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ABSTRACT

The current and future status of the education triad is examined with particular reference to determining eligibility for federal funds. The existing system of postsecondary governance is discussed, followed by a study of the legal constraints on the functions of and interrelationships among the triad elements. The status quo regarding postsecondary educational governance is concluded to be unacceptable. Immediate goals for the triad are shown to be: increased understanding of each element's capabilities; sharper emphasis on each element's strong points; cleaner definition of each function; and better division, of power among triad elements must be maintained if the triad concept is to succeed in the long run. Educational consumer protection is one of the primary issues whose solution requires an intelligible division of function among triad elements. All three elements of the triad will need to participate in eligibility determinations, with balance of power stimulated through increased attention to the legal considerations. (LBH)

The Council On Postsecondary Accreditation

Respective Roles of Federal Government, State Governments, and Private Accrediting Agencies in The Governance of Postsecondary Education

by
William A. Kaplin

A report on the
current and future status
of the education "Triad," with
particular reference to determining
eligibility for federal funds

RESPECTIVE ROLES OF FEDERAL GOVERNMENT, STATE GOVERNMENTS, AND PRIVATE ACCREDITING AGENCIES IN THE GOVERNANCE OF POSTSECONDARY EDUCATION

[A Report on the current and future status of the education "triad," with particular reference to determining eligibility for federal funds. Prepared at the request of the Council on Postsecondary Accreditation.]

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July 1975

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FOREWORD

There has been strenuous debate the past couple of years over the increasing reliance by the federal government on private accrediting bodies in the government's determination of those educational institutions and programs eligible to participate in numerous federal funding programs. The debate has extended into Congressional hearing rooms as legislators began the long public process leading to further amendments to or rewriting of the Higher Education Act of 1965.

There has emerged from the Congressional hearings, various national studies, conferences, and seminar-type discussions a concept of quality determination for federal funding purposes that would rely on a procedural-regulatory system equilaterally participated in by the federal government, the individual state governments, and the private accrediting bodies. At least the concept as rhetorically discussed is "equilateral." Legally, no one seemed to be quite sure that such a partnership was possible.

In an effort to determine what the actual legal lengths of the triangle might be, the Council on Postsecondary Accreditation commissioned a scholar, Professor William A. Kaplin of the Catholic University of America, to make a study and write a report on the current and future status of the education "triad," with particular reference to determining eligibility for federal funds.

Mr. Kaplin, Associate Professor of Law, is no stranger to the intricacies of accreditation. He was a legal reviewer of the landmark court case of Marjorie Webster Junior College versus the Middle States Association of Colleges and Secondary Schools; contributed a significant working paper on the law's view of professional power to the national Study of Accreditation of Selected Health Educational Programs; formerly held a legal position with the Department of Health, Education, and Welfare; and periodically teaches a course in higher education and the courts.

This is the first in a series of studies and reports planned by the Council on Postsecondary Accreditation in fulfilling its perceived role of serving as a balance wheel for accreditation. A second study on another new concept, "educational auditing" is in progress and, hopefully, will result in a report around which a national conference will be scheduled in the spring of 1976.

Meanwhile, we are pleased to present this report by Professor Kaplin. We think it is a significant contribution to the literature -- literature from which national policy could emerge.

Kenneth E. Young
President, COPA
August, 1975

I. The Existing System of Postsecondary Educational Governance

The current system for governing postsecondary education is a dispersed conglomeration of governmental and private activity which Harold Howe once called a "non-system to the second power." Although the federal government, the states, and the private accrediting associations (the postsecondary education "triad") all participate substantially in the system, coordination of activities both within each triad element and among elements has often been inadequate and gaps have often existed where no one seems to be regulating.

A. The Federal Government

Probably the major function of the federal government is the establishment of national spending priorities for postsecondary education and the provision of federal funds for expenditure in accordance with priorities. The Office of Education and the Veterans Administration provide the bulk of federal aid. The Commissioner of Education recognizes private accrediting agencies, and to a lesser extent state agencies, whose approval of institutions and programs is a prerequisite for eligibility to participate on OE programs.[1/] The VA relies for eligibility purposes on State Approving Agencies which operate under federal contract and are reimbursed by the VA. The state approving agencies may approve all courses accredited by a nationally recognized accrediting

1. See generally "The Federal Eligibility System as Administered by the Office of Education" (AIES, USOE, April 7, 1975).

agency (38 U.S.C. §1775), while for nonaccredited courses they must follow criteria and procedures specified in federal law (38 U.S.C. §1776). The recognition function and eligibility decisions of OE are often relied upon by other federal agencies when they make funding decisions.

