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U.S. Department of Education  
400 Maryland Ave., SW, Mail Stop 294-42  
Washington, D.C. 20202

**Re: Distance Education Notice of Proposed Rulemaking (NPRM) Docket ID ED-2018-OPE-0076**

May 4, 2020

Dear Mr. Martin,

Thank you for the opportunity to comment on the Department's Notice of Proposed Rulemaking to amend the regulations related to distance education. This comment is submitted on behalf of the Center for American Progress' Postsecondary Education Team. If you have any questions about these comments, please contact Antoinette Flores at [aflores@americanprogress.org](mailto:aflores@americanprogress.org).

We agree with the Department that the COVID-19 National Emergency presents an unprecedented moment in higher education, as institutions across the country have rapidly moved education online without preparation to continue serving students throughout the pandemic. However, while there is a need for emergency flexibility in the short-term, we caution against using the pandemic as a means of justifying further changes in the name of innovation and reform that will potentially negatively impact the quality of education students receive over the long-term.

The need for quality distance education has never been more important in terms of equity and student success. Research has found severe equity gaps in online education success, with outcomes that disproportionately impact African American and Latino students. There are already too few protections against low-quality higher education programs, especially as the Department readies new regulations that undermine quality through its gainful employment, borrower defense, and accreditation to go into effect. The Department should do more, not less to protect students.

The Department's notice of proposed rulemaking maintains some basic student taxpayer protections on areas that are especially critical to higher education quality and that have been subject to fraud waste and abuse in the past, namely, on the credit hour, outsourcing of programs to unaccredited entities, and the definition of distance education. However, each of these areas are places where the Department presented significantly weaker

proposals at the start of the rulemaking that would open students and taxpayers to potential abuse.

For example, the Department's initial language would have essentially eliminated the federal definition of the credit hour, a rule established in 2010 to create a minimum standard and correct for abuses in the aid program, including egregious credit inflation that allowed institutions to charge students more money for less education. It proposed allowing institutions to outsource up to 100 percent of a program to unaccredited providers with few restrictions, which could result in a bait and switch, where students believe they are paying for one institution but are receiving something entirely different. Another proposal would have significantly watered down the requirement that distance education programs provide regular and substantive interaction, which could result in students paying thousands of dollars for, essentially an online textbook. These proposals were overwhelmingly rejected by negotiators in favor of the compromise consensus language.

While the Department reached consensus, it was not without significant process concerns that cut corners to limit debate and neglected to include a wide range of relevant stakeholders representing consumer interests. We urge the Department to keep this in mind as it works to finalize the rules. While we believe the proposed regulations should be stronger, it would be dangerous to students and to true innovators looking to increase equitable student outcomes to weaken the consensus language. For these reasons, it is critical that the Department maintain its proposed language that was agreed upon by consensus. We urge the Department not to exploit the current national emergency as a means of justifying for weakening of the proposed rules.

Below we discuss the importance of maintaining consensus language in key three areas: the credit hour, outsourcing of programs, and the definition of distance education along with overall observations about how the process of the rulemaking was flawed from the start that should be considered as the Department finalizes its rules.

## **The Department's process violates law**

The Department must comply with requirements under the Higher Education Act, which require "individuals with demonstrated expertise or experience in the relevant subjects under negotiation" and the Administrative Procedure Act (APA), which requires that the Department conduct a "reasoned" rulemaking.<sup>1</sup> However, the process was anything but

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<sup>1</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 30 (1983); <https://prprac.org/pdf/APA.summary.ProfMetzger.pdf>

reasoned and, given the wide scope of regulations, aside from accreditors themselves, the Department failed to secure negotiators with demonstrated expertise in all relevant subjects included in the rulemaking.

Instead, the Department cut corners throughout the process abandoning all precedent in how the rulemaking was constructed. It stacked the deck with representatives of institutions and accreditors while limiting knowledgeable pro-consumer ones.<sup>2</sup> It limited the information it provided to negotiators, in many cases, refusing to provide data or evidence and based its changes on unsourced anecdotes. It was not clear when or why various changes were being made and the Department often handed out new changes before negotiators had any chance to review them, making it difficult for negotiators without extensive regulatory expertise to effectively weigh in on changes.<sup>3</sup> It jammed a packed agenda leaving little time for in-depth discussion on many of the agenda items. Finally, it rushed changes through by threatening negotiators with worse changes<sup>4</sup> if they did not get to consensus and allowed negotiators around the table to threaten the lone consumer advocate with being removed from the rulemaking for negotiating in bad faith,<sup>5</sup> simply for raising concerns or asking questions about what changes meant or how the already confusing process was supposed to work.

These procedural challenges combined raise questions about whether the Department reasonably included all relevant stakeholders, knowledgeable negotiators, and whether the rulemaking meets the requirements required under the Higher Education Act and the APA, raising serious concerns about the validity of the consensus agreement. The changes below detail some of the ways in which the Department undermined the legitimacy of the consensus agreement.

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

The Department's widespread agenda, ranging across a broad array of issues including program integrity, institutional eligibility, federal oversight, distance education, faith-

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<sup>2</sup> <https://www.newamerica.org/education-policy/edcentral/everything-you-never-wanted-to-know-about-the-2019-rulemaking/>

<sup>3</sup> <https://twitter.com/claremccann/status/1095333558611107841>

<sup>4</sup> Begins at 00:49

<https://edstream.ed.gov/webcast/Play/6f53451a9a0044809d01aadcefb3fd0d1d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8>

<sup>5</sup> Begins at 3:05

<https://edstream.ed.gov/webcast/Play/128ddc8de9bb4e5988027198efeb62b51d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8>

based institutions, and TEACH grants, spread expertise thin and limited full debate on the changes. From the start, the largest criticism the Department received from the public, including consumer groups, institutional associations, and accrediting agencies was that there were too many issues on the agenda, which would limit an in-depth discussion on any one of them.<sup>6</sup> Rather than limit the agenda, or conduct separate rulemakings to address each topic, the Department's response was to break up the rulemaking into a series of subcommittees that met at the same time, were not open to the public as required under the Higher Education Act, and which spread expertise thin. For example, the distance education subcommittee, which included only one negotiator representing accrediting agencies, was left to debate and decide upon the definitions related to accreditation which were entirely divorced from the actual changes proposed. Negotiators mentioned numerous times their lack of expertise on accreditation and raised concerns over how the definitions the subcommittee was charged with negotiating might be applied in changes being discussed by the main committee.

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

#### The negotiating committee was stacked in favor of institutions and accreditors

The Department sought a negotiating committee that favored industry representatives and lacked representation for students and their advocates. Unlike previous rulemakings, the Department neglected to propose including a state representative, a consumer representative, and a State's Attorney General, though it later agreed to add a member representing State Higher Education Executive Officers but provided no alternate.<sup>7</sup> The Department also was the lone no vote declining to add a State's Attorney's General, even as an alternate with a limited role in speaking. The Department should revise its language in the preamble to reflect that the committee unanimously agreed to add a state's attorney general but the Department declined to honor it.

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<sup>6</sup> C-RAC, <https://www.regulations.gov/document?D=ED-2018-OPE-0076-0116>; NAICU, <https://www.regulations.gov/document?D=ED-2018-OPE-0076-0027>;

<sup>7</sup> <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/20181011-nominations-unofficial-fedreg.docx>

The result was a committee that failed to adequately represent the interests of students and consumers and the resulting consensus lacked serious consideration to the topic of consumer protection. The stacked deck with industry representatives worked to the Department's favor when it threatened worse changes if the committee did not reach consensus. The majority of voices around the table are affiliated in some form with regional accrediting agencies, which were concerned about the changes proposed to geographic scope.<sup>8</sup> Just one institutional representative, an alternate, is from an institution accredited by a national accrediting agency, while the rest are associated with regional accreditors. After the Department's threat, the negotiating committee became incensed with reaching consensus by any means necessary and resulted in committee members threatening to seek to remove the legal aid rep for negotiating in bad faith and pressuring her to agree to consensus.<sup>9</sup>

## **Maintain a clear federal definition of a credit hour (34 CFR 600.2)**

The credit hour regulation is a bedrock consumer protection designed following the discovery of fraud in the aid programs. It is critical the Department maintain a federal definition of the credit hour consistent with the consensus language.

The history of the regulation shows why it is critical to maintain. A lack of standards on how much education should be delivered resulted in institutional price gouging by manipulating the number of credit hours in order to charge students more money. The credit hour determines a student's enrollment intensity and how much aid a student is eligible for. Prior to the federal definition, accrediting agencies were responsible for determining the definition and assessment of credit hours for programs and courses. However, without a formal definition, standards varied and, in some cases, were non-existent. A report in 2002 and 2003 by the Department of Education Inspector General's Office found that at least two regional agencies reviewed did not have minimum requirements for the establishment of credit hours. Follow-up reporting in 2009 and 2010 found that among the three largest regional agencies, none provided any definition for the credit hour or provided guidance on minimum requirements.<sup>10</sup> Failure to conduct oversight led to egregious credit inflation, allowing institutions to charge students more

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<sup>8</sup> <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/listofnegotiators.pdf>

<sup>9</sup> Begins at 3:05

<https://edstream.ed.gov/webcast/Play/128ddc8de9bb4e5988027198efeb62b51d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8> ; Begins at 4:55

<https://edstream.ed.gov/webcast/Play/2eb8815ca86d4bc899dd3b3b1fdb69ee1d?catalog=82d9933c-1256-4cb2-8783-89599eb97fd8>

<sup>10</sup> <https://www2.ed.gov/about/offices/list/oig/misc/georgemillersept092013.pdf>

money for less education, and failing to take action even when the accreditor was aware of the problem.<sup>11</sup> The federal definition of the credit hour was established to create a minimum standard and correct for abuses in the aid program. Attempts to weaken or eliminate this rule absent an alternative will result in institutions taking advantage of easy access to aid at the expense of students.

