Defense of Freedom Institute

May 5, 2025

**SUBMITTED VIA FEDERAL eRULEMAKING PORTAL**
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Mr. James P. Bergeron
Acting Under Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Attention: Tamy Abernathy

**Re: Comment on the Department's Announcement of Its Intent to Receive Public Feedback for the Development of Proposed Regulations and Establish a Negotiated Rulemaking Committee**
**Agency/Docket Number: ED–2025–OPE–0016**
**Document Number: 2025–05825**

Dear Acting Under Secretary 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. 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 education law and policy, in particular the Department's regulations issued under the Higher Education Act of 1965, as amended ("HEA").

On April 4, 2025, the Department published in the *Federal Register* an announcement that it intends to pursue negotiated rulemaking procedures to develop proposed regulations under Title IV of the HEA.[1] The announcement noted that the negotiated rulemaking process "will focus on how title IV regulations have impacted institutions, States, and other partners and if their implementation may be inhibiting innovation and contributing to rising college costs,"[2] with the

[1] U.S. Dep't of Educ., *Intent to Receive Public Feedback for the Development of Proposed Regulations and Establish Negotiated Rulemaking Committee*, 90 Fed. Reg. 14741, 14742 (Apr. 4, 2025).
[2] *Id.*

intention of "streamlin[ing] or eliminat[ing] unnecessary regulatory processes that are not otherwise required by law."[3]

The announcement specifies the following three topics for negotiation:

> 1. Refining definitions of a qualifying employer for the purposes of determining eligibility for the Public Service Loan Forgiveness program.
>
> 2. Pay As You Earn (PAYE) and Income Contingent Repayment (ICR) repayment plans.
>
> 3. Potential topics that would streamline current federal student financial assistance program regulations while maintaining or improving program integrity and institutional quality.[4]

DFI submits this public comment to express support for the Department's focus on streamlining and otherwise improving its regulations under the HEA for the benefit of students, institutions, and taxpayers and to identify specific regulatory targets that would help the Department achieve its stated objectives in the negotiated rulemaking process.

**Costs of the Regulatory State to American Taxpayers**

The Trump Administration's commitment to eliminating unnecessary regulatory burdens that sap American resources while stifling innovation is urgently needed. The 2025 edition of *Ten Thousand Commandments*, a report by Clyde Wayne Crews Jr. of the Competitive Enterprise Institute documenting the impacts of federal regulations on the American people and the economy, estimated that compliance costs and economic impacts of federal regulations have reached at least $2.155 trillion annually—constituting, on average, an approximately $16,000 annual regulatory tax on U.S. households.[5] This hidden regulatory cost to the American people rivals the cost of the individual income tax and is nearly four times the cost of the corporate income tax.[6] The report identifies 220,813 final rules issued by the federal government since it began itemizing those rules in the *Federal Register* in 1976 and finds that, for every law enacted by Congress in 2024, the administrative state issued 19 rules.[7]

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[3] *Id.*
[4] *Id.*
[5] CLYDE WAYNE CREWS JR., TEN THOUSAND COMMANDMENTS: 2025 EDITION 6 (2025), *available at* https://cei.org/wp-content/uploads/2025/04/10K_2025_v5.pdf.
[6] *Id.* at 6–7.
[7] *Id.* at 7.

DFI thus welcomes the critical efforts by President Trump and the current leadership of the Department to stand athwart the unbridled growth of the administrative state and end the federal government's regulatory binge. In particular, the Biden-Harris Administration's overreaching and often unlawful regulatory and sub-regulatory actions resulted in higher costs for average Americans, unlawfully transferred the cost of college from millions of student loan borrowers to American taxpayers, and hampered the ability of new and innovative institutions and accreditors to compete in higher education and improve educational opportunities for students.

Below, we identify a non-exhaustive list of areas where rolling back burdensome regulations under the HEA would benefit Americans by freeing them to pursue high-quality educational programs and by allowing entities to offer such programs without being smothered by federal bureaucratic mandates.

