Centennial Institute

POLICY BRIEF

No Political Oversight of Private Colleges

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By Krista Kafer

Should private colleges and universities be subjected to adversarial oversight by politicians in 50 state capitals? The Education Department is set to mandate more government control over a private-sector accreditation process that has served higher education well. To what purpose?

The new regulations offer little benefit to these institutions, their students, or the taxpayers. Abuses by a few unethical, for-profit colleges do not justify a power grab against 6,000 nonprofit schools.

If states politicize their authorization process, colleges may face the choice of compromising their mission or closing their doors. In a nation founded on the free exchange of ideas, that's wrong. Policymakers should withdraw the proposed regulations.

Intrusive Proposal Threatens Academic Freedom

Should private colleges and universities be subjected to adversarial oversight by politicians in fifty state capitals? As an institution, private colleges and universities predate the nation's founding. Their existence, independent of government control, has played a fundamental role in the exchange of ideas in our nation for nearly four centuries.

They create a space for learning, exploration, and debate that reaches far beyond students and the campus itself. These independent institutions, along with think tanks and other research organizations, communities of faith, civic associations, and the free press, form the foundation upon which rests the nation's marketplace of ideas.

Not everyone, however, appreciates an open exchange of information. Certain politicians and interest groups make it their mission to squelch debate and suppress ideas with which they disagree. Armed with legislative or regulatory authority, these individuals would like nothing

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more than to tell private college and universities what they can teach and whom they can hire. Politically motivated government intrusion would undermine the independence of these institutions and with it the open marketplace of ideas.

Nor is the question of whether private colleges should be subjected to oversight by politicians merely hypothetical. It has now been posed to Americans by an overreaching federal agency on a six-week timeline.

The US Department of Education has proposed regulations that would mandate greater government control over private colleges and universities and the private-sector accreditation process that has served higher education for more than a century. The Department is using its regulatory authority under the Higher Education Act, the law that governs federal student loan and grant programs, to force this change.

Currently, colleges and universities may accept federal student aid if they have legal status within their home state and are accredited by an agency approved by the Department. Since the federal government has not, until recently, attempted to direct how states authorize private colleges and universities, state policies vary considerably.

Many states, including Colorado, rely on recognized national or regional accreditation, a process which is rigorous and nonpolitical, to provide in depth quality evaluation and monitoring.

Mandating 'Adverse Action:' But Why?

The proposed regulations, if made final on the first of November this year, will mandate a one-size-fits-all federal definition of state authorization. Each state will have to redesign its authorization process to include "adverse action." This presumably means individual states will have to establish guidelines, standards, and requirements against which institutions will be judged and approved or denied.

A state legislature or executive agency would then determine whether private colleges and universities will be able to enroll students with federal loans or grants. Such changes would be at best duplicative of the accreditation process – and at worst a pretext for government interference into the curriculum, research, and culture of private academic institutions.

Moreover, these regulations imply that each institution of higher education will have to receive authorization from every state in which it has a presence as opposed to just its home state. Because states will likely interpret the regulatory language differently, institutions that operate in more than one state may be subjected to multiple, potentially conflicting requirements. While large institutions may be able to bear the cost of compliance, smaller institutions may find it too burdensome to serve students in more than one state.

The cost of accreditation is already significant. An accredited school must periodically undergo the self-study, peer review, site visit and judgment process that can take two years of time and considerable energy on the part of faculty, administrators and staff. It is unreasonable to add additional compliance costs to these institutions which are already in good standing with their accreditation bodies.

Finally, while the costs of increased government oversight of institutions of higher education are high, there will be little benefit to these institutions, their students, or the taxpayers should the regulations become final. The Department's published justification asserts that a more "active" state government role is necessary because of unspecified "weaknesses" in the current system; yet bureaucrats could cite but one example—a temporary gap in state oversight over proprietary schools in California—to back up this claim. The description did not indicate if the interruption in service had any impact whatsoever.

Even if one takes into account the recently publicized examples of 15 for-profit schools with unethical marketing practices, one cannot justify increased government control of more than 6,000 private schools to further police a small minority of bad actors.[1]

These so-called diploma mills are paying the price of their bad behavior.[2] Public scrutiny, declines in stock share value, state regulatory actions, lawsuits and pressure from accrediting bodies are prompting these organizations to change their practices.[3] There is no need for additional state authority.

