

**REVIEW OF PROGRAM APPROVAL STATUTES:
THE PRIVATE COLLEGE ACT AND THE ACADEMIC DEGREE ACT**

Submitted for: Information.

Summary: This three-part item addresses the effectiveness of current approval processes for Illinois private colleges and explores the feasibility of several strategies for strengthening these processes to assure the highest quality degree programs for the citizens of Illinois. Part I of this item presents a brief history and summary of the regulatory statutes governing approval of private colleges and universities in Illinois. Part II explores the scope of existing authority and identifies strengths and weaknesses of Illinois' regulatory system for private sector degree-granting activity. Finally, Part III explores the feasibility of three identified strategies for strengthening Illinois' regulatory system.

Although Illinois statutes do not reach all institutions serving Illinois residents, these statutes remain some of the strongest in the nation. Given sufficient personnel and budgetary support, current statutes can better assure program quality among institutions located within the state and subject to Illinois approval statutes. Problems posed by Internet-based institutions that offer substandard degrees are unlikely to be solved by amendments to state statutes.

Action Requested: None.

STATE OF ILLINOIS
BOARD OF HIGHER EDUCATION

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Introduction

Illinois was early among states accurately identifying the strain that digital learning would place on regulatory processes, and suggesting that state regulatory statutes would be unable to adequately address the problem through prior restraint. This item is a response to requests to assess the efficacy of current approval processes, and to explore the feasibility of several strategies for strengthening these processes to assure the highest quality degree programs for the citizens of Illinois.

Part I of this item presents a brief history and summary of the regulatory statutes governing approval of private colleges and universities in Illinois. Part II explores the scope of existing authority and identifies strengths and weaknesses of Illinois' regulatory system for private sector degree-granting activity. Finally, Part III explores the feasibility of three identified strategies for strengthening Illinois' regulatory system to assure the highest quality degree programs for the citizens of Illinois.

History of the Illinois Private College Act and Academic Degree Act

Prior to 1945, new Illinois institutions either received authorization to operate directly from the legislature or were authorized through standard processes for incorporation of private for-profit or not-for-profit organizations. In essence, higher education was unregulated by the state, and consumers relied on the reputation of institutions or upon institutional affiliation with reputable accrediting bodies when selecting private colleges.

In 1944, Congressional enactment of the GI Bill increased access to higher education for thousands of returning World War II veterans. As access and enrollments increased, concerns about the maintenance of academic quality emerged across the nation. In responding during the mid-forties, many states enacted their first statutes requiring state approval of private colleges. Consistent with this national trend, in 1945, the Illinois legislature enacted what is now known as the Private College Act. This act designated the Office of the Superintendent of Public Instruction (OSPI) as the agency responsible for review and approval of all applications to establish a new private college, junior college, or university. It required new degree-granting institutions to obtain state approval before incorporating, but made no provision for periodic reviews after authorization had been granted.

The early 1960's marked a period of renewed state legislative activity relating to the regulation of private colleges and universities. This new wave of regulatory legislation was responsive to two national trends. First, growth throughout the fifties of legitimate correspondence schools was accompanied by a wave of diploma mill activity that had captured national attention. Second, the National Defense Education Act of 1958 provided low-interest

loans for college students and debt cancellation for those who became teachers after graduation. Increasing access and dramatically increasing enrollments throughout the 60's raised concerns about the maintenance of quality that were addressed by regulatory legislation enacted by states during that period. In 1961, the Illinois legislature adopted the "Degree-Granting Institutions Act," which was patterned after model consumer protection legislation recommended by the Council of State Governments to stem proliferation of bogus credentials and was directed to consumer protection.¹ The Illinois act followed a legislative investigation into Illinois diploma mill activity and much bad publicity relating to frauds perpetrated by institutions despite existing regulatory safeguards.

Responsibility for administration of both the Private College Act and the Academic Degree Act was transferred to the Illinois Board of Higher Education (IBHE) in 1979. The Board of Higher Education drafted administrative rules that were adopted with notice and comment, and were designed to pull together provisions of the two loosely coordinated statutes. These rules have remained largely unchanged over the years, and staff relies heavily on them in interpreting both acts today. The two acts and rules require institutions, established after 1945, to obtain IBHE authorization to operate; and require institutions, established after 1961, to obtain separate authorization for each new degree program.

