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U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue Southwest
Washington, D.C. 20202-6110

July 12, 2019

Re: NPRM – Student Assistance General Provisions, the Secretary’s Recognition of Accrediting Agencies, the Secretary’s Recognition Procedures for State Agencies

Docket ID ED-2018-OPE-0076

Dear Jean-Didier Gaina,

We write on behalf of the National Student Legal Defense Network (“NSLDN”) and the 1.7 million member American Federation of Teachers (“AFT”) in response to the proposed rulemaking for the 2019 Student Assistance General Provisions, the Secretary’s Recognition of Accrediting Agencies, and the Secretary’s Recognition of Procedures for State Agencies (hereinafter the “NPRM”).¹ NSLDN is a non-partisan, 501(c)(3) non-profit organization that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. AFT is a membership organization representing pre-K through 12th grade teachers, early childhood educators, paraprofessionals, and other school-related personnel; higher education faculty and professional staff; federal, state, and local government employees; and nurses and other healthcare professionals. AFT’s purpose is to promote fairness, democracy, economic opportunity, and high-quality public education, healthcare, and public services for students, their families, and communities. Together, our organizations represent students, teachers, and faculty members that are directly affected by the Department’s recognition of accrediting agencies and any proposed changes to the standards by which their recognition is considered.

The role of accrediting agencies as a gatekeeper of federal funds predates the Higher Education Act of 1965 (“HEA”). In fact, the 1952 GI Bill included accreditation as an institutional eligibility requirement. That Act mandated that the Commissioner of Education publish a list of “nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution.”² When the HEA was adopted over a decade

¹ 84 Fed. Reg. 27,404 (June 12, 2019).

² Veterans’ Readjustment Assistance Act of 1952, Pub. L. No. 550, § 253, 89 Stat. 663, 675, *available at*: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg663.pdf>.

later, it similarly provided for accrediting agencies to serve as gatekeepers to federal student aid programs.³

During the HEA’s reauthorization in 1992, Congress reemphasized and strengthened this gatekeeping role. For example, Congress authorized the Department to establish a number of standards for approving accreditors—including, among other things, “an appropriate measure or measures of student achievement”—and required accreditors to have standards that assess an institution’s “success with respect to student achievement in relation to its mission, including, as appropriate, consideration of course completion, State licensing examination, and job placement rates.”⁴ Although the exact statutory requirements regarding accreditation have changed since 1992, the fundamental notion that accreditors should serve as a “reliable authority as to the quality of education” remains today.⁵

Recognized accrediting agencies currently serve as the gatekeeper to approximately \$125 billion in annual federal Title IV funding. Through this NPRM, the Department proposes to drastically restructure their role. Sadly, the Department’s process to arrive at these proposals was deeply flawed, with a negotiated rulemaking committee that leaned heavily toward industry representatives instead of student, faculty, and consumer interests. That committee was tasked with reviewing, in an incredibly short amount of time, an unprecedented scope of regulatory changes on a diverse set of topics. Furthermore, rather than presenting the entire package on which the committee reached consensus, the Department has cobbled together only a portion of that consensus. The particular proposals at issue here favor poor-performing institutions, gut accountability standards, and create enormous space for bad actors to exploit the neediest students. To add insult to injury, the Department’s proposal is, by its own admission, being made with only “limited data on which to base estimates of accrediting agency, institutional, and student responses to the [proposed] regulatory changes.”⁶ If the Department does not understand the impact of its proposals on accreditors, schools, or students, how can the Department in good conscience believe that it has a reasoned basis for proposing such sweeping regulatory reform? Combined with the Department’s simultaneous decision to gut the Gainful Employment Rule, this NPRM further highlights the Administration’s anti-student agenda.

Students, faculty, and other taxpayers deserve and demand better of our nation’s higher education system. Given the tremendously important role that accreditors play, NSLDN and AFT strongly oppose the Department’s proposed changes.

³ Antoinette Flores, “Hooked on Accreditation: A Historical Perspective,” *Center for American Progress* (Dec. 14, 2015), <https://www.americanprogress.org/issues/education-postsecondary/reports/2015/12/14/127200/hooked-on-accreditation-a-historical-perspective/>.

⁴ Higher Education Amendments of 1992, Pub. L. No. 102-305, § 496, 106 Stat. 448, *available at*: <https://www.congress.gov/bill/102nd-congress/senate-bill/1150/text>.

⁵ HEA § 496, 20 U.S.C. § 1099b.

⁶ 84 Fed. Reg. at 27,450.

1. The Department’s Proposed Changes to the Requirements for Institutional Eligibility Will Create Unnecessary Loopholes

a. The NPRM proposes to make changes to key definitions involving additional locations, branch campuses, preaccreditation status, and teach-outs that are not supported by adequate reasoning.

The Department proposes to make changes to numerous definitions applicable to its Title IV regulations without proper justification. First, the NPRM proposes to add a new definition of “additional location” that would cover “a facility [that is] geographically apart [from the main campus] at which the institution offers at least 50 percent of a program” and change the current definition of “branch campus” to indicate that it is one type of additional location that meets additional criteria.⁷ The Department explains that these changes are necessary to “implement its current policy with respect to [these] terms and to avoid confusion caused by occasional inconsistent usage among the Department, States, and various accrediting agencies.”⁸ But the Department fails to provide any examples of “occasional inconsistent usage,” any data about the problems caused by such usage, or why this supposed problem needs correcting. Second, the NPRM proposes to move the definitions of “teach-out agreement” and “preaccreditation” from the accreditation regulations in Part 602 to 34 C.F.R. § 600.2 “for consistency” and because “the use of those terms extends to regulations in part 600 and part 668.”⁹ But the Department fails to explain why it chose to move these terms from Part 602, where they seem most applicable, rather than inserting a cross-reference to those definitions in Parts 600 and 668 instead. The Department also fails to propose changes to the current cross-references to these definitions in Part 602. Third, the NPRM proposes to add a definition of “teach-out” to “clarify the types of activities that qualify” and to change the definition of a “teach-out plan” to “clearly distinguish [it] from a teach-out agreement.”¹⁰ Putting aside whether the Department’s proposed changes effectively accomplish either of those goals, the Department has failed to explain the reasoning behind such changes. Moreover, the Department has failed to explain how the modified definition of “teach-out plan” will impact other regulations that presently use that term. For instance, under existing 34 C.F.R. § 668.14(b)(31), an institution must submit a “teach-out plan” to an accreditor in compliance with 34 C.F.R. § 202.24(c) upon the occurrence of certain events. But it is unclear if the Department has considered the ramifications of amending the definition of “teach-out plan,” including whether it will have a positive, negative, or neutral impact on students. Taken together, these failures have deprived the public of a meaningful opportunity to comment on the Department’s proposals. Those proposals also lack adequate justification.

⁷ 84 Fed. Reg. at 27,411.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

b. The Department’s proposal to make changes to the definition of “proprietary institution of higher education” is not supported by “good reason.”

The NPRM proposes to change the requirements for what qualifies as a “proprietary institution of higher education” under 34 C.F.R. § 600.5(e) without adequate explanation or justification. Specifically, the Department proposes to eliminate the requirement that the institution’s “recognized regional accreditation agency or organization determine[]” whether a program “lead[s] to a baccalaureate degree in liberal arts,” instead allowing the Department to substitute its own judgment, as well as remove a descriptive list of the categories of “general instructional program[s]” that typically qualify, including programs in the “liberal arts subjects, the humanities disciplines, or the general curriculum.”¹¹ The Department claims that these changes are necessary “to establish the Department’s responsibility for determining what types of programs qualify, and to tighten up the regulatory definition.”¹² But this reasoning fails to explain why the Department, and not the institution’s regional accreditor, should determine whether a program qualifies. It also fails to explain why the regulatory definition needs “tightening.” Moreover, contrary to the Department’s explanation, the actual effect of its proposed changes will be to make the regulatory definition less clear. Because this definition serves as an exception to the requirement that proprietary institutions provide an eligible program of training “to prepare students for gainful employment in a recognized occupation,”¹³ and because the Department has simultaneously eliminated the regulatory definition of what it means for a program to “prepare students for gainful employment in a recognized occupation,”¹⁴ the Department’s proposed changes to 34 C.F.R. § 600.5(e) will gut the definition of a “proprietary institution” and expand the scope of institutions eligible to participate in Title IV programs. Absent any explanation, justification, or attempted rationalization, these proposals violate the Administrative Procedure Act (“APA”).

c. The NPRM proposes to create a new loophole for institutions seeking to change their accreditors or obtain multiple accreditors, violating both the HEA and APA.

