Center for Responsible Lending

May 4, 2020

*Electronically filed via regulations.gov*

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking (NPRM)
Docket ID ED-2018-OPE-0076

Dear Secretary DeVos,

The Center for Responsible Lending (CRL)[1] files this comment in response to the U.S. Department of Education's notice of proposed rulemaking that would amend the regulations for distance education as provided for under the Higher Education Act. Research and recent history have established that online education has a disappointing track record, that problematic online programs are particularly concentrated at for-profit institutions, and that accreditors have not demonstrated that they can adequately oversee the quality and consistency of Title IV programs. As COVID-19 upends brick and mortar higher education and moves more students than ever online, the proposed rule leaves these students particularly at risk.

As more borrowers than ever migrate to online platforms, the Department's role in ensuring program integrity is even more vital. The consensus language in the NPRM represents the best compromise between industry, innovators, and borrowers. If it is changed at all, it should be strengthened, not weakened. The final rule should include the consensus definitions regarding regular and substantive interactions, retain the consensus agreement to limit the portion of a program that may be outsourced to 50% (with accreditor approval required above 25%), and prohibit institutions from artificially inflating program time in order to charge more in federally subsidized tuition.

[1] The Center for Responsible Lending (CRL) is a non-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices, including student loan debt incurred as a result of fraudulent representations by higher learning institutions. CRL's views on student lending are informed by its affiliation with Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses, and nonprofits, and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

## Background

Today, millions of students attend school online. The 2016 distance education regulations attempted to rectify the gap created by inconsistent state authority and regulation of online providers, where students and taxpayers found themselves inadequately protected as issues arose with online coursework or programs. The need for regulation was simple: there is no reason why online education should be exempted from full oversight under the higher education oversight "triad," especially when millions of students attend school online and billions of dollars in federal funds flow through these programs.

Despite the Department's claims that less oversight is necessary to promote innovation in online learning, the sector has seen enormous growth in the current regulatory environment. Prior to the COVID-19 crisis, 34% of all higher education students (a total of more than 6.6 million students) were enrolled in online courses, up from 8% of students in the 1999-2000 academic year.[2]

Growth in the sector, however, has not necessarily correlated with increased access or more quality programs. A 2011 GAO investigation of for-profit online programs found significant issues with academic quality in online programs.[3] Students who attended online programs have sued universities for "fraudulent and negligent misrepresentation, unjust enrichment" and violations of consumer protection statutes, citing a lack of instruction by and interaction with faculty who were "consistently unresponsive."[4] Perhaps most distressing, studies show that employers consistently view online degrees as inferior to those earned in-person, citing the "lack of interaction, and in particular face-to-face communication between students and faculty."[5] The American Enterprise Institute has called the "lack of sufficient interaction between students and faculty" the "Achilles' heel" of online education.[6]

**Online education, even prior to the COVID-19 crisis, is prevalent in the for-profit sector.**

In fall 2017, more than 70% of students at for-profit colleges were enrolled in online education, significantly more than at public (32%) and private nonprofit (29%) institutions.[7] Despite an overall reduction in enrollment since 2010 due to a series of investigations, closures and consolidations,[8] for-

[2] U.S. Department of Education, National Center for Education Statistics (NCES). *Digest of Education Statistics 2018*, Table 311.13. Available at https://nces.ed.gov/fastfacts/display.asp?id=80; Radford, A.W. 2011, October. *Learning at a Distance: Undergraduate Enrollment in Distance Education Courses and Degree Programs.* U.S. Department of Education, National Center for Education Statistics. Available at https://nces.ed.gov/pubs2012/2012154.pdf.

[3] U.S. Government Accountability Office. 2011, October. "For-Profit Schools: Experiences of Undercover Students Enrolled in Online Classes at Selected Colleges." Available at https://www.gao.gov/new.items/d12150.pdf.

[4] Straumsheim, C. 2016, April 15. "Equal Promises, Unequal Experiences." *Inside Higher Ed*. Available at https://www.insidehighered.com/news/2016/04/15/george-washington-u-alumni-sue-university-over-quality-online-program.