**Public Service Loan Forgiveness**

The Biden-Harris Administration misinterpreted federal laws and policies relating to student loan forgiveness to shower taxpayer money on potential voters who owed student loan debt—including professionals with six-figure incomes who were fully capable of paying off that debt. One example of this unprecedented and costly interference with the student loan system was the previous administration's one-time waiver of public service loan forgiveness ("PSLF") rules—under which borrowers working for "public service" employers (as set out in federal statute) are eligible for loan forgiveness after 10 years of payments—and other policies related to PSLF that canceled debt at a cost of billions of dollars to taxpayers.

In the case of the one-time waiver, the Department modified its rules *post hoc* to allow credit toward PSLF in the case of partial or late payments, payments on loans or payment plans that previously did not count toward PSLF, and lack of employment by a qualifying employer.[8] The Biden-Harris Administration also implemented multiple student loan borrower account "adjustments" to cancel borrower debt under PSLF, including for periods where borrowers made no payments because their loans were in deferment or forbearance.[9] In 2022, the Department

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[8] U.S. DEP'T OF EDUC., FED. STUDENT AID, TAKE ADVANTAGE OF THE PUBLIC SERVICE LOAN FORGIVENESS WAIVER BY OCTOBER 31ST! 1, *available at* https://financialaidtoolkit.ed.gov/resources/limited-pslf-waiver-borrower-fact-sheet.pdf.

[9] U.S. DEP'T OF EDUC., FACT SHEET: CHARTING THE PATH FORWARD FOR PUBLIC SERVICE LOAN FORGIVENESS 1, *available at* https://www.ed.gov/sites/ed/files/policy/highered/reg/hearulemaking/2021/futureofpslffactsheetfin.pdf; *Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs*, U.S. DEP'T OF EDUC., FED. STUDENT AID, https://studentaid.gov/announcements-events/idr-account-adjustment (last visited May 1, 2025) ("All periods credited toward IDR will also be credited toward PSLF for eligible loans and periods where the borrower certifies public service employment.").

amended its regulations to include such deferment and forbearance within its definition of a "monthly payment" that counts toward PSLF.[10] The U.S. Court of Appeals for the Fifth Circuit directed a federal district court to issue a preliminary injunction blocking that regulatory change, among others,[11] but that ruling did not prevent the Biden-Harris Administration from carrying out its one-time waiver and account adjustment schemes.

As DFI pointed out in its public comment on this proposed PSLF rule, the plain language of the HEA in referring to "monthly payment" did not mean periods where borrowers made no payments because their loans were in deferment or forbearance.[12] The Department's willingness to release billions of dollars in taxpayer money to account for past payments (and non-payments) that did not satisfy the Department's rules at the time regarding payments that qualified under PSLF was unacceptable and may augur the lengths progressive bureaucrats will go in future administrations to flout the rules of loan forgiveness programs to gift taxpayer money to student loan borrowers.

Therefore, in its negotiated rulemaking process related to PSLF, we encourage the Department to discuss proposals that would (1) rescind the Biden-Harris Administration regulations (currently enjoined on a preliminary basis) that violate the HEA by counting non-payments due to deferment or forbearance as "payments" that count toward PSLF,[13] (2) establish regulations related to payments that qualify for PSLF that abide by the statutory language, and (3) prohibit any future administration from "waiving" regulatory requirements related to PSLF for the purpose of engaging in mass student loan debt cancellation.

**Restoration of Student Loan *Repayment* Plans**

On July 10, 2023, the Department promulgated a final rule amending its regulations related to student loan income-driven repayment plans to create the "SAVE Plan."[14] Under the guise of a student loan "repayment" plan, the SAVE Plan offered student loan borrowers such exceedingly generous conditions on the repayment of their loans—including the exemption of a large share of their incomes from the amount used to calculate monthly payments, a reduction in the percentage

