Over the course of two short years and through quiet regulatory actions, many of which have not garnered many headlines, Secretary of Education Betsy DeVos has loosened accountability for U.S. schools and colleges, putting millions of students at risk of civil rights abuses and fraudulent financial schemes. Through aggressive use of its regulatory authority—including what two judges have found to be misuse—the U.S. Department of Education under DeVos has delayed, watered down, or outright eliminated crucial regulations and guidance in an effort to subvert federal laws that ensure students are treated fairly and receive a high-quality education.1

This issue brief documents these incremental changes and explores their potential harm to students, highlighting the necessity of maintaining public vigilance in oversight of the DeVos agenda. Congress should also consider codifying into law regulations and regulatory guidance that it deems important in order to avoid regulatory pingponging between presidential administrations. Overall, DeVos’ actions amount to a de-emphasis of the federal government’s role in education. The brief organizes these actions into three main categories: attempting to de-emphasize the federal government’s role in oversight of education funding; eliminating key student protections; and weakening accountability for school and college performance.

1. **DeVos is de-emphasizing the federal government’s role in oversight of education funding**

States are responsible for providing a free public primary and secondary education to all their students. However, the federal government plays a critical role in this effort as well; it levels the playing field, primarily by providing additional funding for, as well as requiring states to fairly fund, all public K-12 schools.

**Watered down the SNS provision**

Title I of the Elementary and Secondary Education Act (ESEA) is intended to provide additional funding to high-poverty schools—not to compensate for fewer local or state education dollars. As a result, this title includes a “supplement, not supplant”
Prior to the passage of the ESEA's reauthorization, now known as the Every Student Succeeds Act (ESSA), this provision required districts to prove that individual costs paid for by Title I funds did not meet any of the following three presumptions: an activity required by local, state, or federal law; an activity paid for by local or state funds the previous year; or the same services for Title I students that local or state funds support for non-Title I services.  

ESSA makes two important changes to SNS: eliminating these three presumptions, and focusing instead on how districts allocate local and state funds to schools—namely, by requiring that Title I schools receive all of the local and state funds for which they are eligible, even if they receive Title I funds. Importantly, this provision of the law is not defined. Regulations and guidance are needed to ensure that districts know what it means to allocate state and local funds without consideration of receiving Title I funds. 

As a result of these two changes, the proposed rules under the Obama administration would have strengthened SNS by prohibiting districts from barring any schools from receiving local and state funding and by providing them an avenue to show that Title I schools and non-Title I schools receive the same in per-pupil funding in order to demonstrate compliance. The logic is simple: It is impossible to know whether funding is supplementary without knowing how much in base funding each school receives. However, these proposed rules were never finalized due to significant pushback from the Republican-controlled Congress. 

Now, DeVos has abandoned this approach. In the Education Department’s SNS draft guidance released in January 2019, the compliance method only requires that districts allocate funds without regard to a school’s Title I status—not that districts demonstrate their funding methodology for state and local dollars. In other words, high-poverty schools can continue to receive less in local and state funding, as they have historically. 

2. **DeVos is eliminating key student protections** 

As public entities, neither K-12 schools nor state colleges can discriminate on the basis of a protected class. When students make a formal complaint that this right has been violated, the Education Department’s Office for Civil Rights must determine whether an investigation is warranted and require remedy where it finds discrimination. In addition, within the context of higher education, colleges are not allowed to defraud students. 

Changes enacted by Secretary DeVos have delayed, weakened, or eliminated—or propose to eliminate—the following four protections: a rule related to student groups’ placement in special education services; student discipline guidance; the borrower defense to repayment rule; and the Title IX rule.
Illegally delayed the Equity in IDEA rule

The appropriate identification of students who would benefit from services and civil rights tied to special education, as well as these students’ placement into programs able to accommodate their needs, is a complex topic. The over- and underrepresentation of some student groups in special education, such as low-income and African American students, may in some cases be explained by these communities’ higher rates of factors such as inadequate access to health care and screenings as well as exposure to dangerous environmental factors that cause disabilities—many of which are associated with poverty. Nonetheless, states should pay attention to district rates of groups’ placement into special education in order to ensure that placements are educationally warranted and not due to racial bias or income status. Moreover, some groups, such as autistic girls of color, are significantly underidentified; as a result, these students do not receive access to accommodations that would affect their long-term academic growth as well as to the civil rights protections that accompany these accommodations.

In 2016, the Obama administration issued a rule governing the Assistance to States for the Education of Children with Disabilities program and the Preschool Grants for Children with Disabilities program under the Individuals with Disabilities Education Act (IDEA)—referred to as the Equity in IDEA rule—which would require states to review and address any racial disparities in special education. Specifically, states would have to address any “significant disproportionality” in the identification, placement, and discipline of children with disabilities. However, DeVos delayed implementing the final rules, saying that her department needed to study them more thoroughly to ensure that they did not compel the setting of quotas for special education placement. A judge vacated this decision in March 2019.

