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Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue Southwest
Washington, D.C. 20202-6110

July 12, 2019

Re: NPRM – Student Assistance General Provisions, the Secretary's Recognition of Accrediting Agencies, the Secretary's Recognition Procedures for State Agencies

Docket ID ED-2018-OPE-0076

Dear Jean-Didier Gaina,

We write on behalf of the National Student Legal Defense Network ("NSLDN") in response to the proposed rule regarding the 2019 Student Assistance General Provisions, the Secretary's Recognition of Accrediting Agencies, and the Secretary's Recognition of Procedures for State Agencies (hereinafter the "NPRM").[1] NSLDN is a non-partisan, 501(c)(3) non-profit organization that works, through litigation and advocacy, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. NSLDN appreciates the opportunity to comment on this proposal.[2]

The 2016 State Authorization Rule and other mandatory disclosures provide prospective and enrolled students with critical information to inform their enrollment decisions, while the institutional eligibility requirements and standards for participation in Title IV programs hold institutions accountable for any potential misconduct. Because the Department proposes to water down these requirements without adequate justification, as well as proposes to do so without ever fully implementing parts of the current regulations, NSLDN strongly opposes the vast majority of proposed changes in this NPRM. Moreover, as we have expressed elsewhere, we do not comprehend how the Department has adequately considered the costs and benefits of this NPRM when it concedes that it has "limited data on which to base estimates of accrediting agency, institutional, and student responses to the [proposed] regulatory changes."[3] Absent such data, the Department has no business proposing such sweeping regulatory reform.

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1 84 Fed. Reg. 27,404 (June 12, 2019).

2 Because there are many important issues facing student loan borrowers raised by this NPRM, this is one of several comments that NSLDN will submit. NSLDN's comment here will focus on the Department's proposals to weaken the 2016 State Authorization Rule, eliminate or change mandatory disclosure requirements to prospective and enrolled students, limit liability for institutions purchasing closed schools, and expand access to Title IV funds to institutions already deemed ineligible to receive those funds.

3 84 Fed. Reg. at 27,450.

1. **The 2016 State Authorization Rule and Other Institutional Disclosure Requirements, Which Provide Students with Access to Critical Information to Inform their Enrollment Decisions and Seek Help Enforcing Their Rights Under State Consumer Protection Laws, Should not be Modified**

    a. **The Department illegally delayed the 2016 State Authorization Rule, which only recently went into effect, depriving the public of any opportunity to determine whether the Rule achieved its stated goals.**

As an initial matter, it is impossible to comment on this NPRM without placing it in the proper context. In December 2016, after years of discussion and deliberation,[4] the Department published the State Authorization Rule, which, among other things, establishes critical protections for students enrolled in, or considering enrolling in, online education programs.[5] Those protections include requirements that institutions make certain disclosures to help prospective and enrolled students evaluate both the online program and the institution that offers it.[6] In fact, the 2016 State Authorization Rule requires institutions to provide these students with both public disclosures and individualized disclosures regarding, among other items, whether the program meets state licensure requirements and whether the school has been subject to any adverse actions in the past by a state or its accreditor due to its online programs.[7] The 2016 State Authorization Rule was set to go into effect on July 1, 2018.[8] However, in late May 2018, the Department proposed to delay its implementation for two years.[9] In April 2019, a federal court held that the Department's delay was illegal and ordered the 2016 State Authorization Rule to take effect on May 26, 2019.[10] Even assuming that the Department properly enforced the 2016 State Authorization Rule for the past seven weeks, however, insufficient time has passed for the Department to study the rule's

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4 The process included four public hearings, the establishment of a statutorily-required negotiated rulemaking committee, the publication of a proposed rule, and the receipt and consideration of 139 comments in response to that proposed rule. Negotiated Rulemaking Committee; Public Hearings, 78 Fed. Reg. 22,467 (Apr. 16, 2013) (announcing three public meetings and adding state authorization for distance education and correspondence courses to topics for the negotiated rulemaking committee); Negotiated Rulemaking Committee; Public Hearings, 78 Fed. Reg. 27,880 (May 13, 2013) (announcing a fourth public meeting); Negotiated Rulemaking Committee, Negotiator Nominations and Schedule of Committee Meetings—Title IV Federal Student Aid Programs, Program Integrity and Improvement, 78 Fed. Reg. 69,612 (Nov. 20, 2013) (announcing a negotiated rulemaking committee); Program Integrity and Improvement, 81 Fed. Reg. 48,598 (July 25, 2018) (noting 139 comments received).

