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April 27, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 1223 and Senate Bill 843

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1223 and Senate Bill 843, companion bills entitled "Institutions of Postsecondary Education – Fully Online Distance Education Programs – Registration." We write to discuss two ambiguous provisions in the bills and to point out two minor differences between them.

House Bill 1223 and Senate Bill 843 require the registration of institutions of postsecondary education that enroll Maryland students in a fully online distance education program in the State. The bills amend Education Article § 11-202(a), which currently requires that institutions of postsecondary education have a certificate of approval from the Maryland Higher Education Commission ("MHEC") before they commence or continue to operate, do business, or function in the State. The new provisions, codified at § 11-202(a)(2) and (3), require an institution of postsecondary education that enrolls Maryland students in a fully online distance education program in the State to register with MHEC within 6 months of enrolling the first Maryland student, and further state:

EXCEPT AS PROVIDED IN § 11-202.1 OF THIS SUBTITLE, BUT NOTWITHSTANDING ANY OTHER PROVISION OF LAW, AN INSTITUTION THAT IS NOT ACCREDITED BY AN ACCREDITING BODY RECOGNIZED AND APPROVED BY THE UNITED STATES

The Honorable Martin O'Malley

April 27, 2012

Page 2

DEPARTMENT OF EDUCATION MAY NOT COMMENCE OR
CONTINUE TO OPERATE, DO BUSINESS, OR FUNCTION IN THE
STATE.

“Institution of postsecondary education” is a term broadly defined in the law to cover all schools that offer educational programs to individuals at least 16 years old who are no longer in elementary or secondary school. Education Article, §10-101(g)(1). Both institutions of higher education (academic institutions) and private career schools are included within the term “institution of postsecondary education.” The use of the bare word “institution” in §11-202(a)(3) creates an ambiguity regarding the “institution” to which the accrediting requirement is intended to apply.

The context of the provision in subsection (a) could indicate that it applies to all institutions of postsecondary education, both those that are required to have a certificate of approval under (a)(1) and those that are required to register under (a)(2). However, the bill as a whole generally addresses those institutions of postsecondary education that enroll Maryland students in fully online distance education programs and are now required to register. In addition, the summary of the bill in the Fiscal and Policy Note which references this particular provision states that it applies to those institutions that are required to register. This supports the conclusion that, notwithstanding its inclusion in subsection (a) with two other paragraphs collectively referencing all institutions of postsecondary education, the accreditation provision was nonetheless intended to apply only to institutions required to register.

An additional reason to read the provision to apply only to those schools required to register, is that application to all institutions of postsecondary education would be problematic. First, all accrediting bodies require that a school be in operation for a period of time, generally one to two years, before it is eligible for accreditation. Thus, the accreditation requirement would create a “Catch-22”: a new institution would be unable to commence operation in the State for lack of accreditation, and it could never become accredited because of not being in operation. Only branches of existing accredited schools would be able to apply to operate in the State. Second, most private career schools do not seek accreditation for their programs because the schools gain nothing by it. Accreditation is costly but worthwhile for schools because it makes a school eligible for its students to receive federal student loans. However, most private career school programs are not eligible in any event for federal student loans due to the lower number of “clock hours” in the programs, so nothing is gained by a school incurring the cost to obtain accreditation.

The Honorable Martin O'Malley
April 27, 2012
Page 3

For these reasons, it is our view that Education Article, §11-202(a)(3) should be read to apply only to institutions of postsecondary education that are required to register under §11-202(a)(2). It may, however, be advisable to clarify this matter in the 2013 Session.

Section 2 of the bills provides:

That nothing in this Act may be construed to affect the ongoing interpretation of § 11-202 of the Education Article and whether instruction through correspondence, noninteractive learning, credit for prior learning, cooperative education activities, practice, internships, externships, apprenticeships, portfolio review, departmental examinations, or challenges examinations requires a certificate of approval to operate, do business, or function in this State.

As noted above, House Bill 1223 and Senate Bill 843 make substantive amendments to Education Article § 11-202, including imposing a new registration requirement on institutions of postsecondary education that enroll Maryland students in a fully online distance education program in the State. These amendments would presumably "affect the ongoing interpretation of § 11-202 of the Education Article." They would not, however, necessarily affect the interpretation of that section with respect to whether specific types of instruction and other learning activities in the State are subject to the certificate of approval requirement. For this reason, it is our view that the restriction on the extent to which the bills may be interpreted to change the current interpretation of the section should be limited to the matters expressly mentioned.

Finally, there are two minor differences between the two bills. In § 11-202(c)(3), the word "nor" was omitted from the Senate version when it was amended to delete amendments that appeared in the first reader version of the bills. The paragraph properly reads:

If, within 6 months from the date on which the application for certification was submitted to the Commission, the institution has received neither a certificate of approval under subsection (b) of this section **nor** written notice of deficiencies under this subsection, the institution may request within 20 days a hearing before the Commission to determine if the certificate of approval should be issued.

The Honorable Martin O'Malley

April 27, 2012

Page 4

In § 11-203(d)(2)(iii)2.B the House Bill has the lead in language "Notwithstanding subsubparagraph A of this subsubparagraph." while the Senate Bill has the correct form, which is "Notwithstanding subsubsubparagraph A of this subsubparagraph."

It is our advice that if both bills are to be signed, the house bill be signed second, so as to keep the word "nor." The incorrect use of the term "subsubparagraph" can easily be addressed in the next corrective bill.

Very truly yours,

A handwritten signature in cursive script, reading "Douglas F. Gansler".

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro