Conflict of Interest Issues in Higher Education in the Spotlight

Last year higher education came under intense scrutiny as questions were raised about the extent to which universities and their employees were receiving benefits from third party vendors, contractors, lenders, etc., that might be illegal or adverse to the best interest of students.

The initial focus was on the student financial aid area. New York Attorney General Andrew Cuomo began an investigation into student lending practices of New York universities and universities elsewhere enrolling New York residents who received financial aid. Inquiries were sent to approximately 60 universities, and the responses identified a number of questionable practices. These practices included revenue sharing arrangements, under which lenders paid universities a percentage of profits made on loans to students referred to the lender by the university; university officials' ownership of shares in student lending companies; the receipt by university officials of consulting fees, fees for serving on lender advisory boards, reimbursement of expenses for attendance at lender seminars, etc. Though the number of instances of abuse was relatively small, the issue became front page news and the expression "financial aid scandal" became an oft-used catchphrase by the media.

During the Spring of last year, the New York Attorney General announced settlements with a number of universities. Several dozen universities agreed to adopt a Code of Conduct developed by Mr. Cuomo's office, under which revenue sharing arrangements were banned, institutional officials were prohibited from receiving gifts from lenders, college "preferred lender lists" were to be based solely on consideration of the interest of students and their parents, etc. In addition, eight universities agreed to reimburse students for sums they had received from lenders as revenue-sharing payments. The Attorney General's investigation prompted New York to pass the Student Lending Accountability, Transparency and Enforcement Act of 2007, which arguably covers any institution enrolling students from that state.

Attorneys General in a half-dozen other states began their own investigations of the student financial aid industry, and many of them have produced their own codes of conduct. On another front, the National Association of Student Financial Aid Administrators (NASFFA), after initially taking a generally critical position of allegations of wrong-doing by college financial aid officials, developed and published a new code of conduct with six fundamental obligations for institutional financial aid professionals. Interestingly, the Code was the product of negotiations between NASFFA and the New York Attorney General's office, which pressed NASFFA for stronger policy statements than were originally proposed by the group. The end result was a code, intended to establish standards for all university financial aid officers, that is very similar to that issued by the New York Attorney General. NASFFA also agreed to monitoring by the Attorney General's office of student loan practices for five years. Finally, NASFFA agreed that it would no longer allow, at its national conference, sponsorship of social activities, conference events, prize drawings, and other kinds of financial support provided by lenders and exhibitors. This element of the agreement has raised questions about similar third party sponsorship practices at conferences and meetings of other higher education professional associations.

The federal government has been active in this area as well. Last year, the Senate and the House of Representatives approved differing versions of legislation designed to address some of the publicized abuses in the relationship between universities and student loan providers. Those initiatives, however, have not yet found their way into approved legislation, although it is likely that this will occur early this year.

On the federal regulatory front, a 1986 amendment to the Higher Education Act made unlawful any payments or other "inducements" offered by lenders to colleges or borrowers. Though the U.S. Education Department had, since 1986, communicated several times with lenders and colleges regarding what constituted an unlawful inducement, it has only once taken enforcement action for violation of the law, a record of "inaction" that has recently been criticized.

Last year the Education Department published a proposed set of guidelines limiting universities' use of preferred lender lists and specifying what lenders could offer institutions in exchange for student loan applications. The final rules were published in November and will become effective on July 1, 2008. Significantly, the interpretation of what is an inducement was expanded to include all expenditures by lenders made for business-development purposes, such as advertising and other activities intended to create good will for the lender. In early 2008, the Education Department sent queries to over fifty universities and colleges that were distributing most of their federally guaranteed financial aid to a single lender. Similar inquiries had been sent to over 900 institutions last year, the concern being that the institutions may be inappropriately steering students to that "preferred" lender. The responses received are currently being reviewed by the Department, with the likelihood that some institutions will be subjected to a more comprehensive investigation and may be found in non-compliance with federal "anti-inducement" standards. The Department has indicated that it intends to examine, in addition to lender-university agreements, agreements between lenders and "affiliates" of a university, such as an alumni or athletic association, a foundation, etc. Enforcement in the event of a finding of non-compliance can take the form of administrative fines or, possibly (but not likely), limitation, suspension, or termination of a university's eligibility to participate in the Federal Family Education Loan Program.

Though attention was initially directed at student loan practices, interest around the country in higher education practices involving third party vendors, especially those whose services impact students, has broadened in recent months. Attorney General Cuomo moved to another related area in mid-2007 when he issued information requests to nearly 40 universities inquiring whether their athletics departments were receiving revenue from loan referrals. In one instance, it was reported that an athletics department agreed to market the services of a lending company on its website and at university events and to allow the company's use of the university's logo in marketing loans. In return, the athletics department was to receive $75 for each loan application received from university students by the company. The marketing by banks of credit cards to students, often facilitated by universities, has also been criticized. Some universities allow banks and credit card companies to come onto the campus to carry out marketing campaigns and often provide student phone numbers and e-mail lists. Alumni organizations have also become involved under arrangements by which they allow the use of the organization's name in the company's promotion of its card, in exchange for which the company pays the organization a percentage of purchases made with the card.

Another area now being reviewed is that of university study abroad programs, particularly the common practice by which overseas vendors pay the trip expenses of university staff members involved in administering these programs. An article dealing generally with conflict of interest issues in higher education offered the following catalogue of additional suspect practices:

> Many technology companies have advisory boards of college IT administrators that closely resemble the bank panels that have drawn New York Attorney General Andrew M. Cuomo's scorn. Food service and beverage companies, cellular telephone providers and numerous other vendors seeking to reach a campus' students and employees sometimes offer revenue sharing arrangements or other sweeteners . . . that primarily benefit the colleges, much like the various "inducements" that Congress and the Education Department are vowing to prohibit in financial aid. Accounting and auditing firms, like banks, often make contributions to college fund raising drives or sponsor tables at campus events in the course of doing business.

"Higher Ed's Conflict of Interest Problem," Doug Lederman, Inside Higher Ed (insidehighered.com), June 6, 2007. These vendors have a less direct connection with students than do lending companies, but their services still impact the quality of campus life. College officials argue that many of the benefits received from vendors competing for campus business, such as donated equipment, staffing help, extra payments, etc., may result in a better campus environment or better services for students. The issue, however, may be potential damage to the broader, and very important, element of public confidence: ". . . college and university officials and their institutions put at risk their most important asset - public trust - any time they are perceived as acting for personal gain or putting institutional interests ahead of those of students and the public." *Id.*

It is evident that a cloud of suspicion now hangs over colleges and universities when they act as intermediaries between third party vendors and their own students and, in an even broader context, when they enter into purchasing and other contractual arrangements with the private sector. What began as an examination of problems in the student loan area has now grown to a questioning of almost all campus areas in which conflicts of interest may arise. The questions are coming from a broad array of state and federal authorities, from public interest groups, and from the media.

While the extent of the problem may not be as great as some believe, institutions of higher education cannot afford to simply assume, without looking carefully at their actual practices, that they are not vulnerable to criticism. Margaret Spellings, Secretary of the Education Department, was quoted recently as saying, "Leadership can either come from the academy and be informed by the experience they have, or it can be forced on them by others - be it attorneys general, people in Congress, the secretary of education . . ." Paul Basken, *Colleges, Pressed by Spellings and Cuomo, Step up Scrutiny of Possible Conflicts in Their Business Relationships*, The Chronicle of Higher Education, Sept. 19, 2007.