ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES

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Introduction

A paper prepared in 2014 for the Enlisted Association of the National Guard of the United States ("EANGUS") addressed legislation being considered at that time by the California State Assembly that would have restricted the ability of student veterans to use federal funds for accredited courses at educational institutions in California that fully comply with the federal requirements for participation in the veterans educational benefit program. The paper concluded that a court reviewing the legislation, Assembly Bill 2099 ("AB 2099"), probably would find AB 2099 to be inconsistent with federal law. *See* Bancroft PLLC, *A Legal Analysis of the Graduation Rate and Cohort Default Rate Requirements of California Assembly Bill 2099 for the Participation of California Education Institutions in the Federal Educational Benefits Program* (May 1, 2014).

In 2019, several states are considering legislation that would impose new restrictions on for-profit education. Like California's AB 2099 in 2014, some of the state provisions in the current legislation raise issues under the Supremacy Clause of the U.S. Constitution. Federal law may preempt some of the state provisions if they are enacted.

This paper proceeds in three parts. First, it discusses the 2019 state legislation. Also in part one, the paper discusses existing federal law related to the state legislation. Next, in part two, the paper discusses the Supremacy Clause and the preemption doctrine developed by the U.S. Supreme Court. Finally, in part three, the paper suggests that some of the state provisions may face court challenges if enacted into law.

I. State Legislation

New York

In the State of New York, the Governor has stated that "The For-Profit College Accountability Act" would require for-profit schools to report their funding sources and demonstrate that they are not receiving more than 80 percent of their revenue from taxpayers, including federal grants, loans, and tuition assistance programs. *See* New York State Division of the Budget, FY 2020 Executive Budget Briefing Book pg. 97 (2019), https://www.budget.ny.gov/pubs/archive/fy20/exec/book/briefingbook.pdf.

The federal Higher Education Act ("HEA"), in contrast to the New York proposal, allows a for-profit institution to receive 90 percent of its revenue from federal funds under the Title IV student financial aid program. *See* 20 U.S.C. § 1094(a)(24) ("In the case of a proprietary institution of higher education … , such institution will derive not less than ten percent of such institution's revenues from sources other than funds provided under this subchapter … or will be subject to the sanctions described in subsection (d)(2)."). This provision of federal law is known as the "90/10 rule." The 90/10 rule has existed since 1998; it replaced an 85/15 rule that Congress had enacted in 1992. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325 § 481(b)(3), 106 Stat. 448, 611.

The New York proposal would also require that for-profit schools spend at least 50 percent of their revenues "on instruction and learning as opposed to recruiting, marketing, and advertising." FY 2020 Executive Budget Briefing Book pg. 98 (2019).

Maryland

In Maryland, Senate Bill 399, "An Act Concerning Private Career Schools and For-Profit Institutions of Higher Education - Disclosures and Regulation," is similar to the New York proposal. SB 399 provides, among other things, that covered schools or institutions may not enroll new Maryland residents in a program if, in two out of three of the immediately preceding fiscal years, less than 15 percent of the school's or institution's annual revenue is derived from funds disbursed to the school or institution through: (1) state or federal funding sources related to tuition, fees, and other institutional charges for students; or (2) loans and grants provided or guaranteed by the school or institution. SB 399, 439th Sess. § 11-210(c) (Md. 2019). Private career schools and certain for-profit institutions of higher education would be covered by this part of SB 399 if they have annual revenue in excess of $10 million.

Washington

In the State of Washington, House Bill 1124 would lead to the promulgation of a state gainful employment rule. HB 1124 states that "[f]or-profit and formerly for-profit degree-granting institutions and private vocational schools that offer nondegree certificates and training are designed to prepare students for gainful employment in recognized occupations." HB 1124, 66th Leg., 2019 Reg. Sess. § 1 (Wash. 2019). HB 1124 provides that "gainful employment requirements must be based on debt-to-earnings rates demonstrating whether students completing the program will likely be able to reasonably reply student loan debts incurred for attending the institution, based on earnings from employment in the field for which they are seeking a degree, certification, or training." *Id*. § 3(1)(a). HB 1124 goes on to say that the Washington Student Achievement Council "shall determine acceptable debt-to-earnings rates for programs and institutions for the purposes of determining whether the program or institution continues to be eligible to participate in the state's financial aid programs or to operate in the state." *Id*. § 3(2).

Gainful employment is addressed in current federal law. The Higher Education Act requires any "proprietary institution of higher education" to "prepare students for gainful employment in a recognized occupation." 20 U.S.C. § 1002(b)(1)(A)(i). In 2011, the U.S. Department of Education promulgated gainful employment regulations implementing the HEA. A federal court, however, vacated in part the regulations. *See Association of Private Colleges & Universities v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012). In 2014, the Department promulgated new gainful employment regulations. *See* 34 C.F.R. §§ 668.401-668.415.