5 Program Integrity and Improvement, 81 Fed. Reg. 92,232, 92,233 (Dec. 19, 2016).

6 81 Fed. Reg at 92,262–63 (to be codified at 34 C.F.R. § 668.50).

7 *Id.*

8 81 Fed. Reg. at 92,232.

9 83 Fed. Reg. 24,250 (May 25, 2018).

10 *Nat'l Educ. Ass'n v. DeVos*, No. 18-cv-05173-LB, __ F. Supp. 3d. __, 2019 WL 1877355 (N.D. Cal. Apr. 26, 2019).

effectiveness or for the public to determine whether the rule is serving its intended purpose. For that reason alone, NSLDN opposes the NPRM's proposed changes to the state authorization requirements.

a. The NPRM proposes, without adequate justification, to eliminate the requirement that institutions only be allowed to obtain state authorization and enroll students in online programs if they first disclose to those students the state's complaint process where they reside.[11]

Without providing a reasoned basis, the Department seeks to modify the institutional eligibility requirements for state authorization under 34 C.F.R. § 600.9(c).

First, the NPRM proposes to "no longer refer to a student's residence," but "instead . . . to a student's location."[12] The proposed change "would require an institution to determine the State in which a student is located . . . at the time of the student's initial enrollment[] and upon formal receipt of information from the student . . . that the student's location has changed to another State."[13] Furthermore, the NPRM would require institutions to "maintain policies and procedures governing this process"—which could include "a method for a student to log into the institution's system and indicate a new address"—and to "consistently apply [those policies and procedures] to all students."[14] To justify this change, the Department argues first that the "committee agreed" with it and second that "[u]se of the concept of 'residence' has led to confusion and barriers to compliance because States have different requirements for establishing legal or permanent residence."[15] The fact that the committee agreed to this proposal is insufficient to properly justify the change, however. In addition, the Department has failed to explain or provide any data about how the concept of "residence" has led to confusion and barriers to compliance during the last

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11 Numerous commenters have selectively cited a January 2017 letter from former Under Secretary of Education Ted Mitchell. Although the commenters may pretend otherwise, Under Secretary Mitchell affirmed the primacy of state law and guaranteed, consistent with the plain text of the 2016 State Authorization Rule, that a state authorization reciprocity agreement may not supersede state law. He stated that "if the Department becomes aware of an unresolved conflict between the terms of a reciprocity agreement and existing State statutes and regulations, affected institutions seeking authorization via a reciprocity agreement would not be considered authorized under the Department's regulation." Thus, although a state may *choose* to modify its laws in order to comply with a particular reciprocity agreement, the reciprocity agreement does not operate to preempt state law. Moreover, as Under Secretary Mitchell wrote, "[o]nce a State has resolved the conflict within its own body of law, or the reciprocity agreement amends its conditions so as not to preempt state law, affected institutions will be found in compliance." A copy of the January 2017 letter from Under Secretary Mitchell is attached to the July 10, 2019 comment submitted in this proceeding by Marshall Hill, President and CEO of the National Council for State Authorization Reciprocity Agreements.

12 84 Fed. Reg. at 27,413.

13 *Id.*

14 *Id.*

15 *Id.*

seven weeks that the rule has been in effect. Moreover, the Department has not provided any explanation about why its prior justification for the concept of "residence" no longer applies.[16] To make matters worse, the NPRM also fails to propose a definition for the concept of "location," leaving it up to institutions' discretion. It is difficult to follow how the creation of a new undefined term will solve the alleged confusion surrounding the use of "residence," a term of art defined by state law. Ultimately, the Department has not provided adequate justification for this change.

