



TOWARD A CONSUMER PROTECTION FRAMEWORK TO
PROTECT STUDENTS FROM PREDATORY PRACTICES: A LEGAL
ANALYSIS OF JUDICIAL OPINIONS AND STATE LAWS,
REGULATIONS

Neal Hutchens, J.D., Ph.D., Department of Higher Education, University of Mississippi

Frank Fernandez, Ph.D., Institute of Higher Education, University of Florida

Macey Edmondson, J.D., Ph.D., Department of Higher Education, University of
Mississippi

This paper is one in a series of reports coordinated by the State Higher Education Executive Officers Association (SHEEO) and generously supported by Arnold Ventures. Given increased public concerns about educational quality, the series is designed to generate innovative empirical research regarding state authorization processes and policies that can serve as a foundation for future research and policy in this understudied area. The views expressed in this paper – and all papers in this series – are those of its author(s) and do not necessarily reflect the views of SHEEO or Arnold Ventures.

Much of the attention around the regulation of for-profit colleges and universities has focused on the role of the federal government. Attention has been paid to the 90-10 rule, the now-defunct gainful employment rule, and the role of accreditors in the federal financial aid system. The federal role in the regulation of for-profit higher education certainly merits attention from researchers and lawmakers and policymakers. Alongside the federal role, the states also have an important role to play in the regulation of for-profit institutions to protect students from predatory practices. Some authors and reports have drawn attention to the role of the states in the regulation of for-profit higher education (e.g., Cochrane & Shireman, 2017; Schade 2014; Delgado, 2018; Loonin & McLaughlin, 2011). One reason for increased interest in the state role in the regulation of for-profit colleges and universities arose during the Donald Trump presidential administration, which showed little inclination regarding oversight of for-profit higher education. The election of Joseph Biden brought renewed interest in the federal role of countering bad-actor for-profit colleges and universities. Even as new attention is paid to the potential federal role in the regulation and oversight of for-profit higher education, the state regulatory role in relation to for-profit colleges and universities continues to merit attention from lawmakers and policymakers and state higher education authorization officials.

Too many for-profit colleges and universities are “poor actors” or “bad actors.” They are often ill-equipped to provide high-quality instruction, or they mislead or defraud students in such areas as potential future income in relation to the amount of student debt collected (Contreras, 2020). In this report, we focus on the ways states may work to regulate for-profit colleges and universities to reign in bad actors.

Nonprofit public or private institutions are accountable to elected officials or boards of trustees (Hutchens & Fernandez, 2019). While nonprofit institutions can certainly charge high tuition, they primarily fulfill public-service and public-good motives, including by offering tuition discounts or redistributing tuition from wealthier students as need-based aid to low-income students (Winston, 2004).

Alternately, for-profit providers are characterized by profit-seeking behavior to pay revenue to owners or shareholders (Angulo, 2016). For instance, for-profit universities regularly raise tuition to maximize revenue from federal subsidies (Cellini & Goldin, 2014).

From beginning to end, students struggle with for-profit colleges. During the initial encounter with for-profit recruiters, prospective applicants are subject to high-pressure sales tactics that prey on “student anxieties, stress, and fear” (Campbell et al., 2020, p. 2). Once enrolled, students at for-profit colleges bemoan a lack of communication and transparency (Iloh, 2016) and are typically less satisfied than students in nonprofit higher education (Deming et al., 2012). Retention and graduation rates are persistently low at for-profit colleges and universities (Center for Education Statistics, 2021).¹ Compared to alumni of public institutions, graduates of for-profit colleges are less likely to be employed—and they earn less if they are employed (Cellini & Turner, 2019). Among for-profit alumni, students who enroll at for-profit colleges in primarily online programs or who attend large, multicampus “chains” have the worst outcomes (Cellini & Turner, 2019). Despite grim employment prospects, for-profit colleges charge high tuition and their alumni have higher student loan debt than graduates from other sectors of higher education (Cellini & Darolia, 2017). For-profit alumni disproportionately default on their student loans (Goodell, 2016). Public and non-for-profit colleges and universities can and do engage in practices that are not always in the best interests of students, but for-profit institutions consistently and disproportionately fail to act in the best interests of students compared to other higher education actors.

There are multiple ways that states can work to protect students from for-profit colleges. For example, prior research shows that if a state offers more generous need-based grants to low-income students, many of those students enroll at for-profit colleges (Cellini, 2010) where they often take on debt to pay the balance of the total cost of attendance (Cellini & Darolia, 2017). Therefore, one direct policy

¹ See Table 326.10 https://nces.ed.gov/programs/digest/d19/tables/dt19_326.10.asp and Table 326.30 https://nces.ed.gov/programs/digest/d19/tables/dt19_326.30.asp

approach would be to eliminate or reduce funding for students to attend proprietary institutions. States may also develop more rigorous (re)authorization processes to allow for-profit colleges to open or continue operations (e.g., Tandberg et al., 2019). In this report, we focus on how states may independently (or in concert with the federal government) regulate for-profit colleges and universities to implement consumer protections for students and potential students of for-profit institutions. Specifically, we review court opinions and examples of state laws and regulations to lay out a consumer protection framework to circumscribe predatory practices in the proprietary higher education sector. The types of state legal and regulatory practices that we consider in the report are to help ensure that students and potential students receive accurate information regarding such information as student loan debt and job placement rates before enrolling in a for-profit institution. Additionally, we take into account ways that states or students can take legal action to pursue monetary damages or other legal relief when a for-profit provider has misled or defrauded students.

The framework offers implications for the following questions:

- In what ways may state governments require disclosures to potential students or current students by for-profit institutions?
- In what ways may state governments regulate marketing and advertising practices by for-profit institutions?
- In what ways may state governments (including in conjunction with federal legal and regulatory standards) cultivate legal environments that support consumer protection for students that attend for-profit institutions?

APPROACH AND METHODS

For this report, we conducted a review of state laws and legal standards in relation to regulation and oversight of for-profit colleges and universities. Specifically, we focused on ways that states can engage in legal and regulatory actions to provide better consumer protections for enrolled students and disclosures that help potential students make more informed decisions regarding enrollment in for-profit colleges

and universities. Part of our analysis drew from a search of legal decisions. To locate court cases for review, we used the Westlaw legal database using a combination of search tactics, including the use of keyword searches, reviewing potential cases cited in identified cases for additional legal opinions, and reviewing later cases that cited legal cases already identified. It is important to point out, however, that our search process was not focused on reporting out the number of cases identified in searches. Rather, the goal of our review and analysis of legal decisions was to gain a sharper understanding of the potential types of legal challenges that for-profit institutions may bring in court to state authority and, most importantly, the scope of state legal authority to impose rules and requirements on for-profit schools. We supplemented these searches by locating information from state-specific sources, notably, state offices or agencies charged with oversight of higher education or administering state-based financial aid policies. Additional information came from sources that included previous reports and from legislative information provided by the National Conference of State Legislatures.

In our examination of consumer protection and disclosure standards, the authors considered the role of both general application laws, such as in the case of state consumer protection laws, laws or regulatory standards covering nonprofit and for-profit colleges and universities, and laws or regulatory standards specific to for-profit higher education. Considering all three areas of state laws and regulatory domains implicating higher education presented analytical challenges given the breadth and scope of potential state laws and regulations, but this broader focus proved important in better understanding how state legal or regulatory standards—whether from a generally applicable law, a law or regulation focused on any higher education provider, or a law or rule focused on for-profit higher education—can enhance student consumer protections for students and mandate disclosures to students and potential students when it comes to for-profit institutions.

CONSUMER DISCLOSURES TO STUDENTS AND POTENTIAL STUDENTS

Examples of Required Disclosures to Enrolling Students

One strategy to help students make better informed enrollment decisions relates to mandatory disclosures that for-profit providers must make to potential or current students (Shelton, 2012-2013; Taylor, 2010). In reviewing such standards, the research team focused on the nature of disclosures as well as the legal authority of states to impose required disclosures on for-profit colleges to potential, enrolling, or enrolled students. Our review did not focus on disclosures that institutions must make to state agencies or disclosure requirements that are only triggered upon the request of a student or potential student. Our review of cases and state laws revealed several types of disclosures that states can require to students and potential students, including several notable types of disclosures:

- (1) graduation rates for particular programs,
- (2) student passage rates on required licensure or certification exams,
- (3) information regarding student loan debt, such as the requirement to repay loans even if an individual does not finish a program or information regarding the percentage of students at an institution who have defaulted on or failed to repay student loans, and
- (4) placement rates of graduates in full-time, permanent employment.

Our review of state laws indicated that some types of disclosures to students or prospective students attending proprietary schools come in varying forms for all but eight states (see Appendix A).

Alongside the nature or content of disclosures, an important variation relates to whether the disclosure must be made generally or whether a student or potential student must request the information. Some disclosure requirements pertain to information that must be contained in an enrollment agreement. Disclosure requirements may also be specific to for-profit higher education institutions or also include nonprofit and public colleges and universities. Although some language among states is similar, there is not a guiding uniform code (such as the Uniform Commercial Code) followed, at least partially, in states in relation to legal standards

governing business transactions, that states can adopt. The U.S. Department of Education's Office of Postsecondary Education defines proprietary institutions, [34 CFR § 600.5](#), and provides guidelines for eligible programs, [34 CFR § 668.8](#), but leaves much of the regulatory oversight to individual states.

Absent uniform disclosure requirements among states, we discuss two state exemplars: California and Massachusetts. These states offer examples of required disclosures that can be used to regulate proprietary higher education. Additionally, disclosure requirements in both states have withstood legal challenges in court. Though challenges and interpretations may differ across jurisdictions, the California and Massachusetts examples provide insight into how courts may apply federal legal principles to review the permissibility of state regulations that cover for-profit colleges and universities.

1. California

California's mandatory disclosure language for information that must be provided prior to enrollment applies to private postsecondary providers—therefore, it does not apply exclusively to for-profit higher education. The fact that California's policy does not explicitly target proprietary colleges and universities may help shield the rule from legal challenges, such as under equal protection standards (i.e., that for-profit providers are being unfairly singled out from nonprofit private and public colleges and universities). However, regulations aimed only at for-profit institutions, such as in Massachusetts, have also withstood legal review.

California's disclosure language for enrollment agreements is found in the state's education code (§ 94910). The California standards provide a helpful exemplar, as they outline to whom disclosures must be made (i.e., prospective students), the content of disclosures, and even ways disclosure information must be calculated. California requires new providers to provide explicit statements warning students that data are unavailable for gauging the quality of the institution or the employment outcomes of its alumni. Additionally, the state requires that disclosure fact sheets be filed and vetted by the Bureau for Private Postsecondary Education and provides students with the Bureau's contact information in case students or potential students

have questions, concerns, or complaints. See below for California Education Code § 94910.

