

February 10, 2025

Mr. James Bergeron
Acting Under Secretary
Office of the Under Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: U.S. Department of Education Guidance Concerning Accreditation Agencies

Dear Mr. Bergeron:

The Defense of Freedom Institute for Policy Studies (“DFI”) is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Bob Eitel and Jim Blew, former senior leaders of the U.S. Department of Education (“Department”) who are experts in education law and policy, founded DFI in 2021. DFI contributes its expertise to policy and legal debates concerning federal education matters, including the Department’s role in recognizing accreditation agencies for institutions of higher education.

On December 14, 2022, DFI’s leaders and six other former Department appointees joined a letter to U.S. Secretary of Education Miguel Cardona and Under Secretary of Education James Kvaal to express serious concerns over the Department’s decision earlier that year to revise longstanding guidance in response to the State of Florida’s adoption of a new law¹ governing the institutional accreditation of its public universities and colleges.² That letter pointed out that the Department’s statutory authority to recognize accreditation agencies does not extend to interference with a state’s efforts to conduct oversight of, and promote academic quality in, its public higher education system, and it urged the Department to withdraw its guidance and cease its politically motivated harassment of the government of the State of Florida.³

¹ Florida Senate Bill 7044 (2022). Chapter No. 2022-70.

² Letter from Jim Blew, Robert S. Eitel, et al., to Secretary Miguel Cardona and Under Secretary James Kvaal, Dec. 14, 2022, <https://dfipolicy.org/wp-content/uploads/2023/09/Florida-Accreditation-Letter-12.14.2022-FINAL-SIGNED-2.pdf>.

³ Other examples of this undue harassment include Secretary Cardona’s criticism of Florida’s school masking policy and advice to school districts on circumventing state policy (*see*



In light of President Trump’s return to the White House and the consequent reorientation of the Department away from the disastrous policies and misinterpretations of federal law under the Biden-Harris Administration, DFI renews our call for the Department to rescind its July 2022 postsecondary accreditation guidance. In doing so, the Department would wipe away politically motivated and patently unlawful actions of the previous administration. Such a move would be an excellent first step toward a more effective nationwide postsecondary accreditation system that removes barriers to entry for new accreditors and encourages the establishment of new and innovative institutions of higher education.

The Florida Law

Approved by the Florida Legislature on March 9, 2022, and signed by Governor Ron DeSantis on April 19, 2022, Senate Bill 7044 (“SB 7044”) represents the reasoned judgment of the sovereign authorities of the State of Florida that the accreditation process for public postsecondary institutions must change to ensure that Florida students have the opportunity to obtain a quality college or university education.⁴

With SB 7044, Florida aims to improve the quality of education at Florida’s colleges and universities by, in part, breaking up the monopoly exercised by a single accrediting agency, the Southern Association of Colleges and Schools Commission on Colleges (“SACSCOC”), over the institutional accreditation of Florida’s state-supported postsecondary institutions.⁵ Once a regional accreditor with a government-sanctioned monopoly over colleges and universities in the South,⁶

<https://oese.ed.gov/files/2021/08/Letter-from-Secretary-Cardona-FL-08-13-21.pdf>); the Biden-Harris Education Department’s threat to use its civil rights enforcement authority to override Title IX’s requirements and laws in Florida and elsewhere barring biological males who identify as female from competing against biological females in school athletics (*see* https://www.espn.com/college-sports/story/_/id/31566391/us-secretary-education-miguel-cardona-backs-transgender-athletes-rights); and its pledge to evaluate whether a Florida law prohibiting public school instruction of children younger than eight years old on sexual orientation and gender identity violates federal law (*see* https://www.legistorm.com/stormfeed/view_rss/2891167/organization/69539/title/statement-from-us-secretary-of-education-miguel-cardona-on-the-florida-state-legislatures-parental-rights-in-education-bill.html).

⁴ *See* <https://www.flsenate.gov/Session/Bill/2022/7044>.

⁵ SACSCOC has been the institutional accrediting agency for all of Florida’s public colleges and universities and more than 30 of its private colleges and universities. *See* https://sacscoc.org/institutions/?state=FL&results_per_page=25&curpage=1.

⁶ The Department’s 2019 negotiated rulemaking explicitly authorizes SACSCOC and other such institutional accreditors to accredit institutions throughout the United States. 34 C.F.R. § 602.11;



SACSCOC continues to wield its influence despite evidence that it does not improve and may actually hinder the economic outcomes of recent graduates of the institutions it accredits.⁷ SACSCOC has, at times, threatened Florida’s public postsecondary institutions with disciplinary actions for adhering to the policy and administrative decisions of the duly elected Governor of Florida.⁸

Against this backdrop, SB 7044 required Florida’s public colleges and universities to seek and obtain institutional accreditation from a different agency or association every cycle, typically five years.⁹ In 2023, the Florida Legislature passed a law modifying this obligation to require only a

see <https://www.insidehighered.com/views/2020/03/17/pros-and-cons-having-regional-accreditors-go-national-opinion>.

⁷ See, e.g., <https://www.texaspolicy.com/wp-content/uploads/2022/09/2022-09-RR-NGT-Which-College-Accreditors-are-Failing-Students%E2%80%93Gillen.pdf> at 10, 14 (evaluating the debt-to-earnings ratio of recent graduates by accreditor and finding that SACSCOC “stands out for poor performance because it accredits 25% of all bachelor’s degree programs [in the U.S.] but accounts for 42% of failing programs,” according to the metrics of the research, and is thus “[t]he worst regional accreditor” in the area of bachelor’s degrees);

<https://ciceroinstitute.org/research/accreditation-tenure-and-transparency-innovative-higher-education-policies-from-floridas-2022-legislative-session/> (noting that SACSCOC “accredits nearly fifty colleges that have on-time graduation rates of less than 20 percent and still receive federal student aid” and “didn’t notice that the University of North Carolina at Chapel Hill gave student-athletes academic credit for fake courses for nearly two decades”). More broadly, recent research from Harvard Business School has demonstrated that “regional” (now national) accreditors like SACSCOC are particularly unlikely to place pressure on postsecondary institutions to improve student outcomes or low-quality academic programs. See <https://college101.org/wp-content/uploads/2022/06/College101-Accreditor-College-Quality-Report-FINAL-062822.pdf> at 5 (finding that only one percent of oversight actions by such regional accreditors disciplined a postsecondary institution for unsatisfactory student outcomes or academic offerings).

⁸ See, e.g., <https://www.tallahassee.com/story/news/2021/05/13/agency-head-concerned-richard-corporans-bid-fsu-president/5083165001/> (describing a letter from SACSCOC President Belle S. Wheelan warning that Florida State University risked losing its eligibility for federal financial aid by considering hiring the sitting Florida Education Commissioner as its president); <https://www.chronicle.com/article/u-of-floridas-accreditor-will-investigate-denial-of-professors-voting-rights-testimony> (reporting Wheelan’s decision to investigate the University of Florida for its decision not to allow three professors to be paid for their expert testimony in litigation seeking to overturn state legislation on voting rights).