Alas, the lack of need for more government regulation of private institutions rarely gives an energetic bureaucracy pause. While there is no justification for increased state oversight of private college and universities, the potential for harm is too great to ignore. Nearly all colleges and universities enroll students with federal grants and loans and would find it difficult if not impossible to operate if they had to turn such students away.

Should a state adopt an intrusive and politicized authorization and monitoring process under the auspices of these new federal regulations, it would then have the power to deny colleges and universities authorization to participate in Higher Education Act programs.

Some institutions could be forced to choose between compromising their mission and character, or closing their doors – a choice no institution of higher education should face in a nation founded on the free exchange of ideas.

'Chaotic' Impact Foreseen by Educators

The Department of Education began moving for greater government oversight of private institutions on September 9, 2009, when it published a notice in the Federal Register (74 FR 46399) announcing its intent to propose new regulations. The Department formed committees with representation from the higher education committee and held three public hearings.

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[1] Figure cited in the regulation in Notice of Proposed Rulemaking (NPRM), *Federal Register,* June 18, Docket ID-2010-OPE-0004.

[2] Gregory D. Kutz, "For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices," United States Government Accountability Office, GAO-10-948T, August 4, 2010 at www.gao.gov/new.items/d10948t.pdf

[3] "Westwood adopts reforms," *The Denver Post*, August 14, 2010, page 7A; Allison Sherry, "Lawsuit hits for-profit Westwood College, *The Denver Post*, August 18, 2010, page 1A.; Daniel de Vise, "For-profit colleges failing scrutiny," *The Washington Post*, August 19, 2010, (online); and Randall Forsyth, "For-Profit Stocks Marked Down on Leaked GAO Report,"*Barons*, August 3, 2010 (online).

On June 18, 2010, the Department published new regulations and provided an opportunity to the public to comment on the regulations. The comment period closed on August 2, 2010. Final regulations will be published November 1, 2010 – unless officials slow the process or stop it, which they have the authority to do.

The intended regulatory overreach was initially even worse than what is now proposed. The September 2009 draft called for states to monitor each institution's academic quality, financial viability, and compliance with state consumer protection laws. The June 2010 version does not address state monitoring of academic quality or fiscal viability but what remains is bad enough. The relevant section now reads as follows:

> b) The Secretary considers an institution to be legally authorized by a State under paragraph (a)(1) of this section if—
>
> (1) The authorization is given to the institution specifically to offer programs beyond secondary education but not if the authorization is merely of the type required to do business in the State or to operate as an eleemosynary organization;
>
> (2) The authorization provided to the institution is subject to adverse action by the State; and
>
> (3) The State has a process to review and appropriately act on complaints concerning an institution and enforces applicable State laws.[4]

The Department justified these changes by suggesting that weak state oversight results in the movement of diploma mills from one state to another. The Department, however, provided no actual examples. Instead, the document referenced a gap in oversight that occurred in one state on one occasion, while the legislature was making changes to the state agency in charge of overseeing proprietary schools. Nor did the document describe any adverse consequences that occurred as a result of the temporary gap in service.

Given the paucity of evidence of an actual problem, these new regulations appear to be regulation for regulation's sake.

During the comment period, major accrediting bodies such as the American Council on Education (ACE) and the Higher Learning Commission; associations such as the National Association of Independent Colleges and Universities and the Association of Jesuit Colleges and Universities; and independent universities such as Colorado Christian University, all voiced their concern about the new requirements for state authorization.

A letter by the National Association of Independent Colleges and Universities points out that the Department failed to make the case that the regulation was needed. Such changes, warned NAICU president David Warren,

> would open the floodgates to a chaotic array of interpretations with respect to how well-established state arrangements should be altered… It is inappropriate and unnecessary for the

[4] Notice of Proposed Rulemaking (NPRM), *Federal Register,* June 18, Docket ID-2010-OPE-0004 Sec. 600.9.

> federal government to require states to second guess the explicit decisions they have already made about meeting their authorization responsibilities.[5]

On behalf of over 70 higher education associations and accrediting agencies, ACE submitted a lengthy letter criticizing many aspects of the new regulations. On the issue of state oversight, ACE identified multiple flaws in the proposed regulations including their ambiguity and disregard for compliance costs. The regulations could create a confusing array of state requirements with a particularly adverse impact on schools with a presence, including an on-line presence, in multiple states.

