United States Senate
WASHINGTON, DC 20510

July 12, 2019

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

Dear Secretary DeVos:

We write to express strong concerns regarding the U.S. Department of Education's ("Department") proposed regulations for the federal recognition of accrediting agencies, the accreditation of higher education programs and institutions, and the state authorization disclosures and complaint processes for distance education providers. Though the Department states these changes will "clarify the core oversight responsibilities" of each entity in the regulatory triad, cumulatively these proposals will weaken the ability of accrediting agencies, States, and the Department itself to ensure meaningful oversight over institutions and accreditors.[1]

Although the proposed regulations were developed by consensus through the negotiated rulemaking process, these regulatory changes must be viewed in the broader context of this Department's actions. Department officials have demonstrated an unwillingness to hold accrediting agencies accountable for ensuring a minimum bar of institutional quality – for example, by reinstating recognition of the Accrediting Council for Independent Colleges and Schools (ACICS) despite its numerous oversight failures and continued accreditation of Corinthian Colleges, Inc., ITT Educational Services, Inc., and Education Corporation of America until the day of or day before those institutions shuttered.[2] Further, Department officials have already provided closing schools with far too much latitude to continue operations and profit from their failure.[3] And when both accreditors and institutions have failed, the Department has declined to provide students with the relief to which they are entitled under the law.[4] The Department has not only been unwilling to hold accrediting agencies accountable for the

[1] Student Assistance General Provisions, the Secretary's Recognition of Accrediting Agencies, the Secretary's Recognition Procedures for State Agencies, 84 F.R. 27404 (June 12, 2019) (to be codified at 34 C.F.R. Parts 600, 602, 603, 654, 668, & 674), https://www.govinfo.gov/content/pkg/FR-2019-06-12/pdf/2019-12371.pdf.
[2] Danielle Douglas-Gabriel, "Virginia College students sue DeVos for reinstating controversial for-profit college accreditor," *The Washington Post*, June 3, 2019, https://www.washingtonpost.com/education/2019/06/03/virginia-college-students-sue-devos-reinstating-controversial-for-profit-college-accreditor/.
[3] Michael Vasquez, "The Nightmarish End of the Dream Center's Higher-Ed Empire," *The Chronicle of Higher Education*, March 9, 2019, https://www.chronicle.com/article/The-Nightmarish-End-of-the/245855.
[4] Erica L. Green, "Education Department Has Stalled on Debt Relief for Defrauded Students," *The New York Times*, April 5, 2019, https://www.nytimes.com/2019/04/05/us/politics/betsy-devos-student-loan-debt-relief.html.

oversight of their institutions, it has also made clear its position that there is no meaningful federal role in holding colleges or their programs accountable.[5]

In addition, the process the Department designed and by which consensus was reached was, itself, flawed. Congress has raised numerous concerns about the negotiated rulemaking process that went unaddressed, delegitimizing of the rulemaking's consensus. Condensing such an expansive agenda with over a dozen topics into a single negotiated rulemaking provided inadequate time for the full negotiated rulemaking committee to meaningfully discuss the complete scope of regulatory changes—this point was raised repeatedly throughout the process by negotiators.[6] The Department's decision to outsource the debate over the regulatory changes to non-voting subcommittees and to break both the votes and the subsequent publication of proposed rules into multiple, separate proposals provides further evidence that the scope of the regulatory agenda was too expansive. In particular, it was problematic that a different set of negotiators—the non-voting members of the subcommittees who lacked expertise in accreditation and were not representative of the full committee—were the ones to debate the intricacies of the definitions that would be applied to the broader accreditation proposals discussed by the full voting committee.

The voting committee also lacked adequate representation of States. While representatives from numerous accreditors and institutions were included on the full committee, the Department initially excluded State representatives altogether. Further, the Department's representative was the sole vote of dissent that blocked negotiators from adding a representative for the State attorneys general from the full committee, omitting a critical consumer protection and state enforcement voice from the discussions.[7]

Given this context, the proposed changes to the accreditation and state authorization disclosures and complaint processes have the potential to exacerbate existing weaknesses in the program integrity triad, which the Department estimates will cost taxpayers $3.8 billion over the next 10 years.[8] We believe this estimate understates the cost as it does not account fully for the thousands of students who would be left with debt they otherwise would not bear from low-quality institutions, including through the Department's own acknowledgment that more students would lose the opportunity for a closed school discharge because accrediting agencies would now have the option to sanction individual programs instead of institutions.[9] The proposed regulations would significantly lower the bar for new, unproven accreditors to act as gatekeepers to federal financial aid, while simultaneously minimizing the Department's ability to hold those accreditors accountable. In addition, they would lower accreditor standards that institutions must meet to access Title IV funds. The proposed regulations would further extend access to federal financial aid to failing institutions, while shielding prospective buyers of a failed school from accepting the full liability of its debts. We detail our strong concerns with provisions in the proposed

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[5] Program Integrity: Gainful Employment, 83 F.R. 40167 (August 14, 2018) (to be codified at 34 C.F.R. Parts 600 and 668), https://www.govinfo.gov/content/pkg/FR-2018-08-14/pdf/2018-17531.pdf.