The federal government also provides some educational consumer protection, in fragmented fashion, through various agencies. DOD, HUD, BIA, FAA, FCC, and the fraud branch of the Postal Inspection Service all participate in some fashion.[2/] Proprietary schools are regulated by the Federal Trade Commission under its authority to prevent "unfair or deceptive acts or practices in commerce. . . ." (15 U.S.C. §345(a)). The federal government also exercises regulatory authority over postsecondary educational institutions in certain other defined areas of national concern, e.g. equal employment opportunity (EEOC) and private sector labor relations (NLRB).

Additionally the federal government performs technical assistance and national leadership functions in postsecondary education and supports postsecondary education research. OE's publication of directories of educational institutions is an example in this general area, as is the work of the new National Institute of Education.

B. The States

The states' broad functions in postsecondary education

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2. See "Toward a Federal Strategy for Protection of the Consumer of Education" (Report of the Subcommittee on Educational Consumer Protection, Federal Interagency Committee on Education, Dec. 18, 1974).

encompass planning, operating, regulating, and funding. Consumer protection is a major though sporadically exercised regulatory responsibility of the states under their police powers. Overall educational planning is the responsibility of boards of regents or coordinating boards in many states, although the degree of planning and coordinating varies greatly depending on the state.

There are essentially two layers of state regulation of postsecondary institutions and programs, but both layers are not found in all states and they are not always clearly distinct from one another. The first level is incorporation or chartering, a function performed by all states. Some states have very general laws for all nonprofit corporations, some have statutes particularly for eleemosynary institutions, and some have special statutes for incorporating educational institutions. Proprietary schools are often relegated to general business corporation laws. The states also have responsibility for registering foreign corporations (i.e. those chartered in another state) which do business in their jurisdiction, but how and when this applies to foreign educational institutions is sometimes unclear.

The second level of regulation is represented by licensure. This is a more substantial form of regulation because it involves education requirements in addition to corporate ones. Such requirements are generally imposed as a condition of offering education within the state, granting degrees, or using a collegiate name. Not all states have licensure requirements, and their strength and enforcement varies among those that do. Often accredited institutions are exempted from all or most requirements,

thus substantially escaping the net of state supervision.[3]

A model state regulatory statute was recently drafted by the Education Commission of the States[4] and has been adopted in several states. While it is much more comprehensive and administratively sound than most current state legislation, it does contain a provision permitting broad exemption of accredited institutions and programs "provided [that the state agency] may require such further evidence and make such further investigation as in its judgment may be necessary." (§6(2)).

States also operate State Approving Agencies under Veterans Administration programs (see I.A. above). This function is sometimes, but not always, done by the same state staff which performs licensure. States must also establish a State Postsecondary Education Planning Commission (the "1202 Commissions") as a condition to receiving certain federal aid for community colleges and occupational education (see Title X of the Higher Education Act of 1965, as amended in 1972). The state's existing coordinating board or board of regents may be designated as the 1202 Commission.

States are also responsible for reviewing the academic credentials of applicants for professional and occupational licensure. During this process they pass judgment on the educational validity of courses of study and institutions from which applicants have graduated. This function is performed by yet other state

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3. For a review of state corporation and licensing law, see Legal and Other Constraints to the Development of External Degree Programs, V.I, §4.1, & V.II, appendices A & B (final report under Grant NE-G-00-3-0208, U.S. Nat'l Inst. of Educ., Jan. 1975.)

4. Model State Legislation, Report of the Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees, Education Comm'n of the States, No. 39, June 1973.

agencies, usually a collection of boards each with jurisdiction over one or more professional or occupational categories.

In addition, the states establish and operate their own public systems of postsecondary education and may provide various kinds of financial assistance for private institutions or for students in public and private institutions.

C. The Private Accrediting Agencies

Since accreditation is undertaken by a wide variety of private agencies and associations, some accrediting entire institutions and some accrediting parts of institutions or specialized programs of study, no uniformly applicable statement of accreditation's purposes and functions is possible. Although there has been considerable debate in recent years concerning purposes and functions, the resulting statements are usually quite general and there is no strong consensus even for the generalities. Although greater consensus is likely to develop under the leadership of the new Council on Postsecondary Accreditation, differences among agencies will continue to exist and an understanding of accreditation's purposes and functions will depend as much on identifying the differences as upon defining the consensus.

The U.S. Office of Education's list of accreditation functions has nine entries, the primary one of which is "certifying that an institution has met established standards."[5/] But the accrediting community itself does not lay claim to all these functions. Even

5. See "Nationally Recognized Accrediting Agencies and Associations," p.1 (AIES, OE, Jan. 1975). A helpful analysis of this list can be found in Selden, "Dilemmas of Accreditation of Health Educational Programs," SASHEP Staff Working Papers, Pt. II, pp. G-3 to G-10 (Nat'l Comm'n on Accrediting 1972).

regarding the quoted function, many agencies would claim that institutional or programmatic self-improvement is a more predominant function or would caution that accreditation "certifies" only that the institution or program is meeting its own stated objectives.

