

**STATEMENT OF TERRY W. HARTLE  
SENIOR VICE PRESIDENT  
AMERICAN COUNCIL ON EDUCATION**

**BEFORE THE  
HEALTH, EDUCATION, LABOR AND PENSIONS COMMITTEE  
OF THE U.S. SENATE  
ON**

**THE TRIAD: PROMOTING A SYSTEM OF SHARED RESPONSIBILITY**

*Thursday, Sept. 19, 2013*

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Chairman Harkin, Senator Alexander and members of the committee, thank you for inviting me to testify today at this hearing examining the triad. During the early history of the Higher Education Act (HEA), the triad was largely a paper requirement. But that all changed with the 1992 reauthorization. As defaults skyrocketed, Congress turned greater attention to the triad and decided to strengthen its components dramatically. The history of the last 20 years has been one of continual tweaking of the triad largely in the direction of placing more and more responsibility on accreditors. This has happened because accreditation is the strongest and most viable arm of the triad.

**Department of Education and the Triad**

Today, I've been asked to speak specifically about the Department of Education's role in the triad. The department is charged with overseeing certification and eligibility for Title IV participating institutions. This part of the triad, contained in subpart 3 of Title IV, is fairly complex and has only gotten more so in recent years.

Under section 498 of the Higher Education Act, the Department of Education is required to ensure "the administrative capability and financial responsibility of an institution of higher education" in order to participate in federal student aid programs. In the simplest terms, the department must be satisfied that institutions have the administrative and financial systems to guarantee they will be good stewards of taxpayer dollars.

Through program reviews, institutions must provide sufficient information and documentation to satisfy the requirements of eligibility and administrative capabilities. Institutions are subject to a variety of sanctions if they fall out of compliance. The department has the authority to fine institutions, suspend the availability of Title IV aid and even terminate an institution's eligibility overnight if it determines students or taxpayers are at risk.

Despite this incredible range of powers, most are rarely used or are applied unevenly. The most common sanction used by the department is a fine and these are levied most frequently for non-compliance with reporting requirements, including campus crime (Clery Act) and statistical reporting under the Integrated Postsecondary Education Data System. The department's authority under Section 498A to take action against a college or university resulting in the immediate loss of institutional eligibility is used very rarely.

Institutions must comply with a raft of regulatory requirements under Subpart 3 and its related requirements. Many are exceptionally complex and the time and effort burden associated with them can be quite heavy. In addition, the department often enforces regulations years after the violations allegedly occur. To cite one example: As a result of a 1994 investigation, two major universities were accused of violating regulations surrounding "professional judgment." The universities appealed that ruling in 1995. They did not hear a word from the department until earlier this year when the appeals were denied and fines imposed. Seventeen years. Not surprisingly, these are now known within the higher education community as the "cicada fines."

Institutional compliance with these regulations is generally assessed by program reviews that are largely conducted by regional Department of Education staff. These officials do not always have the experience, tools or skills to handle the huge array of responsibilities they have. One specific concern is the ability of regional staff, trained to review student financial aid, to conduct the complex financial analysis necessary to assess the accounting practices and policies of large,

publicly traded institutions.

In addition, since oversight responsibility is divided across the department's regional offices, we find institutions subject to different interpretations and liabilities as regional staff try to untangle various regulations and subregulatory guidance.

Obviously, the department's review actions often identify issues that must be addressed by the institutions. In many cases, this information would be of great interest to accreditation agencies. But while accreditors are required by law to share information about institutional reviews with the department, information sharing from the department to the accreditors is very uneven.

At present, the most controversial aspect of the department's eligibility and certification activities concerns the financial responsibility provisions in Section 498(c). That provision was greatly strengthened after the unannounced closures of several for-profit institutions in the late 1980s left students in the lurch. The current regulations were written in collaboration with the higher education community nearly 20 years ago to guard against precipitous closures of postsecondary institutions. However, the application of the regulations have not kept up with changes in accounting practices and, in some cases, have had unanticipated and undesirable consequences.

