



 REPORT EDUCATION

How to Restore Oversight over the Department of Education

JANUARY 24, 2019 — DENISE FORTE

Since the beginning of the Trump administration, Congress has failed to carry out its duty to provide oversight of the Department of Education's programs and practices. With Democrats taking control of the House of Representatives, we can expect a return to "regular order," which includes the House performing oversight of the agencies over which committees have jurisdiction.

The House Committee on Education and Labor (formerly the Committee on Education and the Workforce) has responsibility for overseeing the work of the Department of Education and the Department of Labor, alongside several other independent agencies, such as the Corporation for National and Community Service and offices such as the Administration on Aging at the Department of Health and Human Services.

Under the leadership of Secretary Betsy DeVos, the Department of Education has been opaque in its decision making, little is known about who influences decisions made by the secretary, and few justifications have been provided for actions taken by the department that do not follow congressional intent. During these years, congressional committees provided very weak oversight of the Department of Education, and in many cases, supported the Trump administration's anti-regulatory agenda. This has allowed Secretary DeVos to engage in a systematic attempt to roll back bedrock civil rights and consumer protections for students. Here are some key examples:

- **Undermining Gainful Employment Rules.** Gainful employment regulations issued during the Obama administration require for-profit schools and others offering vocational-type programs to maintain minimum performance standards to ensure that student are getting value for their education investments.¹ The test that the Obama administration established requires these programs calculate the amount of debt students are taking on versus the amount of income they earn once they graduate. The rule ensures that students enrolling in these institutions will have sufficient income once they graduate to pay reasonable living expenses, and make their monthly student loan payments.² If a program on average does not help students earn enough to pay a reasonable percentage of their income toward loan payments, the program may become ineligible for federal loans. Secretary DeVos has proposed regulations that would gut these protections, and allow schools to run up big student debt without holding schools accountable for failed vocational programs.³
- **Limiting Students Rights: Narrowing the Borrower Defense Rule.** Under the Borrower Defense Rule, students who attend education programs where the school mislead them, or engaged in other misconduct in violation of certain state laws, may be entitled to a cancellation of outstanding loans.⁴ Secretary DeVos had initially delayed forgiving the student debt of around 15,000 students who were carrying about \$150 million in debt incurred while attending schools that had violated state laws, but eventually gave up after a legal challenge arose.⁵ She is still, however, proposing to throw up new legal barriers for students to win debt cancellations. For example she is

proposing to require students to show intentional fraud by the school (instead of, for example, ineptness) by clear and convincing proof, instead of the more traditional preponderance of the evidence standard.⁶

- **Undermining the Public Service Loan Forgiveness Program.** Under the existing Public Service Loan Forgiveness program, students who make regular student loan payments for at least ten years, while serving in a public service position (government or nonprofit), can have the remainder of their student loan debt canceled.⁷ A recent report by the Government Accountability Office (GAO), however, revealed that an overwhelming number of students (99.6 percent) applying for such forgiveness since 2017 have been denied, due in part to inadequate information provided by the Department of Education and its student loan servicers.⁸ Members of Congress recently wrote to Secretary DeVos at the Department of Education, saying “[n]ot only has this Administration ignored the mounting warning signs . . . but it has actively reduced oversight of student loan servicers—thereby contributing to the current problems in student loan servicing.”⁹

There many more examples of Department of Education actions that have not been sufficiently questioned by the House committee, including: the undermining of distance education rules;¹⁰ introducing regressive regulations on sexual assault and Title IX;¹¹ trying to reverse the ban on arbitration clauses;¹² restoring recognition to the Accrediting Council of Independent Colleges and Schools (ACICS), even with the collapse of two large for-profit college chains it oversaw;¹³ rescinding Obama-era guidance on school discipline meant to reduce the disproportional representation of minority youth in school disciplinary proceedings;¹⁴ and bringing into leadership of the Department of Education a number of individuals who’ve represented for-profit colleges while at the same time dismantling a team investigating widespread abuses by for-profit colleges.¹⁵

This report begins with a brief explanation of the value of congressional oversight, as well as the duties required of congressional committees. It then examines the role of the House Committee on Education and Labor, and suggests a pathway to reestablish true oversight over the Department of Education. Drawing on interviews with experienced current and former congressional investigation and oversight staff, the report makes recommendations regarding the committee’s leadership, agenda, and staffing, and identifies the main tools at the committee’s disposal.

