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Spring round-up: State legislators seek to further regulate postsecondary education

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Over the last few months state legislatures have put forward various bills that would increase regulation of postsecondary education. Though these bills are generally targeted at for-profit education, there are some components that might apply to nonprofit schools as well. As of this writing, none of these bills have been signed into law yet, and some of them are no longer under consideration in this legislative cycle. In this advisory, we highlight some significant proposals we have been tracking in California, Maryland, New York, and Oregon.

Scope of legislation

A flurry of California bills apply to all schools that are licensed by the California Bureau for Private Postsecondary Education (BPPE). Specifically, this package would affect all for-profit institutions and all non-Western Association of Schools and Colleges (WASC) accredited private postsecondary institutions with a physical presence in California. Nonprofit institutions that are California-based or trigger California's physical presence requirement would be included within the scope of certain of these proposals. These bills are currently under consideration in the California state legislature.

Maryland's bill applies to private career schools and for-profit institutions of higher education. This bill has been approved by the legislature and is awaiting a decision by the governor, who may decline to sign it.

New York's bills are applicable only to "proprietary institutions of higher education," which the bills define as schools with any gainful employment or degree-granting programs that are not operated as public or nonprofit institutions. These proposed sections governing for-profit institutions have been amended out of the latest proposed bills and are not currently under consideration.

Oregon's bill applies to private career schools, which are defined as proprietary institutions that prepare students for specific professions. This bill is currently under consideration in the Oregon legislature.

90/10 rule proposals

At the federal level, proprietary institutions that participate in federal student financial aid programs under Title IV of the Higher Education Act must earn at least 10 percent of their

revenue from non-Title IV sources. The U.S. Department of Education enforces this rule through institutions' annual financial statement audits and other reviews.

California legislators propose to require that for-profit institutions derive no more than 85 percent of their revenue from federal or state financial aid sources. The rule proposed in California AB 1343 would differ from the federal 90/10 rule by lowering the permissible percentage of government funding to 85 percent and including all government funding in the calculation, including money from the U.S. Department of Veterans Affairs and the U.S. Department of Defense and any state student aid programs. California's bill allows institutions that exceed this ceiling to qualify for state authorization as long as the institution dedicates at least 50 percent of tuition revenue to student instruction.

Maryland legislators attempted to implement a similar 85 percent ceiling, including money from all government sources, but the state legislature removed that language from Maryland HB 464 before passage.

In New York AB 2006 and New York SB 1506, New York legislators proposed to take a more aggressive approach, requiring proprietary institutions to receive no more than 80 percent of institutional revenue from certain government sources. These government sources would have included all federal money and New York state student aid programs, including the Tuition Assistance Program.

Oregon's HB 2976 also would establish an 80 percent ceiling. However, Oregon would include under the 80 percent cap all federal money, all state money, and any loans that the institution itself guarantees. Alternatively, institutions could pass this test if 80 percent of their students pay their tuition without the use of money from federal sources, state sources, or loans guaranteed by the school.

Expenditure regulations

In addition to regulating institutional revenue, certain state proposals would govern for-profit institution expenditures.

California, as noted above, would require proprietary institutions that fail the 85/15 test to use at least 50 percent of their annual revenue for student instruction.

New York's AB 2006 and SB 1506 would have required that proprietary institutions spend at least 50 percent of their annual revenue on student instruction.

Oregon's bill would require that career schools spend at least 50 percent of all tuition revenues on direct instruction to enrolled students. Oregon's bill would also bar schools from using money from federal or state government sources for advertising and recruitment of students. The bill would charge the Oregon Higher Education Coordinating Commission with defining these terms.

Gainful employment

The U.S. Department of Education has proposed amendments to its "gainful employment" regulations that would require institutions to make certain disclosures about student outcomes as well as restrict federal funding for schools with disqualifying debt-to-earnings ratios. The federal gainful employment regulations would apply to nondegree programs at nonprofit schools and almost all programs at for-profit institutions. The state bills would impose state-level gainful employment rules and could conflict with the federal gainful employment regulations.