[5] Linardopoulos, N. 2012 "Employers' Perspectives of Online Education." *Campus-Wide Information Systems 29*(3), 189-194.

[6] Xu, D. & Xu, Y. 2019, March. "The Promises and Limits of Online Higher Education: Understanding How Distance Education Affects Access, Cost, and Quality." *American Enterprise Institute.* Available at https://www.aei.org/research-products/report/the-promises-and-limits-of-online-higher-education/.

[7] U.S. Department of Education, National Center for Education Statistics. *Digest of Education Statistics 2018*, Table 311.15. Available at https://nces.ed.gov/fastfacts/display.asp?id=80.

[8] These investigations include congressional hearings, investigative reporting, and Government Accountability Office (GAO) audits as well as numerous law enforcement actions by state Attorneys General.

profits colleges continue to enroll an outsized share of students that take only online courses: 22% of *online-only* undergraduate students and 27% of all *online-only* graduate students.[9]

Further, for-profit online programs are far more likely to target and recruit students that are low-income, African American, veterans, and female heads of households.[10] For-profit colleges rely heavily on the Title IV aid that these students bring, with 10 of the largest 11 for-profit colleges receiving around 70% or more of their revenues from this source.[11] When including military student aid, revenue shares from federal aid sources for five of these schools rises to 90% or more.

Abuses by for-profit schools are well-known. These predatory practices include misrepresentations of graduation rates, job placement rates, and likely earnings, all the while engaging in high-pressure sales tactics in attempts to enroll as many students as possible.[12] As a result of these abuses, often coupled with poor quality instruction and curriculum, many for-profit students are left stuck with crushing levels of student debt, often without a degree or any measurable benefit or greater earnings.[13] CRL's own focus group research with former students that had attended for-profit *online* programs confirms that the online format, in particular, can exacerbate these disappointing outcomes, as reflected in comments about superficial instruction, lack of instructor availability and engagement, and online degrees that are not taken seriously in the job market.[14]

**Research underscores the negative impacts online education in for-profit settings can have on students, particularly those least well-prepared for educational instruction.[15]**

Through comparing student performance in online and in-person courses offered through DeVry University, a large for-profit institution, researchers found that students enrolled in online courses experienced an increased probability of separating from the program and were likely to perform worse in future coursework than students enrolled in identical in-person courses.[16]

Further evidence of poor student outcomes comes from research that explores the labor market outcomes of students who attended for-profit institutions compared to students that attended public

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[9] Howarth, R. & Stifler, L. 2019, March 28. "The Failings of Online For-Profit Colleges: Findings from Student Borrower Focus Groups." *Brookings Institution.* Available at: https://www.brookings.edu/research/the-failings-of-online-for-profit-colleges-findings-from-student-borrower-focus-groups/.

[10] Berman, J. 2017, September 11. "Plagued by Scandal, For-Profit Colleges Target Single Mothers." *Marketwatch.* Available at https://www.marketwatch.com/story/plagued-by-scandal-for-profit-colleges-target-single-mothers-2017-09-07.

[11] Kelchen, R. 2017, January 11. "How much do for-profit colleges rely on federal funds?" *Brookings Institution*. Available at https://www.brookings.edu/blog/brown-center-chalkboard/2017/01/11/how-much-do-for-profit-collegesrely-on-federal-funds/.

[12] Shireman, R. 2017, January 24. "The For-Profit College Story: Scandal, Regulate, Forget, Repeat." *The Century Foundation.* Available at https://tcf.org/content/report/profit-college-story-scandal-regulate-forget-repeat/ and

[13] Cellini, S.R. & Koedel, C. 2017, September. "For-Profit College Policy at the Crossroads." *Urban Institute*. Available at https://www.urban.org/research/publication/profit-college-policy-crossroads.

[14] Howarth & Stifler, 2019.