Today, at the turn of the millennium, increased access provided by Internet-based degree programs, and what might be termed *off-the-shelf* degrees, has once again focused nationwide attention on issues of quality. As was true in 1945 and 1961, the changing character of new institutions and degree programs has created concern that the value of degrees is being eroded. As some states have found themselves unwilling havens for substandard Internet-based institutions seeking to avoid regulation in other states, there have been individual attempts at legislative remedy. Thus far, however, no model code has been proposed to address problems created by this new breed of institutions. Nationwide initiatives have largely been limited to accrediting bodies' efforts to update policies to provide greater scrutiny of distance learning programs, although there have been recent federal U.S. Department of Education (USDE) efforts to establish information-sharing "partnerships" among state and federal agencies.²

Scope and Effectiveness of Illinois' Regulatory System

Scope of Illinois' Authority Over Private Sector Colleges

Although the quality standards applied to independent colleges are similar to those applied to public universities, separate and distinct policy purposes underlie degree approval in these two sectors. For public universities and community colleges, IBHE is charged with approving new units of instruction based upon educational and economic justification. This gives the Board broad discretion in setting priorities for the initiation of new programs at public institutions based upon perceived need. With respect to program review, the Board "is authorized

¹ This new act proved, initially, to provide ineffective assistance to the 1945 Private College Act. As stated by one OSPI administrator, "On the surface, the new legislation seemed to expand and strengthen the state's regulatory system, but taken literally, it was so compromised by its exemptions that it only duplicated the 1945 law and complicated and weakened the entire regulatory concept." Owing largely to this troublesome exemptions clause, the act was essentially ignored until the seventies.

² It is interesting to note that calls for regulatory reform are now being made by corporate newcomers to the field of higher education, such as the University of Phoenix, who serve markets in several states, and seek to ease the burden of satisfying disparate state requirements by advocating either the adoption of model state statutes or the transfer to federal agencies of regulatory responsibility for private colleges.

to review” existing programs at public institutions, and “to advise the appropriate board of control if the contribution of each program is not educationally and economically justified.” The Board of Higher Education Act does not give the Board power to revoke approved units of instruction for Illinois public colleges and universities.

The state’s role with respect to private colleges is quite different. The Academic Degree Act sets forth clear policy objectives for regulation of private colleges:

It is the policy of this state to prevent deception of the public resulting from the offering, conferring, and use of fraudulent or substandard degrees. Since degrees are constantly used by employers in judging the training of prospective employees, by public and private professional groups in determining qualifications for admission to and continuance of practice, and by the general public in assessing the extent of competence of persons engaged in a wide range of activities necessary to the general welfare, regulation, by law, of such evidences of achievement is in the public interest. To the same end, protection of legitimate institutions and of those holding degrees from them also is in the public interest.

This statement emphasizes that the state’s role in regulating private colleges and universities is to assure that the degrees they bestow will fairly reflect the competence of degree recipients and meet standards consistent with public expectations. Because reasonable public expectations are based on existing practice, Illinois employs common practice among existing Illinois institutions as the standard that applicant institutions must meet.

Illinois private colleges must demonstrate the economic viability of the institution and show adequate financial support for proposed new degree programs. They need not demonstrate that their programs are “economically justified.” Being essentially tuition dependent, private colleges are inherently responsive to student demand, and typically tailor new program offerings to the market and close them without state intervention when tuition revenues do not cover the costs of a program.

Private colleges are not required to show “educational justification,” but must show that their institutional mission and program objectives are appropriate for a degree-granting institution; that information provided to the public is accurate and not misleading; and that faculty, curricula, and instructional resources are adequate to achieve these objectives. This analysis of program quality is similar to that for publics, although the underlying question is not whether public dollars should be spent on a program, but whether the institution’s plan is economically viable and will result in degree programs of reasonable quality.

With regard to program review, regulatory statutes governing private colleges charge the Board of Higher Education with responsibility for periodic review of degree programs it approves, and confers power to *revoke* authorities granted to private institutions if these institutions “fail to maintain the conditions of original approval.” In this respect, regulatory statutes governing private colleges are stronger than those governing public colleges and universities, giving the Board power to continually monitor and *enforce* quality standards.

