



October 20, 2023

Middle States Commission on Higher Education
1007 North Orange Street
4th Floor, MB #166
Wilmington, DE 19801

Dear Middle States Commission on Higher Education,

On behalf of the American Council on Education (ACE) and the undersigned higher education associations, I write regarding the proposed third-party providers policy from the Middle States Commission on Higher Education (MSCHE).¹ The relationships that institutions of higher education have with third-party servicers, particularly online program managers (OPMs), have recently undergone increased scrutiny. While we believe a 16-day comment period is less than sufficient to receive substantive comments that will better inform the policy proposal, we appreciate this opportunity to share our views on the policy changes MSCHE is considering.

The Department of Education (Department) embarked on an effort to increase oversight of third-party servicers (TPS) earlier this year, beginning with a Dear Colleague Letter (DCL), to “clarify that entities performing the functions of student recruiting and retention, the provision of software products and services involving Title IV administration activities, and the provision of educational content and instruction are defined as third-party servicers.”² The Department also held a listening session, in which ACE submitted comments, to gather feedback from stakeholders on how the 2011 sub-regulatory guidance could be improved.^{3,4,5}

The DCL was originally set to take effect on May 1 but was extended to Sept. 1, and ultimately postponed entirely until a later, as yet undetermined, date.⁶ The DCL

¹ Middle States Commission on Higher Education. (2023). *Third-party providers policy*.

<https://msche.app.box.com/s/cjvoem4q55vgp58xla52qvubtzteo12><https://www.cancer.gov/publications/patient-education/takingtime.pdf>

² Federal Student Aid. (February 15, 2023). *Requirements and responsibilities for third-party servicers and institutions (updated May 16, 2023)*. <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-may-16-2023>

³ Announcement of Listening Sessions, 88 FR 10101 (February 16, 2023).

<https://www.federalregister.gov/documents/2023/02/16/2023-03261/announcement-of-listening-sessions>

⁴ American Council on Education. (March 16, 2023). [Comments to Possible Changes to EDs Incentive Compensation Prohibition and Bundled Services]. Retrieved from <https://www.acenet.edu/Documents/Comments-ED-Bundled-Services-031623.pdf>

⁵ Program Integrity Issues, 75 FR 66832 (October 29, 2010) (to be codified at 34 C.F.R. pts. 600, 602, 603, 668, 682, 685, 686, 690, & 691). <https://www.federalregister.gov/documents/2010/10/29/2010-26531/program-integrity-issues>

⁶ Federal Student Aid. (May 16, 2023). *Update to third-party servicer guidance in GEN-23-03*.

<https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-05-16/update-third-party-servicer-guidance-gen-23-03>

received over 1,000 comments, including comments from ACE.^{7,8} In our comments, we shared that the DCL would:

- Dramatically expand the number of entities subject to TPS requirements and would disrupt important educational services that support students;
- Create a significant burden for institutions and outside entities that disrupts the ability of institutions to provide critical educational services; and
- Raise serious concerns regarding the prohibition on an institution contracting with a TPS if the servicer was located outside of the United States.

While we were happy the Department rescinded the prohibition on an institution contracting with a TPS if the servicer was located outside of the United States, we remain concerned about the expansion of the definition of TPS and the direction the Department may go when further guidance is released.

In line with our concerns around the efforts of the Department, we share these same concerns with provisions of the proposed third-party providers policy from MSCHE and believe that the new definition of third-party provider should be limited in scope. We hope that MSCHE would halt any movement on this policy proposal until further action is taken by the Department clarifying the status of third-party servicers.

The New Definition of Third-Party Provider Should Be Limited in Scope

MSCHE proposes to define a third-party provider as “any entity that has a contract or written arrangement to provide services to the institution.” This definition is a new definition in addition to the term “third-party servicer” that is currently in the Higher Education Act (HEA). This definition also presents an expansion of scope from how the term is used in the MSCHE third-party providers guidelines from 2019.⁹

The new definition of third-party provider is extremely broad and would cover every contractual agreement with an outside entity. In the 2019 guidelines, the term “third-party provider” only covers contractual agreements between “a member or candidate institution and an unaccredited (i.e. an organization not accredited by an agency recognized by the U.S. Department of Education) third-party (institution, corporation, or other entity) to outsource a portion of the institution’s educational programs.”

