

DuaneMorris®

www.duanemorris.com

2019 CAPPS Legislative Policy Conference Legal Update

Keith Zakarin
Kristina Gill

April 8, 2019

©2019 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.

Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi | Ho Chi Minh City | Shanghai | Atlanta | Baltimore
Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka | Duane Morris LLP – A Delaware limited liability partnership

Yep, the Hate Zombies are Back Again



Balance of Control

Goals of the legislative package:

Put for-profit schools out of business

Limit enrollment

Regulate conversions and OPM models

Curtail any incentive compensation

Balance of Control

Common Themes

Increased restrictions
Regulatory drafting left to the BPPE
Increased AG oversight

Balance of Control



AB 1340 (David Chiu) – Outcomes Metrics

State level gainful employment rule

Pass: no restrictions
Zone: enrollment cap
Fail: prohibits CA enrollment

- Utilizes 34 CFR § 668.403
- Directs BPPE to adopt GE regulations, and any other regulations necessary to implement the section
- Mandates institutions report student level data, including education debt to BPPE
- Extracts wage data from the Employment Development Department

AB 1340 (David Chiu) – Outcomes Metrics

Concerns

- California already requires School Performance Fact Sheets
- The Employment Development Department collects payroll data from employers and uses a sampling to estimate employment by industry- potential for underreporting of income
- This data would not be directly correlated to the student
- Potentially crippling impact on enrollment
- Question of how many programs would fail, be in the zone, or pass

AB 1341 (Mark Berman) – Redefining “Nonprofit Corporation”

- Creates a new definition to qualify as a “nonprofit” corporation for purposes of California’s education laws
- Determination of “nonprofit” status would largely be left to the discretion of the California Attorney General (AG)
- Limits institutions that are not already approved
- Creates certain mandatory disqualifying events such as limitations if schools convert and create an OPM

AB 1341 (Mark Berman) – Redefining “Nonprofit Corporation”

Concerns

- Schools seeking to convert will be subject the AG review
- Creates significant limitations on future operational changes (for example, more schools may seek to adopt a model that segregates academics and operations)
- Non-profit schools may not want to partner with for-profit schools out of an abundance of caution because “joint venture” is so broad
- Public notice and opportunity to comment on conversions may bring even more scrutiny to the sector

AB 1342 (Evan Low) – Transactions and Agreements Between Nonprofit Corporations and For-Profit Entities

Requires any nonprofit corporation to obtain **written consent** of the California AG before entering into an agreement with any for-profit entity to:

1. sell, transfer, lease, exchange, option, convey or otherwise dispose of a material amount of the assets of the nonprofit corporation; or
2. transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit corporation.

AB 1342 (Evan Low) – Transactions and Agreements Between Nonprofit Corporations and For-Profit Entities Concerns

- Limits opportunities for for-profit institutions to contract with nonprofit institutions
- Fails to protect proprietary business documents by requiring public disclosure (AG has broad discretion re: documents to request)
- Approval of contracts will be at the full discretion of the AG
- Creates significant limitations on future operational changes (i.e. model that segregates academics and operations)
- Creates significant delays that could have operational impacts

AB 1343 (Susan Eggman) – Limitations on Loans and Student Aid

- Creates a state level 85/15 Rule
- The numerator would include revenue from federal or state student financial aid funds or from loans by a federal or state agency
- Prohibits enrollment of California residents if an institution exceeds 85%
- Exemptions:
 - Institutions demonstrate that not less than 50% of the institution's revenue is dedicated to student instruction, or
 - annual revenues are less than \$2.5 million annually

AB 1343 (Susan Eggman) – State 90/10* Rule

Concerns

- Proposed rule is significantly more expansive than the Federal rule
- Enrollment of California residents would be prohibited
- No mechanism for correction

AB 1344 (Rebecca Bauer-Hahan) – Out-of-State Institutions

- Expands the information required to be provided to the Bureau for an out-of-state private postsecondary institutions
- Adds an affirmative reporting requirement for adverse actions
- Institutions subject to any of the described actions would be reviewed by the Bureau, in consultation with the attorney general, and would be subject to possible revocation or probation.

AB 1344 (Rebecca Bauer-Hahan) – Out-of-State Institutions

Concerns

- Expands information required
- Creates a reporting requirement similar to BDR triggers
- Required imposition of “probationary” status
- Investigation could result in enrollment prohibition/ revoking registration
- Challenges by the institution require a preponderance of the evidence that the BPPE’s order was arbitrary, capricious, or not based upon substantial evidence

AB 1345 (Kevin McCarty) – Incentive Compensation

- Prohibits an institution from providing financial incentives to any person, including a student, involved in student recruitment, enrollment, continued enrollment, admissions or attendance, or in awarding financial aid
- Prohibits schools from conditioning employment or contracts on success in recruitment, enrollment, continued enrollment, admissions or attending, or success in awarding financial aid, or the sale of educational materials
- Removes "bundled services" exception
- Removes "token gift" to students exception

AB 1345 (Kevin McCarty) – Incentive Compensation

Concerns

- Expands incentive compensation restrictions beyond USDE ban
- Extends prohibitions to contracts
- A school could not terminate employment of an employee based on a failure to perform as enumerated
- Compliance with USDE's ban on incentive compensation is not enough under this rule

AB 1346 (Jose Medina) – Student Tuition Recovery Fund

- Expands the definition of economic loss under the Student Tuition Recovery Fund (STRF)
 - amounts paid by the student to the institution
 - any amounts paid in connection with attending the institution
 - all principal, interest and charges of any kind for a loan incurred by a student to pay these amounts

AB 1346 (Jose Medina) – Student Tuition Recovery Fund

Concerns

- Potential to result in a faster depletion of STRF
- Could require additional STRF assessments to cover the increased liabilities