In a recent study, Jerry W. Miller gathered statements from 45 accrediting agencies concerning their functions. The result was a list of 32 functions each of which was cited from one to 35 times in the statements. Most often cited were improving education, stimulating improvement in programs and in institutions, improving standards, assuring adequate educational preparation of practitioners, and identifying acceptable institutions and programs of study. Miller used this listing as the basis of an extensive survey (via the Delphi procedure) of approximately 100 knowledgeable persons both within and without the accrediting community. The procedure produced a revised list of eight functions which accreditation should (not does) serve. The two primary functions were

> To identify for public purposes educational institutions and programs of study which meet established standards of educational quality.
>
> To stimulate improvement in educational standards and in educatonal institutions and programs of study by involving faculty and staff in required self-evaluation, research, and planning.[6]

D. Interrelationships Among Triad Elements

Although each element of the triad has its own interests to

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6. Miller, Organizational Structure of Nongovernmental Postsecondary Accreditation: Relationship to Uses of Accreditation (Nat'l Comm'n on Accrediting 1973).

pursue and its own particular sphere of operation, the elements also share many common concerns and serve many functions which relate closely to those of other triad elements. Often the practice is to formally interrelate functions by having one element of the triad rely upon determinations or judgments of another element. Although the current debate has focused mainly on patterns of federal reliance on accrediting associations in determining federal funding eligibility,[7] many other reliance interlocks are evident in the governance system. Sometimes these interlocks result from considered policy judgments concerning a particular task, but often they result from political restraints, the shortage of funds, or perhaps an element's disinclination to accept difficult challenges posed by its legal responsibilities. The following briefly summarizes the major current interlocks.

The federal government relies on accrediting agencies to identify institutions and programs eligible for a wide range of federal education programs, particularly those administered by USOE.[8] It similarly relies on the states in this process by requiring that institutions and programs have legal authorization from the state to provide education programs before they can be eligible for funds. The federal government also relies on the states to operate State Approving Agencies (38 U.S.C. §§1770-1779) under veteran's educational benefits programs, and it relies on

7. See generally Orlans, et al., Private Accreditation and Public Eligibility (1974) (the Brookings Study commissioned by USOE).

8. See "Nationally Recognized Accrediting Agencies and Associations" (AIES, USOE, Jan. 1975).

state agencies to identify eligible institutions and programs of nursing and of public vocational education under certain USOE programs.[9/]

The states often rely on accrediting agencies by exempting accredited institutions or programs from various licensing or other regulatory requirements. Some also rely on accreditation in determining eligibility under their own state funding programs, and the State Approving Agencies rely on accreditation in approving courses under veteran's programs (38 U.S.C. §1775(a)(1)). State licensure boards also rely heavily on accreditation by making graduation from an accredited school or program a prerequisite to professional or occupational licensure. In many of these instances where states rely on accreditation they in turn rely on the federal government (specifically USOE) to recognize and oversee the accrediting agencies whose determinations they accept, and to publish directories indicating the accredited status of schools.

The accrediting agencies, as private bodies, do not formally rely on other elements of the triad in the sense that federal and state governments do. But they do rely on the states to recognize an institution's legal existence and degree-granting authority as a prerequisite to accreditation. They also rely on states to recognize and protect their own legal status as corporations. And in a sense many agencies rely on federal and state governments to indirectly lend the support of public sanction to accrediting determinations by their reliance upon them.

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9. See "State Agencies for Approval of Public Postsecondary Vocational Education and State Agencies for Approval of Nurse Education" (AIES, USOE, Aug. 1974).

II. Legal Constraints on the Functions of, and Interrelationships Among, the Triad Elements

The range of functions which can be undertaken by the triad is limited by federal or state constitutional provisions, statutes, and administrative regulations which define and limit each element's legal authority. Proposals to change the functions of any element must thus be considered in light of this framework of existing law. This section of the Report explores legal constraints pertinent to each element's role in the governance of postsecondary education.

A. Federal Government

As courts have often noted, the federal government is a government of limited powers. It has only those powers which are expressly conferred by the Constitution or which can reasonably be implied from those conferred. In the realm of education, federal authority stems primarily from the "Spending Power," i.e. Congress' power to tax and spend for the general welfare. This power is the constitutional basis for virtually all federal aid-to-education programs, including those which employ accreditation as an eligibility criterion. The spending power, however, does not give the federal government a roving commission to regulate postsecondary education. What leverage the federal government exerts through the spending power arises from its establishment of purposes and conditions for expenditure of funds. Though recipients are subject to federal requirements, they could avoid the requirements by not accepting the funds.