[6] Accreditation and Innovation Negotiated Rulemaking Sessions 1-3, *Jan. 14-16; Feb. 19-22; and Mar. 25-28, 2019.*

[7] David Halperin. "DeVos Department Bars State Attorneys General from Key Panel." *Republic Report*, January 16, 2019, https://www.republicreport.org/2019/devos-department-bars-state-attorneys-general-from-key-panel/.

[8] 84 F.R. 27450.

[9] 84 F.R. 27450.

regulation below, and urge the Department to remove those provisions and maintain current regulations while Congress reauthorizes the Higher Education Act.

1. The proposed rule would fast-track federal recognition of unproven accreditors.

Under the proposed regulations, the Department would open significant loopholes to the requirement that new accreditors must have two years of experience prior to becoming an official gatekeeper of Title IV funds. Specifically, the rules would allow accreditors that are "affiliated with" or "a division of" a recognized agency to receive federal recognition without meeting the two-year rule.[10] The Department, however, does not define either term, which could allow unknown and untested agencies without the requisite experience and expertise to exercise oversight of federal financial aid funds.

The Department's proposal would also eliminate the current regulation requiring an accrediting agency to demonstrate that "its standards, policies, procedures, and decisions to grant or deny accreditation are widely accepted" across the education community.[11] This provision is a long-standing, foundational component of the peer-review process on which accreditation is based—it is also the provision used by the Department previously to claim ACICS was widely accepted by the higher education community when it was not.[12] Instead, the Department proposes that any new agency seeking initial recognition simply submit letters of support from accredited institutions, educators, and employers, and letters from at least one program or institution seeking accreditation by the agency.[13] This is an insufficient substitute to ensure adequate community support for an agency's actual standards, policies, procedures, and decisions. Further, the proposal would no longer require an accreditor to have prior experience before expanding the scope of its accrediting activities to new degree levels, certificates, programs, or geographic regions.[14]

Accreditors are a critical pillar of the program integrity triad—these proposals would expose the entire higher education system to increased risk by allowing unproven regulators to grant new institutions and programs access to federal student aid, including through student loans—for which students will assume the debt burden. Department officials note in their rationale that non-federal negotiators expressed concern that eliminating requirements regarding prior experience could create risk.[15] Department officials said they have added additional requirements to "mitigate risk," but provide no concrete examples to substantiate that claim and, in fact, have proposed to instead further reduce oversight through other regulatory changes.

2. The proposed rule would make it more difficult to remove ineffective accreditors from serving as gatekeepers of federal financial aid.

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[10] 84 F.R. 27418.
[11] 84 F.R. 27419.
[12] Michael Stratford, "Education Department overstated endorsements of for-profit college accreditor," *Politico*, October 4, 2018, https://subscriber.politicopro.com/article/2018/10/education-department-overstated-endorsements-of-for-profit-college-accreditor-830646.
[13] 84 F.R. 27434 – 27437.
[14] 84 F.R. 27434 – 27437.
[15] 84 F.R. 27419.

Under the Department's proposed rules, ineffective accrediting agencies would be subject to a less transparent and less comprehensive review—making them less likely to lose recognition. The proposed regulations would introduce the new concept of a "monitoring report" for those accreditors that are found to be in "substantial compliance"—but nevertheless not in full compliance with federal law. This is an incredibly broad term that the Department is proposing to define to describe situations when an accrediting agency "***generally adheres*** with fidelity to those policies, practices, and standards" or "has policies, practices, and standards that need minor modifications to reflect its ***generally compliant practices***" (emphasis added).[16]

This broad definition has no statutory basis and leaves ample Secretarial discretion to determine whether an accreditor is out of compliance with federal requirements. The proposed regulation allows the Senior Department official to approve an agency's recognition for at least 12 months based on "substantial compliance," if the agency has a policy or procedure "in place" but "has not had the opportunity to apply the policy or procedure."[17] This process would allow Department staff to make decisions about how it plans to enforce federal law without full transparency and public accountability, rather than subjecting the reviews of these monitoring reports to a typical full agency review that involves separate reviews by the Senior Department official and Secretary, as well as a public comment period and a public Advisory Committee review.[18] Weakening the review process for accreditors is particularly troubling given the Department's acknowledgement that "increased competition among accreditors could have the unintended consequence of encouraging some accreditors to lower standards."[19]