⁹ See <https://www.flsenate.gov/Session/Bill/2022/7044/BillText/er/PDF> at 11 (“A public postsecondary institution may not be accredited by the same accrediting agency or association



one-time change in accreditation in place of SB 7044's recurring requirement.¹⁰ Institutions must select a new accreditor from a list of accreditors identified by the state's higher education governing boards as being "best suited to serve as an accreditor" for public postsecondary institutions, as drawn from the Department's database of approved accrediting agencies and associations.¹¹ The Department's rulemaking in 2019 that ended the regional accreditation monopoly explicitly contemplates and authorizes such action. The agency crafted these regulations based on a consensus developed by an ideologically diverse set of 16 higher education stakeholders. The final rule expressly aims to "introduce greater competition and innovation that could allow an institution or program to select an accrediting agency that best aligns with the institution's mission, program offerings, and student population."¹²

Under the Florida law, if the prospective accreditor denies an institution's application for candidacy status, the school must seek accreditation from another new agency recognized by the Department.¹³ If the college or university cannot secure candidacy status with any new accreditor by the end of the five-year review cycle, it may remain with its current accreditor.¹⁴

The new Florida process inserts healthy competition and positive incentives into a languishing sector to improve student outcomes. As Dr. Angela Garcia Falconetti, President of Polk State College and Chair of the Florida College System Council of Presidents, explained when the bill passed, "This is an exciting moment for our state. Senate Bill 7044 represents a fundamental shift in how higher education operates here in Florida."¹⁵ And as Governor DeSantis remarked as he signed the bill into law, SB 7044 is "all about trying to make these institutions more in line with

for consecutive accreditation cycles. In the year following reaffirmation or fifth-year review by its accrediting agencies or associations, each public postsecondary institution must seek and obtain accreditation from an accrediting agency or association identified by the Board of Governors or State Board of Education, respectively, before its next reaffirmation or fifth-year review date." The law also contains other major reforms of Florida's postsecondary education system, including permitting colleges and universities to sue their accreditors for retaliatory actions and authorizing changes to faculty post-tenure review, that are outside the scope of this letter.

¹⁰ See <https://www.flsenate.gov/Session/Bill/2023/266/BillText/er/PDF> at 24.

¹¹ *Id.*

¹² See 84 Fed. Reg. 58,834 (Nov. 1, 2019).

¹³ See <https://www.flsenate.gov/Session/Bill/2022/7044/BillText/er/PDF>.

¹⁴ *Id.*

¹⁵ Quoted in <https://www.fldoe.org/newsroom/latest-news/icymi-governor-ron-desantis-signs-bill-to-reform-higher-education-in-florida.stml>.



what the state’s priorities are and quite frankly the priorities of parents throughout the state of Florida. So what the bill today is going to do is it’s going to *end this accreditation monopoly*.¹⁶

The Department’s Response

After the Florida Legislature passed SB 7044, the Biden-Harris Education Department quickly went to work to undermine the law by inventing new requirements, never before contemplated in the relevant statutory or regulatory text, that it purported to apply to postsecondary institutions and accreditors.

On July 19, 2022, ignoring required notice-and-comment procedures, the Department resorted to sub-regulatory guidance in the form of Dear Colleague Letters (“DCLs”), DCLs GEN-22-11 and GEN-22-10, a letter to institutional accrediting agencies, and a blog post. All of this guidance is utterly novel and outside the Department’s statutory authority granted by Congress. It appears that the Department has already removed the blog post from its website,¹⁷ and we urge the Department also to withdraw the DCLs and the letter, as they are illegal moves by the agency designed by the prior administration to impede a legally supportable policy choice by a sovereign state acting in the best interest of its citizens.

Dear Colleague Letter GEN-22-11

DCL GEN-22-11¹⁸ reverses years of commonly accepted practice and precedent. Without legal support, the letter orders postsecondary institutions to obtain the Department’s pre-approval before the school applies to a new accreditor.¹⁹

DCL GEN-22-11 lists a range of information and documents that postsecondary institutions must submit for consideration by the Department in deciding whether to pre-approve the application to the new accreditor. Among other documentation, the Department intrusively requires the institution to submit “any substantive correspondence or other communications with the new

¹⁶ *Quoted in*

<https://www.dailycommercial.com/story/news/politics/government/2022/04/19/florida-gov-ron-desantis-signs-bill-cap-tuition-threaten-tenure-politicized-curriculum/7365499001/> (emphasis added).

¹⁷ The link to the blog post on the Department’s website, <https://blog.ed.gov/2022/07/postsecondary-accreditation-cannot-become-a-race-to-the-bottom/>, now redirects to the main page of the Department’s official blog, *Homeroom*.

¹⁸ <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/procedures-institutions-seeking-approval-request-change-or-add-accrediting-agencies>.

¹⁹ *Id.*



accrediting agency, including any substantive correspondence or other communications with the agency relating to the institution’s planned application.”²⁰

The Department claims that “these procedures are in better alignment with the requirements of 34 CFR § 600.11.”²¹ The DCL warns postsecondary institutions that following the Department’s guidance (as opposed to a state’s statutory commands) “will help protect institutions from an *inadvertent loss of Title IV eligibility*.”²² This veiled threat was clearly a shot across the bow of states (like Florida) that contemplate accreditation reform as one method of improving the performance and outcomes of their public colleges and universities, as well as accreditation agencies that decide to cooperate with those states.

Dear Colleague Letter GEN-22-10

Issued the same day as the DCL discussed above, DCL GEN-22-10²³ lists six factors that the Department would consider when determining whether to approve an institution’s request to change accreditors.

These factors include whether “the proposed change of agencies or multiple accreditations would strengthen institutional quality,” “the institution is seeking to change agencies or seeking multiple accreditations because the new agency and its standards are more closely aligned with the institution’s mission than the current accrediting agency,” “the proposed change or addition involves an accrediting agency that has been subject to Department action,” and “if ultimately approved by the Department and the accrediting agency, the institution’s membership in the accrediting agency would be voluntary, as required for recognition of the accrediting agency under 34 CFR § 602.14(a).”²⁴ In listing this final factor, the Department referred to regulations that only recognize accrediting agencies that have a “voluntary membership.”²⁵

The Department’s Letter to Institutional Accrediting Agencies

In a letter sent to institutional accrediting agencies on the same day as the DCLs,²⁶ the Department’s then Accreditation Group Director stated that “a voluntary association for quality

²⁰ *Id.*

²¹ *Id.*

²² *Id.* (emphasis added).