Revoked the student discipline guidance

Data, including federal data from the Education Department’s Civil Rights Data Collection (CRDC), consistently show that students with disabilities and certain students of color are suspended or expelled at higher rates than their peers. For example, CRDC data show that black or African American male students account for 8 percent of student enrollment but 25 percent of out-of-school suspensions or expulsions.

The impacts of exclusionary discipline practices vary. Suspended and expelled students lose valuable learning time, feel less connected to school, and are more likely to drop out. They also perform more poorly in school due to their suspensions, as do their nonsuspended peers. Many factors contribute to racial disparities in discipline. In an effort to address these issues, in 2014, the U.S. Department of Justice and the Education Department’s Office for Civil Rights issued joint guidance intended to help school districts both reduce disparities and implement more positive approaches to discipline.

In 2019, the Education Department rescinded this guidance. Secretary DeVos defended the decision, which was bolstered by a recommendation from a federal school safety commission that she headed, saying that the guidance amounted to enforcing “quotas” in school discipline rates.
**Delayed and rewrote the borrower defense to repayment rule**

The Trump administration has sought to delay and rewrite the borrower defense to repayment rule, which provides a process for student loan borrowers to seek loan forgiveness if their colleges defrauded or misled them about the quality of their education.\(^\text{18}\) The borrower defense to repayment rule originated under the Obama administration after the closing of Corinthian Colleges, a chain of schools that was plagued by high defaults and questionable programs and was under investigation by the Education Department and numerous attorneys general for deceptive marketing practices and lying about graduation rates.\(^\text{19}\) Under increasing pressure, Corinthian Colleges shut down overnight, leaving thousands of students stranded.\(^\text{20}\)

In June 2017, the Trump administration moved to delay the implementation of the borrower defense to repayment rule while it worked to rewrite it. Following legal action from numerous consumer protection groups, a judge struck down the delay.\(^\text{21}\) In July 2018, the Education Department released its proposed rewrite of the rule, which, if instituted, would make it nearly impossible for borrowers to get loan relief. The department received more than 30,000 public comments on the rule and has yet to issue a final version.\(^\text{22}\) Despite the fact that the 2016 rule is in effect, the department does not appear to be enforcing it, and some 140,000 student loan borrowers who have applied for relief are currently waiting without an answer.\(^\text{23}\)

**Weakened the Title IX rule**

In February 2017, the Trump administration withdrew federal guidance developed under the Obama administration that spelled out protections for transgender students in schools and colleges under Title IX of the Education Amendments Act of 1972.\(^\text{24}\) Title IX is a federal law that prohibits schools receiving any federal funding from discriminating based on sex. The rescinded guidance clarified that Title IX encompasses gender identity, thus prohibiting discrimination based on a student’s gender identity. It also specified protections, including access to bathrooms and other facilities.\(^\text{25}\) Rescinding the guidance eliminated a resource that students and parents could use for advocacy to make schools safer and more welcoming for students. However, policymakers in the U.S. House of Representatives just passed the Equality Act, which would codify the guidance into law and make it permanent.\(^\text{26}\)

In September 2017, the administration withdrew more guidance developed under the Obama administration that provided information on how schools and colleges should handle sexual assault, as it worked on its own rewrite of regulations.\(^\text{27}\) In November 2018, the Trump administration proposed new regulations that would weaken protections for survivors of sexual assault.\(^\text{28}\) Among other changes, these regulations would reduce school liability by narrowing the definition of sexual harassment, would allow schools to choose the burden of proof required for sexual assault cases, would dissuade survivors from reporting, and would bolster accused students’ rights over those of survivors.\(^\text{29}\)
3. DeVos is weakening accountability for school and college performance

A common refrain from Betsy DeVos is that individual liberty and choice are the ultimate arbiters of accountability in K-12 education. This view rests on the presumption that all parents have access to the same, high-quality information about school performance and ignores data that show that parents want their neighborhood schools to be effective at preparing students for life after high school, to be funded fairly, and to reflect their children’s racial identity. DeVos’ view also ignores evidence that, while modest, the accountability requirements—specifically, the school management changes—of the federal No Child Left Behind Act targeting poor school performance resulted in improvements in student achievement based on standardized test scores.

