



July 12, 2019

SENT VIA EMAIL

Secretary Betsy DeVos  
U.S. Department of Education  
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Dear Secretary DeVos,

On behalf of the National Student Legal Defense Network and the 1.7 million member American Federation of Teachers, we write today to request a hearing regarding the Department's proposal to substantially modify the criteria that the Department uses to determine whether an accrediting agency or association is a "reliable authority as to the quality of education or training" for the purposes of Title IV of the Higher Education Act ("HEA"). *See* 84 Fed. Reg. 27,404 (June 12, 2019) (hereinafter the "NPRM"). 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.

Such a hearing is required by HEA § 496(a), 20 U.S.C. § 1099b(a), which limits the Secretary's authority to establish accrediting agency recognition criteria until "after a notice and opportunity for a hearing," *i.e.*, a procedural requirement unique to regulations promulgated regarding accreditation criteria under § 496(a). Particularly in light of the fact that the Department has proposed a drastic restructuring of the process by which it recognizes accrediting agencies—including the substantive criteria that recognized accreditors must meet—the public must have an opportunity to respond to comments submitted during the post-NPRM comment period. This is both appropriate and statutorily required.

**BACKGROUND**

Higher education accreditation has the primary purpose of helping ensure that institutions of higher education provide a quality education to students. HEA § 496(a). In fact, in order for an institution to participate in the Title IV student aid programs, the institution must be accredited by an accrediting agency recognized by the Secretary "to be a reliable authority as to the quality of education or training offered for the purposes of [the HEA] or for other federal purposes." *Id.* Today, recognized accrediting agencies serve as the gatekeeper to approximately \$125 billion in annual federal Title IV funding.

Given the tremendously important role that accrediting agencies play in our nation's system of higher education (and higher education finance), it is not surprising that Congress was prescriptive about the criteria and the process the Secretary must use to determine whether an

accrediting agency can serve as a “reliable authority as to the quality” of an institution of higher education. Under the HEA, such standards are only to be established “after notice and opportunity for a hearing.” *Id.* The HEA then outlines eight separate criteria, plus subparts, that the Secretary must include in her criteria, in addition to requiring that accrediting agencies have an “appropriate measure or measures of student achievement.” *Id.*

On July 31, 2018, the Department published a notice in the Federal Register announcing its intent to establish a negotiated rulemaking committee under HEA § 492, 20 U.S.C. § 1098a. *See* 83 Fed. Reg. 36,814 (July 31, 2018). As announced in the July 2018 Notice, the proposed topics for negotiation included requirements for accrediting agencies in their oversight of member institutions, requirements of accrediting agencies to honor institutional mission—and, importantly, for present purposes—“[c]riteria used by the Secretary to recognize accrediting agencies.” 83 Fed. Reg. at 36,815. The Department also announced the creation of three “public hearings for interested parties” to broadly discuss the “rulemaking agenda.” 83 Fed. Reg. at 36,816. As stated in the July 2018 Notice, those hearings were held because “Section 492 of the HEA requires that, before publishing any proposed regulations to implement programs authorized under title IV of the HEA, the Secretary obtain public involvement in the development of those regulations.” 83 Fed. Reg. at 36,815. This requirement is distinct from the process made explicit in HEA § 496(a), which sets forth a hearing requirement specific to the criteria that accrediting agencies must meet to gain recognition from the Department.

On October 15, 2018, the Department published a notice in the Federal Register announcing its intention to establish a negotiated rulemaking committee to prepare proposed regulations for the programs authorized under Title IV of the HEA. *See* 83 Fed. Reg. 51,906 (Oct. 15, 2018). The topics for consideration by the negotiated rulemaking committees included the “[c]riteria used by the Secretary to recognize accrediting agencies, emphasizing criteria that focus on education quality and deemphasizing those that are anti-competitive.” *Id.* at 51,907.

The Department subsequently sought negotiators to represent various constituencies in the negotiated rulemaking process. Although that process was far from inclusive of the appropriate points of view, the Department nevertheless convened a negotiated rulemaking committee that met to develop proposed regulations at sessions held in January, February, March, and April 2019. At the convenings, the negotiators discussed a wide array of topics, involving accreditation. At the final meeting, on April 3, 2019, the negotiated rulemaking committee reached consensus on regulatory language on all of the topics under consideration. On June 12, 2019, the Department issued the NPRM, publishing and seeking comment on the proposed rule suggested by the negotiated rulemaking committee.