[15] For a recent exhaustive review of the literature on online higher education outcomes generally, see: Protopsaltis, S. & Baum, S. 2019, January. "Does Online Education Live Up To Its Promise? A Look at the Evidence and Implications for Federal Policy." *George Mason University and the Urban Institute.* Available at http://mason.gmu.edu/~sprotops/OnlineEd.pdf.

[16] Bettinger, E. & Loeb, S. 2017. "Promises and Pitfalls of Online Education." *Brookings Institution Evidence Speaks Reports 2*(15).

institutions.[17] Controlling for demographics, prior earnings, program of study, and location, the authors found that certificate-seeking students who attended for-profits experienced lower annual wages by about 11%, compared to their public-sector counterparts. These wage differences were substantially worse for female students and *more than doubled for those enrolled in online for-profit programs.*

Finally, researchers examined the question of biased response rates by instructors in an online college environment by certain race and gender combinations among students. In a field experiment involving 124 massive open online courses, the authors found that instructors are 94% more likely to respond to white male students (as indicated by fictive names evocative of certain races and genders) than other race/gender combinations.[18] This finding has implications for the for-profit online sector, as both African-American and female students are more heavily represented in for-profit online colleges when compared to public and private non-profit schools. The research is clear and makes the case for more stringent regulation and oversight, not less.

**Accountability in higher education is always important, but it is crucial when known bad actors are attempting to operate outside of oversight.**

The Department has already weakened states' oversight of online education through the recent rewrite of the State Authorization for Distance Education rules.[19] These rules govern voluntary state reciprocity agreements such as The National Council for State Authorization Reciprocity Agreement (NC-SARA), whose stated purpose is to provide distance education institutions with uniform regulations in all NC-SARA member states.[20] Reciprocity agreements shift principal oversight responsibilities from the state in which the distance education student resides to the "home state" of the institution offering the online instruction. Ed's new rules leave in place uniform minimum standards such as those established by NC-SARA that fall far short of the intended purpose of protecting students from predatory and low-quality online institutions.

Further, the State Authorization rules undermine the ability of participating states to seek legal action against out-of-state distance education providers on behalf of residents that have been harmed by allowing NC-SARA and similar compacts to explicitly prevent enforcement of postsecondary-specific law as to distance education programs/schools except in the home state. [21] This encourages unscrupulous institutions to seek the least stringent state in which to locate their home base.[22] For-profit distance education providers have the most incentive to engage in this behavior, as the vast majority of their

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[17] Cellini, S.R. & Turner, N. 2018. "Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data." *Journal of Human Resources.* doi: 1016_8302R1.

[18] Baker, R.; Dee, T.; Evans, B.; & John, J. 2018. "Bias in Online Classes: Evidence from a Field Experiment" (CEPA Working Paper No.18-03). *Stanford Center for Education Policy Analysis*. Available at http://cepa.stanford.edu/wp18-03.

[19] McKenzie, L. 2019, November 12. "Rift Over State Reciprocity Rules." *Inside Higher Ed*. Available at https://www.insidehighered.com/digital-learning/article/2019/11/12/disagreement-over-federal-regulations-distance-education

[20] Mattes, M. 2016. "States 'Opt Out' of Online Higher Education Regulation, Leaving Students Behind." *The Century Foundation.* Available at https://tcf.org/content/commentary/states-opt-online-higher-education-regulation-leaving-students-behind/.

[21] The Institute for College Access and Success. 2018. *Going the Distance: Consumer Protection for Students Who Attend College Online*. Available at https://ticas.org/content/pub/going-distance.

[22]Vasquez, M. 2017, November 10. "Inside the Scramble to Save Ashford U." *The Chronicle of Higher Education*. Available at https://www.chronicle.com/article/Inside-the-Scramble-to-Save/241747.

online enrollments for both undergraduates (80%) and graduates (85%) are in states other than the home state of the for-profit college.[23]

The current NPRM states that the proposed regulations are intended to limit risks to students and taxpayers, by delegating authority for assuring academic quality in the distance education space to States and accreditors. However, the new State Authorization rules effectively gut the authority of individual states to assure that their residents are receiving a quality education from out-of-state distance ed providers.

