

# The Role of Accreditation Commissions in Higher Education: The Troublesome Case of Dana College

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## INTRODUCTION: EDUCATIONAL ACCREDITATION AND THE MARKET FOR INFORMATION

One of the standard results of modern economic theory is that it is far easier for consumers to obtain reliable information about goods than it is about services. The ordinary consumer of goods often buys fungible products in small quantities, which can typically be inspected before use. Even with respect to those attributes that are latent, experience with the initial purchase generates a lot of information about product characteristics that influences the willingness to make the next purchase.<sup>1</sup> With most consumer goods, individuals can rely on some mixture of search and experience.<sup>2</sup> They can rely on brand reputation, obtain free samples, review consumer reports, or rely on word-of-mouth endorsements from strangers and friends. Taken together, these multiple sources ensure that the information deficits for standard goods are relatively small, so that people know that once they purchase branded commodities they are confident of having uniform experiences from one case to the next.<sup>3</sup>

Services are often far more difficult to evaluate. To be sure, there are some services supplied by TV repairmen, plumbers, and

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<sup>1</sup> For a discussion of the relationship between search and experience goods, where the former refers to “qualities of a brand that the consumer can determine by inspection prior to purchase of the brand” and the latter refers to “qualities that are not determined prior to purchase,” see generally Phillip Nelson, *Information and Consumer Behavior*, 78 J Polit Econ 311 (1970) (exploring the implications of search and experience goods on market behavior). See also Phillip Nelson, *Advertising as Information*, 82 J Polit Econ 729, 730 (1974).

<sup>2</sup> See Nelson, 78 J Polit Econ at 321–23 (cited in note 1). See also Martin Meyers, *Meeting the Challenge of Marketing Intangibles*, 15 Acad Mktg Stud J 145, 147 (2011).

<sup>3</sup> See William M. Landes and Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J L & Econ 265, 270 (1987).

automobile mechanics whose quality can often be determined relatively quickly after use: we know whether the TV works, whether the pipes are still clogged, or whether the engine turns over. But with many types of services, such as health care and education, the evaluative process is a far chancier operation for two reasons. First, the time horizon on which these judgments have to be made is often quite long. Second, the nonstandard nature of the treatment and the intervention of other relevant causative factors make it difficult to determine whether favorable or adverse consequences should be attributable to the efforts of these service providers or the behavior of the service recipient. The likely fit between a given student and a given institution is often hard to measure, and the simple strategy of trying the product once and then switching to a close substitute if it fails to meet expectations does not work well in many service markets. Education at a college or university is ordinarily consumed in one-, two-, or four-year quantities, and any effort to switch educational institutions midstream is a costly alternative that in most settings (but not, as we shall see, in the case of Dana College) is taken up only by a relatively small number of students.<sup>4</sup> Choices are largely made in an environment that poses a high risk of information failure.

In markets characterized by delayed outcomes and massive confounding factors, reputation continues to matter, perhaps even more than it does with inspection-type goods. Yet the information shortfall systematically leads to the introduction of intermediate institutions to evaluate key information about these products. This is surely the case with education, where gaps in information about the quality of education have led to the rise of intermediate institutions whose function is to organize information about the comparative strength of different institutions in any given market segment.<sup>5</sup> It is for these reasons that the rankings offered in such publications as the *Princeton Review*,<sup>6</sup> *Bloomberg Businessweek*,<sup>7</sup> and *US News & World Report*<sup>8</sup> on colleges, business schools, and law schools pack so much punch.<sup>9</sup> They offer a common reference point that allows applicants

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<sup>4</sup> See Government Accountability Office, *Transfer Students: Postsecondary Institutions Could Promote More Consistent Consideration of Coursework by Not Basing Determinations on Accreditation 1* (Oct 2005).

<sup>5</sup> See Paul L. Caron and Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 *Tex L Rev* 1483, 1510–13 (2004).

<sup>6</sup> See <http://www.princetonreview.com/college-rankings.aspx> (visited Oct 22, 2011).

<sup>7</sup> See <http://www.businessweek.com/bschools/rankings> (visited Oct 22, 2011).

<sup>8</sup> See <http://www.usnews.com/education> (visited Oct 22, 2011).

<sup>9</sup> See Jeffrey Evans Stake, *The Interplay between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 *Ind L J* 229, 232–42, 244–60 (2006).

without direct information to make choices that, while imperfect, are thought to be more reliable than those choices that would be made in the absence of any such source of information.

One of the great virtues of this voluntary market is that entry into that space is not hampered by any form of government regulation. The information from one source can be offset, at least in part, by information gleaned from another source, which results in a useful, if imperfect, limitation on the information so generated. In some cases, organizations that receive negative rankings can—indeed, they are invited to—make presentations to these various ratings organizations, which may in some instances result in either the reworking of the standard or a revaluation of the institution in question.

In many ways, however, these self-generated, third-party evaluations are often incomplete; so, many educational institutions commission other organizations to rate their overall performance. From such modest origins are various accreditation systems born. It is no accident that accreditation systems tend to flourish in those areas where participation in the market is voluntary, which includes virtually all educational institutions above K–12 and the private educational market for the K–12 level. In one sense, these accreditation associations are more comprehensive than the standardized audits that many financial firms commission about their own affairs. Few private institutions are so confident of their own stature that they are willing to forsake all forms of evaluation by independent accreditation organizations of which they are a part.

In many instances, the voluntary nature of these organizations works well because what is sauce for the goose is sauce for the gander. As a matter of general practice, accreditation is, in the absence of special circumstances, conducted on a regular cycle of, say, seven years. Each institution starts with a detailed self-study in accordance with a strict protocol set out by the accrediting body. Once that study is completed, it is circulated to an accreditation team that is typically made up of senior members of other institutions within the group. The accreditation committee meets on its own to plan a site visit during which it collects information. After the visit, it writes a report that contains its recommendations and supporting reasons for the accreditation or reaccreditation of the school.<sup>10</sup>

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<sup>10</sup> See American Bar Association Section of Legal Education and Admissions to the Bar, *The Law School Accreditation Process* \*3–11, online at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2010\\_aba\\_accreditation\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accreditation_brochure.authcheckdam.pdf) (visited Oct 23, 2011).

In most instances, the programs work uneventfully. Because each school in turn is subject to evaluation by teams made up of people from other institutions, there is a natural check on what members are likely to say about others. Outright refusals to accredit established institutions are infrequent. But in some cases institutions can be put on probation, especially if they fall short on some key measurable variable relating to such matters as endowment, budget, student-faculty ratios, and the like.<sup>11</sup> Yet the sure knowledge that each institution will soon find itself in the dock tends to place some boundaries on the process. And in private markets at least, the threat to withdraw, either individually or as a group, can also place some constraints on how these accreditation bodies operate.