Strengths and Weaknesses of Illinois’ Regulatory System

Improving regulation of Illinois private colleges requires honest assessment of the strengths and weaknesses of the existing system. By several measures, Illinois has a relatively

tough regulatory system. In 1988, the American Council on Education publication, *Diploma Mills: Degrees of Fraud*, identified Illinois as one of 22 states that “clearly have strong laws” regulating colleges and universities. In more recent years, several low regulation states have instituted systems for regulatory oversight, and a 1997 ACE publication revisiting the state regulatory practices stated that, “most states have strong laws that are adequately enforced.” The American Council on Education’s state-to-state comparison of statutory authorities leaves little question that Illinois still ranks high among “strong regulation” states in the strength of its laws and adopted rules.³

Certain features of Illinois’ regulatory system for private colleges may be seen as strengths or weaknesses, depending upon one’s point of view. Despite strong authority to approve and revoke, Illinois has been described as relatively friendly to the private sector, or a “low hassle” state. Illinois requires no bond to be posted by applicant institutions, and charges no licensing or re-licensing fees for institutions or degree programs. Historically, the Board has believed that bonds and fees would not add materially to the funding and could compromise the perception of the Board’s independence in the exercise of its legislative oversight authorities. Although states with strong approval statutes often require annual or periodic reauthorization, Illinois does not. This results in tremendous reduction in paperwork for approved Illinois institutions each year.

There also are clear weaknesses in existing authorities. Previous board items have discussed the impact of digital technology and Internet-based programming on Illinois’ ability to protect consumers from substandard or fraudulent degrees. The quality of Internet-based programs clearly impacts Illinois consumers of higher education, and many such programs offered by out-of-state institutions are, indeed, substandard or fraudulent. However, by rule, out-of-state institutions offering degrees and instruction at a distance may offer degree-programs to Illinois residents without IBHE approval, as long as they have no physical presence in the state. In this regard, the policy purposes of Illinois’ regulatory acts are not adequately served by existing authorities for regulation of Internet-based programs.⁴

Illinois regulatory statutes also exempt a large number of Illinois institutions from the requirement for approval and review. In identifying states with “relatively tough laws,” ACE warned that some state’s laws, although generally tough, create exemptions for religious institutions, institutions organized on a nonprofit basis, or institutions that were in existence prior to the laws’ passage, and these exemptions can create a safe harbor for diploma mill activity. Presently, 73 private institutions are grandfathered under Illinois’ Private College Act and Academic Degree Act, meaning that they are free to offer degrees of any kind on their home campuses without State approval. While no grandfathered institution is presently a “diploma mill,” several of these institutions have been on financial watch lists created by the

³ The referenced publication is *External Degrees in the Information Age: Legitimate Choices*, by Henry A. Spille, David Stewart, and Eugene Sullivan, published by the American Council on Education in 1997. In *The Law of Higher Education*, authors William Kaplin and Barbara Lee categorize three different “approaches” to state licensure of private colleges: 1) licensure on the basis of minimum standards; 2) licensure based on realization of institutional objectives, and 3) licensure based on honest practice. Illinois, in fact, covers all three bases, having adopted into rule and policy, criteria that address institutional objectives, minimum requirements (based on common practice), and honest practices.

⁴ It bears noting that this national problem has not been solved by any state. The nature of the delivery mechanism presents constitutional issues relating not only to the Commerce Clause, but also to the First Amendment of the federal constitution.

U.S. Department of Education, and the maintenance of quality programs, in the face of growing financial pressures, creates cause for concern. Should financial pressures result in impaired quality at such institutions, IBHE has no authority to step in to protect consumers.

Additionally, Illinois statutes are not well suited to deal with a growing phenomenon in higher education, the multi-state corporate institution. Complex corporate structures and public trading of stock in educational ventures are creating academic and administrative incentives very different from those found at traditional institutions. The potential impact of this trend on academic quality has yet to be fully appreciated; but it seems likely that adjustments will have to be made sometime in the future.

Finally, fiscal and personnel resources have reached their limit with regard to approval capability for in- and out-of-state institutions covered by the acts. In Illinois, applications from new institutions with a physical presence in the state have increased ten-fold during the last decade, greatly straining fiscal and personnel resources devoted to private college regulation. Annual degree authorizations for private institutions have increased by 1,400 percent since IBHE began administering the statutes in 1979, leaving approximately 1.5 full-time-equivalent staff members to analyze more than 198 degree programs during calendar year 2001. This demand on staff time has restricted program review to such an extent that review now occurs primarily in response to consumer complaints.

