



Statement

COMMITTEE ON EDUCATION & LABOR

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The Hon. Robert C. "Bobby" Scott • Chairman

U.S. House Committee on Education and Labor, Majority Staff
Statement to the Office of Information and Regulatory Affairs
Friday, June 14, 2019

The Department of Labor's (Department) proposal to create Industry-Recognized Apprenticeship Programs (IRAPs) and affiliated Standard Recognition Entities (SREs)¹ makes unprecedented and unauthorized decisions within its apprenticeship programs without statutory authority. The National Apprenticeship Act (NAA) does not give the Department the required statutory authority to create a new apprenticeship certifying body, and by doing so, the Department is acting against Congressional intent and outside of the enabling Act. These actions raise several due process concerns, as no stakeholder feedback has been gathered to establish the necessity of a revision of the regulations affiliated with the NAA or to provide input into the nature of the content that should be included in the new regulations. The Department's decision to give third-parties equal standing to the federal government and state governments, as well as the benefits this standing provides, further shows a disregard for federal law and well-established doctrines. This process also lacks transparency and negatively affects states, as they will have no role in activities within their respective jurisdictions, in contradiction to their authority granted and cooperation ensured under the NAA.

Lack of Statutory Authority

First, it is clear that the Department lacks the statutory authority to create a new certifying body to establish standards within a sector or region pursuant to the NAA, and in doing so, the Department is acting in contravention of Congressional intent. The plain language of the NAA is clear that the Department is directed first and foremost to promote labor standards necessary to safeguard the welfare of apprentices, as included in the contracts of apprenticeship.

*The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with state agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in doing so.*²

Congress was also clear during the 1937 Committee Hearing on the NAA that the law "enable[s] the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the [s]tates in promotion of such standards."³ By relying on its directive "to bring together employers and labor for the formulation of programs of apprenticeship," while

¹ *Industry Would Govern Apprenticeships in Labor Department Plan*, Bloomberg (May 31, 2019).

² National Apprenticeship Act, 29 U.S.C. §50 (emphasis added).

³ *To Safeguard the Welfare of Apprentices: Hearing Before the Subcommittee of the House Committee on Labor*, 75th Congress (1937).

disregarding the remaining language of the law, the Department is fundamentally shifting the purpose of the Act without Congressional action providing this authority to do so.

The legislative history additionally shows that Congress specifically did not want anyone other than the Department of Labor and states to set standards for apprenticeships. During the floor debate over the the NAA, which is also known as the Fitzgerald Act because it was authored by Representative William Fitzgerald of Connecticut, another Representative asked Representative Fitzgerald whether private entities would have anything to do with setting training standards for apprenticeships. Representative Fitzgerald's response to the question was to state that, "[t]he standards will be set up by the Department of Labor in cooperation with the States" and that no other entity was to have anything to do with setting standards for apprenticeships.⁴

In addition, federal courts have consistently held that the authority to develop and formulate labor standards for apprenticeships lies with the Department of Labor and not other entities.⁵ With two of the three branches of government providing clear guidance on how the NAA is to be interpreted regarding labor standards for apprenticeships, we find the Department's sudden and unjustified departure from the law to be particularly concerning.

In ceding the ability to develop and formulate labor standards to private entities, the Department is not fulfilling its duty to safeguard apprentices or ensuring apprenticeship contracts. We are concerned about the lack of detail or emphasis in publicly available documents related to IRAPs regarding the apprenticeship contracts between the employers and the apprentices, as are required by statute. The absence of details regarding these contracts indicate that IRAPs are not following the letter of the law, as no details have been provided regarding the parameters of the apprenticeship contracts in the IRAP program, including how the apprenticeships will be delivered, or the basic requirements established by the Department concerning the welfare of apprentices—requirements for wage progression, safety, quality of training, issuance of a nationally portable credential, etc.

The lack of mention of apprenticeship contracts or details of the responsibilities of the new third-parties and their approved apprenticeship programs leaves absent details on when the employment agreement between the apprentice and the employer begins, therefore leaving open the possibility that the apprentice will not be covered by employment-related protections for some or all of their apprenticeship program. This again shows that the Department, in creating regulations that do not include these requirements, is acting outside of the authority granted by the enabling Act. How will one know if they are an apprentice or an intern? How will the accreditors (SREs) know it without a contract? These questions illustrate some fundamental gaps in this proposal.

⁴ 81 Cong. Rec. H6632 (daily ed. June 30, 1937) (statement of Mr. Fitzgerald).