What is typical about how accreditation institutions operate need not be universal, and for two reasons. First, one implicit constraint against opportunistic behavior is a set of universal rules that binds all parties equally. Rules of that sort are difficult to form for markets that are undergoing rapid transformation. In addition, further difficulties arise in connection with accreditation institutions whose reach extends beyond the simple provision of information for members and the world at large. In this regard, it is critical to note that in many instances, decisions of accreditation agencies do not only supply information to the world at large. Rather, they also are used to meet legal preconditions for the ability of graduates of these institutions to participate in certain markets. Thus the accreditation system of the American Bar Association, which operates through its Council of the Section of Legal Education and Admissions to the Bar, becomes in practice relevant to whether graduates of those law schools may be licensed to practice law.<sup>12</sup> Indeed, the ABA is quite insistent in its belief “that every candidate for admission to the bar should have graduated from a law school approved by the ABA and

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<sup>11</sup> See, for example, Susan Kinzie, *Panel's Review Lands Medical School on Probation*, Wash Post B05 (Oct 16, 2008) (reporting that George Washington University School of Medicine and Health Sciences was put on probation by the Liaison Committee on Medical Education, making it the only institution on probation at the time and only the fifth since 1994).

<sup>12</sup> See American Bar Association Section of Legal Education and Admissions to the Bar, *2011–2012 Standards and Rules of Procedure for Approval of Law Schools* iv (2011), online at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2011\\_2012\\_standards\\_and\\_rules\\_for\\_web.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf) (visited Oct 23, 2011):

The majority of the highest courts of the states rely upon ABA approval of a law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied. Whether a jurisdiction requires education at an ABA-approved law school is a decision made by a jurisdiction's bar admission authority and not by the Council or the ABA.

that every candidate for admission should be examined by public authority to determine fitness for admission.”<sup>13</sup>

The clear implication of this statement is that the ABA hopes through its influence to make sure that it is the sole pathway through which accreditation can take place. Yet there is no explicit acknowledgement in this instance that any assertion of monopoly power—an evocative word that the ABA does not use to describe its powers—should be subject to any useful oversight on how these accreditation standards should be set and applied. The ABA could not, in my view, decide that the accredited law schools must all teach courses that speak to the superiority of capitalism, the inevitability of the social democratic state, the natural superiority of men over women, or the imperative social need for gender equality. The simple point here is that to the extent that this organization makes itself into a portal—and especially the exclusive portal—for occupational privilege, the correlative duties of nondiscrimination should be quite clear.<sup>14</sup>

#### I. THE ACCREDITATION PROCESS AND DANA COLLEGE

The same issue applies to educational accreditation that does not involve the practice of law. That observation quickly leads to the particular subject of this paper, which reexamines a decision of the Higher Learning Commission of the North Central Association of Colleges (HLC), which operates out of Chicago.<sup>15</sup> On June 30, 2010, it moved to deny a “change of control” application of Dana (which rhymes with the last syllable of banana) College. That application was filed by the Dana Education Corporation (DEC), a for-profit entity.<sup>16</sup> Clearly nothing can be done to reverse that decision. But this entire episode still offers an instructive lesson on the role of accreditation in modern undergraduate education in the United States.

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<sup>13</sup> *Id.*

<sup>14</sup> A similar issue was raised regarding the ability of Hastings College of Law to keep out student organizations that did not hew to its line on certain issues of gender equity. See *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, 130 S Ct 2971, 2979–81 (2010), which I criticized in *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 Cato S Ct Rev 105, 110.

<sup>15</sup> For information about this organization, see <http://www.ncahlc.org> (visited Oct 23, 2011).

<sup>16</sup> In the interest of full disclosure, one of DEC’s principals was my son-in-law, Daniel Pianko, who was slated to become the chairman of the board of trustees in the reconstituted institution. I had no role in filing the application and no financial stake in its operation. Indeed, I only learned of the transaction after HLC had rejected the application of DEC. I have written this entire paper by myself, based solely on information that is a matter of public record.

As with all stories, it is useful in this instance to note the two parties who squared off in this debate. HLC controls the accreditation for over a thousand colleges and universities located in nineteen states.<sup>17</sup> It is one of six regional accreditation organizations for four-year institutions in the United States.<sup>18</sup> All of these organizations today work closely with the Department of Education (ED), which is responsible for distributing massive forms of government aid, chiefly in the form of subsidized loans, to the students who attend these institutions. On a wide range of issues, the central mission of HLC and its sister organizations is to make sure that their accreditation stations work in harmony with ED on key issues such as defining a credit hour, on which the allocation of about \$150 billion in student aid currently turns.<sup>19</sup> The relationship between the six accreditation institutions and ED is obviously a large portion of any account of how these agencies operate, because there is no doubt that they have a dual capacity. In some instances, the accreditation institutions act as agents of the membership, but in others they act as agents of the federal government—especially on that critical issue of student aid.

On the other side of this transaction is, or was, Dana College, which was founded in 1884 by Danish pioneers as a small Lutheran college in the town of Blair, Nebraska, about twenty-five miles northwest of Omaha, overlooking the Missouri River.<sup>20</sup> As such, it was—for the school has now closed its doors forever—one of the

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<sup>17</sup> The nineteen states are: Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming. See [http://www.ncahlc.org/component/com\\_directory/Itemid,192/form\\_submitted,TRUE/institution,/showquery,/state,ANY/submit,Search/](http://www.ncahlc.org/component/com_directory/Itemid,192/form_submitted,TRUE/institution,/showquery,/state,ANY/submit/Search/) (visited Oct 23, 2011).

<sup>18</sup> See Council for Higher Education Accreditation, *Recognized Accrediting Organizations* \*1 (Aug 2011), online at [http://www.chea.org/pdf/CHEA\\_USDE\\_AllAccred.pdf](http://www.chea.org/pdf/CHEA_USDE_AllAccred.pdf) (visited Oct 23, 2011).

<sup>19</sup> The issue is right now front and center, for as ED explained in its letter to the six accreditation organizations:

The definition of a credit hour for Federal purposes is necessary, in part, because more than \$150 billion of Federal financial aid is awarded annually based on an individual student's enrollment, as represented in number of credits. The credit hour is a basic unit of student aid eligibility, and the new regulations address vulnerabilities in the student aid programs that leave them open to fraud and abuse.

Eduardo M. Ochoa, Assistant Secretary for Postsecondary Education, *Guidance to Institutions and Accrediting Agencies Regarding a Credit Hour as Defined in the Final Regulations Published on October 29, 2010* (Mar 18, 2011), online at <http://ifap.ed.gov/dpceletters/GEN1106.html> (visited Oct 23, 2011).