Clearly, some institutions are slipping through the cracks of Illinois' regulatory system for private colleges. Degrees granted by these institutions may or may not meet Illinois' strict standards, but are certain to affect the quality of the state's workforce, and draw students from Illinois' traditional degree-granting institutions. Legitimate questions have been raised concerning the need to revise Illinois' regulatory statutes to better protect consumers in a period of rapid change.

Strengthening the System

Concern over the changing character of degree-granting institutions and new instructional delivery systems has led to several recurring suggestions for strengthening Illinois' regulatory system. These suggestions may be roughly categorized as:

- Enlarging state jurisdiction to include Internet-based and other distance learning institutions serving Illinois residents from out-of-state;
- Adding educational justification to the list of criteria for new programs;
- Raising approval standards from the present standard of common practice to a higher standard; and
- Raising the standard of common practice.

Following is a brief discussion of the advantages and disadvantages attending each of these strategies for increasing regulatory authority. This is followed by a discussion of what changes to Illinois' regulatory system might produce positive effects for Illinois consumers.

Enlarging Jurisdiction

Previous board items on distance learning have addressed several practical problems involved in enlarging jurisdiction of regulatory statutes to encompass *all* institutions serving Illinois residents, whether or not these institutions maintain a physical presence in the state. Current regulatory authorities permit good control over institutions physically present in the state, but do not give the Board the authority to assure quality of institutions operating without such a presence.

Although the regulation of Internet-based institutions is necessary to *fully* protect consumers, the resources required to do so are prohibitive. As indicated above, applications from new institutions with a physical presence in the state have increased ten-fold during the last decade, greatly straining fiscal and personnel resources devoted to private college regulation. Expansion of jurisdiction to encompass institutions serving Illinois residents (with or without a physical presence in Illinois) would require approval of institutions in 50 states and an unknown number of countries. The additional personnel and budgetary requirements for fairly administering and enforcing standards, worldwide, are inestimable.

States with laws regulating out-of-state correspondence and Internet-based institutions find that many institutions simply ignore the law, knowing that the odds are against being discovered, and they are unlikely to be called to task for failure to register. Even outright fraud carries a slight risk of prosecution. In most states, states attorneys and attorneys general do not place diploma mill activity high on their list for prosecution, in part because “victimless” crimes are low priority, and students at these institutions often do not see themselves as victims. Where out-of-state, Internet-based institutions are involved, the complexity of such cases creates further disincentive to prosecution. These facts have placed many Internet operations effectively beyond laws that establish jurisdiction beyond state lines, and suggest that the “solution” of enlarged jurisdiction may be unworkable, or at least highly problematic. The staff is in the process of developing an on-line consumer information function to help close this gap in oversight and consumer protection.

Adding Educational Justification, or “Need,” to Criteria for Approval of Private Colleges and their Degree Programs

Illinois presently applies the same standards to all private institutions it regulates. Noting the threat new programs can present to the stability of existing institutions and programs, some have suggested that the state’s investment in higher education should be protected by restricting approval of new programs to those that are not already being offered by existing Illinois institutions. Although some states have similar laws in effect, many analysts believe there are constitutional problems associated with such restrictions. Interstate educational activities clearly fall within the category of commerce protected by the Commerce Clause of the federal constitution. The clause has been interpreted to prohibit states from applying standards to out-of-state schools which are higher than or different from the standards applied to in-state schools.⁵

⁵ “In one famous case, which arose after a state had refused to license an out-of-state business because the in-state market was already adequately served, the Court said that the state’s decision was ‘imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests’ and held that ‘the state may not promote its own economic advantages by curtailment or burdening of interstate commerce.’” *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (3rd edition), by William A. Kaplin and Barbara A. Lee. Jossey-Bass Publishers, San Francisco, 1995.

Moreover, limiting new programs on the basis of “need” would represent a departure from the consumer protection purpose of Illinois’ regulatory statutes, which permits the Board to regulate “the evidences of achievement” and does not empower the board to regulate teaching and learning itself. Being essentially the free exchange of ideas, private higher education, itself, must be accorded the highest level of protection under the federal constitution. Restricting new program offerings on the basis of “need” would require legislative redefinition of the policy purpose of Illinois’ regulatory statutes, and risk encroachment on the free exercise of speech under the First Amendment.