Why Oversight Is Critical to Good Governance

The Constitution intentionally established three independent branches of government in order to provide the checks and balances that are necessary for a healthy democracy. Oversight of the federal executive branch is a key responsibility of Congress. When a congressional committee fails to meet this responsibility, it undermines the balance of power between the legislative and executive branches that the Founders envisioned.

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Strategic oversight, when done well, should enhance the management and services an agency provides. Moreover, an agency that is performing its statutory mission should welcome congressional oversight to ensure accountability for how it is managing the legislatively directed work and achieving the desired outcomes. For example, in the mid-1990s the Corporation for National and Community Service received significant attention from the committee through oversight hearings because of its failure to achieve the necessary internal controls that would result in successful audits. Successful oversight will also be guided by policy goals. From 2007 to 2010, the committee oversaw investigations¹⁶ into conflicts of interest in contracting,¹⁷ lack of controls in student lending, and the health and safety of students. Each of these oversight activities resulted in new policies that enhanced the management and services provided by the agency.

The Committee's Role in Oversight

Under the rules of the House of Representatives in the 115th Congress,¹⁸ the committee had general as well as specific oversight duties. Within its broad jurisdiction of “education or labor, generally,” the committee has general oversight duties that it shares with all House committees. These general oversight duties include:

Rule X. 2. (b)(1).

(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction;

(B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction;

(C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto);

(D) future research and forecasting on subjects within its jurisdiction.

In addition, each committee must publish an oversight plan for the committee. House rules require that each committee

must identify the programs authorized under its jurisdiction that are not currently funded by Congress; programs that are permanently authorized but have not had a comprehensive review; and programs to be authorized during the current Congress or next Congress. The oversight plan must also specify how the committee will carry out its oversight of these authorization efforts. During the 115th Congress, the oversight plan for the Committee on Education and the Workforce (passed on January 24, 2017) offered the following as to the approach the committee would take in regards to education programs:

- **Every Student Succeeds Act.** In 2015, Congress passed and the President signed a bipartisan, bicameral bill to replace No Child Left Behind with common sense reforms to allow states and communities the flexibility needed to provide all students an excellent education. Unfortunately, the Obama administration has frequently ignored both the letter and intent of the Every Student Succeeds Act in its efforts to implement this bipartisan law. The Committee will work with the Trump administration to ensure the law is properly implemented, including following the significant changes made to the Preschool Development Grants.
- **Student Loans.** The U.S. Department of Education manages \$1.3 trillion in outstanding federal student loans and disburses billions in grants and work-study funds each year. The Committee will continue to monitor the costs and performance of these programs.
- **Higher Education Regulations.** Institutions of higher education are subject to myriad federal regulations and reporting requirements that are often burdensome and costly. The regulatory burden has only worsened with rules that interfere with academic freedom, infringe on the authorities of the states, limit student choice, and unfairly target particular sectors of higher education. The Committee will continue its oversight of regulatory policies and challenge those that enlarge the federal footprint in higher education.¹⁹

Oversight plans for this committee have varied in approach and tone over the years, depending on the leadership of the committee. When the Republicans took over the House of Representatives for the 104th Congress starting in 1995, they also changed the name of the Committee to the House Committee on Economic and Educational Opportunities. The oversight plan reflected this new attention to “opportunity” by stating:

The exciting thing about our opportunity is we can highlight places and programs that are successful. Not surprisingly, these are typically schools, parents, and workplaces that have broken the Washington paradigm. They have focused on solving the problems of education and work and have created exciting and effective solutions. The programs we will highlight will be models for success. Many times they have succeeded despite Washington, not because of it.