Second, the NPRM proposes to remove the requirement that, as a condition of state authorization for purposes of Title IV, an institution may only enroll students in a state in which the institution is not physically located if the institution "document[s] that there is a State process for review and appropriate action on complaints" via either the state in which the enrolled students reside or a valid state authorization reciprocity arrangement.[17] In the Regulatory Impact Analysis ("RIA"), the Department states that this proposed change would eliminate a largely duplicative standard regarding student complaint disclosures, "as the regulations under § 668.43(b) already require institutions to disclose the complaint process in each of the States where its enrolled students are located."[18] But this assertion is untrue. The requirement in 34 C.F.R. § 668.43(b) states that an institution must "provide" students or prospective students with "contact information" for filing complaints with an accreditor or state approval or licensing entity. But nothing about that section requires, *as a condition of state authorization*, that an institution only be permitted to operate in a jurisdiction in which there actually *is* a complaint process. In other words, despite the Department's suggestion in the RIA, there is nothing that duplicates the institutional eligibility requirements in 34 C.F.R. § 600.9(c)(2) to justify their rescission. In addition, the Department argues that it proposes this change because "the committee agreed" to it and it will "ensure that students who are located in States without a complaint process [will] not [be] prevented from receiving [Title IV funds]."[19] Whether or not the committee agreed to it does not provide a "good reason" for this change, however. The opinion of a chosen few cannot absolve the Department of its responsibilities under the APA. Finally, the Department's assertion that this change will allow students to access Title IV funds in states without a complaint process ignores one of the primary justifications underlying the 2016 State Authorization Rule, which was to strengthen state oversight of online education programs.[20] Part of that oversight necessarily includes processing and taking action on complaints

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16 For example, in 2016, the Department explicitly considered and responded to commenters' concerns about referring to a student's "residence" when it finalized the 2016 State Authorization Rule, explaining that "a student is considered to reside in a State if the student meets the requirements for residency under that State's law" and that an institution can rely upon a student's "self-determination unless the institution has information that conflicts with that determination." 81 Fed. Reg. at 92,236.

17 84 Fed. Reg. at 27,413.

18 84 Fed. Reg. at 27,449.

19 84 Fed. Reg. at 27,414.

20 *See* 81 Fed. Reg. at 92,232 (noting that "some States have expressed concerns about their ability to . . . receive, investigate[,] and address student complaints about out-of-State institutions," including examples of a student living in California and enrolled in an online program offered by an institution in Virginia that could not benefit from California's

from enrolled student residents. For all of the above reasons, NSLDN opposes the NPRM's proposal to eliminate the requirement that, as a condition of state authorization, institutions offering online education programs in specific states document those states' complaint review processes.

b. The Department proposes to eliminate the disclosure of job placement rates to current and prospective students, unless the institution advertises or publishes those rates, without "good reason."

The NPRM proposes to replace the current requirement in 34 C.F.R. § 668.41 that institutions disclose to prospective and enrolled students their job placement rates—including the source of the information, timeframe covered, and methodologies used—with a requirement that institutions only disclose their job placement rates when those rates are advertised or otherwise published.[21] The NPRM also proposes to no longer require institutions to disclose the source of the job placement rate information, timeframe covered, or methodologies used.[22] To justify these changes, the Department alleges that the current regulation is "overly burdensome, unhelpful to students, and limits an institution's ability to evaluate its own progress if the methods used for internal analysis do not meet the standard of rigor required for published placement rates."[23] Moreover, the Department's argument goes, "[r]equirements to disclose to the public any calculated placement rate . . . incentivize an institution to avoid calculating any placement rates whatsoever."[24] The Department provides no data to back up its assertion that the job placement disclosure requirement is "overly burdensome," however. In addition, the Department's analysis that job placement rates are "harmful" to students contradicts reality. Job placement rates are helpful to students who want to evaluate the likelihood that a given program will lead to a job in their chosen field. These rates have also been the basis of numerous enforcement actions against schools for substantial misrepresentations, as well as numerous borrower defense to repayment claims. Finally, the Department fails to explain how the current regulation limits institutions' ability to evaluate their own progress or incentivizes them not to calculate placement rates at all. It also does not discuss how widespread this problem is. Taken together, the NPRM's proposal to change the requirement to disclose job placement rates is not supported by "good reason." Combined with the Department's recently published Final Rule to eliminate the Gainful Employment disclosures, this proposed change is on even weaker factual and legal footing.

