Cooley

Federal Judge Rules on MA Regulations on Marketing by For-Profit Schools

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This case was a constitutional challenge to several regulations issued in 2014 by then Massachusetts Attorney General Martha Coakley, which were intended to curb what she described as “unfair practices” by for-profit schools operating in the state. On cross-motions for summary judgment, the court upheld some of the regulations and ruled others to be unconstitutional under the First Amendment to the Constitution. Cooley represented the plaintiff, MAPCS, through its Boston and DC offices.

The regulations were promulgated in a highly political context and against the backdrop of the ongoing efforts of a national task force of Attorneys General (of which AG Coakley was a participant) working in collaboration with the federal government to increase regulatory pressure on for-profit college. The rulemaking conducted by AG Coakley’s office was based on an administrative record that was intended to cast the target schools in the most unfavorable light, including the full text of the 2012 Senate Majority Report compiled by Senator Harkin.

While Judge Saylor was appropriately deferential to the Commonwealth, the ruling made it clear that there are constitutional lines state regulators cannot cross when promulgating and enforcing consumer protection laws. The most interesting and potentially most important aspect of the case, which thus far has been overlooked in media coverage, concerned the Judge’s comments that certain key regulations appear constitutional on their face, but could be held invalid upon implementation by the AG in an applied challenge.

In brief, Judge Saylor invalidated two of the regulations as constitutionally impermissible under the First Amendment. The so-called “Credit Transfer” regulation was invalidated because it would have forced for-profit schools to state, falsely, that they were unaware of schools that would accept their transfer credits. The “Time to Complete Program” regulation was also invalidated because it would have prohibited schools from truthfully stating that some students could finish the programs in less than the median time.

Seven other regulations were upheld. Notably, the court upheld an unusual regulation preventing schools from contacting prospective students more than twice in any seven-day period, with or without consent, which MAPCS argued was preempted by federal law (the Telephone Consumer Protection Act, or TCPA, popularly known as the Do Not Call statute.)

Judge Saylor also acknowledged that the regulation requiring schools to disclose “Any Fact” that would likely influence a student’s enrollment, and the regulation prohibiting schools from enrolling any “Unqualified Students” were “troublesomely vague.” While he declined to invalidate these regulations because he said there are ways they could be reasonably implemented, he made clear that schools would be within their rights to bring a new lawsuit if the AG applied these rules too broadly. The important point here is that a so-called “as applied” challenge to these regulations are not foreclosed by the Judge’s decision, and may carry a greater likelihood of success than a “facial” challenge.

Judge Saylor in effect signaled to the schools (and reminded the Commonwealth) that if these rules are applied too broadly he would expect there could be new litigation. In essence, Saylor warned the AG’s office to be wary of crossing a line that would invite another, potentially successful lawsuit from a regulated school.

In this sense, even though the Court issued a “split decision,” in the current enforcement environment the decision is, nevertheless, a rare victory for the schools, reaffirming important free speech and due process rights and putting regulators on notice that constitutional rights must be respected both in implementing and promulgating new regulations.

Mike Goldstein has been a pioneer in the development of new and more effective and efficient approaches to education in general and eLearning in particular through the creation of innovative approaches to combining the resources and interests of the various sectors of the education, technology, financial and governmental communities.

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