

May 30, 2018

## **RECENT DEVELOPMENTS RELATED TO REGULATION AND LITIGATION INVOLVING THE EDUCATION SECTOR**

To Our Clients and Friends:

This is the latest update of significant developments relating to regulatory, administrative, and legal actions involving schools. This quarter saw the reinstatement of the Accrediting Council for Independent Colleges and Schools (ACICS), as well as three for-profit law schools turning the tables on their schools' accreditor, the American Bar Association. There were also significant developments on the political and regulatory fronts, not to mention a shifting landscape in federal enforcement. Let's jump into it.

### **A. ACICS Ruling and Reinstatement**

On March 23, 2018, a federal district court ordered the Department of Education (ED) to reconsider its decision terminating recognition of ACICS. ACICS had submitted a petition for continued recognition to ED in January 2016. In December 2016, President Obama's ED Secretary terminated ACICS's recognition, and ACICS challenged the decision in court. In an April 29, 2017 filing, the Trump Administration supported the previous Administration's termination decision.

However, on March 23, the United States District Court for the District of Columbia found that ED failed to consider supplemental responses and additional evidence ACICS provided to ED in May 2016 at ED's request. The court held that in doing so, ED violated the Higher Education Act and its implementing regulations' requirement that the ED Secretary consider all available relevant information, as well as the Administrative Procedure Act's requirement that an agency must examine all relevant data. *ACICS v. DeVos*, No. 16-2448 (RBW), 2018 WL 1461958, at \*13, 17 (D.D.C. Mar. 23, 2018). The court concluded that ED acted arbitrarily and capriciously by failing to consider this information. *Id.* at \*17.

On remand, ED must reconsider the recognition petition ACICS submitted in January 2016 and must consider in the first instance the supplemental materials ACICS submitted in May 2016. In the interim, Secretary DeVos restored ACICS's status as a federally recognized accrediting agency effective December 12, 2016. ACICS may file a written submission explaining the relevance of the May 2016 materials and include additional relevant evidence. Secretary DeVos ordered that any written submission and exhibits should be filed with ED no later than May 30, 2018. Because the court did not reach the merits of ACICS's case, it is hard to know how ACICS will fare under this new review. But it is fair to say that just the opportunity for a new review shows a seismic shift in the landscape from one Administration to the next.

## **B. Change in Enforcement Focus, Per the *New York Times***

Two recent *New York Times* articles further highlight the differences in approach between the current and previous Administrations when it comes to enforcement relating to the sector. In an article dated May 9, 2018, the *Times* reports that Mick Mulvaney, the interim director of the Consumer Financial Protection Bureau (CFPB), will move the agency's student loan division into its consumer information unit. A CFPB spokesman described the change as a "very modest organizational chart change," but some officials believe it may dampen the agency's zeal for an enforcement case it has been pursuing against the nation's largest student loan collector, Navient. Further signaling its desire to move away from examining student-lending issues, the CFPB also removed the topic "student loan servicing" from its bi-annual long-term regulatory agenda.

In the second article dated May 13, 2018, the *Times* reports that a unit within ED that was tasked with investigating for-profit colleges, which previously included a dozen or so lawyers and investigators at the end of the Obama Administration, is now made up of three employees. Its mandate has also shrunk. Whereas the unit used to investigate such issues as advertising, recruitment practices, and job placement claims, the three-person team now focuses on processing student loan forgiveness applications and smaller compliance cases.

## **C. Litigation**

Outside of the political arena, there was activity this past quarter in both federal and state courts.

### **1. InfiLaw Scores a Win in Florida and Sets Its Sights on the ABA**

InfiLaw was involved in a variety of litigation this past quarter, fighting back a False Claims Act case and filing multiple suits against the American Bar Association.

*First*, on April 23, 2018, the United States District Court for the Middle District of Florida dismissed for a second time a False Claims Act lawsuit filed against InfiLaw Corp. and its now-closed law school, Charlotte School of Law. *U.S. ex rel. Bernier v. Infilaw Corp.*, No. 6:16-cv-970-Orl-37TBS, 2018 WL 1905342, at \*8 (M.D. Fla. Apr. 23, 2018). A former law professor turned *qui tam* relator, Barbara Bernier, "adopted the kitchen-sink approach" to pleading after the United States declined to intervene, according to the court. She alleged the school had made improper "incentive payments to recruitment staff," "admitted academically unqualified students," "altered students grades," "joked its employment stats" and "failed to implement a written plan to combat misuse of copyrighted works," among other allegations. *Id.* at \*6, \*8.

