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Changing Higher Ed Podcast 149 with Host Dr. Drumm McNaughton and Guest Mike Goldstein - Higher Ed Braces for Impact of Third-Party Service Regulation Expansion

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Welcome to Changing Higher Ed, a podcast dedicated to helping higher education leaders improve their institutions, with your host, Dr. Drumm McNaughton, CEO of the Change Leader, a consultancy that helps higher ed leaders holistically transform their institutions. Learn more at changinghighered.com. And now, here's your host, Drumm McNaughton.

Drumm McNaughton 00:31
Thank you, David. Today, we welcome back a special guest, Mike Goldstein, Managing Director of Center for Higher Education Transformation at Tyton Partners. Mike is a pioneer in developing the legal environment in higher education and a counselor at the highest levels of legislation. He founded the law firm Dow Lohnes in 1978, which merged into Cooley LLP in 2014, and was a senior partner there for seven years before moving to Titan.

Mike joins us today to discuss the most recent “Dear Colleague” letter from the Department of Education on third party servicer rules and their implication on higher education institutions. And a hint, if you think that this doesn't affect you, you may be mistaken.

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Mike, welcome to the program. Or should I say welcome back to the program?

Mike Goldstein 01:23
Thank you, Drumm; it's a pleasure to be on this program. I think you're one of the more articulate sources of excellent information in the higher education space, and it's always fun to have these conversations with you.

Drumm McNaughton 01:37
Likewise. Thank you very much. It's very kind of you to say that. We certainly try to have interesting guests on such as yourself. That also makes it a lot of fun for me. But for those in our audience who haven't heard you on the podcast before, give them a little background on who you are. And I've always found your experience fascinating.

Mike Goldstein 01:59
I've been involved with higher education for about half a century and have been a university administrator. I was associate vice chancellor at the University of Illinois and the Director of university relations for the City of New York. For many years, I had a higher education law practice at the law firm Dow Lohnes, and then we merged into the global firm Cooley in the 2010s. More recently, I joined Tyton Partners, an investment banking firm wrapped around a strategic consulting organization but entirely devoted to the higher education vertical, from pre-K to workforce development. And I've been working on some very innovative projects for the future of American higher education.

Drumm McNaughton 02:53
You've done this for many years, not only working with accreditors but with your work with Cooley. We've crossed paths multiple times in our careers

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and have a lot of respect for each other's skills. I really enjoy working with you.

Mike Goldstein 03:08
That's certainly mutual. But it's important that when we have these conversations, we're getting all sides of the issues, and that's something that you're successful in doing. There's always more to the story, which a well-known NPR program says, and I think this is one of those cases.

Drumm McNaughton 03:29
I remember Paul Harvey and now the rest of the story. That's hopefully what we're able to bring folks today.

Mike Goldstein 03:37
We're talking about something that has received a lot of notoriety in higher education. But, there's a very, very small segment of the population who cares about this—the issuance of what's called a Dear Colleague letter, which is Department of Education speak for a document that expresses the opinion of the Secretary of Education regarding how a law or regulation that is to be applied is to be interpreted. So, it's not strictly what the law says. It's, "I'm the Secretary, and this is what I think the law or the regulation means." So, what's happening here is a very, very complex information piece on the secretary's thought that's been issued as a mechanism for achieving something quite independent of what a particular regulation was designed to do.

Drumm McNaughton 04:37
So the Department has issued this Dear Colleague letter, which is guidance from the secretary. What is the problem they're trying to solve with this?

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Mike Goldstein 04:49
Well, Drumm, that's a great question because we're spending a lot of time discussing what the Dear Colleague says, and we need to focus on that and why it came out in the first place. It is an ingenious expansion of a very simple regulation designed to monitor companies that contract with institutions to provide services to manage various aspects of Federal Student Aid.

For many years, the Department has found itself battered—I think that's the right word—over what is arguably its inability to manage what has become a fairly significant part of the higher education ecosystem, and that is companies and organizations that provide various kinds of services to institutions. These services are most notably the online program managers like 2U that convert programs online and provide the mechanism to distribute them and then work with institutions in terms of recruiting and enrolling students, to companies that deal with pathways for students coming from foreign locations, to companies that work on developing new curricula, print and online publishers, and a wide variety of activities that institutions rely on to do their job better.