The recent economic downturn, for example, has exposed significant shortcomings in administration of the ratios test. In 2010 alone, more than 100 nonprofit colleges unexpectedly failed the test, leaving them subject to department oversight and forcing them to obtain costly letters of credit. For some institutions, this change also triggered additional oversight and demands for letters of credit by state regulators. Institutions that were not at risk of precipitous closure were drained of resources which could have been better spent on student financial aid and other institutional priorities.

As an example, when the market fell in 2008, the endowments of most colleges lost value. However, the methodology used by the department was inconsistent with generally accepted accounting practices, causing the department to view the decreases in endowment portfolio value as a current operating loss. A number of schools requested a correction, but the department refused to reconsider.

It is to be expected that the regulations to implement the Subpart 3 requirements are complex and messy—nine pages of statutory language are unlikely to result in clear or simple regulations. The complexity of the regulations is exacerbated by the tendency of the department to consistently impose the maximum burden on institutions. As the U.S. Government Accountability Office noted in a recent report, the Department of Education rarely discusses these burdens with institutions before they take effect and therefore the department seriously underestimates the institutional burden. The department ought to be encouraged to make more of a good faith effort to assess the burdens they are imposing.

Unfortunately, the department does not seem interested in doing so. In the 2008 reauthorization, Congress, at the suggestion of Senator Alexander, included a provision requiring the Department of Education to compile and publish a “compliance calendar” so institutions would have a single source of information on what regulatory materials are due and by what date. Sadly, the Department of Education has not complied with this requirement.

As I have noted, the requirements of Subpart 3 are critically important. But they have become exceptionally complex and impose a significant compliance challenge for institutions. The bottom line is that the Department of Education has extraordinary latitude and a wide variety of tools to protect students and taxpayers. However, the department employs these tools in an inaccurate and uneven manner without opportunity for discussion. In addition, there are areas of significant deficiency which could be addressed by real-time access to data and increased staff training.

But before adding more responsibilities, I think the committee should request an external, top-to-bottom review of the institutional eligibility process to better understand:

- Uniformity of practice in institutional eligibility reviews, administrative capabilities and resulting findings across the Department's regions;
- Availability of the tools necessary to do centralized risk-based modeling;
- Adequacy of staff training with particular attention to the complexities of financial auditing;
- Timeliness in the department's resolution of outstanding issues resulting from program and other compliance reviews;
- Rigor of new school eligibility practices before approval;
- Administrative and regulatory burden imposed on campuses; and
- Financial responsibility standards to ensure consistency with generally accepted accounting practices.

### **Department of Education's Relationship to Other Parts of the Triad**

The department's central role in the triad is to ensure institutional eligibility and certification, and I have suggested some ways that the department could be refocused to more effectively meet its responsibilities in this area. However, we must remember that each part of the triad is inescapably linked to the other parts. Therefore, I would like to take a moment to discuss the current state of the department's relationship to the other two parts of the triad: the states and the accreditors.

## **ED'S ROLE IN RELATION TO THE STATES**

With regard to its role with the states, the department has tried mightily to get them to take a larger role with respect to approving institutions operating within their borders. But states vary greatly in their willingness to perform such a function—some have complicated, multifaceted provisions and others do little more than require institutions to have a business license to be “approved” for purposes of federal student aid. Ultimately, efforts by the department in this area have failed, largely because it has very little authority to impose licensure requirements on states or to force them to do more than each state wants to do.

The department's efforts have also resulted in considerable confusion for institutions in concerning how to ensure their compliance with shifting mandates and unclear guidance. In 2011, the department significantly expanded its state authorization regulation and tried to put some teeth into state requirements. The new regulation, and the inevitable subregulatory guidance, imposed a complex set of requirements state licensure systems must meet in order to pass federal muster (e.g., requirements about the type of complaint system, the extent to which accreditation can substitute for licensure process, whether the school is licensed as a charitable entity and so on). Unfortunately, some states simply ignored the new requirements and major confusion, especially for private colleges and universities, has resulted. It is now clear that state laws and administrative practice are highly complex. As questions arose, the department and regional offices offered an array of different interpretations. In the end, the department was unable to say which states met the regulatory requirements and has postponed the implementation of the regulations for another year.