The Department proposes to establish conditions under which the Secretary will *not* determine an institution’s cause for changing its accrediting agency, or for holding accreditation from more than one agency, to be reasonable. At the same time, the NPRM proposes to create a loophole to both sets of those conditions that would violate the HEA and APA.

First, the NPRM proposes to allow the Secretary to find that an institution’s cause for changing its accrediting agency is reasonable if “the agency did not provide the institution its due process rights, the agency applies its standards and criteria inconsistently, or if the adverse action, show cause, or suspension order was the result of an agency’s failure to respect an institution’s stated mission,

¹¹ 84 Fed. Reg. at 27,412.

¹² *Id.*

¹³ See 34 C.F.R. § 600.5(a)(5).

¹⁴ 84 Fed. Reg. 31,392 (July 1, 2019).

including religious mission.”¹⁵ But the Department has not provided a single example of an institution that has lost its accreditation for these reasons, thereby failing to demonstrate any need for this proposed change. In addition, the NPRM’s proposed language plainly contradicts the HEA. Under HEA § 496(j), an institution “may not be certified or recertified” for purposes of Title IV if the institution has had its “accreditation withdrawn, revoked, or otherwise terminated for cause,” unless such action has been “rescinded by the same accrediting agency.”¹⁶ In other words, Congress set forth a single exemption to HEA § 496(j)(2)’s mandate that certain institutions not be certified by the Department. Yet the Department, under the guise of “reasonableness,” seeks to carve out a new exemption. Such a change impermissibly contradicts the unambiguous language of the HEA. The proposal is, therefore, contrary to law and in excess of the Department’s statutory jurisdiction within the meaning of section 706 of the APA.

Second, the NPRM proposes to allow the Secretary to find that an institution’s cause for seeking multiple accreditation is reasonable if “the institution’s primary interest in seeking multiple accreditation is based on the original accrediting agency’s geographic area, program-area focus, or mission.”¹⁷ The Department argues that such a change is necessary in order to “open the institutional accreditation system to competition, either through expansion by current institutional accrediting agencies or from new accrediting agencies,” which will, in turn, “allow for greater specialization among agencies to ensure a closer match with the mission of the institutions or programs they accredit.”¹⁸ Moreover, the Department argues that greater competition, where there is none today, can mean “more accountability.”¹⁹ Finally, the Department claims that allowing multiple accreditation will protect students when institutions want to switch accreditors by allowing the institution to keep its current accrediting agency while transitioning to a new one.²⁰ Notably, the NPRM includes no data to establish that there is, as the Department alleges, no competition and that the absence of such competition has caused harm to the industry. The Department also fails to provide any information, analysis, or study to support its claim that more competition would lead to greater accountability. For those reasons, the Department’s proposal to create a loophole for institutions seeking multiple accreditation lacks sound reasoning.

¹⁵ 84 Fed. Reg. at 27,414.

¹⁶ HEA § 496(j), 20 U.S.C. § 1099b(j).

¹⁷ 84 Fed. Reg. at 27,414.

¹⁸ 84 Fed. Reg. at 27,415.

¹⁹ *Id.*

²⁰ *Id.*

2. The Department’s Proposed Changes to the Accreditor Recognition Process May Permit the Department to Recognize Accreditors with a History of Accrediting Institutions with Poor Student Outcomes²¹

a. The Department’s creation of a new standard of “substantial compliance” is unlawful, lacks adequate justification, and will permit bad accreditors to retain their recognition for years.

As an initial matter, the Department proposes in 34 C.F.R. § 602.3(b) to create a new standard of “substantial compliance.” This standard would apply to an accreditor that “has the necessary policies, practices, and standards in place and *generally adheres with fidelity* to those policies, practices, and standards; or the agency has policies, practices, and standards in place that need minor modifications to reflect its *generally compliant* practice.”²² If an agency is designated as being in “substantial compliance,” that agency would be allowed to maintain its recognition. Such a result, however, plainly exceeds the Department’s statutory authority, represents an unreasonable interpretation of the HEA, and lacks adequate justification.

The HEA, by its terms, creates a binary status for recognized accrediting agencies because it requires the Secretary to find an agency out of compliance whenever the Secretary determines that an agency “has failed to apply effectively the criteria in this section, or is otherwise not in compliance with the requirements of this section.”²³ Having found an agency out of compliance, the Secretary has two statutory options: (1) “limit, suspend, or terminate the recognition of the agency,” after notice and opportunity for a hearing, or (2) “require the agency . . . to take appropriate action to bring the agency . . . into compliance” within twelve months.²⁴ The Department’s proposal to add a third category of

²¹ The NPRM proposes to make changes to key terms in Part 602, but fails to adequately support these changes. For example, the Department proposes to change all references of “evidence” to “documentation” in 34 C.F.R. §§ 602.31, 602.35, 602.36, 602.37. 84 Fed. Reg. at 27,433, 27,438–40. The Department claims that this change is necessary because “evidence” is “more often used in legal proceedings.” *See, e.g.*, 84 Fed. Reg. at 27,439. But it fails to explain why that matters, whether “evidence” has been vague or difficult to use in practice, or why it proposes to replace it with “documentation.” Moreover, the proposed term, “documentation,” will necessarily be limited to written records, whereas “evidence” can apply to a wider range of proof. Yet, the Department does not explain why it wishes to limit the record in accrediting decisions in this way or what purpose such a limitation would serve. For that reason, the Department’s changes lack a reasoned basis.

²² 84 Fed. Reg. at 27,478 (emphasis added). This term also shows up as a proposed addition to 34 C.F.R. § 602.32. The problem with the Department’s proposal is highlighted by its 2018 decision to re-recognize the Accrediting Council on Independent Colleges and Schools (“ACICS”). In that situation, the Department decided to re-recognize the accrediting agency, even though it also found that ACICS had been non-compliant with two fundamental recognition criteria: (1) competency of representatives, 34 C.F.R. § 602.15(a)(2); and (2) conflict of interest, 34 C.F.R. § 602.15(a)(6). Thus, the very notion of “substantial compliance,” without additional guidance about what it means to “substantially” comply (*i.e.*, 50% compliance vs. 75% compliance vs. a regime whereby certain standards are more important than others), leaves the door open to unbridled discretion for a Department to continue recognizing bad actors.

²³ HEA § 496(l)(1), 20 U.S.C. § 1099b(l)(1). The statute is not discretionary, stating that once the Secretary makes the requisite determination, the Secretary “shall” take the steps outlined in § 496(l)(1).

²⁴ *Id.*

recognized agencies that are in “substantial compliance” contemplates something other than what the statute requires. The proposal is, therefore, contrary to law within the meaning of section 706 of the APA.

In addition to violating the HEA, the Department’s proposal to add “substantial compliance” to 34 C.F.R. § 602.3(b) lacks good reason. In the preamble, the Department argues that, “in 2010, the Department changed its compliance review process to an ‘all-or-nothing’ standard that finds an agency either to be fully compliant or fully noncompliant.”²⁵ As explained above, that “all-or-nothing” standard is nothing new. In fact, it is required by statute. Moreover, the Department claims that adding a third category of “substantial compliance” is necessary because:

[E]ven when there is a minor error or omission that could easily be corrected, the agency must be found out of compliance. This approach fails to differentiate between an agency that is guilty of negligent disregard for academic rigor and an agency that is using policy language that differs slightly from the Department’s regulations or is missing a document or signature.²⁶

Interestingly, the Department provides no data, studies, or empirical analysis to demonstrate that this concern is an actual problem faced by accreditors. Even if it were, the Department’s proposal is not the proper response. The HEA already provides the Department with flexibility within its binary framework, giving the Department discretion to fashion a required “appropriate action” to bring the accrediting agency into compliance within twelve months.²⁷ And even that twelve-month window can be extended for “good cause.” Thus, the proper response, pursuant to the HEA, would be to require the agency to come into full compliance within twelve months, not create a new category of “substantial compliance.” There is no reasoned basis for the approach proposed by the Department.

In addition to its proposed changes at 34 C.F.R. § 602.3(b), the Department also proposes to make changes to 34 C.F.R. § 602.36²⁸ to account for this new category. Under the Department’s proposal,

²⁵ 84 Fed. Reg. at 24,706.