²³ <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/guidance-institutions-seeking-change-or-add-accrediting-agencies>.

²⁴ *Id.*

²⁵ 34 CFR § 602.14(a)(2)(i), (3)(i).

²⁶ <https://www2.ed.gov/admins/finaid/accred/letter-to-institutional-accreditors.pdf>.



assurance, as opposed to a compelled one, or even one centralized through or by the federal government, is one of the unique features of American higher education. This voluntary association is intended to engender a willing and cooperative environment for the review and improvement of educational programs at American institutions of higher education.”²⁷

Without any supporting evidence, the letter then accuses Florida’s SB 7044 of “potentially undermin[ing] the voluntary nature of the relationship and the independent roles of the various actors in the triad,” thus requiring the Department to reexamine “the issue of voluntary membership in two circumstances: when institutions seek to change accrediting agencies (or seek multiple accreditation) and when the Department reviews accrediting agencies as part of its recognition process.”²⁸

The letter states that the Department will “examine the issue of voluntariness when it conducts its agency recognition review.”²⁹ It then instructs accrediting agencies, even when the Department finds that a postsecondary institution had reasonable cause to change accreditors, to “**conduct their own independent evaluation of whether an institutional change of accrediting agencies (or multiple accreditation) is voluntary**” to determine “whether accrediting an institution will compromise the voluntary nature of their membership **prior to** approving a membership application.”³⁰ Without describing the standards that it would use in making a determination, the Department threatens accrediting agencies with withdrawal of recognition if it finds that an agency does not have a voluntary membership.³¹ This letter strongly implies that institutions seeking a new accreditor in accordance with SB 7044 cannot do so voluntarily and that any accreditation agency that accepts Florida state universities and colleges as new members would violate the “voluntary membership” requirement supposedly enforced by the Department—placing its Department recognition at risk.

The Department’s Blog Post

The Department rounded out its salvo against SB 7044 on July 19, 2022, with a blog post in the Department’s Office of Postsecondary Education entitled “Postsecondary Accreditation Cannot

²⁷ *Id.* at 1.

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ *Id.* (emphases in original).

³¹ *Id.* at 2–3 (“If, after having reviewed all the relevant factors, the Department determines that an accrediting agency does not have a voluntary membership, as required for recognition by the Department under section 1099b(a)(2) of the HEA and § 602.14(a), the Department will be unable to recognize the accrediting agency.”).



Become a Race to the Bottom.”³² The blogger accused the Florida law *and* the Department’s own 2019 regulations (allowing postsecondary institutions to seek accreditors throughout the United States) of causing confusion and potentially producing “a chilling effect on accrediting agencies as they seek to effectively do their job.”³³ The post claimed that the goal of the Department’s DCLs and letter to accreditors was thus “to prevent a race to the bottom in quality standards among accrediting agencies and ensure that institutions cannot switch to an accrediting agency with less rigorous standards simply to evade accountability from an accrediting agency that investigates practices or takes corrective action against an institution.”³⁴

The blog asserted that the 2022 guidance would “help maintain the integrity of the Federal triad and preserve the accrediting agencies’ role in oversight as intended in the HEA” by, paradoxically, placing federal pressure on other members of the triad—the State of Florida and accreditors—to follow the Department’s will in effectively making SB 7044’s reforms a dead letter.

As noted previously, it appears that this blog post is no longer accessible on the Department’s website.³⁵ We thank the Department for removing this blog post.

Florida Lawsuit and Recent Developments

On June 21, 2023, the State of Florida sued Secretary Cardona and other Department officials, arguing that they had violated the Administrative Procedure Act (“APA”) by misinterpreting the law and failing to pursue notice-and-comment rulemaking in issuing its accreditation guidance discussed above.³⁶ More broadly, the complaint asserts that the accreditation system set out by the Higher Education Act of 1965, as amended (“HEA”), violates the private nondelegation doctrine and other constitutional requirements because it vests private actors with authority to set binding standards for the receipt of federal education funding.³⁷ On October 2, 2024, the U.S. District Court for the Southern District of Florida dismissed the state’s complaint,³⁸ and the case is now on appeal in the U.S. Court of Appeals for the Eleventh Circuit.³⁹

³² *Supra* note 17.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See https://www.myfloridalegal.com/sites/default/files/2023-06/accreditation-complaint_as-filed.pdf at 37–39.

³⁷ *Id.* at 31–37.

³⁸ *Florida v. Cardona*, 2024 U.S. Dist. LEXIS 180392, at *55–56 (S.D. Fla. Oct. 2, 2024).

³⁹ *Florida v. Cardona*, No. 24-13814 (11th Cir. appeal docketed Nov. 20, 2024).



Meanwhile, the actions of the Biden-Harris Education Department since it issued the guidance suggest that it was deliberately hamstringing Florida higher education institutions' legally mandated efforts to switch to different accreditors by drawing out the approval process for these changes. For example, in compliance with SB 7044 and the Department's guidance, the University of North Florida ("UNF") submitted an application to the Department to seek accreditation from the Higher Learning Commission (instead of SACSCOC) in January 2023.⁴⁰ The Department slowed this approval process to a crawl, requesting in September 2024 voluminous documents and communications from UNF about the details of its plans.⁴¹ Despite the fact that UNF responded with over 1,000 pages of information in response to that request in October,⁴² the Department's delays mean that UNF continues to be accredited by SACSCOC,⁴³ thus stymying Florida's attempts to introduce greater accountability in the accreditation process for its public colleges and universities.

The Department's Attacks on SB 7044 Violate Federal Law and the U.S. Constitution.

The Guidance Violates the HEA by Exceeding the Department's Statutory Role in the Program Integrity Triad.

As a sovereign state, Florida is a member of the "program integrity triad" established by Congress in the HEA,⁴⁴ equal (and not subject) to the Department and accrediting agencies.⁴⁵

State authority within the triad provides a balance within the federal scheme to assure students of the quality of postsecondary institutions eligible to receive financial aid under Title IV of the HEA.⁴⁶ This congressionally mandated balance is intended to ensure that the U.S. Secretary of Education ("Secretary") does not become the ultimate arbiter over how public and private postsecondary institutions are managed and run for the benefit of students, parents, and taxpayers.⁴⁷

⁴⁰ See <https://www.insidehighered.com/news/governance/accreditation/2024/11/11/florida-officials-fume-over-sluggish-accreditation-changes>.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See <https://www.unf.edu/catalog/about/Accreditations.html> (indicating that UNF's institutional accreditor is still SACSCOC and noting no recent or pending changes to its accreditation status).

⁴⁴ 20 U.S.C. § 1001 *et seq.*

⁴⁵ See <https://crsreports.congress.gov/product/pdf/R/R43826/10> at 1.