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[10] U.S. Dep't of Educ., *Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions; Federal Perkins Loan Program; Federal Family Education Loan Program; and William D. Ford Federal Direct Loan Program*, 87 Fed. Reg. 65904, 66065 (Nov. 1, 2022).
[11] *Career Colls. and Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 256 (5th Cir. 2024).
[12] Letter from Robert S. Eitel, President, Def. of Freedom Inst. for Pol'y Stud., to Dr. Miguel Cardona, Sec'y of Educ. 42 (Aug. 12, 2022), *available at* https://dfipolicy.org/wp-content/uploads/2022/08/BD-NPRM-Public-Comment-08.12.2022-signed.pdf.
[13] 34 C.F.R. § 685.219(c)(2)(v).
[14] U.S. Dep't of Educ., *Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program*, 88 Fed. Reg. 43820, 43875 (July 10, 2023).

of undergraduate loan borrowers' income paid each month, substantially shortened payment timelines for borrowers with low original loan balances, and a refusal to charge any interest on loans that is not covered by the borrower's monthly payment—that it transformed the federal student loan program into a grant program.[15] One independent estimate pegged the cost of that program to taxpayers at $475 billion.[16]

State attorneys general from 18 states filed two lawsuits against the SAVE plan in federal courts. On February 18, 2025, the U.S. Court of Appeals for the Eighth Circuit issued an order preliminarily enjoining the Department from implementing any provision of SAVE, due in part to its reasoning that the Secretary of Education's ("Secretary") authority to offer income-contingent repayment plans under the HEA does not include the power to forgive student loan debt.[17] While the ruling directly applies only to the SAVE plan—and to the "hybrid" plan the Department created in response to preliminary injunctions against SAVE—the reasoning of the ruling extends to other plans the Department has offered for the repayment of student loans, including the income-contingent repayment plan ("ICR") established in 1994 and the "Pay As You Earn" ("PAYE") plan established in 2012, both of which canceled remaining debt at the conclusion of the specified payment term.[18]

DFI supports the Department's intention to revisit its income-contingent repayment plans. In doing so, the Department should consider simplifying borrowers' repayment options and preventing confusion by reducing the number of plans it offers and establishing affordable monthly payments that result in each borrower repaying the full amount of his or her loan, along with any interest charged to the borrower, over an extended period of time. In the event that the SAVE litigation stalls or it becomes clear that Congress will fail to abrogate those regulations through the budget reconciliation process, we also strongly recommend that the Department make preliminary preparations to convene negotiated rulemaking to rescind SAVE such that any final rescission regulations would be published before November 1, 2027. We are confident that, in vivid contrast to the Biden-Harris Administration's harmful goal of charging American taxpayers for as much student loan debt as possible, the Department's current leadership will be focused on requiring the repayment of student loan debt by borrowers.

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[15] *See* Letter from Robert S. Eitel, President, & Paul F. Zimmerman, Pol'y Couns., Def. of Freedom Inst. for Pol'y Stud., to Dr. Miguel Cardona, Sec'y of Educ 5–6 (Feb. 10, 2023), *available at* https://dfipolicy.org/wp-content/uploads/2023/02/DFI-Comment-IDR-NPRM-02.10.2023.pdf.

[16] *See Biden's New Income-Driven Repayment ("SAVE") Plan: Budgetary Cost Estimate Update*, PENN WHARTON BUDGET MODEL (July 17, 2023), https://budgetmodel.wharton.upenn.edu/issues/2023/7/17/biden-income-driven-repayment-budget-update.

[17] *Missouri v. Trump*, 128 F.4th 979, 991 (8th Cir. 2025).

[18] *Id.* at 986.

**Borrower Defense to Repayment**

On November 1, 2022, the Department promulgated a final rule amending its regulations related to its borrower defense to repayment ("BDR") and closed-school discharge regulations.[19] Instead of working within the framework of the law, the regulations fundamentally revised the BDR statute and grafted to it a complex loan forgiveness adjudication process, none of which was contemplated by Congress when it legislated the BDR provision. The rule also manufactured extra-statutory loan discharge opportunities for students at schools that have yet to close in defiance of the law.[20] Based on assumptions in the Department's own analysis of the rule, its implementation would have cost taxpayers close to $120 billion.[21]

On April 4, 2024, a unanimous three-judge panel of the U.S. Court of Appeals for the Fifth Circuit found that provisions challenged in a lawsuit against this regulation were "almost certainly unlawful"[22] and directed a federal district court to postpone on a nationwide basis the effective date of the regulations pending a final judgment on the challenge.[23] This matter is now pending before the Supreme Court, and it is unclear whether the U.S. Department of Justice will continue to defend the 2022 regulations.