<sup>20</sup> For more information about the college, see generally William E. Christensen, *Saga of the Tower: A History of Dana College and Trinity Seminary* (Lutheran 1959); Peter L. Petersen, *A Place Called Dana: The Centennial History of Trinity Seminary and Dana College* (Dana 1984). For the most recent updates, see Wikipedia, *Dana College*, online at [http://en.wikipedia.org/wiki/Dana\\_College](http://en.wikipedia.org/wiki/Dana_College) (visited Jan 31, 2012).

many small colleges in the United States that served its core constituency well for many years. Its small faculty had 45 professors and 8 instructors, and its student body at the time of closing numbered 637, all of whom were able to finish their educations at other institutions once Dana closed its doors.<sup>21</sup>

Prior to that time, Dana had entered into a period of decline that accelerated over time. In the years before it closed its doors, it ran progressively larger deficits between 2005 and 2009.<sup>22</sup> By early 2010 the endowment stood at only \$1 million, which was not enough to sustain Dana past July 1, 2010.<sup>23</sup> The difficulties with its sagging enrollment lay at both ends, with insufficient recruitment efforts in the core region of Nebraska and Iowa, coupled with the inability to retain students after their first year, when close to 40 percent of the student body transferred to other institutions.<sup>24</sup> These internal difficulties were aggravated by the nationwide economic downturn that made it impossible for Dana to increase its alumni contributions even though it added two new development officers.

The dire internal situation made it clear to all concerned that Dana could survive as a college if only it could find outside financial support strong enough to alter that downward trajectory. One key question therefore was how to structure the change in control with the continuity of its mission. As a first step, Dana College in effect put itself up for sale by interviewing several potential takeover candidates.<sup>25</sup> Eventually the key college officials decided that DEC offered the best prospects for the survival and recovery of the college, and it thus acceded to a transaction whereby most of the assets of the college were to be sold to DEC, with the exception of land and buildings that were to be transferred to a nonprofit foundation, which was to operate as the successor to the original nonprofit college.<sup>26</sup> The land and buildings were in turn to be leased to DEC for an eighteen-year period.<sup>27</sup> DEC itself was not a freestanding entity. Rather, it was formed as the sole sponsor of the

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<sup>21</sup> See Wikipedia, *Dana College* (cited in note 20).

<sup>22</sup> Dana College Change of Control Request, Mar 12, 2010, \*6 (“Dana Change of Control Request”) (“In 2005 it was \$7.17M, in 2006 it was \$8.16M, in 2007 it was \$9.58M, in 2008 it was \$11.33M, and in 2009 it was \$12.55M.”).

<sup>23</sup> See *id.* at \*4, 6; Higher Learning Commission, *Public Disclosure Notice on Dana College* \*1 (Nov 30, 2010); Letter from Dennis Gethmann, Chair, Dana College, to Dr. Sylvia Manning, President, Higher Learning Commission \*1 (July 3, 2010) (on file with author).

<sup>24</sup> See <http://www.american-school-search.com/review/dana-college> (visited Oct 23, 2011).

<sup>25</sup> See Goldie Blumenstyk, *Dana College, Once under Pressure to Merge, Now Has a Buyer*, Chron Higher Ed (Mar 16, 2010), online at <http://chronicle.com/article/Dana-College-Once-Under-Pr/64687/> (visited Oct 23, 2011).

<sup>26</sup> Dana Change of Control Request at \*3 (cited in note 22).

<sup>27</sup> *Id.* at \*7.

new college. It in turn was a wholly owned subsidiary of Nebraska Higher Education, which received its financial support from a group called Chicago Growth Partners.<sup>28</sup>

By working on this deal, the DEC approach turned Dana College from a nonprofit institution that could claim tax-deductible contributions into a profit-making institution that could not receive such tax-deductible donations. In order to forestall the financial demise, the acquisition rested on a two-part strategy. The first part of that strategy called for an immediate infusion of \$4.5 million in cash from DEC to staunch the immediate cash drain. It was anticipated, but not guaranteed, that a second \$5.5 million contribution would then cover the deficits for the 2011–12 academic year.<sup>29</sup>

At the same time that these financial actions were taken, DEC sought to reconstitute how Dana ran its recruitment and retention operations. Part of that strategy depended on the ability to use Internet outreach as an effective recruitment tool: DEC's forte is in the aggressive use of the Internet as a marketing and recruitment tool. Down the road, DEC also proposed to allow its students, and students from other universities, to study abroad in a variety of new programs, as is commonly done in other colleges in its same educational niche.<sup>30</sup>

Part of it depended on the actions of Dana College insiders to improve the retention rate for current students. That effort was to be headed up by Janet Philipp after she stepped down from her role as president of the college. The college and DEC calculated that the marginal cost of adding new students would be low because the physical plant of the college had been expanded in the 1970s to accommodate a student body of around one thousand students.<sup>31</sup> It was therefore not necessary in the short run to expand the physical plant in order to expand enrollment.

Apart from these major changes, the primary emphasis in the Dana-DEC agreement was the retention of its mission statement and core values. On that point there was a certain irony. Dana had been

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<sup>28</sup> Letter from Gethmann to Manning at \*1 (cited in note 23); Blumenstyk, *Dana College*, Chron Higher Ed (cited in note 25).

<sup>29</sup> See Letter from Dr. Sylvia Manning, President, Higher Learning Commission, to Dr. Janet Philipp, President, Dana College \*2 (June 30, 2010) ("First Rejection Letter") (on file with author).

<sup>30</sup> See Lauren Etter, *A College Closes for Good as Rescue Plan Is Rejected*, Wall St J A3 (Sept 15, 2010).

