

Testimony of C. Todd Jones
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Interested Party Hearing on Proposed Regulations to Prevent Fraud
and Otherwise Ensure Proper Use of Title IV, HEA Program Funds

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My name is C. Todd Jones, and I am president of the Association of Independent Colleges and Universities of Ohio. I am testifying today on behalf of the organization.

AICUO represents 50 independent nonprofit colleges and universities in Ohio, which educate over 130,000 students and award degrees at the associate, baccalaureate, masters, professional, and doctoral levels. Membership includes five institutions with substantial on-line educational programs, and numerous others that utilize on-line programs.

I am here today to testify on three topics: the proposed state authorization regulations specifically; the gainful employment regulations specifically; and third and most importantly, the evaluative standard used in development of consensus through the negotiated rulemaking processes.

Before discussing these topics, I want to add one final matter for considering the context of my comments: I was also designated by Secretary Duncan as the negotiator in 2009-2010 for the independent college sector for then-proposed Program Integrity regulations.

State Authorization Regulations for Distance Education

During the Program Integrity negotiations, the department proposed regulations on state authorization of higher education programs. The final rules unilaterally moved into content that was not raised during the negotiations, and when the department's rules were challenged in federal court, they were rejected as conflicting with the negotiated rulemaking process.

The United States Department of Education is to be commended for its efforts in this area, regardless of the outcome of the federal court case. ED raised an important and timely issue during the Program Integrity negotiations: how do state regulations on program authorization interrelate in an era of cross-border on-line education. Unfortunately, the department's proposal this year to regulate yet again in this area is premature, and I recommend that the department defer regulatory action.

As the department is aware, currently the Presidents' Forum, the Council of State Governments, regional education boards, APLU, and SHEEO, among others, are developing the State Authorization Reciprocity Agreement (SARA). While there is still significant work ahead for SARA, it represents two things: an honest effort to forge a true consensus, and a process through

which interested parties participate with highly informed stakeholders with deep knowledge of state laws and practices.

The fixed time frame of negotiated rulemaking and the limitation of participants that inherently must exclude some stakeholders (for purposes of making negotiation of other rules possible) makes negotiated rulemaking less suited to a complex issue like harmonization of over 50 state regulatory regimes. However, the very fact that the department still could regulate on any shortcomings of SARA if it came to final agreement means that the department would be best advised to withdraw its announcement to regulate on state authorization for distance education and let the process run its course.

Gainful Employment

Gainful Employment regulations are another area on which the department attempted to regulate during the Program Integrity sessions. I will make only two modest recommendations on this matter. First, the department should seriously consider the difficult questions it was unable to answer during its initial foray on gainful employment.

- What are the possible unintended consequences of the proposal and how does the department respond to them?
- Will the proposal encourage students to focus primarily on short-term earnings increases because that is the data available and that is given emphasis by the U.S. Department of Education?
- How could the department ever hope to give such data proper context?
- Is a college that produces significant numbers of teachers for Appalachian schools and Native American reservations protected from inappropriate scrutiny from ED for doing exactly the kinds of public service jobs that are the basis of the administration's loan forgiveness proposal?
- What will the department do for colleges that graduate significant numbers of students that move out of state or internationally?

As senior staff will remember from my dreary monologues during negotiated rulemaking three years ago, these questions can go on and on.

Second, and more importantly, is there a less burdensome, less invasive method of achieving the policy goal sought by the department? The purpose of the regulation is to identify fraudulent institutions—ones that provide an education with Title IV funds where former students do obtain employment in the field advertised by the institution at “appropriate” compensation. During the former negotiated rulemaking session, I suggested using other significant indicators of non-employment—namely student default rates and complaint rates.

Having created the mechanism for complaints at the state level, the latter data are presumably available to the department. Default rates are also readily available. The reality is that the department lacks the fortitude to force the closure of institutions where default rates reach unconscionable levels like one-third of loan recipients. This administration has been in power for

over four years. I would like the department to report on how it is aggressively investigating all institutions above some unreasonable default level.

However, as a former senior department official myself, the reason is as well known to me as it is to today's department leadership: politics. The department is unprepared to use the obvious standards, so it chooses to burden the entirety of higher education because that is easier to execute and more uniform in application. There is a difference between balance and fairness, and the department should allow itself to regulate those institutions that are problems, and free those that are not.

Deference to Consensus

Finally, I must mention the very means by which the department is seeking change. I have a great deal of respect for Secretary Duncan's efforts over the last four years to help make college more affordable, to protect the Pell grant program, and his honest efforts to reduce fraud in federal higher education programs.

Unfortunately, the means used to date in negotiated rulemaking and elsewhere are greatly increasing the likelihood that the policy changes he has sought will be undermined or eliminated in the future. The lesson of Secretary Spellings's work with accreditors was lost in transition. Her unilateral attempts to change the purpose of accreditation led to direct congressional rebuke.

In a similar manner, this administration's overriding the general consensus on state authorization regulations led it to go for broke, promulgating final regs it wanted over a general consensus. As a result Congress acted and federal courts overturned the regulations. In fact, it is worth briefly cataloging the unilateral imposition of higher education policy by the administration in the last four years beyond the examples I have cited:

- During the Program Integrity session, it reversed an explicit, unanimous consensus on the definition of a credit hour with a rationale that even the administration's supporters are at pains to explain with clarity to this day;
- Other rules with essentially no observable need outside of California, like the state complaint regulations, were also driven through over overwhelming consensus;
- During the Teacher Preparation session, the department explicitly stacked the panel with supporters, and yet when even these supporters were unwilling to swallow what the department demanded, senior department staff talked over and refused to recognize for comment any dissent. Clearly, if the regulations remain in the same form once they leave the Office of Management and Budget, they will remain controversial;
- In addition, the department conducted the single biggest rewrite of FERPA regulations in the law's history to suit the administration's priorities, taking no significant advice from the public;
- Finally, the department unilaterally changed a major evidentiary standard for scrutinizing sexual assault cases under Title IX in 2011. As the former Assistant Secretary for Enforcement, I can tell you that the move itself shocked me less than comments from general counsel from outside Ohio with whom I have spoken. They have told me that they believe the new guidance is actually decreasing the reporting of sexual assault, but

they cannot tell the department for fear of targeted investigation from OCR. This is information the department would have learned in an open process.

I raise all of these examples because of my great concern that this negotiated rulemaking session is going to mirror the other unilateral policy processes conducted over the last four years. My recommendation to the department is that it step back from imposing its current views onto higher education and listen to a real public consensus process. If it does not, it will either be a replay of the late Clinton administration, where Congress conducted an HEA reauthorization with no input from the administration, or it will see a tidal wave reversal four or five years hence, with no deference to the legal status quo because the department and its leadership refused similar deference to or input from any stakeholders with which it disagreed.

Thank you for the opportunity to speak with you today.