In August 2018, in a notice of proposed rulemaking ("NPRM"), the Department proposed to rescind its gainful employment regulations. *See* 83 Fed. Reg. 40167 (2018). The Department based its "proposal to rescind the GE regulations on a number of findings, including research results that undermine the validity of using the regulations' debt-to-earnings (D/E) rates measure to determine continuing eligibility for participation in the programs authorized by title IV of the Higher Education Act of 1965, as amended." *Id*. at 40167. Under the 2014 regulations, as stated in the NPRM,

> GE programs must have a graduate debt-to-discretionary earnings ratio of less than or equal to 20 percent or debt-to-annual earnings ratio of less than or equal to 8 percent to receive an overall passing rate. Programs with both a discretionary earnings rate greater than 30 percent (or a negative or zero denominator) and an annual earnings rate greater than 12 percent (or a zero denominator) receive an overall failing rate. Programs that fail the D/E rates measure for two out of three consecutive years lose title IV eligibility. Non-passing programs that have

> debt-to-discretionary income ratios greater than 20 percent and less than or equal to 30 percent or debt-to-annual income ratios greater than 8 percent and less than or equal to 12 percent are considered to be in the "zone." Programs with a combination of zone or failing overall rates for four consecutive years lose title IV eligibility. *Id*. at 40170-71.

The Department in its NPRM summarized the reasons for its proposed rescission of the gainful employment regulations:

> The Department proposes to rescind the GE regulations because, among other things, they are based on a D/E metric that has proven to not be an appropriate proxy for use in determining continuing eligibility for title IV participation; they incorporate a threshold that the researchers whose work gave rise to the standard questioned the relevance of to student loan borrowing levels; and they rely on a job placement rate reporting requirement that the Department was unable to define consistently or provide a data source to ensure its reliability and accuracy and that has since been determined is unreliable and vulnerable to accidental or intentional misreporting. In addition, because the GE regulations require only a small portion of higher education programs to report outcomes, they do not adequately inform consumer choice or help borrowers compare all of their available options. *Id*. at 40176.

California

In California, several Assembly Bills, AB 1340 through AB 1346, introduced on February 22, 2019, would impose new restrictions on for-profit education.

For example, AB 1340 would enact as state law part of the federal gainful employment regulations that the U.S. Department of Education is now in the process of rescinding. AB 1340 provides that "[a]n institution offering a program intended to prepare a student for gainful employment in a recognized profession, as that term is used in [20 U.S.C. § 1002] … shall not enroll a California resident … in any program unless the program meets [either] … (a) The standard for passing the federal debt-to-earnings rates measures established in [34 C.F.R. § 668.403] as it read on January 1, 2017" or "(b) The graduation rate and placement rates standards in former Section 94866 of the Education Code, as it read in the Maxine Waters School Reform and Student Participation Act of 1989 on January 1, 1997." AB 1340, 2019-2020 Sess. § 1 (Cal. 2019).

AB 1342 would require a nonprofit corporation that operates or controls a private postsecondary educational institution to obtain the written consent of the California Attorney General before entering into an agreement or transaction to "(A) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of its assets to a for-profit corporation," when a material amount of the nonprofit corporation's assets are involved, or "(B) Transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit corporation to any for-profit corporation." AB 1342, 2019-2020 Sess. § 1 (Cal. 2019). AB 1342 would give broad discretion to the Attorney General to decide whether to give consent. The bill provides that "[t]he Attorney General shall have discretion to consent to, give conditional consent to, or not consent to any agreement or transaction" covered by the bill, and "[i]n making the determination, the Attorney General shall consider any factors that the Attorney General deems relevant," including whether "[t]he terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporation," whether "[t]he agreement or transaction will result in any inurement to any private person or entity," whether the agreement or transaction "is at fair market value," and whether "[t]he proposed agreement or transaction is in the public interest." *Id*. (Although the subject is beyond the scope of this paper, AB 1342 would seem to implicate federal constitutional protections for property rights, including the Takings Clause of the Fifth Amendment, which applies to the states through the Due Process Clause of the Fourteenth Amendment.)

AB 1343 would adopt as California law a more stringent version of the federal 90/10 rule. The bill would prohibit a private postsecondary institution that arranges loans for students from enrolling California residents in any program unless the institution meets one of the following two tests: "(1) No more than 80 percent of the institution's tuition revenue … is derived from student financial aid provided by a federal or state agency, and from loans arranged or guaranteed by a federal or state agency"; or "(2) In the program in which a resident of California enrolls, not more than 85 percent of the students enrolled pay tuition in whole or in part from student financial aid provided by a federal or state agency, or from loans arranged or guaranteed by the institution." AB 1343, 2019-2020 Sess. § 1 (Cal. 2019). The bill would exempt an institution with annual revenues of less than $2.5 million. *Id*.