²⁶ *Id.*

²⁷ HEA § 496(l)(1)(B), 20 U.S.C. § 1099b(l)(1)(B).

²⁸ The Department proposes other changes to 34 C.F.R. § 602.36 without adequate justification. To begin, current regulation allows for the senior Department official (“SDO”) to make a decision in a recognition proceeding if the statutory authority or appropriations for NACIQI ends or if NACIQI lacks a quorum. *Id.* § 602.36(b). The Department’s proposal would limit the SDO’s authority to make decisions under those circumstances to applications for renewal of recognition or the review of a compliance report. 84 Fed. Reg. at 27,849. The Department claims that “it is necessary to have this procedure available for decision-making on renewals and compliance reports in the event NACIQI’s statutory authority or appropriations ends, or if NACIQI lacks a quorum of appointed members.” 84 Fed. Reg. at 27,439. Additionally, the Department asserts that the committee “saw no need for a senior Department official to conduct proceedings on initial applications for recognition without input from NACIQI.” *Id.* The committee’s beliefs about what is or is not needed, however, do not qualify as a “good reason.” Furthermore, the Department has failed to provide any evidence that the SDO had been abusing his or her broader authority under the current regulation.

the senior Department official will be able to approve recognition “if the agency has demonstrated . . . substantial compliance with the criteria for recognition.”²⁹ The proposed regulations set as the minimum for “substantial compliance” that an agency has “a compliant policy or procedure in place[,] but has not had the opportunity to apply [it].”³⁰ The Department justifies this dramatic reduction in what is required of accrediting agencies to earn recognition by stating simply that “accrediting agencies should not be penalized when implementing new policies and procedures.”³¹ It is difficult to follow the Department’s logic here. Whether an agency has a compliant policy or procedure in place, but has failed to implement it, is an entirely different scenario from whether an agency has been penalized when implementing a *new* policy or procedure. Moreover, the Department’s justification cites no evidence of how many agencies have suffered this type of penalty, instead relying exclusively on conjecture. Such reasoning is inadequate to justify the change.

b. The Department’s proposal to create a “monitoring report” also runs afoul of the HEA, lacks adequate justification, and is unnecessary, given the ability of agencies to use compliance reports instead.

Coupled with the new “substantial compliance” category, the Department proposes to add the concept of a “monitoring report” to 34 C.F.R. § 602.3(b). This new term is defined as “a report that the agency is required to submit to Department staff when it is found to be substantially compliant.”³² The report must contain documentation to demonstrate either: (1) “[t]he agency is implementing its current or corrected policies;” or (2) “[t]he agency, which is compliant in practice, has updated its policies to align with those compliant practices.”³³ The Department also proposes to limit the review of a monitoring report to Department staff only, unless those staff are not satisfied by the report.³⁴ In that instance, the report will then be submitted to the National Advisory Committee on Institutional Quality and

In addition, the NPRM proposes to remove the phrase “or to apply these criteria effectively” from the provision in 34 C.F.R. § 602.36(e)(2)(i) that applies to decisions to deny, limit, suspend, or terminate recognition. 84 Fed. Reg. at 27,439. The Department argues that this change is necessary because “the Department believes failure to comply sets a workable and sufficient standard.” *Id.* Moreover, the Department argues that the deleted phrase is “too vague” and “may invite inconsistency or conflict with the proposed standard of ‘substantial compliance.’” *Id.* The Department fails to explain how “failure to comply” will set a more workable and sufficient standard or why the phrase “apply these criteria effectively” is too vague. Even if true, that still does not justify the Department deleting the phrase without first considering reasonable alternatives. The Department also fails to provide any information, data, or analysis to back up its claim that the deleted phrase will conflict with its new “substantial compliance” standard. If the Department wishes to make this sort of change, it must rely upon more than pure speculation and inadequate justifications to do so.

²⁹ 84 Fed. Reg. at 27,489.

³⁰ *Id.*

³¹ 84 Fed. Reg. at 27,439.

³² 84 Fed. Reg. at 27,478.

³³ *Id.*

³⁴ 84 Fed. Reg. at 27,417.

Integrity (“NACIQI”) and for public comment.³⁵ Once submitted to the Department, the Department proposes to include additional procedures for the review of “monitoring reports” under 34 C.F.R. § 602.33. Those procedures include: (1) allowing the Department to conduct a compliance review upon the receipt of a monitoring report; (2) after sending its draft analysis to the agency and reviewing its response, permitting the Department to either conclude the compliance review or continue monitoring the agency’s areas of deficiencies; (3) notifying the agency that its response is unsatisfactory and that the draft analysis and agency response will be forwarded to NACIQI for review and recommendation, as well as published in the Federal Register for public comment; and (4) expanding the timeframe for the agency’s written response to the draft analysis from thirty days to ninety days and the agency’s notice before a NACIQI hearing from seven days to thirty days.³⁶ In addition, the Department proposes changes to 34 C.F.R. § 602.34 to allow NACIQI, “[i]n the case of substantial compliance, [to] grant initial recognition or renewed recognition and recommend a monitoring report with a set deadline to be reviewed by Department staff to ensure that corrective action is taken and full compliance is achieved.”³⁷ Finally, the Department proposes to allow the senior Department official to require periodic monitoring reports if he or she “has concerns about the agency maintaining compliance.”³⁸

Again, for the reasons stated above, the Department’s proposals regarding the inclusion of a “monitoring report” run afoul of the HEA. Under HEA § 496, an agency found to be out of compliance generally has twelve months to come into compliance, unless the Secretary extends the timeframe for “good cause.”³⁹ But under the Department’s proposal, monitoring can occur indefinitely, seemingly without a finding of “good cause,” because the proposed regulatory language places no limit on the length of time that an agency can be monitored. This is inconsistent with the HEA’s requirements.

³⁵ *Id.*

³⁶ 84 Fed. Reg. at 27,437, 27,488. The Department provided no explanation to justify the expanded timelines. More importantly, the proposed regulatory text goes much further than the Department claims. For example, the Department’s proposal eliminates NACIQI’s ability to initiate a compliance review. *Compare* 34 C.F.R. § 602.33(a)(1) *with* 84 Fed. Reg. at 27,488. The Department’s proposal also eliminates the current requirement that Department staff include a recommendation for recognition in the draft analysis. *Compare* 34 C.F.R. § 602.33(c)(1) *with* 84 Fed. Reg. at 27,488; *see also* 84 Fed. Reg. at 27,435 (proposing to change the current requirement that a draft analysis include a recommendation in § 602.32(h)). If the Department intends to make these types of changes, it must not only make clear to the public that it is doing so, but also must provide a “good reason,” something the Department has failed to do.

³⁷ 84 Fed. Reg. at 27,489. Again, the proposed regulatory text goes much further than the Department claims. For example, the Department’s proposal makes clear that NACIQI’s review is no longer always required. *Compare* 34 C.F.R. § 602.34(c)(1) *with* 84 Fed. Reg. at 27,488–89. The Department’s proposal also eliminates language that requires the Department to include among the interested parties invited to NACIQI’s meeting “those who submitted third-party comments concerning the agency’s compliance with the criteria for recognition.” *Compare* 34 C.F.R. § 602.34(d) *with* 84 Fed. Reg. at 27,488–89. If the Department intends to make these types of changes, it must not only make clear to the public that it is doing so, but also must provide a “good reason,” something the Department has failed to do.

³⁸ 84 Fed. Reg. at 27,439.

³⁹ HEA § 496(l)(1), 20 U.S.C. § 1099b(l)(1).

Moreover, the Department has provided no evidence to justify the addition of a “monitoring report” and the procedures associated with it. The Department claims that a monitoring report “will allow the Department to review actions taken by an agency that is otherwise in substantial compliance with the criteria for recognition to resolve areas of minor noncompliance” without “requiring a full compliance review, which burdens both staff and agencies.”⁴⁰ The Department has made no attempt, however, to quantify the costs of this burden in terms of time, resources, or money. The Department also argues that monitoring reports “will increase the likelihood of identifying and correcting minor problems before they become larger problems.”⁴¹ Yet, the Department provides no data to back up this claim. If the Department wishes to make these types of changes, it must provide a reasoned basis for doing so, which it has failed to do here.

c. The Department should not lower the barrier to entry for new accreditors without adequate justification.

