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## Reexamining the Examiners: The Need for Increased Government Regulation of Accreditation in Higher Education

Sarah Molinero

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# Reexamining the Examiners: The Need for Increased Government Regulation of Accreditation in Higher Education

Sarah Molinero\*

## ABSTRACT

*Higher education institutions in the United States must be accredited by an agency recognized by the Department of Education to be eligible to receive federal funding, making accreditation critical to an institution's survival. But while the federal government relies on accreditation as a benchmark for dispersing billions of taxpayer dollars each year, it specifically disclaims accountability for the quality of education that students actually receive at accredited institutions.*

*With the increase in for-profit education, mounting student loan debt, and a growing trend in competition for international student recruitment, the accreditation system utilized in the United States for over 100 years no longer keeps pace with these developments. This article explains how the federal government is uniquely situated to ensure the quality of higher education because of its use of accreditation as a prerequisite for federal funding. Mandating standards that accrediting agencies must follow to measure the quality of the institutions they accredit and fostering competition among the accrediting agencies themselves will preserve and improve the quality of higher education in the United States.*

I.	INTRODUCTION.....	834
II.	ACCREDITATION IN THE UNITED STATES .....	835
	A. <i>Private Recognition of Accrediting Agencies.....</i>	836
	B. <i>Government Recognition of Accrediting Agencies.....</i>	840
	C. <i>Government Denial of Accountability.....</i>	843
	D. <i>Benefits of Accreditation .....</i>	846

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III.	NEW HIGHER EDUCATION, OLD	
	ACCREDITATION STANDARDS .....	847
A.	<i>Dickinson State University</i> .....	849
B.	<i>A Call for Change</i> .....	853
	1. <i>Specific Standards for Measuring the</i>	
	<i>Quality of Institutions</i> .....	854
	2. <i>Incentives for Accrediting</i>	
	<i>Agencies</i> .....	857
IV.	CONCLUSION .....	859

### I. INTRODUCTION

The higher education system in the United States is viewed as one of the most successful in the world.<sup>1</sup> Given the high degree of institutional diversity in U.S. higher education, this reputation is maintained through private, voluntary initiatives designed to bring order to higher education standards<sup>2</sup> and to create a framework for evaluating the quality of institutions.<sup>3</sup> Today, accreditation of higher education institutions is the process by which colleges, universities, and programs are externally reviewed to promote quality assurance and quality improvement.<sup>4</sup> Institutions are accredited by private organizations; nevertheless, the federal government exploits the private accreditation system for use as a benchmark for federal funding eligibility<sup>5</sup> while taking little responsibility for ensuring that the system functions as intended. With the changing economy and evolving needs of both institutions and students, this article argues that the federal government should take a more active role in the accreditation process and increase its accountability in ensuring quality education.

Part I of this article describes the development of accreditation of higher education institutions in the United States and distinguishes between private and government recognition of accredit-

1. Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1472 (2011).

2. See Matthew W. Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 LAW & CONTEMP. PROBS. 89, 90 (1994).

3. Fred F. Harclerod, *Accreditation: Voluntary Enterprise*, in UNDERSTANDING ACCREDITATION 43 (Kenneth E. Young et al. eds., 1983).

4. Judith S. Eaton, *An Overview of U.S. Accreditation*, COUNCIL FOR HIGHER EDUC. ACCREDITATION 1 (Aug. 2012), <http://www.chea.org/pdf/Overview%20of%20US%20Accreditation%202012.pdf>.

5. See Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 LAW & CONTEMP. PROBS. 121, 121 (1994).

ing agencies. This part then discusses the federal government's current laissez-faire approach to actual accreditation of institutions by the agencies it recognizes and the resulting lack of accountability for the educational quality of these institutions. Part II of this article explores shifting trends in higher education in the United States, analyzing, in particular, the increased need for recruitment of international students to augment declining enrollment and revenue at higher education institutions in the United States. These developments highlight the need for an overhaul of the current accreditation system, which has functioned in essentially the same manner since its inception. More stringent accreditation standards are necessary to ensure that students (both domestic and international) attending higher education institutions in the United States do not merely receive a degree, but a quality education. As a result of this analysis, this article argues for increased government regulation of the quality standards utilized by recognized accrediting agencies and encourages the recognition of additional regional accrediting agencies to foster competition and increase internal quality control measures in the accreditation process.

## II. ACCREDITATION IN THE UNITED STATES

In the United States, accreditation is viewed as a mark of the worth or educational quality of an institution.<sup>6</sup> The process of accreditation in the United States is unique in the world, as it is not undertaken directly by the federal government through the United States Department of Education ("DOE").<sup>7</sup> Indeed, the United States lacks a national ministry of education or centralized authority that exercises national control over regulation of higher education institutions in the country.<sup>8</sup> Rather, accreditation is touted as a decentralized, nongovernmental process, essentially performed by volunteers, that relies on self-assessment and peer review.<sup>9</sup>

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6. Elaine El-Khawaw, *Accreditation in the USA: Origins, Developments, and Future Prospects*, INT'L INST. FOR EDUC. PLANNING 1, 14 (2001), <http://unesdoc.unesco.org/images/0012/001292/129295e.pdf>.

7. Barbara Brittingham, *Accreditation in the United States: How Did We Get to Where We Are?*, 2009 NEW DIRECTIONS FOR HIGHER EDUC. 7, 7 (2009).

8. U.S. Dep't of Educ., *Accreditation in the United States*, ED.GOV., <http://www2.ed.gov/print/admins/finaid/accred/accreditation.html> (last modified Apr. 11, 2013).

9. Brittingham, *supra* note 7, at 10.

It is important at the outset, however, to distinguish between accreditation of higher education institutions and the recognition of the accrediting agencies that actually accredit these institutions. Although accreditation itself is nongovernmental, recognition of the accrediting agencies may be carried out either by private organizations or by the government through the DOE.<sup>10</sup> Thus, the federal government plays an important role in the recognition of accrediting agencies and, ultimately, in shaping accreditation in the United States. To understand the federal government's involvement with accreditation, and the challenges facing it today,<sup>11</sup> one must understand the evolution of accreditation in the context of the history of higher education.

### A. *Private Recognition of Accrediting Agencies*

Because education is not enumerated in the Constitution as a federal concern, higher education institutions in the United States developed and operated with minimal oversight by the federal government<sup>12</sup> and did not follow any uniform nationwide system of organization and administration.<sup>13</sup> By the end of the nineteenth century and the beginning of the twentieth century, higher education in the United States consisted of a wide variety of institutions, from old colonial colleges to a diverse assortment of "colleges

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10. Eaton, *supra* note 4, at 5.

11. See discussion *infra* Part III.

12. Finkin, *supra* note 2. Even the second Morrill Act, which included restrictions regarding the use of funds, set forth no framework for evaluating the institutions that accepted and utilized its funds. See Morrill Land Grant Act of 1890, ch. 841, 26 Stat. 417 (codified as amended at 7 U.S.C. § 322 (2006)); JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES, 1636-1968 at 235 (Harper & Rowe rev. & enlarged ed. 1968). The lack of government interference in the early development of higher education only served to contribute to the proliferation of educational diversity among institutions. See Brittingham, *supra* note 7, at 10.