Another example of the confusion stemming from this well-intentioned effort is the department's demand that an institution be authorized in any state where a student is located. In an era of distance education, many institutions have a few students in many, if not all, states. But

many states have seized this opportunity as a revenue generator and the cost to institutions to obtain and maintain certification is very high. For example, a state regulator tried to force Coursera to become authorized in Minnesota in order to offer free online courses in the state.

## **ED's ROLE IN RELATION TO ACCREDITORS**

In the department's relationship to accreditors, we see an alarming trend of more and more responsibilities being placed on the shoulders of accreditors.

Under the HEA, the department, working through the National Advisory Committee on Institutional Quality and Integrity (NACIQI), must "recognize" accrediting agencies as "reliable authorities" on institutional quality. Over time, we have seen the department use NACIQI as a lever to try to gain greater control over academic quality issues. Currently, accreditors are required to complete an 88-page, highly detailed document before they can be considered for recognition. And even trusted accreditors must demonstrate compliance with that document each time they appear for renewal of recognition.

Accrediting agencies have been regularly given new responsibilities because the Department of Education would like them to perform additional functions. For example, accreditors are now expected to use a federal definition of credit hour and assess institutional credit hour determinations. Unfortunately, the department's definition is not a good one. It is overly focused on the amount of time a student spends in class. In an era when online learning and competency-based education are growing rapidly, a single federal definition based largely on "seat time" is fatally flawed. Even the department will now privately admit the definition does not work, yet the regulation remains in place and accreditors are carefully assessing institutional credit hour decisions. This definition has created challenges for many excellent and academically serious institutions that have, over decades, found slightly non-traditional ways to record credits on their transcripts.



Accreditors believe the recognition process has turned into a game of gotcha where interpretations are unpredictable and change frequently. One accreditor was recently told it could not count department chairs as faculty members on their review teams. This is a curious decision—even the department’s IPEDS definition of faculty makes clear that department chairs are faculty members. What is worrisome is the willingness of the department to make such a specific decision. The department is charged with “recognizing” accreditation agencies—it does not have the authority to treat these agencies as regulatory extensions of the department.

The imposition of more and more highly detailed requirements on accreditors is dangerous because it distracts them from their central mission. Fundamentally, we want accreditors to ensure that each accredited institution offers a high-quality academic program and find evidence students are learning and receiving degrees of value. I hope reauthorization will provide an opportunity to refocus and rebalance the role of accreditors so that they focus on student learning and educational quality.

## **Conclusion**

Because the department is limited in its ability to require states to take an expanded role, it has increasingly turned to accreditors to fill this vacuum. Unfortunately, left unchecked, this trend threatens to make accreditors a regulatory enforcement arm of the department.

Sorting out these relationships between the members of the triad is the key to ensuring its effectiveness in the future, and in summary, my recommendations would be as follows:

First, the eligibility and certification function of the department has grown dramatically and resembles a garden where some extensive pruning is necessary. It is important to make certain the department has the staff it needs to accomplish its responsibilities and the expectations for institutions are clear, sensible and reasonable.

Second, the state role in the triad, although important, is uneven. It may be impossible to define responsibilities that all states will agree to follow so those responsibilities may have to be addressed by other actors.

Third, accreditors have been forced to take on an oversized role with respect to the triad and the Department of Education has significantly increased its control over them. Both are developments that merit careful review in the coming reauthorization.

The members of this committee all know we are witnessing dramatic changes in almost every aspect of postsecondary education. Some of these changes will not last while others may be transformational. The years ahead will bring even more changes we can't begin to imagine. This means that, like colleges and universities, the triad will continue to evolve over the rest of this decade and beyond. We must ensure it has the capacity to adapt to these new and unpredictable developments as they occur.