

Congress of the United States

Washington, D. C. 20515

May 4, 2020

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Docket ID ED-2018-OPE-0076

Dear Secretary DeVos:

We write to express concern with the U.S. Department of Education's (Department's) notice of proposed rulemaking (NPRM) on distance education and innovation. Due to the propensity for fraud and abuse in distance education, this teaching method requires a strong regulatory structure to ensure students are protected from low-quality and predatory providers.¹ The rapid expansion of distance education by institutions of higher education (institutions) as a response to the coronavirus (COVID-19) pandemic calls for greater rather than less oversight. Additionally, it is not yet clear how the needs of institutions and students will change as a result of the new and unprecedented challenges presented by COVID-19. Especially during this crisis, students must trust that distance education can provide them with a high-quality education. Thus, we urge the Department to delay this rulemaking until Congress and the public can better assess the needs of students and institutions in order to properly respond. If the Department chooses to move forward with the rulemaking process, then we urge the Department to address the specific concerns and recommendations outlined below.

I. Lack of Evidence

We long have expressed our concerns with the Department's flawed process for negotiated rulemaking and the Department's attempts to use its deregulatory agenda to override Congressional intent.² The Department has failed to provide adequate justification and evidence for using negotiated rulemaking to make specific changes to existing regulations, including in this NPRM. Chief among those unsupported claims are arguments that institutions are "dissuaded from innovating because of added regulatory burden and uncertainty about how the Department will apply its regulations to new types of programs and methods of institutional

¹ *The Cautionary Tale of Correspondence Schools*, David Whitman, New America, December 2018, <https://www.newamerica.org/education-policy/reports/cautionary-tale-correspondence-schools/>.

² Letters from Ranking Member Senator Patty Murray and then-Ranking Member and now Chairman Bobby Scott, September 14, 2018 ([link](#)); October 31, 2018 ([link](#)); July 12, 2019 ([link](#) and [link](#))

educational delivery.”³ Data show that despite this claim, distance education and competency-based education (CBE) programs have thrived. Between 1997 and 2017, enrollment in distance education increased from 1.3 million⁴ to nearly 6.7 million.⁵ Additionally, a 2019 study found the vast majority of surveyed institutions either operated at least one CBE program or were interested in or already in the process of creating such a program.⁶

The Department also has failed to demonstrate that relaxing federal rules around online programs will promote *better* outcomes for students and investments for taxpayers. Research indicates that distance education programs vary in quality and risk, exacerbating inequity in postsecondary success for online students who are less academically prepared.⁷ In fact, outcomes for online students are very poor,⁸ especially among students attending for-profit institutions, where online modes of delivery are the most common.⁹

II. Flexibilities for Competency-Based Education (CBE) in 34 CFR 668.2, 34 CFR 668.22, 34 CFR 668.34, and 34 CFR 668.164

While CBE programs present a promising opportunity to focus on student learning outcomes and reduce time to completion, there is little evidence to validate those outcomes. In fact, research shows CBE students could take longer to progress through coursework, especially if they lose momentum by not receiving adequate faculty interaction and support.¹⁰ Further, the evidence cited in the NPRM acknowledges CBE is still in its infancy and multiple barriers exist to expansion apart from federal regulations, including the “need to change business processes and high costs associated with start-up.”¹¹

³ 85 FR 18638.

⁴ *Distance Education and Postsecondary Education Institutions: 1997-98*, National Center for Education Statistics, December 1999, <https://nces.ed.gov/surveys/peqis/publications/2000013/index.asp?sectionID=3>.

⁵ *Distance Learning*, Fast Facts, National Center for Education Statistics, 2018, <https://nces.ed.gov/fastfacts/display.asp?id=80>.

⁶ *State of the Field: Findings from the 2019 National Survey of Postsecondary Competency-Based Education*, American Institutes for Research, October 2019, <https://www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf>.

⁷ *The Promises and Limits of Online Higher Education: Understanding How Distance Education Affects Access, Cost, and Quality*, Di Xu and Ying Xu, American Enterprise Institute, March 2019, <https://www.aei.org/research-products/report/the-promises-and-limits-of-online-higher-education/>.

