CECU Career Education Colleges and Universities

May 10, 2021

The Honorable James Fielder, Jr., Ph.D.,
Secretary of Higher Education
Maryland Higher Education Commission
6 North Liberty St.
Baltimore, MD 21201

Dear Dr. Fielder:

We are writing to encourage the Maryland Higher Education Commission to interpret SB 294, the Veterans' Education Protection Act (hereinafter referred to as "Maryland SB 294"),[1] in a manner that is fully consonant with the parallel federal law in 20 U.S.C. §1094, as amended by Section 2013 of the American Rescue Plan Act of 2021 (ARP), Pub. L. No. 117-2 (Mar. 11, 2021). In order to avoid federal preemption, SB 294 must be interpreted in a manner that does not conflict with the federal statute or frustrate the carefully crafted regulatory market viability regime governing the use of federal education benefits at federally regulated institutions of higher education.

I. MARYLAND SB 294 MUST BE INTERPRETED TO AVOID CONFLICTS WITH 20 U.S.C. §1094 AND SECTION 2013 OF THE ARP

a. BACKGROUND

The Higher Education Act of 1965, as amended (HEA), authorizes numerous federal student aid and institutional grant programs and provides terms and conditions for participating in such programs.[2] For-profit institutions of higher education are permitted to participate in federal student aid programs under Title IV of the HEA. In general, for-profit institutions are held to the same financial and administrative capacity standards as other private institutions of higher education. However, for-profit institutions are subjected to several other additional accountability standards, including the 90/10 rule. The 90/10 rule is a revenue test that requires for-profit institutions to derive at least 10% of their revenue for each fiscal year from sources other than the federal student aid sources.[3]

Congress established the original proprietary institution revenue metric as part of the Higher Education Reauthorization Amendments of 1992.[4] At the time, the revenue test required proprietary institutions to derive at least 15 percent of their revenue from non-title IV sources. In 1998, the ratio was changed such that institutions were required to attract at least 10 percent of

[1] 2020 Legis. Bill Hist. MD S.B. 294, codified at MD Code Ann, Education, § 11-210 (West 2020), bill text available electronically at, http://mgaleg.maryland.gov/2020RS/Chapters_noln/CH_546_sb0294t.pdf.
[2] *See* Alexandria Hegji, CONG. RSCH. SERV., R43351, The Higher Education Act (HEA): A Primer (2018).
[3] 34 C.F.R. Appendix C to Subpart B of Part 668
[4] *Id.*

their revenue from non-title IV sources.[5] The Congressional Research Service has noted that "changes to the numerator or denominator of the formula could have substantial effects on proprietary institutions. For example, if the formula were changed to include more sources of revenue in the numerator, proprietary institutions may require more offsetting revenue to meet the requirements of the rule. If, on the other hand, the formula was changed to include more sources of revenue in the denominator, it would be easier for proprietary institutions to meet the requirements of the rule."[6]

At no time since the inception of the 90/10 rule until the enactment of the ARP were non-Title IV funds considered to be revenue under the numerator of the metric.[7] In particular, federal education assistance funds provided by the Department of Veterans Affairs and the Department of Defense were not considered part of the numerator. Critics have called this a "loophole" for years and have urged Congress to move such revenue into the numerator of the formula.[8] Proponents have claimed that the rule incentivizes for-profit institutions to recruit veterans and other students eligible to use DOD and VA education benefit programs.[9]

B. PASSAGE OF MARYLAND SB 294

In May 2020, Maryland SB 294, the Veteran's Education Protection Act, was enacted into law.[10] In the preamble, the Act describes the exclusion of "funds of the United States Department of Veterans Affairs and the United States Department of Defense [from] the cap on federal funds that institutions of postsecondary education otherwise collect" as "the 90/10 loophole" and makes clear that the purpose of the Act is to close that loophole.

The Act provides that for-profit institutions operating in Maryland must derive "at least 10% of the Institution's… annual revenue … from a source other than federal funds."[11] The Act defines "annual revenue" to be revenue that is included in the federal 90/10 rule under 20 U.S.C. §1094(a)(24), and consequently the revenue formula standards under 20 U.S.C. §1094(d)(1). The federal revenue calculation is therefore linked to and serves as the baseline calculation for Maryland SB 294. Any revenue that is included as institutional revenue under 20 U.S.C. §1094(a)(24) may be included in the formula, and anything not meeting that definition is excluded.