⁴⁶ 20 U.S.C. § 1070 *et seq.*

⁴⁷ See <https://crsreports.congress.gov/product/pdf/R/R43826/10> at 2 ("The United States does not have a centralized authority exercising singular national control over postsecondary educational institutions.").



Congress was clear about the Department’s two primary responsibilities regarding the program integrity triad established in the HEA: 1) to ensure the “administrative capacity and financial responsibility” of participating Title IV institutions; and 2) to ensure the quality of independent higher education accreditors.⁴⁸ The Department’s 2022 guidance far exceeds either mandate and is, in fact, an affront to the balanced authority of the triad envisioned in the law. It was aimed to weaponize accreditation to protect the status quo from needed reforms.

The Biden-Harris Education Department acted as though Florida and other states have ceded their authority to unelected officials within the federal government for the management and quality of their states’ public postsecondary institutions. This is not the case and is patently inconsistent with the balance among members of the triad established by Congress under the HEA. The Department has no authority to question or circumscribe Florida’s decision to dictate the timing of the process that its colleges and universities use to obtain and maintain accreditation.

States across the country have issued a variety of accreditation mandates, partly because the Department has encouraged states to take a stronger role in the accountability triad.⁴⁹ The Biden-Harris Education Department’s capricious targeting of Florida’s accreditation legislation, passed by a democratically elected legislature and signed by a democratically elected governor, ventured well beyond any statutory basis and set a dangerous precedent for the Department to undermine state authority by picking winners and losers based on whether the current administration favors a state’s political climate.

States are not the only members of the program integrity triad that have cause to be concerned by this federal overreach. Accreditors, targeted with withdrawal of federal recognition if they fail to comply with the Department’s directives under its 2022 guidance, also face displacement from their traditional role within the scheme. A senior official with the American Council on Education predicted this dangerous prospect in his 2013 testimony before the U.S. Senate Health, Education, Labor, and Pensions Committee, noting that “[a]ccreditors have been forced to take an oversized role with respect to the triad, and the Department of Education has significantly increased its control over them. . . . The Department is charged with ‘recognizing’ accreditation agencies—it does not have the authority to treat these agencies as regulatory extensions of the Department.”⁵⁰

⁴⁸ Higher Education Act of 1965, P.L. 89-329, as amended through P.L. 117-103.

<https://www.govinfo.gov/content/pkg/COMPS-765/pdf/COMPS-765.pdf>.

⁴⁹ We refer the Department to its state authorization regulations published on October 29, 2010, to demonstrate how the agency under past administrations has dragooned states into taking an active role in the accountability triad. *See* 75 Fed. Reg. 66,832 (Oct. 29, 2010).

⁵⁰ *See* <https://www.help.senate.gov/imo/media/doc/Hartle.pdf>.



The Department Lacks Statutory Authority to Require Pre-Approval of Postsecondary Institutions' Change in Accreditors.

Between its issuance of regulations in 1994 on the recognition of a postsecondary institution's change of accreditor⁵¹ and its novel sub-regulatory guidance, the Department never interpreted federal law to require it to *pre-approve* a postsecondary institution's decision to change accreditors. The simple reason is that the Department has no statutory authorization to do so, a fact that the Department understood until it issued its guidance on July 19, 2022.

Federal law on this point is simple and uncontroversial. In 20 U.S.C. § 1099b(h), Congress requires postsecondary institutions seeking to move from one accrediting agency to another to “submit[] to the Secretary [of Education] all materials relating to the *prior* accreditation, including materials demonstrating reasonable cause for changing the accrediting agency or association” in order to continue receiving Title IV funding in the form of federal loans and grants.⁵²

Accordingly, Department regulations require such institutions seeking to change accreditors to send to the Secretary “[a]ll materials related to its *prior* accreditation or preaccreditation” and “[m]aterials demonstrating reasonable cause for changing its accrediting agency.”⁵³ The Department's regulations list two circumstances in which the Secretary must find the cause not to be reasonable, both relating to the postsecondary institutions attempting to escape the revocation of their accreditation or probation.⁵⁴ Neither of these exceptions is at issue in Florida's new accreditation policy. Accordingly, a state legal requirement like SB 7044 would constitute “reasonable cause for changing” accreditors.

Nearly 10 years ago, the Obama Education Department issued an announcement confirming this understanding by “remind[ing]” postsecondary institutions how to notify the Department of a change in accreditors.⁵⁵ In accordance with the terms of the statute, the agency reminded postsecondary institutions to notify the Department of the school's decision to change accreditors “as soon as possible when the institution begins the process of obtaining a new accrediting agency,” along with “documentation of its current accreditation” and “reasonable cause for

⁵¹ *Institutional Eligibility Under the Higher Education Act of 1965, as Amended*, 59 Fed. Reg. 22,324 (Apr. 29, 1994).

⁵² 20 U.S.C. § 1099b(h) (emphasis added).

⁵³ 34 C.F.R. § 600.11(a)(1) (emphasis added).

⁵⁴ 34 C.F.R. § 600.11(a)(1)(ii)(A)–(B).

⁵⁵ <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2016-08-05/general-subject-guidance-schools-seeking-new-accreditation>.



changing its accrediting agency.”⁵⁶ The institution was then required to notify the Department when it had secured accreditation or pre-accreditation status with the new agency.⁵⁷

The Department never before understood this notification requirement to mean pre-approval. Indeed, this Obama Education Department guidance says nothing of a need for pre-approval of the postsecondary institution’s change in accreditor. This is clear because the statute requires no such thing. In fact, it explicitly provides for notice to be provided *after* the application for a change in accreditation has occurred. The statute requires institutions to send the Department documentation relating to their *prior* accreditation—thus specifically contemplating that the institution already will have initiated the process of changing its accreditor when the notice occurs—along with the documentation of the reasonable cause for the switch. The Obama Education Department recognized that the notice and documentation are a mundane matter of sending the appropriate paperwork to the Department, not an arbitrary hurdle to prevent institutions from making a change in accreditor that they believe is necessary.

The Biden-Harris Education Department failed to comply with the HEA in rescinding its prior guidance and insisting that it must pre-approve a Florida postsecondary institution’s decision to switch accreditors. The agency ignored the plain terms of the statute and claimed authority not granted by Congress. The new requirements contained in this recent guidance are invalid as a matter of law.

The Department Has No Statutory Authority to Demand More than “Reasonable Cause” from Postsecondary Institutions Seeking to Change Accreditors.

The Biden-Harris Education Department’s demand in DCL GEN-22-11 for information and documentation from postsecondary institutions as part of the pre-approval process for accreditor changes is another example of how far it strayed from the plain meaning of 20 U.S.C. § 1099b(h).

