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June 24, 2011

The Honorable Greg Abbott
Attorney General
State of Texas
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Via Certified Mail, Return Receipt Requested

Re: Request for Legal Opinion Regarding the Texas Higher Education Coordinating Board's Authority to Establish a State Higher Education Complaint Procedure in order to Comply with the U.S. Department of Education's Program Integrity Regulations

Dear General Abbott:

The Texas Higher Education Coordinating Board ("THECB") seeks your assistance in interpreting Section 61.031 of the Texas Education Code and *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 235 S.W.3d 627 (Tex. 2007). One question we seek to resolve is whether Section 61.031 of the Texas Education Code grants appropriate authority to THECB to establish a state higher education complaint procedure that complies with the U.S. Department of Education's ("DOE") Program Integrity regulations. A further question on which we seek guidance is how to resolve the conflict between the holding in *HEB Ministries* and the instruction by the DOE that religious institutions be included in the complaint procedure.

Background

State authorization rules were included in the DOE's Program Integrity regulations, released on October 29, 2010 and effective July 1, 2011. Under the Higher Education Act of 1965, an institution of higher education (public or private) must be "legally authorized" by the state within which it is located for participation in the Title IV federal student financial aid programs. See 20 U.S.C. § 1070 *et seq.* Section 600.9 of the Program Integrity rules expands on this statutory requirement by establishing minimum standards that a state must follow for its authorization to be recognized by the DOE. See 34 C.F.R. § 600.9. Institutions located in states which do not currently have conforming regulations will not be eligible to participate in Title IV programs.

There are two components of the state authorization requirement: 1) each institution must have state authorization by name to offer post-secondary education, and 2) all institutions must be subject to a state complaint procedure. 34 C.F.R. § 600.9. Regarding the state complaint procedure, the new rules require each state to establish "a

process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws.” 34 C.F.R. § 600.9(a)(1) (emphasis added). According to the DOE, the State must have a process to review and appropriately act on complaints concerning all public and private institutions of higher education located in the state – including religious institutions – for those institutions to be considered to be legally authorized in the State. *See* 34 C.F.R. § 600.9; 75 Fed. Reg. 66868 (Oct. 29, 2010).

States must comply with the complaint procedure requirement by July 1, 2011; otherwise, institutions of higher education may request a waiver from DOE for 2011-12, and, if necessary, for 2012-13. 75 Fed. Reg. 66833 (Oct. 29, 2010). The institution’s request must be accompanied by an explanation from the state of how a 1-year extension will permit the state to comply with 34 C.F.R. § 600.9. *Id.*

According to guidance provided by the DOE, the state complaint procedure must address three categories of complaints:

1. Violations of state consumer protection laws, e.g., laws related to fraud or false advertising (“Category 1”);
2. Violations of state laws or rules related to licensure of postsecondary institutions and approval to operate (“Category 2”); and,
3. Complaints relating to quality of education or other state or accreditation requirements (“Category 3”).

75 Fed. Reg. 66865-66 (Oct. 29, 2010). The state may fulfill this role through a state agency such as THECB or the Office of the Attorney General, or through other appropriate state officials. *See id.* The state may choose to have a single agency or official handle complaints regarding institutions, or may use a combination of agencies and state officials. *Id.* at 66866.

THECB does not currently have in place a complaint procedure which would fully comply with the requirements of the DOE’s Program Integrity regulations. THECB’s current complaint procedure only concerns institutions operating under Certificates of Authority (*i.e.*, private institutions which are not accredited) and Certificates of Authorization (*i.e.*, out-of-state accredited institutions which are generally exempt currently from Chapter 7 of the THECB’s regulations). If a written complaint is received regarding an institution operating under a Certificate of Authority, THECB staff investigates the complaint directly. There are currently three institutions of higher education in this category. If a written complaint is received regarding an institution operating under a Certificate of Authorization, the complaint currently is forwarded to the applicable accrediting body for investigation and resolution.

In order to comply with the DOE Program Integrity regulations, the State needs to put into place a complaint procedure, as outlined in the regulations, which includes complaints about all institutions of higher education (public and private) located in the state.

Discussion

THECB may well have the authority to put a proposed complaint procedure (described below, and designed to comply with the DOE Program Integrity regulations) into place pursuant to Section 61.031 of the Texas Education Code. Section 61.031 provides as follows:

Sec. 61.031. PUBLIC INTEREST INFORMATION AND COMPLAINTS.