The NPRM also makes several changes to make it easier for new accrediting agencies to earn recognition. For example, in 34 C.F.R. § 602.10(a), the Department proposes that, “[i]f an agency accredits one or more institutions that could designate the agency as its link to the title IV, HEA programs, the agency satisfies the Federal link requirement, even if the institution currently designates another institutional accrediting agency as its Federal link.”⁴² Despite providing no data to demonstrate that barriers to entry are a serious problem for new agencies seeking recognition, the Department nevertheless claims that such a change will “decrease barriers to entry and enable new agencies to more easily enter the marketplace.”⁴³ In addition, the NPRM proposes to eliminate the requirement that an agency seeking initial recognition demonstrate two years of prior experience conducting accrediting activities for those agencies that are affiliated with or a division of an already recognized agency.⁴⁴ The NPRM does not define what it means to be “affiliated,” nor does it propose any meaningful criteria to determine whether an accrediting body is “affiliated” with a recognized agency. The Department also provides no evidence of how difficult it has been for new accreditors to meet the two-year rule in the past, nor how many agencies have been unable to obtain initial recognition as a result. Finally, the NPRM allows an agency that cannot demonstrate its experience when applying for an expansion of scope to still receive approval as long as the Department limits the number of institutions or programs it can accredit under the expanded scope for a certain period of time or requires the agency to submit “monitoring reports” about the accreditation decisions it makes under the expanded scope.⁴⁵ Again,

⁴⁰ 84 Fed. Reg. at 27,347.

⁴¹ *Id.*

⁴² 84 Fed. Reg. at 27,418.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 84 Fed. Reg. at 27,419.

the Department provides no justification or explanation for this change. Taken together, the NPRM fails to establish a “good reason” for lowering the barriers to entry for new accrediting agencies.

d. The Department’s proposal to expand the geographic area of an accrediting agency to any group of states it chooses plainly exceeds the Department’s statutory authority and should not be implemented.

The NPRM proposes to amend 34 C.F.R. § 602.11(b) so that “an agency’s geographic area on record with the Department would include not only the States in which the main campuses of its accredited institutions are located[,] but also any State in which an accredited location or branch may be found,”⁴⁶ which plainly exceeds the Department’s statutory authority and represents an unreasonable interpretation of HEA § 496(a)(1). The proposal is, therefore, “not in accordance with law” under 5 U.S.C. § 706(2)(A) and “in excess of statutory jurisdiction” under 5 U.S.C. § 706(2)(C).

Section 496 of the HEA requires, *inter alia*, that “the accrediting agency or association shall be a State, regional, or national agency or association.”⁴⁷ For that reason, the current regulation also requires that an accrediting agency demonstrate that its accrediting activities cover a “State,” a “region of the United States that includes at least three States that are reasonably close to each other,” or the “United States.”⁴⁸ Without any justification, explanation, or consideration of the Department’s legal authority, the Department proposes to expand the available categories for accrediting agencies to include a fourth type, namely a “group of States chosen by the agency in which an agency provides accreditation to a main campus, a branch campus, or an additional location of an institution.”⁴⁹ This definition functionally permits an accrediting agency to perform accrediting activities in a geographic area that does not clearly meet the requirements of the HEA. For example, under the proposed definition, an accrediting agency could accredit one institution with a main (and only) campus in Maine, another with a main (and only) campus in Hawaii, and a third with a main (and only) campus in Florida, but avoid accrediting institutions in any of forty-seven other states. Without addressing the issue of whether this is good or bad policy, it is in stark contrast to the plain language of the HEA.

e. The Department should not rescind the “widely accepted” standard because it is not duplicated anywhere else in the regulations.

Without “good reason,” and indeed based on an inaccurate one, the NPRM proposes to rescind in its entirety the “widely accepted” standard found in 34 C.F.R. § 602.13.⁵⁰ As an initial matter, the

⁴⁶ 84 Fed. Reg. at 27,418.

⁴⁷ HEA § 496(a)(1), 20 U.S.C. § 1099b(a)(1).

⁴⁸ 34 C.F.R. § 602.11(a)-(c).

⁴⁹ 84 Fed. Reg. at 27,478.

⁵⁰ Relying upon its reasoning to eliminate the “widely accepted” standard under 34 C.F.R. § 602.13, the NPRM also proposes to add a requirement under 34 C.F.R. § 602.32(b) that any agency seeking initial recognition must include with its application “letters of support” from three accredited institutions or programs, three educators, and three employers or

Department asserts in the preamble that provisions of this section are “duplicative of requirements in other sections of the regulations.”⁵¹ Yet, the Department has failed to identify to the public the source of this perceived duplication, thereby depriving it of a meaningful opportunity to comment. Perhaps the reason for this is clear. Current § 602.13 (requiring accrediting agencies to demonstrate that their standards, policies, procedures, and decisions to grant or deny accreditation are “widely accepted”) is *not* duplicated anywhere else in the Department’s regulations.

If the Department intended to suggest instead that existing 34 C.F.R. § 602.13 is duplicative of the *proposed* regulations—perhaps referring to proposed § 602.32(b) (proposing to require letters of support)—that does not solve the Department’s problem. First, it is not clear that this is what the Department is referring to, thus depriving the public of a meaningful opportunity to comment. Members of the public should not be forced to hunt through a voluminous regulation to make guesses about what the Department means. Second, the Department cannot justify deleting a proposed regulation by simply proposing a related (but not identical) regulation and then claiming that the existing regulation is now “duplicative” and should be deleted. Such an approach obliterates the requirement that the Department provide a reasoned basis for its decisions. Third, in reality, the provisions are not duplicative. Proposed 34 C.F.R. § 602.32 does not require an accrediting agency to “demonstrate” that its standards are “widely” accepted. It merely asks that the accrediting agency “submit” some evidence of individuals and entities that “support” the accrediting agency’s application for initial recognition. Furthermore, nothing in proposed § 602.32 relates to the Department’s consideration of renewals of recognition. In contrast, current § 602.13 applies to both initial and renewal applications.⁵² The two regulations are simply not the same.

The Department also notes as justification that 34 C.F.R. § 602.13 imposes a standard that the “statute does not require, is too vaguely defined, and has been enforced inconsistently in the past”⁵³ and that could “leave institutions reasonably believing that a promising new program or method of delivery would run afoul of this requirement simply by being different than what most of its peers do today.”⁵⁴ As to the belief that the “widely accepted” language exceeds the Department’s statutory authority, the Department never explains how this is so. This deprives the public of the opportunity to meaningfully comment. Nor does the Department provide any explanation, justification, or reasoned basis for why it suddenly believes that existing § 602.13 is problematic because it imposes a “standard that [the] statute

practitioners (if appropriate). 84 Fed. Reg. at 27,435–36. For all of the reasons detailed *infra* in this section, the proposed elimination of the “widely accepted” standard is without “good reason.” The Department likewise fails to adequately support its addition of “letters of support” to § 602.32, including why such letters will be more easily evaluated in a consistent way by the Department, will not similarly block competition or prevent innovation, or are only needed for agencies seeking initial accreditation.

⁵¹ 84 Fed. Reg. at 27,419.

⁵² See 34 C.F.R. § 602.31(a)(2) (requiring evidence of compliance with all standards in 34 C.F.R. Part 602, Subpart B, including 34 C.F.R. § 602.13).

⁵³ 84 Fed. Reg. at 27,419.

⁵⁴ *Id.*

does not require.” This is particularly troubling in light of the fact that the provision was adopted twenty years ago and the Department has never raised this concern previously.⁵⁵ Furthermore, the Department makes no suggestion as to why the existing regulation is “too vaguely defined.” Even if true, that does not justify the Department deleting the regulation without first considering reasonable alternatives, such as staff directives or subregulatory guidance.⁵⁶ The Department’s nod to alleged inconsistent enforcement of the “widely accepted” regulation is also unsupported by any information, data, or analysis.⁵⁷ Finally, we do not understand why current § 602.13 could “leave institutions reasonably believing that a promising new program or method of delivery would run afoul of this requirement simply by being different than what most of its peers do today.” The requirements in § 602.13 are requirements that *accrediting agencies* must demonstrate to obtain recognition or re-recognition. An institution, by definition, cannot “run afoul” of § 602.13. For all of these reasons, the Department fails to provide adequate justification to support the rescission of 34 C.F.R. § 602.13.

f. The Department’s proposal to limit the documentation an accreditor must retain regarding its accreditation and preaccreditation decisions is without “good reason.”