The U.S. Commissioner's authority to recognize accrediting agencies derives from Congress' exercise of the spending power by which it has delegated to the Commissioner the authority to determine eligibility under federal aid programs for postsecondary education. Thus recognition is not a direct exercise of regulatory power but rather a function which exists due to and only in the context of federal fund expenditure. The spending power would not authorize recognition independent of expenditure or permit the federal government to impose recognition requirements which are unrelated to the federal government's interest in the expenditure of its funds.[10/] Nor would the spending power authorize the federal government to require all accrediting agencies to be recognized in order to perform accrediting functions. It would only permit a requirement that an accrediting agency be recognized if it wishes the federal government to rely on its judgments in the process of expending federal funds.

Any federal involvement in private accreditation or other aspects of postsecondary education deeper than that authorized by the spending power would have to be justified under one of Congress' regulatory powers. The only such power with major pertinence to this Report is the "Commerce Power," which authorizes Congress (and administrators to whom Congress delegates power) to regulate

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10. It has been argued that some of the Commissioner's current recognition policies may exceed his delegated authority or legitimate interests in Federal fund expenditure. See Dickey & Miller, "Federal Involvement in Nongovernmental Accreditation," 53 Educ. Rec. 138 (1972); Finkin, "Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate," 2 J. of Law and Educ. 339 (1973).

activities which are in or which affect interstate commerce. Courts have held that this power justifies establishment of federal wage and hour standards for employment in public and private higher educational institutions engaged in commerce (Maryland v. Wirtz, 392 U.S. 183 (1968)) and federal regulation of labor-management relations in private institutions of higher education (e.g., Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970)). This power is also the legal basis for Federal Trade Commission jurisdiction over proprietary schools which "commit unfair or deceptive acts or practices in Commerce" (15 U.S.C. §345(a)) and would permit extension of similar jurisdiction to non-profit postsecondary institutions. Any future application of antitrust laws to postsecondary educational institutions or accrediting associations would also be based on the commerce power.[11/]

For the most part, however, the commerce power has not been extensively invoked in education. While it is a reservoir of constitutional authority which could support a range of new federal regulatory functions in postsecondary education, its use has and will be limited by the tradition of state and private control over postsecondary education and the necessity of showing that regulated activities are "in" or "affect" interstate

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11. See generally, regarding postsecondary education and the antitrust laws, Wang, "The Unbundling of Higher Education," 1975 Duke L.J. 53. And for a recent Supreme Court decision rejecting the existence of a "learned professions exemption" under which accrediting agencies have sometimes claimed immunity from antitrust laws, see Goldfarb v. Virginia State Bar, 43 U.S. Law Week 4723 (1975).

commerce.[12] The spending power remains for now and the immediate future as the primary legal path for federal involvement in postsecondary education.

B. State Governments

Unlike the federal government, the states have governments of general powers and can claim all governmental power not denied them by the federal constitution or their own constitutions. Besides having spending power comparable to the federal government's and plenary legislative power over their own public educational institutions, states also have broad regulatory powers (usually called "police powers") over private activity affecting the public health, safety, or general welfare. Education is, by both legal principle and political tradition, readily encompassed within the state's police powers. While the states do tap those powers extensively to regulate education, this regulation is much more substantial in elementary-secondary than in postsecondary education. In the latter area each state has a reserve of legal authority sufficiently broad and comprehensive to handle most problems currently under discussion. States may fail to act on such problems for lack of money or expertise, but lack of power should not be a reason for inaction except as noted below.

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12. Legally, this showing is relatively easy to make and could probably be made for most of postsecondary education by an ingenious Congress. See, e.g., Maryland v. Wirtz, 392 U.S. 183 (1968); Katzenbach v. McClung, 379 U.S. 294 (1964).

A state's regulatory power exists in most respects only within its own boundaries. If a degree mill in State A is mailing bogus degrees into State B, the latter cannot regulate the degree mill out of existence. It can regulate the school's sales personnel if they appear in State B, or it can refuse to recognize the degrees for its own governmental purposes, but in other respects State B is dependent upon action by State A, the situs of the school. Thus, in the interstate or national arena, states can comprehensively effectuate regulatory goals only by joint (e.g. the interstate compact) or cooperative (e.g. uniform legislation) action. The necessary agreement of purpose, method, and resources is often difficult to achieve, especially when the problem is national in scope implicating all 50 states.

Besides these legal and practical difficulties, state power in the interstate or national arena is directly limited by the commerce clause of the federal Constitution. Even where Congress has not sought to regulate, the commerce clause as construed by the courts acts as an implied bar to some forms of state regulation which affect the free flow of commerce among the states. It is settled that the clause prohibits state regulation which discriminates against interstate commerce or out-of-state enterprises in favor of intrastate commerce or in-state enterprises. And even regulations which apply even-handedly to both interstate and intrastate activity may nevertheless be invalid if they substantially burden interstate

commerce. The general rule, unanimously affirmed by the Supreme Court in 1970, is that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. [Pike v. Bruce Church, 397 U.S. 137, 142 (1970).]