## Comments

**The Department must not roll back definitions regarding regular and substantive interactions, including language about the definition of an instructor.**

Researchers state clearly that any approach that eliminates or substantively weakens the regular and substantive interaction requirement is "not only inconsistent with the significant evidence that clearly demonstrates the key role of faculty-student interaction in ensuring a quality online education, but would further erode employer, educator, and public confidence."[24] This erosion of confidence is based on a number of research findings that the Department should be seeking to remedy, not exacerbate through counterproductive "flexibility measures."

These findings, as outlined in the recent testimony of Sandy Baum before the New Jersey State Senate, include:

- "'Students in online education, and in particular underprepared and disadvantaged students, underperform and, on average, experience poor outcomes. Gaps in educational attainment across socioeconomic groups are even larger in online programs than in traditional coursework."
- "Online education has failed to improve affordability, frequently costs more, and does not produce a positive return on investment."
- "Regular and substantive student-instructor interactivity is a key determinant of quality in online education; it leads to improved student satisfaction, learning, and outcomes."
- "Online students desire greater student-instructor interaction; the online education community is also calling for a stronger focus on such interactivity to address a widely recognized shortcoming of current online offerings."[25]

The Department of Education Office of the Inspector General (OIG) has repeatedly raised concerns about distance education and has characterized it as "an area that poses significant risks to the integrity of federal student aid programs."[26] In particular, the OIG has focused on, as recently as March 2018, the

[23] Howarth & Stifler, 2019.
[24] Protopsaltis & Baum, 2019.
[25] Baum, Sandy. "Does Online Education Live Up To Its Promise? A Look at the Evidence." Statement before the New Jersey Senate Higher Education Committee, February 25, 2020. Available at: https://www.urban.org/sites/default/files/publication/101762/Does%2520Online%2520Education%2520Live%2520Up%2520To%2520Its%2520Promise%2520a%2520Look%2520at%2520The%2520Evidence_0_9.pdf
[26] Protopsaltis & Baum, 2019.

regular and substantive interaction requirement.[27] More specifically, the OIG raised concerns about replacing "instructor" with "faculty" in the definition of distance education, which the House PROSPER Act aimed to do, arguing that this difference would essentially make the regulation meaningless and allow correspondence education programs to qualify for Title IV. The OIG wrote that "Removing the definition of distance education and replacing 'instructor' with 'faculty' in correspondence education would allow a school to qualify for full participation in the federal student aid programs based on email contact between students and faculty on matters unrelated to the subject matter of a program."[28]

During negotiated rulemaking, the Department of Education attempted to undermine the requirement. Similar to the attempts by legislators in the PROSPER Act, the Department proposed changes that would undermine the qualifications of an instructor. The Department also suggested limiting requirements for interaction to reactive outreach from instructors and even suggested including the communication of non-academic content to be considered a substantive interaction. These changes, which were rejected in the consensus language, have the effect of blurring the line between correspondence and online education, encouraging unscrupulous bad actors to take advantage of vulnerable students.

We urge the Department to heed the warnings of its own OIG and the recommendations agreed to by negotiators, not to further change the definitions of regular and substantive interaction, including the definition of an instructor.

**The Department should leave intact the consensus agreement to limit the portion of a program that may be outsourced to 50%, with accreditor approval required above 25%.**

Currently, Title IV programs may outsource some of their educational programs to other providers, including non-Title IV providers, such as YouTube. Outsourcing up to 25% of a program is allowed without accreditor approval, and up to 50% is allowed once accreditors have approved. The approval of the Department of Education acts as "Good Housekeeping Seal of Approval" - a marker of quality and confidence for student borrowers and their families. They trust that Title IV institutions have gone through and complied with some baseline level of oversight. The basic requirements for receiving federal aid (receiving accreditation, passing a financial responsibility test, and passing a cohort default rate metric) are the very least institutions should do to ensure that they are providing quality education to their students. To allow providers to bypass these requirements is essentially a back door into Title IV for unvetted, unqualified, and predatory providers who see the students who attend their institutions as dollar signs, not promising minds. As New America has written in previous comments, lifting the 50% cap would allow "federal financial aid eligibility to become something of a shell game" in the most egregious cases.[29] During negotiations, the Department seemed eager to not only lift the 50% threshold, but even proposed raising the limit to 100% during some discussions, a move that negotiators resoundingly rejected.

