for the Department to assume that this negotiating committee can adequately discuss and negotiate all of the proposed topics. While the addition of two subcommittees to address two of the twelve issues may be useful for those topics, provided negotiators on the full committee commit to a fulsome debate of those issues, there are still too many disparate issues—and far too many policy-related, non-technical issues that will require extensive discussion—on the docket to allow for sufficient time for thoughtful consideration of each issue. The structure will ultimately impede consensus; this grants the Department an unfair advantage, since it will result in the ability of the Department to draft any regulations it wants. We propose that the Department, at a minimum, break these subjects into different negotiated rulemaking committees. We also urge the Department to ensure that representatives of the following constituencies are represented as negotiators:

- Students;
- Legal aid organizations;
- Consumer protection organizations and representatives;
- Faculty and instructors;
- Two- and four-year institutions of higher education, including CBE providers;
- Systems of higher education;
- Financial aid officers;
- Veterans and servicemembers and affiliated groups;

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<sup>15</sup> A full list is available here:

<https://www.federalregister.gov/documents/search?conditions%5Bagencies%5D=education-department&conditions%5Btype%5D=RULE&order=newest&page=1>.

- Business/industry representatives;
- K-12 and teacher preparation organizations with expertise in the TEACH Grant program;
- Regional, national, and programmatic/specialized accreditors;
- State authorizers;
- State coordinating boards; and
- State attorneys general.

Public input should not be treated as a mere formality for the Department’s rulemaking. It is the law,<sup>16</sup> and given the magnitude of the topics covered by this rulemaking, the three sessions and single committee proposed by the Department are insufficient to have meaningful input and negotiation.

Sincerely,

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<sup>16</sup> The Department itself acknowledges these requirements. As stated in the notice for this new rulemaking (Docket ID ED-2018-OPE-0076), “Section 492 of the Higher Education Act requires that, before publishing any proposed regulations to implement programs authorized under title IV of the HEA, the Secretary obtain public involvement in the development of the proposed regulations.” Moreover, the Department states, “We intend to select participants for the negotiated rulemaking committee from nominees of organizations and groups that represent the interests significantly affected by the proposed regulations.”