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When a Three-Legged Stool Loses a Leg

How the U.S. Department of Education Forfeited State-Level Oversight of Higher Education

Higher education law and policy has long focused on a so-called oversight “triad,” whereby states, accrediting agencies, and the federal government play commensurate roles overseeing institutions of higher education.¹ For more than seventy years—first formalized as part of the Veterans’ Readjustment Assistance Act of 1952² and later enshrined in the Higher Education Act (“HEA”)—federal higher education policy has looked to this combination of states, nongovernmental accrediting agencies, and the federal government to oversee institutions of higher education.

For much of its history, the effectiveness of the triad has been reasonably subject to discussion, debate, and criticism. Yet policymakers and advocates have paid scant attention to 2010 U.S. Department of Education policy that expressly blessed a practice whereby states fully exempt institutions from state oversight. And while the HEA *requires* institutions to be “legally authorized within such State” to provide postsecondary education and accountability policy has rested on the triad, the Department has permitted states to either delegate their oversight responsibilities to another leg of the triad (federally recognized accrediting agencies) or dispense with oversight altogether. Under federal regulations, if a state “has a process to review and appropriately act on complaints” concerning institutions, a state may choose either of these paths to *completely* exempt institutions from any state higher education laws, without a resultant impact on Title IV eligibility. *See* 34 C.F.R. § 600.9(a)(1).³

Unfortunately, that’s not the end of the story. Despite the requirement that states have a “process to review and appropriately act on complaints” before delegating or eliminating state oversight, the Department has gutted that requirement. In a 2011 Dear Colleague Letter—issued only five months after the requirement was adopted—the Department opined that the regulation allows a state to refer a complaint to other appropriate entities, including accreditors, for “final resolution.”⁴ Thus, if a state has a mechanism to *accept* complaints, even if it refers those complaints to nongovernmental accreditors for resolution, states are free to delegate or eliminate any other state oversight.

So much for the three-legged stool.

How did this happen?

As noted, an institution may only participate in the federal student aid programs if “legally authorized” within a state to provide a “program of [postsecondary] education.”⁵ The Department is charged by law to “determine,” as a precondition of participation in the student aid programs, an institution’s “legal authority to operate within a State.”⁶

For decades, while policymakers believed states played a key role as a member of the accountability triad, the Department’s regulations were largely silent about the meaning of state authorization. During this time, states have had a checkered

record—at times, authorizers have sought to increase their role; at others, state authorizers have missed the boat (or never sought to even get on board).

This hands-off approach led to absurdity, as the Department acknowledged in 2010: an institution could be “authorized by a State by virtue of the State’s decision not to have any oversight over the institution.”⁷ And in other cases, states could functionally eliminate their own leg of the triad by “deferring all, or nearly all, of their oversight responsibilities to accrediting agencies for approval of educational institutions, or [by] providing exemptions for a subset of institutions for other reasons.”⁸

With these concerns at the forefront of the Department’s attention, the Department began a negotiated rulemaking process in November 2009 designed in part to consider the HEA’s state authorization requirement.⁹ At the outset of the 2009 negotiated rulemaking, the Department framed the issue by noting that “over 35 years ago, the Department determined that institutions were authorized by the State by virtue of the State’s decision not to have any oversight over them.” Highlighting an example from California, the Department complained that when states failed to affirmatively authorize private postsecondary institutions, the institutions were nevertheless allowed to participate in the student aid programs. The Department also noted that many states were “deferring to accrediting agencies for approval of educational institutions,” which “undermined” the “checks and balances provided by accreditation and State legal authorization.”¹⁰

After the first set of negotiations, the Department proposed language in December 2009 that would have required states to monitor “academic quality,” “capacity and continuing financial viability under its current ownership status,” and “compliance with State laws with respect to consumer protection, the maintenance of student records, refund policies, and other matters relating to state authority in these areas.” With respect to assurances of “academic quality,” however, the proposal permitted states to “rely on [Department-recognized] accrediting agencies.”¹¹

By January 2010, the Department completely reversed course. Acknowledging that it was acting “in response” to outside interests, the Department “removed the provisions dealing with monitoring the quality of educational programs and financial responsibility.”¹² The Department also removed the provisions requiring states to oversee institutional compliance with consumer protection laws. Instead, the Department proposed that state authorization meant only that non-public institutions needed to obtain documentation of authorization from the state establishing authority to operate educational programs.