The GAO, the Inspector General, and congressional oversight committees have said that the Department of Education doesn't know what's happening between these enterprises and institutions. How much are they paying? How much control do they have? Are they overseeing their operations as institutions? How much profit is being made by these organizations, if any? Who is running them? How well are they run? Who's responsible for their activities?

Drumm McNaughton 06:52

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Another point is that at the root of all this is Title IV, Federal Financial Aid. So isn't that the core of what they're trying to get at?

Mike Goldstein 07:02
When it comes to higher education, the Department of Education is not really involved with education. It is basically a financing agency. It provides grants and loans to students. It's not involved with institutional quality. Under the law, that is the responsibility of accrediting agencies. It's not involved with the approval of institutions or the granting of degrees and other credentials. That's the responsibility of the states. So, to participate in Federal Financial Aid, an institution has to be accredited and state authorized. Then the Department says, "Okay, you now can participate in the Student Aid program." So, the interest is in the money.

Now, the money is in the many billions of dollars that flow from the federal treasury through the institutions to students, either as loans or grants. So, that's the hook. But the issue is that the Department's position is, "We're responsible for ensuring that that money is used properly, and therefore we need to know how the institutions use it, how the students use it, and if that is for the best public purpose." There's nothing wrong with that argument.

The issue here is what they have done, which is grabbed hold of the third-party service or regulation, which was intended for entities that actually put their fingers on the federal money and said, "We're going to use this as a way to answer the objections and concerns that we've received from our overseers about how we don't know enough about what's going on in higher education about these non-institutional providers of support services to institutions."

Drumm McNaughton 08:54

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It makes sense that they would do that. But the mechanism may not be the greatest thing. However, this is dumping an awful lot of stuff on TPS. So what are those things that it's dumping on them? First, let's talk about some of the responses that we've had from key people, such as ACE and the US Chamber.

Mike Goldstein 09:15
The law is straightforward: a third-party servicer has to have a written agreement with the institution, and the agreement has to have certain specifications, including details regarding the financial arrangement between the institution and the third-party servicer. The third-party servicer is jointly and severally responsible. That's a legal term. What it really means is if the third-party service was involved in improper use—and I don't want to use the word misuse, but improper, which could be error as well as intentional misuse—then the third-party service is liable for the incident tuition for the repayment of those funds, and the third-party servicer must submit an annual audit that is in accordance with government accounting standards, which is considerably more complex than a general audit.

Finally, the third thing is completely unrelated to the government's interest: the third-party servicer must be a US company, and a US national must control it. Now, that makes some sense with regard to entities that have their fingers on the federal money. The question here that has been puzzling is, what does that have to do with someone who is, for example, providing support for online courses? There’s a simple answer here, and it goes to why they chose the third-party servicer as a vehicle for solving this problem that's been dumped on them by Congress and their other oversight agencies. The short answer is because it's there. The Department has been quite ingenious in looking at its statutory and regulatory framework. It’s

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Identifying ways it can solve problems without necessarily going back to Congress or without necessarily going to a complex regulatory process.

I want to come back to that in a moment. But what the Department has done is say, “We have this third-party servicer rule, and this third-party servicer gives us the oversight we're looking for. It lets us look at the contracts. It allows us to look at the economic relationships. It binds the third-party services. It requires them to deliver detailed information about their finances. So why don't we expand the rule to cover all these different providers since the rule is drafted somewhat broadly? It says involving Title IV, which is the acronym for the student aid programs.

It's just easy. It's a stroke of the pen that doesn't go through any Congressional review. It can't be challenged in the courts because all it’s saying is the secretary's opinion. But it gets the Department exactly where it wants to go because no institution isn’t going to put itself in the line of fire. No one wants to be the first wildebeest to jump off the cliff, knowing that the crocodiles are down below. So, therefore, the Department accomplishes what it wants very simply.