Potential commerce clause limitations on state police powers will become increasingly pertinent as postsecondary education institutions and programs increasingly operate on a national or regional, rather than purely local, basis, and as innovations in postsecondary education increasingly make use of interstate mails and communications media, computer hook-ups, branch campuses or counselling centers, transient instructors or students, and other interstate delivery techniques. But though the likelihood of burdening interstate commerce becomes stronger, the state's legitimate interests in regulating are also strong. Prevention of "fraud, misrepresentation, incompetence, and sharp practice" are acknowledged as weighty state interests in the commerce clause cases (Robertson v. Calif., 328 U.S. 440 (1946)). Thus, in matters pertinent to this Report states retain considerable regulatory authority even over postsecondary education activities which touch upon or affect interstate commerce, so long as they regulate evenhandedly and focus on the in-state aspects of interstate activity.

When the educational activity is so completely interstate that state authority is inadequate for either legal or practical reasons, then the regulatory task is appropriately one for the federal government. The examples in (A) above suggest areas for such federal involvement. Even here, however, state involvement and cooperation between federal and state governments may often be essential, especially regarding unfair or deceptive practices (see IV (A)(6) below).

C. The Private Accrediting Agencies

The accrediting agencies, being private, do not derive their power directly from public law as do federal and state governments. They owe their existence and legal status basically to the common law of "voluntary associations" or "private associations" and to state corporation law,[13] and they have whatever general powers are set forth in their articles of incorporation or association and accompanying by-laws and rules. These powers are enforced through private sanction embodied in the articles, by-laws, and rules and through voluntary public and private reliance on accrediting decisions, rather than through the direct public sanction of public law. (See, however, Section I(D) above.)

Aside from the practical limitations on their powers stemming from the absence of direct public sanction to aid in enforcement, accrediting agencies are also subject to regulation

13. See generally Kaplin & Hunter, "The Legal Status of the Educational Accrediting Agency," 52 Cornell L.Q. 104 (1966).

by federal and state governments under the powers and subject to the limitations set forth in (A) and (B) above. Accrediting authority is also limited by the common law of associations as enforced by the courts. The emerging principle in the latter area, as stated by the appellate court in the Marjorie Webster litigation, is that:

> Where membership in, or certification by,. . . [a private] association is a virtual prerequisite to the practice of a given profession, courts have scrutinized the standards and procedures employed by the association notwithstanding their recognition of the fact that professional societies posses a specialized competence in evaluating the qualifications of an individual to engage in professional activities. The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction. Even where less than complete exclusion from practice is involved, deprivation of substantial economic or professional advantages will often be sufficient to warrant judicial action.14/

Subject to this developing common law, to existing state and federal law, and to any further regulation imposed pursuant to federal and state power, a private accrediting agency may legally perform any function in postsecondary education which is within the scope of its articles and by-laws.

D. Interrelationships Among Triad Elements

The three triad elements seldom exercise their legal powers in complete isolation from one another. As Section I(D) above indicates, one triad element in exercising its powers will some-

14. Marjorie Webster Jr. College v. Middle States Ass'n, 432 F.2d 650, 655 (D.C. Cir. 1970). See generally Kaplin, "The Law's View of Professional Power," in SASHEP Staff Working Papers, Pt. II, J-4 to J-16 (Nat'l Comm'n on Accrediting, 1972).

times rely on the judgments or decisions of another triad element. Such interlocking reliances can create additional problems regarding legal authority. For both federal and state governments, authority to rely on private groups such as accrediting agencies may be limited by the "delegation of authority" or "non-delegation" doctrine. For accrediting associations, active cooperation in a system whereby federal or state government relies on their decisions may subject the associations to the "state action" doctrine.

1. Non-delegation Doctrine. It is clear that both Congress and state legislatures may delegate broad authority over educational matters to administrative agencies or officers. But the power of legislatures to delegate to private groups or organizations (or the power of administrators to subdelegate their delegated authority to private groups or organizations) is much more restricted. Courts, particularly state courts construing state constitutions, have often held such delegations to be unconstitutional as an abdication of government's law-making responsibilities. Thus federal or state governmental involvement with private accrediting associations, to the extent it can be construed as a delegation of governmental authority to such associations, may be subject to question under the non-delegation doctrine.