Moreover, ACE and its cosigners object that the proposal "represents an inappropriate intrusion by the federal government into state responsibilities and prerogatives."[6] They conclude:

> Finally, the Department admits it has no mechanism in place or plan to enforce these new requirements, and moreover, enforcement of the regulation would conflict with principles of sovereign immunity. There would be no way for the Department to force a state into compliance with these requirements, leaving students' ability to qualify for federal financial aid subject to the whims of state legislative action.

While the regulations' ambiguity, potential for high compliance costs, and intrusion into state prerogatives are significant flaws with the potential to do harm to independent institutions of higher education, this final point made by ACE is the most significant.

Students' ability to qualify for federal financial aid, enroll in a university of choice, and receive an education free of political interference should *not* be left to the whims of a state legislature.

Voluntary Accreditation or Mandated Authorization?

Historically, federal and state governments have respected the autonomy of independent institutions of higher education and have not attempted to regulate them. For more than 100 years, college and universities have looked to independent accrediting bodies to provide professional peer review and evaluation for their self-improvement.

According to the Accrediting Council for Independent Colleges and Schools (ACICS), regional accrediting agencies were first established in the 1880s.[7] Initially they developed national standards on credit policies and equivalency of degrees to provide a standard comparison for universities in the United States and those abroad. The organizations later established quality standards for higher education institutions.

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[5] David L. Warren, President of the National Association of Independent Colleges and Universities," to Jessica Finkel of the US Department of Education, August 2, 2010, available online at www.naicu.edu/docLib/20100802_NAICUCommentLtr8-2-10.pdf

[6] Letter from Molly Corbett Broad, President of the American Council on Education, to Jessica Finkel of the US Department of Education, August 2, 2010, available online at www.acenet.edu/AM/Template.cfm?Section=LettersGovt&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=37640

[7] See "History of Accreditation," Accrediting Council of Independent Colleges and Schools, at www.acics.org/accreditation/content.aspx?id=2258

National accrediting organizations such as ACICS and ACE were created in 1912 and 1918 respectively. By the 1930s, accreditation had become a well established, independent mechanism for evaluating the quality of higher education institutions.

Federal regulation of institutions of higher education started in the 1950s. In the Veteran's Readjustment Assistance Act of 1952, Congress mandated that the Commissioner of Education (now called the Secretary of Education) publish a list of recognized accreditation associations. In 1965, with the passage of the Higher Education Act (HEA), the federal government began to regulate higher education and accreditation.

Under the Higher Education Act, most recently reauthorized in 2008, institutions of higher education must be accredited by a regional or national organization approved by the US Department of Education in order to participate in federal grant and loan programs. The HEA also mandates that participating institutions of higher education have state authorization but the law leaves the components of the authorization process to the states.

Colorado as a Case Study

State authorization varies considerably. Many states use accreditation by recognized accrediting associations as the foundation for approval or for monitoring purposes. In the state of Colorado, for example, the Colorado Commission on Higher Education (CCHE) provides authorization for private colleges, universities, seminaries, and proprietary schools to operate within the state using a process that is transparent and nonpolitical.

The state does *not* interfere politically with the curriculum, philosophy, or character of its private universities and colleges. Rather relies upon the accreditation process for a determination of quality.

As of 2008, in order to receive authorization in Colorado, a newly-established private institution of higher education must provide to CCHE a mission statement, a brief description of educational programs to be offered, information about the governing board, faculty and target student body, the list of degrees offered and their duration, the types of student support services including library resources, the school's admissions policies, and information about the school's financial resources.[8]

An evaluation team composed of independent peer experts then recommends full authorization or probationary authorization – or may choose not to recommend the school. The school must then obtain accreditation from one of the six nationally recognized regional accrediting associations or a national accrediting agency recognized by the US Department of Education.

For example: Colorado Christian University, which hosts the Centennial Institute, is accredited by the Higher Learning Commission. HLC's official visit to conclude our decennial renewal process happens to be scheduled for next month.

[8] See Colorado Commission on Higher Education policy regarding Title 23, Article 2 of the Colorado Revised Statutes, Section I, Part J at http://highered.colorado.gov/Publications/Policies/Current/i-partj.pdf

The Colorado Commission on Higher Education only terminates authorization in the event that the institution of higher education fails to gain accreditation or loses accreditation. In other words, the state uses accreditation as the basis for ongoing monitoring and trusts that institutions in good standing with their accreditation bodies need no further oversight or intrusion.