Except as provided in subdivision (d) of Section 94909 and Section 94910.5, prior to enrollment, an institution shall provide a prospective student with a School Performance Fact Sheet containing, at a minimum, the following information, as it relates to the educational program:

- (a) Completion rates, as calculated pursuant to Article 16 (commencing with Section 94928).*
- (b) Placement rates for each educational program, as calculated pursuant to Article 16 (commencing with Section 94928), if the educational program is designed to lead to, or the institution makes any express or implied claim related to preparing students for, a recognized career, occupation, vocation, job, or job title.*
- (c) License examination passage rates for programs leading to employment for which passage of a state licensing examination is required, as calculated pursuant to Article 16 (commencing with Section 94928).*
- (d) Salary or wage information, as calculated pursuant to Article 16 (commencing with Section 94928).*
- (e) If a program is too new to provide data for any of the categories listed in this subdivision, the institution shall state on its fact sheet: "This program is new. Therefore, the number of students who graduate, the number of students who are placed, or the starting salary you can earn after finishing the educational program are unknown at this time. Information regarding general salary and placement statistics may be available from government sources or from the institution, but is not equivalent to actual performance data."*

(f) All of the following:

- (1) A description of the manner in which the figures described in subdivisions (a) to (d), inclusive, are calculated or a statement informing the reader of where he or she may obtain a description of the manner in which the figures described in subdivisions (a) to (d), inclusive, are calculated.*
- (2) A statement informing the reader of where he or she may obtain from the institution a list of the employment positions determined to be within the field for which a student received education and training for the calculation of job placement rates as required by subdivision (b).*
- (3) A statement informing the reader of where he or she may obtain from the institution a list of the objective sources of information used to substantiate the salary disclosure as required by subdivision (d).*

(g) The following statements:

- (1) "This fact sheet is filed with the Bureau for Private Postsecondary Education. Regardless of any information you may have relating to completion rates, placement rates, starting salaries, or license exam passage rates, this fact sheet contains the information as calculated pursuant to state law."*
- (2) "Any questions a student may have regarding this fact sheet that have not been satisfactorily answered by the institution may be directed to the Bureau for Private Postsecondary Education at (address), Sacramento, CA (ZIP Code), (Internet Web site address), (telephone and fax numbers)."*

(h) If the institution participates in federal financial aid programs, the most recent three-year cohort default rate reported by the United States Department of Education for the institution and the percentage of enrolled students receiving federal student loans.

(i) Data and information disclosed pursuant to subdivisions (a) to (d), inclusive, is not required to include students who satisfy the qualifications specified in subdivision (d) of Section 94909, but an institution shall disclose whether the data, information, or both provided in its fact sheet excludes students pursuant to this subdivision. An institution shall not actively use data specific to the fact sheet in its recruitment materials or other recruitment efforts of students who are not California residents and do not reside in California at the time of their enrollment.

(California Education Code § 94910)

The Legal Test: *Southern California Institute of Law v. Bigger* (2013)

Similar to the disclosures considered above, California also has attached disclosure requirements to law schools that receive their accreditation from California as opposed to from the American Bar Association. One school, the Southern California Institute of Law (SCIL), challenged a requirement to report bar passage rates for potential students to review before enrolling (*Southern California Institute of Law v. Bigger*, 2013). At issue in the case were state rules imposed on California-only accredited law schools requiring them to post results of the ten most recent bar examination results of graduates or to provide a web link for prospective students to be able to access this information.

A law school challenged the bar passage disclosure requirement on grounds that it represented compelled governmental speech in violation of the First Amendment. Namely, the law school argued that it disagreed with the use of bar passage rates as an indication of the quality of a law school's education program. As to the appropriate standard to evaluate its First Amendment claim, the law school contended that "its website and publications are not intended solely for the purpose of proposing commercial transactions. The website details SCIL's faculty and curriculum and provides tools and resources to existing students to support their education" (*Southern California Institution of Law*, 2013, p. *3). Such a characterization was used by the law school to bolster its arguments that the regulation should be subject to a more heightened level of scrutiny than what courts normally apply to commercial speech, that is, speech that primarily deals with a sales or commercial transaction.

As to the nature of the speech at issue in the case, however, the court ruled that the website contained information that dealt with commercial speech as the materials—while "not equivalent to, for example, a car dealer's website"—was "designed" to market the law school (*Southern California Institution of Law*, 2013, p. *5). Additionally, the court determined that the regulation under review dealt with commercial speech that was not "inextricably intertwined" with noncommercial speech despite the presence of materials about faculty and curriculum that did more

than entail an “economic motive” (Southern California Institution of Law, 2013, p. *6). While the law school claimed that the disclosures represented compelled speech that should be subject to heightened scrutiny, the court ruled that a compelled disclosure such as the one at issue in the case fit within the commercial speech framework and was subject to a less rigorous standard of review as it dealt with the disclosure of purely factual information. Under this standard, the court ruled that the disclosure standard was reasonably related to preventing the deception of prospective students. The court also pointed out that the law school could still provide information questioning the wisdom of equating bar passage rates with the quality of the educational program in its web-materials. The case is instructive in showing that disclosure requirements dealing with factual information are strongly positioned to withstand a legal challenge, even when a school is displeased with or in disagreement with the information being disclosed.

2. Massachusetts

Massachusetts provides another helpful example of an approach to required consumer disclosures, including ones that are specifically focused on for-profit institutions. The state achieves its disclosure goals pertinent to higher education through multiple regulations. For instance, the Code of Massachusetts Regulation (CMR) charters the Division of Professional Licensure under the Office of Consumer Affairs and Business Regulation. The Division of Professional Licensure mandates disclosures from private occupational schools (230 CMR 15.05).²

With this state regulatory framework, Massachusetts offers an example of requiring disclosures that specifically apply to for-profit higher education (940 CMR 31.00). The regulatory language addresses “false or misleading statements or representations” (940 CMR 31.04), “required disclosures” (940 CMR 31.05), “prohibited practices” (940 CMR 31.06), and “unfair or deceptive practices involving student loans and financial aid” (940 CMR 31.07). We provide selections of

² <https://www.mass.gov/doc/230-cmr-1500-private-occupational-schools-general-provisions-and-standards-of-practice/download>

Massachusetts' disclosure regulations below (the full text can be found in Appendix B).

Note that the Massachusetts disclosure language begins to overlap with other areas of speech or practice that relate to consumer protection. For instance, the "required disclosures" language in 940 CMR 31.05 begins to refer to the content of advertisements. Additionally, the text of 940 CMR 31.06 ("prohibited practices") begins to address what may be referred to as high-pressure sales tactics. We address how states may regulate marketing, advertisements, and sales tactics later in the report. The regulations in Massachusetts illustrate how consumer protection disclosure requirements rules triggered as part of an enrollment agreement or through direct communications with potential students can be paired, as covered later in the report, with rules that also encompass general advertising and marketing materials. As discussed in the next subsection, the Massachusetts disclosure rules also provide a helpful example to consider rules that are more likely to pass court review and ones that may encounter more difficulty in withstanding a legal challenge.

Selected Portion from Massachusetts Disclosure Rules for For-Profit Institutions

It is an unfair or deceptive act or practice for a school to use language or make a claim or representation in any form, including but not limited to spoken, electronic, or printed form, which has the tendency or capacity to mislead or deceive students, prospective students, or any other person . . .

It is an unfair or deceptive act or practice for a school to misrepresent the amount of time it takes to finish a program, including a representation that a program can be completed “in weeks” or similar language suggesting that the length of time to complete the program is shorter than the actual median completion time to obtain a certificate, diploma, or degree.

(940 CMR § 31.04)

Selected Portion from Massachusetts Disclosure Rules for For-Profit Institutions

*It is an unfair or deceptive act or practice for a school to conceal or fail to disclose to a prospective student any fact relating to the school or program, disclosure of which is likely to influence the prospective student **not to enter** into the transaction with the school . . .*

*It is an unfair or deceptive act or practice to fail to make the following disclosure to consumers and prospective students, clearly and conspicuously, **at least 72 hours prior to entering into an enrollment agreement with a consumer or prospective student:***

*For any school **that accepts federal Title IV funds, or that provides institutional loans**, it is an unfair or deceptive act or practice for a school to fail to make the following disclosure to consumers and prospective students, clearly and conspicuously, at least 72 hours prior to entering into an enrollment agreement with such consumer or prospective student . . .*

*For any occupational program that: ... (b) **refers in advertising, recruiting or promotional materials to statements to employment prospects or job placement**, it is an unfair or deceptive act or practice for a school to fail to make the following disclosure to consumers and prospective students, clearly and conspicuously, at least 72 hours prior to entering into an enrollment agreement with such consumer or prospective student . . .*

*It is an unfair or deceptive act or practice for a school to represent to a student or prospective student or to any other person **that its credits are or may be transferable** to another educational institution without:*

(a) identifying the school(s) with which it has written agreements or other documentation verifying that credits can be transferred to said school(s); and

(b) indicating it is aware of no other schools that accept the transfer of its credits

(940 CMR § 31.05)

Selected Portion from Massachusetts Disclosure Rules for For-Profit Institutions

*It is an unfair or deceptive act or practice for a school to **enroll or induce retention** of a student in any program **when the school knows, or should know**, that due to the student's educational level, training, experience, physical condition, lack of language proficiency, or other material qualification, the student will not or is unlikely to:*

(a) graduate from the program; or

(b) meet the requirements for employment in the occupation to which the program is represented to lead . . .

*It is an unfair or deceptive act or practice for a school to initiate communication with a prospective student, prior to enrollment, via telephone (either voice or data technology), in person, via text messaging, or by recorded audio message, **in excess of two such communications in each seven-day period** to either the prospective student's residence, business or work telephone, cellular telephone, or other telephone number provided by the student*

(940 CMR §31.06)

The Legal Test: Massachusetts Association of Career Schools v. Healey

We highlight Massachusetts' regulations on proprietary higher education, in part, because of the ways the standards thoroughly address the ways that colleges can withhold information from students or potential students in their communications or marketing and advertising. Additionally, we point to Massachusetts as an exemplar because the required disclosure regulations were challenged in court. The regulations were largely upheld by a federal district court. But, the court did strike down some provisions contained in the regulations, which may prove instructive to other states in crafting disclosure requirements for for-profit colleges with a better chance of withstanding potential legal challenges.

In *Massachusetts Association of Career Schools v. Healey* (2016), an association representing for-profit schools challenged nine regulations. The regulations are partially represented in the prior subsection and provided in full text in Appendix B. On First Amendment grounds, the association argued that seven of the regulations constituted an impermissible restraint on First Amendment protections by regulating specific content and that another regulation infringed speech rights by

being too vague for due process purposes on what type of speech was prohibited.³ While rejecting most challenges to the regulations on speech grounds, the court ruled that a regulation dealing with misrepresentations in program completion and in credit transfer did violate First Amendment standards.