Federal law merely requires that when a postsecondary institution changes accreditors, it must notify the Secretary and submit documentation demonstrating “reasonable cause” for the change. The State of Florida, exercising its sovereign authority under the Constitution of the United States and as a co-equal member of the HEA’s program integrity triad, has directed its public postsecondary institutions to change accreditors. This directive is itself “reasonable cause” within the terms of 20 U.S.C. § 1099b(h) for colleges and universities to change accreditors. The Department has no statutory authority to reject such a conclusive basis for a change of accreditors. By signaling that it would do so, the Department unlawfully ignored Florida’s sovereign status under the Constitution and federal law, as well as its statutory placement within the triad.

⁵⁶ *Id.*

⁵⁷ *Id.*



The Biden-Harris Education Department pushed even further past the clear boundary of its statutory authority by constructing new, arbitrary hurdles to showing “reasonable cause” that all postsecondary institutions must surmount when they change accreditors. For example, the requirement that a postsecondary institution submit “any substantive correspondence or other communications with the new accrediting agency, including any substantive correspondence or other communications with the agency relating to the institution’s planned application”⁵⁸ has nothing to do with the terms of the statute, which simply requires institutions to send information on the *prior* accreditation and reasonable cause for the change. There is no basis in the statutory text for the Department to conduct a fishing expedition within an institution’s correspondence with a new accreditor to determine whether a perceived impropriety has occurred.

Likewise, the factors listed in DCL GEN-22-10 that the Department said it would consider as part of this extra-statutory pre-approval process disregard the bounds of the Department’s legal authority. For postsecondary institutions to maintain recognition of their accreditation status when they change accreditors, Congress decided only to require that they provide to the Department “reasonable cause” for the change. Such “reasonable cause” does not depend on “[w]hether the proposed change of agencies or multiple accreditations would strengthen institutional quality” or “[w]hether the institution is seeking to change agencies or seeking multiple accreditations because the new agency and its standards are more closely aligned with the institution’s mission than the current accrediting agency.”⁵⁹

These factors involve weighty considerations about the interests of the institution that the institution, not the Department, is in the best position to make. Moreover, the Biden-Harris Education Department invented for itself a substantial new authority to oversee and make assessments of institutional quality that are not provided to it in statute and were contrived only for this new circumstance. As long as the institution submits some “reasonable cause” for the change in accreditors, the statute provides no basis for the Department to refuse to recognize the new accreditation. Outside of isolated instances not present in this controversy, the law certainly provides no basis for the Department to wade into a determination of whether the change is ultimately helpful or unhelpful to the institution. This is beyond the scope of the statutory language.

This change is especially egregious because the Department’s exact arguments were discussed at length at the Department’s 2019 rulemaking, and then rejected. When the Department considered public comments suggesting that the proposed changes to accreditation rules could allow

⁵⁸ <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/procedures-institutions-seeking-approval-request-change-or-add-accrediting-agencies>.

⁵⁹ <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/guidance-institutions-seeking-change-or-add-accrediting-agencies>.



accreditors to lower standards, it provided a reasoned rationale for rejecting those arguments.⁶⁰ In its 2022 accreditation guidance, the Department provided no new evidence to reverse via a sub-regulatory letter what was recently enacted through regulation.

The Department also said it would consider “[w]hether the proposed change or addition involves an accrediting agency that has been subject to Department action.”⁶¹ Again, in the plain terms of the statute, this factor has no bearing on whether the institution has “reasonable cause” to change accreditors. And, as discussed below, the consideration of such a factor is an arbitrary and capricious exercise of the Department’s power. If the Department was truly concerned about the quality of accreditors *that the Department has itself approved* for use by postsecondary institutions, then it should have engaged in self-examination regarding its recognition process.

In short, to maintain federal recognition of their accreditation status when changing accreditors, postsecondary institutions must only submit to the Department documentation demonstrating “reasonable cause” for the change. SB 7044’s requirement that public postsecondary institutions change accreditors every accreditation cycle constitutes “reasonable cause” for these institutions to do so; however, in an overtly political effort to undermine Florida’s duly enacted law, the Biden-Harris Education Department suddenly decided to change the rules to require institutions to provide much more than “reasonable cause” for their accreditor change. That decision was beyond the Department’s authority under the HEA.

The Department’s Pre-approval Guidance Was Based on Arbitrary and Capricious Reasoning.

The APA requires courts reviewing federal agency actions to set them aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶² Inventing new policy through Dear Colleague Letters, correspondence, and a blog post is the epitome of arbitrary and capricious agency action.

The Biden-Harris Education Department’s reasoning for the unlawful guidance fails to pass muster under the APA’s requirements. In its July 19, 2022, blog post, the Department claimed that the new constraints on states were needed to prevent a “race to the bottom” where postsecondary institutions seek out low-quality accreditors to avoid scrutiny of their academic programs. This argument completely ignored the fact that *the Department is responsible* under federal law for

⁶⁰ See 84 Fed. Reg. 58,834 (Nov. 1, 2019).

⁶¹ <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-07-19/guidance-institutions-seeking-change-or-add-accrediting-agencies>.

⁶² 5 U.S.C. § 706(2)(A).



recognizing accreditors as “reliable authorit[ies] as to the quality of education or training offered” by postsecondary institutions in order to receive federal funding under Title IV.⁶³

If the Department was truly concerned with postsecondary institutions engaging in a “race to the bottom” in changing accreditors, then it could have simply withdrawn recognition from any already-recognized accreditor that, as the blog post put it, does not hold institutions to “high standards.” Doing so would have put an immediate end to any attempts to “evade accountability” for low-quality academic offerings.⁶⁴ The Department’s failure in issuing the 2022 guidance to consider the alternative policy of merely enforcing its own standards in approving “reliable” accrediting agencies for the purpose of Title IV funding was arbitrary and capricious.

Moreover, the Department had no justification for applying its “race to the bottom” rationale to SB 7044. The Florida law empowers the relevant state governing board to determine which (Department-recognized) accreditors would be best suited to ensure school quality. The clear purpose of the law—to improve education quality for the sake of students’ academic and economic outcomes by disrupting the decades-long relationships between an accreditor and its clients—is to generate a race to the top for Florida’s state-supported postsecondary institutions. The Department abjectly failed to reveal any intention by the Florida Legislature to help the state’s public colleges and universities “evade accountability” by severing their relationships with current accreditors. In fact, the Department could not have done so because the intention of lawmakers and the governor in passing SB 7044 was exactly the opposite. The Department’s reasoning was hopelessly flawed, as well as arbitrary and capricious.