Although not a panacea and not without valid criticisms of its efficacy, federal accountability plays a role in addressing the quality of all public K-12 schools, something that parental choice alone cannot achieve. This is particularly true in higher education, where DeVos’ Education Department has used its efforts to improve the information that students receive from and about colleges as they decide where to apply as justification for eliminating regulations that hold colleges accountable. But data to inform college choice is not a sufficient replacement for accountability; federal requirements in higher education ensure that colleges maintain a high bar of performance, and previous deregulation attempts have resulted in an upswing in fraud and low-quality education options.

Approved low-quality state plans under ESSA

States indicate how they will comply with the federal law ESSA through plans that they must submit to the Education Department for review and approval—a process the department last conducted in 2003. The law’s previous iteration, the No Child Left Behind Act, included strict accountability provisions for the performance of each identified subgroup, including students who are from low-income families, students of color, English-language learners, and students with disabilities.

Congress revoked the regulations of ESSA in 2017, giving Secretary DeVos significant discretion in determining the criteria to approve the state plans. Compared with its predecessor, the No Child Left Behind Act, ESSA, as the law was renamed, provides more flexibility for states to develop their own accountability systems, in order to allow for state and local innovation in providing a high-quality education. However, several independent reviews of states’ ESSA plans show that schools in some states are not sufficiently being: held accountable for the performance of each student subgroup; identified when subgroups consistently underperform; or required to participate in federal annual testing requirements—all central tenets of the law. Simply put, the Education Department under DeVos approved plans that should not have passed muster.
Proposed weakening federal oversight expectations
In April 2019, the Trump administration completed a negotiated rule-making that would deregulate quality assurance in higher education. While there are still numerous steps left before new regulations are finalized, what has been proposed would result in the unraveling of federal oversight of college quality. Congress tasks independent nonprofit organizations called accrediting agencies with the job of ensuring that colleges meet quality standards before they can access the billions of dollars in federal financial aid that the government awards each year. And it tasks the Education Department with overseeing accrediting agencies.

Proposed changes include: extending more time and taxpayer money to schools that do not meet quality standards; easing the requirements to become a gatekeeper of taxpayer funds; allowing colleges to create new programs with minimal oversight; and reducing public transparency into whether colleges and accreditors meet the standards surrounding quality. Combined, these changes would make it nearly impossible both to strip a college of its accreditation when it does not meet standards, as well as to remove federal recognition of an agency that falls down on the job.

Delayed and proposed eliminating gainful employment regulations
In March 2017, the administration delayed regulations that obligate colleges to disclose data on how well programs serve students under the gainful employment regulations. Gainful employment regulations hold career training programs accountable for producing graduates who can obtain jobs and earn enough money to repay their loans. In June 2017, the Education Department began the process of rewriting the rule, and in August 2018, it released rules that would effectively eliminate the requirements entirely. It has yet to publish the final rule. Eliminating the rule would raise the risk of thousands more students taking on debt for low-quality programs that do not provide a leg up on employment.

Challenged affirmative action
The Trump administration has taken on numerous efforts to challenge affirmative action practices. Under Secretary DeVos, the Office for Civil Rights has investigated numerous colleges’ race-based admissions practices. In July 2018, for example, the administration eliminated guidance encouraging race-based admission in colleges, including guidance encouraging schools to strive for diversity in admissions, stating that it was legal for colleges to consider race in admissions, and clarifying how the federal government should consider complaints about admissions policies. In August 2018, the Trump administration sided in court with a conservative anti-affirmative action group suing Harvard University, challenging its admissions practices. The case could very likely end up in a right-leaning U.S. Supreme Court, which puts affirmative action itself at risk. And just last month, in response to the Trump administration’s assault on affirmative action, one college agreed to end its practice of considering race in admission, even though it acknowledged that this practice followed the law.
Conclusion

Debating the appropriate role of the federal government in education is valid. However, years of practice show that the federal government plays an important role in improving the quality of public education, as well as in protecting students from being discriminated against or defrauded.

Secretary of Education Betsy DeVos’ deregulatory agenda flies in the face of this important role. And her actions’ cumulative effects on students must be part of the public discourse.

While it is natural for regulations to reflect some aspects of the values of the presidential administration that enacts them, they should also be based faithfully on the law and be passed according to established procedures. DeVos’ deregulatory agenda has skirted the rules and has become her decree on the appropriate role of the federal government in education, rather than a tool to improve the quality of education. In order to ensure that regulations are not subject to political whim, Congress should consider what regulations it deems necessary to codify into law.

The deregulatory actions of Betsy DeVos will take years to undo. Until that time comes, the public and Congress must remain vigilant about what decisions and changes are not making headlines and bring the Education Department’s nefarious practices into the light of day.

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Endnotes


29 Ibid.


39 Flores, “Hooked on Accreditation.”


47 Meckler, “Texas Tech Health Sciences Center agrees to stop using race in medical school admissions.”