⁵ See, e.g., *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719, 731 (9th Cir. 1989) (agreeing that "the Fitzgerald Act [] directs the Secretary of Labor 'to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices' and related objectives."); *Gregory Electric Co. v. United States Dep't of Labor*, 268 F. Supp. 987, 991 (D.S.C. 1967) ("The National Apprenticeship Act, 29 U.S.C.A. § 50 is written in very broad terms. It contains a wide grant of authority to the Secretary of Labor to develop ... standards of training for apprentices, and to give such standards the widest possible application."); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 449 (S.D. Ohio 1968) ("[U]nder 29 U.S.C. § 50, the Secretary of Labor has been charged, since at least 1937, to formulate ... labor standards of apprenticeship."); *Daugherty v. United States*, 1974 U.S. Dist. LEXIS 7514, at *7 (S.D. Tex. July 22, 1974) ("[T]he National Apprenticeship Act among other things directs that the Secretary of Labor is to formulate ... labor standards necessary to safeguard the welfare of apprentices.").

Furthermore, the Secretary is only authorized to bring together employers and labor for the formation of apprenticeship programs. While the Secretary may work in cooperation with employers and industry in setting apprenticeship standards, their authority does not extend to or include the ability to cede the Department's duty to set standards to third-parties. On a broader note, the Department also may not delegate its duty to ensure the welfare of apprentices to a third party under the terms of the NAA, and any attempt to do so does not reflect Congressional intent.

The pertinent statutory text indicates that the welfare of apprentices should be safeguarded, yet the Executive Order (EO), the Training and Employment Notice (TEN), and the corresponding Information Collection Requests (ICRs) have been focused on the creation of new programs without acknowledging the welfare of apprentices. The ICR provides no detail on the role the Department plays in overseeing the welfare of apprentices or the delegation of that duty. In the absence of regulation, there is no guarantee that the Department will keep its duty in that regard. The Department can only hope that SREs will be acting in the best interest of the nation, the Department, and the apprentices. The requirements for program review fall only to third-parties, with no influence from the Department as to which programs are approved or what protections are determined between the apprentice and the employer.

Moreover, there are no clear protections in place to protect against bad actors like for-profits who have demonstrated their propensity to falsify their program outcomes. Despite questions from stakeholders in the ICR process for accreditor applications, the Department has yet to provide clear detail about how to protect proven predatory providers from participating as SREs. For example, in the Department of Education's 2014 Gainful Employment regulation, they noted that "several state Attorneys General have sued for-profit institutions to stop . . . fraudulent marketing practices, including manipulation of job placement rates."⁶ More specifically, "DeVry, Inc. claimed that 90 percent of graduates actively seeking employment found jobs in their field within six months of graduation and that their graduates' incomes one year after graduation were 15 percent higher than those of graduates from other colleges or universities." These misleading claims led the Federal Trade Commission (FTC) to obtain a settlement of \$100 million as they were also making false claims about graduates' placement in their field of study, showing the risk DOL is unnecessarily opening up to apprentices and potential participants. These claims included "a graduate from the technical management degree program working as a mail carrier", "a business administration graduate working as a waiter at the Cheesecake Factory", "a business administration graduate working as a secretary at a prison", and "a technical management graduate working as a sales associate at Macy's."⁷

There is no evidence of the ability of these third-parties to better assess quality than the Department already does, and there is no evidence that IRAPs will produce high-quality results because there are no IRAPs currently in existence. Creating a completely new system for creating standards and approving programs is essentially legislating from the Executive Branch, with no testing of the system or program before enactment through pilots, as was recommended by the Task Force on Apprenticeship Expansion⁸ (Task Force), showing an irresponsible use of federal funds and taxpayer dollars.

⁶ The Institute for College Access & Success, *Of Metrics and Markets: Measuring Post-College Employment Success*, available at https://ticas.org/sites/default/files/pub_files/of_metrics_markets.pdf (2018).

⁷ *Id.* at 18. Table 5 on page 19 of the report also documents investigations of a dozen for-profit colleges nationwide that resulted in millions of dollars paid by colleges to settle cases involving allegations that they deceived and mislead prospective students about job placement rates.

⁸ Task Force on Apprenticeship Expansion, *Final Report to: The President of the United States*, available at <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf> (2018).

In addition, the Department has not provided details on the financial impact of these actions on the agency, SREs, apprentices, or on potential IRAP providers. We do not know if fees will be assessed on potential IRAP apprentices. Will IRAP apprentices have to pay additional fees or for additional credentials created by the third-parties instead of the free certificate of completion they currently receive from the Department or State Apprenticeship Agencies? Without protections against potential abuse, the Department is essentially establishing a “pay-to-play” model to the benefit of third-party SREs without a clear benefit to apprentices or IRAP providers.