3. The proposed rule would weaken the standards by which accreditors evaluate institutions.

Under the proposed regulations, accreditors would no longer be required to evaluate institutions based upon one clear set of standards. Instead, accreditors could establish "alternate standards, policies, and procedures to satisfy recognition requirements in the interests of innovation or addressing undue hardship to students."[20] The Department has said these alternate standards could be established based on industry (rather than academic) recommendations, allowing for more "innovative" program delivery or other demonstrated need. Multiple sets of accreditation standards would greatly diminish their usefulness in ensuring baseline quality, making it more difficult for the Department to monitor accreditor performance moving forward. This is particularly worrisome given the Department has not required transparency or clarity around what the alternate standards would be, when they may be used, or how the Department would assess agencies with multiple sets of standards.

Likewise, the Department proposes to require accreditors to effectively establish another standard for institutions with religious-based missions. This conflicts with what Congress intended in the underlying statute by treating institutions with religious missions differently than

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[16] 84 F.R. 27417.
[17] 84 F.R. 27439.
[18] We are further concerned that the Department has already begun to implement this process to monitor ACICS when the proposed regulation has yet to receive public comment and go into effect.
[19] 84 F.R. 27405.
[20] 84 F.R. 27423.

others, and by cordoning off certain policies, decisions, and practices from review.[21] The Department's proposal could open the door for religious colleges to discriminate in major areas of operations and prevent accrediting agencies from addressing those issues.

The proposed rule also significantly curtails regulations regarding accrediting agency review and oversight over institutions' substantive changes. The substantive change regulations were created in 1994 to address tactics used by for-profit colleges to establish branch campuses that would gain accreditation through the main campus and avoid review by an accrediting agency, and is an area of considerable risk.[22] Nevertheless, the proposed rule would allow some institutions the ability to add new locations without accreditor approval, and removes the requirement that a representative sample of these locations be periodically reviewed.[23]

In addition, the proposed rule allows accrediting agencies to approve certain major substantive changes at an institution using only its agency staff and not the agency's commission.[24] This change would continue to shield significant changes at an institution from full transparency and accountability. For example, agencies would be able to approve written arrangements between an institution and an unaccredited educational provider without the full transparency and accountability afforded by the agency's commission, whose members are typically voted in by the institutions the agency oversees, are subject to conflicts of interest policies, and include public members.

Finally, the proposed rule strikes existing provisions requiring accrediting agencies to review the reliability and accuracy of an institution's assignment of credit hours.[25] This is contrary to Congress's intent to ensure colleges do not inflate the number of credit hours required, demonstrated by its enactment of a statutory provision requiring accrediting agencies to have standards to evaluate whether the amount of time required for a program aligns with the objectives of the credential. This statutory provision has been in place since 1992, and was enacted by Congress in response to colleges that had falsified information regarding the length of programs offered in order to charge higher levels of tuition.[26]

4. The proposed rule would extend access to taxpayer funds for failing institutions.

The proposed rule would further extend the time period during which a failing institution can retain access to federal student aid. The proposed regulation would permit accreditors to allow

[21] 20 U.S.C. 1099b(a)(4)(A) calls for an agency to consistently apply and enforce standards that respect the stated mission of the institution of higher education, including religious missions. This means acknowledging each institution's mission with due regard, not creating separate standards and singling out one type of mission.
[22] Antoinette Flores, "Substantive Change Regulations," *Center for American Progress*, January 9, 2019, https://cdn.americanprogress.org/content/uploads/2019/01/09072144/Substantive-Change.pdf.
[23] 84 F.R. 27425 – 27482.
[24] 84 F.R. 27425 – 27482.
[25] 84 F.R. 27482. The Department also eliminates the requirement that State agencies "conduct an effective review and evaluation of the reliability and accuracy of the institution's credit hours." 84 F.R. 27440.
[26] Congress again reaffirmed this sentiment in 1998, stating that "assuring that course hours are not inflated is an appropriate function of a review of course quality" (S. Rpt. 105-181, p. 71).

the institutions they oversee to remain out of compliance with standards, policies, and procedures for recognition for up to three years—and even longer for those that claim to have good cause.[27]

