

# Congress of the United States

Washington, DC 20510

October 31, 2018

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 our deep concerns with the U.S. Department of Education's ("Department") forthcoming negotiated rulemaking that seeks to modify regulations and student protections in the Federal Student Aid (FSA) programs authorized under the Higher Education Act of 1965 (HEA). On October 15, 2018, the Department published its final agenda and schedule for negotiations.<sup>1</sup> Based on this announcement, it is clear the Department has set up a deeply flawed rulemaking process that is severely lacking in transparency, divergent viewpoints, and public participation. Given this Administration's track record, we are concerned that this process would allow the Department to weaken rules and rewrite the HEA in a way that increases opportunities for corporate and special interests to take advantage of students and taxpayers.

As we requested on our September 14, 2018 letter, we urge you, once again, to abandon the current rulemaking process and allow Congress to address these issues comprehensively through the reauthorization of the HEA. Our concerns with five key areas in the proposed rulemaking process are detailed below.

## ***1. Final Scope of Topics for Negotiations***

The Department has allotted only 11 days over a three-month period to convene experts, negotiate, and reach consensus on over a dozen complex topic areas. Negotiators need more time to ensure appropriately thoughtful discussion of these complex issues. Further, even though more than 25 organizations expressed concern over the number of issue areas bundled into one negotiated rulemaking, the Department's final agenda still lists 16 areas for deregulation. Some commenters even testified that the process may be set up to fail and thwart meaningful efforts to build consensus and, thus, allow the Department to regulate on its own.<sup>2</sup>

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<sup>1</sup> "Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings-Accreditation and Innovation," U.S. Department of Education, October 15, 2018, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-22506.pdf>.

<sup>2</sup> Public testimony from Alyssa Picard, American Federation of Teachers, *U.S. Department of Education Docket ID ED-2018-OPE-0076 Public Hearing*, Washington D.C. September 6, 2018 <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/transcriptdcph.pdf>

## ***2. Consensus Structure for Negotiations***

The proposed rulemaking does not make clear how the Department plans to vote on or reach consensus across the 16 topic areas. The Department's announcement states that a single Accreditation and Innovation rulemaking committee will have voting authority to determine consensus on the various issues. However, the Negotiated Rulemaking Act of 1990 states that "consensus" means "unanimous concurrence among the interests represented on a negotiated rulemaking committee, unless such committee agrees...upon another specified definition."<sup>3</sup> To date, the Department has been silent as to whether it will require the full committee to achieve consensus on all 16 topics collectively or if the committee will allow separate consensus votes on multiple topics grouped together for purposes of voting. If it is the latter, the Department has not stated how and when it plans to group those topics. In addition, the Department has not explained what its process will be if the rulemaking committee disagrees with the Department's proposed approach and grouped topics.

## ***3. Non-Voting Structure of Multiple Simultaneous Subcommittees***

We are extremely concerned by the Department's plan to quarantine a large number of substantive topic areas into subcommittees with members that have no voting authority on the full rulemaking committee. In addition to the full Accreditation and Innovating rulemaking committee, the Department proposes three subcommittees – Distance Learning and Educational Innovation, Faith-Based Institutions, and TEACH Grants – to serve as technical working groups. Although subcommittee members determine which proposal will be presented to the full committee, they would not have the opportunity to debate the final proposal with committee members and participate in the final consensus vote that determines whether the Department must adopt the proposal in crafting the proposed regulation. To give an example of the breadth of topics covered in one subcommittee, the Distance Learning and Educational Innovation subcommittee will be responsible for discussing six very complex issues, including state authorization, credit hour, instructor interaction, program length, institutional eligibility, and competency-based education. Yet those with direct experience on these six complex issues will not have a seat on the full rulemaking committee and will not be able to vote on the final proposal.

This structure, moreover, further complicates an already opaque process. While the Department is allowing the public to be physically present at the rulemaking discussion panel, it is restricting access to the subcommittee meetings through a Department-provided livestream. This would deny the public and stakeholders the opportunity to engage with the negotiators who are representing their interest. Equally troubling is the fact that the three subcommittees will meet simultaneously, making it impossible for interested citizens to monitor all of the proceedings in real-time. The Department is essentially confining some of the most substantive conversations to subcommittee meetings that will be held outside of public spaces.