Maryland SB 294 defines "federal funds" to mean (1) federal financial assistance provided to an institution through a grant, a contract, a subsidy, a loan, a guarantee, an insurance policy, or any other means, (2) federal financial assistance that is disbursed to a for-profit institution of higher education or a private career school under any federal law on behalf of a student to be used to

[5] *Id.*
[6] *Id.* at 7.
[7] *Id.*
[8] Wesley Wilson, *Here's why Congress must close the '90/10 loophole' in veterans' education*, THE HILL (Aug. 26, 2019), https://thehill.com/opinion/education/458772-heres-why-congress-must-close-the-90-10-loophole-in-veterans-education.
[9] *Id.*
[10] *See supra*, note 1.
[11] *Id.* at §11-210(d).

attend the institution or school, except not (3) any monthly housing stipend provided under the federal Post-9/11 Veterans Educational Assistance Act of 2008. Maryland SB 294 also explicitly requires the Maryland Higher Education Commission to publish rules to implement the Act.

C. PASSAGE OF THE AMERICAN RESCUE PLAN ACT OF 2021

The ARP was enacted into law on March 11, 2021, roughly 10 months after Maryland SB 294. Section 2013 of the ARP modified the 90/10 rule to provide that, beginning for institutional fiscal years starting on or after January 1, 2023, for-profit institutions must derive at least 10% of their revenue from sources other than "federal education assistance funds," which are "federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."[12] The Act also creates a presumption that "federal education assistance funds" are presumed to be revenue included in the numerator of the metric.[13] The ARP prohibits the Department of Education from beginning a rulemaking process related to the amendments made under Section 2013 until October 1, 2021, and states that these amendments apply to institutional fiscal years beginning on or after January 1, 2023.[14]

D. INTERPLAY BETWEEN THE ARP AND MARYLAND SB 294

The ARP purports to accomplish the same legislative purpose as Maryland SB 294. In the lead up to the markup of the ARP legislation in the House Education and Labor Committee, proponents of the legislation described it as closing the "90/10 loophole" in order to stop "for-profit schools [from using] predatory tactics to aggressively recruit servicemembers and veterans, and in turn, allows them to enroll more minority students and women."[15] Likewise, Maryland SB 294 purports to close the "90/10 loophole" to stop "predatory for-profit institutions of higher education and private career schools [from] aggressively recruit[ing] veterans by recruiting on bases and at Veterans Affairs hospitals to access GI benefits,"[16] and "it is well settled that preambles to a statute may be considered" in order to "determine legislative intent." *Georgia Pacific v. Benjamin*, 904 A.2d 511, 524 (Md. App. 2006). It is, therefore, clear that the intent behind the ARP and Maryland SB 294 was identical, and they should be interpreted accordingly. *State v. Bey*, 452 Md. 255, 265 (Md. App. 2017) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature...") (quoting *State v. Johnson*, 415 Md. 413, 421 (2010)).

The primary mechanism of SB 294, namely the calculation of the appropriate ratio for each institution, can be harmonized easily with federal law, in part because the Maryland legislature expressly tied the denominator of the ratio for the state rule to the denominator used in the

[12] American Rescue Plan Act of 2021, § 2013, Pub. L. No 117-2 (Mar. 11, 2011)
[13] *Id.*
[14] *Id.*
[15] *See* statement of Rep. Mark Takano (D-Calif.), Chair of the House Committee on Veterans' Affairs, Prais[ing] Inclusion of Provision to Close the "90-10 Loophole" in the Latest COVID-19 Relief Package (Feb. 9, 2021), available at, https://takano.house.gov/newsroom/press-releases/rep-takano-praises-inclusion-of-provision-to-close-the-90-10-loophole-in-the-latest-covid-19-relief-package#:~:text=The%2090%2D10%20rule%20is,programs%20being%20offered%20to%20students.
[16] *See supra*, note 1.

federal rule, which is based on a federal definition of revenue.[17] And since the numerator of the ratio is a portion of the denominator, the best interpretation of the state rule is to limit the numerator by reference to the denominator used in the federal rule, just as the numerator is already limited in the federal rule.