*That is the mission for this Committee: to be bold and to provide the knowledge, understanding and commitment to truly unleash the positive potential of this country from the bureaucratic mess of Washington. As President Clinton stated in his State of the Union address, “We need a new government for a new reality.”*²⁰

In addition to renaming the committee in the 104th Congress, the committee also created a new subcommittee, the Subcommittee on Oversight and Investigation. Consistent with the blueprint for the new Republican majority elected in the 104th Congress—the Contract with America—the Subcommittee on Investigation and Oversight was used to make the case for devolving responsibility for education back to the states, because of doubts about federal accountability and a perceived lack of successful outcomes in education. The subcommittee focused its attention on the cost of higher education, student financial aid, and school reform through a series of hearings in Washington, D.C., as well as across the country. A change in leadership at the top of the committee in 2001 resulted in the dissolution of the subcommittee, but the committee continued its focus on school reform, with a particular emphasis on charter schools and school vouchers, eliminating duplicative federal education programs, and higher education reform. However, there was also significant policy changes resulting from this oversight, particularly in the area of public education with the passage of the No Child Left Behind Act.

The change in the leadership of the committee in 2006 and change in party, from Republican to Democratic control, also yielded a new direction in oversight. Early oversight focused on implementation of the No Child Left Behind Act and college affordability. However the committee also investigated issues on seclusion and restraint practices in schools, fraudulent practices in student lending, and conflicts of interest in contracting at the Department of Education.²¹

Where the Committee Has Recently Gone Wrong

In the almost two years since the confirmation of Betsy DeVos as the secretary of education, the Republican majority on the House committee failed to carry out general oversight duties for the Department of Education, as well as specific oversight of the operation of the agency as it administers its programs and regulations. The House committee’s responsibility to carry out oversight of its agencies of jurisdiction is not only obligatory, but also necessary to ensure that the agency is carrying out the legislature’s directives. Sadly, this failure to provide proper oversight has come at a critical time, when the agency is in the midst of implementing major reforms in education policy under the Every Student Succeeds Act (ESSA),²² reauthorizations of the Higher Education Act of 1965,²³ and focusing on several civil rights laws under its purview. Stakeholders and taxpayers should be concerned when they cannot be assured that the legislative

branch is holding accountable the agency for which it has jurisdictional interest. The lack of oversight by the committee during the first term of Congress under this administration, has allowed the agency to operate with little accountability to its constituency of education stakeholders, states, schools, parents and students.

The oversight plan adopted at the start of the 115th Congress provided the general outlines for how the committee was to carry out its oversight. At the broadest level, the plan called for a heightened focus on ESSA, a review of the Department of Education's administration of its \$1.3 trillion student loan program, and a reconfiguration of regulations regarding higher education. In a review of the hearing agenda, as posted on the committee website, a total of twenty hearings were held on education issues during the 115th Congress. Common practice suggests legislative hearings are used to review legislation under consideration by the committee, whereas oversight hearings offer opportunities to scrutinize agency practices and policies, program implementation, or management issues outlined in the oversight plan. Of the twenty hearings, four could be generously characterized as higher education oversight, three as ESSA program oversight, and one on the department's efforts in general. This sluggish strategy resulted in no legislative changes to federal student loan programs, even as the majority continued to raise complaints of higher education accountability regulations. Similarly, the lack of strategic ESSA program oversight combined with the Congressional Review Act to eliminate guidance on ESSA compounded the confusion felt by stakeholders on program implementation.²⁴

Another tool used in congressional oversight is for members of the committee to direct letters of inquiry to the leadership of an agency—and these letters slowed to a trickle during the 115th Congress. These letters of inquiry are important because they can help to inform the oversight process and bring attention to areas of concern. Based on letters posted on the majority's website during the 115th Congress, the committee had less interest in oversight of the Department of Education when it was under Republican control than when it was under Democratic control. In fact, the Republican majority sent twice as many letters of inquiry during the last two years of the Obama administration than during the first two years of the Trump administration. Due to the significant implementation issues surrounding ESSA, the interest by the agency to roll back long-standing regulations and guidance, and lack of concern about potential administration conflicts, this failure by the committee to perform general oversight duties may have significant implications for stakeholders, taxpayers, and the perceived integrity of the agency.

The use of the Congressional Review Act (CRA) is an example of how Congress ignored the tools available to conduct oversight and investigate concerns it might have had with the previous administration's implementation and regulatory agenda.