Currently, the Department’s regulations require accreditors to retain “all decisions made throughout an institution’s or program’s affiliation with the agency regarding accreditation or preaccreditation of any institution or program and its substantive changes, including all correspondence that is significantly related to those decisions.”⁵⁸ The NPRM proposes, however, to require accreditation agencies to retain only “all decision letters issued by the agency regarding an institution’s or program’s accreditation or preaccreditation and any substantive changes.”⁵⁹ The Department justifies this change, without any evidence or data, by alleging that it will “reduce administrative burden.”⁶⁰ Again, such an assertion fails to qualify as a “good reason” under the APA.

g. The Department’s proposal to replace an agency’s requirement that its standards “effectively address” the quality of institutions with one to set forth “clear expectations” is also without “good reason.”

⁵⁵ See 64 Fed. Reg. 56,612 (Oct. 20, 1999) (Final Rule); 64 Fed. Reg. 34,466 (June 25, 1999) (NPRM). The 1999 NPRM was the result of consensus, which included representatives from the Department.

⁵⁶ “It is well settled that an agency has a ‘duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.’” *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

⁵⁷ Notably, the Department attempts to rely on *its own conduct* (through alleged inconsistent enforcement) to justify this change.

⁵⁸ 34 C.F.R. § 602.15(b)(2).

⁵⁹ 84 Fed. Reg. at 27,420, 27,479.

⁶⁰ 84 Fed. Reg. at 27,420.

Current regulations require an agency’s accreditation and preaccreditation standards to “*effectively address* the quality of the institution or program” in certain specified areas.⁶¹ The NPRM proposes to remove this requirement and replace it with one to “set forth clear expectations for institutions or programs.”⁶² The Department justifies this change by asserting that the phrase “effectively address” is “vague.”⁶³ Yet, it provides no explanation of why this is the case, which agency or agencies have struggled to understand it, or how difficult it has been to apply in practice. The Department likewise claims that “clear expectations” is “more specific,”⁶⁴ reasoning that the Department again never explains. Bald assertions like these simply do not fulfill the Department’s rulemaking obligations under the APA.

h. The Department proposes, without proper justification, to make less rigorous the requirements an agency must meet when applying its standards to accreditation decisions.

The NPRM proposes to change many of the requirements under 34 C.F.R. § 602.17 without proper justification. Currently, the regulation requires an agency to have “effective mechanisms for evaluating an institution’s or program’s compliance with [its] standards” before it makes an accrediting decision.⁶⁵ As relevant here, the agency has to: (1) evaluate whether an institution or program “maintains degree and certificate requirements that at least conform to commonly accepted standards;” (2) require an institution or program to engage in an “in depth self-study,” pursuant to agency guidance, to assess its current educational quality and efforts to improve; (3) analyze the institution’s or program’s self-study, including considering any other information the agency deems appropriate; and (4) require institutions that offer distance education or correspondence courses to verify the identities of enrolled students.⁶⁶ The NPRM proposes to: (1) eliminate the language that would require institutions to have specific degree and certificate requirements; (2) remove the requirement that the institution’s self-study be “in depth” and pursuant to agency guidance; (3) only permit the agency to consider information about the institution or program from other sources if the agency first substantiates that information; and (4) eliminate the list of possible methods for verifying a student’s identity enrolled in distance education or correspondence courses.⁶⁷ None of these proposed changes include an explanation or justification that qualifies as a “good reason.”

⁶¹ 34 C.F.R. § 602.15(a)(1) (emphasis added).

⁶² 84 Fed. Reg. at 27,421. The NPRM proposes a similar change to the language in 34 C.F.R. § 602.32(b), 84 Fed. Reg. at 27,435, which is also inadequately supported because the Department does not offer any reason for this change, 84 Fed. Reg. at 27,436.

⁶³ 84 Fed. Reg. at 27,421.

⁶⁴ *Id.*

⁶⁵ 34 C.F.R. § 602.17.

⁶⁶ *Id.*

⁶⁷ 84 Fed. Reg. at 27,422.

First, the Department explains its proposal to eliminate the mandate that institutions have specific degree and certificate requirements by stating that it wants agencies to “hold institutions and programs to basic, commonly accepted academic standards,” which it believes will “protect against diploma mills and . . . ensure transfer of credit opportunities.”⁶⁸ It is unclear from the Department’s reasoning how prevalent the diploma mill or transfer of credit problems are, nor how the current regulation failed to solve them. Without further explanation, such reasoning fails to provide adequate justification for the suggested change.

Next, the Department argues that it is changing the self-study requirement to “focus on continuous improvement rather than strict, and often bureaucratic, requirements.”⁶⁹ Again, the Department fails to explain why this change in focus is needed, how the current self-study process is not working, or why being less strict and bureaucratic would ultimately lead institutions to more quickly improve educational quality. Such failures do not fulfill the Department’s rulemaking obligations under the APA.

In addition, the Department claims that agencies should not be allowed to consider information from other sources about an institution or program because an agency should “exclud[e] findings . . . based on unsubstantiated allegations in the press, in court filings, or elsewhere.”⁷⁰ Yet, the Department fails to explain how the consideration of this information, substantiated or not, contributes to any real problems in the agency’s decision-making process about accreditation. This failure does not qualify as a reasoned basis for the Department’s proposed change.

Finally, the Department proposes to remove the list of methods an institution can use to verify a student’s identity because it finds the list “redundant or unclear,” wants to “provide[] flexibility to agencies to approve verification methods,” and “avoid circumstances under which the regulations would quickly become out-of-date as technology changes.”⁷¹ The Department’s reasoning here is non-sensical. As an initial matter, the Department provides no explanation of which terms it considers redundant or unclear. It is not the job of the public to guess what the Department’s reasoning may be. More importantly, the current list is both non-exhaustive *and* includes a catch-all category to account for technological advances. In other words, it already permits agencies to approve verification methods that are not specifically listed and avoids the possibility that the regulatory language will “quickly become out-of-date.” Again, the Department fails to back up its suggested change with sound reasoning.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 84 Fed. Reg. at 27,423.

⁷¹ *Id.*

i. The Department’s proposal to permit “alternative standards,” while also allowing agencies to let institutions or programs remain out of compliance with one or more of those standards, violates both the HEA and the APA.

Despite the HEA’s clear statutory language, the NPRM proposes to permit agencies to inconsistently apply their standards regarding educational quality and to make up alternative standards. Both of these changes violate the HEA and are without adequate justification.

First, the HEA commands that the Secretary only recognize agencies that meet established criteria.⁷² The statute further requires that those criteria “shall require” that the agency “consistently appl[ies]” standards that “respect the stated mission of institutions of higher education.”⁷³ The word “consistently” is not mere surplusage here.⁷⁴ Rather, “consistently” means that the accrediting agency must constantly adhere to the same standards and principles to ensure that courses or programs offered are of sufficient quality to achieve their stated objectives.⁷⁵ Section 602.18 already applies this statutory command with its requirement that an accrediting agency “consistently apply and enforce standards.”⁷⁶ Indeed, the regulation continues by setting out, in subsections (a)-(e), the concrete ways that an accrediting agency can demonstrate compliance.⁷⁷ In contrast, the proposed regulation—without explanation, justification, or consideration of the statutory language—does not require that the accrediting agency act “consistently.” To the contrary, the standards permit an accrediting agency, “when special circumstances exist,” to apply “alternative means” of satisfying the criteria.⁷⁸ The problems with this proposal are numerous. First, it ignores the statutory requirement that requires consistency. Second, it does not define the “special circumstances” that would permit an accrediting agency to avoid statutory compliance. Third, it does not specify what “innovative program delivery approaches” or “undue hardship on students” mean in order for an agency to avoid the statutorily required “consistency.” Fourth, it does not require the accrediting agency to publish these “alternative” standards or make them available to the Department, state authorizers, or students. Rather, the proposal simply states that the “agency’s *process for establishing and applying* the alternative standards, policies, and procedures, [be] set forth in its published accreditation manuals.”⁷⁹ This last problem is critical. As noted above, the statute requires consistency. But the proposed regulation will permit accrediting agencies to secretly avoid consistency, as long as they publish the process by which they

⁷² HEA § 496(a), 20 U.S.C. § 1099b(a).

⁷³ *Id.*

⁷⁴ *See, e.g., Potter v. United States*, 155 U.S. 438, 446 (1894).

⁷⁵ HEA § 496(a)(4)(A), 20 U.S.C. § 1099b(a)(4)(A).