This risk is evident in the trend of for-profit colleges and education technology companies moving into private contracting in the role of online program managers (OPMs), providing a wide range of online

[27] U.S. Department of Education, Office of the Inspector General. 2018. "U.S. Department of Education Office of Inspector General Recommendations for the Reauthorization of the Higher Education Act." Available at https://www2.ed.gov/about/offices/list/oig/misc/lettertocongressonoighearecommendationsmarch2018.pdf.
[28] Id.
[29] New America Foundation. 2019. *Outsourcing of Educational Programs*. Available at https://s3.amazonaws.com/newamericadotorg/documents/Eligible_Programs_Issue_Paper.pdf.

education services to affiliated colleges and universities.[30] While potentially expedient for the public higher education institution, OPMs are private, profit-seeking entities lacking the motives and responsibility required to provide a quality of education that meets the standards of public higher education institutions without serious oversight. Furthermore, students are often unaware of the involvement of these external companies, wrongly assuming that a course developed and/or taught by an OPM contractor is created and managed by the public institution.[31]

The Purdue University/Kaplan partnership is an example of this type of arrangement, creating a new online university Purdue Global that has a 30-year contractual service relationship with Kaplan as a for-profit OPM.[32] While the new entity has been cloaked in a mission of inclusion and educational access for students, experts in higher education have expressed concern that this relationship ignores Kaplan's history of problematic practices in the distance education space.[33] A recent study of 79 similar arrangements between OPMs and public universities found that "growing private control-which is often hidden from public view-is jeopardizing the quality of online programs, stripping control from colleges and universities, and putting students at risk of predatory behavior and abuse at the hands of for-profit companies."[34] It's notable that 68% of these contracts included OPM responsibility for course development and 32% included OPM instruction.[35]

Instead of allowing institutions to outsource their programs to unaccredited agencies, the Department of Education should focus on strengthening quality requirements through the accreditation process. The OIG stated in 2018 that it had "reported extensively on some accrediting agencies' deficient oversight of critical issues such as credit hours, program length, and competency-based education," and added simply that "accrediting agencies are not always reliable."[36] Strengthening the accreditation process, especially for online programs, should be the paramount goal of the Department, rather than stripping away quality checks as the sector is expanding at a breakneck pace.

Unfortunately, the Department is doing the opposite. In last year's accreditation rules, for instance, the Department changed regulations to allow relatively unaccountable agency staff to approve contracts with unaccredited providers, instead of the commissioners who were previously responsible for the approvals. These rules also sped up the process so that approvals would be processed in a maximum of 180 days, making it more likely that the approval process will become more opaque and will not be based on meaningful due diligence. We urge the Department to reverse those changes.

Instead of helping students access high-quality, innovative remote instruction, the Department has proposed allowing institutions to outsource up to 100% of instruction, which would make it very difficult