<sup>31</sup> See *Dana College: Adaptive Reuse Opportunity* \*3 (CB Richard Ellis), online at [http://www.selectgreateromaha.com/omaha/media/docs/development/Dana%20College%20Campus%20\(Blair,%20NE\).pdf](http://www.selectgreateromaha.com/omaha/media/docs/development/Dana%20College%20Campus%20(Blair,%20NE).pdf) (visited Oct 24, 2011); Etter, *A College Closes for Good*, Wall St J A3 (cited in note 30).



founded as a Lutheran institution, and at the time of its closing, it was in fact a member of the Evangelical Lutheran Church in America.<sup>32</sup> Part of the new change-of-control agreement called for the college to sever that connection.<sup>33</sup> As such, that action represented a deviation from the long-time mission statement of Dana College, which read as follows: “[T]he establishment and maintenance of an institution of learning of collegiate rank, in which higher education shall be given in harmony with the Christian faith as taught by the Evangelical Lutheran Church in America.”<sup>34</sup>

The change, however, is one that would have been in the offing even if Dana had remained solvent so that no change-of-control agreement was required. Quite simply, the number of Catholic students at Dana College had for several years exceeded the number of Lutheran students, which would have forced the issue of institutional self-identification in any event. Given the absence of any perceived difference of mission inside Dana, the arrangement with DEC had gained the strong support of the administration, the faculty, the alumni, as well as both student and parent groups, who all saw the application as a lifeline and not a hostile takeover.<sup>35</sup> To the faculty at Dana College, the issue was whether the new management would retain the “tradition of excellence” of Dana College as it historically operated.<sup>36</sup> Its letter claimed that the faculty had received “ample assurance that Dana’s tradition of excellence will not only be maintained but enhanced.”<sup>37</sup> It also stated that the faculty was “particularly enthusiastic about DEC’s plans to create a robust study abroad program.”<sup>38</sup> Officials from other universities chimed in with their unqualified support of the change-of-control request.<sup>39</sup> In their view, the change of control would make roughly

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<sup>32</sup> See *ELCA’s Dana College to Close, Board of Regents Announces* (Evangelical Lutheran Church in America News Service June 30, 2010), online at <http://www.elca.org/Who-We-Are/Our-Three-Expressions/Churchwide-Organization/Communication-Services/News/Releases.aspx?a=4567> (visited Oct 24, 2011).

<sup>33</sup> See *Dana College to be Sold, Will End Affiliation with ELCA* (Evangelical Lutheran Church in America News Services Mar 17, 2010), online at <http://www.elca.org/Who-We-Are/Our-Three-Expressions/Churchwide-Organization/Communication-Services/News/Releases.aspx?a=4482> (visited Oct 24, 2011).

<sup>34</sup> See *Dana College Catalogue 2009–2011* \*3, online at [http://www.dana.edu/downloads/DanaCollegeCatalog09-11\(1\).pdf](http://www.dana.edu/downloads/DanaCollegeCatalog09-11(1).pdf) (visited Oct 24, 2011).

<sup>35</sup> See Letter from Dana College Faculty Senate to Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 1, 2010) (on file with author).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Letter from Patricia Carlson, Undergraduate Program Coordinator, and Theresa Barron-McKeagney, Director, University of Nebraska–Omaha School of Social Work, to Higher Learning Commission (May 3, 2010) (on file with author); Letter from John E.

those changes that the old management would have done if it had been able to remain in power as part of its natural course of evolution. But one of the keys to the deal was the conviction of the Dana College board of regents that DEC had a strong understanding of, and commitment to, the new mission.

The support for the transaction was not confined to the college itself. In addition, it had the support of a larger number of major public figures in Nebraska, including its two senators, E. Benjamin Nelson<sup>40</sup> and Mike Johanns,<sup>41</sup> former senators Bob Kerrey (by that time president of the New School)<sup>42</sup> and Chuck Hagel,<sup>43</sup> Governor Dave Heineman,<sup>44</sup> Michael Flood, the Speaker of the Nebraska state senate,<sup>45</sup> and Jeff Fortenberry, the state senator for the district in which Dana was located.<sup>46</sup> Letters in support of the proposal were also submitted by the mayor and council members of Blair, Nebraska,<sup>47</sup> and on behalf of the various merchants and civic groups in Blair.<sup>48</sup>

In looking at this transaction, it is evident that it was a high-risk operation even under the best of circumstances. Both halves of the

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Christensen, Chancellor, University of Nebraska–Omaha, to Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 20, 2010) (on file with author); Letter from Adam R. Nelson, Associate Professor, University of Wisconsin–Madison, to Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (on file with author); Letter from Dr. Jack Kay, Provost and Executive Vice President, Eastern Michigan University, to Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (May 7, 2010) (on file with author).

<sup>40</sup> See Letter from E. Benjamin Nelson, United States Senator, to Dr. Sylvia Manning, President, Higher Learning Commission (Apr 30, 2010) (on file with author).

<sup>41</sup> See Letter from Mike Johanns, United States Senator, to Dr. Sylvia Manning, President, Higher Learning Commission, and Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 15, 2010) (on file with author).

<sup>42</sup> See Letter from Bob Kerrey, President, The New School, to Dr. Sylvia Manning, President, Higher Learning Commission, and Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (May 4, 2010) (on file with author).

<sup>43</sup> See Letter from Chuck Hagel, Former United States Senator, to Dr. Sylvia Manning, President, Higher Learning Commission, and Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 23, 2010) (on file with author).

<sup>44</sup> See Letter from Dave Heineman, Governor of Nebraska, to Dr. Sylvia Manning, President, Higher Learning Commission, and Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 23, 2010) (on file with author).

<sup>45</sup> See Letter from Michael J. Flood, Speaker of the Nebraska State Senate, to Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 21, 2010) (on file with author).

<sup>46</sup> See Letter from Jeff Fortenberry, Nebraska State Senator, to Dr. Sylvia Manning, President, Higher Learning Commission (Apr 27, 2010) (on file with author).

<sup>47</sup> See Letter from City of Blair to Dr. Sylvia Manning, President, Higher Learning Commission, and Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 27, 2010) (on file with author).

<sup>48</sup> See Letter from Blair Area Chamber of Commerce to Dr. Karen Solomon, Vice President for Accreditation Relations, Higher Learning Commission (Apr 22, 2010) (on file with author).

plan had to kick in quickly for the revival effort to succeed, for the outside cash was only sufficient to make the college self-sustaining financially for two years at most. Yet by the same token, all the parties had some confidence that they could pull off the program, for otherwise Dana had no reason to choose this option over others, and the investors in DEC had no reason to spend \$10 million that they could never hope to recoup.

The key for having this deal happen depended on receiving a transfer-of-control approval from HLC, for otherwise its students would be ineligible to receive subsidized federal loans under Title IV that were available to a wide range of nonprofit and for-profit institutions.<sup>49</sup> The accreditation process itself was a difficult one, for Dana College submitted its change-of-control request on March 15, 2010, knowing that its resources could last only until July 1, 2010—the day after HLC responded to the request for the approval of the application. What made matters more difficult is that accreditation works through a two-stage process whereby a special committee investigates the request, after which it writes a report to HLC, whose board then makes the final decision.