⁷⁶ 34 C.F.R. § 602.18.

⁷⁷ *Id.*

⁷⁸ 84 Fed. Reg. at 27,423.

⁷⁹ 84 Fed. Reg. at 27,841 (emphasis added).

adopt their “alternative” standards. For all of these reasons, the NPRM’s proposal is arbitrary and capricious, not in accordance with law, and in excess of the Department’s statutory jurisdiction under § 706 of the APA.

Unfortunately, the problems with the proposed revisions to 34 C.F.R. § 602.18 do not end there. In § 602.18(d), the Department also proposes to permit accrediting agencies to apply their standards *inconsistently*, which is again in direct conflict with the HEA. The Department’s proposal would permit “safe harbors for agencies to exercise responsibly their ability to support innovation and address hardship” by allowing institutions or programs to be out of compliance with one or more of the agencies’ standards for a period not to exceed three years without “good cause.”⁸⁰ Yet, the Department provides no reason whatsoever as to why these safe harbors are needed. Like its other proposals, the suggested changes to subsection (d) are not in accordance with law and not justified by a reasoned basis.

- j. The NPRM eliminates the requirement that an agency immediately initiate adverse action against an institution found to be out of compliance with the agency’s standards, while also allowing non-compliance to continue for a period of up to seven years, without sound reasoning.***

Under current 34 C.F.R. § 602.20, whenever an agency review determines that an institution or program is out of compliance with even one of its standards, the agency “must immediately initiate adverse action against the institution or program” or “require the institution or program to take appropriate action to bring itself into compliance” within a set time period, ranging from one to two years, as determined by program length.⁸¹

The Department’s proposal contains three major changes to this regulation. First, it removes the option for an agency to immediately initiate adverse action under subsection (a)(1), providing no justification for this change.⁸² Second, under subsection (a)(2), it expands the timeframe for coming into compliance from a maximum of two years to at least four years.⁸³ Third, under subsection (c), it permits an agency to take adverse action against an institution or program that fails to come into compliance by the required deadline, but also requires the agency to allow that institution or program to “maintain its accreditation or preaccreditation until it has had reasonable time to complete” the activities in its teach-out agreement.⁸⁴ In other words, the Department’s proposal expands the timeframe for how long an institution or program can be out of compliance for an additional three years. To justify this dramatic expansion, the Department claims it is “remov[ing] overly prescriptive

⁸⁰ 84 Fed. Reg. at 27,423, 27,841.

⁸¹ 34 C.F.R. § 602.20(a).

⁸² See 84 Fed. Reg. at 27,424.

⁸³ 84 Fed. Reg. at 27,424–25.

⁸⁴ 84 Fed. Reg. at 27,424.

timelines” that require an agency to place “great[er] importance on acting swiftly than acting in the best interest of students” and do not provide enough time to come into compliance.⁸⁵ The Department also suggests that most institutions lose accreditation due to financial instability and that precipitous closures harm both students and taxpayers.⁸⁶ Such reasoning fails to explain, however, why the current timelines are “overly prescriptive,” why the emphasis on taking swift action is misplaced, and what qualifies as being in the “best interests” of students, as well as how the Department makes such a determination. Moreover, the Department’s reasoning completely ignores the reality that accreditors often act far too slowly to protect students from predatory institutions and that, when institutions are given additional access to Title IV funds instead of being forced to close, students are also harmed. Ultimately, the Department’s justifications fail to qualify as a “good reason” under the APA.

k. The Department’s proposed overhaul of the “substantive changes” that require mandatory agency approval is not supported by proper justification.

Currently, 34 C.F.R. § 602.22(a), requires an agency to mandate that the institutions it accredits notify the agency and obtain its approval *before* making changes to: (1) the established mission or objectives of the institution; (2) legal status, form of control, or ownership of the institution; (3) the addition of courses or programs that represent a significant departure from the existing offerings and methods of delivery that were previously approved; (4) the addition of new degrees or credentials; (5) a change from clock hours to credit hours; (6) a substantial increase in the number of clock or credit hours required to complete a program; (7) contracting with a non-Title IV entity that will offer more than 25% or more of one of the accredited institution’s programs; (8) the establishment of an additional location where the institution will offer at least 50% of an educational program; (9) the acquisition of any other institution or its location or program; and (10) the addition of a permanent location where the institution is conducting a teach-out for a closed school.⁸⁷

The NPRM proposes to make numerous changes to this list, none of which are supported by a reasoned basis. To begin, the Department proposes to limit the definition of “substantive change” to “high-impact, high-risk changes.”⁸⁸ The Department also proposes to make the following changes to when an institution must notify its accreditor and obtain its permission, including when: (1) it makes a *substantial change* to its mission, objectives, or programs; (2) adds graduate programs, but was previously approved to offer undergraduate degrees and certificates only; (4) contracts with a non-Title IV entity that will offer more than 25%, but less than 50%, of one of the accredited institution’s programs; and (5) adds a direct assessment program.⁸⁹ Without indicating that it is doing so, the NPRM also proposes to eliminate the requirement that an institution obtain accreditor approval when it decides to add new

⁸⁵ 84 Fed. Reg. at 27,424–25.

⁸⁶ 84 Fed. Reg. at 27,425.

⁸⁷ 34 C.F.R. § 602.22(a)(2).

⁸⁸ 84 Fed. Reg. at 27,426.

⁸⁹ 84 Fed. Reg. at 27,426–27.

courses.⁹⁰ In addition, the Department proposes to allow senior agency staff, rather than the agency's decision-making body, to make a decision on "substantive change" proposals within ninety days⁹¹ and includes a new list of additional changes that an institution must seek approval for if that institution has been placed on probation, been subjected to negative action by the agency in the past three years, or placed on provisional certification.⁹² Finally, the Department's proposal includes the ability of an institution to open additional locations without prior approval if that institution has been through one full accreditation cycle and has been approved previously to open at least two additional locations.⁹³ To justify all of these sweeping changes, the Department explains that accrediting agencies need "more flexibility" while "maintaining proper agency oversight of high-risk changes."⁹⁴ The Department also claims that its proposals will "streamline approval" and protect students and taxpayers from certain changes that "represent unique risks."⁹⁵ Yet, the Department never defines what it means by "high-impact, high-risk changes," fails to explain how the current regulation is too inflexible, why only certain "high-impact, high-risk changes" should receive pre-approval from an accreditor, or why Title IV funding should be extended on a quicker timeline to new, innovative programs that have not yet been successfully tested at scale. Given the Department's lack of sound reasoning, the Department's proposed changes to 34 C.F.R. § 602.22 should not be implemented.

1. The NPRM's proposals to accrediting agencies' operating procedures lack sound reasoning.

As relevant here, the Department proposes to make two changes to accrediting agencies' operating procedures under 34 C.F.R. § 602.23 that are not properly supported. First, the Department proposes to add subsection (f) to establish, *inter alia*, that if an accreditor offers preaccreditation status to an institution and then denies full accreditation to that same institution, it "may maintain the institution's preaccreditation for currently enrolled students until the institution has had a reasonable time to complete the activities in its teach-out plan . . . but for no more than 120 days," unless "good cause" is shown.⁹⁶ Second, the Department plans to require the Secretary to recognize as accredited "all credits

⁹⁰ 84 Fed. Reg. at 27,482.

⁹¹ 84 Fed. Reg. at 27,427.

⁹² *Id.* The Department's proposed change misses the mark in terms of which institutions are covered. In addition to institutions on probation, under provisional certification, or who have been subjected to negative accreditor actions, it should also include, at minimum, institutions with pending limitation, suspension, termination, fine, and law enforcement actions; those that have failed to meet the 90/10 requirement; those that have been notified that any of their three most recent cohort default rates are thirty percent or greater, pursuant to 34 C.F.R. Part 668 Subpart N; and those with financial responsibility failures, including any failures due to "past performance" under 34 C.F.R. § 668.174, regardless of any conditions that the Department uses to enable such institutions to continue their Title IV participation or eligibility.