Accordingly, as part of its upcoming negotiated rulemaking under the HEA, the Department should consider proposing a rescission of the unlawful BDR and closed-school discharge regulations to return the Department's regulatory framework to compliance with the plain terms of the HEA in both areas.

**Financial Value Transparency and Gainful Employment**

On October 10, 2023, the Department promulgated a final rule amending its regulations related to financial value transparency ("FVT") and gainful employment ("GE").

The final rule amended the Department's regulations to require FVT disclosures for all eligible programs and institutions, including disclosure to students of accurate information on the financial consequences of their education program choices. While DFI agrees with the goal of ensuring that students have information regarding the financial outcomes related to an education program, we

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[19] U.S. Dep't of Educ., *Institutional Eligibility Under the Higher Education Act of 1965*, 87 Fed. Reg. 65904 (Nov. 1, 2022).
[20] *Id.* at 66060–61.
[21] Letter from Richard Burr, Ranking Member, U.S. Senate Comm. on Health, Educ., Lab. & Pensions, & Virginia Foxx, Ranking Member, U.S. House Comm. on Educ. & Lab., to Hon. Miguel Cardona, Sec'y, U.S. Dep't of Educ. 1 (Aug. 12, 2022), *available at* https://edworkforce.house.gov/uploadedfiles/8.12.22_foxx_and_burr_to_cardona.pdf.
[22] *Career Colls. and Schs. of Tex.*, 98 F.4th at 255.
[23] *Id.* at 256.

have grave concerns regarding the accuracy of the FVT disclosure data the Department makes available to students pursuant to these regulations and the ability of institutions to challenge flawed data in line with constitutional standards of due process.[24] In its negotiated rulemaking process, we encourage the Department to discuss revising the current FVT regulations to ensure that data published by the Department is accurate and that there is adequate due process for institutions to review and challenge data they believe is inaccurate.

With respect to GE, the Department's final rule established a "GE program eligibility framework" subjecting educational programs that provide career training to earnings premium and debt-burden measures to determine whether they can continue to receive Title IV funding under the HEA.[25] This final rule exceeds the Department's authority under the HEA because it rests on the single statutory phrase "prepare students for gainful employment" to create a regulatory regime of mass economic and political significance.[26] These GE regulations also suffer from the same flaws as the FVT regulations with regard to data accuracy and the ability of institutions to challenge inaccurate data.[27] In its negotiated rulemaking process, we encourage the Department to consider rescinding the regulations related to GE promulgated under the Biden-Harris Administration and put an end to the costly and unauthorized GE regulatory regime conjured out of five words in the HEA.

**Financial Responsibility, Administrative Capability, and Certification Procedures**

On October 31, 2023, the Department promulgated a final rule amending its regulations issued under the HEA related to financial responsibility, administrative capability, certification procedures, and ability to benefit.[28]

The Department's amended regulations related to financial responsibility imposed new mandatory and discretionary "triggers"—allegedly signaling a significant risk to the financial health of an educational institution—that would prompt the Department to seek financial protection from that institution, such as a letter of credit.[29] As DFI explained in our public comment on the proposed version of these regulations, the "triggering events" identified in these requirements do not meet the statutory direction Congress provided to the Department and include events that have no