On June 18, 2010, the Department published its proposed state authorization rule (the “NPRM”), which largely mirrored its January 2010 proposal. Despite failing to reinstate the core financial and consumer protection standards jettisoned during negotiations, the NPRM remained true to the Department’s initial concerns with a *laissez faire* approach to state authorization. For example, the NPRM was expressly driven in part by the Department’s concern that state authorization in some states meant, as a practical matter, a decision *not* to have any oversight at all. 75 Fed. Reg. 34806, 34813. The Department reasoned that state authorization should be a “substantive requirement” where a state takes an “active role in approving an institution and monitoring complaints from the public about its operations and responding appropriately.” *Id.*

Despite these concerns, on October 29, 2010 the Department adopted a Final Rule that established only “minimal” requirements that “many States will already satisfy.”¹³ (The Department used the word “minimal” *five times* on a single Federal Register page to describe the obligations it was placing on state authorization.) But even within those “minimal” obligations stood a glaring loophole: states could basically opt out of providing *any* meaningful scrutiny by delegating oversight responsibility to accrediting agencies. What had started as the Department’s attempts to regulate an unwritten loophole around non-existent standards had turned into the Department *expressly enshrining that loophole* into federal regulation.¹⁴ Under the final rule, as long as a state maintains a “process to review and appropriately act on complaints” and authorizes the school to operate “by name as an educational institution,” or through some “other action by an appropriate state agency,” the state “may exempt the institution from any State approval or licensure requirements based on the institution’s accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.” 34 C.F.R. 600.9(a)(1)(i)(A)–(B).

Sadly, even this was not the end of the conversation.

On March 17, 2011, the Department issued Dear Colleague Letter GEN-11-05, better known for its creation of the so-called “bundled servicing loophole” for incentive compensation. In the DCL, the Department provided “additional guidance” regarding the new state authorization rule. With respect to the requirement that institutions be recognized “by name” or through some “other action,” the Department stated that if, for example, a school has articles of incorporation “for the establishment of a postsecondary institution” and the “institution is incorporated by name,” the institution would satisfy the requirement, without any additional substantive oversight. Moreover, with respect to the complaint procedure, the Department highlighted that while the State must maintain “final authority” for managing complaints submitted (and must have a Process to receive complaints), “upon considering a complaint,” the state “may refer it to other appropriate entities, such as an institution’s accrediting agency, for final resolution.”

After the DCL, if an institution was expressly incorporated to form a postsecondary institution, a state may forward all complaints to an accrediting agency for final resolution and either defer all state oversight of institutions to that accrediting agency or forego all state oversight if the institution has been in operation for at least twenty years.

What was once framed as a concern for “checks and balances” across the three-legged triad was suddenly a two-legged stool.

What are the consequences?

This regulation and guidance are not without consequence. Perhaps most significantly, the Department of Education has essentially blessed a universe in which states can hand off or eliminate oversight of institutions. Students with valid concerns about institutional misconduct—which may be in violation of their state’s higher education laws—could be left without recourse because the school is not subject to the state’s higher education laws. Even if a state refers complaints to a school’s accreditor, it is unlikely the accreditor will investigate violations of state higher education laws.¹⁵ There have been extremely few—if any—reported instances of an accreditor holding an institution accountable for a violation of state law. At the same time, state policymakers may see robust consumer laws applicable to institutions of higher education, without any sense that many institutions are simply exempt from those laws.

The Department made clear in 2010 that entities may not be exempt from state oversight if the entity was established without reference to its existence as an educational institution. According to the Department, if a business entity was “established by name as an educational institute through a charter, statute, constitutional provision or other action to operate educational programs,” the entity can be exempt from state oversight. For example, a non-profit cannot be exempt from state oversight based on its authorization or license for serving the “public interest or common good.” The “key issue,” according to the Department was “whether the legal authorization the institution receives . . . is for the purpose of offering postsecondary education in the state.”¹⁶

But the HEA clearly requires *something* from states. Yet once an institution passes this test—which, if state law allows, can be met simply by a description of the entity being formed for the purpose of offering postsecondary education—states are free under the Department’s regulations to delegate or eliminate additional oversight.