In 1970 the HEW Office of General Counsel prepared a working paper on whether the system by which the Commissioner of Education relies on accrediting agencies under Federal

aid-to-education statutes[15] constitutes an unlawful delegation of authority. The paper answered in the negative because the system "contains sufficient safeguards against. . .arbitrariness and abuse." The safeguards were these: 1) the Commissioner recognizes and monitors all accrediting agencies whose decisions are relied on, thus providing on-going assurance that accrediting activities are consistent with federal interests; and 2) accreditation is a well-established function undertaken for many purposes independent of aid eligibility, thus minimizing the risk that accrediting decisions will be manipulated for private advantage under aid-to-education programs. The second point is questionable, at least in light of recent criticisms that the eligibility system is warping the original purposes of accreditation and that some agencies seek recognition primarily to facilitate federal aid eligibility for their constituencies. The first point is stronger and probably sufficient to uphold the Commissioner's system against an unlawful delegation argument. But if the Commissioner or Congress were to substantially lessen the federal monitoring of accrediting agencies, as has been urged in some quarters, the system's vulnerability to challenge under the nondelegation doctrine would correspondingly increase. To some degree, federal monitoring may be a price accrediting agencies must pay for participation in the eligibility determination process.

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15. For comprehensive description and analysis of the Commissioner's recognition and reliance system, see "The Federal Eligibility System," supra note 1; Finkin, "Federal Reliance on Voluntary Accreditation," supra note 10 at 343-368.

State systems for relying on accrediting agencies (e.g. excusing accredited schools from certain institutional licensure requirements or using graduation from an accredited school or program as an eligibility criterion for occupational licensure) may also in effect delegate government power to private groups. The legality of such delegations has been litigated several times with mixed results. Recent cases have upheld delegations to accrediting associations, apparently because such action is reasonable given the history and experience of accreditation and practically necessary given the burden that would befall the state if it had to make its own invididual educational judgments. E.g. Colorado Polytechnic College v. State Bd. for Commun. Colleges, 476 P.2d 38 (Colo. 1970). But earlier cases have invalidated delegations to accrediting agencies where such delegations bind the state prospectively to accreditation standards or lists of accredited institutions not in existence at the time the delegation was made. E.g. State ex rel. Kirschner v. Urquhart, 310 P.2d 261 (Wash. 1957).

While the cases upholding delegations are more recent and numerous than those invalidating delegations, thus suggesting that state reliance on accreditation will withstand future judicial scrutiny, it would be wise to approach the issue with healthy skepticism. The cases to date are not particularly well reasoned, and do not take account of recent commentary on the limits of accrediting agencies' expertise and capabilities for policing the maintenance of educational standards. There

thus remains a strong possibility that some forms of delegation to accrediting agencies would be invalidated by the courts, at least where the breadth of the delegation and the lack of state-imposed safeguards are such as to create a substantial potential for abusing the system.

2. State action doctrine. Even though a governmental delegation of authority is legally sound under the principles in (D)(1) above, it still has legal implications for the delegatee accrediting association. When federal or state governments act through their own agencies and officials, they are limited by provisions of the federal Constitution. Though accrediting agencies normally are not so limited, being private organizations not subject to Constitutional constraints, they may become subject to these constraints when they act as agents or delegates of government and thus lose their purely private character.

The legal vehicle for this conversion is the "state action" (or "governmental action") doctrine under which courts may deem ostensibly private activities to be actions of the state (government) because of their close connections with government activity. The major consequence would be the application to accrediting agencies of constitutional due process requirements. Due process would basically require that accrediting agencies utilize fair procedures which afford institutions and programs a reasonable opportunity to defend themselves against adverse accrediting decisions, and that accrediting decisions not be

arbitrary, irrational, or capricious.[16] Although these requirements would broadly limit the power of accrediting agencies by limiting the way in which they go about their business, such requirements are increasingly being accepted as good policy.[17]

The only case which has analyzed the state action doctrine's applicability to accrediting activities is Marjorie Webster Jr. College v. Middle States Association, 302 F. Supp. 459 (D.D.C. 1969), rvsd., 432 F.2d 650 (D.C. Cir. 1970). After considering an extensive record of trial testimony and documents, the federal district court noted:

> The regional accrediting associations have operated as service agencies for the Federal government in determining eligibility for funding. Moreover, Middle States function as an agency to identify institutions of quality is not limited to its relationship with the Federal government. In states under its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans and state scholarships.

On the basis of these facts, the district court concluded that Middle States was "engaged in a quasi-governmental function, subjecting it to the restraints of the Constitution." The appellate court, though reversing the district court, did not overturn its state action conclusion but rather "assume[d] without deciding, that either the nature of . . .[Middle States'] activities or the federal recognition which they are awarded renders them state action. . . ."

16. See generally Kaplin, "The Law's View of Professional Power," supra note 13 at J-25 to J-28.

17. See Miller, supra note 6, at 140, 186-194.

Under this approach, the mere existence of an interrelationship between government and accreditation is not determinative. What is crucial is the degree of actual state reliance on accrediting decisions and the degree of actual government involvement in or influence upon accrediting decisions. A finding of state action depends upon the cumulative impact of government-accreditation interrelationships at the federal level, the state level, or both. The impact of current interrelationships is such as to create a substantial possibility that future courts will follow Marjorie Webster and hold accrediting decisions to be state action.