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[24] Letter from Paul F. Zimmerman, Pol'y Couns., Def. of Freedom Inst. for Pol'y Stud., to Hon. Miguel Cardona, Sec'y, Dep't of Educ. 24–29 (June 20, 2023) (hereinafter "Zimmerman Letter"), *available at* https://dfipolicy.org/wp-content/uploads/2023/06/DFI-Comment-Gainful-Employment-NPRM-06.20.2023.pdf (explaining these data flaws in more detail).
[25] U.S. Dep't of Educ., *Financial Value Transparency and Gainful Employment*, 88 Fed. Reg. 70004, 70005 (Oct. 10, 2023).
[26] *See* Zimmerman Letter, *supra* note 24, at 14–17.
[27] *See supra* note 24 and accompanying text.
[28] U.S. Dep't of Educ., *Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit (ATB)*, 88 Fed. Reg. 74568 (Oct. 31, 2023).
[29] *Id.* at 74702–07.

bearing on financial responsibility.[30] Many of these requirements also lack definitional clarity and would impermissibly delegate authority to determine financial responsibility to third parties, including state-level actors,[31] and some would place a huge amount of discretion in the hands of the Secretary even in the absence of any indication that the financial responsibility of an institution is at risk.[32] Accordingly, we encourage the Department to consider including in its negotiated rulemaking a proposal to rescind the previous administration's amendments to the HEA financial responsibility regulations.

The Department's amended regulations related to administrative capability revised and expanded the requirements for institutions to establish initial and ongoing administrative capability, providing the Department with the authority to make an administrative capability finding based on a broader set of issues than it has used historically.[33] The expanded requirements are anchored to a new and poorly defined standard of "adequacy," and the Department did not support these changes with any finding that the previously mandated disclosures and information provided to students were deficient.[34] The new requirement that an institution maintain "adequate" career services also overlaps with requirements that are already evaluated by accrediting agencies and is outside the Department's realm of expertise.[35] The amendments include measures related to GE programs that do not have any bearing on an inability to successfully administer a Title IV program.[36] Due to the vague and overreaching nature of these requirements, we encourage the Department as part of its negotiated rulemaking process to consider a proposal to rescind these regulatory amendments regarding administrative capability.

Finally, the Department included in its final rule amendments to regulations related to certification procedures and Program Participation Agreement ("PPA") provisions to extend its oversight of institutions that may evidence administrative or financial issues that either require the Department to conduct additional monitoring or seek additional financial protection, or that may disqualify an institution from participating in Title IV programs.[37] As DFI pointed out in our public comment on the proposed version of these provisions, they create unwarranted uncertainty for institutions and their students, include terms that are not sufficiently defined, and create unnecessary administrative burdens in areas where the Department's previous oversight authority regarding certification was sufficient.[38] These amendments also included interference with accreditor and state agency oversight of programs and undermining the integrity of the state reciprocity

[30] Zimmerman Letter, *supra* note 24, at 36.
[31] *Id.* at 37–41.
[32] *Id.* at 41–42.
[33] 88 Fed. Reg. at 74698–99.
[34] *See* Zimmerman Letter, *supra* note 24, at 43.
[35] *Id.* at 44.
[36] *Id.*
[37] 88 Fed. Reg. at 74695–98.
[38] Zimmerman Letter, *supra* note 24, at 46–47.

agreement.[39] Therefore, DFI encourages the Department to include in its upcoming negotiated rulemaking a proposal to rescind these new rules relating to certification procedures.

**Return of Title IV Funds**

On January 3, 2025, the Department promulgated a final rule amending its regulations issued under the HEA relating to distance education and return of Title IV funds.[40]

In response to public comments, the Department removed from its final rule most of the arbitrary, capricious, and unlawful proposals it had proposed in its notice of proposed rulemaking.[41] However, it retained a requirement that, for the purposes of calculating the total Title IV funds to be returned to the federal government, an institution must document a student's withdrawal within 14 days of that student's last date of attendance.[42] In a comment DFI co-authored with Adam Kissel, Visiting Fellow at the Heritage Foundation, we explained why this deadline is unreasonable and proposed that the Department replace it with a 28-day deadline.[43] We encourage the Department to include in its upcoming negotiating rulemaking process a discussion of extending the deadline by which institutions must document a student's withdrawal for the purpose of returning Title IV funds.