In its First Amendment challenges to the regulations, the association contended that the regulations impermissibly limited information that for-profit schools could communicate with students or potential students. In making these arguments, the association urged for the court to apply a heightened level of judicial review to the regulations. In response, the state's attorney general argued the regulations should be subject to the lowest level of judicial review (called rational basis review) as they dealt with mandatory disclosures or, at most, an intermediate level of judicial review (a middle level of court review) as the regulations dealt with commercial speech (that is, speech that is seeking to promote a business or commercial transaction) and not forms of speech, such as on political or social matters, that are often subject to a more stringent level of judicial review.

In framing its analysis, the court explained that the "default test" for commercial speech is subject to four parts.⁴ First, if the speech at issue is, in fact, "actually false, deceptive, or misleading" or "proposes an unlawful activity," then the speech is not protected by the First Amendment (Healey, 2016, p. 190). However, if the speech is "only 'potentially misleading,'" then the "court must make three additional inquiries: (1) whether the asserted governmental interest is substantial; (2) whether the regulation directly advances the government interest asserted; and (3) whether the regulation is not more extensive than is necessary to serve that interest" (Healey, 2016, p. 190). The court rejected arguments that two more-recent U.S. Supreme Court decisions had "implicitly overturned" a prior U.S. Supreme Court decision so that strict scrutiny should apply to the regulations (Healey, 2016, p. 190).

³ The association also asserted due process protections and argued as well that another regulation was preempted by a federal telemarketing law, with the preemption challenge considered later in this report.

⁴ The court cited the U.S. Supreme Court decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

The court also stated that based on the U.S. Supreme Court's precedent⁵ that the lowest level of judicial scrutiny applied to disclosures satisfying the following conditions: "(1) the speech is potentially misleading and (2) the regulations require the schools to disclose factual and uncontroversial information" (Healey, 2016, p. 197).

Under these aforementioned standards, the Massachusetts attorney general conceded that three regulations (deceptive language in general, time to program completion, and high-pressure sales tactics) were subject to intermediate (i.e., middle-tier) court scrutiny but argued that the other four regulations (information regarding the consequences of loan default, graduation rates, job placement rates, and transferability of credits) were subject to rational basis court review instead of a higher level of judicial scrutiny. Of these four, the court agreed with the Massachusetts attorney general that disclosures dealing with consequences of loan default, graduation rates, and placement rates were subject to rational basis review, the lowest level of court scrutiny. Rejecting the attorney general's position on one rule, the court concluded that the provision dealing with the sharing of information regarding the transferability of credits involved more than a "factual disclosure" and should be subject to intermediate scrutiny (Healey, 2016, p. 200). In sum, the court applied intermediate judicial review to four of the regulations and rational basis review to three of the regulations.

Of the four regulations reviewed under intermediate scrutiny (deceptive language in general, time to program completion, high-pressure sales tactics, and transferability of credits), the court invalidated two of them—the disclosure on time to program completion and the one dealing with the sharing of information on credit transfer. For the disclosure on time to program completion, the court found it impermissible for the state to limit schools to only reporting median completion times; instead, for-profit providers should have also been able to inform prospective students that they could finish a program faster than the median time. In relation to credit transfer, the court stated that the regulation limited a school to only listing

⁵ The court cited the U.S. Supreme Court decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985).

other institutions to which it had a formal transfer agreement, even if another institution routinely accepted transfer credits despite the absence of a formal agreement. As such, the court concluded that the state's regulation prohibited an institution from engaging in truthful communication with students or potential students.

To summarize how the court ruled on First Amendment challenges to seven of the regulations, the court upheld two of the regulations under intermediate scrutiny and three of the regulations under rational basis review, while invalidating two of the regulations. One case from a federal district court should be kept in perspective in interpreting state authority to compel disclosures or regulate the commercial speech of for-profit postsecondary institutions—other courts could reach different results. Still, the Healey decision is instructive regarding the scope of state authority to place disclosure requirements on for-profit postsecondary institutions. First, required disclosures that deal with factual information and knowledge (such as the consequences of defaulting on student loans, graduation rates, or employment placement rates for graduates) may well be subject to only rational basis review, the lowest level of judicial scrutiny, which suggests substantial state legal latitude in relation to disclosures dealing with factual information.

Second, disclosures or restrictions on marketing materials or other communications from a for-profit institution that go beyond the sharing of factual information may trigger intermediate scrutiny under commercial speech standards. While presenting a higher legal hurdle compared to rational basis review, as shown in this case, even when subject to intermediate scrutiny, a governmental rule related to the regulation of commercial speech can still be found permissible by courts. Healey presents two helpful recommendations for other states for regulations that may be subject to this middle level of court review. Under intermediate scrutiny and regulations of commercial speech, a rule cannot limit any more speech than is necessary to address the governmental interests at stake. Additionally, under intermediate scrutiny, a state needs to be able to justify that requirements imposed on for-profit institutions deal with a substantial governmental interest and that

concerns regarding for-profit institutions are real and not simply conjecture. In Healey, for instance, the state of Massachusetts succeeded in some of its claims dealing with regulations that the court reviewed under intermediate review because it had compiled substantial documentation of problematic practices by for-profit schools in the state.

SUMMARY

The California and Massachusetts exemplars show states that have adopted clear, detailed, and thorough regulations to require disclosures from private colleges and universities. In the case of California, mandatory disclosures can be required from all private providers, which by default, apply to the proprietary sector. As the Massachusetts example shows, for-profit schools may serve as the focus for state regulation. The two examples show how states can:

- Require providers to provide disclosures “clearly and conspicuously” (Massachusetts).
- Impose a waiting period (e.g., at least 72 hours prior to entering into an enrollment agreement) so that disclosures must be provided before students commit to enrolling (Massachusetts).
- Require that disclosure information (e.g., “fact sheets”) be filed with state agencies that have oversight for regulations (e.g., California’s Bureau for Private Postsecondary Education).

Though disclosures are an important element in moving states toward adopting a robust set of consumer protections for students or potential students who may be targeted by for-profit colleges and universities, we recognize that disclosures have their limits. Shelton cautioned that disclosures “may quickly begin to be viewed as a safe harbor provision insulating the school from allegations of misrepresentation.” (Shelton, 2012-2013, p. 114). Similarly, Dundon (2015) warned: “smart industry participants will simply ensure that they make the proper disclosures and representations, continuing their fundamentally unfair business models” (p. 392). Thus, in the sections that follow, we discuss two ways that states can complement disclosures with other state-based consumer protection legal protections: (1)

restrictions on predatory advertising and marketing practices and (2) consumer protection laws and rules enforceable by state officials or in legal actions initiated by individual students or groups of students.

PROTECTING STUDENTS FROM PREDATORY ADVERTISING AND MARKETING PRACTICES

Legal Arguments for Regulating Aggressive Marketing

Corporations do not have unlimited free speech protections when it comes to marketing or advertising products and services (Matsuda, 1989). There are multiple legal theories for regulating aggressive marketing. For example, around the early 2000s, technological changes enabled pharmaceutical companies to market directly to consumers. Legal scholar Richard Ausness argued that the more aggressive marketing practices would “lead to greater tort liability” and “the most likely theories of liability are failure to warn and negligent marketing” (2002, p. 97). Law professor Victoria Dawson examined aggressive marketing schemes in the retail industry. She argued that when “aggressive marketing schemes might be attributed to the acceptable industry-wide practice, a negligence cause of action must include not only the individual retailer involved, but all participants who contributed to the creation of the risk as well” (2010, p. 752). She further argued that “the tort concept of enterprise liability is effective in impacting the practice of aggressive marketing schemes” (p. 753).

It is necessary to regulate aggressive marketing by for-profit colleges and universities because they often target vulnerable populations—and use huge sums of public financial aid and student loan revenue to do so. For-profit colleges have a track record of focusing their advertising and sales strategies on unemployed, underemployed, military veterans (or their family members who are eligible for transferrable tuition benefits), low-income, homeless, and racially-minoritized individuals (see, e.g., Schade, 2014 for more information). For-profit colleges spend significantly more than private, nonprofit colleges (\$4:\$1) and far more than public colleges (\$20:\$1) on advertising (Cellini & Chaudhary, 2020).

Munro (2015) tells how the federal government had limited success regulating the for-profit sector's aggressive marketing tactics during the Obama administration. Under the leadership of Secretary of Education Arne Duncan, the U.S. Department of Education adopted abusive recruitment regulations, which were overturned by *Association of Private Sector Colleges and Universities v. Duncan* (2012) when the court concluded that the Department of Education had overstepped its authority granted by the Higher Education Act. The Department of Education tried to revise the regulations, but they were again challenged and overturned (*Association of Private Sector Colleges and Universities v. Duncan*, 2014).

In the absence of new federal regulations on aggressive marketing by the for-profit sector, Schade (2014) argued that states should adopt their own regulations that align with Federal Trade Commission policies. For instance, Schade noted Maryland's 2011 legislative efforts to regulate for-profit higher education. Maryland limited most state aid to students attending public or private, nonprofit colleges and universities. Additionally, Maryland sought to limit the sector's ability to create financial incentives that may encourage recruiters to use aggressive marketing or

Any institution of higher education may not pay a commission, a bonus, or any other incentive payment based on success in securing enrollments or the award of financial aid to a person or entity engaged in student recruitment or admission activity.

(Maryland Senate Bill 695, 2011)

high-pressure sales tactics (see excerpt below).

States may find that focusing on recruiter compensation is an effective strategy for limiting how for-profit colleges and universities induce students to borrow to pay for-profit tuition (Taylor, 2010). States may adopt, and state regulatory agencies may enforce, policies that align with the federal False Claims Act. The False Claims Act allows individuals to sue on behalf of the federal government "alleging fraud in the obtainment of Title IV funds [federal financial aid], primarily arising from recruiter compensation arrangements" (Taylor, 2010, p. 739). If policymakers do not limit state aid to for-profit colleges and universities, they could encourage individuals to sue

for-profit colleges on behalf of the state when for-profit recruiters misrepresent educational or post-graduation opportunities to access state grants through students.

Here are three examples of how states have sought to limit aggressive marketing or high-pressure sales tactics.

Arkansas

The Arkansas State Board of Private Career Education (which is under the Arkansas Division of Higher Education) places strict dollar limits on how for-profit colleges can offer incentives to recruit students. In Arkansas, “the admissions representative shall not . . . offer as an inducement or enticement any consideration with a value of more than \$50 to a prospective student prior to enrollment, such as cash, food, housing or gifts” (Code Ark. R. § 142.00.1-III). Additionally, Arkansas has adopted rules that allow it to closely monitor advertising. For-profit colleges must provide the state with “printed copy and dates for radio and television advertising” (Code Ark. R. §142.00.1-XXX). Arkansas also requires that the school be named in all its advertisements and declared that “‘blind’ advertisements are considered misleading and unethical.” Ultimately, Arkansas uses administrative codes to hold for-profit colleges “responsible for any statements or commitments made by its admissions representatives.”