13. BRUBACHER & RUDY, *supra* note 12, at 61. Prior to the American Revolution, the first of the American colonial colleges, Harvard College, was established in 1636 with the dual purpose of preparing civic leaders and a literate and learned clergy. CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 104-05 (2d ed. 1994). Eight more colonial colleges followed suit, including:

the College of William and Mary (founded in 1693); the Collegiate School at New Haven (chartered in 1701 and later renamed Yale College); the College of Philadelphia (founded in 1740 and later renamed the University of Pennsylvania); the College of New Jersey, 1746 (renamed Princeton College); King's College, 1754 (renamed Columbia University); the College of Rhode Island, 1764 (renamed Brown University); Queen's College, 1766 (renamed Rutgers College); and Dartmouth College, founded in 1769.

*Id.* at 105.

and universities” with varying admissions requirements and curricula.<sup>14</sup>

This environment gave rise to questions of the quality of these institutions, along with concerns that competition among these universities for funding, students, and reputation would corrupt the educational system in America.<sup>15</sup> Moreover, due to the lack of regulation, standards, and consistency of degree-granting institutions in the quarter-century prior to 1900, universities in the United States garnered little to no respect from the major universities in Europe.<sup>16</sup> The need for stronger admissions standards and a framework for evaluating the new and expanding higher education institutions thus grew.<sup>17</sup> To avoid losing American students to European higher education institutions and to bring about greater uniformity in the standards of American higher education institutions, several voluntary associations were formed with the purpose of nationally systematizing higher education in the continued tradition of limited government oversight.<sup>18</sup> Membership in these institutions was based on merit and was awarded only after extensive research into the institution and site visits.<sup>19</sup> By 1912, the University of Berlin refused to recognize any American degrees awarded by institutions not identified by the Association of American Universities (“AAU”) as “adequately prepared to undertake graduate study,” with other European universities soon following suit.<sup>20</sup>

Beginning in 1914, the AAU published a list of approved institutions, but it voluntarily ceased publication in 1948 when the bur-

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14. Finkin, *supra* note 2, at 89–90.

15. *Id.* at 90.

16. See Ann Leigh Speicher, *The Association of American Universities: A Century of Service to Higher Education 1900–2000*, ASS'N OF AM. UNIVS. (2010), [http://www.aau.edu/about/history\\_centennial.aspx](http://www.aau.edu/about/history_centennial.aspx) (follow “AAU Beginnings” hyperlink). European universities recognized that the decentralization and lack of regulation of American higher education institutions offered limited assurance that the degrees these institutions awarded met quality education standards. See *id.*

17. Harclerod, *supra* note 3.

18. Finkin, *supra* note 2, at 90 (noting that the most prominent were the National Association of State Universities (1895), the Association of American Universities (1900), the Association of American Colleges (1915), and the American Council on Education (1918)); see also Harclerod, *supra* note 3, at 43 (indicating the formation at the same time of the New England Association of Colleges and Secondary Schools (1885), the Middle States Association of Colleges and Schools (1887), the North Central Association of Colleges and Secondary Schools (1895), and the Association of Colleges and Secondary Schools of the Southern States (1895)).

19. Speicher, *supra* note 16.

20. Areen, *supra* note 1, at 1478; see also Speicher, *supra* note 16.

den of the listing process became too great.<sup>21</sup> Once the AAU declined to continue reviewing the quality of American colleges and universities, public criticism prevented the government from undertaking the task through the United States Bureau of Education (now the DOE).<sup>22</sup>

Private, nonprofit organizations now known as accrediting organizations or agencies assumed the responsibility.<sup>23</sup> The existing regional associations combined in 1949 to form the National Committee of Regional Accrediting Agencies ("NCRAA") and took over the publication of the list of accredited institutions.<sup>24</sup> At the same time, rising concerns among university presidents regarding specialized accrediting associations led to the formation of another voluntary organization, the National Commission on Accrediting ("NCA").<sup>25</sup> In 1964, a similar voluntary organization, the Federation of Regional Accrediting Commissions of Higher Education ("FRACHE"), replaced the NCRAA and set about unifying the differences among the regional standards for accreditation.<sup>26</sup> The FRACHE and the NCA merged in 1975 into the Council on Postsecondary Accreditation ("COPA").<sup>27</sup> COPA disbanded in 1993, leaving a void in the recognition of accrediting agencies.<sup>28</sup> This void was filled by the Commission on Recognition of Postsecondary Accreditation ("CORPA"), which continued the recognition function of COPA.<sup>29</sup> In 1996, the Council for Higher Education Accreditation ("CHEA") was founded,<sup>30</sup> which replaced CORPA and now coordinates the regional institutional and specialized accreditors.<sup>31</sup> The main goal of CHEA recognition is to ensure that accrediting agencies "contribute to maintaining and improving academic quality."<sup>32</sup> The formal system of private accreditation thus

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21. Harclerod, *supra* note 3, at 44.

22. Areen, *supra* note 1, at 1478.

23. *Id.*

24. Harclerod, *supra* note 3, at 44.

25. *Id.*

26. *Id.*

27. Charles M. Chambers, *Characteristics of an Accrediting Body*, in UNDERSTANDING ACCREDITATION 151 (Kenneth E. Young et al. eds., 1983).

28. Brittingham, *supra* note 7, at 25.

29. *Id.*

30. Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J.C. & U.L. 691, 720 (2010).

31. Eaton, *supra* note 4, at 5.

32. *Id.* at 9. The author writes that:

CHEA has six standards by which it reviews accrediting organizations for recognition. The standards place primary emphasis on academic quality assurance and improvement for an institution or program. They require accreditors to advance aca-

developed out of the need to set a framework for degree-granting institutions as well as substantive standards for more particularized training in specific professions.<sup>33</sup>

Currently, there are two basic types of higher education accreditation in the United States: institutional and specialized (also known as “programmatic”).<sup>34</sup> Six regional accreditors accredit entire institutions and the overall quality of colleges and universities.<sup>35</sup> Because these regional accreditors are private associations, they are largely free to set their own standards for accreditation. While the standards vary somewhat among the six regional accreditors, overall, the accrediting process is surprisingly unified nationwide.<sup>36</sup> The standards have moved away from a rigid application of quantitative measures, including admissions criteria and minimal academic standards.<sup>37</sup> Rather, the standards now embrace the idea that institutions should set forth their own educational missions and should be assessed according to how well the educational mission is accomplished.<sup>38</sup>

Programmatic accreditors, on the other hand, accredit specific professional programs that are generally situated within a larger institution.<sup>39</sup> Specialized accreditation developed out of concerns regarding how well professional institutions prepared students for

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demic quality, demonstrate accountability, encourage purposeful change and needed improvement, employ appropriate and fair procedures in decision making, continually reassess accreditation practices and sustain fiscal stability.

*Id.* at 6.

33. Finkin, *supra* note 2, at 90.

34. U.S. Dep’t of Educ., *supra* note 8.

35. Finkin, *supra* note 2, at 90–91 n.4. Each regional accrediting agency has jurisdiction over a specific geographic area: the Middle States Association of Colleges and Schools (New York, Pennsylvania, New Jersey, Maryland, Delaware, the District of Columbia, the Canal Zone, Puerto Rico, and the Virgin Islands); the New England Association of Schools and Colleges (Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, and Connecticut); the North Central Association of Colleges and Schools (Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming); the Northwest Association of Schools and Colleges (Washington, Montana, Idaho, Utah, Nevada, Oregon, and Alaska); the Southern Association of Colleges and Schools (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia); and the Western Association of Schools and Colleges (California, Hawaii, Guam, Micronesia, and American Samoa). MICHAEL PRAIRIE & TIMOTHY GARFIELD, COLLEGE AND SCHOOL LAW: ANALYSIS, PREVENTION, AND FORMS 445 n.33 (Nancy L. Herbst ed., 2010).