The first stage in this process took place with an extensive site visit on May 13–14, 2010,<sup>50</sup> where the accreditation team of four members contained two representatives of HLC, including Karen Solomon, who, as vice president of Accreditation Relations was either the sole or the second addressee on many of the letters that poured into HLC during April and May of 2010. The field report followed an intensive investigation with a large on-campus component, during which the team met with all the faculty and staff of Dana College and with representatives of DEC. In essence that report recommended that the change of control be approved for reasons that bought into the Dana narrative described above: “[T]he Fact-Finding Team found that all participating parties involved are acting in good faith, that they are working intensely to bring all transactions into alignment, and there is evidence that all parties are committed to bringing successful closure to the proposed transaction in a timely manner.”<sup>51</sup> The report was well aware of the financial risks outlined above, but took this overall position:

Dana College has a rich and unique history intertwined with that of Blair, Nebraska and the region. One strength of the

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<sup>49</sup> For the details of Title IV, see generally Department of Education, *Title IV Programs*, online at [http://federalstudentaid.ed.gov/about/title4\\_programs.html](http://federalstudentaid.ed.gov/about/title4_programs.html) (visited Oct 24, 2011).

<sup>50</sup> See *Dana College Fact-Finding Team Report* \*2–6 (unpublished report, May 13–14, 2010) (on file with author).

<sup>51</sup> *Id.* at \*6.

proposed transaction is that it would provide the opportunity for that history to continue to evolve. Considerable effort has been made to engage in a high level of verbal communication with members of the current Board of Trustees, faculty, staff, students, and members of the Blair, Nebraska community. To have failed to engage in these conversations would make it possible to conclude that the proposed transaction is a sham to transfer the name and accreditation of a proud institution as though a mere conduit for revenue. The representatives of the Dana College community who talked with members of the team conveyed their trust in the individuals working on behalf of the DEC.

Another strength is that if the change of control occurs, and the plans articulated by the Dana Education Corporation come to fruition, the college will be much stronger. There is reason to be optimistic for this outcome because the investors will do everything they can to protect and enhance the value of their investment. There is also great constituent support for this transaction given that it seems to be the only way for this institution to stay open. Dana College community members know that without this transaction, or one similar, Dana College would not hold classes come fall of 2010.<sup>52</sup>

At this point, the clear betting would have been that approval for the change of control was in the bag, given that Solomon was also a part of the final review team at HLC. It is impossible to draw definitive conclusions about either the make-up of this team or its decision-making process because I do not have access to the “staff recommendation” that the fact-finding team made to HLC. But in light of the fact that two of its four members were from HLC,<sup>53</sup> it seems as though that recommendation would have had to have been positive in keeping with the overall tenor of its balanced and fair-minded report. In light of these important background facts, it has to be rated on the record as something of a surprise that the Board of HLC rejected the change of control. Nonetheless it seems clear that in this instance more than the record was at work. What clearly mattered was the strong intervention of Senator Tom Harkin, who, during a March 11, 2010, committee hearing on the status of for-profit colleges, raked Sylvia Manning over the coals because she had

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<sup>52</sup> Id at \*6–7.

<sup>53</sup> See id at \*1.

approved the Ashford University transaction. It is worth noting some of the highlights of the Senate hearing:<sup>54</sup>

Sylvia Manning, president of the regional agency [(HLC)] that accredited Bridgepoint's Ashford University, probably wishes she too had found an excuse not to attend.

The hearing before the Senate Committee on Health, Education, Labor and Pensions was framed as a "case study" of how for-profit colleges have embraced online education to fuel explosive growth and drive large profits, and Bridgepoint [which owns Ashford University] and for-profit colleges in general took a lot of hits from Harkin. He at one point called Bridgepoint "a scam, an absolute scam."

... Harkin, for one, made it clear that he believes many accreditors lack the expertise to keep tabs on the increasingly complex operations of the biggest for-profit colleges, and warned that "something has got to change" if the agencies—as the federal government's subcontractor on assessing institutional quality—are to continue to grant colleges access to federal financial aid.<sup>55</sup>

At this point, the link to Dana College was made explicit when Harkin asked about how Manning's operation had changed since the Ashford incident:

"Unfortunately, [the accreditation process] wouldn't have [stopped the abuses] a couple years ago," but it would now, Manning said, citing a series of new policies that the Higher Learning Commission has, or soon will, put in place, which will flag institutions that change programs significantly or increase the size of distance programs. She also noted on multiple occasions that in the past year, the accreditor has twice rejected efforts to transform struggling nonprofit colleges (Rochester College in Michigan and Dana College in Nebraska) into for-profit institutions—suggesting "our new, strengthened policy on acquisition."<sup>56</sup>

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<sup>54</sup> See Doug Lederman, *More Than Bridgepoint on Trial*, Inside Higher Ed (Mar 11, 2011), online at [http://www.insidehighered.com/news/2011/03/11/senate\\_hearing\\_on\\_for\\_profit\\_colleges\\_singes\\_accreditors\\_as\\_well\\_as\\_bridgepoint](http://www.insidehighered.com/news/2011/03/11/senate_hearing_on_for_profit_colleges_singes_accreditors_as_well_as_bridgepoint) (visited Oct 24, 2011).

Harkin has made the accreditation issue a prominent part of his website. See <http://harkin.senate.gov/help/forprofitcolleges.cfm> (visited Oct 24, 2011).

<sup>55</sup> Lederman, *More Than Bridgepoint*, Inside Higher Ed (cited in note 54).

<sup>56</sup> *Id.*

At this point, it becomes possible to put into context the reasons for the denial of accreditation that Manning offered to Janet Philipp in her letter of June 30, 2010.<sup>57</sup> Her three-page letter also notes that HLC took into account all of the materials submitted by the college, the report of the fact-finding team, and the staff summary report.<sup>58</sup> Nonetheless, that letter looks to be incompatible with the underlying record in ways that augur ill for any future application for a change of control from nonprofit to profit-making institutions. The letter does not say that the board decision was unanimous, which seems unlikely given that Karen Solomon was on the fact-finding team. But there is no direct confirmation on the point. It could have been that Solomon did not vote in opposition to her president, Manning, who could have never written the letter she did if, as president, she had dissented from the decision of the board.

It is worth looking at the key points of the letter as it addresses the four central factors that guided HLC's denial of the Dana College application.

First, the letter insisted that there could not be "sufficient continuity" with the previous mission owing to the possibility that "the educational programs anticipated by the buyers include online or hybrid programs, or study abroad programs to non-Dana College students, which are not the residential liberal arts programs that have been historically offered by Dana," even though these are people "who are not the historic populations of Dana students."<sup>59</sup>

It is hard to imagine a less persuasive case on this dimension. It was recognized by everyone at the college and on the fact-finding team that the college had to change or it would perish. Wholly without regard to any change-of-control status, many colleges and universities introduce overseas exchange programs and avail themselves of online tools to advance their mission. It is hard to think that any current college would lose its accreditation if it took those same natural steps for expansion. It then seems extremely odd to reject the application on these grounds. There is no reason why any system of accreditation should lock any college or university into a losing business strategy, with or without a change of control.