California

In 2014, California legislators adopted Senate Bill 1247, which directed the state Bureau of Private Postsecondary Education to prioritize complaints “alleging unlawful, unfair or fraudulent business acts or practices, including unfair, deceptive, untrue, or misleading statements.” In other words, California not only sought to adopt regulations to limit misleading marketing, the state also sought to develop a strong enforcement mechanism by ensuring that allegations of illegal or untrue recruitment tactics would receive full attention.

*The bureau shall, in consultation with the advisory committee, adopt regulations to establish categories of complaints or cases that are to be handled on a priority basis. **The priority complaints or cases shall include, but not be limited to, those alleging unlawful, unfair or fraudulent business acts or practices, including unfair, deceptive, untrue, or misleading statements, including all statements made or required to be made pursuant to the requirements of this chapter, related to any of the following:***

- (1) Degrees, educational programs, or internships offered, the appropriateness of available equipment for a program, or the qualifications or experience of instructors.*
- (2) Job placement, graduation, time to complete an educational program, or educational program or graduation requirements.*
- (3) Loan eligibility, terms, whether the loan is federal or private, or default or forbearance rates.*
- (4) Passage rates on licensing or certification examinations or whether an institution's degrees or educational programs provide students with the necessary qualifications to take these exams and qualify for professional licenses or certifications.*
- (5) Cost of an educational program, including fees and other nontuition charges.*
- (6) Affiliation with or endorsement by any government agency, or by any organization or agency related to the Armed Forces, including, but not limited to, groups representing veterans.*
- (7) Terms of withdrawal and refunds from an institution.*
- (8) Payment of bonuses, commissions, or other incentives offered by an institution to its employees or contractors.*

(California Senate Bill 1247, 2014) (codified at West's Ann.Cal.Educ.Code §94941)

Massachusetts

In addition to the provisions and litigation discussed in the previous section, Massachusetts also adopted a provision that specifically focused on ending high-pressure sales tactics by phone in the for-profit sector. This provision was challenged

Engaging in High-pressure Sales Tactics. *It is an unfair or deceptive act or practice for a school to initiate communication with a prospective student, prior to enrollment, via telephone (either voice or data technology), in person, via text messaging, or by recorded audio message, in excess of two such communications in each seven-day period to either the prospective student's residence, business or work telephone, cellular telephone, or other telephone number provided by the student.*

(940 CMR §31.06)

as being impermissible under a federal law that regulated phone sales tactics. The

litigation in *Massachusetts Association of Career Schools v. Healey* (2016)—the case covered previously in this report—illustrates how states may impose regulations on for-profit colleges and universities, even when a federal law may also apply.

The Legal Test: Massachusetts' Rules Not Preempted by Federal Law

Litigation dealing with regulations covering for-profit institutions enacted in Massachusetts were considered previously in the report, specifically in relation to legal standards applied to the regulations based on the First Amendment. In this litigation, *Massachusetts Association of Career Schools v. Healey* (2016), the association representing for-profit schools in the state also argued that a provision dealing with high-pressure sales tactics was preempted, or made invalid, under federal law by the Telephone Consumer Protection Act (TCPA). Preemption deals with instances when federal law displaces the authority of states to regulate in a particular area. The court rejected several arguments by the association that the TCPA overrode state authority to implement rules that forbid for-profit institutions from placing undue pressure on potential students to enroll. It is important not to overstate the importance of one case from a federal trial court, but the case helps to illustrate that even when a federal law may deal with a regulatory area, such as telecommunications, it does not mean that states are forbidden to regulate for-profit schools. Additionally, the case also highlights the importance of federal-state partnerships when it comes to regulation in particular areas. In *Healey*, the court pointed out that Congress had intended to regulate telecommunication alongside the states and not in place of the states. In this instance, such concurrent regulation provided room for Massachusetts to prohibit high-pressure sales through phone by for-profit institutions. The focus of our report is on state authority, but the case serves as an important reminder that federal authority can be used to complement rather than to supplant the state role when it comes to the regulation of for-profit colleges and universities.

GENERAL STATE CONSUMER PROTECTION LAWS, OTHER LEGAL STANDARDS

State consumer protection laws have been advocated as one important legal mechanism to protect students that attend for-profit institutions (Cochrane & Shireman, 2017; Delgado, 2018; Loonin & McLaughlin, 2011). Previous sections considered specific requirements related to required disclosures to consumers, such as when signing an enrollment agreement, and to information contained in marketing and advertising materials. Such disclosures provide an important dimension to consumer protection of students and potential students. But what happens when a for-profit institution has defrauded or otherwise misled students or failed to live up to promises made to students? Whether as part of rules applicable specifically to for-profit colleges, under general consumer protection laws, or other legal actions (such as ones based in tort law or contract law), states can provide aggrieved students the opportunity to seek legal recourse, such as monetary damages, for inappropriate action on the part of a for-profit institution.

Actions by State Attorneys General Offices, Other State Agencies

Actions by a state's attorney general (or other state agencies) represent an important tool of consumer protection in dealing with bad-actor for-profit institutions. These offices have the ability to act as regulators on behalf of students in issues where fraud, misrepresentation, misleading advertisements, and deceptive trade practices take place by proprietary institutions, creating consumer protection causes of action (Pridgen et al., 2020). Our review of cases in Westlaw and of settlement agreements reported by state attorney general offices show the importance of this type of enforcement in regulating for-profit colleges and universities and responding to instances of wrongdoing. Unlike an action brought by an individual or group of individuals, state agencies, if appropriately resourced, are better able to engage in enforcement that is able to take on incidents where large numbers of students have been the victims of misleading or fraudulent actions by for-profit providers. Several state attorneys general have recognized the need for reform and have cracked down on for-profit institutions to protect students from

misrepresentation (Schade, 2014). Leading actions against for-profit institutions involving state attorneys general include false and misleading data and disclosures and deceptive trade practices. State attorneys general have been interceding on behalf of students wronged by for-profit institutions for well over a decade. They, or other agencies, can act as a watchdog on behalf of constituents who are students at for-profit institutions and create oversight for those who might be left with unpaid debt or unemployment as a result of false data reporting and deceptive trade practices.

False and Misleading Data and Disclosures

State attorneys general have interceded when falsified information was being used by for-profit colleges to bolster data and lure students in, promising results that actual data do not support. In 2012, Colorado's attorney general filed suit against Westwood College, a proprietary institution headquartered in Denver. The attorney general found that Westwood, whose subsidiary financed students' school loans at a whopping 18%,⁶ did not follow Colorado's consumer protection laws and used misleading and inaccurate information to recruit students (Steffen, 2012). The settlement listed several requirements that Westwood would have to complete in order to continue in business, some of which can be used as guidance by states to provide more disclosure oversight of for-profit institutions: (1) not advertising that certain job titles can be obtained unless there is a student who graduated in the immediate preceding year who obtained a job with that title, (2) including the number of graduates that were used to determine prospective salary data, (3) requiring permission to be obtained by a graduate indicating that their employment is aligned with work normally associated with their degree, and (4) disclosing the entire amount of tuition required to complete a degree (Final Consent Judgment with Alta Colleges, Inc., and Westwood College, Inc., et. al, 2012). If guidelines provided more specificity, including providing formulas for computing data, the less likely data can be

⁶ Compare 18% in 2012 to today's average rate of 2.75% - 5.30% for federal student loans and 3.34% - 12.99% for private loans (Gravier, 2021).

manipulated. Additionally, transparency of calculations would allow students to assess how data was used. Many times, there are reporting requirements for states, but publishing information for students is not always required.⁷

As California Attorney General, Kamala Harris filed suit against Corinthian Colleges, Inc. claiming that their institutions misrepresented disclosure data, including job placement rates and program offerings. For example, career services officers were using placement data that included students who had been hired for two days by a temporary staffing agency (Blumenstyk, 2013). Since then, President Biden's administration has provided funding to assist with student loan debt relief for students of Corinthian who were promised relief from the Education Department. This relief was supposed to come under the direction of Education Secretary Betsy DeVos, but California's attorney general filed suit when the funding was not forthcoming (California Office of the Attorney General, 2021). Similarly, in 2013, the New York Attorney General, Eric Schneiderman, reached a settlement with Career Education Corp., also for misleading information, including career placement rates and failing to inform students that their degree would not be sufficient for post-graduation licensing exams (Kirkham, 2013).

Deceptive Trade Practices

State attorneys general have also found that for-profit employees are being rewarded with a commission if they meet student or placement quotas. Guidelines should be clear that employees who provide data for disclosure purposes should not receive any type of commission associated with rates to prevent further falsification of information. In the Colorado Westwood settlement mentioned above, admissions counselors received a commission for the number of students they recruited to attend their colleges (Steffen, 2012). This led to vulnerable students taking out

⁷ See Appendix A.

massive loans with the false hope of obtaining certain careers upon graduation. The settlement ordered Westwood to pay \$2.5 million to assist with debt reduction of their students who either had a balance, had paid off a balance, or defaulted within a certain time period where wrongdoing was determined to have taken place. (Final Consent Judgment with Alta Colleges, Inc., and Westwood College, Inc., et. al, 2012). In New York's settlement with Career Education Corp., career services officers received bonuses based upon job placement rates (Kirkham, 2013). Allowing commission-based pay puts key employees in compromising situations where students have the potential to be harmed for the sake of optimal data reporting.

Third Party Reporting Companies

There may be instances where for-profit institutions engage third-party companies to analyze and produce data for disclosures which appear on institutional websites. For-profits may argue that these are independent companies and liability should not be placed on the institutions; however, courts have concluded that these companies are considered agents. For example, Kentucky's attorney general brought a suit on behalf of the state against American National University of Kentucky, Inc. ("National"), a career college with six campuses in Kentucky. National was required to publish data on its website regarding placement rates. National's website was maintained by a company called National College Services, Inc., also owned by National's owner (two separate entities, with one owner). The employment rates that were published were not explained and appeared unusually high compared to other similar institutions. These rates were supposed to be distributed into categories of students who were employed in their field of study, a related field, or outside their field of study. This was not stipulated on National's website, so students who viewed the information could have incorrectly concluded that the graduation rates were promising if they attended the institution. The Kentucky Court of Appeals confirmed that National College Services, Inc. was an agent of National and acted willfully in publishing graduation rates that were not explained and were not clear for students to understand. In interpreting the Kentucky Consumer Protection Act, the court

stated “willful” means “a conscious wrong or evil purpose on part of the actor, or at least inexcusable carelessness whether the actor is right or wrong” (American National University for Kentucky, Inc. v. Commonwealth of Kentucky, 2019). This case indicates that states may look to case law to find that incorrect data that is published does not have to be done so willfully and with malicious intent; if the institution was inexcusably careless in examining the data published for prospective students, they can be held liable. Therefore, the results from this case are twofold. First, when guidelines are either created or amended, authors should remember to include language that will encompass third parties, including ones that are owned by the for-profit or not, that produce data or that may operate or function in some way that affects students, and that have the opportunity to falsify information. Second, in providing clearer guidelines, states may look at language used in consumer protection laws that provide penalties not only for willful⁸ actions, the highest level of negligence, but also expand to include other levels of negligence such as gross negligence or even simple negligence⁹ if the information is published and students relied on the information.