As mentioned earlier, the use of the Congressional Review Act (CRA) is an example of how Congress ignored the tools available to conduct oversight and investigate concerns it might have had with the previous administration's implementation and regulatory agenda. The CRA, a legislative mechanism for repealing regulations, is very disruptive because it also prevents the issuance of new regulations similar in substance. It is important to note that in the twenty years prior to the Trump administration, only one CRA resolution had been passed by Congress and signed into law reversing a previously issued regulation.²⁵ However, during the the 115th Congress, more than forty CRA resolutions were introduced and, perhaps more alarming, sixteen were signed into law by President Trump and two directly impacted department programs—ESSA and teacher preparation.

In the case of ESSA, the CRA resolution left states and local education agencies with little guidance on implementation of a significant rewrite of elementary and secondary education law. And, because ESSA handed over discretion to the states on how to carry out the law, concerns still remain from stakeholders, educators, advocates, and parents as to how successful states will be in narrowing the achievement gap and improving academic achievement for lower performing students without some standard guidance applicable to all states.

Recommendations for Successful Oversight

In interviews with experienced current and former investigation and oversight staff, advice to the new majority fell into two main areas: committee leadership and agenda, and tools for oversight.

Committee Leadership and Agenda

Oversight should be a routine part of any committee activity as it seeks to ensure that the programs under its jurisdiction are implemented in the right way, and it falls to the chairman to set the oversight agenda, its main goals, and tone for the committee. The new chairman of the Committee on Education and Labor, Bobby Scott of Virginia, has served on the committee for a significant period of his tenure in Congress, and has previous experience as a chairman when he was the chair of the Subcommittee on Crime, Terrorism, and Homeland Security for the Judiciary Committee from 2007 to 2011.

The expansive jurisdiction of the Committee on Education and Labor, and the fact that the agency has taken advantage of the lack of interest in oversight by the previous Republican majority, means that oversight hearings and activities could fill up the calendar for the rest of Congress. However, it is critical that early on in the first session, committee leadership takes stock of what it hopes to accomplish with its oversight agenda for the term. In one of the first moves by the 116th Congress, the House of Representatives passed a rule returning the committee to its original name, the

Committee on Education and Labor, and Scott has already announced his intention to reorient its direction with a strong civil rights inflection.²⁶

The past two years have seen a number of concerns raised by outside groups about decisions made by Secretary DeVos that impacted the Department of Education's stakeholders. Civil rights organizations have protested changes in Title IX guidance on campus sexual harassment and abuse, changes in how cases are assessed for intake and reviewed by the Office of Civil Rights at the department,²⁷ and the suspension of the Obama school discipline guidance.²⁸ Higher education stakeholders have brought legal challenges against the department for ignoring Freedom of Information Act requests, and rescinding borrower protection rules.²⁹ There continue to be other worthwhile oversight opportunities for the Committee to explore:

- **Rule making:** Has the department followed the law and the rule concerning its regulatory agenda?
- **Programmatic:** Are the programs specified by ESSA being carried out by the agency or by its grantees?
- **Personnel management:** What was the justification for the indiscriminate reassignment of Senior Executive Service employees at the agency? Why did the agency change the longstanding telework policy?
- **Agency operations:** Who in the agency or outside of the agency was consulted in the decision making around changes to loan servicing at Federal Servicing Administration at the agency?

And within each of the areas outlined above, there are a myriad of subject matter for the chairman and members of the committee to pursue. Most certainly, there will be follow up from the new majority on ESSA implementation and whether guidance from the agency to states has been sufficient. Members have initiated inquiries relative to the mismanaged accreditation process for-profit schools³⁰ and why the agency has not carried out its responsibility relative to the Borrower Defense Rule.³¹ And, the soon-to-be chairman has previously announced he would pursue aggressive oversight of the department's civil rights enforcement responsibilities.

Tools for Oversight

Oversight and investigation activities bring with them a range of tools. One former oversight staffer said, "Congressional oversight and investigation requires different tools than other investigatory offices, such as the Inspector General or a criminal prosecutor. There is no judge or a jury for federal oversight, and the process is highly member-driven." As much as staff should be developing their own subject and content expertise, it is important to use the process to also help committee members develop their knowledge base in the area for oversight. Using a variety of tools and external

supports can make the oversight process more credible and assist in the development of a clear and workable policy solution.