Second, the First Rejection Letter seriously misstates the timing of the various reforms. As all the internal documents at Dana College and the fact-finding report make clear, the first line of business was to control costs and to boost enrollment on campus. The online activities integral to that task, insofar as they related to

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<sup>57</sup> First Rejection Letter at \*1-2 (cited in note 29).

<sup>58</sup> *Id.* at \*2.

<sup>59</sup> *Id.* at \*1.

recruitment, would have to be introduced immediately. The effort to run overseas programs, whether a good or bad idea, would only take place at some future time, if it took place at all. The use of the verb “anticipated” in the First Rejection Letter has no temporal qualifier, which makes it odd to deny a transfer of control today for programs that might take place, if at all, five or ten years in the future.<sup>60</sup> Surely, the sensible alternative is to approve the current transfer and to reserve the right to evaluate either the online or overseas ventures when they are in sufficiently concrete form. Reaccreditation is required as a matter of course for all institutions. It allows ample time for these matters to be sorted out on a more complete record.

The second factor relates to the revised governance structure as it must be structured to (1) “legally enable the organization to protect its institutional and educational integrity,” and (2) “promote effective leadership and support collaborative processes that enable the organization to fulfill its mission.”<sup>61</sup> The First Rejection Letter claims that the change-of-control transaction failed to meet this test because the Dana College board “lacks sufficient autonomy from the shareholder to make critical decisions including but not limited to hiring/firing the CEO or approving the operating budget, to protect the integrity of the College.”<sup>62</sup>

The objections to this conclusion in the First Rejection Letter have both a broad and narrow basis. On the narrow ground, the First Rejection Letter contains absolutely no specific reference to any of the findings contained in the fact-finding report, which indicated precisely the opposite. The high level of voluntary buy-in from everyone at Dana College, such as the willingness of outgoing President Philipp to take a supporting role on the new venture, offers powerful evidence that the transaction in question took all sorts of preliminary steps to assure the degree of collaboration needed to make this operation run.

The broader implications of this decision cast a huge shadow over the for-profit control of any small liberal arts college. More concretely, the denial of the change-of-control request in the First Rejection Letter does not rest on any specific element of the DEC transaction. It turns solely on the a priori ground that *any* change of control to a for-profit entity will necessarily founder on this one ground, for it is always possible that some conflict will arise between the interests of the shareholder and the college that needs to be resolved. It is as if the only criterion that matters is the phrase

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<sup>60</sup> Id at \*1.

<sup>61</sup> First Rejection Letter at \*1-2 (cited in note 29).

<sup>62</sup> Id at \*2.

“legally enable.” But if that is the concern, then the appropriate response is to announce in advance a per se rule that prohibits transfers of nonprofit educational institutions to for-profit institutions. So understood, there is then really no reason to require anyone to go through the time and expense of preparing any fact-finding reports in the first place, because of the incurable corporate taint. Announce the rule in advance, and the whole process comes to a stop before it begins, which would mean that Dana College would never have a chance to react to the one proposal that it thought best increased its chances of survival.

At the same time, if we run the logic in reverse, it becomes clear that, since these change-of-control transactions are allowed in principle, it cannot be correct for HLC to veto them at the time of the initial application on the mere prospect of some future conflict over educational control. As with the previous question of the continuity of mission, there is no reason to make a definitive judgment on future outcomes when the application is filed, at least in cases that exhibit extensive coordination and cooperation between the current college officials and their new owners. Reaccreditation is still part of the process, and any worst-case scenarios that turn out to be true can wait for resolution until that time. The accreditation denial on the initial applications should be reserved for those cases where a hostile takeover that could easily cloud future cooperation exists. Further, the utter unwillingness to refer to either the supporting letters or the fact-finding report represents a serious dereliction of duty. Any commission that rejects its fact-finding report should always give clear and explicit reasons as to why it chose to take that course of action. Silence on that issue is a clear abuse of administrative discretion.

The third factor referred to in the First Rejection Letter addresses the sufficiency of the financial support. As noted earlier, no one was under any illusion that the initial contribution of \$4.5 million in new cash was sufficient to turn the operation around, but as the fact-finding report explicitly noted, Dana could not open for fall classes unless this deal went through. And everyone agreed that the transaction was fraught with uncertainty and risk. But the right question in this instance is to ask, “Compared to what?” On this point, the fact-finding panel noted the whole project was at the “mercy” of getting additional funds “because the investors will do everything they can to protect and enhance the value of their investment.”<sup>63</sup> So the real choice here is certain failure versus a

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<sup>63</sup> *Dana College Fact-Finding Team Report* at \*7 (cited in note 50).



possibility of success that comes with the transfer in question. At this point, a simple error analysis gives a clue to the proper choice: let them go ahead, as the only alternative to DEC is a complete shipwreck. The DEC alternative offers a positive chance of success by a party that has put its money on the line. If it fails, the college will fail anyhow, and HLC would not have blood on its hands. The fact-finding team noted all these complications, but still had a generally positive tone.

That level of confidence may well have been fully justified. Although it was not discussed in the Dana College materials, HLC had, in the previous year, approved a change-of-control request for a similar small Lutheran institution, Waldorf College of Forest City, Iowa, which was in a similar financial predicament.<sup>64</sup> The buyer in that case was Columbia Southern University, which took over Waldorf in 2009.<sup>65</sup> By May 2010, Columbia Southern had nurtured Waldorf back to financial health by adding new degrees in business, psychology, criminal-justice administration, and fire-science administration. It raised faculty salaries on term (not tenure) contracts and lowered its tuition as it reached out for online students.<sup>66</sup> Many of these activities were in progress when the Dana application was reviewed, but the comparisons were not made. But the instructive point here is that the infusion of entrepreneurial skills can turn bad situations around by using techniques whose efficacy was not apparent to HLC.

On the fourth factor, the First Rejection Letter noted that the new team put in place by DEC was inexperienced in dealing with the transactions of running a liberal arts college, even if they had extensive experience in working in the for-profit educational space.<sup>67</sup> But once again, this point had fully been disclosed to everyone, and the conclusion on that ground was that they had the right intellectual skills and temperament to make this new venture work. It was perfectly clear that DEC impressed both all the insiders and the fact-finding team. Yet neither the supporting letter nor the fact-finding report referred to either of these sources.