**Accreditation**

In 2019, based on a consensus developed by an ideologically diverse set of 16 higher education stakeholders, then Secretary Betsy DeVos issued a final rule that ended the regional accreditation monopoly with the goal of "introduc[ing] 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."[44] Multiple states have relied on this groundbreaking move to improve the quality of education at their public colleges and universities, including by requiring these institutions to seek and obtain institutional accreditation from a different agency.[45]

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[39] *Id.* at 48.
[40] U.S. Dep't of Educ., *Program Integrity and Institutional Quality: Distance Education and Return of Title IV, HEA Funds*, 90 Fed. Reg. 470 (Jan. 3, 2025).
[41] *Id.* at 474, 475, 479, 482, 483, 487, 490.
[42] *Id.* at 504 (to be codified at 34 C.F.R. § 668.22(b)(2)).
[43] Letter from Adam Kissel, Visiting Fellow, The Heritage Found., & Robert S. Eitel, President & Co-Founder, & Jim Blew, Co-Founder, Def. of Freedom Inst. for Pol'y Stud., to Dr. Miguel A. Cardona, Sec'y, U.S. Dep't of Educ. 5 (Aug. 21, 2024), *available at* https://dfipolicy.org/wp-content/uploads/2024/08/HEA-TRIO-DE-NPRM-DFI-Heritage-Comment-08.21.2024.pdf.
[44] U.S. Dep't of Educ., *Student Assistance General Provisions, The Secretary's Recognition of Accrediting Agencies, The Secretary's Recognition Procedures for State Agencies*, 84 Fed. Reg. 58834, 58893 (Nov. 1, 2019).
[45] *See* FLA. STAT. § 1008.47(2); N.C. GEN. STAT. § 116-11.4(b).

On May 1, 2025, the Department issued a Dear Colleague Letter ("2025 Dear Colleague Letter"), which superseded illegal guidance issued in 2022 by the prior administration that sought to obstruct these regulatory reforms. The Department's 2025 Dear Colleague Letter rightly recognizes the sovereign authority of the states to manage their public institutions and acknowledges that the agency "has no authority to substantively intervene in the decision of an institution or program to select a particular accrediting agency (or to intervene with a State to direct its public institutions to seek a new accrediting agency)."[46]

The 2019 rulemaking and the 2025 Dear Colleague Letter provide solid foundations for further beneficial reforms to America's higher education accreditation system. To encourage institutions of higher education and states to capitalize on their newfound ability to seek accreditation from a new agency or seek accreditation from multiple agencies, the Department should consider including in its negotiated rulemaking process proposals to eliminate barriers to entry for new accrediting agencies, including by streamlining and expediting procedures for departmental recognition of new accreditors. Increasing competition and accountability among institutional and programmatic accreditors by permitting new agencies to enter the field of accreditation would result in a more innovative and ideologically diverse accreditation system that would help ensure American taxpayers are funding quality higher education programs that benefit students and families.

**Conclusion**

The Department's announcement of negotiated rulemaking to reform the federal student loan program and eliminate burdensome higher education regulations is a welcome step toward making America's higher education system fit for purpose in the 21st century. To maximize the impact of this important rulemaking effort, DFI encourages the Department to include the issues we discuss above among the topics it considers in its regulatory reforms, including predictable rules concerning public service loan forgiveness, simplified student loan repayment plan options that result in borrowers (not taxpayers) repaying debt, easing barriers to entry for new accrediting agencies, and the elimination of vast regulatory regimes that find no basis in the statutory language of the HEA.

Please contact me with any questions.

[46] James P. Bergeron, Deputy Under Sec'y, Acting Under Sec'y, U.S. Dep't of Educ., Dear Colleague Letter: Changes to the Approval Process for Changing Accrediting Agencies 2–3 (May 1, 2025), https://www.ed.gov/media/document/dear-colleague-letter-changes-approval-process-changing-accrediting-agencies-may-1-2025-109941.pdf.

Sincerely,

*/s/ Paul F. Zimmerman*
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Defense of Freedom Institute for Policy Studies