### **REQUEST FOR HEARING**

The policy proposals in the NPRM are sweeping. Indeed, the Department has referred to them as part of their effort to “rethink” accreditation.<sup>1</sup> And for the reasons stated in our separately filed

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<sup>1</sup> Andrew Kreighbaum, *DeVos to Announce New Push for Deregulation, Innovation*, Inside Higher Ed (July 30, 2018), available at: <https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>.

comment, the policies espoused in the NPRM will be harmful to students and taxpayers, while simultaneously benefitting poor performing institutions of higher education. Given the nearly \$1.6 trillion in outstanding student loan debt in this country, rampant abuse at predatory for-profit colleges, and immense problems with respect to the servicing of federally issued and held student loans, the Department's proposals to weaken the standards for quality assurance will only compound the enormity of the student debt crisis in this country.

As the Department well knows, for *all* regulations promulgated under the HEA, Congress has mandated that that Department use additional procedures that are not required of most other federal agencies. For example, while many federal agencies can promulgate rules using the process outlined in § 553 of the Administrative Procedure Act ("APA"), HEA § 492 requires that the Department must use employ additional processes that involve public input and discussion. *First*, HEA § 492(a) requires the Secretary to "obtain public involvement in the development of proposed regulations." The Secretary is required to "provide for a comprehensive discussion and exchange of information concerning the implementation" of Title IV by holding "regional meetings and electronic exchanges of information." HEA § 492(b). The Secretary is also required to "take into account the information received through such mechanisms in the development of proposed regulations and shall publish a summary of such information in the Federal Register together with such proposed regulations." *Second*, HEA § 492 requires—again, with respect to *all* regulations published for Title IV—that the Secretary, "[a]fter obtaining the advice and recommendations" described above, and before publishing an NPRM, subject proposed rules to a negotiated rulemaking process. HEA § 492(b); *see also Nat'l Educ. Ass'n v. DeVos*, No. 18-CV-05173-LB, \_\_\_ F. Supp. 3d. \_\_\_, 2019 WL 1877355 (N.D. Cal. Apr. 26, 2019) ("In the HEA, Congress imposed a statutory requirement on the promulgation of all Title IV regulations. They must be subject to 'negotiated rulemaking.'").

But for a class of regulations, Congress has chosen to require that the Department use yet an *additional* procedure. More specifically, when the Secretary adopts or modifies regulations regarding the "criteria" that the Department uses in order to determine whether an accrediting agency is a "reliable authority as to the quality of education or training offered," the HEA imposes a third requirement, *i.e.*, a "notice and opportunity for a hearing." Now that the comment period is on the cusp of closure, we believe that the Department is statutorily required to provide notice of, and convene, a "hearing" during which members of the public can react, present testimony (oral or written) and evidence, and respond to the comments that have been submitted during the process.<sup>2</sup>

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<sup>2</sup> To be clear, we are not requesting that the Department convert the rulemaking into a "formal" rulemaking governed by APA §§ 556-557. Nor are we asking the Department to conduct a "hearing" as that term is used in APA §§ 556-557. Nor are we asserting that APA § 553 requires more of the Department. Rather, under the plain language of section 496(a) of the Higher Education Act, a hearing is required for any regulations promulgated under the authority contained therein. The failure to comply with this procedure would therefore be "contrary to law" under 5 U.S.C. § 706(2)(A), "without observance of procedure required by law" under 5 U.S.C. § 706(2)(D), and render the resultant regulations in excess of the Department's statutory authority under 5 U.S.C. § 706(2)(C).

The failure to provide an additional hearing would render the “notice and opportunity for a hearing” language in § 496(a) mere surplusage. *See generally Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the Supreme Court’s “reluctan[ce] to treat statutory terms as surplusage” in any setting). Indeed, if Congress intended that the negotiated rulemaking procedures could satisfy the “notice and opportunity for a hearing” requirement in § 496(a), there would simply be no reason to include that provision at all.