36. Brittingham, *supra* note 7, at 20.

37. Finkin, *supra* note 2, at 91; see Matthew W. Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate*, 2 J.L. & EDUC. 339, 341 (1973).

38. Finkin, *supra* note 2, at 91.

39. Martin, *supra* note 5, at 122.



practice, particularly in the medical profession.<sup>40</sup> Legal education soon followed this trend, adopting standards for course requirements and institutional visitation.<sup>41</sup> The American Bar Association ("ABA") is currently the only accreditor of law schools in the United States that is recognized by the DOE.<sup>42</sup> Specialized accreditation currently includes institutions that provide specialized training in areas such as arts and humanities, community and social services, personal care and services, education, law, and healthcare.<sup>43</sup> It may also be linked to state licensing requirements, wherein state laws require graduation from an accredited institution as a condition of becoming licensed within that state.<sup>44</sup>

The process of accreditation and reaccreditation is focused primarily on self-studies and peer evaluations, viewed in the context of the stated mission of the institution under review. Accrediting agencies rely on higher education institutions to assess themselves against a set of standards promulgated by the regional accreditor and to identify their own strengths and weaknesses.<sup>45</sup> This process underlines that the goal of accreditation in the United States is not just one of quality assurance, but of quality enhancement.<sup>46</sup>

### B. *Government Recognition of Accrediting Agencies*

Beginning as early as 1785, the federal government committed public lands and funding for higher education when the Continental Congress set aside land for public education in the Northwest Territory.<sup>47</sup> In 1862, President Abraham Lincoln signed the Land Grant College Act, also known as the Morrill Act,<sup>48</sup> which provided each state with 30,000 acres of public land for each member in its

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40. See generally Robert Glidden, *Specialized Accreditation*, in UNDERSTANDING ACCREDITATION 187 (Kenneth E. Young et al. eds., 1983).

41. *Id.* at 189.

42. See U.S. Dep't of Educ., *supra* note 8.

43. *Id.*

44. Finkin, *supra* note 2, at 91.

45. Brittingham, *supra* note 7, at 10.

46. Areen, *supra* note 1, at 1479.

47. See *id.* at 1472. These federal land grants and the policy of providing federal assistance without federal control of higher education continued over the next several decades. From 1804 to the mid-1850s, the government granted almost four million acres of public land in fifteen states for the establishment of "seminar[ies] of learning." LUCAS, *supra* note 13, at 147.

48. Morrill Land Grant Act of 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. § 301 (2006)).

Congressional delegation.<sup>49</sup> The purpose of these grants was to establish and maintain colleges designed to assist with the development of knowledge primarily in agricultural and mechanical arts, so that the United States could compete with the rest of the world in the industrial arena.<sup>50</sup> Although the Morrill Act specified that agriculture and the mechanical arts should be taught at institutions established under it, scientific and classical studies were not excluded.<sup>51</sup> At the same time, the “government established the Bureau of Education to collect and publish data on schools and colleges in the United States.”<sup>52</sup> The federal government, therefore, began to support higher education as a means of achieving its public policy objectives, particularly, at that time, to train citizens to contribute to the economic growth of the country.<sup>53</sup> A second Morrill Act, passed in 1890,<sup>54</sup> provided annual federal disbursements to the land-grant colleges, but tightened the restrictions on the specific programs that the federal expenditures could be used to fund.<sup>55</sup>

Until the 1930s, government aid to higher education was largely limited to granting funds directly to the states or public institutions.<sup>56</sup> However, the changing economic conditions at the time of the Great Depression marked the beginning of a shift in policies underlying the involvement of the federal government in higher education. Fueled by concern for the economic climate, from 1935 to 1943, the National Youth Administration was the first federal program that assisted individual students in gaining access to institutions of higher education.<sup>57</sup> Following World War II, the government became concerned with the welfare of veterans and passed the Servicemen’s Readjustment Act of 1944,<sup>58</sup> better known

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49. LUCAS, *supra* note 13, at 148.

50. See Julie M. Morgan, *Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act*, 17 J.L. & POL’Y 531, 537 (2009).

51. BRUBACHER & RUDY, *supra* note 12, at 235.

52. Charles M. Chambers, *Federal Government and Accreditation*, in UNDERSTANDING ACCREDITATION 236 (Kenneth E. Young et al. eds., 1983).

53. Morgan, *supra* note 50, at 537. “The Morrill Act was significant because it initiated the practice of using federal grants-in-aid to achieve certain specific objectives desired by the federal government.” BRUBACHER & RUDY, *supra* note 12, at 234; see 7 U.S.C. § 301.

54. Morrill Land Grant Act of 1890, ch. 841, 26 Stat. 417 (codified as amended at 7 U.S.C. § 322 (2006)).

55. BRUBACHER & RUDY, *supra* note 12, at 234–35.

56. *Id.* at 235.

57. *Id.* The National Youth Administration, a federal program, operated from 1935 to 1943, during which time the federal government spent \$93,000,000 on higher education for 620,000 students. *Id.*

58. Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284.

as the G.I. Bill,<sup>59</sup> followed in 1952 by the Veterans' Readjustment Assistance Act ("VRAA").<sup>60</sup> To ensure that this federal funding was spent on legitimate institutions providing quality training or education, the government increasingly "began to rely on the already well-established system of voluntary accrediting agencies."<sup>61</sup> In fact, Congress statutorily charged the Commissioner of Education (now the Secretary of Education) with determining which accrediting agencies would be considered reliable authorities of quality education at higher education institutions and publishing a list of nationally recognized accrediting agencies.<sup>62</sup>

In the following years, public opinion shifted to the fundamental ideal that all Americans, even in times of peace, should have access to higher education opportunities.<sup>63</sup> In 1965, the federal government responded to the need to assist all undergraduate students, no matter their socioeconomic status, with access to higher education.<sup>64</sup> With the enactment of the Higher Education Act ("HEA"), the availability of federal financial aid was drastically increased, along with the government's reliance on accrediting agencies.<sup>65</sup> The reauthorization of the HEA in 1992<sup>66</sup> brought more regulatory consequences to the recognition of accrediting agencies.<sup>67</sup> Further, Congress established the National Advisory Com-

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59. BRUBACHER & RUDY, *supra* note 12, at 236.

60. Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 66. The first G.I. Bill was designed to improve the economic prospects of veterans returning from World War II by providing educational benefits. Chambers, *supra* note 52, at 238-39. The majority of veterans enrolled in technical schools offering vocational training, and over the next five years, the number of these institutions tripled, with limited quality controls. *Id.* at 239.

61. Martin, *supra* note 5, at 123.

62. *Id.* at 123-24; *see also* Brittingham, *supra* note 7, at 14 ("Accreditation became useful to the government when there was sufficient financial aid support to require a means of ensuring that the money followed students who were enrolled in educationally satisfactory institutions.")

63. BRUBACHER & RUDY, *supra* note 12, at 239.

64. *Id.* at 241.

65. *See* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of titles 20 and 42 of the United States Code).

66. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (codified as amended in scattered sections of titles 11, 20, 25, and 42 of the United States Code).