With regard to the specifics of which federal funds count towards the numerator, Congress implicitly left the issue to the Department of Education by using broad language in the ARB and then specifically referring to and dictating the timing of the federal rulemaking process. Once the specifics of the federal rule are established, state rulemaking could mirror those rules as it interprets and implements SB 294. Since any conflict with the federal 90/10 rule would create a constitutional conflict ultimately resulting in the preemption of the state rule, as discussed *infra*, the state law should be read with whatever interpretive gloss is needed in order to match the federal rule precisely. *See*, *e.g.*, *Koshko v. Haining*, 921 A.2d 171, 398 Md. 404 (Md. App. 2007) (citing "the principle of constitutional avoidance" in applying a gloss that would engraft an additional presumption onto a state law that facially conflicted with the mandate of the U.S. Constitution).

The other aspects of SB 294 should likewise be interpreted in harmony with the federal rule in order to avoid federal preemption. On its face, SB 294 offers a different mechanism for determining the sanction for failure to comply with the 90/10 rule than the federal sanction. Maryland SB 294 prohibits institutions that have failed the revenue metric from enrolling new Maryland residents if they failed the 90/10 rule for two out of three of the immediately preceding fiscal years or failed the requirement for two consecutive years.

In contrast, the ARP provides that if an institution fails the 90/10 requirement for two consecutive institutional fiscal years, it is ineligible to participate in federal student aid programs for at least two institutional fiscal years and until it has demonstrated compliance with all other eligibility criteria. If an institution fails the 90/10 rule for one year, the Department places the institutional on a provisional program participation agreement to subject the institution to additional monitoring for two fiscal years. As a result, it appears to be possible that an institution could be sanctioned under the Maryland 90/10 rule for failing the rule for 2 out of 3 years while at the same time passing the federal 90/10 rule. However, in order to avoid a constitutional conflict in such cases from the federal preemption principles discussed below, the institution should be given an additional year of probation in which to rectify the problem before the sanction is implemented, either as a necessary interpretive gloss or as a matter of enforcement discretion.

II. If Maryland SB 294 Were Interpreted to Conflict with Federal Statute, It Would Be Preempted

The Supremacy Clause of the U.S. Constitution "provides a clear rule that federal law shall be the supreme Law of the Land." *Arizona v. United States*, 567 U.S. 387, 388, (2012). States are prohibited from regulating on issues that Congress has determined "must be regulated by its

[17] *See supra*, note 1, at §11-210(A)(2).

exclusive governance." Id. at 369. State law may be preempted where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947); *see English v. General Elec. Co*., 496 U.S. 72, 79 (1990).

State law is also preempted when it conflicts with federal law, including when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). "What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

Specifically, state law is preempted where a federal agency has been entrusted to strike a "delicate balance of statutory objectives" and the state law could skew that balance. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). Similarly, when a "uniquely federal interest" is involved, state law is preempted if a significant conflict exists between an identifiable federal policy and the operation of state law, or if the application of state law would "frustrate specific objectives" of federal legislation, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (holding that federal contracts are an area of uniquely federal interest that committed to federal control); *see also Buckman*, 531 U.S. at 347 ("the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law.")

Congress has erected a carefully balanced regime of veterans benefits in higher education. On the one hand, incentivizing veterans to get a college degree (and incentivizing institutions of higher education to admit them) by providing significant additional funding beyond that available to the general public for veterans who choose to pursue a degree, thereby also benefitting the institutions that admit and educate those veterans. On the other hand, in the ARP, Congress specifically balanced those incentives with a disincentive for institutions of higher education that might rely too heavily on veterans' benefits as a source of revenue, expanding the 90/10 rule to apply to veterans' benefits used at for-profit institutions and preventing such institutions from continuing participation in Title IV programs if the percentage of their revenue from Federal education assistance funds (including veterans benefits) rises above 90%.