It is worth noting as well that Congress has repeatedly used the appropriations process to use funding to target and bolster programs registered with the Department, signaling a lack of approval for IRAP options as laid out by the Department in the Fiscal Year 2019 Budget Request.⁹

Due Process Concerns

Second, no stakeholder or State Apprenticeship Agency feedback has been gathered or sought to substantiate the need for regulatory revision, which raises due process concerns as well as concerns regarding neglecting the statutory requirements of the NAA. The statute and regulations affiliated with the NAA result from extensive stakeholder engagement, a precedent first set by the federal Committee on Apprenticeship Training which informed the creation of the National Apprenticeship Act, and includes the authority to appoint national advisory committees. In 2008, the Department “collaborated extensively with the Secretary’s Advisory Committee on Apprenticeship and other stakeholders” to develop the new NPRM.¹⁰ However, during this current Administration, no Committee was convened to discuss the necessity of creating IRAPs or SREs, and the while Task Force was convened to make “recommendations regarding . . . the processes for identifying qualified third parties to recognize high-quality programs, and the overarching guidelines for ensuring that Industry-Recognized Apprenticeships meet industry-relevant quality standards,”¹¹ it is clear from the charge given that there was not interest from the Department on whether or not SREs or regulations affiliated with them were necessary. The Task Force did not make any recommendations on amending 29 CFR 29.¹²

The Task Force, did however, make the recommendation to only start IRAPs as a pilot program, stating that the “Industry-Recognized Apprenticeship program should begin implementation with a pilot project in an industry without well-established Registered Apprenticeship programs. This would test the process for reviewing certifiers and would help the Federal Government better understand how to support industry groups working to develop standards and materials for Industry-Recognized Apprenticeship programs.” The Department has yet to provide a clear and evidence-based explanation for why they are explicitly ignoring this recommendation.

The Department is asserting its authority to grant a “favorable determination”¹³ to a third-party without a clear explanation of what is required for favorable determination, a process to appeal if that determination is

⁹ U.S. Department of Labor, *FY 2019 BUDGET IN BRIEF*, available at <https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>.

¹⁰ U.S. Department of Labor, *National Apprenticeship Act Revised Regulations Webinar*, available at https://www.doleta.gov/OA/pdf/Slide_Show.pdf (Oct. 30, 2008).

¹¹ Task Force on Apprenticeship Expansion, *Final Report to: The President of the United States*, available at <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf> (2018).

¹² *Id.*

¹³ U.S. Department of Labor, *Training and Employment Notice No. 3-18*, available at https://wdr.doleta.gov/directives/attach/TEN/TEN_3-18_Acc.pdf (Jul. 27, 2018).

granted, or how that determination matches the requirements of an IRAP. It is also unclear who would have the ability to revoke a favorable determination once it is provided, considering a revocation cannot occur absent regulation. These policies, in addition to the fact that favorable determination has no legal binding or definition yet confers a legal authority, places the Department at risk for litigation.

The Department has not sought feedback on whether or not third-parties should be granted this favorable determination; the related ICR only asked for comments regarding the contents of the application to become an SRE. This provides for a legally questionable Administrative Procedure Act (APA) process, as there has been no engagement on the necessity of these third parties or this determination. The TEN explicitly stated that “the public will also have the opportunity to provide input on the proposed application” – but not the necessity of the application, the necessity of a third-party receiving a favorable determination or conferring benefits and responsibilities associated with a favorable determination by the Department.¹⁴ Further, as the Department has already established both the fact that SREs exist and that SREs may be approved and awarded a favorable determination before the related regulation is finalized, it is clear that the Department has no intention of taking into serious consideration any comments that will be submitted once the Notice of Proposed Rulemaking (NPRM) is made public, all of which is a violation of the APA.

Through the ICR, the Department is creating a benefit to SREs by providing them with a favorable determination, which is likely to result in a monetary benefit for the organization. The term “favorable determination” has no existence in law and can only be considered a de facto approval by the Department of Labor for SREs. The Committee is concerned that there is no legal or regulatory framework for overseeing such unregulated SREs or their approved IRAP programs under the TEN, as it is only an informational document. In fact, if the Department approved an organization with misleading practices (i.e. DeVry), the Department would have no clear authority to remove the “favorable determination” if an organization was found to be out of compliance with the TEN or ICR, “cooking its books” to attract apprentices or federal or state funding, providing apprentices with predatory loans, and so on.