Additionally, the new proposed rule rewrites the requirements for accreditors on the enforcement of their standards, walking back requirements to immediately initiate adverse action against an institution and doubling the amount of time an institution can take to bring itself into compliance—from a current maximum of two years to now ***four years***—before losing its accreditation.[28]

Department officials argue that short, "overly prescriptive" timelines "place a greater importance on acting swiftly than acting in the best interest of students."[29] According to a report from the U.S. Government Accountability Office, however, even with the existing timelines, accrediting agencies rarely take action against colleges other than for financial reasons.[30] Instead, accreditors often take other actions, including monitoring and warnings, before issuing a probation or show cause order, which is typically used to officially start the two-year clock for a college to bring itself into compliance. Despite current practice, the Department's proposal takes an extreme position of potentially allowing an institution to be out of compliance for ***at least seven years*** before it is subject to an adverse action. This can hardly be in the best interest of students or taxpayers.

These changes contradict the lessons learned from the numerous high-profile school closures over the past few years, from Corinthian Colleges and ITT Technical Institute, which occurred nearly five years ago, to Education Corporation of America, Vatterott Colleges, and Dream Center Education Holdings, which all occurred in the past year. These examples underscore the need for swifter action on the part of accreditors and the Department. Doing so would have protected tens of thousands of students from going further into debt by unknowingly continuing to attend failing schools, and would have given those students an opportunity to transfer to higher-performing institutions or get their loans discharged.[31] Despite this context, the proposed rule would extend Title IV dollars to closing or failing institutions for up to 120 days after its participation in federal aid programs officially ends.[32]

5. The proposed rule would enable bad actors to profit off of failing institutions.

Under the proposed regulations, an entity that purchases a failing school would no longer be responsible to repay the balance of the debt the institution owes to taxpayers. Instead, the new owner would only be responsible for the institution's Title IV liability for a minimum of that academic year or up to a maximum of one prior academic year.[33] The Department says this change will help facilitate the purchase of failing institutions and "result in an investment in the

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[27] 84 F.R. 27423.
[28] 84 F.R. 27424.
[29] 84 F.R. 27425.
[30] U.S. Government Accountability Office, Higher Education; Education Should Strengthen Oversight of Schools and Accreditors. Published Dec. 22, 2014, reissued January 22, 2015. https://www.gao.gov/products/GAO-15-59
[31] Michael Vasquez and Dan Bauman, "How America's College-Closure Crisis Leaves Families Devastated," *The Chronicle of Higher Education*, April 4, 2019, https://www.chronicle.com/interactives/20190404-ForProfit.
[32] 84 F.R. 27440 – 27441.
[33] 84 F.R. 27415.

community and additional opportunities for students to complete a postsecondary credential." It is not clear how shielding owners from full liability makes this possible.[34] Rather, the proposed rule could make it easier for for-profit entities to acquire and profit off of failing institutions on students' and taxpayers' dimes without any guarantee of quality or long-term stability for students. Sales may exacerbate problems and subject thousands of students to harm. For example, schools owned by the Education Management Corporation (EDMC) have long faced problems around potential insolvency, and those problems were only exacerbated by the Department-approved sale and attempted conversion to nonprofit status by the unproven Dream Center Education Holdings, which had zero experience managing a college.[35]

6. The proposed rule would eliminate important consumer disclosures and complaint procedures required for the State authorization of distance education providers and would weaken requirements for the State authorization for religious institutions.

We are encouraged that negotiators agreed to uphold several central tenets of the State authorization requirements for distance education providers, and prospective students would receive direct disclosures if the program in which the student intended to enroll did not meet the requirements for licensure in the State in which the student was located.[36] In particular, we have long been concerned that existing state reciprocity agreements have sought to curtail states' authority to enforce their own student protection laws. We urge the Department to ensure any final regulations specify that a reciprocity agreement will not be considered to meet the state authorization requirements under 20 U.S.C. 1099a (34 CFR 600.9) unless it permits states to enforce both their general and specific higher education laws.

Nevertheless, while the proposed rule would uphold many of the existing requirements for State authorization, it proposes to eliminate the need for programs to provide students with disclosures regarding any adverse actions against them from either States or accreditors. The Department also proposes to eliminate language specifying how States must receive, review, and act upon complaints from students enrolled in distance education.[37] These were common-sense student protections established by the prior Administration to allow students to learn pertinent, and potentially problematic, information regarding their institution prior to enrollment—particularly when enrollment is exclusively online and there is no physical face-to-face contact.

Additionally, the proposed rule would strike the existing definition of a "religious institution" as one that is owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation, and only awards religious degrees or certificates.[38] Religious institutions may currently be exempt from State authorization requirements if established by State law or constitution. Striking this definition would allow a State to exempt religious institutions from a federal requirement for any reason. As a result, fewer students may be covered by the protections of the state authorization process.