Another fundamental problem with restricting program duplication is that of defining what constitutes a duplicative program. Assessing duplication on the basis of program name or discipline code may miss the point. New programs may prove competitive because they have better and more up-to-date equipment, have developed a more effective approach to program delivery, or approach the subject matter of a discipline in a new way. Thus, prohibiting “duplication” may prove, instead, to prohibit program improvement and deny access to quality higher education programs.

Raising Approval Standards from Common Practice to a Higher Standard. The perfect education may still be what occurs between a mentor with infinite patience and a student with a burning desire to learn. The system of higher education we know today has evolved from continuing attempts to optimize access, choice, affordability, and quality. For example, admissions standards typically are set to maximize access while minimizing the need for remediation. Decisions to raise standards for admission require colleges to limit access, while lowering admissions standards requires increased efforts to remediate students who finish high school without the requisite skills.

Similar tradeoffs are seen with student-to-faculty ratios, facilities, and instructional resources. Raising the ratio of faculty to students may increase quality, but also will raise costs and restrict access for students from less affluent families. Common practice has settled upon 15 to 30 students as optimal for courses requiring student-faculty interaction. While some institutions have wonderfully elaborate facilities, these facilities can increase expenses beyond what is necessary, again lowering access. The instructional resources necessary to deliver a given program are generally established empirically, vary with curricular emphasis, and change continuously with advances in particular disciplines. In sum, existing academic programs represent a series of compromises based upon institutional and program objectives, curriculum design, and the characteristics of the student population that is served.

Improvements in common practice are possible and desirable. They are made each day at institutions and within programs, leading, in some cases, to widespread improvement across the system as a whole. In a sense, individual classrooms serve, continually, as laboratories for innovative practices, the best of which are adopted by programs with similar needs at other institutions. Implementing quality improvements from the top-down through enhanced state standards has advantages in terms of assuring consistency among programs. Yet, without empirical evidence to support stricter standards, there is risk that strict standards will be inapplicable to a broad range of institutions and will chill educational innovation and improvement over time. State administrative offices are generally ill equipped to prescribe standards for admissions, curricula, instructional resources, or faculty qualifications for the broad range of academic programs presently offered in Illinois.

Raising the Standard of Common Practice. Although current statutory authorities do not enable the board to set approval standards that exceed common practice at Illinois institutions,

Illinois institutions of higher learning possess the power to raise quality standards within existing statutes. Illinois institutions may act cooperatively to “raise the bar” by increasing their own quality standards.

To the degree that existing institutions raise and adhere to clear policies concerning admissions, transfers, and graduation requirements, these institutions and their increased quality standards provide the tools for effective regulation within existing statutory authorities.

“Housekeeping” Changes to Existing Statutes and Administrative Rules. There has been wide agreement among those who have worked to administer Illinois’ private college regulatory acts that it would be beneficial to combine the two acts into one statute. Staff has developed draft legislation that would do so and incorporate modest “housekeeping changes” to better suit modern conditions. These changes have not been brought forward for the board’s consideration, due to concern that opening up the statute for revision could result in unintended amendments, ultimately weakening rather than strengthening existing processes.

Summary and Conclusion

Higher education is being challenged by this period of innovation and change. Illinois approval statutes, designed to protect Illinois consumers from substandard and fraudulent degrees, do not reach institutions serving Illinois residents from out-of-state locations, and do not prevent certain high profile abuses, including the outright sale of degrees by entities with no physical presence in the state. Multi-state corporations are able to offer degrees from beyond Illinois’ borders. These degrees may or may not meet Illinois’ strict standards, but are certain to affect the quality of Illinois’ workforce, whether by enhancing or by devaluing the common currency of a degree in Illinois.

Such developments create legitimate questions as to whether “physical presence” remains an appropriate test for determining Illinois’ regulatory jurisdiction, and whether state statutes might be enhanced in other ways to prevent erosion of quality based upon unregulated practice. Unfortunately, proposed measures to expand jurisdiction, limit duplicate practice, and impose top-down standards of quality are impractical, and likely to draw legal challenge on constitutional grounds. Strengthening Illinois statutes will have little effect if budgetary commitments are not made to assure enforcement.

Illinois statutes remain some of the strongest in the nation. Given sufficient personnel and budgetary support, current statutes can better assure program quality among institutions located within the state and subject to Illinois approval statutes. Funding and additional staff would shorten the time for approvals and allow proactive review of institutions, leading, in some cases, to revocation.