A key tool for successful oversight that was highlighted by current and former staff interviewed on background was the importance of constructing a bipartisan strategy for oversight. Seeking out consultation from the minority to include drafting letters of inquiry, bipartisan briefings and were all highlighted as best practices for professional staff. In an article written for the *Wayne Law Review*, former senator Carl Levin and Elise J. Bean noted the presence of a bipartisan strategy can result in a more effective oversight:

Bipartisan investigations require members of Congress with different views to work together. Taking those disparate views into consideration is likely to lead the investigation to ask a wider variety of questions, dig more deeply into the facts and issues, and produce a more accurate and sophisticated understanding of what happened and why. In addition, bipartisan investigations may make it easier to overcome opposition to an inquiry, obtain more information from the subjects of the investigation, help build a shared understanding of a problem, help bridge political divides, increase the investigation's credibility, and help increase public confidence in Congress.³²

Similar views were offered by the Project on Government Oversight:

Congressional oversight is stronger and more credible when it's bipartisan. While it's a given that certain issues will, by their nature, lead to partisan disagreements, there are some issues that should transcend politics. For example, ensuring that the executive branch is correctly enforcing and executing the law or that companies are not grossly over-charging the government or otherwise harming the public is in the interest of both parties and the country in general. Those types of issues shouldn't be allowed to become partisan.³³

Chairs of other congressional committees have been criticized in the past for using oversight as a political weapon against the administration of an opposing party.³⁴ The high profile use of subpoenas and requests for thousands of pages of information from an agency hasn't always yielded the result wanted. These practices are also not advised by professional staff, and judging from his record, it is unlikely the new chair would take this easier high-profile path. As he hires new staff to carry out oversight, it will be important that they keep that tone in mind.

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There are also efforts short of a subpoena that should be considered as necessary parts of understanding the underlying area of oversight and building the evidence that results in successful oversight:³⁵

- **Oversight briefings.** Partisan or bipartisan in-person briefings by agency personnel to congressional oversight staff on the subject of inquiry.
- **Transcribed Interviews.** This tool is a construct of the oversight process that allows witnesses who participate in to be deposed by oversight staff without having to swear under oath.³⁶
- **Depositions.** The process by which witnesses are deposed in oversight and investigation activities varies from committee to committee, and only some committees have deposition authority. The House Committee on Oversight and Government Reform requires a member of the committee to be in the room during depositions. The Committee on Education and Labor allows staff to handle depositions on their own.
- **The General Accountability Office (GAO) and Congressional Research Service.** The GAO and the Congressional Research Service are two agencies authorized by law to support congressional oversight efforts. Both agencies are staffed by program and legal experts and are capable of assisting congressional staff in oversight activities. In the case of the GAO, it can also assert its own interest in government oversight and initiate audits and research.
- **Inspectors General.** Under Section 4(a) of the Inspector General Act of 1978, the inspector general of an agency is required “to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment.”³⁷
- **Nongovernmental organizations and other non-federal agencies with an oversight focus.** Outside organizations have a valuable role to play in bringing greater transparency and accountability to the work of federal agencies and offices.³⁸ For example, The Century Foundation has successfully used the Freedom of Information Act on a number of occasions to highlight concerns it had with the proliferation of for-profit universities and the failure of accreditors to hold these institutions accountable to their students.³⁹

- **State Attorneys General.** State attorneys general have also begun to use their position to comment on department actions that undermine their efforts to protect students in their states.⁴⁰

Conclusion

The successful takeover of the House by Democrats in the 2018 midterm elections not only yields a new direction for the majority, but new opportunities for the House Committee on Education and Labor to return to regular order and carry out its oversight and investigation responsibilities. As it begins this important work, the committee is poised to bring new energy and insight for addressing concerns at the Department of Education that have been overlooked over the past two years. And, with a new chairman, the addition of new members and staff, and a posture of bipartisanship, oversight of the Department of Education should result in greater transparency, accountability, and effective program management that will benefit taxpayers and education stakeholders.

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