Presently, several states enable institutions to avoid certain state higher education Laws. In some cases, such as in Massachusetts and Minnesota, state laws are nuanced to ensure that the state retains some oversight authority.¹⁷ In other states, however, laws have been written to fundamentally eliminate any meaningful state role over the institutions.

In Texas, for example, private postsecondary institutions are regulated by one of two agencies: the Texas Higher Education Coordinating Board (which oversees public institutions, private, accredited non-profit institutions, and degree-granting¹⁸ career schools) and the Texas Workforce Commission (which supervises non-degree granting career schools). With respect to schools overseen by the Coordinating Board, Texas has a “policy and purpose” of “prevent[ing] deception of the public resulting from the conferring and use of fraudulent or substandard degrees,” and has emphasized the protection of “legitimate institutions and of those holding degrees from them.”¹⁹ Despite these lofty goals, Texas exempts many private institutions—including those “fully accredited” and “not operating under sanctions imposed by” a “recognized accrediting agency”—from the basic standards of the Education Code. *See* Tex. Educ. Code Ann. § 61.303(a).²⁰ Under the law, for example, accredited schools

are also relieved of the direct statutory tie between violations of the Education Code and the Texas Deceptive Trade Practices Act. *Id.* § 61.320 (rendering a violation of certain Texas education laws to constitute a violation of the Trade Practices Act and providing a “public or private right or remedy” to enforce the law).

Likewise in California—which is often viewed as a model for strong consumer laws—many institutions are almost entirely exempt from the California Private Postsecondary Education Act, including all institutions “established, operated, and governed” by a federal, state, or local entity,²¹ most law schools,²² and, most notably, any institution that is accredited by Western Association of Schools and Colleges (WASC).²³ Each exempt institution is completely relieved from a laundry list of practices prohibited by state law including: promising or overstating employment prospects; making inaccurate or misleading advertisements regarding job availability, degree of skill, or length of time required to learn a trade; advertising false accreditation status; providing incentive-based compensation for recruitment; paying students for recruitment; and countless other practices. *See generally* Cal. Educ. Code § 94897; *but see* § 94874 (exempting certain institutions from that chapter). And while California law ordinarily allows students indirectly to enforce these provisions through the unlawfulness prong of the Uniform Competition Law, *see* Cal. Bus. Code § 17200, because California has exempted certain schools from those prohibited practices, so too has California eliminated the private right of action to enforce those laws.²⁴

This means schools like the University of Southern California and the California Institute of Technology—both of which are WASC-accredited²⁵—are exempt from regulator enforcement of laws specifically designed to protect higher education students from deceptive advertising. And although Student Defense has brought litigation against these institutions stemming out of misleading advertising, the core idea of the triad is that *state regulators* should have the authority to police institutions operating within their states. But in those cases, the regulators’ hands are tied and state laws specifically designed to protect students are off-the-table.²⁶

What’s next?

Strong oversight matters. In March 2023, the Department announced its intention to conduct negotiated rulemaking on topics to include state authorization, but it is unclear whether or how soon the Department will be proceeding with that process. Not only must the Department move forward with its regulatory agenda on state authorization, but it must restore the base of the triad by eliminating a state’s ability to exempt institutions based solely on their accreditation or period of operation.

Without action, having lost a key leg, the three-legged accountability stool will topple.