If Maryland SB 294 were interpreted to conflict with federal law, federal law would preempt SB 294. In the case of an overt conflict between Maryland SB 294 as interpreted and the federal 90/10 rule, SB 294 would clearly be preempted. See, e.g., *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) ("when federal and state law conflict, federal law prevails and state law is preempted.").

Even if SB 294 were interpreted to merely diverge from the federal rule in a way that generated a less overt conflict, however, the prospect of federal preemption would still loom. Congress has imposed significant regulations on institutions of higher education that participate in Title IV programs and/or the various veterans' education benefits programs, including the specific regulation imposed on for-profit institutions with regard to federal funding under the 90/10 rule. Indeed, the federal funding provided to students and their institutions under the Title IV

programs and veterans education benefit programs is entirely a creature of federal statute, based on funds flowing from the federal treasury that are apportioned under rules created and implemented by the federal government. States may have exercised their police power traditionally in the general regulation of institutions of higher education, but when it comes to the specific question of how much federal funding (of which kinds) is the right amount and how much is too much, the very question would not exist but for the federal programs that created the funding in the first place. Cf. *Buckman*, 531 U.S. at 353 (finding federal preemption where the plaintiffs' claims "exist[ed] solely by virtue of the [federal legal] requirements" and the claims "would not be relying on traditional state [powers] which had predated the federal enactments in questions," but rather "the existence of these federal enactments is a critical element in their case").

For example, if the SB 294 formula were interpreted to yield different results than the federal 90/10 rule, at a minimum, it would generate confusion among the regulated institutions and the student population. It would be impossible for institutions and consumers to know which of the two 90/10 calculations was "correct" for purposes of evaluating an institution's performance or to know which result to trust or credit.

Additionally, it is unusual that the State of Maryland has attempted to supplant a federal market viability rule that is based entirely on revenue derived from federal sources. Indeed, there is no significant state nexus that would make it obvious as to what interest or unique perspective Maryland could offer in regard to this rule. Like in *Buckman*, a market viability regulation based on federal revenue is "inherently federal in character." The State does not possess unique insight into how much federal revenue is too much or too little since it does not operate such programs.

Maryland SB 294 attempts to accomplish the same goals as the federal rule as amended by the ARP but used a disparate formula that undermines and frustrates the purposes of the ARP. Although states play a broad role in higher education, Congress has reserved for itself the regulatory authority over this unique accountability rule that turns exclusively on the amount of revenue an institution derives from federal sources. Therefore, an interpretation of SB 294 that conflicts with the federal rule would be unenforceable because it would be preempted by federal law.

III. The Maryland Higher Education Commission Should Interpret SB 294 Via Rulemaking to Be Consistent with the Federal 90/10 Rule

In order to avoid federal preemption of SB 294, we encourage the Maryland Higher Education Commission to continue its pause on interpretation and enforcement of SB 294 until the federal rules governing the amended version of 20 U.S.C. § 1094 have been finalized, and then to carry out its interpretation and enforcement of SB 294 in parallel with the federal rules. Given that the ARB accomplishes the same legislative purpose the Maryland legislature sought to accomplish, this should not be a controversial decision.

Compliance with both the federal law and a divergent interpretation of SB 294 would create unnecessary compliance costs for all for-profit institutions operating within the state. All institutions would need to run the 90/10 calculation twice, once using the federal standard and

again using the Maryland standard. Undoubtedly, this will produce disparate calculations at the same institutions and could lead to some schools passing the Maryland 90/10 rule while failing the federal 90/10 rule, or vice-versa. Because both the federal and the Maryland rules become effective in fiscal year 2023, implementing a separate interpretation of the Maryland rule does not advance any legitimate legislative purpose and therefore should be avoided.

Sincerely,

Jason Altmire, DBA
President & CEO
Career Education Colleges and Universities

Duncan Anderson
Founder and Chief Executive Officer
Education Affiliates, Inc.

Aaron Shenck
Executive Director
Mid Atlantic Association of Career Schools

Rex Spaulding
President and CEO
North American Trade Schools

Cyndie Shadow, Ph.D.
President
Fortis College-Landover

Bernard Marth
President
All-State Career School-Baltimore

Cory Hughes
President
Lincoln College of Technology-Columbia

Sean London
President
Fortis College-Towson