67. Martin, *supra* note 5, at 140-41. The author states:

Section 496 of the 1992 HEA requires that, in order to be recognized by the Secretary of Education, an accrediting agency must have standards for assessing several defined areas of an institution's operations, including the conventional subjects of accrediting agency review, such as curricula and faculty and facilities, as well as areas of importance to federal program concerns, including default rates, student achievement rates in relating to institutional mission, records of student complaints, reasonableness of fees in relation to credentials offered, and compliance with federal student aid program responsibilities. Section 496 also requires accrediting agencies to

mittee on Institutional Quality and Improvement (“NACIQI”) to review accrediting agencies and provide recommendations to the Secretary of Education regarding their recognition.<sup>68</sup> Congress last amended the HEA by enacting the Higher Education Opportunity Act of 2008 (“HEOA”).<sup>69</sup> After a push by the DOE in 2006 for accrediting associations to require accredited institutions to assess student achievement in order to be recognized by the DOE, Congress prohibited this type of regulation in the HEOA.<sup>70</sup> The recognition of accrediting agencies by the federal government has thus taken on regulatory consequences, as recognition of accrediting agencies is required by the DOE in order for the institutions or programs they accredit to seek federal student aid funding.<sup>71</sup> The DOE has consistently revised the government’s recognition process of accrediting agencies, influencing the manner by which accrediting agencies accredit higher education institutions.<sup>72</sup>

### C. Government Denial of Accountability

Although the DOE utilizes accrediting agencies as “gatekeepers” for distribution of federal funds, it makes a point to disclaim all responsibility for the actual accreditation of institutions. Indeed, the DOE clearly professes its hands-off approach to accrediting agencies and accreditation on its website, specifying that it takes no responsibility for the actual accreditation of higher education

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meet standards of independence and . . . requires each agency to maintain public information about its accreditation processes and to make public the schools being considered for accreditation.

*Id.* (citations omitted). Congress also mandated that each state set up a State Postsecondary Review Entity (“SPRE”) charged with reviewing institutions that the Secretary of Education had identified as having issues such as a high default rate on student loans. Areen, *supra* note 30, at 726. This requirement was eliminated in the 1998 reauthorization of the HEA, to the relief of accreditors who viewed it as the government’s attempt to eliminate or federalize accrediting agencies. *Id.*

68. U.S. Dep’t of Educ., *National Advisory Committee on Institutional Quality and Integrity*, ED.GOV. (Oct. 31, 2011), <http://www2.ed.gov/about/bdscomm/list/naciqi.html#charter> (last modified Apr. 9, 2013).

69. Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

70. Areen, *supra* note 30, at 726-27. The HEOA also altered the structure of the NACIQI and the recognition process for accrediting agencies. U.S. Dep’t of Educ., *supra* note 68.

71. Eaton, *supra* note 4, at 8.

72. Martin, *supra* note 5, at 124; see 34 C.F.R. § 602.1 (2012).

institutions, and, therefore, is not accountable for the quality of the institutions accredited by a recognized agency.<sup>73</sup>

Under the 1992 amendments to the HEA, for the first time, Congress explicitly provided substantive criteria by which accrediting agencies would be evaluated for recognition by the Secretary of Education.<sup>74</sup> The current version of the HEOA now provides that accrediting agencies must assess student achievement in relation to the institution's mission, along with other measures of governance and processes, such as faculty performance, student support services, and admissions practices.<sup>75</sup>

However, the HEA and the subsequent amendments to the substantive statutory requirements for accrediting agencies have, in reality, done very little to address accountability in the accrediting process.<sup>76</sup> In fact, the 2008 HEOA makes clear that the Secretary, whose authority over accrediting agencies is limited, "cannot establish criteria that specify the standards accrediting agencies must use to evaluate institutions."<sup>77</sup>

Moreover, at least one federal court involved in accreditation litigation has been quick to recognize that accrediting agencies are not "arm[s] of government."<sup>78</sup> Even if the "pervasive entwinement" analysis utilized by the United States Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*<sup>79</sup> was

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73. U.S. Dep't of Educ., *College Accreditation in the United States*, ED. GOV., <http://www2.ed.gov/admins/finaid/accred/accreditation.html> (last modified Mar. 4, 2013). The DOE states:

The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking national recognition by the Secretary must meet the Secretary's procedures and criteria for the recognition of accrediting agencies, as published in the Federal Register.

*Id.*

74. See Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (codified as amended at 20 U.S.C. § 1099b(a)(5) (2006)).

75. See *id.* § 1099b(a)(5)(A)–(J) (2006).

76. See *The New Higher Education Act: Where it Comes up Short*, CHRON. HIGHER EDUC. (Aug. 8, 2008), <http://chronicle.com/article/The-New-Higher-Education-Act/30619/#top>.

77. Holiday H. McKiernan & Tim Birtwistle, *Making the Implicit Explicit: Demonstrating the Value Added of Higher Education by a Qualifications Framework*, 36 J.C. & U.L. 511, 554 (2010).

78. *Parsons Coll. v. N. Cent. Ass'n of Colls. & Secondary Sch.*, 271 F. Supp. 65, 70 (N.D. Ill. 1967).

79. 531 U.S. 288 (2001). *Brentwood Academy* involved the Tennessee Secondary School Athletic Association ("TSSAA"), a not-for-profit membership corporation that regulated

held to apply to accrediting agencies, it has been recognized on at least one occasion that the DOE is not necessarily pervasively entwined with an accrediting agency.<sup>80</sup> In a per curiam opinion from the United States Court of Appeals for the Eleventh Circuit, the court found that even under a pervasive entwinement analysis, because of the manner in which it functions, the Southern Association of Colleges and Schools (“SACS”) remains a private organization.<sup>81</sup>

Even though courts have generally declined to label accrediting agencies as state actors, some have recognized that “denying that accrediting agencies are state actors” is a “legal fiction,”<sup>82</sup> and “have felt compelled to apportion some kind of public attribute to

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interscholastic sport among public and private high schools. *Id.* at 291. Athletic teams of member schools could only play against athletic teams of other member schools in the absence of a special dispensation. *Id.* The TSSAA found that Brentwood Academy, a private parochial high school and member of the TSSAA, violated a recruitment rule by sending a letter to incoming students and their parents regarding spring football practice. *Id.* at 293. As a result, the TSSAA placed Brentwood Academy on probation, deemed its boys’ football and basketball teams ineligible to compete in playoffs for two years, and fined Brentwood Academy \$3,000. *Id.* Brentwood Academy sued the TSSAA and its executive director, alleging that the TSSAA was a state actor, and the enforcement of the recruitment rule violated the First and Fourteenth Amendments. *Id.* The Court found that “state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). In its analysis, the Court relied on a “pervasive entwinement” theory based on “management or control” that considers an organization’s “expressly private characterization in statutory law” and “the failure of the law to acknowledge the entity’s inseparability from recognized government officials or agencies.” *Id.* at 296 (internal quotation marks and citations omitted). Under this test, the Court ultimately held that the TSSAA was a state actor, subject to constitutional standards. *Id.* at 298 (“The nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.”).

80. See *Hiwassee Coll. Inc. v. S. Ass’n of Colls. & Sch.*, 531 F.3d 1333, 1335 n.3 (11th Cir. 2008) (per curiam).

81. *Id.* The court states:

Even were we to [extend the “pervasive entwinement” analysis to accrediting agencies], however, the record before us would not allow us to find that the Department of Education (“DOE”) is pervasively entwined with [the Southern Association of Colleges and Schools (“SACS”)] . . . : SACS is self-governed and receives no funding from the federal or state governments; SACS determines its own membership in accordance with its own standards; DOE has never delegated to SACS its authority to terminate federal funds; and Hiwassee maintains contact with the DOE and federal government absent involvement with SACS. Though SACS is undoubtedly governed by the requirements delineated by Congress in the HEA for recognition of accrediting institutions, this alone does not outweigh the factors indicating that SACS is in fact a private, independent entity.