Joint Actions by State Attorneys General

Joint legal actions and investigations have been initiated by multistate attorney general offices (AGs) into deceptive recruiting practices and false disclosures by for-profit institutions. The increase in students defaulting on school loans prompted Kentucky’s attorney general to join forces with other AGs who wanted to investigate violations of consumer protection laws (Kirkham, 2011). The result was an agreement

⁸ States vary in their application of negligence standards. In states recognizing willful negligence, there is usually some intentional or egregious behavior or absence of behavior (Negligence, Gross Negligence, and Willful Misconduct, Westlaw Practical Law Commercial Transactions).

⁹ Some states do not differentiate between gross or simple negligence. “Generally, gross negligence means more than momentary thoughtlessness, carelessness, inadvertence, or error of judgment. It involves a higher level of misconduct than ordinary negligence and requires proof of something more than the lack of ordinary care” (Negligence, Gross Negligence, and Willful Misconduct, Westlaw Practical Law Commercial Transactions).

between the states and for-profit colleges whereby pressure from multiple states led to enhanced measures taken by for-profits. In 2019, state attorneys general from 20 states submitted a statement to the U.S. House Education & Labor Committee shedding light on the disproportionate number of veterans being targeted by for-profit institutions as a result of the 90/10 Rule where veterans' benefits were not included in student aid numbers. The letter also highlighted the recent trend in for-profit institutions converting to "faux nonprofits." For example, Grand Canyon Education, Inc. created a nonprofit entity that purchased Grand Canyon University, with the owner being CEO of both entities. The AGs hope that these and other issues will be highlighted in the projected reauthorization of the Higher Education Act (State Attorneys General Letter, 2019).

Actions by Other State Agencies

Although most state departments of consumer protection fall under the umbrella of attorney general offices, there may also be city-level offices, such as the NYC Department of Consumer and Worker Protection (DCWP), formerly the Department of Consumer Affairs (DCA), which was passed by the City Council to protect the constituents of New York City. In January 2020, the DCA brought an action against Berkeley Educational Services of New York, Inc., a for-profit college. The DCA alleged that Berkeley had engaged in deceptive practices after receiving numerous complaints from students. The New York Supreme Court, Appellate Division, accepted allegations of false advertising, claiming that a degree provided adequate preparation for professional exams, and misleading conduct in the collection of student debt, all of which were in violation of the New York City Consumer Protection Law and denied Berkeley's Motion to Dismiss (*City of New York v. Berkeley Educ. Servs. of New York, Inc.*, 2020). This provides insight for municipalities where for-profit institutions are located. Layers of consumer protection may be warranted where students have been wronged.

Legal Actions by Students—Special Focus on Barriers from Arbitration Agreements

Students who have been subject to mistreatment by for-profit colleges or universities may seek to rely on state laws or legal standards, such as consumer protection laws. Students may also turn to legal standards based on violation of contract standards or legal actions based on tort law, which deals with claims of injury by one party against another, such as fraudulent or negligent misrepresentation. The ability of for-profit students to sue a for-profit institution represents an important way for individuals to challenge unscrupulous actions by for-profit providers. Regulatory actions and enforcement by state officials provide key avenues to prevent or deal with wrongdoing by for-profit colleges that do not require students who have already been subject to injury to have to take on the additional burden of pursuing legal action. Still, lawsuits brought by students or groups of students provide an additional state-based legal tool to permit students to challenge improper action by for-profit institutions.

However, due to standards re-implemented under the Donald Trump presidential administration, for-profit colleges can require students to enter into arbitration agreements that cut off access to courts and that also prohibit or severely curtail the ability of students to pursue class action litigation against for-profit institutions (Walsh, Cao, & Mishory, 2019). This action by the Trump administration reversed a decision by the Barack Obama presidential administration dealing with borrower defense rules to disallow for-profit colleges from using arbitration agreements to stop students from suing in court (Kreighbaum, 2018). Our review of cases showed the difficulty of students being able to engage in successful legal challenges to arbitration agreements, despite claims of fraud or deception on the part of for-profit colleges. The election of Joseph Biden means that arbitration agreements could once again be prohibited for use in student enrollment agreements with for-profit institutions. Doing so would revive an important federal-state partnership so that the full range of state legal options would be available to students in challenging bad actions by for-profit colleges.

The Legal Test: Arbitration Agreements Hamper Student Challenges to For-Profits

For-profit postsecondary education providers routinely require enrolling students to sign an arbitration agreement. Arbitration agreements do not displace state contract standards, but, under what is known as the Federal Arbitration Act (FAA), arbitration agreements must be afforded the same legal status by courts as other contractual agreements under state law. As a federal law, state legal provisions cannot override the requirements of the FAA. One strand of our analysis was to locate and to analyze legal cases involving students challenging the enforceability of arbitration agreements in claims made against for-profit schools. The legal decisions considered in this section help to delineate the interplay between state laws and legal standards and the FAA.

Outside of specific circumstances, such as instances of unconscionable or unscrupulous actions on the part of a for-profit institution, federal courts, including the U.S. Supreme Court, have interpreted Congressional intent under the FAA as establishing a strong legal presumption in favor of the enforceability of arbitration agreements. As such, the arbitration agreements between for-profit education providers and their students are often upheld by courts. Arbitration agreements can also limit the ability for claimants to pursue an arbitration action that includes a class proceeding, which means that individuals can be made, by the arbitration agreement, to arbitrate claims on an individual instead of a class (group) basis. For-profit universities may try to use arbitration agreements that are enforceable through the FAA to override state laws that allow for class action litigation (see, for example, *AT&T Mobility LLC v. Concepcion* (2011); *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.* (2010)).

Despite strong legal presumptions in favor of arbitration agreements, some circumstances exist when an arbitration agreement can be invalidated under state law standards. For example, in *Morgan v. Sanford Brown Institute* (2016), the Supreme Court of New Jersey ruled that an arbitration agreement was invalid as applied to students because the language in the arbitration provision failed to adequately explain that a student, by signing the arbitration agreement, was giving up the right to

pursue action against the institution in a court proceeding. The court explained that New Jersey law required that an arbitration agreement, as a contractual arrangement, had to explain in clear language that an individual was foregoing the right to pursue legal action in court. The court concluded that the arbitration agreement under consideration did not meet this standard, stating that the “enrollment agreement and arbitration provision do not explain, in broadly worded language or any other manner, that plaintiffs are waiving their right to seek relief in court for a breach of the enrollment agreement or for a statutory violation” (Sanford Brown Institute, 2016, p. 309) (quoting from a U.S. Supreme Court decision, *First Options of Chicago, Inc. v. Kaplan*, 1995). Further, the court noted that the agreement was not written in plain language so as to be understandable to a typical consumer.

As to the FAA and New Jersey law, the court stated that the federal law only required that an arbitration agreement be treated under state law in the same way as other contractual agreements. At issue in the case was also whether the arbitrator, per the arbitration agreement, or a court should determine whether a particular issue was subject to arbitration. According to the court, “State law governs not only whether the parties formed a contract to arbitrate their disputes, but also whether the parties entered an agreement to delegate the issue of arbitrability to an arbitrator” (Sanford Brown Institute, 2016, p. 303). The court also noted that while “the FAA expresses a national policy favoring arbitration, the law presumes that a court, not an arbitrator, decides any issue concerning arbitrability” (Sanford Brown Institute, 2016, p. 304).

Sanford Brown Institute presents an example of a court holding that an arbitration agreement was not valid as to students enrolled at a for-profit institution based on state legal standards. Yet, our review of cases showed that state and federal courts in a number of cases have rejected challenges to arbitration agreements by students at for-profit institutions. Courts tend to uphold arbitration standards because of the legal presumption in favor of arbitration agreements under the FAA. See, for example, *Kourembanas v. InterCoast Colleges* (2019), where a federal court held that an arbitration agreement was not unconscionable under Maine law.

In another case, a federal appeals court decision shows how the FAA can limit state authority in regulating arbitration agreements. In *Ferguson v. Corinthian Colleges Inc.* (2013), a federal appeals court considered arguments that claims for “public injunctive relief” were exempted from arbitration in California (*Corinthian Colleges Inc.*, 2013, p. 930). Students at the for-profit Corinthian Colleges had sought to bring legal claims against Corinthian in a class action lawsuit on the basis of California consumer protection and false advertising laws. A key issue in the case was a California Supreme Court ruling in which the court had held that an arbitration agreement was not binding when a plaintiff was seeking to stop a business from engaging in deceptive practices so as to benefit the general public. The California Supreme Court in a later decision had ruled that this standard applied to the laws relied upon by the students in the lawsuit against Corinthian Colleges. The federal appeals court ruled that U.S. Supreme Court decisions instructed that the FAA preempted the California rule that exempted the students from the arbitration agreement they signed with Corinthian Colleges. Additionally, the court ruled that the public arbitration claims at issue in the case fell within the scope of Corinthian’s arbitration agreement.

In *Bernal v. Burnett* (2011), a federal court considered whether arbitration agreements were unconscionable as applied to students at a proprietary school in Colorado. While unconscionability represented a matter of state law, the court noted that a state’s definition of unconscionability could not interfere with the FAA, which expresses a Congressional intent to favor arbitration agreements. Under these standards, the court ruled that the arbitration agreement was not unconscionable under these aforementioned standards.

In a recent case, a federal district court stated how the FAA reflects a “strong policy in favor of arbitration” (*Cheatham v. Virginia College*, 2020). The court also noted how, as in the case before it, an arbitration agreement may leave to the arbitrator the decision whether an issue is subject to the arbitration agreement. For another example of leaving issues to the arbitrator, see, for example, *Davis v. ECPI College of Technology*, 2007) (ruling that, as the parties had duly entered into an

arbitration agreement, it was up to the arbitrator to determine if a class or consolidated arbitration was appropriate); *Kendrick v. Concorde Career Colleges, Inc.*, 2012). See also, for example, *Ratcliffe v. Dorsey School of Business* (2018), where the court stated that arbitration agreements validly entered into leave to the arbitrator questions of whether the contract is itself valid. Given the inclination by courts to defer to the arbitrator, the FAA represents an important legal standard in the interplay between state laws and arbitration agreements.