Under this system, the state of Colorado has fostered the growth of a robust and generally well-behaved marketplace of institutions of higher education including 28 public institutions of higher education, 105 private and faith-based degree-granting colleges and universities (including CCU), and 340 private occupational schools.[9]

While licensure programs, in education and nursing for example, receive additional oversight, Colorado's private institutions of higher education remain largely independent of government control. The requirement that these institutions earn and maintain accreditation provides taxpayers assurance that they meet recognized industry standards.

Consequences of Politicizing Oversight for Higher Education

This whole picture could change in Colorado and across the country, and not for the better, under the federal regulations set to take effect six weeks from now. In some states, legislatures or "authorizing" agencies may continue to show restraint in respecting the overall independence of higher education.

In other states, however, politicians will be tempted to become deeply involved in setting course requirements, quality measures, faculty qualifications and various mandates about how and what to teach.

Regulation of *private* colleges and universities by state government is particularly worrisome. It raises grave questions of academic freedom, due process and First Amendment rights.

The result could be an ever-greater politicization of higher education (beyond its already vexed condition on most public and many non-public campuses) as ideological advocates and victim groups will converge to pressure state "authorizers" to require that institutions adopt or repudiate certain curricula, teaching methods, and policies**.**

The June 18 proposal almost guarantees that states will have to cope with highly charged arguments over teaching methods, degree requirements and culture wars over textbooks, evolution versus Intelligent Design, phonics versus whole language, campus ROTC, climate change, family policy, abortion, race**,** gender, sexual orientation, and so forth.

Institutions already face such controversies, of course. But the proposed rules would weaken the crucial existing presumption in favor of each institution's academic freedom, a right defended by regional accrediting agencies.

[9] Colorado Department of Education, "Colorado Higher Education at a Glance," at http://highered.colorado.gov/Data/AtAGlance.html

By adding an explicitly political step to the accrediting process, the proposed rule puts institutional autonomy at risk. And this autonomy, we should remember is not primarily for the benefit of the colleges themselves. It is for the benefit of all their students, and for the larger community which the nation's colleges and universities serve.

Finally, the requirement that states enforce state law is patronizing and unnecessary. Colorado state and local government agencies conduct their obligations with regard to licensure programs, health and safety codes, taxation, and laws governing business and marketing practices.

At present, for instance, the Colorado Attorney General's office is investigating complaints lodged against the Denver-based Westwood College.[10] States do not need the federal government to tell them to enforce their own laws.

Recommendation: Withdraw the Proposed Section 600.9

In response to the valid and decisive objections raised by higher education accreditation bodies, higher education associations, universities and colleges, and think tanks, the US Department of Education should eliminate new regulations related to state authorization in Section 600.9 in the final version.

Existing state and federal regulatory authority over private institutions of higher education – in addition to private legal recourse, actions by accrediting organizations, and the market mechanisms open to consumers and investors – is sufficient to penalize those organizations that act outside of the law.

The regulations contemplated in Section 600.9 will unjustly and unnecessarily burden America's law-abiding institutions of higher education, jeopardizing their unique contribution to the lives of students and to the infrastructure of liberty.

The proposed rule cannot be made less burdensome or dangerous through redrafting. It should be stricken in its entirety.

Conclusion: America Doesn't Need Political Oversight of Private Colleges

One of the pillars of our open society is the free exchange of ideas without oversight by the government. Colleges and universities, which predate the nation's founding, provide an open space for such a free exchange.

Up to now, the federal government has recognized the importance of independent private colleges and universities and has struck a proper balance that preserves institutional independence while providing a mechanism for assuring accountability for student aid funding.

The requirement that colleges and universities participating in student aid programs under the Higher Education Act maintain accreditation by a recognized association achieves that balance.

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[10] Daniel de Vise, "For-profit colleges failing scrutiny," *The Washington Post*, August 19, 2010, (online).

While federal law currently requires that participating colleges and universities receive state authorization, regulators have appropriately allowed states to determine the process.

States typically rely on the time-tested quality evaluation and monitoring provided by accrediting associations for some or most of the authorization process.

This avoids duplication, additional compliance costs, and the minefield of political oversight for private higher education institutions.

Unfortunately, the US Department of Education is now poised to abandon this well-proven model.

If proposed regulations become final, the agency will force states to adopt a potentially intrusive role in private higher education.

Such an overreach is both unnecessary and unacceptable. Federal officials should not proceed with it.

The continued independence of colleges and universities is too important to the freedom of inquiry and the unfettered transmission of ideas, to be placed at risk in this heavy-handed manner. ■

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