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[30] Mattes, Margaret. 2017. "The Private Side of Public Higher Education." *The Century Foundation.* August 7, 2017. https://tcf.org/content/report/private-side-public-higher-education/.
[31] Id.
[32] Fain, P. 2017, May 30. "Fine Print and Tough Questions for the Purdue-Kaplan Deal." *Inside Higher Ed.* Available at https://www.insidehighered.com/news/2017/05/30/regulators-and-accreditor-begin-review-purdues-boundary-testing-deal-kaplan.
[33] Shireman, R. 2017, April 30. "There's a Reason the Purdue-Kaplan Deal Sounds Too Good to Be True". *The Chronicle of Higher Education*. Available at https://www.chronicle.com/article/There-s-a-Reason-the/239954.
[34] The Century Foundation. 2019, September 12. *TCF Analysis of 70+ University-OPM Contracts Reveals Increasing Risks to Students, Public Education.* Available at: https://tcf.org/content/about-tcf/tcf-analysis-70-university-opm-contracts-reveals-increasing-risks-students-public-education/.
[35] Id.
[36] U.S. Department of Education, Office of the Inspector General, 2018.

for students to understand and evaluate the quality of their own institution. Again, the Department seems to be working towards the goal of deregulating for-profit institutions and weakening quality-control measures at the expense of students, in a time when online enrollment is surging and enrollment in low-quality programs is a real threat. We urge the Department to maintain the consensus agreement which provides reasonable limits on outsourcing.

**The Department must not allow institutions to artificially inflate program length.**

The Department has a responsibility to be a good steward of taxpayer dollars. Allowing for the inflation of program length merely so that colleges access additional student loan funds, rather than academic necessity, is a failure of that stewardship. Under current regulation, colleges may already exceed state requirements for a program's length by 50%. Institutions must not be allowed to unnecessarily pack a program's curriculum and charge more for it.

A 1991 Senate investigation into abuses in federal student aid programs found "serious problems at every level" and revealed that "Unscrupulous and/or dishonest school owners and officials reaped enormous profits by evading [federal student aid] requirements in several critical areas," including course length, particularly at proprietary, or for-profit, schools.[37] Testimony related to the investigation revealed that "some proprietary schools have falsified information regarding the length of their courses and/or deliberately stretched courses beyond the level needed to train students for employment…" and the Inspector General found that "course-stretching can result in a proprietary school student's paying as much as 38 times the tuition charged by other postsecondary institutions, such as a local community college, for the same training."[38]

Three years after the Senate investigation in 1994, then-Secretary of Education Lamar Alexander reported that "an institution…sought approval of a 600-hour program when the state in which the institution [was] located [required] only 40 hours of training for entry level positions for which the program provides training."[39] And the OIG has documented instances where accrediting agencies simply did not assess the appropriateness of overall program length, revealing that abuses in this area are not systematically observed or corrected.[40]

This history of abuse clearly shows that requiring a "reasonable relationship" between course length and entry-level requirements is crucial. We strongly urge the Department to maintain the current language in its final rule, under which colleges may already exceed state requirements by up to 50%.

[37] United States Senate. 1991. "Abuses in Federal Student Aid Programs Report." *Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*. Available at https://files.eric.ed.gov/fulltext/ED332631.pdf.

[38] Id.

[39] 59 FR 9548. Available at https://www.govinfo.gov/content/pkg/FR-1994-02-28/pdf/FR-1994-02-28.pdf.

[40] U.S. Department of Education, Office of the Inspector General. 2009. "U.S. Department of Education Office of Inspector General Review of the Middle States Commission on Higher Education's Standards for Program Length." Available at https://www2.ed.gov/about/offices/list/oig/misc/lettertocongressonoighearecommendationsmarch2018.pdf.

## Conclusion

For nearly a year, Administration officials have touted the consensus reached by negotiators in the spring of 2019. Despite the congratulatory remarks of everyone from Secretary DeVos to Ivanka Trump, however, these proposed rules fall far short of what negotiators agreed to.

The Department should respect the work and compromise of the negotiators who reached consensus and take more seriously their role in protecting vulnerable borrowers and their families from predators who see federal financial aid dollars as a quick way to make a buck. Restore the consensus agreement by restoring the consensus definitions regarding regular and substantive interactions and the consensus agreement to limit the portion of a program that may be outsourced to 50%, with accreditor approval required above 25%, as well as prohibiting institutions from artificially inflating program time in order to charge more in federally subsidized tuition.

Respectfully Submitted,
The Center for Responsible Lending