In the end, therefore, the key element is just as it was before. Inexperience compared to what is the question. Since the alternative was to go under, the correct result is to abide the event and allow the

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<sup>64</sup> For a fuller account, see Lawrence Biemiller, *Sale to a For-Profit Company Pulls a College Back from the Brink*, Chron Higher Ed (May 29, 2011), online at <http://chronicle.com/article/Sale-to-For-Profit-Company/127687/> (visited Dec 28, 2011).

<sup>65</sup> See Scott Jaschik, *The Sale of Waldorf*, Inside Higher Ed (May 6, 2009), online at <http://www.insidehighered.com/news/2009/05/06/waldorf> (visited Oct 24, 2011).

<sup>66</sup> See Biemiller, *Sale to a For-Profit Company*, Chron Higher Ed (cited in note 64).

<sup>67</sup> See First Rejection Letter at \*2 (cited in note 29).

operation to go into effect, knowing that the shared goodwill could make up for these deficits. If they did not, the college would fail anyhow. To be sure, the board held out this olive branch to the college—the option for DEC to file its own separate application for approval after a site visit in time for the board meeting of February 2011,<sup>68</sup> which, even if granted, would have left the situation in limbo until full accreditation could have been awarded. But given what is said above, a decision to schedule a shortened period for review after one year or eighteen months would have allowed DEC to put its house in order so that there would be something to present.

The June 30th letter was not the last exchange between Dana and HLC. During the days that followed, the head of the Dana board of regents made a direct appeal to Manning, who turned it down cold in her response of July 5, 2010.<sup>69</sup> The letter from Dana's board of regents indicated that it lay within the power of HLC to offer a conditional approval of the transaction, which might have addressed the online and overseas aspects of the program.<sup>70</sup> But as Manning responded, HLC declined to exercise its discretion over this matter:

The fact that the College *might* close in the event of a denial is significant, but by Commission policy it is not among the factors on which the decision to extend accreditation must be based. The decision to extend accreditation is based on the Board's judgment of whether the proposal advanced by the College and its buyers shows that the approval factors outlined in the policy are met. In this case, the Board reasonably determined that they were not met.<sup>71</sup>

The letter also reiterated that the buyers could submit a new application in the next several months, without any presumption of its approval.<sup>72</sup> To do so would have required an extensive investment in the interim period, with no greater prospect of success, given that the situation on the ground would have surely deteriorated further without the accreditation in hand. The July 5th letter from Manning also mentioned the possibility that Dana College could become a branch of another institution, but again not within any sensible timetable.<sup>73</sup> It was clear to everyone that the denial of accreditation spelled the end of Dana College. The Second Rejection Letter

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<sup>68</sup> See *id.*

<sup>69</sup> See Letter from Gethmann to Manning at \*1–2 (cited in note 23); Letter from Manning to Dennis Gethmann, Chair, Dana College \*1–2 (July 5, 2010) (“Second Rejection Letter”) (on file with the author).

<sup>70</sup> See Letter from Gethmann to Manning at \*1 (cited in note 23).

<sup>71</sup> Second Rejection Letter at \*2 (cited in note 69).

<sup>72</sup> See *id.* at \*3.

<sup>73</sup> *Id.* at \*2.

insisted the college's closure was "ultimately" the choice of the college, not of the HLC.<sup>74</sup>

## II. LESSONS FROM THE DANA SHIPWRECK

Looking over this sequence, it is clear that the rocky reception that Dana College received from HLC presents an important challenge to all accreditation proposals. How does one deal with future uncertainty in connection with the current prospects?

Without the ability to gain accreditation in the short run, the entire organization had to fold. As the last page of the letter from Dana's board of regents to Manning made clear, the denial of accreditation is not just a private act.<sup>75</sup> It is one that has real public consequences. To be sure, the transfer of control could go forward so long as DEC and Dana College were willing to stay in business without accreditation. If the only thing that accreditation did was to supply a "Good-Housekeeping Seal of Approval" to the college, it might have taken that course. But as the closing paragraphs of the Second Rejection Letter make clear, the denial of accreditation quite simply means that students who attended the struggling college could not obtain the same tax-subsidized Title IV loans from the federal government that would be available to all its competitors.<sup>76</sup> No institution on either the for-profit or nonprofit side of the line can operate in an environment where it is denied the subsidy that is given to its key competitors.

The question here is not, of course, whether the overall program of government subsidies to educational loan programs is or is not a good idea. In general I think that it is a bad idea. First, it distorts the choices that students make in their own educational careers.<sup>77</sup> Second, it puts the federal government in the business of defining how these institutions should be accredited for the loan programs, which necessarily requires all sorts of oversight of private institutions and high compliance costs. Thus, to give only one example of the endless struggles that have to be faced in this regard, the process of accreditation raises the question, "Accreditation for what?" As reports from ED make amply clear, it is in the interest of both accredited institutions and students to reduce the requirements for earning a credit hour in order to increase the fraction of education

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<sup>74</sup> Id.

<sup>75</sup> See Letter from Gethmann to Manning at \*2 (cited in note 23).

<sup>76</sup> See Second Rejection Letter at \*2-3 (cited in note 69).

<sup>77</sup> See Neil S. Seftor and Sarah E. Turner, *Back to School: Federal Student Aid Policy and Adult College Enrollment*, 37 J Hum Res 336, 349 (2002).

that can be covered by subsidized loans.<sup>78</sup> It is of course wholly improper for the government to acquiesce in private efforts to degrade the appropriate credit standards, just as it is improper for any guarantor of a loan to be indifferent to the collateral that the primary lender receives for the loan in question. The question here, however, is twofold. The first part is whether the standards of review should be tilted in favor of nonprofit over for-profit institutions. And second, in dealing with individual cases, how the accreditation process should work to ensure sensible decision making.

On the first of these questions, the clear concern in all cases is that for-profit institutions are more prone to investor fraud and abuse than the nonprofit institutions, which do not have the same opportunities for abuse. It is more difficult to take money out of a nonprofit institution that does not allow dividends than it is from a for-profit institution, which makes that option available. But even this point does not deny that for-profit institutions have several advantages over their nonprofit competitors. In the first place, they do not place any direct drain on state and local governments, which often provide extensive subsidies for their in-state institutions, including the community colleges and specialized programs that account for the loan dollars. In general, it is less advisable to provide subsidies for parties who have already received them than it is for parties who have not already been so involved.

In addition, nonprofit institutions are more likely to be innovators in education if only because they are more open to change in dealing with new circumstances. Thus, in the Dana College situation, it is odd that accreditation should have faltered on the college's willingness to adopt new online approaches to recruitment and retention that most of these smaller institutions have done. It follows, therefore, that the fraud issue may in some cases—perhaps many cases—hoist a red flag over these accreditation reviews. But, in light of the stated intention to preserve (to the extent possible) the residential on-campus environment of a small-town college, the atypical Dana College transaction did not raise this risk above a background level.