Unlawful Delegation of Approval Authority

Lastly, the Department has exceeded its Congressional mandate and statutory authority by giving a third-party equal standing to the federal and state government. The NAA does not delegate the Department the authority necessary to allow third parties to approve the standards of programs. At a recent U.S. Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies hearing, Secretary Acosta compared these third-party accreditors to those that exist in higher education.¹⁵ In contrast, the Higher Education Act gives explicit authority to third-parties to accredit institutions, but also has in place a number of mechanisms to control for conflicts of interest, including a governing board and peer review mechanisms. The National Apprenticeship Act does not. Moreover, there is no clear way outlined by the Department to address conflicts of interest.

In allowing SREs to accredit apprenticeships without Departmental approval, the Department is in potential violation of the nondelegation doctrine, which restricts the government from ceding its authority and

¹⁴ *Id.* at 2.

¹⁵ U.S. Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies hearing, “Review of the FY2020 Budget Request for the U.S. Dept. of Health and Human Services”, available at <https://www.appropriations.senate.gov/hearings/review-of-the-fy2020-budget-request-for-the-us-dept-of-health-and-human-services> (Apr. 4, 2019).

functions and those of State Apprenticeship Agencies to private entities. By allowing private industry to act as IRAP accreditors, the Department is putting IRAP accreditors on the same footing as the Department itself and State Apprenticeship Agencies. In *Carter v. Carter Coal Co.*, the U.S. Supreme Court reasoned that by conferring on a majority of private individuals the authority to regulate “the affairs of an unwilling minority,” the law was “legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”¹⁶ Subsequent cases such as *Sunshine Anthracite Coal Co. v. Adkins* have clarified that while a private entity may act subordinately to the government by serving in an advisory function in its involvement in regulation, a private entity may not stand on equal footing with a government agency.¹⁷

This practice also raises the issue of fundamental fairness. What authority pursuant to the NAA permits the Department to give companies competitive advantages over their competitors? Not only is this an issue of fairness, doing so potentially violates the competitors’ due process rights. SREs could very likely be made up of industry participants and under this program, they would have regulatory authority to approve apprenticeships over other industry participants in the same industry. Therefore, SREs would be a self-interested entity with regulatory authority over its competitors. Legal precedent shows that this kind of relationship violates the due process rights of the other industry participants who are not IRAP accreditors. In the recent *Assoc. of American Railroads v. Dept. of Transportation* case, the DC Circuit ruled that, “the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, or regulate, as official bodies. After all, ‘[t]he difference between producing... and regulating ... production is, of course, *fundamental*.’ (emphasis added). To do both is an affront to ‘the very nature of things,’ especially due process”.¹⁸ We do not allow Chevrolet to set the standards for Ford and make the determination of the quality of their workforce training programs, or any other form of standards by which they are reviewed

Last but not least, the Department is, without statutory authority, giving standing to a third-party an authority that is equal to a states’ authority to control the apprenticeship programs and standards offered in their state. States’ roles are granted through the NAA, unlike the role of a third-party which is granted nowhere, raising preemption concerns. Because there is no existing known requirement for state cooperation in the IRAP system, this also directly conflicts with the statutory requirements as set out in the NAA. Do the non-statutorily authorized third-parties preempt a State’s apprenticeship laws and ability to self-govern their programs? This is yet another question that remains unanswered in this process. Further, with these unauthorized actions, the Department is taking away the states’ authority over programs operating and conducting business in their state.

As our statement has illustrated, this proposed program is troubling in its lack of authority as well as troubling in its lack of transparency and specificity in terms of how it will work in the real world and with other existing structures and laws in the apprenticeship space. In addition to the many unanswerable questions we have already brought up in our statement based on the currently available information on this ill-defined program, there are a number of other important outstanding process-related questions that will need to be

¹⁶ *Carter v. Carter Coal Co.*, 298 U.S. at 311 (1936).

¹⁷ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). The Supreme Court upheld a provision of the Bituminous Coal Act of 1937, which authorized private coal producers to propose standards for the regulation of coal prices. In that case, the private industry party served in a purely administrative or advisory function in which they were permitted to provide proposals to the government entity that then approved or disapproved the proposals.

¹⁸ *Assoc. of American Railroads v. Dept. of Transportation*, 821 F.3d 19, 36 (2016).

answered once the scope of the Industry-Recognized Apprenticeship system is finalized. Among these questions are the following from the Task Force Final Report:

- A. How will the U.S. Department of Labor differentiate between high/low quality certifiers, especially since no potential certifiers will have prior experience administering an Industry-Recognized Apprenticeship program?
- B. How often will certifiers be reviewed, and under what conditions would the positive recommendation be removed?
- C. What does it mean for a certifier to be “recommended” by the Department?
- D. How will the Department differentiate between high value and low value credentials?
- E. What constitutes “sufficient support and input from sector participants” for potential Industry-Recognized Apprenticeship program certifiers?