In the new policy proposal, MSCHE states that any arrangement with a third-party provider may include, but is not limited to, the following:

⁷ Department of Education. (n.d). *Requirements and responsibilities for third-party servicers and institutions*. <https://www.regulations.gov/docket/ED-2022-OPE-0103/comments>

⁸ American Council on Education. (March 29, 2023). [Letter to the Education Department on Third-Party Servicers]. Retrieved from https://www.acenet.edu/Documents/Comments_ED_Third_Party_Servicers_032923.pdf

⁹ Middle States Commission on Higher Education. (2023) *Policies, procedures, and guidelines: Third party providers guidelines*. <https://www.msche.org/policies-guidelines/?title-search=Third&type=>

- Educational services such as (1) Teaching/Instruction, (2) Tutoring/Advising/Counseling, (3) Curriculum Development, (4) Admissions Services, (6) Marketing/Advertising/Recruiting, (7) Online Program Management, and/or (8) International Student Management (including ESL support);
- Other types of student support services such as food or dining services; and
- Operational or business functions of the institution such as procurement, information technology, or human resources.

Each aforementioned contractual agreement with a third-party provider would be subject to the review and approval of MSCHE at the “time of application, candidacy, grant of accreditation, self-study evaluation, substantive change, and at any other time deemed relevant by the Commission.” The level of documentation that would need to be placed on institutions to ensure they are in compliance with this new policy proposal would be enormous and could very well cause smaller and under-resourced institutions with capacity issues to lose their accreditation. While we appreciate that the policy proposal states MSCHE will not place a threshold limit on the number of contractual agreements, we remain concerned about the ability of MSCHE to provide “intense scrutiny” to institutions of higher education when making a determination of “excessive outsourcing,” especially when this term is not defined.

The HEA states that a TPS is any individual; state; private, for-profit organization; or nonprofit organization that enters into a contract with “any eligible institution of higher education to administer, through either manual or automated processing, any aspect of such institution’s student assistance programs under this title.”¹⁰ While the MSCHE policy proposal uses the same definition of a TPS that is in current regulations, we fear that the addition of the expanded definition of a third-party provider essentially trumps the definition of a TPS and greatly expands the scope of congressional intent.¹¹

MSCHE Should Halt any Movement on This Policy Proposal Until Further Action by the Department

As we shared earlier, the Department embarked on efforts to expand the definition of a TPS earlier this year through a DCL and now those efforts have been delayed. It would be counterintuitive for MSCHE to move forward with this policy proposal knowing that the Department is currently contemplating changes in this area. Institutions of higher education could be placed in a situation where there are conflicting requirements from their accreditor and the Department. MSCHE could also find itself in a situation in which MSCHE’s policies are non-compliant with federal standards.

¹⁰ Higher Education Act of 1965, 20 U.S.C. § 1088(c). (2022)

¹¹ The Higher Education Act does not use the term “third-party provider.” The common term used is “third-party servicer,” which has a distinct definition.

In our comment letter to the Department, we recognize the important interest in transparency and oversight of outside entities the Department has, but truly believe that this is best addressed through the negotiated rulemaking process. To this end, the Department announced in its unified agenda that it would be considering third-party servicers as a topic of negotiated rulemaking.¹² This will allow the Department to carefully consider other approaches that better address the intent of the DCL while avoiding any negative consequences.

Conclusion

We appreciate MSCHE's commitment to greater transparency in higher education but believe that the proposed third-party provider policy is premature given the Department's ongoing efforts. We believe that institutions should pursue any relationships with third parties in ways that best serve the interests of students. However, adding a new expansive definition of third-party provider and potentially causing smaller, under-resourced institutions to lose their accreditation status is not an effort that we believe should be taken in an uncertain regulatory environment. It is our hope that MSCHE will pause these efforts and limit the scope of a new definition of third-party provider. We look forward to working together as this process moves forward.

Thank you for your time and attention to this request.

Sincerely,



Ted Mitchell
President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
National Association of Independent Colleges and Universities

¹² Office of Information and Regulatory Affairs. (n.d.) *Agency rules list – Spring 2023*. Office of Management and Budget, Executive Office of the President.

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1800&csrf_token=3BFC84AFA2C5F648E5823D2148C8E7EDA50B9E512BD1B58AF62DD8E0D99A8606F9BDD235013B8CFE1787066946140913B3D8