California's AB 1340 would restrict enrollments for gainful employment programs that do not pass federal debt-to-earnings ratio measures. The bill would require the BPPE to develop and

adopt regulations further defining gainful employment. The bill would also require institutions to disclose student earnings and student debt data to state regulators.

Maryland's HB 464 would require for-profit institutions to provide students with information about earnings, debt, and outcome measures before the student enters into any enrollment agreement with that institution. The institution would be required to disclose these outcome measures publicly on its website.

Incentive compensation

At the federal level, all institutions are prohibited from providing incentive compensation to any person engaged in recruiting, admission, or the awarding of financial aid on the basis of their success in securing student enrollments. Federal guidance has indicated that there is an exception for tuition-sharing agreements between institutions and unaffiliated third parties that provide "bundled services" that include nonrecruiting services.

California's AB 1345 seeks to strengthen state level regulation of incentive compensation practices by prohibiting any payments and contracts that are directly or indirectly tied to student enrollment. This would prohibit, for example, "contracts for employment" that set minimum target numbers for recruiters to reach in order to maintain good standing. During the hearings in the California State Assembly's Committee on Higher Education, there were discussions regarding whether this bill would prohibit tuition-share agreements that currently fall under the federal exception for providers of bundled services. While the language of the bill is muddled and does not specifically mention tuition-sharing agreements or the bundled services arrangements, the bill also eliminates the common sense clause in California law that permits institutions to comply with California regulations by meeting federal standards.

As currently drafted, AB 1345 would be applicable to for-profit institutions, non-WASC accredited nonprofit institutions with a physical presence in California and perhaps third-party providers that contract with them.

Nonprofit and for-profit conversions

The California bills include two sets of provisions that address the conversion of institutions from for-profit to nonprofit status, AB 1341, and from nonprofit to for-profit status, AB 1342.

Other proposed for-profit school regulations

Some state bills propose novel regulations for the for-profit postsecondary education sector.

For example, California's AB 1344 provides additional requirements for out-of-state for-profit institutions that seek to enroll students in California. This bill requires these institutions to notify the BPPE of certain adverse actions taken against the school by state agencies, federal agencies, or consumers. The bill would authorize the BPPE to revoke the ability of these schools to enroll students in California if the BPPE and attorney general find that these adverse actions indicate that the institution would pose a risk to California residents.

New York's bills would have required proprietary institutions to provide annual financial disclosures to the state, including information related to revenues, expenditures, officer compensation, board compensation, and benefits for other senior administrators. New York also proposed restricting the ability of institutional senior staff or board members from serving on the board of any of the institution's institutional or programmatic accreditors. Finally, New York would have prohibited proprietary institutions of postsecondary education from including mandatory arbitration clauses in their student enrollment agreements.

Conclusion

Proposed state legislation is being pursued by a coalition of consumer advocacy groups frustrated by current federal higher education policy. The proposals should be seen in a broader context, however, for the same advocacy groups are pushing a similar agenda federally in the context of proposed Higher Education Act of 1965 provisions and they were active in the recently concluded negotiated rule-making process. The consumer advocacy coalition continues to target institutions or practices perceived as abetting for-profit education, even if there is strong support for those activities in higher education or current law, such as the State Authorization Reciprocity Agreement. Like the federal program integrity rule package in 2010, we would not be surprised to see adverse consequences to other sectors of higher education, intended or unintended, as a result of this ongoing campaign.

We are available to respond to questions.

Contacts

Stephanie J. Gold
Partner, Washington, D.C.
T +1 202 637 5496
stephanie.gold@hoganlovells.com

Elizabeth B. Meers
Senior Counsel, Washington, D.C.
T +1 202 637 8676
elizabeth.meers@hoganlovells.com

Greg Ferenbach
Counsel, Washington, D.C.
T +1 202 637 6457
greg.ferenbach@hoganlovells.com

Ray Li
Associate, Washington, D.C.
T +1 202 637 4858
ray.li@hoganlovells.com

Jeannie Yockey-Fine
Senior State Regulatory Services Specialist,
Washington, D.C.
T +1 202 637 5495
jeannie.yockey-fine@hoganlovells.com

www.hoganlovells.com

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