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consumer protection laws regarding her enrollment agreement as well as lawsuits filed by multiple state attorneys general against online programs for misleading tactics).

21 84 Fed. Reg. at 27,441.

22 *Id.*

23 *Id.*

24 *Id.*

c. The NPRM also proposes to change institutional disclosure requirements without adequate justification and in a manner contrary to the HEA.

Among others, the Department proposes to make at least two changes to the institutional disclosure requirements under 34 C.F.R. § 668.43. First, the NPRM proposes to add at § 668.43(a)(14) a new requirement that institutions disclose their job placement rates to prospective and enrolled students *only if* the institution's "accrediting agency or State requires the institution to calculate and report a placement rate."[25] The Department makes clear that it is attempting to incorporate "all of the relevant statutory requirements for disclosures," but wants to "limit the occasions when an institution is required to disclose a placement rate."[26] Such a change is unnecessary and illogical, though. As relevant here, the HEA mandates that institutions disclose their job placement rates without regard to whether their accreditors or state authorizers require them to calculate these rates.[27] In other words, even with these changes, institutions will still have to comply with the HEA's mandatory disclosures. The Department's proposed regulation will not, as it appears to suggest, provide a safe harbor to only do so if the institution's accreditor or state has required that it calculate job placement rates. Second, the NPRM proposes to add two additional disclosure requirements: (1) notice that an agency is required to maintain a teach-out plan by its accrediting agency and the reason why; and (2) notice that the institution is "under investigation, action, or prosecution by a law enforcement agency for an issue related to academic quality, misrepresentation, fraud, or other severe matters."[28] The Department argues that it intends for these requirements to replace requirements under 34 C.F.R. § 668.50(b)(4), (5) (relating to disclosures of any "adverse actions" taken against an institution by its accreditor or state, respectively), which were either "unnecessary" or "undefined."[29] The Department asserts that a disclosure requirement about adverse actions taken by an accreditor is "unnecessary" because "those actions generally strip an institution of its eligibility for title IV, HEA funds and disclosures of that fact would come too late for students to act upon."[30] Such reasoning fails to take into account that adverse actions can—and typically do—stop short of an accrediting agency stripping an institution of its Title IV eligibility, including show cause orders and probation. In those situations, notice to students would not be too little, too late. Indeed, students *want* and *deserve* to know whether their federal student aid is being spent to attend an institution that fails to meet the very standards that makes it eligible for Title IV participation. The Department also claims that a disclosure requirement about adverse actions taken

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25 84 Fed. Reg. at 27,442.

26 *Id.*

27 HEA § 485(a)(1)(R), 20 U.S.C. § 1092(a)(1)(R) (requiring that an institution disclose, by means described in the statute, "the placement in employment of, and types of employment obtained by, graduates of the institution's degree or certificate programs, gathered from such sources as alumni surveys, student satisfaction surveys, the National Survey of Student Engagement, the Community College Survey of Student Engagement, State data systems, or other relevant sources").

28 84 Fed. Reg. at 27,442.

29 *Id.*

30 *Id.*

by a state is "unclear" because the term "adverse action" was never defined.[31] No evidence is provided about why institutions struggled to understand this term. Nor has the Department considered the reasonable alternative of defining the term, a clear violation of the APA. Moreover, the Department fails to explain why it no longer thinks that students need to receive disclosures about state investigations or enforcement actions against institutions. For all of these reasons, NSLDN opposes the Department's proposed changes to the institutional disclosure requirements.

d. Without effectively implementing and studying the impact of the 2016 State Authorization Rule and without "good reason," the NPRM proposes to delete the disclosure requirements for online education programs.