As noted, the presidential administration of Barack Obama enacted borrower defense rules—for when students sought forgiveness of federal loans on the basis of fraud by an institution—that prohibited schools from making students who were federal Direct Loan borrowers submit to arbitration when asserting claims that a for-profit school had engaged in fraudulent or deceptive practices (U.S. Department of Education, 2016). Reversing course, the administration of Donald Trump permitted institutions to again require students to enter into and enforce arbitration agreements under such circumstances (Kreighbaum, 2019). Prior to assuming office, President Biden had indicated an intent to restore the borrower defense rule put in place during the Obama administration (Murakami, 2020). The U.S. Department of Education has announced that arbitration agreements are a potential topic for virtual hearings on student financial aid rules and other regulations (U.S. Department of Education, 2021).

Restoration of similar or the same borrower defense rules enacted under the Obama administration would permit students at for-profit institutions greater leeway in pursuing court actions against for-profit postsecondary education providers, such as actions based on state contract or consumer protection laws, and would also provide a public dimension to these actions. Limiting the ability of for-profit schools to require students receiving federal Direct Loans to enter into arbitration agreements would open up the state legal and regulatory playbook for individual students and groups of students to be able to pursue claims in state and federal courts that they had been treated fraudulently or in a deceptive manner by a for-profit postsecondary institution. A federal appeals court that considered what kinds of claims the borrower

defense rule could apply (based on when the Obama-era standards were in place) concluded that the rule could encompass breach of contract and misrepresentation claims (*Young v. Grand Canyon University, Inc.*, 2020). If a similar borrower defense rule to that announced in the Obama administration were revived in the Biden administration, the *Young* case illustrates that an array of state claims could be advanced by claimants in individual legal actions against for-profit institutions and limit the ability of for-profit institutions to require students to arbitrate contested issues.

CONCLUSION

While enforcement and regulation are uneven across states, our report shows that states have been active players in the regulation of for-profit higher education, even if the state role has tended to receive less attention than that of the federal government. A review of cases indicates that states possess meaningful legal authority in the regulation of for-profit higher education, authority that goes beyond the initial permission of an institution to operate in the state, whether physically or through distance education. In working alongside other state officials and agencies, state higher education officers can benefit students and potential students by understanding the array of state-based laws and regulations available to target bad-actor for-profit institutions and how state and federal laws can play complementary roles in curbing and addressing excesses by for-profit schools.

Our review of legal decisions shows that states may require a range of disclosures by for-profit institutions to prospective and current students. Likewise, states may also regulate the marketing and recruiting materials and practices of for-profit colleges and universities, such as to forbid high-pressure recruiting practices. Even when a state law or regulation is subject to a middle level of judicial review because commercial speech standards are at issue under the First Amendment, states may still impose advertising and disclosure requirements on for-profit institutions.

Our review of cases shows, as well, the potential regulatory and consumer protection roles that can be taken on by state attorneys general or other state agencies. Additionally, states can work in concert to pursue legal actions against bad-actor for-profit institutions. Individual students or groups of students who have been defrauded or deceived by a for-profit college or university may also use state laws, such as ones based in consumer protection, contract, or tort, to seek legal relief. As shown in our review of legal cases, however, arbitration agreements are often contained in the larger enrollment agreements required by for-profit institutions, thus limiting student access to courts. Under the Biden presidential administration, a policy window may be open for a joint state-federal approach to (once again) prohibit arbitration clauses, such as through a revised borrower defense rule, in enrollment agreements and provide individual students or groups of students harmed by for-profit institutions access to courts.

Taken together, our review of state-based legal standards suggests a consumer protection framework to protect students or potential students from bad practices by for-profit colleges and universities. For prospective students or prior to an individual signing an enrollment agreement, states can regulate disclosures and information contained in marketing and advertising materials and prohibit high-pressure recruiting practices. For students who have been defrauded or harmed by a for-profit institution, state officials or agencies, such as state attorneys general, can play a pivotal role in pursuing bad actors. State and federal legal standards, if properly aligned, can also work together in a complementary manner to advance the consumer protection interests of prospective and enrolled students at for-profit schools. Alongside other legal and regulatory rules, such as ones based on initial state authorization, a multi-level approach can help to protect individuals from unscrupulous actions by for-profit colleges and universities.

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APPENDIX A

Table 1a		
Required Disclosures to Students, Prospective Students		
State	Citation	Commentary
Alabama	Ala.Code 16-46-5(i)(6)	Language specific to private postsecondary institutions
Alaska	AS §14.48.060(b)(4)	Generally required of all postsecondary institutions
Arizona	A.R.S. §32-3021(B)(2)	
Arkansas	Ark. Admin. Rules 142.00.09-001	No single section addresses required disclosures, but required publication can be found in various sections of the rules
California	Cal Edu. Code §§94910	Language specific to private postsecondary institutions
Colorado	8 CCR 1504-1 III(H)	Required published catalog for private occupational schools
Connecticut	Reg. of Conn. State Agencies §10a-22k-5(e)	Enrollment contract requirements for private occupational schools
Delaware		No disclosure requirements to student or prospective students could be located
Florida	F.S.A §1005.04 (1)(a)	Language specific to nonpublic postsecondary schools
Georgia	Ga. Code Ann. §20-3-250.6	Language found in part for nonpublic postsecondary educational institutions
Hawaii	Haw. Code R. §8-101-3(n)	Required publication of brochure/catalogue for private, trade, vocational or technical schools
Idaho	DAPA 08- State Board of Education, 08.01.11- Registration of Postsecondary Educational Institutions and Proprietary	Some disclosures required specifically for new postsecondary institutions and proprietary schools

	Schools, 200.09.a.vi	
Illinois	Illinois Student Assistance Commission, https://commonmanual.org/wp-content/uploads/2021/06/CM2021.pdf ; 105 ILCS §426/37 (as required by the Private Business and Vocational Schools Act of 2012)	Language specific to proprietary schools
Indiana		No disclosure requirements to student or prospective students could be located
Iowa	Iowa Code §714-25 ; Registration of Postsecondary Schools, §261B.8	Language specific to proprietary schools
Kansas		No disclosure requirements to student or prospective students could be located
Kentucky	K.R.S. §165A.370(1)(f) (see also KY's Council on Postsecondary Education, Consumer Protection Information)	Language specific to proprietary schools to students prior to enrollment
Louisiana	LA Admin. Code, Title 28, Part III §901(C)	Language specific to proprietary schools
Maine	05-071-147 Me. Code R. §6	Language specific to privately owned business, trade and technical proprietary schools
Maryland	MD Code, Commercial Law, §13-320 ; Md. Code Regs 13b.01.01.15(A)	Language specific to proprietary institutions
Massachusetts	230 CMR 15.05(2) 940 CMR 31	Language in provisions specific to private occupational schools and to for-profit and occupational schools
Michigan		No disclosure requirements to student or prospective students could be located
Minnesota	Minn. Stat. 136A.826	Language specific to private career schools

Mississippi	CPSCR Regulations for State Oversight Rule 3.8; MCCA Standards & Regulations, Part 201, Chapter 4, Rule 4.2.18.2	CPSCR Regulations for State Oversight Rule 3.8 - Language specific to proprietary schools MCCA Standards & Regulations, Part 201, Chapter 4, Rule 4.2.18.2 - Language for higher education institutions generally
Missouri	6 CSR 10-5.010 (6)(F)(3)	Only required upon acceptance or enrollment, no language indicating required prior to enrollment
Montana		No disclosure requirements to student or prospective students could be located
Nebraska	Neb. Admin.Code §92-41-009	Language specific to private postsecondary career schools
Nevada	Nev.Rev.Stat.Ann. §394.441	Language specific to private postsecondary institutions
New Hampshire	N.H. Code Admin. R. Hedc 304.01; N.H. Code Admin. R. Hedc 405.11	N.H. Code Admin. R. Hedc 304.01 - Language specific to career schools N.H. Code Admin. R. Hedc 405.11 - Applies to public institutions and requires website disclosures
New Jersey	N.J.S.A. 18A §3B-6b ; See also: https://www.nj.gov/education/cte/ppcs/students/OnlineRC.shtml	Required of propriety, public, and independent schools
New Mexico	5.100.6.11 NMAC; 5.100.6.13 NMAC	Required of proprietary institutions
New York	8 CRR-NY 53.3	Required disclosures of all higher education institutions
North Carolina	2A SBCCC 400.11	Language specific to proprietary schools; not required prior to enrollment
North Dakota		No disclosure requirements to student or prospective students could be located
Ohio	OAC Ann. 3332-1-09 (c)	Language specific to career colleges and schools

Oklahoma	Higher Education Policy & Procedures Manual, Academic Affairs, 3.1.4.	Requires information in an enrollment contract for all institutions, but not required to disclose information prior to enrollment
Oregon	OARD 715-045-0033	Information is required only upon request
Pennsylvania	22 Pa. Code §73.61	Language specific to private licensed schools
Rhode Island	RIBGHE Regulations Governing Proprietary Schools, Standard 4	Language specific to proprietary schools
South Carolina	S.C. Code Regs. 62-26(F)	Language found in advertising regulation for nonpublic postsecondary institutions, but requires substantiation
South Dakota		No disclosure requirements to student or prospective students could be located
Tennessee	Tenn. Comp. R. & Regs. R. 1540-01-02-.13 ; exemptions are here ; of note is (f)); see also Tenn. Comp. R. & Regs. R. 1540-01-02-.11	This applies to regularly authorized postsecondary institutions
Texas	19 TAC §7.4(20)(D) (for higher education institutions generally); Tex. Educ. Code §132.055(5) (language specific to career schools & colleges)	19 TAC §7.4(20)(D) - Required of higher education institutions generally; Tex. Educ. Code §132.055(5) - Language specific to career schools & colleges
Utah	Utah Code Ann. §13-34-108	Language specific to proprietary schools
Vermont	CVR 22-000-004(2243.5.3)	Language specific to degree granting private postsecondary institutions
Virginia	8 VAC 40-31-160(F)	Language specific to all postsecondary institutions
Washington	W.A.C. 250-61-120 ; W.A.C. 250-61-151	Language specific to degree granting institutions
West Virginia	W. Va. Code St. R. § 133-20-9	Language specific to degree granting institutions
Wisconsin	School & Program Approval Guide: Understanding EAB Oversight, Part B, Student Enrollment	Wisconsin's EAB collect disclosure information and publishes it for students and prospective students

Wyoming		No disclosure requirements to student or prospective students could be located
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APPENDIX B

940 CMR 31

Adopted by Mass Register Issue 1263, eff. 6/20/2014.

Current through Register 1440, April 2, 2021

Section 31.01 – Purpose

In 1978, the Attorney General of Massachusetts promulgated 940 CMR 3.10, relating to Private Home Study, Business, Technological Social Skills and Career Schools, pursuant to the Attorney General’s authority in M.G.L. c. 93A, § 2(c). 940 CMR 3.10 was designed to protect Massachusetts consumers seeking to enroll in any course of instruction or educational service offered by certain private business, vocational, and career schools, and to ensure that the private career school industry was operating fairly and honestly by means of legitimate and responsible business acts and practices that are neither unfair nor deceptive. In recent years, there has been a proliferation of for-profit and occupational post-secondary educational institutions that intensively market degree and non-degree programs to students. Many of these schools accept state and federal funds in the form of student grants and loans to finance student enrollment. Certain widespread acts and practices in the for-profit and occupational school industry continue to unfairly harm consumers, frequently leaving students with few career opportunities and significant student debt. The Attorney General, therefore, has updated and amended the 1978 regulations by replacing 940 CMR 3.10 with 940 CMR 31.00, to address problems experienced by consumers when they seek or are enrolled in for-profit schools or occupational programs.

