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U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue SW
Washington, DC 20202

Submitted electronically
RE:

To whom it may concern,

We—the undersigned coalition of 10+ organizations representing the interests of millions of students, loan borrowers, institutional faculty and staff members, veterans, civil rights and college access advocates, and researchers—appreciate the opportunity to offer feedback to the U.S. Department of Education (Department) as it seeks to finalize accreditation changes in its accreditation-related notice of proposed rulemaking (NPRM) that would bring seismic changes to the higher education accountability triad.

While the proposed rule's common-sense student success metrics would help bring regulators into a contemporary era, other provisions would demolish critical guardrails that ensure lackluster accreditors do not receive federal recognition, and prevent predatory and low-quality colleges from switching accrediting agencies to evade sanctions. Weakening the Department's oversight in this area would make it easier for such institutions to take advantage of students.

We also remain concerned about potential political intrusion into accreditor and institutional operations, as the NPRM extends the federal government into matters, including academic freedom and intellectual diversity, that fall outside the Department's congressionally-circumscribed role. Finally, the NPRM asks accrediting agencies to monitor and enforce compliance with laws, such as those related to civil rights, with which they have little to no expertise, inviting uneven or ad hoc enforcement that entirely falls outside the lane of accrediting agencies.

Below, our coalition offers recommendations on the proposed rule that would foster a contemporary accreditation system and shield it from government interference, while protecting the investments of students, educators, and taxpayers.

Eligibility for federal recognition
The Higher Education Act (HEA) demands that accreditors, before applying to become recognized as a financial aid gatekeeper, must "demonstrate the ability and the experience to operate as an accrediting agency or association within the State, region, or nationally, as appropriate."

Current regulations establish that nascent accreditors, to prove they have "the ability and the experience" for federal recognition, must accredit at least one college, as well as conduct accreditation activities for at least two years. This requirement helps ensure an entity that could become a gatekeeper for billions in federal aid—taxpayer dollars— first has a comprehensive track record as a regulator and institutional overseer, thus serving to meet the HEA's experience requirements.

However, the NPRM would significantly erode the longstanding precedent of minimum expected qualifications for obtaining federal recognition. It would strike the two-year requirement entirely. Under the proposal, aspirant accreditors would instead need to clear only a low bar to apply for recognition — including a requirement that they need only have a college that has *applied* for accreditation. Merely applying does not demonstrate that an accreditor has the experience necessary to carry out its duties, and will not provide adequate evidence for the Department to review before ensuring the agency is qualified. A prospective new accreditor would also need to have accredited just a single college or program before actually receiving federal recognition. Our coalition believes this, and the other criteria that the Department has set out in the NPRM for accreditors seeking recognition—including to note that agencies must have adopted accreditation standards and operating procedures—are insufficient on two fronts. Legally, the baseline requirements may fail to satisfy the HEA's experience mandate, and practically, they do not actually prove whether an accreditor has the track record to serve as reliable authorities of quality education.

The lower bar for entry into the accreditation field may tempt some passive agencies to seek federal recognition, even though they lack the "ability" the HEA requires. Students, consumers, and taxpayers lose out when an accreditor fails in its duties. Notably, the defunct Accrediting Council for Independent Colleges and Schools (ACICS), the accrediting agency that lost federal recognition several years ago, did not properly monitor institutions notorious in American higher education, including Corinthian Colleges and ITT Technical Institute, whose abrupt closures more than a decade ago are still felt by former students and borrowers. The NPRM could set up an accreditor field populated with agencies similar to ACICS, with egregiously poor standards and oversight practices.

Further, we believe an influx of new accreditors with minimal standards would undoubtedly spur a "race to the bottom," where existing agencies could diminish their own standards and policies to remain competitive in the new field. One negotiator during the Department's negotiated rulemaking sessions earlier this year similarly flagged the potential for a "race to the bottom" – noting even that this race to the bottom has happened before, as colleges fled other accreditors to move to ACICS and take advantage of its lax standards. The Department has also acknowledged possible risk in this area, albeit noting in the NPRM that "it lacks sufficient data to estimate how these proposed changes will affect the accreditation marketplace."

In the NPRM, and in public statements by Department officials, the Department established that it believes that the proposal would save money by prompting the exit of some accreditors that are currently recognized, subsequently cutting down on the Department and staff workload. The reality, though, is that newer accreditors, held to a much lower bar, will raise costs via federal dollars that will go to institutions that otherwise would not be able to find or retain accreditation.

We urge the Department to strengthen the requirements for federal recognition, including by preserving the two-year requirement in existing regulation. If the Department opts to still strike the two-year requirement, though, then it should develop a new framework for identifying risky accreditors that are newly entering the field, with guardrails to protect these kinds of risky taxpayer investments. For example, the Department can limit the number of institutions or programs that a new accreditor can approve for Title IV gatekeeper purposes, cap the initial recognition period for new agencies to ensure continual oversight by the Department, and mandate deeper oversight by the Department even between recognition processes when a new accreditor rapidly grows its portfolio of accredited institutions, or when colleges accredited by a particular agency disproportionately withdraw from accreditation, lose financial aid eligibility, or close abruptly.