As discussed previously, after moving *two* disclosure requirements from 34 C.F.R. § 668.50 to 34 C.F.R. § 668.43, the Department next proposes to delete the remainder of the disclosure requirements in § 668.50.[32] These disclosure requirements are unique to institutions that offer online education programs in states where they are not physically located. The Department justifies the rescission of these disclosure requirements—which it illegally delayed for nearly a year—by claiming that it "moved a number of the disclosures required [in this section] to [§] 668.43."[33] This is a gross overstatement of what the Department has actually proposed. In addition, the Department claims that "several disclosures . . . duplicate of [sic] requirements already contained in [§] 668.43."[34] More specifically, the Department asserts that § 668.43(a)(6) (requiring disclosure of the names of associations, agencies, or governmental bodies that accredit, approve, or license the institution and its programs) is the same as § 668.50(b)(1) (requiring disclosure of whether the online program is authorized in the state where the student resides by either the state or a state authorization reciprocity agreement and the consequences of losing Title IV eligibility if the student relocates to a state where the online program is not authorized). But these disclosures communicate different information to students, the former providing simple contact information for the entities that oversee an institution and the latter providing a warning about whether the online program is authorized to offer degrees or credentials where the student lives. The Department also asserts that the requirement to disclose refund policies in § 668.50(b)(6) is duplicative of the requirement in § 668.42(a)(2).[35] But § 668.42 deals with information an institution must share with students regarding financial assistance, including that the programs must be "need-based and non-need-based."[36] Nothing at all is mentioned in that section about state refund policies. Notably, the Department does not address why, if it "believes that it is vitally important that students have as much information as [sic] the institution at which they are enrolling" regarding whether their

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31 *Id.*

32 84 Fed. Reg. at 27,443.

33 *Id.*

34 *Id.*

35 *Id.*

36 34 C.F.R. § 668.42(a)(2).

educational program will meet state licensure requirements, that same logic does not apply to the individualized disclosures that it proposes to delete here. Although NSLDN generally supports a regulatory approach that makes clear which disclosure requirements apply to which institutions and in which circumstances, this proposal misses the mark. Given its lack of adequate justification, the Department's proposal to delete § 668.50 fails to comply with the requirements of the APA.

2. The Department's Proposed Changes Will Dramatically Reduce Liability for Misuse of Title IV Funds

The NPRM proposes to make two changes to current regulation that would dramatically reduce an institution's liability for improperly spent Title IV funds and unpaid refunds owed to students whenever it acquires a closed location of another institution. Neither of these changes are supported by "good reason."

First, the NPRM proposes to change the requirement at 34 C.F.R. § 600.32(c) that an institution that acquires a closed location agree to be liable for all improperly spent or unspent Title IV funds and all unpaid refunds owed to students. In place of this requirement, the NPRM proposes to allow the institution to be liable only for improperly spent Title IV funds and unpaid student refunds from the current academic year and the prior academic year.[37] The Department argues that such a drastic change is necessary because it will help "facilitate the purchase of [the closed] institution by an institution that is more capable of serving students and of repaying amounts owed to the Department."[38] Although the Department appears to be arguing that institutions will not purchase closed campuses if they have to assume full liability for any prior financial malfeasance, the Department provides no data or analysis to support this claim, including the amounts of liabilities closed institutions typically owe, the number of closed institutions that are never purchased as a result, or the number of institutions that have explicitly made clear they will not purchase a closed institution because they are toxic assets. It is not the public's job to construct the Department's argument for it. Furthermore, the Department has utterly failed to discuss or describe the likely cost of this change, which will undeniably be borne by federal taxpayers. The Department also includes among its "reasons" that "institutions that close with unpaid refunds or outstanding liabilities for title IV, HEA funds are often unable to repay those liabilities and the Department is subsequently unable to collect amounts owed."[39] But this rationale is nothing more than a self-created problem. The Department has ample ability to ensure institutions' financial responsibility, including using its enforcement authorities,[40] holding institutions accountable for "past performance" failures,[41] and

37 84 Fed. Reg. at 27,416.

38 *Id.*

39 *Id.*

40 34 C.F.R. Part 668, Subpart G.

41 34 C.F.R. § 668.174.

requiring institutions to post letters of credit in certain circumstances to protect the federal fisc.[42] Thus, if the Secretary believes that the Department is unable to collect on liabilities owed to the Department, *limiting* that liability does nothing to solve the problem. It is instead a thinly veiled attempt to decrease the Department's own responsibility for addressing and preventing the problems posed by closing institutions in the first place. When the Department cannot justify or explain the suggestions it makes with sound reasoning, it fails to fulfill its obligations under the APA.