⁹³ 84 Fed. Reg. at 27,427.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 84 Fed. Reg. at 27,429.

and degrees earned and issued by an institution or program holding preaccreditation from a nationally recognized agency.”⁹⁷ As justification, the Department asserts that these changes will “mitigate the additional risk to students and taxpayers posed by a preaccredited program or institution” and make clear that “a student who completes a preaccredited program should have the same benefits as a student who completes an accredited [one].”⁹⁸ It is unclear from the Department’s reasoning exactly what risks, if any, will be mitigated by this proposal. In fact, the proposal seems far more likely to magnify them. For example, rather than removing Title IV eligibility from a school that has demonstrated its inability to provide a quality education, the Department instead proposes to allow students to continue to attend that school for up to four months or longer. All the while, students will run up additional debt in exchange for mediocre credit hours, certificates, or degrees. Even if the Department agrees to then recognize those students’ work as “accredited,” they will still have to market themselves to other institutions and employers. How will they effectively do so, having received such a poor education? Here, both the Department’s proposal and its reasoning miss the mark.

m. The Department’s proposals to eliminate the requirement that institutional accreditors approve an institution’s business plan for a new branch campus before approving accreditation and review the reliability and accuracy of an institution’s assignment of credit hours are not justified.

The NPRM proposes to make at least two changes to an institutional accreditor’s required procedures, neither of which is supported by “good reason” and, therefore, is arbitrary and capricious under the APA. First, it proposes to eliminate the requirement that the agency evaluate an institution’s business plan for a new branch campus and “take whatever actions it deems necessary before approving accreditation at the branch campus.”⁹⁹ The Department justifies this change by asserting that it is “remov[ing] requirements that go beyond statutory [ones] and are unnecessarily prescriptive or that duplicate requirements in proposed § 602.22.”¹⁰⁰ The Department never explains why it no longer believes that an agency should review the institution’s business plan before granting accreditation. It likewise fails to explain why it matters that the current requirement goes beyond what the statute requires. In addition, the Department fails to explain *how* the requirement has been “unnecessarily prescriptive.” Moreover, while the proposed requirements in 34 C.F.R. § 602.22 are similar, they are not identical. Proposed § 602.22 would require an institution to obtain agency approval for a new branch campus, which would in turn require the agency to evaluate the institution’s fiscal and administrative capability to operate that branch campus.¹⁰¹ But, importantly, the Department has proposed a large carve-out to this proposed requirement that would include any institution that has

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 84 Fed. Reg. at 27,430 (proposing to eliminate 34 C.F.R. § 602.24(a)(2)).

¹⁰⁰ 84 Fed. Reg. at 27,430.

¹⁰¹ 84 Fed. Reg. at 27,482.

been through one full accreditation cycle and received approval in the past for two additional locations.¹⁰² This is clearly a less onerous regulation than the one the Department proposes to eliminate in 34 C.F.R. § 602.24(a)(2). Second, the NPRM proposes to eliminate the requirement that an agency conduct “an effective review and evaluation of the reliability and accuracy of the institution’s assignment of credit hours.”¹⁰³ Again, the Department relies on the rationale that the current regulation is “unnecessarily prescriptive” and “administratively burdensome.”¹⁰⁴ But again, the Department fails to explain how this is so, including the costs of the alleged administrative burden. For all of these reasons, the Department’s proposed changes to 34 C.F.R. §§ 602.24(a)(2), (f) have not been supported by adequate justification.

n. The NPRM also makes two changes to procedural due process requirements without “good reason.”

Current 34 C.F.R. § 602.25 requires accrediting agencies to include a process for an institution to appeal any adverse action before the decision becomes final.¹⁰⁵ That process includes a hearing before an appeals panel that can include, among other decisions, reversing the adverse action or remanding to the agency’s original decision-making body for further consideration, per the appeal panel’s specific instructions about which issues to address.¹⁰⁶ The NPRM proposes to change the appeals process so that the appeals panel can no longer reverse decisions and, rather than allowing the appeals panel to instruct the agency’s decision-making body on which issues to address on remand, requires the panel to explain instead why its decision differed on appeal.¹⁰⁷ The Department claims that both of these changes are necessary to “ensure[] that an agency board is fully able to re-evaluate its original decision upon remand,” which is prohibited by a reversal, and “to ensure that institutions or programs are fully informed regarding the decisions being made pertaining to their accreditation status and that the original decision-making body speaks for the agency in addressing concerns raised in a remand.”¹⁰⁸ These arguments miss the mark. To begin, the Department seems to misunderstand how an appeals process works. If an agency’s decision is reversed by an appeals panel and specifically *not* remanded, the agency should not get another chance to re-evaluate its original decision. If that decision was wrong, according to the appeals panel, but corrected by that same panel, there is nothing further for the agency to do. In addition, the Department fails to explain how these changes will help institutions or programs better understand the decisions made about their accreditation status. Presumably, identifying specific issues the agency must address on remand helps identify for an institution or

¹⁰² 84 Fed. Reg. at 27,483.

¹⁰³ 84 Fed. Reg. at 27,430.

¹⁰⁴ 84 Fed. Reg. at 27,431.

¹⁰⁵ 34 C.F.R. § 602.25(f).

¹⁰⁶ *Id.* § 602.25(f)(1)(iii)-(iv).

¹⁰⁷ 84 Fed. Reg. at 27,431.

¹⁰⁸ *Id.*

program what the agency failed to adequately consider the first time. Moreover, once a new decision is made on remand, it is that decision, and not the remand itself, that will “speak for the agency.” If institutions or programs are confused about decisions made on their accreditation status, the Department’s proposal does nothing to improve the clarity of decisions issued by the agency’s decision-making body. Ultimately, the Department’s explanations are inadequate and seem aimed at creating a solution for which no clear problem exists.

o. The NPRM proposes to limit other information an agency must provide to the Department, as well as the Department’s authority to keep requests for information confidential from institutions, without adequate justification.

The NPRM proposes to make two changes in 34 C.F.R. § 602.27 that are not supported by “good reason.” First, it proposes to “replace the requirements that an agency provide the Department with a copy of any annual report and a copy of its directory of accredited and preaccredited institutions and programs with a requirement that an agency provide a list, updated annually, of its accredited and preaccredited institutions.”¹⁰⁹ The Department explains that this change will allow greater efficiency, reduce administrative burden, and decrease the size of agency submissions.¹¹⁰ However, the Department never explains why it no longer needs the annual report or directory or why the annual list will serve the same purpose as the report and directory. Second, it proposes to “replace the requirement that an agency must consider a contact with the Department confidential ‘upon the request of the Department’ with a requirement that the contact must be considered confidential ‘if the Department determines a compelling need for confidentiality.’”¹¹¹ The Department explains that the change “attempts to address a concern raised by the Task Force on Federal Regulation of Higher Education.”¹¹² Yet, the Department never explains what that concern was, nor how the suggested change will address it. More importantly, the Department fails to make clear that the change will decrease its own authority to keep requests for information confidential or explain why this is sound policy, in light of its role and responsibility to oversee the use of federal funds. Taken together, the proposed changes in 34 C.F.R. § 602.27 are not supported by sound reasoning.

p. The Department proposes to eliminate 34 C.F.R. § 602.30 in its entirety as “duplicative” of other regulatory requirements, a statement that is unsupported by fact or reason.

The NPRM proposes to rescind 34 C.F.R. § 602.30 in its entirety. The current regulation makes clear that recognition proceedings are administrative actions taken on the following: (1) applications for initial or continued recognition; (2) applications for an expansion of scope; (3) compliance reports; (4)

¹⁰⁹ 84 Fed. Reg. at 27,432.

¹¹⁰ 84 Fed. Reg. at 27,433.

¹¹¹ *Id.*

¹¹² *Id.*

reviews of agencies that have expanded their scope of recognition by notice; and (5) staff analyses identifying areas of non-compliance.¹¹³ The Department argues that this regulation is unnecessary because “the recognition procedures outlined in other sections of this part cover these activities.”¹¹⁴ It fails to identify *which* sections in Part 602 cover these activities, a requirement for making sure that the public can meaningfully comment. More importantly, it cannot identify which sections cover these activities because no such sections exist. Given that the Department’s proposal to eliminate § 602.30 is not supported by “good reason,” it should not be included in the final rule.

q. The Department proposes to change the requirements for initial or renewal of recognition applications without adequate justification.

In the NPRM, the Department proposes to make several changes to the process for submitting initial or renewal of recognition applications under 34 C.F.R. § 602.31. First, without acknowledgment, the NPRM proposes to eliminate the requirement that agencies include in their applications documentation how they are effectively applying the criteria for recognition.¹¹⁵ Under current regulation, this is a fundamental part of the application process. It defies comprehension why the Department would no longer require agencies seeking recognition or re-recognition to “document” how they are “effectively appl[ying]” the Department’s criteria. If the Department wishes to make such a change, it must be clear that it is doing so and provide a “good reason.” It has not done so here.

