



YOUR OTHER REGULATORY CONCERN



Career colleges should watch for the “informal” rulemaking that occurs in legal settlements

By Nicole Kardell, Ifrah Law

Companies large and small understand how important it is to stay on top of federal and state regulations and to stay compliant. This is particularly true for industries consistently in the crosshairs of government enforcement agencies, such as the Department of Justice and state attorneys general. Alas, the for-profit education industry is one of the “favorites” of federal and state investigators and is under almost constant scrutiny. Much of the attention may be in the wake of battle against the industry Senator Tom Harkin, D-Iowa, initiated several years ago. Regardless of origin, the wake is long and wide and shows no signs of dissipating. This means the likelihood of getting hit with a subpoena or civil investigative demand is greater for for-profit educators than for companies in many other sectors.

Considering this backdrop, it is important for for-profit education members to comply with applicable federal and state regulations and to maintain a record demonstrating compliance. Maintaining a respectable compliance record can dramatically reduce the costs associated with responding to a subpoena. It also may appease investigators who would otherwise continue probing a company if the subpoena response is drawn out or delayed. Recordkeeping for compliance measures, therefore, should be treated with the same level of attention that is dedicated to documentary support for financials and taxes.

It is also important to stay informed of industry developments in legislation, regulations and enforcement actions to be able to anticipate and to prepare for what may be coming down the pike. It may seem common sense, or be common practice, to keep up with activity on Capitol Hill, at the Department of Education and state equivalents. But too often overlooked are the enforcement actions and almost inevitable settlement negotiations between other industry companies and government agencies. (It is common for an investigating agency to find some wrongdoing that warrants a settlement or further action.) Settlement agreements between government agencies and other companies can shed light on the matters investigators are most interested in. Issues arising out of previous investigations and enforcement actions are often fodder for new legislation and revisions to regulations. Settlement agreements also serve as bases for agreements with subsequent companies.

Too often overlooked are the enforcement actions and almost inevitable settlement negotiations between other industry companies and government agencies.

And, unfortunately, some government agencies seem to treat their settlement agreements as binding precedent for all industry members (in other words, they expect all industry companies to adhere to applicable terms of the settlement agreement, and they may pressure other companies into adopting those terms). This latter phenomenon is especially evident when the initial settlement agreement is made with a company that has a significant industry presence. Although this type of extrajudicial rulemaking has been challenged at the Federal Trade Commission by POM Wonderful, companies who want to question a government agency's authority will have an uphill battle. It may be more expedient for a company to simply implement standards that satisfy the government's apparent concerns.

So, this past August when New York Attorney General Eric Schneiderman announced his office's sizable settlement with Career Education Corp. (CEC), a red flag should have been raised for other for-profit educators. The settlement was the result of an investigation into disclosures made by CEC to students, accreditors and the state of New York. According to the attorney general's press release, CEC "significantly inflated its graduates' job placement rates."

The inflated rates were the result of CEC's method of calculating and characterizing job placement. For example, CEC apparently counted graduates' employment at single-day fairs and mischaracterized graduates' employment duties in such jobs as retail sales to qualify them as in-field employment. As a result of these practices, the attorney general argued, current and prospective students were misled into believing that an

artificially high percentage of graduates were employed in their field of study or a related field. The attorney general also contended that CEC failed to adequately disclose that some programs lacked programmatic accreditation and that class credits at certain schools were not transferable to public or nonprofit colleges.

The settlement terms included a \$1 million penalty, a \$9.25 million repayment to students, and "substantial" changes in how the company calculates and verifies placement rates. This latter part of the settlement, along with the issues outlined by the attorney general, can provide guidance to other for-profit educators.

The CEC settlement with the New York attorney general imposes stringent rules for calculating and disclosing placement rates (requirements that exceed those of CEC's accreditors) and requires CEC to do the following:

- Hire an independent auditor to verify placement rates for a three-year period.
- Provide job placement assistance services to graduates.
- Stop offering programs that have low job placement rates.
- Cease offering programs that are not accredited or in the process of being accredited.
- Provide adequate disclosures concerning the accreditation status of its programs and the lack of transferability of credits.

The allegations laid out by the attorney general, along with the terms of the settlement, provide a decent gauge for what other institutions could anticipate in the form of revised laws or regulations, or in the form of regulatory actions, with any number of states. The New York attorney general is making headlines over his suit against Trump University, alleging that its promises of graduate success were deceptively "trumped up." Other state attorneys general, most notably Kentucky Attorney General Jack Conway, are on the bandwagon of investigating for-profit educators. Even the Securities and Exchange Commission is showing interest in for-profit education, as Corinthian Colleges Inc. disclosed last summer. The issues covered by this one state agency, and the terms of settlement, will certainly inform other state and federal agents.

For-profit educators should, therefore, pay close attention to how their schools' placement rates are being calculated and ensure that their practices do not cross the lines enunciated by the government. For-profit educators do not have the luxury to push envelopes and challenge standards. Many parties – from state and federal agents to consumer watchdogs – have these educators in their sights.



Nicole Kardell is an Attorney at the Washington, D.C.-based law firm of Ifrah Law. She represents clients across matters involving government action. From federal and state enforcement actions to government contract work, Kardell has spent most of her time as a lawyer representing clients on the opposite side of the table of government regulators and prosecutors. She has worked on matters involving the Federal Trade Commission, Department of Justice, Internal Revenue Service, offices of inspector general of several federal agencies and attorneys general of numerous states. She can be contacted at nkardell@ifrahlaw.com.