Second, the NPRM proposes to change the requirement in 34 C.F.R. § 600.32(d) that allows an institution that conducts a teach-out at the site of a closed institution to have that site approved as an additional location—with no assumption of liability—as long as the institution closed as the result of a limitation, suspension, termination, or emergency action by the Secretary.[43] Instead, the NPRM proposes to also allow the approval of an additional location—again, with no assumption of liability—for an institution engaged in an accreditor-approved teach-out plan *and* allow such an approval to take place whenever the Secretary has evaluated and approved the teach-out plan.[44] The Department argues that this dramatic expansion is necessary because it "will provide opportunities for an institution to engage in an orderly closure and minimize disruption for the student."[45] The Department fails to consider, however, that it is not always in the student's best interests to complete his or her academic program at a closing institution. Similarly, the Department disregards that eliminating liability for improperly spent Title IV funds and unpaid student refunds will not help the Department in its stated goal of collecting amounts owed. Consequently, the Department's justifications do not rise to the level of "good reason."

3. The Department's Proposal to Allow an Institution to Originate and Disburse Title IV Funds After the End of its Participation in Title IV Programs is Unlawful

The Department proposes at 34 C.F.R. § 668.26 to allow an institution to continue to originate, award, or disburse funds under Title IV (with the approval of the institution's accreditor and state)

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42 For example, institutions that are provisionally certified must comply "with any additional conditions specified in the institution's program participation agreement that the Secretary requires the institution to meet in order for the institution to participate under [that] certification." 34 C.F.R. § 668.13. In addition, the HEA also provides the Department with authority to require "financial guarantees" from institutions and the "assumption of personal liability" by "one or more individuals who exercise substantial control over such institution[s]." HEA § 498(e), 20 U.S.C. § 1099c(e).

43 84 Fed. Reg. at 27,416.

44 *Id.*

45 *Id.*

for no more than 120 days following the end of its participation in Title IV programs.[46] Such a proposal violates the HEA and is without adequate justification.[47]

As an initial matter, the NPRM's proposal violates the HEA because it proposes to unilaterally grant the Secretary new authority to allow an institution to "continue to originate, award, or disburse funds" *after* the end of an institution's participation in Title IV programs. According to the clear terms of the HEA, the Secretary shall only provide funds to "an institution of higher education that has an agreement with the Secretary under section 1087d(a) of [Title IV] to participate in the direct student loan programs."[48] The HEA also requires institutions to sign additional documents demonstrating their eligibility to receive Title IV funds, including a Program Participation Agreement ("PPA").[49] If an institution does not have these two agreements, it is statutorily ineligible to receive Title IV funds. In other words, the HEA prohibits the Secretary from providing funds to ineligible institutions. Yet, the NPRM proposes to allow the Secretary to do just that. The Department cannot, by regulatory fiat, grant itself authorities that do not exist in the HEA.

In addition, the Department has failed to provide a "good reason" for this regulatory change. For example, the Department argues, without evidence, that allowing the additional disbursement of funds would permit an institution to teach-out its own students, giving them time to complete their academic programs.[50] Such reasoning does not consider that students may not want to finish their degree or credential at the closing institution, choosing instead to transfer or apply for a closed school discharge. Moreover, while the Department has estimated that "5 institutions may utilize this opportunity annually,"[51] it has not made clear where it came up with this number or how much this specific change would cost. Its three-sentence justification simply does not satisfy the Department's burden under the APA.

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46 84 Fed. Reg. at 27,440.

47 Although the Department does not make this argument, the NPRM's proposal is also dramatically different from the Department's current "second disbursement" regulation in at least two critical respects. *See* 34 C.F.R. § 668.26(d)(1), (3). First, the "second disbursement" regulation only permits institutions to use or "request additional funds" if the institution's participation in Title IV ends during a "payment period," *id.* § 668.26(d)(1), or a "period of enrollment," § 668.26(d)(3). Second, the regulation only permits a school to request new funds if the commitment was made prior to the end of an institution's participation in Title IV. *See, e.g.*, 34 C.F.R. § 668.26(d)(3)(iv). In other words, under existing regulation, the Department is merely making good on commitments it has already made to students regarding their financial aid packages *during a time when their institutions still participated in Title IV*. In contrast, the NPRM seeks to extend the Department's authority to provide additional Title IV funding for use at an institution that the Department, for whatever reason, has already determined is no longer eligible to receive those funds.