*Id.*

82. *Auburn Univ. v. S. Ass’n of Colls. & Sch.*, 489 F. Supp. 2d 1362, 1373 (N.D. Ga. 2002).

these agencies presumably because the agencies have become the gatekeeper to federal financial aid funds without which schools would be unable to function.”<sup>83</sup> It is from this rationale that some courts have developed a common law due process requirement as a check on these “quasi-public” accrediting agencies.<sup>84</sup>

With the 2008 amendments to the HEA, the government has shown an effort to improve access to higher education by requiring dissemination of information regarding the institutions to consumers (students and parents).<sup>85</sup> With this approach, Congress places the burden on students and parents to assess these institutions and again eschews any accountability for the quality of higher education in the United States.

#### *D. Benefits of Accreditation*

Although accreditation is touted as “voluntary,” the tangible benefits of it essentially preclude institutions from opting not to pursue accreditation.<sup>86</sup> These benefits include “(1) qualifying to participate in federal and state financial assistance programs;<sup>87</sup> (2) exempting the institution from state licensing requirements; (3) facilitating the transfer of credits and degree programs from one institution to another; and (4) qualifying for tuition reimbursement programs offered by employers.”<sup>88</sup> Moreover, students may be deterred from considering enrollment in an unaccredited college or university, while faculty recruitment and retention at unaccredited institutions may be adversely affected.<sup>89</sup> Accordingly, lack of accredited status may have a devastating effect on the continued vitality of any higher education institution.<sup>90</sup>

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83. *Id.* at 1370.

84. *See* Thomas M. Cooley Law Sch. v. Am. Bar Ass’n, 459 F.3d 705, 712 (6th Cir. 2006).

85. *See* Morgan, *supra* note 50, at 555.

86. PRAIRIE & GARFIELD, *supra* note 35, at 446.

87. Currently, only those institutions accredited by agencies recognized by the Secretary of Education may participate in federal student aid programs. *See* 20 U.S.C. § 1099b (2006).

88. PRAIRIE & GARFIELD, *supra* note 35, at 446.

89. *See, e.g.*, Hampton Univ. v. Accreditation Council for Pharmacy Educ., 611 F. Supp. 2d 557, 566 (E.D. Va. 2009).

90. PRAIRIE & GARFIELD, *supra* note 35, at 446.

## III. NEW HIGHER EDUCATION, OLD ACCREDITATION STANDARDS

For-profit institutions are changing the form of higher education in the United States to continue to meet the needs of American students in the changing economy. In the past, the key to job security and advancement might have been on-the-job training and hard work.<sup>91</sup> As the availability of jobs decreases and the number of job applicants increases, American workers recognize the need for a college degree to obtain not only a well-paying job, but job security.<sup>92</sup> Moreover, the increase in unemployment following the current recession has led many to pursue job training in industries with higher demand and superior employment prospects.<sup>93</sup> The perception of higher education has shifted from that of obtaining a well-rounded education to a direct and necessary path to a career.<sup>94</sup> Thus, the American student is changing as older, already working, or otherwise non-traditional students seek to become more marketable in the face of the bleak economic outlook.<sup>95</sup> These students may work full-time and have family responsibilities,<sup>96</sup> and lack the financial resources or time to pursue the traditional higher education track.<sup>97</sup> It is into this gap that private for-profit institutions have stepped, seeking to provide these students with the necessary training to improve their credentials while offering program flexibility and affordability.<sup>98</sup>

For-profit institutions differ from their nonprofit counterparts in many respects, the most significant being that nonprofit institutions are prohibited from distributing net revenues to those with the power to control those revenues, such as members, officers, directors, or trustees, while for-profit institutions have no such restrictions.<sup>99</sup> The range of available for-profit online programs is extreme, from clearly illegitimate “diploma mills” to well-known,

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91. Creola Johnson, *Degrees of Deception: Are Consumers and Employers Being Duped by Online Universities and Diploma Mills?*, 32 J.C. & U.L. 411, 422 (2006).

92. *Id.*

93. Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 526 (Spring 2012).

94. See Johnson, *supra* note 91, at 423–26.

95. *Id.* at 417–18.

96. *Id.* at 423.

97. Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 505 (Spring 2009).

98. *Id.*

99. Osamundia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 48–49 n.9 (2011).



established institutions with a commitment to providing quality education.<sup>100</sup> With the aforementioned economic factors, as well as the growth of the Internet and the opportunity to structure online education at a lower cost, enrollment in for-profit institutions continues to grow rapidly.<sup>101</sup> Additionally, students enrolled in for-profit institutions are eligible for federal financial aid.<sup>102</sup>

Much has been written about the need to reform accreditation in the context of the increase in for-profit institutions,<sup>103</sup> legitimate online institutions and degree mills,<sup>104</sup> as well as the need to protect consumers in the wake of mounting student loan debt.<sup>105</sup> A full discussion of these challenges is beyond the scope of this article. However, limited literature exists on another important and shifting aspect of higher education in the United States—the growing trend in international student mobility, and the competition for international students at institutions in the United States. With these institutions facing financial challenges, many look to increase revenue through international student recruitment.<sup>106</sup> One such institution, Dickinson State University (“DSU”), a public university located in North Dakota’s oil-producing region, experienced a drop in enrollment as area high school graduates were enticed to enter the booming oil industry rather than pursue a college education.<sup>107</sup> To combat declining enrollment and boost

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100. Cooley & Cooley, *supra* note 97, at 506–07.

101. James, *supra* note 99, at 49.

102. *Id.*

103. See generally Cooley, *supra* note 93; Cooley & Cooley, *supra* note 97; Melanie Hirsch, *What’s in a Name? The Definition of an Institution of Higher Education and Its Effects on For-Profit Postsecondary Schools*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 817 (2006).

104. See generally Johnson, *supra* note 91; Goldie Blumenstyk, *In a First, the North Central Association Accredits an On-Line University*, CHRON. HIGHER EDUC. (Mar. 19, 1999), <http://chronicle.com/article/In-a-First-the-North-Central/20031/>; Eric Kelderman, *Behind an Online Giant’s Accreditation Bid, a Small Brick and Mortar Campus*, CHRON. HIGHER EDUC. (Mar. 11, 2012), <http://chronicle.com/article/Behind-an-Online-Giant-a/131124/>; Kelly McCullom, *Accreditation of On-Line University Draws Fire*, CHRON. HIGHER EDUC. (Apr. 2, 1999), <http://chronicle.com/article/Accreditation-of-On-Line/14056/>.

105. See generally Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439 (2012); Michael C. Macciarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL’Y 67 (2010).

106. Rahul Choudaha & Li Chang, *Trends in International Student Mobility*, WES 5 (Feb. 2012), <http://www.wes.org/ras/TrendsInInternationalStudentMobility.pdf>.