III. Basic Questions Regarding Triad Functions and Interrelationships

This section identifies and organizes major, yet basic, questions which are often alluded to but whose answers are obscure. Sometimes these questions tend to be slighted because of their difficulty. But hard thinking, empirical research, and hammering out explicit policy regarding these questions must be undertaken before new triad functions and relationships can be successfully fashioned.

A. General

1. What precisely do the determinations made by each element of the triad (e.g. eligibility, licensure, accreditation) signify vis-a-vis the particular educational institution or

program to which they are applied?[18] (This question should be asked both as a general conceptual question and as a specific descriptive question particular to each federal aid program, state agency, or accrediting association whose determinations are being studied.)

2. (a) What are the particular interests which must be protected in order to have an effective governance system for postsecondary education? (b) Which of these interests are not now being adequately protected by any determination being made by any element of the triad? I.e., what needs to be "signified" which is not now being signified by any element of the triad as their determinations are understood in light of answers to question (1)?

3. To what extent must the determinations made for proprietary education differ from those made for public and private nonprofit education? What is the justification for each difference in treatment?

4. To what extent does the proliferation in types of education programs and groups of persons served require that the triad's various determinations be based on differentiated standards, e.g. different accreditation standards for non-traditional programs, different licensure standards for vocational-technical programs? To what extent can a core of uniform standards be identified which a triad element could use for all postsecondary institutions or all postsecondary programs?

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18. For an illustration of the kinds of issues which can arise here, see Grimm, "The Relationship of Accreditation to Voluntary Certification and State Licensure," in SASHEP Staff Working Papers, Pt. II (Nat'l Comm'n on Accrediting, 1972)

B. Eligibility Determinations

1. What are the particular interests which the federal government seeks to further and purposes it seeks to achieve in making eligibility determinations? Is it possible to identify these interests and purposes more precisely than current statements such as "protect the federal investment" or "promote educational consumer protection"? What must the federal government know (what does it want to have signified) about programs or institutions in order to make eligibility determinations which will protect these interests and achieve these purposes? Can this necessary "knowledge" be identified more precisely than current statements such as "institutional probity," "stability," or "educational worthiness"?

2. Are there federal interests now sought to be protected through general eligibility determinations which could be better protected by specific programmatic requirements particular to each federal aid program or group of related programs? (Note the regulations recently proposed (39 Fed. Reg. No. 202, Oct. 17, 1974) under the Guaranteed Student Loan Program which evidence an affirmative answer in one area of recent controversy.) Is there an intelligible way to draw a conceptual line between those federal interests which should be protected through specific programmatic requirements (e.g. the new GSLP regulations) and those which can be satisfactorily protected through general eligibility requirements (e.g. §435(a)-(f) of the Higher Education Act of 1965)?

3. To what extent can the interests which the federal government seeks to further through eligibility determinations be better protected through use of compliance investigations and suspension-termination mechanisms which operate after the initial determination of eligibility? Are such compliance techniques more appropriate with specific programmatic requirements than with general eligibility requirements?

4. Should accreditation be (a) a necessary prerequisite to general eligibility, (b) one alternative avenue to general eligibility, (c) one factor to be weighed along with other factors in determining general eligibility, or (d) a factor which is irrelevant to general eligibility? To what extent should the answer depend on the kind of aid program (e.g. institutional vs. student aid) or the kind of institution or program (e.g. nonprofit vs. proprietary schools) involved?

5. To what extent is it necessary to have differences in general eligibility requirements from program to program, even within the Office of Education, as opposed to a uniform set of criteria whose fulfillment would make an institution or program eligible for all federal education programs conditional on meeting the specific programmatic requirements particular to each program?

6. Should determinations regarding eligibility for federal education funds be made separately by each federal funding agency, or is it possible to have a centralized eligibility system which can make general eligibility determinations for all funding agencies?

IV. Conclusions and Guidelines Regarding the Reform of Functions and Interrelationships

A. General

1. The status quo regarding postsecondary educational governance is not acceptable. Almost all informed observers agree that the issue is not whether change is needed but what kinds of change should take place. Future analysis should continue the same focus.

2. All elements of the triad will continue to be involved in governance for the forseeable future. The capabilities, interests, and constituencies of each element are sufficiently different, and the traditions of federalism and private responsibility in postsecondary education are sufficiently strong, that substantial elimination of any element is unlikely both politically and as a matter of educational policy. Thus, changes in governance should proceed from a continuing recognition of all three elements. The immediate goals should be: increased understanding of each element's capabilities; sharper emphasis on each element's strong points; clearer definition of each element's functions; and better division, coordination, and interrelationship of functions.