Throughout the rulemaking, members of the main committee and the subcommittee from the competency-based education community, who would seemingly have the most to gain by gutting the credit hour, strongly opposed the Department's initial proposal to effectively eliminate the existing definition. The primary reasoning was concern about a potential return to the past and the risk it creates for students and institution attempting to innovate responsibly. As a result, the Department reached a compromise with negotiators that preserves the credit hour rule. We support the consensus language the Department agreed to in the NPRM and urge that you maintain it and re-add requirements 34 CFR 602.24(f) and 603.24(c) eliminated in the accreditation rules released last year that required accrediting agencies create standards around credit hour. While ED raises concerns about the precision of the credit-hour proxy, those issues are better left to accrediting agencies responsible for academic issues. If accreditors aren't assessing institutions' use of the credit hour, the rule will be nearly impossible to enforce.

### **Maintain Limits on Outsourcing of Educational Programs (34 CFR 668.5)**

Under current regulations, institutions can outsource part of a program to an unaccredited entity providing that entity provides less than 50 percent of a program. Changes to these regulations raise concerns that unaccredited providers with little to no oversight will enter the aid programs and provide part or all of an education with no guarantee of quality and unbeknownst to the student. These types of agreements can result in a bait and switch, where students believe they are paying for one institution but are receiving something entirely different since these types of arrangements may not be immediately apparent when a student enrolls.

The Department of Education lacks sufficient evidence for justifying further change. A 2015 experiment was intended to test the boundaries of this regulation, through EQUIP. The EQUIP experiment lifted the 50 percent limit and allows students to enroll in programs offered primarily by non-traditional providers in conjunction with a traditional institution of higher education, and with oversight from both a quality assurance entity and accrediting agency. Importantly, the experiment increases access while creating

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<sup>11</sup> <https://www2.ed.gov/about/offices/list/oig/misc/georgemillersept092013.pdf>

robust accountability based largely on student outcomes. However, with only one of eight entities able to enroll students and receive aid, only one program passed the necessary approvals to begin offering aid through the program, which is not enough to begin assessing results. The Department should not proceed in changing this regulation until it has reliable results through the EQUIP program. Among the other entities, concerning evidence arose that would caution against using the experiment as justification or further opening up the rules, including some programs price gouging students, at least one entity fined for deceptive advertising, and one entity that closed precipitously before it ever got off the ground. This is enough evidence to suggest the Department should not proceed with changing these rules.

During the rulemaking, negotiators on the main negotiating committee and on the subcommittee strongly opposed the Department's initial proposal to outsource up to 100 percent of a program. One negotiator, an accrediting agency, stated that of primary concern was that these types of arrangements are commonly sought by financially unstable institutions as a means of generating revenue and need greater oversight and limits, not less. Instead, the Department proposed worse changes if the negotiators did not come to a consensus. As a result, negotiators agreed to fast track approvals through accrediting boards, weakening oversight while maintaining some limits on the rule. The Department should not seek to change these rules, particularly in a crisis environment where institutions are in need of fast solutions to online education and financially vulnerable.

We support the consensus agreement to limit outsourcing of educational programs to no more than 50% of a program, with accreditor approval required above 25% of a program; but we urge the Department to restore the requirements that accreditors thoroughly approve such arrangements through their commissions, which was changed in the accreditation rules finalized last year (34 CFR 602.32). In addition, we encourage the Department to seek data on the use of these arrangements, evaluate the terms to see whether further regulation is needed, and require accreditors to be transparent when they approve such an arrangement so that the Department can ensure accreditors are adequately assessing the programs.

## **Maintain a strong definition of distance education (34 CFR 600.2)**

For more than a decade, the phrase “regular and substantive” has been used to draw the distinction between “correspondence courses” and “distance education,” and was first introduced in statute to correct for fraud and abuse in the aid programs among



correspondence courses. The distinction is critical because correspondence courses are largely self-study courses and have limited faculty that provide no meaningful instruction while distance education programs include significant instruction and engagement with faculty. Today, that distinction is well understood and easily documented. Weakening this rule will result in students paying thousands of dollars essentially for an online textbook and lead to more fraud, waste, and abuse.

We support the Department's proposed language but urge the Department not to further change the definitions of regular and substantive interaction, including the definition of an instructor. The language in the NPRM reflects a hard-fought compromise among negotiations, and the Department should not diverge from the proposed definition in its final rule.

## **Conclusion**

We strongly encourage ED to strengthen the regulations, not weaken them. We also encourage the Department to maintain the agreed upon language, particularly with respect to the credit hour, outsourcing of programs to unaccredited entities, and the definition of distance education. While some emergency flexibility may be needed and have been granted in light of the national emergency as a result of the Coronavirus pandemic, it is more important than ever that the Department maintain and uphold quality in distance education. Students and taxpayers need clear safeguards over the long-term.

Sincerely,  
Antoinette Flores  
Director, Postsecondary Education  
Center for American Progress