AB 1345 would prohibit institutions from providing financial incentives to any persons, including students, involved in student recruitment, enrollment, continued enrollment, admission, or attendance, or involved in awarding financial aid based on student enrollment, or in the sales of any educational materials, based on succeeding in those activities. AB 1345, 2019-2020 Sess. § 2 (Cal. 2019). The bill would also amend Section 94897 of the California Education Code to strike an existing provision stating: "For institutions participating in the federal student financial aid programs, this subdivision shall not prevent the payment of compensation to those involved in recruitment, admissions, or the award of financial aid if those payments are in conformity with federal regulations governing an institution's participation in the federal student financial aid programs." Thus, AB 1345 would seem to prohibit, at least in certain circumstances, the payment of compensation even if such compensation is lawful under the federal statute governing incentive compensation. That statute prohibits "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. § 1094(a)(20). To participate in the Title IV student financial aid program, institutions must agree in their program participation agreement with the U.S. Department of Education to abide by the incentive compensation ban. *Id*.

II. The Supremacy Clause and the Preemption Doctrine

Under the Supremacy Clause of the Constitution and decisions of the U.S. Supreme Court applying the Supremacy Clause, statutes enacted by Congress trump any state law that comes into conflict with such statutes. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As the Supreme Court has explained, the Supremacy Clause "provides a clear rule" that "Congress has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Gibbons v. Ogden*, 9 Wheat. 1, 210-11 (1824)). "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 567 U.S. at 400 (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

Federal statutes will preempt state law in three circumstances. First, Congress may enact a statute containing an express preemption that withdraws specified powers from the States. *Arizona*, 567 U.S. at 399.

Second, under the field preemption doctrine, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id*.

Third, a state law is preempted when it conflicts with federal law. *Id*. This includes those instances in which "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado*

Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). In addition, conflict preemption analysis includes the doctrine of obstacle preemption. "The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 406 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In obstacle preemption analysis, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Courts have recognized that the Higher Education Act preempts state law when the HEA and state law conflict. *See Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (reaffirming prior circuit precedent in which the court "recognized that the Higher Education Act preempts D.C. laws that 'actually conflict' with federal law"); *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010) (holding that "conflict preemption" applied to plaintiffs' state law claims "because, if successful, they would create an obstacle to the achievement of congressional purposes" in the HEA).

III. Possible Preemption Challenges to State Provisions

Some provisions in the pending state legislation may raise issues under the Supremacy Clause. If enacted, such provisions could invite court challenges contending that the provisions are preempted by federal law because they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 406

For example, a state law preventing a for-profit institution from operating in a state unless the institution complies with an 85/15 rule or an 80/20 rule might be challenged on the ground that it conflicts with the federal 90/10 rule. The Supreme Court has indicated that in preemption analysis courts must consider whether a challenged state law "would interfere with the careful balance struck by Congress" in a statute. *Arizona*, 567 U.S. at 406; *accord Knox v. Brnovich*, 907 F.3d 1167, 1175 (9th Cir. 2018); *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1149 (9th Cir. 2015). In settling on the 90/10 rule, Congress struck a careful balance and repealed the 85/15 rule it had adopted six years earlier.

A new state law adopting a gainful employment rule might also be challenged in court under the Supremacy Clause. The U.S. Department of Education is now in the process of rescinding the federal gainful employment regulations promulgated in 2014. The rescission of the federal rule could have preemptive effect. *See Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 966 (9th Cir. 2005) ("Where … a decision *not* to regulate represents … a considered determination that no regulation is appropriate, that choice preempts contrary state law imposing governing standards."). The Department has explained that it proposes to rescind the gainful employment regulations because, among other reasons, "they are based on a D/E [debt-to-earnings] metric that has proven to not be an appropriate proxy for use in determining continuing eligibility for title IV participation." 83 Fed. Reg. at 40176. Furthermore, any new regulations issued by the Department if and when it rescinds the gainful employment regulations could preempt a state-enacted gainful employment rule. Any gainful employment rule enacted by a state before the Department concludes its process would run the risk that the state rule would conflict with any federal regulations ultimately issued by the Department.

Conclusion

When a state legislates in the same space in which the federal government has legislated, the potential for conflict exists. The Supremacy Clause resolves conflicts between state law and federal law in favor of the latter. It remains to be seen which, if any, of the pending state provisions that would impose new restrictions on for-profit education will be enacted. Any such provisions that are enacted will raise substantial issues under the Supremacy Clause and likely will face court challenges contending that the provisions are preempted by federal law.

About The Veterans Education Project by EANGUS

The Enlisted Association of the National Guard (EANGUS) is the National Association supporting the National Guard. As Veterans serving Veterans, we amplify the voices of all Servicemembers. We are committed to nonpartisan research, engagement, and policy implementation in our efforts to support all institutions that meet the needs of Student Veterans. Our mission is to highlight innovation across the spectrum of higher education. The Veterans Education Project (VEP) works tirelessly to protect the educational benefits of Servicemembers and their families. We fight for the rights and benefits that Servicemembers should receive but currently don't. Our mission is to address the current issues facing all Student Veterans and create better educational opportunities. For more information, please see www.thevep.org.