3. Substantial change along the lines of point (2) above cannot take place until more knowledge is developed concerning the significance of the determinations made by each triad element. (See question (1) in section III(A) above.) Developing such knowledge will require more explicit statements of the criteria upon which determinations are made (e.g. the criteria for state

licensure of a vocational school), validating research regarding these criteria, and better information concerning the extent to which determinations are enforced over time so as to retain their original validity.

4. In considering functional relationships among triad elements the most crucial issues are those concerning reliance of one element on another element's determinations (see section I(D) above). Legal principles are directly implicated in these reliance issues (see section II(D) above) and must be carefully considered in resolving them. The problems raised in point 3 above concerning the significance of triad determinations are also directly implicated: one element should rely on another's determination only when it in fact signifies something particular which the relying element must have signified in fulfilling its functions. Sound answers to questions such as "to what extent should states rely on private accreditation in licensing schools?" cannot be obtained until more is known about (and more attention is paid to) what the determinations in fact signify concerning the institution or program to which they are applied.

5. A meaningful balance of power among triad elements must be maintained if the triad concept is to succeed in the long run. The legal framework in which the triad operates (see section II above) already provides a basis for balance, since each element can claim a significant measure of legal authority within this framework. Balance of power can be stimulated through increased attention to such legal considerations. It can also be stimulated through increased cultivation of each element's particular

capabilities, since each element can claim certain functions which it can perform better than either of the other elements. Point 6 below briefly outlines a balance of power, based on legal authority and practical capability, for one area of recent controversy.

6. Educational consumer protection is clearly one of the primary issues whose solution requires an intelligible division of function among triad elements. All elements should have a role to play.

The states should have primary responsibility for (a) assuring basic financial stability and capacity for continuity of institutions and programs through corporation and licensure laws; and (b) establishing and enforcing prohibitions against deceptive and fraudulent practices which occur within the state's boundaries.

The federal government should (a) devise and enforce programmatic requirements which guard against particular consumer abuses arising under particular aid programs; and (b) establish and enforce prohibitions against deceptive and fraudulent practices which are interstate in scope and thus cannot be adequately handled by the states.

Private accrediting associations should (a) promulgate and apply standards of continuity and financial stability which relate specifically to the institution's or program's capacity to fulfill its proclaimed educational mission; and (b) promulgate and apply ethical standards relating to deceptive or overbearing practices which misrepresent the educational mission of the institution or program, or which adversely affect the quality of

education or training offered.

In addition, each element should adopt procedures for sharing information with one another on consumer abuses in postsecondary education and for informing one another of adverse determinations against institutions or programs engaging in consumer abuse.

B. Eligibility Determinations

1. The status quo is no more acceptable in the eligibility area than in postsecondary governance in general. Many suggestions for overhauling the current eligibility system or creating a new system have been made in recent years, creating a base upon which further consideration should build. The Eligibility Task Force, Institute for Educational Leadership, George Washington University, has been categorizing proposals and preparing conceptual models for alternative eligibility systems, and their work will be useful in harnessing the current debate.

2. All three elements of the triad will continue to participate in eligibility determinations, at least in the near future. Reliance on federal and state governments will (and should) tend to increase, however, while reliance on accrediting agencies will (and should) tend to decrease. The federal government should increasingly develop its own specific, programmatic eligibility requirements which encompass particular program concerns not addressed by general eligibility determinations, and should develop an effective mechanism for enforcing these requirements. The state governments should improve their own regulatory capabilities, particularly in the areas suggested in IV(A)(6) above, so that

(a) their grants of legal authority to provide education programs will be more meaningful and uniform, and (b) they will be better prepared to make general eligibility determinations within their jurisdictions in certain circumstances. The accrediting associations should accomodate their operations to the increased responsibilities of federal and state governments, and should maintain channels for lending their expertise and viewpoints regarding educational quality to them as they undertake these increased responsibilities.

3. If the federal government is increasingly to rely on state agencies to make general eligibility determinations, it should initially be in situations where (a) recognized accrediting agencies do not exist; or (b) the audience identified by accreditation would be significantly narrower than that which the federal program was intended to serve. In relying on state agencies the federal government should stimulate improvement in state governance capabilities by (a) limiting participating state agencies to those which perform substantial state licensure or approval functions state-wide for institutions or programs whose federal eligibility it would determine; and (b) requiring state agencies to meet criteria which focus on those functions the state is best suited to perform (see IV(A)(5) & (6) above) and avoid forcing state agencies into the mold of private accrediting associations.

4. Consideration of realignments such as those suggested in (2) & (3) above--or any other realignments--will require better knowledge of what is in fact signified by the determin-

ations of each triad element (e.g. what is signified by accreditation), as well as better understanding of what the federal government desires to signify by a general eligibility determination. In this respect the matters raised in points IV(A)(3) &(4) above are particularly pertinent to the eligibility debate.

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