107. Dale Wetzel, *Dickinson State University Locked Down Degree Scandal*, HUFFINGTON POST (Feb. 10, 2012), [http://www.huffingtonpost.com/2012/02/10/dickinson-state-universit\\_n\\_1269667.html](http://www.huffingtonpost.com/2012/02/10/dickinson-state-universit_n_1269667.html).

revenue, DSU began looking to recruit international students into its programs.<sup>108</sup>

### A. *Dickinson State University*

North Dakota's eleven publicly supported colleges and universities belong to a unified system of higher education, the North Dakota University System ("NDUS").<sup>109</sup> Organized in 1990, the NDUS is governed by the State Board of Higher Education ("SBHE") and serves to assist the SBHE with its policy of enhancing "the quality of life for all those served by the NDUS as well as the economic and social vitality of North Dakota."<sup>110</sup>

DSU, located in Dickinson, North Dakota, was originally founded in 1918 to fill the need for qualified teachers in rural areas.<sup>111</sup> DSU was initially accredited by a regional accrediting agency, the North Central Association of Colleges and Schools ("NCACS") in 1928, but the accreditation was terminated in 1934.<sup>112</sup> DSU became reaccredited by NCACS in 1949.<sup>113</sup> DSU's last "Program to Evaluate and Advance Quality" ("PEAQ") evaluation<sup>114</sup> occurred in 2004-2005, with its next scheduled PEAQ to occur in 2014-2015.<sup>115</sup>

From 2003 to 2012, DSU enrolled 816 international students, the vast majority coming from China, with others coming from

108. *Id.*

109. N.D. UNIV. SYS., <http://ndus.edu/system/> (last visited Feb. 4, 2013).

110. *Id.*

111. HISTORY OF DICKINSON STATE UNIVERSITY, [http://www.dickinsonstate.edu/discover\\_dsu/about\\_dsu/history.aspx](http://www.dickinsonstate.edu/discover_dsu/about_dsu/history.aspx) (last visited Feb. 4, 2013). DSU is a member of the NDUS. See N.D. UNIV. SYS., *supra* note 109.

112. *The Database of Accredited Postsecondary Institutions and Programs*, U.S. DEP'T OF EDUC., <http://ope.ed.gov/accreditation/InstAccrDetails.aspx> (follow "Get Data for one accredited institution/campus/site" hyperlink; then search "Name of Institution" for "Dickinson State University"; then follow "Dickinson State University" hyperlink) (last visited Feb. 4, 2013).

113. *Id.*

114. The HLC website states:

The Program to Evaluate and Advance Quality (PEAQ) is one of two avenues for seeking and retaining accreditation. . . . PEAQ employs a four-step comprehensive evaluation process to determine accreditation status. The program consists of an institutional self-study, an evaluation by a team of trained peer reviewers, and final decision-making by the Commission through three panels.

*Maintaining Accreditation through the Program to Evaluate and Advance Quality (PEAQ)*, HIGHER LEARNING COMM'N, <http://www.ncahlc.org/PEAQ-Home/peaq.html> (last visited Feb. 4, 2013).

115. *Dickinson State University*, HIGHER LEARNING COMMISSION, [http://www.ncahlc.org/component/com\\_directory/Action,ShowBasic/Itemid,1514/](http://www.ncahlc.org/component/com_directory/Action,ShowBasic/Itemid,1514/) (last visited Feb. 4, 2013).

Russia.<sup>116</sup> Many international students were enrolled into a Dual-Degree Program (“DDJ”) or a Top Up Program, through which students are able to complete requirements for two degrees, one from their home institution, and one from DSU. Other international students enrolled in a Disney Human Resources Certificate Program, a two-semester program in which students complete one semester of classes at DSU and spend another semester interning at Disney World in Florida.<sup>117</sup>

The NDUS Office of Articulation and Transfer (“OAT”) requires a written copy of each articulation agreement concerning the acceptance and transfer of credits for these programs between DSU and the international institutions to be on file.<sup>118</sup> Although the events prompting the action are unclear, the OAT requested that DSU gather and inventory all international agreements.<sup>119</sup> On February 10, 2012, NDUS released an internal audit of Dickinson State University and its 127 international transfer agreements.<sup>120</sup> To say the results were unfavorable would be an understatement. The report states:

Upon completion of the review, DSU’s international agreements, specifically for the DDJ, Top Up and Disney programs are seriously lacking controls and oversight. Several process level controls have been waived or controls that were once in place have been intentionally overridden or ignored, threatening the overall compliance of the program. This is a result of continuously deteriorating processes throughout DSU departments and adherence with the requirements set forth in the agreements.<sup>121</sup>

The investigation and report uncovered numerous serious issues related to the SBHE and DSU policy of requiring all international students to follow normal admission and enrollment procedures, including completing an application and providing official tran-

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116. Liao Hui-chuan, *US University Denounced as Degree Mill for Exchange Students*, WANT CHINA TIMES (Mar. 13, 2012), <http://www.wantchinatimes.com/news-subclass-cent.aspx?cid=1504&MainCatID=15&id=20120313000001>.

117. *Internal Review Report*, N. D. U. SYS. 8 (Feb. 10, 2012), <http://www.ndus.edu/uploads/reports/96/dsu-internal-review-ddj-final-draft1-020912.pdf>.

118. *NDUS Procedures*, § 403.7.2 *Articulation Agreement*, N.D. U. SYS., <http://www.ndus.edu/makers/procedures/ndus/default.asp?PID=271&SID=56> (last visited Feb. 4, 2013).

119. *Internal Review Report*, *supra* note 117, at 7.

120. *Id.*

121. *Id.* at 3.

scripts and other documentation.<sup>122</sup> Many students were admitted as freshmen rather than as transfer students.<sup>123</sup> DSU often failed to ensure that admitted students met minimum requirements for admission.<sup>124</sup> DSU accepted unofficial transcripts and non-standard English proficiency tests for Chinese students.<sup>125</sup> Many of the international students were issued degrees from DSU even though they failed to achieve the required number of credits or minimum cumulative GPA.<sup>126</sup> Specifically, of the 816 students who participated in the international programs at DSU, 594 received a degree.<sup>127</sup> Of those 594, only ten had actually successfully completed the program; the other 584 were still missing credits or coursework at the time the degree was awarded.<sup>128</sup>

The report recommended the cancellation of all existing international agreements until each could be reevaluated.<sup>129</sup> In the aftermath of its issuance, several senior administrators resigned, and a dean of the College of Education, Business, and Applied Science committed suicide,<sup>130</sup> although a clear connection between the two events has not been established.<sup>131</sup>

On July 11, 2012, a full five months after the release of the internal audit of DSU, the Higher Learning Commission (“HLC”)<sup>132</sup> of the NCACS issued a public disclosure notice in which it placed DSU on “notice,” meaning that DSU was taking actions that “could lead it to be out of compliance with one or more Criteria for Accreditation.”<sup>133</sup> Specifically, the public disclosure indicated that the HLC placed DSU on notice:

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122. *Id.* at 4, 9.

123. *Id.* at 4.

124. *Id.*

125. *Id.*

126. *Id.* at 4-5.

127. *Id.* at 12.

128. *Id.*

129. *Id.* at 19.

130. Hui-chuan, *supra* note 116.

131. Eric Kelderman, *North Dakota's Moment in the Spotlight Isn't a Pretty One*, CHRON. HIGHER EDUC. (Mar. 4, 2012), <http://chronicle.com/article/North-Dakotas-Moment-in-the/131041/>.

132. The Higher Learning Commission, one of two commission members of NCACS, is responsible for the regional accreditation of higher education institutions in nineteen states. *History & Background*, HIGHER LEARNING COMM'N, <http://www.ncahlc.org/About-the-Commission/history-background.html> (last visited Feb. 4, 2013) (a list of the higher education institutions can be found by clicking the “North Central region” link).