The Department's use of multiple subcommittees that meet at the same time and has members with no voting authority on the full committee is deeply problematic. If topics are substantive enough for re-regulation, then those members need voting authority. If there are too many topics

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<sup>3</sup> 5 U.S. Code §562(2)

to cover, then the Department should establish separate rulemaking committees, with separate consensus votes.

#### **4. *Negotiator Categories***

Given the importance of the full committee under the proposed structure, it is critical the Department has all the appropriate stakeholders on the main Accreditation and Innovation rulemaking committee. However, the Department's call for nominations on the full committee omits key stakeholders such as state attorneys general, state higher education executive officers (SHEEO), faculty, consumer advocates, and service-members.

The omission of state attorneys general and SHEEO categories is unreasonable given that the Accreditation and Innovation committee will examine "oversight responsibilities among members of the regulatory triad, including accrediting agencies, States, and Department." Likewise, faculty members – who would be in the best position to debate and vote on "substantive and regular" interaction in online and competency-based programs, credit hour requirements, program length, teach-out processes, and outsourcing arrangements between a college and third-party providers – are excluded from both the full committee and the subcommittee on Distance Learning and Educational Innovation.

The main rulemaking committee is also extremely imbalanced between institutional representation and student advocates. The announcement states that there will be 11 institutional representatives (eight institutional representatives and three from accrediting agencies) and only three student negotiators or their consumer representatives. The inclusion of consumer advocacy organizations would be invaluable as they can provide both the historical and continued need to protect students against documented incidents of deceptive practices and poor-quality programs. Limiting the representation of consumer advocates signals the Department's abandonment of its mission to prioritize the interests of students, service-members and taxpayers in favor of for-profit college representatives and special interests.

The omission of state and faculty representatives and reduction of student representatives fall short of the Department's obligation under the Negotiated Rulemaking Act of 1990, as well as common and historic practice as described in Department guidance, to publish a notice that lists the interests that are likely to be significantly affected and achieve a balanced membership.<sup>4</sup>

#### **5. *Speaking Protocols for Alternate Negotiators***

The Department's new protocol regarding the role of alternate negotiators would essentially gag the alternate, and is a marked departure from prior rulemaking process. The announcement states, "Only the primary negotiator may speak during the negotiations unless the primary negotiator is absent for the day or a significant portion of a day, in which case the alternate may speak during the negotiations." However, the Department's longstanding practice has allowed alternates to have virtually all the privileges of membership except 1) sitting at the table and 2)

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<sup>4</sup> 5 U.S. Code §564(a)(3) and U.S. Department of Education, *The Negotiated Rulemaking Process for Title IV Regulations – Frequently Asked Questions*. <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html>

voting, unless the primary is absent. While alternates sit behind the main negotiator, they have the same rights to speak and are in all respects treated as negotiators.<sup>5</sup> Instituting this policy will upend years of precedent and practice. Further, we underscore our concern that the Department is at a markedly unfair advantage in negotiations where it not only selects the negotiators it wishes to speak, but also makes it virtually impossible for other voices to be heard.

In sum, the Department's proposed procedures for the forthcoming negotiated rulemaking severely limit the number of expert and affected voices at the negotiating table – particularly those representing students, states, and faculty that are directly impacted by the targeted regulations – and public involvement in the negotiated rulemaking process. This is not the first time the Department has tried to use these tactics, including trying to prevent members of the public from livestreaming meetings<sup>6</sup> and providing the public with just 30 days to submit comments on proposed regulations.<sup>7</sup>

We urge the Department to abandon this rulemaking process. Thank you for your prompt attention to this matter.

Sincerely,



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PATTY MURRAY  
Ranking Member, Senate Committee on  
Health, Education, Labor & Pensions



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ROBERT C. "BOBBY" SCOTT  
Ranking Member, House Committee on  
Education & the Workforce

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<sup>5</sup> Lubbers, J. "Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education." *Appendix IV of Recalibrating Regulation of Colleges and Universities*, December 5, 2014.

<sup>6</sup> Camera, L. "Federal Education Panel Sidetracked by Squabble Over Livestreaming," U.S. News & World Report, Nov. 13, 2017, <https://www.usnews.com/news/education-news/articles/2017-11-13/federal-education-panel-sidetracked-by-squabble-over-livestreaming>

<sup>7</sup> Notice of Proposed Rulemaking, *Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program* (Docket ID ED-2018-OPE-0027); Notice of Proposed Rulemaking, *Program Integrity: Gainful Employment* (Docket ID ED-2018-OPE-0042-0001)