⁸ *Does Online Education Live Up to Its Promise? A Look at the Evidence and Implications for Federal Policy*, Spiros Protopsaltis and Sandy Baum, January 2019, <https://mason.gmu.edu/~sprotops/OnlineEd.pdf>.

⁹ *Distance Learning*, Fast Facts, National Center for Education Statistics, 2018, <https://nces.ed.gov/fastfacts/display.asp?id=80>.

¹⁰ *The Student Perspective on Competency-Based Education: Qualitative Research on Support, Skills, and Success*, Jennifer Wang, Young Invincibles, September 2015, <https://younginvincibles.org/wp-content/uploads/2015/10/Young-Invincibles-CBE-Paper.pdf>

¹¹ 85 FR 18675

The lack of information about the impact of CBE programs is particularly concerning given the Department has run a multi-year experiment testing the effects of providing flexibilities to CBE programs. To date, the Department has not produced results from the experiment. Instead, the NPRM proposes a regulation based on anecdotal evidence, without providing a reasonable justification for many of its changes.¹² Meanwhile, multiple reviews of direct assessment CBE programs conducted by the Department's Inspector General have raised concerns about the failure of institutions offering these programs to provide required supports to students and necessary information to regulators to adequately track and oversee them.¹³ These audits have led the Inspector General to recommend *more* Department oversight and less flexibility in CBE, in contrast to the Department's proposed rule.¹⁴ We, therefore, urge the Department to abandon its proposed changes to regulations governing the approval and oversight of CBE programs until more evidence and data are gathered to inform the decision.

III. Definition of a Credit Hour in 34 CFR 600.2

The credit hour rule helps create a common currency for the distribution of taxpayer-financed, federal student aid dollars, as it is the underlying mechanism for how institutions and the Department determine a student's enrollment intensity. Without it, taxpayer dollars would be at significant risk from institutions seeking to inflate their courses to gain additional federal financial aid in exchange for less substantive work relative to other institutions.

In fact, the regulatory definition of the credit hour was created in response to reports from the Inspector General of abuses in the for-profit sector that over-inflated the number of credits it was awarding for the amount of coursework it was providing.¹⁵ The existence of a regulatory definition ensures some consistency in how institutions define a credit hour, while allowing adequate flexibility for CBE and other innovative programs to test new approaches to higher education. Eliminating the credit hour definition, without providing a meaningful and appropriate replacement, would put students, taxpayers, and the entire CBE field at risk.

¹² "There is anecdotal evidence that competency-based education programs may have strong loan repayment performance...Of course, it could be the unique attributes of WGU, or the students attracted to the institution, that contribute to these results, and it is not yet known if the results would be replicated by other institutions." 85 FR 18682-3.

¹³ See, for example: *The Higher Learning Commission Could Improve Its Evaluation of Competency-Based Education Programs to Help the Department Ensure the Programs Are Properly Classified for Title IV Purposes*, Office of the Inspector General, U.S. Department of Education, September 2015, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05o0010.pdf>; *The Western Association of Schools and Colleges Senior College and University Commission Could Improve Its Evaluation of Competency-Based Education Programs to Help the Department Ensure Programs Are Properly Classified for Title IV Purposes*, Office of the Inspector General, U.S. Department of Education, August 2016, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a05p0013.pdf>.

¹⁴ See *id.*

¹⁵ *The Higher Learning Commission of the North Central Association of Colleges and Schools' Decision to Accredite American InterContinental University*, Alert Memorandum, Office of the Inspector General, U.S. Department of Education, December 2009, <https://www2.ed.gov/about/offices/list/oig/auditreports/AlertMemorandums/113j0006.pdf>.

A federal definition is even more critical since the Department eliminated the regulatory requirement on accrediting agencies to evaluate the reliability and accuracy of the institution's assignment of credit hours.¹⁶ It would be unacceptable to have no federal or accreditor role in the evaluation of institutions' credit hour policies. We, therefore, urge the Department to maintain consensus language related to the credit hour, as included in the NPRM, if the Department proceeds to issue a final rule, and not to revert to its original position of eliminating a federal definition of the credit hour.