Switching accrediting agencies

Congress signaled its intent decades ago to root out the practice of accreditor-shopping, in which an institution switches accreditors, or maintains accreditation from multiple agencies, in order to evade regulatory sanctions. The Senate subcommittee investigation that determined for-profit colleges were engaging in accreditation shopping led to Congress adopting new HEA mandates in the 1990s. Today, an institution that wants to switch agencies must first file documentation with the Department, "including materials demonstrating reasonable cause for changing the accrediting agency or association." Current regulations reinforce these safeguards, prohibiting the Department from finding "reasonable cause" if a college is moving accreditors after its accreditor punished it severely or revoked accreditation.

The NPRM would gut protections against accreditor-switching. It proposes that the Department would be forced to presume an institution has shown reasonable cause, unless the Department affirmatively determines the switch means to evade federal law or dodge enforcement. In essence, this would flip the burden of proof written into the HEA statute, so instead of a college proving why it should be allowed to switch, the Department would need to prove why it does not, if it chooses to do so. The coalition believes this presumption-based approach does not square with the language of the HEA, which places the burden of proof upon colleges. It is also simply an ill-conceived policy choice. A college on the verge of losing accreditation or engaged in unlawful behavior could find a newer, less experienced accreditor willing to look the other way and take it on, or maintain a "back-up" accreditor through multiple accreditation, compounding the "race to the bottom" dynamic we describe elsewhere in these comments.

We ask the Department to restore a genuine "reasonable cause" provision, one that requires institutions to affirmatively demonstrate that an accreditation switch is not intended to escape oversight. At a minimum, the Department must maintain its appropriate restrictions on colleges subject to sanctions like probation, where an attempt to switch agencies is almost certainly an attempt to evade accountability.

Academic freedom and intellectual diversity

Our coalition supports robust academic freedom protections that enable educators and researchers to pursue their scholarship and the pursuit of truth without interference from government actors. These tenets and policies, which should be controlled exclusively by the academy, have set apart and advanced the American higher education model globally.

While we appreciate that the Department also purports to support the notion of academic freedom, we are deeply concerned that a government entity is regulating this area. What is taught in the classroom, and how, should fall only on faculty members and other campus-based staff. A federal agency promoting or forcing a definition of academic freedom would likely invite political judgments into faculty speech and research and institutional culture.

We note that several negotiators expressed similar worries during negotiated rulemaking—that the federal government would insert itself into the arena of academic freedom—which led the Department to remove a definition of academic freedom from proposed regulatory language. We strongly oppose the inclusion of a definition of academic freedom and use of the term in regulation entirely. While the Department moved the definition to the preamble, which may not carry the same legal weight as the NPRM itself, we remain concerned the example definition of academic freedom the Department included could exert de facto pressure on accreditors to adopt it, especially given that the Department specifically noted the sample definition would satisfy the regulatory purposes of the proposed rule.

Furthermore, while the HEA grants the Department the power to set criteria for accreditor recognition, without mandating the specific standards of an agency, nothing in the statute references academic freedom. The Department is inferring its authority from this general criteria provision, but this is a major overextension of the role the Congress set for the education secretary. The subsection's specific examples of authorized criteria are “measure of student achievement” and “due process procedures,” for instance, rather than institutional culture standards.

Separately, the Department of Education Organization Act (DEOA) forbids the Department from exercising over the "curriculum, program of instruction, administration, or personnel of any educational institution.” The Department compelling accreditors to maintain and review institutional faculty policies, including around academic freedom, essentially morphs those agencies into a conduit for government intrusion into classroom matters, an area in which DEOA expressly blocks Department interference.

Similar issues arise with the Department’s mandate in the NPRM that accreditors must require institutions in their purview to maintain intellectual diversity policies, and that colleges must then somehow measure student and faculty perceptions of viewpoint diversity. Again, nothing in federal statute authorizes the Department to dictate how institutions cultivate or measure "intellectual diversity.” Demanding that accreditors police a proper balance of viewpoints on campuses also runs afoul of DEOA, and again, would transform accrediting agencies into a conduit for curriculum and personnel decisions that the Department is barred from making on its own. Any mandate that colleges measure and report on the ideological composition of their faculty and student body could spur direct government control into the content of scholarship and teaching, directly in counter to statutory restrictions.

We ask that the Department remove all references to “academic freedom” and “intellectual diversity” from the NPRM and preamble, as their inclusion would chill, not protect academic freedom. The Department also clearly lacks the statutory authority to define and direct these concepts. If the Department does maintain these references, then it should remove any definition of academic freedom from either the NPRM or preamble.

Accreditors policing laws, including civil rights statutes and First Amendment
The Department’s proposal improperly places accreditors in a law enforcement position for federal laws the Department (and other federal agencies) are charged with enforcing. The NPRM would force accreditors to evaluate whether institutions are complying with various laws they have no experience in enforcing, including the First Amendment in the case of public colleges, and civil rights laws.