The Department issued this Dear Colleague letter on February 28. It initially gave two weeks to comment on it. There was an uproar over that, so they extended it to yesterday. The Department also moved back the implementation date from May 1 to September 1 to give more room. They also did something else that was—I would say curious and almost simultaneously. They published an announcement saying that it will do a Negotiated Rulemaking, a comprehensive, very intensive, very time-consuming process to review a whole suite of regulations, including those regulations that involve the oversight of entities providing services to

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institutions. And the Department will initiate that in late spring over the next six to eight months.

Now, that will result in new regulations that will be a process. It will have weeks of hearings and a long period of public comment, requiring the Department of Education to review, respond, and publish draft regulations that will then be subjected to further comment. Then the final regulations will likely go into effect on July 1, 2024, at the earliest. But because of the standard calendar, it will probably be July 1, 2025. So, that process carefully and intensely goes through a review by all the affected parties. The Department then comes out, not necessarily with regulations that people like, but at least regulations that people can say, “Okay, we understand what they've done and why they've done it.” That’s because the Department will explain in great detail, what they've done and why they've done it. And if we're lucky, it will be by consensus. And if we're not lucky, at least we will know what they're doing.

Drumm McNaughton 15:02
We've seen Neg Reg before. We saw one in 2019, with all the issues coming up for consensus. But one of the things with Neg Reg is, if it comes out within “x” number of months before a change of administration, all those rules can be set aside, am I right?

Mike Goldstein 15:23
Not easily, and that's an important point. If the rules have not been promulgated, then a process can be stopped. But once a rule is promulgated, it has to go through a new proceeding to set the rules aside. We can see that with the Biden Administration, there are several rules in environmental and other areas where they are in the process of changing or suspending a rule. But there is a formal process.

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Again, the advantage and curse of a Dear Colleague is that it is a statement of opinion. It can be rescinded the day after it's issued and by the next administration. From administration to administration, we've seen changes in interpretations of Dear Colleagues that, in some cases, have been 180-degree reversals. So, one of the reasons I would think that the Department is trying to do the regulatory proceeding is that in the short term and certainly until the next administration, if there is a change, it has effectively changed the rules. And by the time there is a new administration, if the Department has promulgated a rule, it's triggered a process that cannot easily be reversed even though it has not necessarily gone into effect. It can be reversed, but it becomes more difficult.

So, the Department thinks it's solved a problem in the near term, and it's also setting in place a process it thinks will solve the problem in the long term. What's interesting is that with minor exception, every organization involved in higher education, from the American Council on Education—which is the umbrella for all post-secondary institutions—to the US Chamber of Commerce—which traditionally has been very supportive of the for-profit side of higher education—have come out with almost identical letters, arguing that the Dear Colleague is wrong, is overbroad, and is overly restrictive. For example, there is unanimity that the foreign control restriction is absurd and highly detrimental to higher education institutions. There is unanimity that the burden imposed on institutions is far greater than necessary. There is unanimity that the burden imposed on third-party services will dramatically restrict the availability of services while increasing the cost to institutions. This is quite remarkable because, usually, there's this polar split of the traditional institutions coming out on one side and the for-profit institutions along with their support on the other. A few who have

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argued about the transparency issue for years view this as finally doing what is needed.

It is not surprising that this is being put out by the Federal Student Aid, which is led by Mr. Cordray, who was previously the head of the Consumer Finance Protection Board and a brilliant consumer advocate. It speaks very strongly from a consumer advocacy perspective. But along with the impact it will have on higher education, the balance between the information needed to protect the consumer and the effect of how that information is gathered is so off that everybody has jumped back in their seat and said, “Wait. Wait. We understand the issue. We don't understand the cure.”

Drumm McNaughton 19:26
It makes a lot of sense. But, of course, this will significantly impact those who use third-party services. But, for those who don't, will this impact them at all?

Mike Goldstein 19:40
Well, the short answer is there probably aren't any who don't. It’s not just OPM. It's not just those who provide online services. It’s publishers. It’s test publishers. It’s organizations. Those who provide evaluative information, support services, counseling services, and almost everything that is done short of janitorial services will or may fall under these rules. So, part of the problem is not “Well, there are only a relative handful of schools that use OPMs.” But the answer is that's not so. It's very substantial now. A relative handful of schools will not in some way be affected administratively in terms of what they have to do. And this includes quite a wide panoply of organizations that serve higher education that have nothing to do with, for example, online courseware. So, if part of this is we have to get a handle on the OPMs, what they've done is they've said, “Well, we've got this three-inch

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target. We will fire a bazooka at it, and we'll probably hit the target. And by the way, we'll get rid of the rest of the room." That's a piece of the issue. It's the extraordinary breadth of what has been included within the scope of this Dear Colleague.