IV. Definition of Distance Education in 34 CFR 600.2

A long history of abuse by fly-by-night, for-profit correspondence schools – at the expense of both federal financial aid recipients and veterans using GI educational benefits – led Congress to place limitations on correspondence education.¹⁷ At the same time, the development of new technologies made online education more ubiquitous. Following a demonstration project testing federal aid for distance education programs, the George W. Bush Administration specifically urged Congress to implement “quality standards for electronically-delivered education [that] emphasize the importance of interaction between the instructor and student.”¹⁸ Congress followed this recommendation and established “regular and substantive interaction” as the singular statutory distinction between correspondence courses and distance education.

We urge the Department not to weaken the distinction between correspondence courses and distance education. Otherwise, the Department will undermine Congressional intent and abdicate its responsibility to enforce statutory requirements related to these two forms of education. Meanwhile, the consensus definition for distance education, including the definitions for regular and substantive interaction and the definition of an instructor, provide helpful clarifications to these terms. If the Department issues a final rule, we urge it to maintain the consensus definition, as published in the NPRM, and strongly urge the Department not to revert to its original proposal to allow accrediting agencies to define such terms with minimal federal guidelines.

V. Written Arrangements to Provide Educational Programs in 34 CFR 688.5

In order to receive taxpayer-financed Title IV financial aid dollars, institutions must meet a number of requirements that are established and enforced by the program integrity triad. This includes obtaining accreditation and state authorization, passing federal financial responsibility and administrative capability tests, and meeting federal cohort default rate thresholds. Third-party providers that are not eligible for Title IV financial aid are not subject to any of these tests.

¹⁶ 34 CFR 602.24(f) and 603.24(c).

¹⁷ See, e.g. 20 U.S.C. 1091(k); see also *The Cautionary Tale of Correspondence Schools*, David Whitman, New America, December 2018, <https://www.newamerica.org/education-policy/reports/cautionary-tale-correspondence-schools/>.

¹⁸ *Third Report to Congress on the Distance Education Demonstration Program*, U.S. Department of Education, April 2005, <https://www2.ed.gov/programs/disted/DEDP-thirdreport.pdf>.

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Current regulations guard against the risk in institutional arrangements by limiting the share of an educational program that can be outsourced to an ineligible third-party provider – up to 25 percent without accreditor approval and no more than 50 percent with accreditor approval.

The Department initially proposed eliminating these restrictions. This proposal would have allowed otherwise ineligible providers to operate under the institution’s brand and receive taxpayer dollars, without the oversight of the federal, state, and accreditor systems designed to protect students and taxpayers. Negotiators resoundingly rejected the Department’s proposal, as it effectively would create a back door into Title IV financial aid eligibility for untested educational providers. Negotiators, however, wisely agreed to keep current regulations unchanged, and we strongly urge the Department to do the same.

Conclusion

The Department’s proposed regulations governing distance education and innovation should ensure, first and foremost, that students and taxpayers are adequately protected from low-quality and predatory providers. We believe those protections are well-reflected in several areas of the consensus agreements and urge the Department not to deviate from those provisions as outlined above. We remain troubled that the Department continues to indicate concerns with several areas of consensus agreement reached in the NPRM, despite the fact negotiators rejected many of the Department’s most problematic proposals.¹⁹ Given the outstanding coronavirus pandemic, we urge the Department to delay this rulemaking until the COVID-19 pandemic has ended and the public can adequately assess how to meet the needs of students and institutions.

Sincerely,



ROBERT C. “BOBBY” SCOTT

Chairman
House Committee on Education
and Labor



PATTY MURRAY

Ranking Member
Senate Committee on Health, Education,
Labor and Pensions

¹⁹ In the NPRM, the Department continues to express areas of concern with certain consensus agreements. For example, see discussion in “credit hour,” 85 FR 18646, and in “written arrangements” in 85 FR 18659.



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