133. Higher Learning Comm'n, *Public Disclosure Notice on Dickinson State University*, NCACS (July 13, 2012), [http://ncahlc.org/download/\\_PublicDisclosureNotices/PDN\\_1514.pdf](http://ncahlc.org/download/_PublicDisclosureNotices/PDN_1514.pdf).

because of concerns related to the University's oversight of admissions and transfer procedures; its gathering and reporting of enrollment and related data; its accountability for, and oversight of, contractual relationships related to its academic program; the integrity of the program provided to certain international students; and its articulation of, and consistent adherence to, policies and procedures at the University or other levels.<sup>134</sup>

The HLC notified DSU that it might have been out of compliance with three of the five criteria utilized by the HLC for accrediting an institution, specifically in the areas of integrity, governance and administration, evaluation and assessment techniques, and effective student learning.<sup>135</sup>

The HLC required that DSU file a Notice Report by February 2013, providing evidence that it resolved the concerns identified by the HLC.<sup>136</sup> Furthermore, in May 2013, DSU was required to host a focused evaluation to demonstrate the contents of the Notice Report.<sup>137</sup> The HLC will review the Notice Report and the results of the May evaluation in November 2013.<sup>138</sup> At that time, it will determine whether DSU may be removed from notice, or whether further action, including probationary status, is appropriate.<sup>139</sup>

Although a relatively small incident, the “[s]candal,” as it has been called,<sup>140</sup> at DSU underlines the current issues with an accreditation system that has undergone limited change since its inception. The incident raises serious questions regarding the university and its accredited status with NCACS. Specifically, why were DSU's clearly inappropriate processes allowed to continue unchecked for such a long period of time? More importantly, why was it only after the NDUS and SBHE completed the audit and uncovered the issues that the HLC placed DSU on notice that its accreditation was in jeopardy? Those concerned with the integrity of the accreditation system in the United States deserve answers to these questions.

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* Wetzel, *supra* note 107.

### B. *A Call for Change*

From 2009 to 2010, the federal government awarded almost 150 billion dollars in grants or loans to students of higher education institutions.<sup>141</sup> It is not disputed that under the Spending Clause of the United States Constitution,<sup>142</sup> Congress has the power to establish the terms under which federal funding will be distributed to institutions.<sup>143</sup> In limiting the Secretary of Education's ability to mandate specific standards that accrediting agencies must use to accredit institutions,<sup>144</sup> Congress has squandered a significant opportunity to improve the quality of higher education in the United States.

Congress' continued refusal to explicitly regulate higher education likely stems from the long-standing tradition of institutional autonomy held since the beginning of higher education in the United States. However, this tradition developed at a time when the government had a limited financial stake in higher education. Even if it is admitted that, with the initial enactment of the HEA in 1965 and its subsequent amendments, the government has taken on a more regulatory role in accreditation,<sup>145</sup> it is undeniable that the current system is not functioning as it should, and the government's regulation of accreditation must change. As the federal government continues to spend taxpayer money on higher education, it should take a more active role in its regulation. Responding to the 2008 HEOA, Charles Miller, Chairman of the Commission on the Future of Higher education, stated:

By diluting the role of the Secretary of Education in the nation's accrediting process, Congress has reduced responsible oversight of tens of billions of dollars of federal funds and has surely lowered the bar on quality and raised the bar for innovation in American higher education. Accreditation is in serious need of reform, and that self-regulatory system with its inherent conflicts of interest is destined to have a poor future

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141. See Matthew A. McGuire, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 120 (Oct. 2012).

142. U.S. CONST. art. I, § 8, cl. 1. The Spending Clause provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]" *Id.*

143. See *Students for Sensible Drug Policy Found. v. Spellings*, 460 F. Supp. 2d 1093, 1098 (D.S.D. 2006).

144. See McKiernan & Birtwistle, *supra* note 77, at 554.

145. See discussion *supra* Part II.B.

as the public becomes more aware of policy issues like transfer of credits and transparency of performance.<sup>146</sup>

While placing more regulatory control of higher education institutions in the hands of the federal government will almost certainly be met with public criticism, the government must nonetheless confront the “legal fiction” of accrediting agencies as autonomous, non-governmental entities by: (1) providing stronger statutory language requiring specific standards of quality that accrediting agencies must measure and evaluate before accrediting an institution, and (2) providing incentives for accrediting agencies to perform their functions.

1. *Specific Standards for Measuring the Quality of Institutions*

The accrediting process in the United States has come under fire in recent history for the increase in student loan debt and the need for reform as the for-profit sector expands. However, noticeably missing from any government action to curb abuses in the accrediting process is a commitment to addressing the quality of higher education institutions. Maintaining and improving quality has always been the goal of the accreditation process; the difficulty the government faces in promulgating standards is how quality should be defined in a higher education system as diverse as that of the United States.

Higher education institutions typically award degrees based on the amount of credit hours a student completes<sup>147</sup> rather than what a student has learned and how that knowledge should translate to future prospects.<sup>148</sup> At DSU, even this basic practice of ensuring that international students had indeed earned the degrees they were awarded was not followed, as many of the degrees were conferred even though the international students lacked the re-

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146. *The New Higher Education Act: Where it Comes up Short*, *supra* note 76.

147. McKiernan & Birtwistle, *supra* note 77, at 514.

148. See CLAYTON M. CHRISTENSEN & HENRY J. EYRING, *THE INNOVATIVE UNIVERSITY: CHANGING THE DNA OF HIGHER EDUCATION FROM THE INSIDE OUT* 391–92 (2011) (arguing that universities should change their traditional measures of success from what is important to scholars and ranking systems to what students now value, such as meaningful credentials for employers and graduate schools). The authors also present a case study of Brigham Young University – Idaho (“BYU-Idaho”), where by applying “modular design principles” to its courses of study and focusing students on particular career or graduate school paths, students could obtain the same quality of education while reducing the number of required courses. *Id.* at 296.

quired number of credits.<sup>149</sup> Some commentators suggest that the United States should develop a “common degree framework” under which quality should be determined by standardizing learning *outcomes* obtained at each degree level (associate, bachelor’s, master’s, doctoral) rather than by the amount of credit hours a degree requires.<sup>150</sup> These outcomes would be measured not by uniformity in the curriculum, but by reference to certain common points, including:

a demonstration of knowledge of the foundation and history of that major field, a demonstration of an understanding of the overall structure of the discipline and the relationships among its sub fields and to other disciplines, and a demonstration of the ability to communicate the basic knowledge of the field in coherent ways and appropriate ways.<sup>151</sup>

In this manner, a bachelor’s degree in, for example, biology from a university in Pennsylvania would be similar in “level and competencies” to the same degree from a university in California, while avoiding the “standardization” of higher education.<sup>152</sup> The argument is persuasive, and, as a long-term solution for assessing the quality of higher education institutions, the result appears to be ideal. On a smaller scale, and working within the framework of the existing accreditation structure, there are changes that the federal government could easily implement that would have similar effects.

First, the federal government should make regional accrediting agencies accountable by statutorily requiring that they measure student performance outcomes at the institutions they accredit. Specifically, accrediting agencies should shift the focus of accreditation from soundness in governance, inputs, and processes to soundness in actual education. As a prerequisite for accreditation by an accrediting agency, the DOE should require that higher education institutions measure and report areas including, but not limited to: retention and graduation rates, test scores, average time for degree completion, labor market outcomes, and certifica-

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149. See *Internal Review Report*, *supra* note 117, at 5; see also CHRISTENSEN & EYRING, *supra* note 148, at 331–32 (indicating that under the pressures of the current economy, students and universities alike may become shortsighted regarding the true value of a degree).

150. See McKiernan & Birtwistle, *supra* note 77, at 518.

151. *Id.* at 521.