48 HEA § 452(a)(1), 20 U.S.C. § 1087b(a)(1).

49 HEA § 487, 20 U.S.C. § 1094.

50 84 Fed. Reg. at 27,441.

51 84 Fed. Reg. at 27,464.

4. By Breaking up Proposals from the Consensus Agreement into Multiple Proposed Rules, the Department Risks Running Afoul of the HEA's Negotiated Rulemaking Requirement, Rendering the Entire Process Contrary to Law

With respect to the negotiated rulemaking process, the Department has been criticized for: (i) choosing a committee of negotiators that was nearly devoid of student-centered voices; (ii) creating an unwieldy and unmanageable agenda by proposing too many topics for a single negotiated rulemaking; and (iii) failing to provide any data or information to inform the rulemaking itself, which this comment joins. In addition, the Department's decision to cherry pick certain proposals from the consensus rule for this NPRM risks violating the HEA's negotiated rulemaking requirement, and therefore risks being contrary to law, in at least two ways. First, the consensus rule involves multiple moving parts that are designed to work together, a fact that the Department itself acknowledges.[52] But if the Department finalizes this NPRM by November 1, 2019, and leaves other pieces of the consensus rule for a later date, the rule will, by design, not function as the negotiating rulemaking committee envisioned. This is simply not what Congress had in mind when it enacted HEA § 492, 20 U.S.C. § 1089. Second, the decision to break up the consensus rule into multiple parts deprives the public of the opportunity to meaningfully comment on the consensus rule itself. Finally, there is no guarantee that the Department will, in fact, propose the remaining pieces of the consensus rule at a later date. That outcome will similarly prevent the consensus rule from functioning coherently as a whole. Given these very serious procedural errors, the Department should rescind this NPRM and begin a new negotiating rulemaking process.

5. The Comment Period is too Short and Does not Permit a Meaningful Opportunity to Comment

The NPRM fails to explain why the Department provided only a 30-day comment period for a rulemaking that touches on topics as disparate as the criteria for accreditor recognition, state authorization, and institutional eligibility. Moreover, the short 30-day comment period—which included one federal holiday (Independence Day, July 4, 2019) and eight weekend days, totaling only twenty-one business days—does not permit us to meaningfully comment on the proposed regulations. We also note that this regulation is classified as "economically significant" and "major" by the Office of Information and Regulatory Affairs ("OIRA"). In such circumstances, section 6(a) of Executive Order 12,866 commands that the Department "afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days*." Yet, without explanation, the Department has chosen here to provide a comment period of only half that time. Thirty days is simply not enough to prepare meaningful comments to such a comprehensive rulemaking.

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[52] *See, e.g.*, 84 Fed. Reg. 27,450 (noting that "[a]n additional complicating factor in developing [estimates of federal student aid transfers] are the related regulatory changes on which the committee reached consensus in this negotiated rulemaking that will be proposed in separate notices of proposed rulemaking"); *see also* 84 Fed. Reg. at 27,454 (noting that the estimated net impact of Pell grant and loan changes as the result of allowing institutions to respond more quickly to market demand "reflects uncertainty about the extent of this potential expansion, as well as the fact that much of the expansion may involve online programs subject to forthcoming proposed regulatory changes that would interact with these proposed regulations").

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For all of the reasons stated above, NSLDN strongly opposes the Department's proposed changes to institutional eligibility requirements and standards for participation, mandatory public and individualized disclosures, and the 2016 State Authorization Rule. Such changes will leave students less informed about their enrollment decisions, permit online education programs to operate in states without an established complaint process, impermissibly limit federal liability for misuse of Title IV funds at closed schools that are purchased by other institutions, and allow the Department to unlawfully disburse Title IV funds to ineligible institutions.

Thank you for your attention to these important issues facing student loan borrowers. For more information, please contact NSLDN's Counsel, Robyn Bitner, at robyn@nsldn.org.

Sincerely,

The National Student Legal Defense Network