The Department’s threat to limit, suspend, or terminate its recognition of SACSCOC, the current accreditor of Florida’s public colleges and universities, due to dozens of findings of noncompliance places these flaws in its reasoning in sharp focus. In a letter dated October 19, 2022, the Department notified SACSCOC that the agency had agreed with the recommendation of the National Advisory Committee on Institutional Quality and Integrity (“NACIQI”) to make 28 findings of noncompliance with regard to information SACSCOC failed to submit as part of its application for renewal of its recognition by the Department.⁶⁵ The Department directed SACSCOC to submit a compliance report within 12 months and, with regard to numerous findings of “substantial compliance,” seven monitoring reports within the same time frame.⁶⁶

⁶³ 20 U.S.C. § 1099b(a).

⁶⁴ *Supra* note 17.

⁶⁵ https://www.republicreport.org/wp-content/uploads/2022/11/SACS-Decision-Letter_Oct-20221.pdf at 1–5.

⁶⁶ *Id.* at 7.



In addition to accepting NACIQI’s recommendations, the Department expressed other concerns, including that SACSCOC’s rejection of complaints from individuals charging institutional noncompliance on “procedural or administrative” grounds could “undermine individuals’ efforts to call potential areas of institutional noncompliance to your attention,” and calling on SACSCOC to reevaluate its handling of such complaints in light of this concern.⁶⁷ The letter concluded with a reminder that failure to comply with the Department’s demands for information would mean “the Department may be compelled to limit, suspend, or terminate SACSCOC’s recognition” under the HEA.⁶⁸

The Department’s letter to SACSCOC claiming severe deficiencies in its application for renewal of recognition totally undermines the Department’s “race to the bottom” rationale for imposing pre-approval requirements on institutions seeking to change accreditors under SB 7044. While rapping the knuckles of SACSCOC for what the Department perceived to be a multitude of failures to justify a renewal of its recognition, the Department threatened Florida’s public colleges and universities over their future compliance with a rule that would force them to leave SACSCOC for a new Department-approved accreditor—likely, one that is not beset with 28 noncompliance findings. Taking these two positions at once was simply inexplicable.

Far from seeking to “evade accountability,” Florida has every reason to require its public colleges and universities to avoid the sudden disruption that would occur if SACSCOC loses its recognition as an accreditor by requiring them to change to a new one. Thus, in light of its threats to terminate SACSCOC’s recognition, the Department’s “race to the bottom” rationale was arbitrary and capricious.

The Department’s Novel “Voluntariness” Command to Accreditors Ignored the Facts and Was Arbitrary and Capricious.

To the extent that DCL GEN-22-10 and its letter to institutional accrediting agencies regarding “voluntariness” evinced the Biden-Harris Education Department’s intention to deny requests by Florida’s public colleges and universities to change accreditors in compliance with SB 7044, as well as to withdraw Title IV recognition from accreditors who accept accreditation requests from such institutions complying with that law, the Department misapplied the law and engaged in arbitrary and capricious reasoning.

As explained above, SB 7044 merely requires Florida’s public colleges and universities to seek and obtain a new accreditor. If this requirement causes the relationship between accreditor and postsecondary institution to no longer be “voluntary,” then the Department has itself been

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 7.



recognizing accreditors that do not have a “voluntary” relationship with their institutional members.

As discussed in the section above, any postsecondary institution must be accredited by a Department-recognized accrediting agency before it can receive federal student financial aid. Given that most institutions would not be financially viable without federal student aid, nearly every college and university does not experience accreditation as a voluntary exercise. The case law supports this view.⁶⁹

The Biden-Harris Education Department’s interpretation of the word “voluntary” in the statute would render the Department’s own exercises of authority prohibited under the HEA. For instance, as discussed previously, the Department’s 2019 rulemaking permits postsecondary institutions to obtain accreditation from agencies that have traditionally operated outside of their geographic boundaries. If the accreditation process were truly “voluntary” in the way that the Department now uses the term, then how could the Department have lawfully restricted postsecondary institutions from seeking accreditors outside their regions for so many decades?

Similarly, the Department requires that it approve a postsecondary institution’s decision to maintain simultaneous memberships with multiple accreditation agencies.⁷⁰ If a Florida statutory requirement is not permissible because it does not allow its public colleges and universities to “voluntarily” remain with their current accreditor, then how can the Department refuse to allow any institutions to “voluntarily” become a member of multiple accreditors?

The answer to these questions is that, for the purpose of interfering with Florida’s sovereign authority to manage its public higher education policy, the Biden-Harris Education Department expanded the word “voluntary” far beyond its natural meaning within this context. Just as Congress can direct institutions to obtain institutional accreditation from a Department-recognized agency for purposes of academic quality assurance, the Florida Legislature can direct its postsecondary institutions to seek and obtain accreditation from a new agency as a full member of our constitutional system and regulatory triad. Either both conditions are allowed, or neither is allowed. The Department’s apparent intention to enforce a double standard when it comes to SB 7044 was arbitrary and capricious.

⁶⁹ See *St. Agnes Hosp., Inc. v. Riddick*, 748 F. Supp. 319, 326–327 (D. Md. 1990) (concluding that a Maryland-sanctioned agency for the accreditation of medical educational institutions had placed a burden on the religious beliefs of a Roman Catholic health care institution by withdrawing the institution’s accreditation over its refusal to offer or provide training in elective abortions based on the claim “that the state action required the plaintiff to choose between the exercise of its religion and the receipt of a governmental benefit”).

⁷⁰ 34 C.F.R. § 600.11(b).



The Department Violated the APA by Failing to Issue Its Rules Pursuant to Notice-and-Comment Procedures.

The APA requires an agency issuing a “legislative” rule, as opposed to an “interpretive” rule, to publish notice of the rule in the *Federal Register* and allow the public an opportunity to comment on its provisions.⁷¹ If an agency fails to issue a legislative rule according to the notice-and-comment rulemaking process, that rule is invalid.⁷²

One federal court of appeals recently distinguished these two kinds of rules as follows:

[L]egislative rules have the force and effect of law, and interpretive rules do not. Thus, a rule that intends to create new law, rights or duties is legislative, while a rule that simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties is interpretive.⁷³

By requiring postsecondary institutions to obtain pre-approval of their change of accreditors and accrediting agencies to consider “voluntariness” in determining whether to accredit an institution,

⁷¹ See 5 U.S.C. § 553(b)(A); *State of Tennessee v. Dept. of Educ. et al.*, Case No. 3:21-cv-308, slip op. at 38 (E.D. Tenn. Jul. 15, 2022) (citing *Tenn. Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018)).

⁷² See, e.g., *id.* at 38–39 (citing *Tenn. Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018)).