The second question is what, if anything, could or should be done in order to prevent the miscarriage of justice in the instant case. The first point to note is that the types of remedies that might be available in principle are heavily dependent on the legal status of HLC. Should it be treated as though it were just another private institution doing its own work, or should it be regarded as a

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<sup>78</sup> See note 19 and accompanying text.

government agency whose actions necessarily attract scrutiny as a constitutional matter, most notably in this context under the Due Process Clauses of the Fifth and Fourteenth Amendments, given that HLC has relationships with both state and federal agencies? As a constitutional matter, I regard this question as straightforward. Those agencies that act as portals for government approval programs are state actors to the extent that their actions influence the ability of individuals to recover state or federal money. It cannot be the law that a single body that has the power to grant or deny government benefits should be treated as a mere private actor when it exerts its crucial gatekeeper function to federal funds.

The applicable constitutional issues are easy enough to discern. The case law on this point has always been willing to treat the question of whether the state or federal government “denies” someone life, liberty, or property without due process of law as one of state action,<sup>79</sup> which is surely involved here. Indeed, in this case, it is not necessary to go as far as 1961, when the Supreme Court, in *Burton v Wilmington Parking Authority*,<sup>80</sup> found state action under a “facts and circumstances” test when the parking authority allowed its tenant to discriminate on the grounds of race in deciding who should be able to use its restaurants.<sup>81</sup> The role of HLC is surely far closer to the state action side of the line, since the federal government has explicitly announced that it requires all accreditation organizations to follow its explicit guidelines on such crucial issues as the definition of an academic hour of credit.

The hard question is what to do with this classification once it is established. In the first place, it raises the question of whether the decision made with respect to Dana College was done only after there had been some communication between HLC and ED with respect to the case. Given the huge attention that is now being given to the status of for-profit institutions with respect to federal loans, it is altogether possible that ED did have conversations of some sort with HLC. In and of itself, these conversations should be welcomed if they improve coordination across the different accreditation divisions. The necessity for this high-level cooperation conclusively resolves the state action question and thus requires HLC to meet the constitutional standards of procedural due process.

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<sup>79</sup> See, for example, *Palmer v Columbia Gas of Ohio, Inc.*, 479 F2d 153, 160 (6th Cir 1973).

<sup>80</sup> 365 US 715 (1961).

<sup>81</sup> *Id.* at 725 (finding that Delaware’s inaction in addressing discrimination at a restaurant meant that the state “not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination”).

Did they? At one level the answer seems surely yes. There were general rules, a specific investigation team, the opportunity to submit evidence, and a written report that contained a statement of reasons for the decision in question. So a frontal assault on the processes in question surely fails. But at a second level, there is real doubt whether the standard in question should be challenged as arbitrary and capricious. Normally, this standard poses a heavy burden on government officials, even if there are cases in which the phrase has been read so as to invalidate decisions that ignore relevant factors or take into account irrelevant ones.<sup>82</sup>

Unfortunately, in this instance, the argument for arbitrary and capricious behavior stems from two features. The first is the radical disjunction between the information collected in the record, and the final determinations on questions of fact. It is not enough just to note that all the information in question has been read. It is absolutely critical that the board explain its final decision when it chooses to reject the recommendations of the fact-finding commission, especially when it makes findings that are nowhere supported by any evidence in the record. It is equally arbitrary in the choice of remedy to shut down an institution on the basis of what might happen someday in the future instead of allowing it an opportunity to show the feared consequences did not come to pass. The direct command is too potent for the circumstances at hand. Try as one might, there is zero support in the First Rejection Letter for the conclusions that it reached.

The fiendish question here is to figure out what passes for a remedy when the denial or approval for a change of control comes one day before the institution has to close its doors. On this score, it is pointless to initiate any litigation, which only slows down the process still further without providing the instant relief that is needed. The only way that this could seemingly work would have been to ask for a judicial order for a provisional accreditation before the HLC review process was complete, which would have been a dead loser on ripeness grounds as a matter of hornbook administrative law.<sup>83</sup> Sad, but true: once the decision is made, it is immune from judicial review.

That situation is of course intolerable as a matter of first impression. But if no private actions can cure the defect, then all

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<sup>82</sup> See, for example, *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 416 (1971), abrogated in part by *Califano v Sanders*, 430 US 99, 105 (1977).

<sup>83</sup> See Charles Alan Wright, et al, *13B Federal Practice and Procedure: Jurisdiction and Related Matters* § 3532.6 (West 3d 2008), quoting *Abbott Laboratories v Gardner*, 387 US 136, 148–49 (1967).

attention must be turned to administrative remedies within the system. On this ground, the key catalyst should be ED, which should take the lead in setting standards for reviewing change-of-control applications that involve the use of provisional accreditation, coupled with an expedited review thereafter. These rules should be announced in advance by all these agencies, so that they will be subject to severe administrative sanctions if they pull a repeat of the Dana College situation. Indeed, the only way to get to the bottom of this situation is for ED to run its own investigation of HLC in order to review the internal documents prepared after the submission of the fact-finding team. What did the summary of the case provide? Who wrote it? What happened inside the final review meeting that led to the rejection of Dana's change-of-control request? Was the vote unanimous? If not, who dissented and why? If so, who changed positions and why?

The stakes here are high because if the Dana-DEC application cannot pass muster, it is hard to imagine any private takeover of a nonprofit college by a for-profit institution could gain accreditation. As the fact-finding team noted, the private parties all have incentives to structure their arrangements for their mutual gain.<sup>84</sup> The presumption should be, therefore, that the new arrangements will address difficulties that were not solved under the older system. To insist that there be no change of character in an institution ignores the powerful point that failing institutions, when acting under serious pressure, can only succeed if they take bold steps to change their character. That was the situation for Dana College. In other cases, the change of control may not be a life-or-death situation, so that closure is not the inevitable byproduct of the administrative denial. But in the end, these cases, too, should be subject to provisional approval, for otherwise the delay could easily lead to a demise of an institution whose self-help could have saved it. The purpose of accreditation is to maintain standards, not to close institutions before they have a chance to show that their new plans will improve their institutional performance.

Accreditation is never an engine for innovation or change. It is at best a brake on reckless action that should be stopped before it starts. But these reckless actions are few and far between. There is nothing that can be done to lift Dana College from the grave. But there are simple yet powerful administrative reforms that could prevent the recurrence of a wasteful and senseless act: the premature destruction of another Dana College.

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<sup>84</sup> *Dana College Fact-Finding Team Report* at \*7 (cited in note 50).