Law enforcement responsibilities should fall to the province of courts, the Department of Justice, and the Department's Office for Civil Rights, bodies built for that type of legal adjudication. Accrediting agencies evaluate educational quality, and should not be in the role of determining whether an institution's speech policies withstand scrutiny. Handing accreditors this role invites inconsistent judgments across accrediting agencies with no legal expertise, and opens the door to accreditors, or the Department, wielding the accreditation gate as leverage over institutions.

Negotiators and the NPRM both have recognized this as a problem. Several negotiators expressed concerns about accreditors slipping into a legal enforcement role. And though the NPRM’s preamble states that accreditors are not expected to "adjudicate legal disputes or act as enforcement agencies,” the mandate to evaluate compliance would force accreditors into that role.

Finally, the coalition has questions about the carve-outs of these provisions that the Department would grant to religious institutions. Other private colleges maintain distinct missions, for instance, historically Black, military, or women’s institutions, but the Department did not take pains to exempt those colleges from new regulatory burdens as it did with religious institutions. We ask that the Department explain its reasoning for identifying religious colleges as the sole exception, and/or expand the exemptions to additional special-mission institutions.

State authority
Congress envisioned the three prongs of the accountability triad—states, the federal government, and accreditors—as equal actors. Accrediting agencies approved by the Education Department bear responsibility for academic quality, states are tasked with consumer protection, and the Department certifies institutions to be eligible for taxpayer-financed financial aid.

The NPRM would entirely throw off this balance, establishing that accrediting bodies have no authority over the governing boards of public colleges they accredit. The coalition believes this would confer an uneven amount of power to states, and would undermine the role of an accreditor in assessing issues affecting academic quality.

Concerns over this issue have already played out. In 2019, NACIQI convened a subcommittee specifically to examine accreditor oversight of governance and political interference at public colleges, after accreditors raised concerns about state-level intervention threatening institutions' good standing. The NPRM would nix that kind of review by regulatory fiat.

We ask that the Department remove this provision from the NPRM.

Financial aid during an appeal
We appreciate that the Department moderated its original position on continuing federal financial aid to colleges that lose accreditation. Initially, the Department proposed to be able to allow Title IV financial aid to flow to a college that lost accreditation, if the Department believed an accreditor had erred in following its own policies in sanctioning a school. Negotiators broadly criticized this provision, correctly arguing that such a policy could give the Department a runaround to nullifying accrediting decisions with which it did not agree, wasting taxpayer dollars in the process. Our coalition also feels this part of the NPRM would have created deep imbalances among the accountability triad, effectively empowering the Department to override accreditors and by extension, removing a leg of that trio.

The Department currently proposes that it could continue Title IV aid to a college that appeals accreditation withdrawal, “until both arbitration and judicial review has concluded or until relief is denied.” While this language represents an improvement over the original provision, the coalition urges the Department to set guardrails around how and when it would apply this policy.

Student achievement
The coalition shares in the Department’s goal to improve students’ academic experience and outcomes, though we are concerned about the legal viability of the achievement proposals within the NPRM. The HEA does indeed allow the Secretary to require a student achievement standard among federally recognized accreditors, but does not permit the Secretary to dictate exactly that standard. The NPRM prescribes specific categories of evidence an agency assesses—licensing and certification exam results, retention and completion rates, post-completion employment and continued-education outcomes, and economic returns relative to cost. This provision essentially is the Secretary specifying, in enumerated detail, which metrics accrediting agencies should use and which datasets they must draw on to calculate at least one of them.

We urge the Department to revise this provision to remove the potential list of required measure categories and data sources, and instead require only that the accrediting agency itself determine and consistently apply a measure of educational and economic return relative to cost.

Conclusion

The Department's accreditation NPRM reflects some of the most comprehensive and consequential policy proposals for the higher education sector in decades, effectively subverting Congress and acting as a de facto reauthorization of the Higher Education Act. It is crucial that the Department reevaluate aspects of its plan that would build an easy avenue for inferior accreditors to become gatekeepers of federal aid—taxpayer dollars, as well as allow for colleges to jump among agencies to potentially avoid punishments. The Department has also exceeded its statutory authority in several areas, but especially by injecting concepts academic concepts—academic freedom and intellectual diversity—into a regulatory process. Our coalition implores the administration to consider how this policy blueprint would disadvantage students and taxpayers alike and substantially revise the rule before finalizing it. We ask the Department to recommit to the contract that is accreditation—ensuring that access to federal aid remains a privilege that institutions must earn through independent scrutiny, free from government encroachment.

Sincerely,

American Federation of Teachers
Debt Collective
NACAC
New America Higher Education Program
Protect Borrowers
Project on Predatory Student Lending
The Education Trust
The Institute for College Access and Success
The Partnership for College Completion
The University of California Student Association (UCSA)
The Campaign for College Opportunity
UnidosUS
Young Invincibles