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CONGRESSIONAL SCHEDULE

Congress is out of session and will meet again for legislative business on Monday, November 15, for the lame-duck session.

The House adjourned on September 30. The Senate finished its legislative business on September 29, but it is reconvening every few days in pro forma session to keep President Obama from making recess appointments during the period before the lame-duck session.

EXECUTIVE BRANCH

DEPARTMENT OF EDUCATION RELEASES NEW RULES ON STUDENT AID  NEW

The Department of Education on October 28 released a broad set of rules tightening federal student aid policies affecting for-profit, non-profit, and public colleges and universities. The goal is to protect prospective students from aggressive or misleading recruiting practices, provide individuals with better information about the effectiveness of career college and training programs, and ensure that only eligible students or programs receive federal student aid.

The rapid growth of enrollment, student debt load, and default rates at for-profit institutions prompted the Department to embark on an 18-month negotiation with the higher education community over new regulations. During this negotiation, the Department developed a set of proposals around 14 specific issues. The final regulations, published in two parts, follow that deliberative process and will go into effect on July 1, 2011. They address 13 of the 14 issues in their entirety and partially address the last issue, which involves the definition of “gainful employment.”
The Department received more than 1,200 public comments on the proposed regulations, which officials used to make 82 revisions in the proposals. The Department backed down from a plan to require that colleges seek federal approval for new programs. But the final regulations maintain the Department’s general stance on the definition of credit hour for the purposes of determining eligibility for federal program funds (colleges can continue to use their own definition of credit hour when awarding academic credit), and on the requirement that institutions prove they have state approval to operate. These provisions have been of particular concern to many non-profit institutions. The six presidentially based higher education associations are reviewing the details of the final regulations and will provide their analysis in the near future.

After receiving more than 90,000 public comments on the gainful employment proposals, the Department announced in September that it would change the publication date of final regulations to early 2011. The Department’s gainful employment proposals would halt student aid to programs whose graduates carry a high student-debt burden and have a low rate of loan repayments. The publication delay will not prevent the Department from publishing final regulations in time for them to take effect on or around July 1, 2012, as originally planned. The Department is taking additional time to hold meetings with interested parties and to hold public hearings on November 4 and 5. These meetings will give individuals and institutions an opportunity to clarify the comments they have submitted and respond to questions from officials. The American Council on Education, with input from the other presidentially based higher education associations, will provide comments.

A summary of the new regulations on program integrity are available on the Department of Education website.

NEW

OTHER

COLLEGE BOARD RELEASES ANNUAL COLLEGE PRICING AND STUDENT AID REPORTS

Although the published tuition prices of colleges and universities rose in 2010, increased federal student aid and tax credits as well as growing aid from colleges and universities, helped keep down the actual costs for many students and families, according to two annual reports released October 28 by the College Board.

The two reports, “Trends in Student Aid” and “Trends in College Pricing,” showed increased tuition and fees, particularly for public four-year institutions where state support has dropped. But increases in federal and institutional student aid, particularly a major increase in the Pell Grant program—to $28 billion in academic year 2009-2010—and federal education tax benefits ameliorated the increase for many students.

As analyzed by the American Council on Education, the College Board reports that average tuition and fees in 2010-11 increased 7.9 percent at public four-year institutions (to an average price of $7,605), 4.5 percent at private nonprofit institutions (average price: $27,293), 5.1 percent at for-profit institutions (average price: $13,935), and 6 percent at community colleges (average price: $2,713). State spending on higher education dropped by nearly 9 percent in 2008-2009, and an additional 5 percent in 2010.
The reports also found that full-time students received an average of about $6,100 in grant aid and federal tax benefits at public four-year institutions, $16,000 at private nonprofit institutions, and $3,400 at public two-year colleges.

**PLAINTIFFS FILE LATEST BRIEF IN STEM CELL CASE  NEW**

Both sides in the ongoing court case on federal funding of human embryonic stem cell (hESC) have filed new briefs. Until the U.S. Court of Appeals rules on the Justice Department’s appeal of the preliminary injunction that halted federal funding of hESC research, the National Institutes of Health (NIH) will continue to fund the research.

The plaintiffs in the case, two researchers who work with adult stem cells, filed a brief with the U.S. Court of Appeals on October 28 in response to the Justice Department’s previous filing. The plaintiffs’ arguments remain consistent with previous court filings: 1) the plaintiffs are harmed due to increased competition for NIH funding; 2) hESC research violates the Dickey-Wicker appropriations amendment, which prohibits federal funding of the destruction of human embryos; and 3) NIH violated the Administrative Paperwork Act in its promulgation of the stem cell guidelines.

The plaintiffs also address the amicus brief filed by the University of California (UC), specifically on the issue of standing (p. 57 of the brief). The plaintiffs were originally granted standing by the Court of Appeals on the grounds that they were placed at a competitive disadvantage because NIH funding of hESC research meant less funding available for other types of research.

The plaintiffs state that UC cannot argue the issue of standing, since amici cannot introduce arguments not made by the defendant. They go on to suggest that the standing argument is baseless, in any event, because the plaintiffs were clearly disadvantaged in the competitive marketplace of NIH research grants. The plaintiffs also do not accept UC's argument that institutions are actually grantees, rather than individuals. The government’s response to this brief is due on November 4; the Court of Appeals has announced that it will hear oral arguments on the preliminary injunction on December 6.

Meanwhile, the Department of Justice filed a new brief in the U.S. District Court, presided over by Judge Royce Lamberth, in support of a summary judgment in its favor. The District Court is considering the underlying case on its merits at the same time the Court of Appeals is dealing with the appeal of the preliminary injunction.

With this latest brief, the Justice Department has begun to address the issue of standing, or at least the concept of competitive injury suffered by the plaintiffs. The brief says, “After more than a year of litigation and the operation of the final Guidelines, neither plaintiff Sherley nor plaintiff Deisher can point to any actual financial harm they have suffered from the actions of defendants.” The brief also contests the plaintiffs’ claims that the government violated the Dickey-Wicker provision or the Administrative Paperwork Act.

It is likely that Judge Lamberth will allow the Court of Appeals to make a final ruling on the preliminary injunction before he rules on the underlying case. However, he could decide to issue
a summary judgment on the underlying case or to reject the various motions entirely and send the case to trial.

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