Section 31.02 – Scope

940 CMR 31.00 defines unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a). Acts or practices not specifically prohibited by 940 CMR 31.00 are not necessarily consistent with M.G.L. c. 93A or otherwise deemed legitimate by the absence of regulation here. 940 CMR 31.00 is designed to supplement existing regulations.

940 CMR 31.00 applies to all Schools (as defined in 940 CMR 31.03) advertising or doing business within Massachusetts, including schools that provide programs, services, courses, and/or instruction, in whole or in part, through electronic means or on the Internet to students residing in Massachusetts, regardless of whether such schools maintain a campus, facility, or physical presence in Massachusetts; are licensed to operate, either by the Department of Professional Licensure or the equivalent regulatory or licensing body in another jurisdiction; or are authorized by the Board of Higher Education, or the equivalent regulatory or licensing body in another jurisdiction, to grant degrees.

Section 31.03 – Definitions

Clearly and Conspicuously. Presented as to be readily noticed and understood by a reasonable person, as defined in 940 CMR 6.01: Definitions. Further, without limiting the requirements of the preceding section, to be clear and conspicuous, the disclosures in 940 CMR 31.05 must be:

- (a) contained on a school's website in a manner that is easy to locate and access; and
- (b) provided to and signed and dated by the consumer or prospective student, with copies to be provided both to the consumer or prospective student (and if the prospective student is younger than 18 years old, to the prospective student's parent or guardian) and retained by the school.

Employment in the Field of Study. Employment in the job specified in the name of the program or in the certificate, diploma, or degree conferred by a school upon graduation from the program, or the reasonable equivalent thereof, such as those set forth in the "Sample of reported job titles" and "Related Occupations" listed in the Summary Report for each Standard Occupational Classification (SOC) code obtained by entering the program's Classification of Instructional Program (CIP) code on O*NET crosswalk, <http://www.onetonline.org/crosswalk/CIP> . The "reasonable equivalent" does not include a job for which:

- (a) training in the program is not required; and
- (b) the entry level salary is less than 80% of the entry level salary of the job specified in the name of the program.

Enrollment Agreement. A contract or agreement under which a consumer agrees to pay tuition or fees to a school or to obtain a loan or grant to pay tuition or fees to a school.

For-profit School. A private post-secondary institution established, operated, or incorporated for profit-making purposes, including any for-profit institution of higher education that offers courses for credit or programs leading to a certificate, diploma, or degree.

Graduate Placement Rate. The number of students obtaining full time (at least 32 hours per week) and non-temporary employment in the field of study during the latest two calendar years for which the school has obtained verification, divided by the number of all students graduating from the program during the latest two calendar years. The graduate placement rate shall be determined within 180 days from the end of each calendar year.

Graduation Rate. The number of students who received certificates, diplomas, or degrees in the program during the latest two calendar years, divided by the number of students who enrolled in the program during the latest two calendar years. The graduation rate shall be determined within 180 days from the end of each calendar year.

Institutional Loan. A loan provided directly from a school to a student, or from a school to a student through an affiliated lending institution or whose payments to the lender are guaranteed or insured, in whole or in part, by the school.

Lending Institution.

- (a) Any private entity that itself, or through an affiliate, engages in the business of making loans to students, parents, or others, for the purposes of financing higher education expenses or that securitizes such loans;

- (b) any private entity, or association of entities, that guarantees educational loans; or
- (c) any industry, trade, or professional association that receives money from any entity described above 940 CMR 31.03: Lending Institution(a) and (b).

Loan Amount. The total principal amount borrowed by a student in connection with enrollment in a program from all public and institutional lending sources.

Loan Nonpayment Percentage. The sum of:

- (a) the most recent federal cohort default rate (as calculated pursuant to 34 CFR Part 668, Subparts M and N); and
- (b) the percentage of student borrowers in said cohort, other than those borrowers in 940 CMR 31.03: Loan Nonpayment Percentage(a), whose Stafford loans, at the time the most recent cohort default rate was calculated, were in deferment or forbearance; and
- (c) the percentage of student borrowers in said cohort, other than those borrowers in categories 940 CMR 31.03: Loan Nonpayment Percentage(a) and (b), who defaulted under the terms of institutional loans during the cohort default period.

Median Completion Time. The median duration of attendance in months, rounded to the nearest month, of all students who obtained a certificate, diploma, or degree from a program during the latest two calendar years.

Occupational Program. Any program whose principal purpose is to train or prepare individuals for a business, trade, technical, or industrial occupation, or any other vocational purpose, including but not limited to occupational certificate, or diploma programs offered by correspondence schools, private business schools, private trade schools and similar entities, and by for-profit schools.

Placement. A student's employment, career, or occupation after leaving a school, or the employment, career, or occupation a school program qualifies or prepares students to enter or obtain.

Placement Services. Services or assistance provided by a school in connection with the securing or attempting to secure employment for students.

Preferred Lender and Preferred Lender List. Any Lending Institution or selection of Lending Institutions that a school endorses, promotes, chooses, or assigns preferential status to, by, without limitation, posting a Lending Institution's name or loan product's name on the school's website or including a Lending Institution's name or loan product's name in informational mailings or brochures or any other document provided to students, prospective students, or their parents, or arranging or otherwise facilitating the origination of loans from the Lending Institution.

Program. A course of study for which a school confers a certificate, diploma, or degree.

Program Cost. The tuition and fees charged for completing a program, including the typical costs for books and supplies (unless those costs are included as part of tuition and fees) the cost of room and board (whether on or off campus), and transportation.

School. Any institution:

- (a) that is a for-profit school; or
- (b) that offers an occupational program, except:
 - 1. a school charging no fee or tuition to any students;
 - 2. a school offering exclusively recreational programs for the purpose of relaxation and enjoyment in non-occupational pastimes, exercise or other such diversions;
 - 3. a program owned and operated by established religious institutions for the exclusive purpose of providing religious instruction;
 - 4. a course of instruction for the primary education of students in grades pre-kindergarten through 12;
 - 5. a public community college, public college, public university, or charitable nonprofit college or university; and
 - 6. incidental training associated with the purchase of a product from a vendor, provided, however, that the training is to familiarize the purchaser with its use and the purchaser is not awarded any form of a certificate or diploma for having received the training.

Total Placement Rate. The product of the graduate placement rate and the graduation rate. The total placement rate shall be determined within 180 days from the end of each calendar year.

Section 31.04 - False or Misleading Statements or Representations

(1)False Advertising. It is an unfair or deceptive act or practice for a school to make or publish, or cause or permit to be made or published, any false, untrue, or deceptive statement or representation or any statement or representation which has the tendency or capacity to mislead or deceive students, prospective students or any other person, by way of advertising or otherwise, concerning the school, its activities in attempting to enroll students, the character, nature, quality, value, or scope of any course or program offered, the school's influence in obtaining employment for its students, graduation rates, graduation time, program cost, loan amount, repayment amount, transferability of credits, or in any other material respect.

(2)Deceptive Language in General. It is an unfair or deceptive act or practice for a school to use language or make a claim or representation in any form, including but not limited to spoken, electronic, or printed form, which has the tendency or capacity to mislead or deceive students, prospective students, or any other person.

(3)False Representation as to Probable Earnings. It is an unfair or deceptive act or practice for a school to make any false, untrue, unsubstantiated, or deceptive statement or representation or any statement or representation which has the tendency or capacity to mislead or deceive students, prospective students, or any other person regarding actual or probable earnings in any job or occupation of the school's graduates.

(4)False Advertising as to Expected Salaries. It is an unfair or deceptive act or practice for a school to represent or imply in advertising or otherwise that persons employed in a particular position will earn a stated salary or income or that persons completing the training course will earn the stated salary or income or "up to" the stated salary or income unless:

- (a) the salary or income is equal to or less than the entry level salary of persons employed in the occupation in the Commonwealth; and
- (b) the advertisement or representation states clearly and conspicuously any limitations, conditions, or other requirements such as union membership or service of an apprenticeship, which must be met before the stated salary or income can be earned; and
- (c) the advertisement or representation states clearly and conspicuously that no guarantee is made that a person who purchases the advertised services will obtain a job or will earn the stated salary or income, unless the guarantee is actually offered by the school. The words "EARN \$...." or "EARN UP TO \$...." or words of similar import or meaning constitute a representation that a person who attends the program will earn the stated salary or income within the meaning of 940 CMR 31.00.

(5)False Representation as to Placement Rates or Services. It is an unfair or deceptive act or practice for a school to make any false, untrue, unsubstantiated, or deceptive statement or representation or any statement or representation which has the tendency or capacity to mislead or deceive students, prospective students, or any other person as to placement, graduate placement rates, total placement rates, or placement services.

(6)Failure to Provide Placement Statistics. It is an unfair or deceptive act or practice for a school to fail to provide, upon request by a student or prospective student, accurate employment data substantiating its graduate and total placement rates. Such data may be deidentified only as necessary for compliance with state or federal law.

(7)False or Misleading Statements Regarding Employment Opportunity. It is an unfair or deceptive act or practice for a school to make any false, untrue, or deceptive statement or representation or any statement or representation which has the tendency or capacity to mislead or deceive students, prospective students, or any other person regarding:

- (a) any opportunity in any job or occupation, or the likelihood of employment in any job or occupation;
- (b) the necessity, requirement, or usefulness of any program in obtaining professional licensure, employment in the field of study, admission to a labor union or similar organization;
- (c) the necessity of or qualification(s) for certification or licensure in any job or occupation, including but not limited to:

- 1.any cost to obtain or maintain such certification or licensure, if such cost is not included in the school's tuition or fees; and
- 2.any continuing education requirement to obtain or maintain such certification or licensure; and

(d) any opportunity to qualify for membership in a society or association or union, or to obtain a license, or any opportunity to enroll in a future program or field of study,

as a result of the completion of any program, without further education, study, externship, internship, or clinical experience.

(8)Government Approval and Accreditation. It is an unfair or deceptive act or practice for a school to advertise or represent that the school or a program has been:

- (a) approved by any government agency without clearly and conspicuously indicating the scope, nature, and terms of that approval, and unless true; or
- (b) accredited by an accrediting body, unless true.

(9)Time to Complete Program. It is an unfair or deceptive act or practice for school to misrepresent the amount of time it takes to finish a program, including a representation that a program can be completed "in weeks" or similar language suggesting that the length of time to complete the program is shorter than the actual median completion time to obtain a certificate, diploma, or degree.