⁷³ *Tenn. Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (internal quotation marks and citations omitted) (citing *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96–97 (2015); *Michigan v. Thomas*, 805 F.2d 176, 182–183 (6th Cir. 1986)); see also *State of Tennessee v. Dept. of Educ. et al.*, Case No. 3:21-cv-308, slip op. at 40–41 (E.D. Tenn. Jul. 15, 2022) (finding that plaintiffs had demonstrated that they were likely to succeed on the merits of a lawsuit challenging the Department’s novel interpretation of Title IX regulations without providing notice and the opportunity for comment because “[t]he Department’s guidance purports to expand the footprint of Title IX’s ‘on the basis of sex’ language, takes definitive positions as to ‘legal obligations’ under Title IX, and explains that Title IX will be ‘fully enforce[d]’ accordingly”) (emphasis added); *id.* at 41 (“Indeed, the Department’s challenged guidance documents go beyond putting the public on notice of pre-existing legal obligations and reminding affected parties of their existing duties.”); *id.* at 39 (quoting *Gen. Motors Corp v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (“An interpretative rule simply states what the administrative agency thinks the statute means” in a way that “only reminds affected parties of existing duties.”); *NRDC v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020) (“A legislative rule is one that has legal effect or, alternately, one that an agency promulgates with the intent to exercise its delegated legislative power by speaking with the force of law.”)).



the Department unquestionably imposed new duties on both types of entities and engaged in legislative rulemaking.

In the case of the pre-approval of accreditor changes, just nine years ago, the Obama Education Department indicated that it held a starkly different understanding of what the statute and its regulations require of postsecondary institutions seeking to change accreditors—namely, that they are *not* required to seek pre-approval of such changes. With its 2022 guidance, the Department changed the landscape, including by pledging to consider factors that go well beyond the statute-based “reasonable cause” requirement and threatening the dramatic consequence of withholding federal financial aid from institutions that fail to comply. Likewise, the Department threatened accrediting agencies with withdrawal of federal recognition if they fail to consider voluntariness in deciding whether to accredit an institution.

By imposing new duties on postsecondary institutions and accreditors without offering the public the opportunity to comment on these new requirements, the Department violated the APA, and its sub-regulatory guidance is invalid and should be withdrawn.

The Department’s Organization Act Bars the Department from Undermining Florida’s Accreditation Reforms.

The Department of Education Organization Act (“DEOA”), which established the Department in 1979,⁷⁴ expresses Congress’s clear intention to circumscribe the extent of the Department’s power to prevent it from interfering with states’ lawful exercise of policymaking in the area of education.

The DEOA conveys this limit to the Department’s authority as follows:

It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education *shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States* and the local school systems and other instrumentalities of the States.⁷⁵

In addition to this express reservation of authority to state and local authorities, the DEOA establishes affirmative boundaries on the Department’s power:

⁷⁴ 20 USC § 3401 *et seq.* (Pub. L. 96–88, Oct. 17, 1979).

⁷⁵ 20 U.S.C. § 3403(a) (emphasis added).



No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to *exercise any direction, supervision, or control* over the curriculum, program of instruction, *administration*, or personnel of any *educational institution, school, or school system*, over any *accrediting agency or association*, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.⁷⁶

By attacking the Florida Legislature’s decision to reform the accreditation process of the state’s public colleges and universities and thus improve academic quality for their students, the Biden-Harris Education Department ignored the clearly expressed intent of Congress authorizing it to wield federal power only in support of state and local policymaking authority and “to strengthen and improve” the states’ control over programs and policies involving education. The Department’s interference with Florida’s sovereign authority over its public higher education system is unlawful and signals a much more muscular approach to undermining state higher education policymaking in contravention of the barriers to federal authority erected by Congress in the DEOA.

By threatening accreditors with withdrawal of federal recognition if they fail to carry out the Department’s priorities in opposing SB 7044, the Department similarly violated the DEOA’s prohibition of supervising or controlling the administration of accrediting agencies or associations. In its desire to hamstring the implementation of the Florida law, the Department trespassed on the authority of the other two co-equal members of the program integrity triad: the states and accrediting agencies. This overreach is in violation of the DEOA and, as we shall see directly below, the basic principles of federalism under the United States Constitution.

The Department’s Guidance Unlawfully Coerces State Postsecondary Institutions to Carry out Federal Policy in Violation of the Principle of Federalism Embedded in the U.S. Constitution.

In 2012, the U.S. Supreme Court invalidated a portion of the Affordable Care Act (“ACA”) that threatened to withdraw all federal Medicaid funding from the states unless they accepted an expansion of the program and the conditions that accompanied this expansion.⁷⁷

In his opinion, Chief Justice John Roberts pointed to the Court’s previous case law indicating that the validity of congressional legislation passed under the Spending Clause authority in the U.S.

⁷⁶ 20 U.S.C. § 3403(b) (emphasis added).

⁷⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012).



Constitution,⁷⁸ including the Medicaid expansion at issue in the ACA, “rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract’” offered by the legislation.⁷⁹ As the Chief Justice wrote, “Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”⁸⁰

Congress—and much less federal agencies, to which our Constitution grants no authority to legislate such conditions—may not force states to regulate, whether it does so via “direct[] command[] . . . or indirectly coerces a State to adopt a federal regulatory system as its own.”⁸¹ Of course, under its Spending Clause authority, Congress can use relatively minor financial conditions to steer state and local governments in its preferred direction.⁸² In the case of the Medicaid expansion, however, the Chief Justice characterized “the financial ‘inducement’ Congress has chosen,” the termination of all existing Medicaid funding, as “much more than ‘relatively mild encouragement’—it is a gun to the head.”⁸³

⁷⁸ U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

⁷⁹ *NFIB*, 567 U.S. at 577 (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)); see *Halderman*, 451 U.S. at 25 (“Though Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions.”); *New York v. U.S. Dept. of Health & Human Services*, 414 F. Supp. 3d 475, 567 (S.D.N.Y. 2019) (“In assessing whether States have been given notice consistent with this standard, the Court must view the challenged conditions ‘from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds’ and ‘must ask whether such a state official would clearly understand that’ the challenged condition was ‘one of the obligations [attached to the accepted funding].’”) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

⁸⁰ *NFIB*, 567 U.S. at 577.

⁸¹ *Id.* at 578.

⁸² See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (“When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.”).