The court held that the majority of these claims had been "publicly disclosed" online and elsewhere and therefore the relator could not proceed because she was not an "original source" of the allegations—i.e., she didn't voluntarily disclose this information to the Government before the public disclosures or demonstrate knowledge that materially adds to the public disclosures. *Id.* at \*7-8. On the remaining claims, the court held that the relator had not provided sufficient specificity; she provided "just vague allegations that these incidents occurred and Defendants were responsible." *Id.* at \*8.

However, the court did give the relator leave to amend, and she filed an amended complaint on May 7, 2018. We would not be surprised to see InfiLaw move to dismiss the complaint again.

*Second*, Charlotte School of Law and its two sister schools, Florida Coastal School of Law and Arizona Summit Law School, turned to offense and filed three separate suits against their accreditor, the American Bar Association, alleging that the ABA's findings of noncompliance with its accreditation standards "were arbitrary, capricious, unreasonable, [and] an abuse of discretion." In the accompanying press release for the Florida Coastal lawsuit, the school highlighted its diverse student body, and the president of Florida Coastal lamented that "[t]he ABA's decisions in regard to accreditation seem to be calculated efforts to win political points, without regard for due process, or how students will be adversely affected." The ABA is yet to respond to these complaints.

## **2. Two Lawsuits Relating to For-Profit Schools**

Two additional lawsuits were unsealed or filed this past quarter relating to for-profit schools. *First*, in the United States District Court for the District of Utah, an ex-employee of lead generator EduTrek filed a lawsuit under the False Claims Act against his former employer and a host of schools. At its core, the lawsuit alleges that EduTrek and its clients violated ED's incentive compensation ban. The United States declined to intervene on February 16, 2018.

*Second*, two former students filed a purported class action lawsuit against Capella University in the United States District Court for the District of Minnesota, alleging the school "misled prospective and current students ... about the time to completion and cost of their mostly student-loan financed doctoral degrees." Compl. ¶ 2, *Wright v. Capella Education Co.*, No. 18-cv-1062 (D. Min. April 20, 2018). The school has until July 9, 2018 to respond to the allegations.

## **3. Don't Forget About the Non-Profit Schools**

As has been the case for a while, and particularly this past quarter, there were a number of prominent investigations opened and lawsuits filed against traditional non-profit schools. The Department of Justice (DOJ) garnered national news coverage of its decision to investigate at least seven elite colleges—Amherst College, Grinnell College, Middlebury College, Pomona College, Wellesley College, Wesleyan University, and Williams College—for possible antitrust issues. The investigation reportedly seems to center on whether the schools improperly shared information among them to enforce the terms of their early-admissions programs.

There was also a notable False Claims Act settlement with the University of North Texas. According to DOJ's press release, the school "agreed to pay the United States \$13,073,000.00 to settle claims that it inaccurately measured, tracked and paid researchers for effort spent on certain NIH-sponsored research grants."

On top of those announcements, DOJ also announced on March 2, 2018 that it had indicted six former employees of the Chicago campus of the Center for Employment Training, a non-profit school, for an alleged "scheme[] to enroll fake students in classes as part of a conspiracy to swindle federal financial aid programs out of millions of dollars."

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Twelve graduates of the landscape architecture program at Colorado State University have also sued their alma mater, alleging that the university should refund their tuition because the school failed to secure proper accreditation for the master's degree program.

Finally, Howard University confirmed on March 29, 2018 that the school had conducted an internal investigation and discovered that several employees of the university's financial aid department awarded themselves grants, even though they had tuition remission, and thus received more money than "the total cost of attendance."

As we have been saying for some time, traditional schools are just as susceptible to the claims that have been made, particularly by the prior Administration, against the for-profit education sector. We are continuing to see that proven true.

## **4. Federal Actions Against Individuals**

The past quarter also saw two notable developments in cases brought by the federal government against *individuals* involved in the sector. *First*, on April 16, 2018, DOJ announced that the owner of "a privately owned, non-accredited school" called Atius Technology Institute, which specialized "in information technology courses, pleaded guilty ... to bribing a public official at the U.S. Department of Veterans Affairs (VA) in exchange for the public official's facilitation of over \$2 million in payments that were supposed to be dedicated to providing vocational training for military veterans with service-connected disabilities."

*Second*, the case brought by the Securities and Exchange Commission against two executives of ITT Educational Services, Inc., appears headed to trial. On March 23, 2018, the United States District Court for the Southern District of Indiana largely denied the dueling summary judgment motions filed by the executives and the SEC. The court set trial for July 9, 2018.

