Cooley

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California recently enacted a new law that will significantly alter the regulation of many in-state and out-of-state postsecondary institutions. The new law will have an immediate impact on a number of issues, and it signals that further regulation is likely in the near future.

Background

The amended statute, which was signed into law by California Governor Jerry Brown on September 29, 2014, was necessary to reauthorize the Bureau for Private Postsecondary Education ("BPPE"). Authorization of BPPE, which is is responsible for oversight of most non-public, postsecondary education in California, was set to expire on January 1, 2015.

The California legislature was unlikely to let BPPE dissolve precisely because it happened once before, causing considerable confusion. When the prior law regulating private postsecondary education in California expired in 2006, it led to an oversight gap that remained until 2010 when the California Private Postsecondary Education Act of 2009 became effective. This lapse was one of the primary reasons for federal state authorization regulations (34 C.F.R. § 600.9) promulgated by the U.S. Department of Education ("ED" or "the Department") in 2010, which are still a source of controversy and confusion four years later.

Significant developments

The bill signed into law last month reauthorizes BPPE until January 1, 2017 and also makes some significant changes. Most notably, the new law prevents for-profit institutions with a physical presence in California (and, on its face, many out-of-state non-profit and public institutions as well) that are receiving veterans' education benefits, such as Post-9/11 GI Bill benefits, from being exempt from BPPE oversight. This limitation applies to the current exemptions available for regionally accredited institutions and will take effect on January 1, 2016. Accordingly, institutions with current exemptions in California may lose the benefit of their exempt status, with the exception of California-based public and non-profit private institutions.

The bill also mandates that BPPE enhance its student complaint processing ability and directs the state Attorney General's office to provide training on this issue. The bill does *not* extend BPPE's oversight over student complaints to exempt institutions; therefore, it does not clarify any of the prior confusion regarding whether exempt institutions satisfy ED's "On-Ground" state authorization rule (34 C.F.R. § 600.9(a)). However, by effectively "sunsetting" exemptions based on accreditation for out-of-state and for-profit institutions, California has essentially changed its law to conform to the Department's desire to eliminate certain exemptions.

The law also directs BPPE to amend its regulations and take other actions that could result in significant changes in the near future. For example, BPPE is directed to develop goals for the processing of applications to reduce the current backlog. BPPE is also directed to enhance its enforcement procedures to more aggressively target unauthorized institutions and other institutions seen as potential risks based on negative actions taken by ED, state attorney generals or other agencies, weak financial health, or other factors.

The law does not appear to change the current "physical presence" triggers for distance education providers enrolling California students; however, since BPPE's physical presence standard is largely based on guidance and regulation and is not statutory in nature, such changes are possible as part of BPPE's anticipated regulatory amendments. (It would likely be difficult, however, for California to regulate purely online distance education programs without a further statutory change.)

More changes on the horizon

In addition to the immediate changes, the new law also sets the stage for significant prospective changes in the coming years.

For example, BPPE is instructed to establish a task force by March 2015 to review standards for training programs geared toward computer science, programming, software development, and computer coding (commonly referred to as "coding academies"). While the bill seems to recognize the critical importance of these programs (noting the "shortage of skilled employees" in these "high-demand fields"), the task force does not appear to be geared toward reducing the regulatory burden on these schools. The task force is directed to provide a report to the legislature by July 2016. Some observers in the technology industry had hoped that the bill would exempt coding academies from BPPE oversight; however, the legislature did not do so. In fact, the changes in this new law actually appear to strengthen BPPE's claim to jurisdiction over such academies.

While there were no further changes to the existing exemptions, except for the limitation on their availability as discussed above, note that the exemption for non-WASC regionally accredited schools is still scheduled to sunset in 2016. The similar exemption for WASC institutions does not sunset. The exemption for non-WASC institutions is the result of a federal court decision which mandated equal treatment of regional accrediting agencies under the U.S. Constitution. If the non-WASC exemption does in fact sunset, a further constitutional challenge is possible since it would mean a return to the same unequal treatment that the court determined was unconstitutional.

The law also specifically directs BPPE to investigate and recommend further legislative changes. One important aspect of this statute is that it only reauthorizes BPPE for two additional years. In the original draft of the bill, the law would have reauthorized BPPE for four more years (until 2019). The original 2009 Act authorized BPPE for five years (2010–2015). The short re-authorization period also suggests further changes are on the way.

For distance education providers, not the same California

The changes in California law bring that jurisdiction closer to many states that are relatively burdensome for accredited institutions, such as Florida or Oregon. While authorization in California is achievable in a reasonable amount of time (unlike in New York or Maryland), California is no longer a state that most distance education providers can ignore from a regulatory perspective.

The bottom line is this—out of state institutions should use special care not to trigger "physical presence" in California unless they are prepared to accept a high degree of regulatory burden and expense. And, institutions should stay tuned as even more law and regulation appears to be on its way.

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