- (a) The board shall maintain a file on each written complaint filed with the board. The file must include:
- (1) the name of the person who filed the complaint;
 - (2) the date the complaint is received by the board;
 - (3) the subject matter of the complaint;
 - (4) the name of each person contacted in relation to the complaint;
 - (5) a summary of the results of the review or investigation of the complaint; and
 - (6) an explanation of the reason the file was closed, if the board closed the file without taking action other than to investigate the complaint.
- (b) The board shall provide to the person filing the complaint and to each person who is a subject of the complaint a copy of the board's policies and procedures relating to complaint investigation and resolution.
- (c) The board, at least quarterly until final disposition of the complaint, shall notify the person filing the complaint and each person who is a subject of the complaint of the status of the investigation unless the notice would jeopardize an undercover investigation.

Added by Acts 1989, 71st Leg., ch. 1084, Sec. 1.08, eff. Sept. 1, 1989.
Amended by Acts 2003, 78th Leg., ch. 820, Sec. 9, eff. Sept. 1, 2003.

For purposes of Chapter 61 of the Education Code, "board" is defined as the Texas Higher Education Coordinating Board. Tex. Educ. Code § 61.003(1).

As part of the complaint process that THECB anticipates putting into place in order to comply with DOE's Program Integrity regulations, THECB proposes to refer all complaints concerning Category 1 (violations of state consumer protection laws, e.g.,

laws related to fraud or false advertising) to the consumer protection division of the Office of the Attorney General for investigation and resolution. For Category 2 and 3 complaints, THECB would, in appropriate cases, refer complaints to the governing board or central office of a state-wide system (such as the University of Texas System or the Texas A&M University System) for final resolution of complaints, which is in accordance with DOE guidelines. See March 17, 2011 DOE "Dear Colleague" ("DCL") letter at <http://ifap.ed.gov/dpcletters/attachments/GEN1105.pdf>.

In other appropriate cases, THECB would refer Category 2 and 3 complaints to the relevant institution of higher education and/or the institution's accrediting body, although, per DOE guidance, THECB would likely retain ultimate responsibility over the handling of those complaints. See 75 Fed. Reg. 66866 (Oct. 29, 2010); DCL letter. Depending upon anticipated guidance from the DOE that THECB is currently seeking, THECB may require students to exhaust all internal institutional review processes before filing a complaint with THECB.

For the Category 2 and 3 complaints which are not successfully resolved by an institution of higher education and/or the institution's accrediting body, and for all other Category 2 and 3 complaints, THECB employees would review and resolve the complaints, in accordance with rules relating to complaint review and resolution policies and procedures to be adopted by THECB. Such policies and procedures would allow for THECB to review and appropriately act on each complaint, as required by the DOE Program Integrity regulations. See 34 C.F.R. § 600.9(a)(1).

As noted above, THECB seeks a legal opinion regarding whether the agency has the authority to put the above-described complaint procedure into place pursuant to Section 61.031 of the Texas Education Code. Further, THECB requests an opinion regarding the agency's authority under Section 61.031 to "appropriately act on" complaints, as required by the DOE Program Integrity regulations. 34 C.F.R. § 600.9(a)(1). That is, Section 61.031 discusses "*taking action*" after investigating complaints and "*complaint investigation and resolution*," without any discussion of what is meant by "taking action" or "resolution" regarding complaints. Educ. Code § 61.031(a)(6) and (b) (emphasis added). THECB anticipates, alone or in conjunction with the Texas State Office of Administrative Hearings, issuing written resolutions of complaints which would be binding upon students and public and private institutions of higher education. Accordingly, THECB requests an opinion regarding whether Section 61.031 of the Texas Education Code provides THECB with the authority to issue such resolutions.

Additionally, THECB seeks a legal opinion regarding how to resolve the conflict between the holding in *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*,

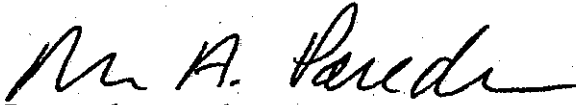
Hon. Greg Abbott
June 24, 2011
Page 5 of 5

235 S.W.3d 627 (Tex. 2007) and the instruction given by the DOE in connection with the Program Integrity regulations that religious institutions be included in the state higher education complaint procedure. 75 Fed. Reg. 66868 (Oct. 29, 2010).

Conclusion

THECB hereby requests, pursuant to Section 402.042 of the Government Code, that you issue an opinion on the above questions. Thank you very much for your assistance in this matter.

Very truly yours,



Raymund A. Paredes