⁸³ *NFIB*, 567 U.S. at 581; see also *New York v. HHS*, 414 F. Supp. 3d at 570 (“The threat to funding presented by § 88.7(i)(3)(iv) makes *NFIB* a more apt analogy here than *Dole*. That provision threatens not a small percentage of the States’ federal health care funding, but literally all of it. Indeed, the Rule allows HHS to initiate a compliance review if it ‘suspect[s]’ noncompliance and to withhold, deny, suspend, or terminate all federal funding from HHS even



The Chief Justice also described the Medicaid expansion as “a shift in kind, not merely degree,” as it transformed Medicaid from a program “designed to cover medical services for four particular categories of the needy” into “an element of a comprehensive national plan to provide universal health insurance coverage.”⁸⁴

It is uncontroversial that public colleges and universities are to be treated as “instrumentalities” of the states that have established them,⁸⁵ and it is undeniable that the amount of federal funding at issue for public colleges and universities under Title IV is substantial. An analysis of 2017 federal and state fiscal support for postsecondary education (including public, nonprofit, and for-profit higher education institutions but excluding student loans and tax expenditures) indicates that federal spending totaled \$74.8 billion compared to total state spending of \$87.1 billion and \$10.5 billion in local funding.⁸⁶ Federally issued student loans, which amounted to \$94 billion in 2018, increased by 26 percent between 2007 and 2017.⁸⁷ In 2017, federal revenue accounted for 13 percent of the budgets of public colleges and universities.⁸⁸ In 2017, federal revenue accounted for over 18 percent of the total revenue Florida’s public colleges and universities received per full-time equivalent student.⁸⁹

The amount of funding at stake for public colleges and universities—13 percent of their budgets nationally in 2017—clearly makes the 2022 Department action more akin to coercion than “relatively mild encouragement.” The Department unlawfully coerced public postsecondary institutions in Florida and across the United States to participate in its extra-statutory review of their change in accretor under penalty of the loss of all Title IV funding. Such coercion—a shift in kind rather than degree because, for the first time ever, it placed the Department in charge of pre-approving all applications to change accreditors—is not compatible with the law or with our system of federalism.

during the pendency of voluntary good-faith efforts to come into compliance with the Rule.”) (internal citations omitted)).

⁸⁴ *Id.* at 583.

⁸⁵ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 823 (1995) (noting that the University of Virginia is “an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments”).

⁸⁶ See <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*



The Department’s Invention of Coercive Conditions on Federal Funding Not Present in the HEA Violated the Constitutional Principle of the Separation of Powers.

The *NFIB* decision discussed in the previous section is based on *Congress’s* decision to condition a vast amount of federal funding on states’ acceptance of certain policies. When a federal agency purports to establish such a condition, it raises even more serious constitutional issues related to the principle of separation of powers underpinning the U.S. Constitution.

It is well established that federal agencies, including the Department, have no authority to withhold funding from state or local governments without Congress’s permission to do so.⁹⁰ “Aside from the power of veto, the President is without authority to thwart congressional will by canceling appropriations passed by Congress. Simply put, ‘the President does not have unilateral authority to refuse to spend the funds.’”⁹¹

Here, the Department unilaterally applied a new condition, not found anywhere in the statute enacted by Congress and contrary to its own interpretation of that law since its enactment, for postsecondary institutions to receive Title IV funds. 20 U.S.C. § 1099b(h) provides no authority to the Department to deny such funding to institutions that notify the Secretary of their change of

⁹⁰ See, e.g., *New York v. HHS*, 414 F. Supp. 3d at 562 (“An agency may not withhold funds in a manner, or to an extent, unauthorized by Congress.”) (citing *Train v. City of New York*, 420 U.S. 35, 44–46 (1975)); *id.* (“§ 88.7(i)(3)(iv) claims a power that no Conscience Provision nor other statute has delegated to HHS: to terminate the entirety of a recipient’s HHS funding as a penalty for violating a Conscience Provision. Congress nowhere ‘provid[ed] the Executive with the seemingly limitless power to withhold funds’ on this scale. Section 88.7(i)(3)(iv) thus aggrandizes the Executive Branch at Congress’s expense. Such an encroachment is inconsistent with the separation of powers.”) (internal citations omitted) (quoting *Train*, 420 U.S. at 45–46)); *City of Chicago v. Barr*, 961 F.3d 882, 892 (7th Cir. 2020) (“The executive branch has significant powers of its own—particularly in matters such as immigration—but the power to wield the purse to alter behavior rests squarely with the legislative branch. Congress has thus far refused to pass legislation that would do precisely what the Attorney General seeks to do here.”); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234–1235 (9th Cir. 2018) (“Because the Executive Order directs Executive Branch administrative agencies to withhold funding that Congress has not tied to compliance with § 1373, there is no reasonable argument that the President has not exceeded his authority. Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals. Because Congress did not authorize withholding of funds, the Executive Order violates the constitutional principle of the Separation of Powers.”) (footnote omitted)).

⁹¹ *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (quoting *In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013)).



accreditors and that demonstrate that the change was for “reasonable cause.” The Biden-Harris Administration had no authority to construct additional hurdles for such institutions seeking to change accreditors, and it had no authority to require the pre-approval of such a change.

By threatening to withdraw all Title IV funding from postsecondary institutions that fail or refuse to abide by this extra-statutory mandate, the Department arrogated to itself Congress’s power under the Spending Clause and violated the constitutional principle of the separation of powers. The requirements contained in the Department’s sub-regulatory guidance are thus invalid and should be rescinded.

Conclusion

Florida has shaken up its postsecondary system by promoting accountability and competition in the accreditation process. This reform aims to improve student academic and career outcomes and is the prerogative of a sovereign state in our constitutional system.

The Florida Legislature and Governor should have been applauded, not harassed, for their willingness to innovate in this arena. The Biden-Harris Education Department’s ill-advised and unlawful attempts to quash such innovation seemed designed to have a “chilling effect” on innovations that may follow in SB 7044’s footsteps, both in Florida and across the country. If the Department feared that such innovation will cause a “race to the bottom” in terms of accreditation, then it should have looked internally to how it recognizes accreditation agencies rather than attacking states that offer reforms to make their higher education systems better.

Policy arguments aside, the Department does not have the authority under federal law or the U.S. Constitution to undermine such innovations conceived in our nation’s “laboratories of democracy.” States are both co-equal members of the program integrity triad and sovereign authorities within the American federal system. Consistent with this country’s constitutional tradition of keeping in state hands the authority to provide for the appropriate education of their residents, Congress has delegated to the Department no authority to wrest control of the management of Florida’s public colleges and universities away from the state’s lawmakers and officials.

Students, parents, taxpayers, and postsecondary institutions would be best served if the Department instead would work *with* state and local officials to help improve academic and career outcomes for all students in Florida and across the country. We have every hope and expectation that the Department under President Trump is committed to doing so, and we stand ready to support that effort.



To that end, we respectfully request that the Department of Education rescind Dear Colleague Letter GEN-22-11, Dear Colleague Letter GEN-22-10, and the letter from the Director of the Department's Accreditation Group to institutional accrediting agencies issued July 19, 2022.

Please contact us with any questions.

Sincerely,

/s/ Jim Blew

Jim Blew
Co-Founder
Defense of Freedom Institute

/s/ Robert S. Eitel

Robert S. Eitel
President and Co-Founder
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/s/ Paul Zimmerman

Paul Zimmerman
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cc: Dr. Jonathan Pidluzny
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U.S. Department of Education