## **5. State Level Litigation and Disputes**

On the state level, there continue to be battles about the proper scope of state authority. On March 12, 2018, Secretary DeVos set forth the Trump Administration's stance in an interpretive guidance, stating that the federal government has the exclusive power to regulate and oversee federal student loan servicers, and therefore any state regulations on the topic are preempted.

Meanwhile, in Massachusetts, a superior court judge rejected a motion to dismiss filed by the Pennsylvania Higher Education Assistance Agency (PHEAA), one of the nation's largest student loan servicers, in a case brought by the Massachusetts Attorney General, on the grounds that PHEAA is not protected by sovereign immunity, even though formed under the Commonwealth of Pennsylvania. In that same case, DOJ had filed a statement of interest arguing that the Massachusetts Attorney General is precluded from suing PHEAA on preemption grounds. Although this argument was not addressed in the court's decision, the court stated during oral argument on the motion: "[T]he preemption issue is not going to make the whole case go away." This stands seemingly in contrast to the guidance from Secretary DeVos.

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In California, Corinthian College students have seemingly taken the baton previously held by state attorneys general and filed a class action lawsuit for declaratory and injunctive relief against Secretary DeVos and ED. The students filed suit in the Northern District of California in December 2017 and filed a first amended complaint on March 17, 2018. The students allege that after Corinthian closed, ED promised the students complete loan forgiveness but then in December 2017 announced a plan to award only partial relief of student loan debt to borrowers using a formula based on students' earnings. The students argue that ED's use of an earnings formula is "arbitrary and capricious" rulemaking that violates the Administrative Procedure Act. On May 25, 2018, a magistrate judge issued a preliminary injunction, blocking enforcement of ED's partial loan relief program, finding that by using records from the Social Security Administration to obtain students' earnings, ED violated the federal Privacy Act. A hearing to consider next steps, including the process for loan forgiveness, is scheduled for June 4.

Finally, Ashford University and its holding company, Bridgepoint Education, scored a victory in Iowa. The state's approval agency had attempted to strike Ashford's eligibility to receive post-9/11 GI Bill benefits after Ashford closed its physical location in Iowa. Ashford sued to block the loss of eligibility, and the state court dismissed Ashford's suit. However, on April 26, 2018, the Iowa Supreme Court vacated the lower court's decision, holding that the lower court judge should have disclosed that she has family ties to the state office of the attorney general. Ashford can now resume its legal challenge to Iowa's attempt to withdraw Ashford's GI Bill eligibility.

## **D. Regulatory Activity**

There has been a lot of activity on the regulatory front. On May 9, 2018, ED published its Spring 2018 Agency Rule List, including the following in its list of topics in the "Prerule" and "Proposed Rule" stages: state authorization of distance education providers, accreditation, borrower defense, gainful employment, and eligibility of faith-based entities and activities.

Rules related to state authorization that had been published in December 2016 were scheduled to go into effect on July 1, 2018, but ED has published a notice of proposed rulemaking that proposes a two-year delay in the effective date. The public has 15 days to comment on the proposed delay. The regulations would have required institutions that offer distance education to students in states where the institution is not physically located to either meet those states' requirements for offering postsecondary education or to participate in a state authorization reciprocity agreement, and then document that there is a state process for review and action on student complaints.

ED previously sent two other Obama-era consumer protection regulations to negotiated rulemaking sessions. After three months of negotiations, the sessions regarding borrower defense to repayment concluded in February without consensus. Sticking points included which evidentiary standard should be used and whether to include or how long a statute of limitations should be. The sessions regarding gainful employment similarly ended without consensus in April after four days of negotiations. Since no consensus was reached in either session, ED can draft its own language, presumably keeping in mind the information gathered during the negotiated rulemaking sessions. ED will need to publish a Notice of Proposed Rulemaking for each rule, which will be followed by a period of public comment. Final regulations will be published by November 1, 2018, to take effect on July 1, 2019.

## E. Corporate Activity

Finally, there were some notable developments in the trend of schools seeking nonprofit status, as well as a noteworthy sale. *First*, the Higher Learning Commission approved Purdue University's acquisition of Kaplan University. This was the final hurdle for the deal. *Second*, Grand Canyon University also received good news from the Higher Learning Commission. The accreditor approved its request to revert back to nonprofit status. *Third*, Ashford University announced it is joining the trend, too, and is seeking to become a nonprofit. It is expected to seek approval from its accreditor, the WASC Senior College and University Commission. *Finally*, Laureate Education Inc. announced a deal to sell the University of St. Augustine for Health Sciences to a private equity firm, Altas Partners, for \$400 million.

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As always, we will continue to monitor all of these developments, and you can look forward to updates in our next report.



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