Finally, the Department’s failure to adhere to the procedural requirements of the HEA can result in vacatur of the proposed rules. *See, e.g., Bauer v. DeVos*, 332 F. Supp. 3d 181, 186 (D.D.C. 2018) (vacating, *inter alia*, the Final Rule delaying the 2016 Borrower Defense Rule); *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 55 (D.D.C. 2019) (vacating the Department’s attempt to delay the 2016 “significant disproportionality” regulations under the Individuals with Disabilities in Education Act); *Nat’l Educ. Ass’n v. DeVos*, 2019 WL 1877355 at \*22 (noting that the “presumptive remedy” for an APA violation associated with the promulgation of a rule “is to vacate the rule” and vacating the Department’s delay of the 2016 State Authorization rule). Although we understand that the Department has expressed its desire to see the NPRM turn into a Final Rule before November 1, 2019—presumably due to the “master calendar” requirement in HEA § 482—the Department cannot let its policy desires supersede the procedures mandated by Congress.

Accordingly, because the Department has chosen to amend the regulations governing the “criteria” it uses to assess the extent to which an accrediting agency or association is a “reliable authority as to the quality of education or training offered,” a hearing is legally required regarding any proposals promulgated pursuant to the Department’s authority under HEA § 496(a). Those proposals<sup>3</sup> include:

- *What definitions apply to this part?* (§ 602.3) [84 Fed. Reg. at 27,416];
- *Link to Federal Programs* (§ 602.10) [84 Fed. Reg. at 27,416];
- *Geographic Area of Accrediting Activities* (§ 602.11) [84 Fed. Reg. at 27,418];
- *Accrediting Experience* (§ 602.12) [84 Fed. Reg. at 27,418];
- *Purpose and Organization* (§ 602.14) [84 Fed. Reg. at 27,419];
- *Accreditation and Preaccreditation Standards* (§ 602.16) [84 Fed. Reg. at 27,420];
- *Application of Standards in Reaching an Accrediting Decision* (§ 602.17) [84 Fed. Reg. at 27,422];
- *Ensuring Consistency in Decision- Making* (§ 602.18)<sup>4</sup> [84 Fed. Reg. at 27,423];
- *Monitoring and Reevaluation of Accredited Institutions and Programs* (§ 602.19) [84 Fed. Reg. at 27,424];
- *Enforcement of Standards* (§ 602.20) [84 Fed. Reg. at 27,424];

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<sup>3</sup> Except as otherwise noted, each of these proposals expressly includes HEA § 496(a) as being part of the justification for the proposal. Nevertheless, to the extent the Department purports to rely on HEA § 496(a) as all or part of its authority to justify any other proposal in the NPRM, we ask that the hearing include those provisions.

<sup>4</sup> In the NPRM, this section refers to “HEA section 496(4)(A).” We believe this to be an error, as the reference should be to HEA § 496(a)(4)(A).

Secretary Elisabeth DeVos

July 12, 2019

Page 5 of 5

- *Review of Standards* (§ 602.21) [84 Fed. Reg. at 27,425];
- *Substantive Change* (§ 602.22) [84 Fed. Reg. at 27,425];
- *Operating Procedures All Accrediting Agencies Must Have* (§ 602.23) [84 Fed. Reg. at 27,428];
- *Due Process* (§ 602.25) [84 Fed. Reg. at 27,431];
- *Notification of Accrediting Decisions* (§ 602.26) [84 Fed. Reg. at 27,431];
- *Activities Covered by Recognition Procedures* (§ 602.30) [84 Fed. Reg. at 27,433];
- *Procedures for Review of Agencies During the Period of Recognition* (§ 602.33) [84 Fed. Reg. at 27,437].

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There can be no doubt that well-functioning accrediting agencies play a vital role in helping to ensure that higher education fulfills its promise to students. Congress, through the HEA, understood the importance of this gatekeeping function by requiring that accrediting agencies must be recognized by the Department subject to standards prescribed by statute and regulation. With respect to those regulatory standards, Congress unambiguously demanded that the Department use both the negotiated rulemaking process and an additional “hearing.” Such a hearing is crucial to the Department’s consideration of comments, views, and perspectives of interested parties, including the students and teachers represented by our organizations.

Thank you for arranging a hearing. We look forward to hearing from you.

Sincerely,



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President  
American Federation of Teachers, AFL-CIO



Aaron Ament  
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National Student Legal Defense Network

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