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# New Legal Challenge for Accreditation

For regional accreditors, the home field advantage may be in danger of disappearing. A preliminary ruling by a federal judge has found that California may not favor the Western Association of Schools and Colleges (known as WASC) over other regional accreditors just because WASC is the primary player in the state.

If it stands, the "tentative" order – which is subject to change when the judge releases her final order – could further complicate the already complex and largely stalled debate over the regulation of the state's career colleges. And beyond California, it could ultimately have implications for the handful of other states that distinguish between the regional accreditors and offer preferential treatment to their local agencies, one expert said Thursday. A generation or so ago, this issue may not have mattered, as institutions generally were accredited by their state's regional accreditor. But in an era of distance education and far-flung branch campuses, more colleges may be seeking to operate in regions far from their home accrediting agencies.

In Saro Daghlian v. DeVry University, the plaintiff alleges that DeVry, an Illinois-based for-profit higher education company with campuses in 25 states, including California, violated California law by failing to provide written disclosure explaining that DeVry credits likely wouldn't transfer to other colleges. DeVry, however, countered with the argument that the statutes at play are unconstitutional: Essentially, California's now-defunct Private Postsecondary and Vocational Education Reform Act, which includes the state's student protection provisions, excludes all WASC-accredited colleges, but not those overseen by other regional accreditors. DeVry is accredited by another regional agency, the North Central Association.

DeVry's defense has argued that the WASC-specific exemption is at odds with the dormant Commerce Clause of the Constitution — which assigns the power to regulate commerce to Congress, effectively barring states from favoring a home-town entity over an out-of-state rival. In a tentative order — which, if it stands in its current form, would grant partial summary judgment to DeVry but would not end the case — Judge Margaret M. Morrow of the Central District Court of California agreed. She further wrote that the discrimination was "not narrowly tailored to further a legitimate state interest."

"[B]y exempting WASC-accredited schools from the burden of complying with the Reform Act, the legislature has in effect conferred a substantial competitive benefit on California-based postsecondary

educational institutions, as over 91 percent of WASC-accredited institutions are located in California," the judge wrote.

And while California's policy of distinguishing between regional accreditors is not the norm nationally, one expert said similar policies are in place in a couple of other states. "There certainly have been numbers of cases in numbers of states where they've said, 'If you're accredited by whoever the local regional accreditor is, you're fine; if not, you have to jump through some hoops,'" said Michael B. Goldstein, who heads the higher education practice at the Washington law firm Dow Lohnes. While other jurisdictions wouldn't be subject to a California district court ruling, Goldstein said they likely would conduct a review of their own policies in response to any final ruling in the case.

Goldstein stressed that the tentative order is not specifically about for-profit colleges at all, and pointed out that in California's case, Harvard University, accredited by the New England Association, would be subject to extra scrutiny as a non-WASC institution.

Yet, in California, the ruling could potentially play a role in the great debate over the regulation of for-profit colleges — including, of course, DeVry.

An outside public relations representative working on behalf of DeVry declined an interview request Thursday because the university has a policy against commenting on litigation. But Janet Spielberg, a lawyer for Daghlian, the plaintiff, said that it's impossible to know what the judge's final ruling might be based on a tentative order. Spielberg said that oral arguments held after the judge wrote the tentative order addressed different issues – including chronological information about what laws applied when – that could potentially inform a different final ruling.

"Nobody can ever tell you with any accuracy what a judge's final order will be, but there is no reason to believe it will be the same as a tentative order when oral argument brought up different issues," Spielberg said.

"I'll just think it's a sad day when you can't have student protections in place for students."

The debate over what colleges should be exempted from the state law that includes the student protections has been a subset of the larger, quite contentious debate surrounding the need for a new law to regulate for-profit colleges in California. Following Gov. Arnold Schwarzenegger's 2006 veto of a bill that would have extended the old Postsecondary Reform Act, the state was essentially left without a regulatory system to monitor its 1,600 career colleges. In the ensuing legislative debate, consumer advocates and for-profit college leaders clashed on any number of issues: How broad of a right the student should have to sue an institution, the complexity of the legislation (consumer advocates wanted more protections written into the law so that they couldn't be compromised, while career college representatives favored streamlining the unwieldy bill and relying more heavily on regulations), and, of course, the WASC exemption.

Consumer advocates argued that there should be no exemption, and that for-profit WASC institutions should be subject to the same state regulatory framework, including the student protections, as non-WASC accredited for-profits. Many career college representatives, however, argued that the WASC exemption was not broad enough – that, in fact, all accredited institutions, including those accredited by national agencies, should be exempt from the state regulatory law. Ironically, both sides would argue that the WASC exemption was arbitrary, though for very different reasons: One side because it exempts any for-profit college from the law that protects students, the other because they believe the exemption should apply uniformly to all accredited colleges.

And as for WASC, while not opposing an extension of the exemption to other regionally accredited (though not nationally-accredited) institutions, its leaders were concerned about a lack of clarity on the WASC exemption in the draft legislation put forth this summer, and concerned that not-for-profit California colleges — the Stanfords and the USCs — would end up falling under a law designed to regulate career colleges.

"For whatever it's worth, in the legislative process, we did not oppose extending the exemption to all regionally accredited institutions, not just to WASC, so it's not quite clear to me what the impact would be if there were new legislation because these issues would have to be assessed and sorted out if this ruling were to stand," said Ralph A. Wolff, president and executive director of WASC — who added that there is a mechanism through which DeVry's California campuses could gain accreditation through WASC as separate units (as Antioch University's California campuses recently did).

The bitter legislative debate ended last month in a stalemate when lawmakers sent Senate Bill 45 to the governor. The bill essentially extends a stopgap measure already in place (which allows for institutions to voluntarily enter into agreements with the state indicating that they will comply with the old Reform Act) through the middle of 2008.

— Elizabeth Redden

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