[34] 84 F.R. 27416.

[35] Ben Unglesbee, "Facing Insolvency, Dream Center is Unloading Art Institutes," *Education Dive*, January 16, 2019, https://www.educationdive.com/news/facing-insolvency-dream-center-is-unloading-art-institutes/546114/.

[36] 84 F.R. 27412 – 17414.

[37] 84 F.R. 27413.

[38] 84 F.R. 27413.

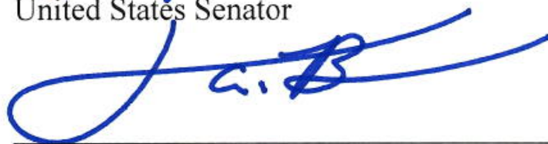
Taken together, the proposed changes to accreditation and State authorization disclosures and complaint processes would be highly detrimental to the oversight of our nation's higher education system. There is inadequate evidence to justify these expansive and expensive changes. We strongly urge the Department to abandon the proposed rule to avoid risk to both taxpayers and students and instead to maintain current regulations while Congress works to reauthorize the Higher Education Act.

Sincerely,

PATTY MURRAY
United States Senator

TAMMY BALDWIN
United States Senator

RICHARD BLUMENTHAL
United States Senator



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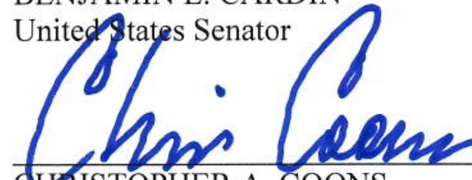

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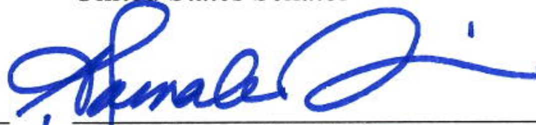

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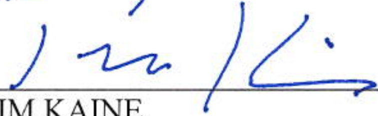

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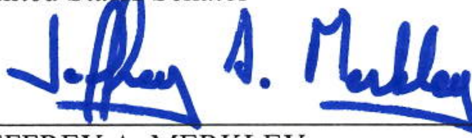

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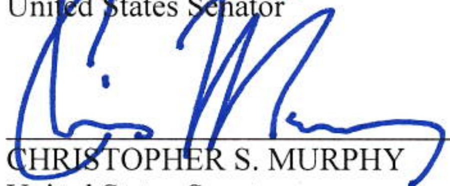

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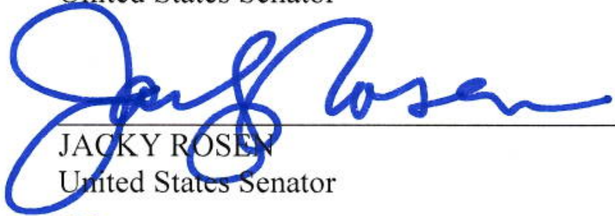

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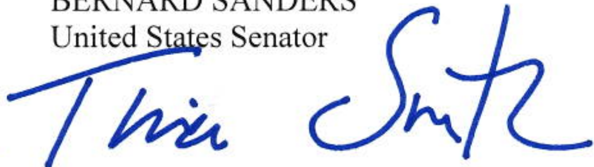

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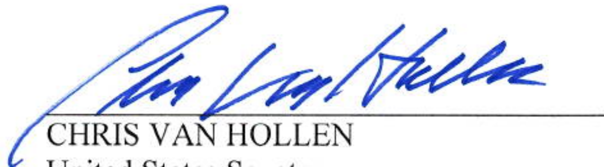

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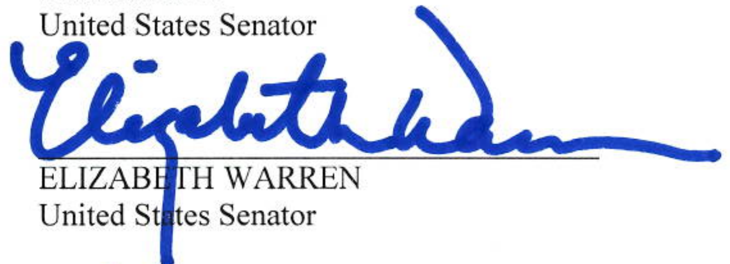

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SHELDON WHITEHOUSE
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RON WYDEN
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