(10)Limited Time Offers. It is an unfair or deceptive act or practice for a school to represent an offer to be limited as to time or otherwise when such is not the fact, or to represent to students, prospective students, or any other person that enrollment in a particular program is only open or available for a particular period of time or until a date certain when enrollment in the program occurs on a rolling, ongoing, or regular basis (including monthly and seasonally).

(11)Money-back Guarantee. It is an unfair or deceptive act or practice for a school to use directly or indirectly any so-called "money back" guarantee, refund agreement, or other similar guarantee, agreement, or contract between school and student which involves deception, misrepresentation, bad faith, or the deceptive concealment of pertinent facts.

(12)Misuse of the Word "Free". It is an unfair or deceptive act or practice for a school to represent any component or service related to a program as "free" when in fact such component or service is regularly included as part of the program.

(13)Faculty Qualifications. It is an unfair or deceptive act or practice for a school to make a statement or representation through advertising or otherwise that a certain individual or individuals have particular teaching or instructional or professional qualifications, certifications, or degrees, when they do not.

(14)Classroom Instruction. It is an unfair or deceptive act or practice for a school to make a statement or representation through advertising or otherwise concerning the nature or character of classroom instruction provided by the school that is false, untrue, deceptive, or which has the tendency or capacity to mislead students or prospective students. Without limiting the generality of the preceding sentence, it is an unfair or deceptive act or practice to represent that classroom instruction is in-person if instruction is in fact provided by non in-person methods, including instruction via video or computer terminals, and/or through self-guided study.

(15)Unapproved or Unlicensed Programs. It is an unfair or deceptive act or practice for a school to:

- (a) represent that the school offers an occupational program the school is not approved or licensed to offer (unless the program is exempted from licensure or approval by the appropriate Massachusetts authorizing agency);
- (b) represent that a program is approved or licensed when it is not; or
- (c) represent that a program teaches a subject, skill, or materials that are not part of the curriculum of a program.

Section 31.05 - Required Disclosures

(1) It is an unfair or deceptive act or practice for a school to conceal or fail to disclose to a prospective student any fact relating to the school or program, disclosure of which is likely to influence the prospective student not to enter into the transaction with the school.

(2) It is an unfair or deceptive act or practice to fail to make the following disclosure to consumers and prospective students, clearly and conspicuously, at least 72 hours prior to entering into an enrollment agreement with a consumer or prospective student:

- (a) Cost of Program. The total cost of the program is [program cost].
- (b) Graduation. [Graduation rate] of students graduated from the program during [the last two calendar years for which data are available].
- (c) Graduation Time. The average student graduates in [median completion time].

(3) For any school that accepts federal Title IV funds, or that provides institutional loans, it is an unfair or deceptive act or practice for a school to fail to make the following disclosure to consumers and prospective students, clearly and conspicuously, at least 72 hours prior to entering into an enrollment agreement with such consumer or prospective student:

- (a) Your Loan Debt. You must repay money that you borrow as student loans to pay for this program, including interest. You must repay any portion of the money you borrow to pay for this program, even if you fail to complete or drop out of the program. Failure to repay student loans is likely to have a serious negative effect on your credit, future earnings, and your ability to obtain future student loans.
- (b) Loan Nonpayment Statistics. [loan nonpayment percentage] of [school name] students defaulted on, or failed to repay, their loans during the period [years covered in corresponding federal cohort default rate used to calculate loan nonpayment rate].

(4) For any occupational program that:

- (a) accepts state or federal financing of student enrollment, either directly or indirectly, in the form of student loans, grants, or funding, and is required to maintain employment statistics as a condition of receiving or continuing to receive said state or federal financing; or
- (b) refers in advertising, recruiting, or promotional materials or statements to employment prospects or job placement, it is an unfair or deceptive act or practice for a school to fail to make the following disclosure to consumers and prospective students, clearly and conspicuously, at least 72 hours prior to entering into an enrollment agreement with such consumer or prospective student:

1.Placement Rates. [Graduate placement rate] of graduates during [latest two calendar years] obtained full-time, non-temporary jobs in their field of study. [Total placement rate] of students that enrolled in the program during [latest two calendar years] obtained full-time, non-temporary jobs in their field of study.

2.Employment Statistics. Employment statistics substantiating these placement rates are available for inspection on request.

(5) It is an unfair or deceptive act or practice for a school to obtain personal consumer information, including names, home or electronic addresses, telephone numbers, or other contact information from lead generators or website operators that do not clearly and conspicuously disclose to consumers that their personal information will be provided to schools.

(6) If a school offers or requires students to take an examination, certification examination, or similar test of the students' competence to enter, continue with, or graduate from a program, or to be certified in a particular occupational field, and the examination or test is available directly from an outside vendor, it is an unfair or deceptive act or practice for a school to fail to disclose the actual cost of such examination or test prior to the time of enrollment.

(7) It is an unfair or deceptive act or practice for a school to represent to a student or prospective student or to any other person that its credits are or may be transferable to another educational institution without:

- (a) identifying the school(s) with which it has written agreements or other documentation verifying that credits can be transferred to said school(s); and
- (b) indicating it is aware of no other schools that accept the transfer of its credits.

Section 31.06 - Prohibited Practices

(1)Anonymous Advertising. It is an unfair or deceptive act or practice for a school to use anonymous advertisements, including advertisements that conceal or fail to disclose the name of the school, to solicit prospective students, or to use "help wanted" or other employment columns in a newspaper, or Internet job boards or employment websites, or other publications, whether printed or electronic, in such a manner as to mislead or deceive consumers, prospective students, or any other person or to cause such a person to believe that a job is offered.

(2)Facilitating Improper Conduct. It is an unfair or deceptive act or practice for a school to encourage, enable, or reasonably fail to prevent students from cheating on examinations or classwork.

(3)Falsifying Records. It is an unfair or deceptive act or practice for a school to misrepresent or falsify a student's attendance or academic progress or record in order to permit a student to continue to receive financial aid or to graduate from a program or for any other reason.

(4)Misrepresenting Program Content. It is an unfair or deceptive act or practice for a school to award a certificate or diploma or confer a degree which misrepresents the program or

course of study or instruction covered or completed or the accomplishments or standing of the student receiving such certificate, diploma, or degree.

(5)Failing to Offer Appropriate Internships. It is an unfair or deceptive act or practice for a school to promise an internship or externship (collectively "internship"), or include an internship as a required element of a program unless the school ensures that all such internships offer training in the field of study, and offers school-based personnel to assist in locating and arranging student internships.

(6)Enrolling Unqualified Students. It is an unfair or deceptive act or practice for a school to enroll or induce retention of a student in any program when the school knows, or should know, that due to the student's educational level, training, experience, physical condition, lack of language proficiency, or other material disqualification, the student will not or is unlikely to:

- (a) graduate from the program; or
- (b) meet the requirements for employment in the occupation to which the program is represented to lead. If a student has a disability, the determination shall be made based on the student's ability to graduate from the program or meet the requirements for employment with the provision of a reasonable accommodation for that disability. In addition, in no event shall 940 CMR 31.00 contravene the requirements of, or obligations of a school to accommodate students in accordance with the Americans with Disabilities Act, the Rehabilitation Act, or any other applicable law concerning students with disabilities.

(7)Enrolling Ineligible Students. It is an unfair or deceptive act or practice for a school to enroll a student in a program for a licensed occupation whom the school knows, or by the exercise of reasonable diligence should know, would be ineligible to obtain licensure in Massachusetts in the occupation for which the student is being trained due to a prior criminal record or other disqualifying reason.

(8)Failing to Provide Language Appropriate Communications. It is an unfair and deceptive act or practice for a school to enroll a student without taking reasonable steps to communicate the material facts concerning the school or program in a language that is understood by the prospective student. Reasonable steps complying with this regulation include but are not limited to:

- (a) using adult interpreters; and
- (b) providing the student with a translated copy of the enrollment materials and disclosures required by these regulations or by any other applicable state or federal law, regulation, or directive in a language understood by the student.

(9)Engaging in High-pressure Sales Tactics. It is an unfair or deceptive act or practice for a school to initiate communication with a prospective student, prior to enrollment, via telephone (either voice or data technology), in person, via text messaging, or by recorded audio message, in excess of two such communications in each seven-day period to either the prospective student's residence, business or work telephone, cellular telephone, or other telephone number provided by the student.

(10) Misrepresenting Role of Recruitment Personnel. It is an unfair or deceptive act or practice for a school to refer to salespersons or recruiters as "counselors" or "advisors" or to imply that a salesperson or recruiter is an academic advisor or counselor, when:

- (a) the primary role of such person is to sell the school's programs or enroll students in the school; or
- (b) such person is evaluated or compensated in any part based on student recruitment.

(11) Misrepresenting Right to Cancel. It is an unfair or deceptive act or practice for a school to misrepresent in any manner the student's right to cancel.

Section 31.07 - Unfair or Deceptive Practices Involving Student Loans and Financial Aid

(1) It is an unfair or deceptive act or practice for a school to make any statement or representation to students, prospective students, or any other person as to student loans or financial aid that is misleading or has the capacity to deceive students or prospective students.

(2) It is an unfair or deceptive act or practice for a school to make any statement or representation to students, prospective students, or any other person that:

- (a) a federal or state grant, or federal, state, or private loan or financial aid is exclusively available at or through the school;
- (b) a program is free or costless to the student as a result of financial aid, when the financial aid consists in whole or in part of loans;
- (c) financial aid need not be repaid, when the financial aid consists in whole or in part of loans; or
- (d) financial aid need not be repaid while the student is in school when the financial aid consists in whole or in part of public or private loans, any of which have no grace period or deferral term.

(3) It is an unfair or deceptive act or practice for any school that recommends specific Lending Institutions to prospective or current students to fail to disclose:

- (a) that the Lending Institution is affiliated with the school or its corporate parent or subsidiaries, if that is the case; or
- (b) that the Lending Institution is providing something of value in the form of a payment or in-kind service to the school in exchange for any advantage or consideration provided to the Lending Institution relating to educational loan activities, if that is the case.

(4) It is an unfair or deceptive act or practice for a school to:

- (a) deny any consumer's right to choose any Lending Institution; or
- (b) discourage any consumer from choosing a lender solely because that Lending Institution is not on the school's Preferred Lender List.

(5) It is an unfair or deceptive act or practice for any school to permit or authorize a Lending Institution, in conjunction with discussing loan options with consumers, to identify the

Lending Institution's employees or agents as employees or agents of the school. This includes the identification of any employee or agent of a Lending Institution in a call center that represents the school.

Section 31.08 – Severability

If any provision of 940 CMR 31.00 or the application of any provision of a regulation to any person or circumstance is held to be invalid, the validity of the remainder of 940 CMR 31.00 and the applicability of such provision to other persons or circumstances shall not be affected.