



MEMORANDUM

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To American Council on Education
Association of American Universities
Association of Public and Land-grant Universities

FROM Stephanie J. Gold
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SUBJECT Authority of U.S. Department of Education to recognize accreditors that apply different approaches to accreditation review based on characteristics of the institution under review

The National Advisory Committee on Institutional Quality and Integrity 2012 Report to the U.S. Secretary of Higher Education identified as a potential problem that accreditors apply the “same level of scrutiny and intensity of review” to institutions with “longstanding competent performance on quality indicators” as to fragile, unstable, and low-performing institutions. ^{1/} The Report called for “greater opportunity . . . to distinguish among applicants with more varied levels and durations of review” and to “[a]fford accreditors greater opportunity and encourage them to design systems for expedited review.” ^{2/} You asked whether under the current Higher Education Act (“HEA”) the U.S. Department of Education (“ED”) may recognize an accreditor that applies different approaches to accreditation review depending on characteristics of the institution under review. As explained below, the HEA would allow ED to recognize such an accreditor. The HEA does require an accreditor to include an on-site visit in its review procedures, but states no limitations on an accreditor’s ability to vary the nature of that on-site review depending on characteristics of the institution under review. ED regulations are more detailed than the HEA with respect to accreditation procedures, but nevertheless they do not state a prohibition on flexible application of specified procedural steps.

^{1/} The National Advisory Committee on Institutional Quality and Integrity, Report to the U.S. Secretary of Education: Higher Education Act Reauthorization Accreditation Policy Recommendations 5 (April 2012), available at <https://www2.ed.gov/about/bdscomm/list/naciqi-dir/2012-spring/teleconference-2012/naciqi-final-report.pdf>.

^{2/} Id. at 5–6.

ANALYSIS

I. Higher Education Act

HEA Section 496 forbids ED to recognize an accreditor unless the accreditor “meets criteria established by the Secretary [of Education] pursuant to this section.” ^{3/} Section 496 also provides that “[n]othing in this chapter shall be construed to permit the Secretary to establish criteria for accrediting agencies or associations that are not required by this section.” ^{4/} Therefore, the HEA authorizes ED to set criteria that an accreditor must satisfy to achieve ED recognition, but ED may not require accreditors to satisfy criteria that Section 496 does not mandate.

Section 496 describes two types of criteria that accreditors must satisfy to achieve ED recognition: (1) criteria that relate to substantive accreditation standards and (2) criteria that relate to accreditation review procedures. Relevant here are criteria that relate to accreditation review procedures. Section 496’s provisions regarding required procedures are limited. As to general accreditation review procedures, Section 496 has two primary requirements. First, an accreditor “shall establish and apply review procedures throughout the accrediting process, including evaluation and withdrawal proceedings, which comply with due process procedures.” ^{5/} Second, an accreditor must “perform[], at regularly established intervals, on-site inspections and reviews of institutions of higher education (which may include unannounced site visits) with particular focus on educational quality and program effectiveness, and [must] ensure[] that accreditation team members are well-trained and knowledgeable with respect to their responsibilities, including those regarding distance education.” ^{6/}

None of the statutory criteria for recognition state that an accreditor must utilize only one procedure or approach to review institutions, nor do any statutory criteria forbid an accreditor to apply different effective approaches with respect to its review procedures based on factors related to the institution under review. Section 496 does require an accreditor to perform periodic on-site inspections and reviews of higher education institutions, but it is not prescriptive about how those on-site inspections and reviews are conducted. Accordingly, absent restrictions on what is acceptable in terms of an approach to accreditation review, the HEA allows ED to recognize an accreditor that utilizes more than one procedure or approach, provided the procedure or approach includes periodic on-site inspections and reviews. The HEA also allows ED-recognized accreditors to take flexible approaches to implementation of on-site inspection and review procedures.

II. U.S. Department of Education Regulations

34 C.F.R. § 602.17 provides in pertinent part:

The [accreditor] must have effective mechanisms for evaluating an institution’s or program’s compliance with the [accreditor’s] standards before reaching a decision to accredit or preaccredit the institution or program. The [accreditor] meets this requirement if the [accreditor] demonstrates that it—

(a) Evaluates whether an institution or program—

^{3/} 20 U.S.C. § 1099b(a).

^{4/} *Id.* § 1099b(g).

^{5/} *Id.* § 1099b(a)(6).

^{6/} *Id.* § 1099b(c).

- (1) Maintains clearly specified educational objectives that are consistent with its mission and appropriate in light of the degrees or certificates awarded;
 - (2) Is successful in achieving its stated objectives; and
 - (3) Maintains degree and certificate requirements that at least conform to commonly accepted standards;
- (b) Requires the institution or program to prepare, following guidance provided by the [accreditor], an in-depth self-study that includes the assessment of educational quality and the institution's or program's continuing efforts to improve educational quality;
- (c) Conducts at least one on-site review of the institution or program during which it obtains sufficient information to determine if the institution or program complies with the [accreditor's] standards;
- (d) Allows the institution or program the opportunity to respond in writing to the report of the on-site review;
- (e) Conducts its own analysis of the self-study and supporting documentation furnished by the institution or program, the report of the on-site review, the institution's or program's response to the report, and any other appropriate information from other sources to determine whether the institution or program complies with the [accreditor's] standards;
- (f) Provides the institution or program with a detailed written report that assesses—
- (1) The institution's or program's compliance with the [accreditor's]'s standards, including areas needing improvement; and
 - (2) The institution's or program's performance with respect to student achievement[.] 7/

Section 602.17 therefore specifies procedural steps that are not identified in the HEA, such as a self-study. Accordingly, Section 602.17 reflects steps that the HEA does not expressly authorize ED to require. Even assuming all procedures enumerated in Section 602.17 are required, ED regulations do not state that accreditors must apply those procedures in the same way for all institutions. With respect to self-studies, for example, the regulations would not specifically bar an accreditor from adopting different self-study requirements for different types of institutions; ED regulations in fact defer to the accreditor to detail through guidance how the self-study must be completed. 8/

7/ 34 C.F.R. § 602.17.

8/ See id. § 602.17(b). Whatever the procedure, an accreditor must have “effective controls against the inconsistent application of [its] standards” and must have a “reasonable basis for determining that the information the [accreditor] relies on for making accrediting decisions is accurate.” Id. § 602.18(b), (d); see also 20 U.S.C. § 1099c(a)(4)(A) (providing that ED’s recognition criteria must require an accreditor consistently to apply and enforce its standards).

CONCLUSION

The HEA does not forbid ED to recognize an accreditor that applies different procedures, or different approaches to its procedures, in an accreditation review of an institution. In other words, nothing in the HEA states a restriction on ED's ability to recognize an accreditor that uses different levels of scrutiny or intensity of review based on characteristics of the institution under review. The HEA requires an on-site visit, but it does not dictate the nature of that visit. ED regulations on accreditation procedures mention a self-study as well as an on-site visit, but a self-study is not statutorily mandated and in any event ED regulations do not require accreditors to take a rigid and uniform approach to self-studies and on-site visits. The HEA does not expressly authorize recognition of an accreditor that applies varying procedures based on characteristics of the institution under review, and our analysis largely depends on the absence of contrary statutory provisions and guidance.