152. See *id.* at 517.



tion and licensure attainments. With regard to international students, program assessments should necessarily contain additional evaluations of English language proficiency and in-depth examinations of the specific international programs, including the qualifications of the international students accepted and enrolled, specific courses and credits required for degree attainment, and statistics relating to obstacles and successes in pursuit of these requirements by the international students enrolled in previous years. Had DSU been required to assess these specific areas on a yearly basis, the issues at DSU would have been apparent earlier. The prestige of an education from the United States, a world leader in many disciplines, has traditionally been the driving force behind its position as a premier destination for international students.<sup>153</sup> Additional transparency in the reporting of the areas noted above, along with measures of language proficiency, will assist the United States in retaining this reputation. As was the case at DSU, international students and the additional revenue they generate for institutions are becoming increasingly necessary to sustaining the financial stability of many higher education institutions.<sup>154</sup> Increased regulation and reporting of student learning outcomes may also contribute to maintaining, or even increasing, international student enrollment at U.S. institutions at a time when other countries are experiencing sizeable growth in attracting international students.<sup>155</sup>

Moreover, several means of measuring student learning are already available and should be utilized. In a 2006 report completed by then-Secretary of Education Margaret Spellings, the DOE proposed measuring learning outcomes through several existing examinations, surveys, or forums, including the Collegiate Learning Assessment.<sup>156</sup> For programs that recruit international students, these measurements could be as simple as requiring comprehensive record-keeping regarding application, enrollment, and pro-

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153. Blair Jackson, *Documentation of International Students in the United States: Forging Alliances or Fostering Alienation?*, 18 GEO. IMMIGR. L.J. 373, 374 (2004).

154. See Choudaha & Chang, *supra* note 106, at 5.

155. *Id.* at 6.

156. See Secretary of Education Margaret Spellings, *A Test of Leadership: Charting the Future of U.S. Higher Education*, U.S. DEP'T OF EDUC. 24 (2006), <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf>. The Collegiate Learning Assessment is an examination that utilizes problems to measure students' critical thinking, analytical reasoning, problem-solving ability, and written communication skills. *CLA: Returning to Learning*, COUNCIL FOR AID TO EDUC., <http://www.collegiatelearningassessment.org/index.html> (last visited Feb. 4, 2013).

gram completion, which institutions should already be maintaining.

With the 2008 HEOA, the federal government took steps to address transparency regarding student loan debt and the increase in for-profit institutions in order to enable students, as consumers, to make better choices regarding their college careers. However, the greater issues lie in the means of measuring quality. Information and statistics regarding the educational quality of an institution and its programs are currently not being measured and supplied to prospective students. Absent this data, students, as consumers, are unable to make informed decisions, and government measures at protecting students as consumers fall short.<sup>157</sup> In order for accreditation to fulfill its function of promoting and improving quality<sup>158</sup> and truly earn its reputation as a mark of the educational value of an institution,<sup>159</sup> these measurements must necessarily be a part of the accrediting process.

## 2. *Incentives for Accrediting Agencies*

As a second improvement to the existing accreditation system, the DOE should seriously review its reliance on only six regional accrediting agencies as dependable authorities on the quality of the education students receive at institutions they accredit. Encouraging competition among existing and newly recognized regional accrediting agencies is crucial to increasing the regulation and accountability of the accreditation system. The existing agencies have been performing essentially the same function since they were founded, some more than 100 years ago. Although their accreditation practices have occasionally been questioned by the DOE,<sup>160</sup> none of the six regional accrediting agencies has ever lost its recognized status.

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157. For a discussion of the 2008 reauthorization of the HEA and its strategy of providing detailed information to students to protect them as consumers, see Julie M. Morgan, *Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act*, 17 J.L. & POL'Y 531 (2009).

158. Eaton, *supra* note 4.

159. El-Khawas, *supra* note 6.

160. See Eric Kelderman, *Under Obama, Accreditors Are Still in the Hot Seat*, CHRON. HIGHER EDUC. (Sept. 12, 2010), <http://chronicle.com/article/Under-Obama-Accreditation-Is/124361/>. The DOE requested that the Secretary of Education review the NCACS' status as a regional accreditor after the HLC accredited the American InterContinental University ("AIU"), a for-profit, online institution, even though it had concerns relating to possible credit inflation. *Id.* Although the situation sparked debate regarding changes that are needed to the accreditation system, see *id.*, the NCACS remains a DOE-recognized accrediting agency, see U.S. Dep't of Educ., *supra* note 8.

As a result, the regional accrediting agencies may operate under a sense of confidence and security—the federal government has traditionally relied on the regional accreditors to assess the quality of institutions,<sup>161</sup> with minimal regulation over how that process should actually function. It may be that the regional accreditors recognize that the DOE relies on them to fulfill an important function, and they may believe that, at this stage, the DOE has few alternatives. The federal government needs to take steps to show the accrediting agencies that they are not too big to fail. No longer should tradition and reputation be the only benchmarks for quality. Along with increased regulation and oversight of the existing regional accrediting agencies by the federal government with regard to actual quality assessment of institutions, the DOE should consider increasing competition among the agencies themselves by recognizing more institutional accrediting agencies. Fostering competition will result in increased internal quality control measures and an incentive for accrediting agencies to preserve their status as reliable assessors of quality, training, and education.<sup>162</sup>

For example, the HLC of the NCACS last reviewed and evaluated the educational programs offered at DSU in 2004 to 2005.<sup>163</sup> Significantly, it was not until after the NDUS, a state-governed entity,<sup>164</sup> released its report of the issues at DSU that the HLC involvement began. If the HLC operated with knowledge that another regional accrediting agency was also available to accredit institutions in North Dakota, it might have been more proactive in ensuring quality at the institutions it accredited in order to maintain its reputation.

Additionally, the situation at DSU suggests that the HLC's current process of allowing ten years to elapse between PEAQ evaluations<sup>165</sup> is excessive and ineffective. The HLC would likely protest that the largest obstacles it faces with the accreditation or reaccreditation process are time and resources. Providing government funding and support (by means of personnel) to permit the regional accreditors to look more closely at institutions' practices on a more frequent basis would also serve the government's ultimate goal of ensuring that government dollars are expended at quality

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161. Martin, *supra* note 5, at 123-24.

162. *See id.*

163. *See Dickinson State University, supra* note 115.

164. *See N.D. UNIV. SYS., supra* note 109.

165. *See Dickinson State University, supra* note 115.

institutions. Because the accreditation process is based heavily on self-assessment,<sup>166</sup> a full-scale institutional evaluation every two to three years is neither feasible nor workable for these institutions. Rather, several smaller-scale assessments should be conducted in the period between PEAQ evaluations, wherein institutions would be required to provide documentation that their programs are in compliance with accrediting standards, but without a burdensome site visit by the HLC. Had this requirement been instituted, the HLC could have addressed the issues with the international program at DSU before the situation became a scandal.

#### IV. CONCLUSION

The system of higher education in the United States is evolving, as it must, to meet the changing needs of institutions and students in the current economy. It follows logically that the existing traditional accreditation system should adapt to these changing conditions and develop uniform required procedures designed to ensure that all students at higher education institutions receive a quality education. The key changes necessary to preserving and improving the quality of U.S. higher education include mandatory and specific standards for measuring quality, transparent reporting of these statistics to ensure that prospective students make fully informed decisions, and increased competition among existing accrediting agencies. Because of its use of accreditation as a prerequisite for federal funding, the federal government is best positioned to implement and regulate these reforms.

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166. See Brittingham, *supra* note 7, at 10.