Endnotes

- 1 See Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, 59 FR 22250-01 (April 29, 1994) ("Thus, the HEA provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the "gate" to Title IV, HEA programs is opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three "gatekeepers" sharing this responsibility have traditionally been referred to as 'the triad.'"); see also generally Clare McCann & Amy Laitinen, *The Bermuda Triad: Where Accountability Goes to Die*, New America, at 5–6 (Nov. 2019) available at: https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Bermuda_Triad_2019-11-20_022701.pdf (discussing the triad); *The Triad: Promoting a System of Shared Responsibility. Issues for Reauthorization of the Higher Education Act. Hearing Before the S. Comm. On Health, Education, Labor, and Pensions*, 113 Cong. 18–19 (2013) (Prepared statement of Terry W. Hartle, Ph.D) (same).
- 2 David Whitman, *The Profits of Failure*, at 163–64 (2021).
- 3 See also 75 Fed. Reg. 66832 (Oct. 29, 2010).
- 4 Strikingly, the Department has reiterated the importance of a *State* having final adjudicatory authority. See, e.g., DCL GEN-14-04 (Feb. 27, 2014); 81 Fed. Reg. 48598, 48602 (July 25, 2016) (reiterating DCL GEN-14-04).
- 5 HEA § 101(a)(2), 20 U.S.C. § 1001(a)(2).
- 6 HEA § 487(c)(6)(B)(iii), 20 U.S.C. § 1099c(c)(6)(B)(iii).
- 7 75 Fed. Reg. 34806, 34850 (Oct. 29, 2010).
- 8 75 Fed. Reg. 34806, 34813.
- 9 74 Fed. Reg. 46399, 46400 (Sept. 9, 2009) (announcing the formation of a negotiated rulemaking committee to consider, *inter alia*, "State authorization as a component of institutional eligibility"). See also Session 1, Issue Paper #5, Team I – Program Integrity Issues, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-session1-issues.pdf>
- 10 Session 1, Issue Paper #5, Team I – Program Integrity Issues, at 12, available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-session1-issues.pdf>.
- 11 Session 2, Issue Paper #5, Team I – Program Integrity Issues, at 3, available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-session2-issues.pdf>.
- 12 Session 3, Issue Paper #5, Team I – Program Integrity Issues, at 2, available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-session3-issues.pdf>
- 13 75 Fed. Reg. 66832, 66859.
- 14 Incredibly, despite writing a regulatory loophole, the Department also expressed concerns about the very practice it was endorsing. For example, in the preamble to the final rule, the Department noted its ongoing "concern[] that States have not consistently provided adequate oversight," and their anecdotal observation that "institutions are shopping for States with little or no oversight." 75 Fed. Reg. 66832, 66859.
- 15 Edward Conroy, "Higher Education Accreditors Don't Want to Hear Your Complaints," New America (Feb. 22, 2023), at <https://www.newamerica.org/education-policy/briefs/higher-education-accreditors-dont-want-to-hear-your-complaints/>.
- 16 75 Fed. Reg. 66832, 66861.
- 17 Massachusetts exempts institutions from submitting to site visits if the school is regionally accredited by the New England Assoc. of Schools and Colleges (presumably the accreditor conducts such visits). See 610 CMR 2.05(5) and 2.09. Minnesota exempts in-state institutions accredited by the Higher Learning Commission from processes related to creating new or modifying existing degrees and majors. Minn. Stat. § 136A.653.
- 18 This includes both degree-granting institutions and those "providing credits alleged to be applicable to a degree" Tex. Educ. Code Ann. § 61.302(2) (C).
- 19 *Id.* at § 61.301.
- 20 See also 19 Tex. Admin. Code § 7.3(20) (defining exemptions by regulation).
- 21 Cal. Educ. Code § 94874(c).
- 22 Cal. Educ. Code § 94874(g).
- 23 *d.* § 94874(i). The Western Association of Schools and Colleges, or WASC, is one of six regional accrediting agencies in the United States. WASC is broken into two commissions that accredit postsecondary institutions: Senior College and University Commission (WSCUC), and Accrediting Commission for Community and Junior Colleges (ACCJC).
- 24 As another example, Alabama exempts from oversight brick-and-mortar institutions which have been in continuous operation since at least July 1984, if they have held accreditation by a Department-recognized accreditor during that period. AL Code § 16-46-3(b)(5). This means, for example, these schools need not comply with Alabama's restrictions on institutions engaging in fraud, misrepresentations, or guaranteeing post-graduation employment. AL Code § 16-46-4.
- 25 See Caltech Accreditation, <https://accreditation.caltech.edu> (last visited 10/24/2023); USC Accreditation, <https://accreditation.usc.edu> (last visited 10/24/2023).
- 26 Moreover, in California, any institution that would otherwise be regulated by the Bureau of Private Postsecondary Education (BPPE) is automatically deemed approved to operate *solely* by virtue of being accredited by any federally recognized accrediting agency. Cal. Educ. Code § 94890(a)(1); *id.* § 94813 (defining "accredited"). By regulation, the BPPE provides a streamlined application process for accredited institutions seeking board approval. Compare Cal. Reg. Code § 71100 et seq. with Cal. Reg. Code. § 71390. This streamlined application absolves accredited institutions from providing regulators copies of advertising, detail about instructional programs offered, financial aid policies, financial statement, record retention policies, and a host of other materials designed to ensure the institution is serving students. See generally Cal. Reg. Code §§ 71100-71380.