In addition, the NPRM proposes to eliminate the requirement that agencies seeking an expansion of scope provide documentation of their experience in accordance with 34 C.F.R. § 602.12(b) (requiring recognized agencies seeking an expansion of scope to “demonstrate that it has granted accreditation or preaccreditation covering the range of the specific degrees, certificates, institutions, and programs for which it seeks the expansion of scope”).¹¹⁶ The Department attempts to justify this change by claiming that it has added a cross-reference to § 602.31 in proposed § 602.32(j), which “outlines additional documentation an agency must submit when seeking an expansion of scope.”¹¹⁷ However, proposed § 602.32(j) does not refer to the requirements under § 602.12(b), but to those under § 602.12(a). More importantly, nowhere do the Department’s proposals in the cross-referenced sections include a similar requirement that the agency document its experience. Yet again, the Department’s reasoning is inadequate under the APA.

Finally, the NPRM proposes to require, rather than permit, agencies submitting information to the Department for the purposes of recognition to redact personally identifying information and other

¹¹³ 34 C.F.R. § 602.30.

¹¹⁴ 84 Fed. Reg. at 27,433.

¹¹⁵ 84 Fed. Reg. at 27,433.

¹¹⁶ *Id.*

¹¹⁷ 84 Fed. Reg. at 27,434.

sensitive information.¹¹⁸ The Department argues that this change is necessary due to the “increased number of [Freedom of Information Act (“FOIA”)] requests the Department is receiving for recognition materials.”¹¹⁹ Although the Department appears to acknowledge that it bears the ultimate responsibility for complying with FOIA’s non-disclosure requirements, it nevertheless seeks to delegate this responsibility to the agencies due to their greater knowledge and familiarity with the documents submitted.¹²⁰ If the Department wishes to make this sort of change, it should more clearly define the term “personally identifying information” before doing so. Because it has failed to do so here, the Department’s proposed change is not adequately supported.

r. The NPRM proposes to change the Department’s review process for accreditor applications, including by altering the impact that negative administrative or court findings have on a recognition decision, without proper support.

The Department proposes to make, *inter alia*, another major change to its procedures for reviewing agency applications for recognition, change in scope, compliance reports, and increases in enrollment that is not justified by “good reason.” Currently, the regulation at 34 C.F.R. § 602.32(d) specifies that reviews of complaints or legal actions will be determinative of compliance if the complaint or legal action “results in a final judgment on the merits by a court or administrative agency.”¹²¹ The Department proposes to change this requirement so that final judgments on the merits “may be considered[,] but are not necessarily determinative.”¹²² It provides almost no rationale for this change, stating simply that it “reflects the view of the Department and expressed by several committee members.”¹²³ That type of justification fails to meet the Department’s burden under the APA. The fact that the Department, or even the Department together with “several” unidentified (or even identified) members of the negotiated rulemaking committee, may *prefer* a particular policy does not satisfy the Department’s obligations to justify the regulatory change under the APA.

3. The Department’s Proposed Changes to the State Agency Recognition Process Will Make it More Difficult for State Agencies to Police Institutions’ Credit Hour Policies

The NPRM proposes to delete 34 C.F.R. § 603.24(c), which delineates specific guidance to state agencies regarding credit hour policies at institutions.¹²⁴ Without any evidence or explanation, the

¹¹⁸ 84 Fed. Reg. at 27,433.

¹¹⁹ 84 Fed. Reg. at 27,434.

¹²⁰ *Id.*

¹²¹ 34 C.F.R. § 602.32(d).

¹²² 84 Fed. Reg. at 27,435.

¹²³ 84 Fed. Reg. at 27,436.

¹²⁴ 84 Fed. Reg. at 27,440 (proposing to eliminate 34 C.F.R. § 603.24(c)).

Department claims that the current requirements are “overly prescriptive” and that state agencies serving as accreditors should “have autonomy and flexibility to work with institutions in developing and applying credit-hour policies.”¹²⁵ The public should not have to guess as to why the current requirements are so onerous as to be unworkable or why greater autonomy and flexibility is necessary. Thus, like many of the Department’s proposals, the NPRM provides no “good reason” to rescind § 603.24(c).

4. By Breaking up Proposals from the Consensus Agreement into Multiple Proposed Rules, the Department Risks Running Afoul of the HEA’s Negotiated Rulemaking Requirement, Rendering the Entire Process Contrary to Law

With respect to the negotiated rulemaking process, the Department has been criticized for: (i) choosing a committee of negotiators that was nearly devoid of student-centered voices; (ii) creating an unwieldy and unmanageable agenda by proposing too many topics for a single negotiated rulemaking; and (iii) failing to provide any data or information to inform the rulemaking itself, which this comment joins. In addition, the Department’s decision to cherry pick certain proposals from the consensus rule for this NPRM risks violating the HEA’s negotiated rulemaking requirement, and therefore risks being contrary to law, in at least two ways. First, the consensus rule involves multiple moving parts that are designed to work together, a fact that the Department itself acknowledges.¹²⁶ But if the Department finalizes this NPRM by November 1, 2019, and leaves other pieces of the consensus rule for a later date, the rule will, by design, not function as the negotiating rulemaking committee envisioned. This is simply not what Congress had in mind when it enacted HEA § 492, 20 U.S.C. § 1089. Second, the decision to break up the consensus rule into multiple parts deprives the public of the opportunity to meaningfully comment on the consensus rule itself. Finally, there is no guarantee that the Department will, in fact, propose the remaining pieces of the consensus rule at a later date. That outcome will similarly prevent the consensus rule from functioning coherently as a whole. Given these very serious procedural errors, the Department should rescind this NPRM and begin a new negotiating rulemaking process.

5. The Comment Period is too Short and Does not Permit a Meaningful Opportunity to Comment

The NPRM fails to explain why the Department provided only a 30-day comment period for a rulemaking that touches on topics as disparate as the criteria for accreditor recognition, state authorization, and institutional eligibility. Moreover, the short 30-day comment period—which included one federal holiday (Independence Day, July 4, 2019) and eight weekend days, totaling only

¹²⁵ 84 Fed. Reg. at 27,440.

¹²⁶ *See, e.g.*, 84 Fed. Reg. 27,450 (noting that “[a]n additional complicating factor in developing [estimates of federal student aid transfers] are the related regulatory changes on which the committee reached consensus in this negotiated rulemaking that will be proposed in separate notices of proposed rulemaking”); *see also* 84 Fed. Reg. at 27,454 (noting that the estimated net impact of Pell grant and loan changes as the result of allowing institutions to respond more quickly to market demand “reflects uncertainty about the extent of this potential expansion, as well as the fact that much of the expansion may involve online programs subject to forthcoming proposed regulatory changes that would interact with these proposed regulations”).

twenty-one business days—does not permit us to meaningfully comment on the proposed regulations. We also note that this regulation is classified as “economically significant” and “major” by the Office of Information and Regulatory Affairs (“OIRA”). In such circumstances, section 6(a) of Executive Order 12,866 commands that the Department “afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days.*” Without explanation, the Department has chosen here to provide a comment period of only half that time. Thirty days is simply not enough to prepare meaningful comments to such a comprehensive rulemaking.

* * *

For all of the reasons stated above, NSLDN and AFT demand that the Department go back to the drawing board. Its unlawful and poorly explained proposals will fundamentally weaken accreditors’ ability to keep poor-quality institutions from accessing federal student aid, as well as the Department’s ability to hold bad accreditors accountable. Although we recognize that the proposed regulations were the result of consensus achieved by the negotiated rulemaking committee—albeit one without sufficient representation by students, consumer advocates, and state law enforcement agencies—the fact of consensus does not (a) *require* the Department to issue a proposed rule, nor (b) eliminate the Department’s obligations under the APA to, broadly stated, justify and explain its proposals. In light of the identified failures, we ask the Department to convene a new negotiated rulemaking committee to more fully and fairly analyze the Department’s objectives. Because of the proposals’ documented failures to comply with the language of the HEA, nothing short of starting over will withstand judicial review.

Thank you for your attention to these important issues facing student loan borrowers. For more information, please contact NSLDN’s Counsel, Robyn Bitner, at robyn@nslldn.org or AFT’s Director of Higher Education, Alyssa Picard, at apicard@aft.org.

Sincerely,

The National Student Legal Defense Network
American Federation of Teachers