Drumm McNaughton 21:16
For example, it could include companies that provide learning management software (LMS). Am I right?

Mike Goldstein
Yes, absolutely.

Drumm McNaughton
And so, if you have online programs and are using an LMS from Canvas or Moodle, an LMS you have not created yourself, you're subject to this letter.

Mike Goldstein 21:48
But remember that approximately 90% of institutions now use online as part of their instructional model. The vast majority of them use it on campus. They either don't enroll online students remotely, or they have a very small number. When my son was in college quite some years ago, he was at a large public university, residential, and far from home. By his senior year, he took about a third of his courses online. He would have a class seminar once a week, and then the rest of the program would be delivered to his laptop in the dormitory or, in this case, his apartment. That's an LMS. That's covered. So, this has nothing to do with worrying about predatory online institutions. This is the core of how institutions carry out their educational purpose. There's absolutely no question that, in many respects, delivering your cause in a hybrid manner is especially more effective than delivering a course face-to-face. Very few institutions have wet labs for chemistry any

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longer. They do it online because you can't be blinded by a beaker blowing up. If it's on the screen of your laptop, you sure can in a lab. Again, this sweeps that in,

Drumm McNaughton 23:25
Wow. This is a lot more far-reaching than most people understand.

Mike Goldstein 23:32
Part of the problem is that the Department was trying to make it as inclusive as possible, so it would be difficult to evade the requirements. So, it just said, “Look, if you're providing a service that touches students, in terms of their educational program,” and that's essentially what they've said, “then you're covered.” Arguably, the Department is doing so because its experience is that if you write something more narrowly, people will find a way to step around it. The Department doesn’t want that to happen. But, obviously, as you make it more inclusive, you are sweeping things in that nobody's asking you any information about now.

Maybe that's not true. I think there is interest in how much institutions pay for LMS. How much do institutions pay for outsourcing student counseling services or assisting student retention, for example? There are many companies now that work with institutions to reduce dropouts and to support students in terms of continuing their programs. So there certainly have been questions about what that industry is all about. It's not an illegitimate question to ask. The question is whether by sweeping in this mechanism—which is quite extraordinarily burdensome and organizations who are very careful not to inadvertently become third-party services for that reason. The whole industry of providing Title IV support services is a very small industry with a relative handful of players precisely because the burden of doing it is so relatively high and highly technical.

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Drumm McNaughton 25:31
Wow. You don't find me speechless very often, Mike. But on this one, I am. I can see the reasons why the Department is doing this. But, at the same time, it will impact institutions so much that they cannot do this.

Mike Goldstein 25:51
I want to challenge something there because it's not a time function. I think it will prevent institutions and those entities that work with institutions from being able to work together. Some very, very fine companies in such questionable places like Canada would be excluded from providing services to institutions under this rule. Now, I think the foreign exclusion is an accident. It has been part of the third-party service or rules from the beginning.

The reason is, if federal money is being managed, in some respect, by an entity, that entity should be located in the US so it is subject to American law. That is not irrational. In order to bring someone under the third-party service and disclosure rules, which is what the Department is looking at, we want to know what these folks are doing. They have to declare them a third-party servicer. If you are declared a third-party servicer, you must be a domestic company. So, it's not that we're looking to exclude foreign companies; it was an attribute of using third-party services or regulations to capture the information. And because of that, you have to be an American company.

The Department has put itself in a real box. You can't say by guidelines that we're going to cover you by the rule, but, by the way, you're not subject to the regulatory requirement. You can't be partially pregnant with regard to being a third-party servicer. The Department does not have that authority.

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So, if they take that away—or at least I would argue that—they have essentially vitiated the ability to bring them under the rule because I don't think you can isolate the rule in that way. That's a piece that I think may, in fact, be the Achilles heel of what the Department has done. There is uniform pushback on the foreign ownership rule. Now, whether there's a workaround on how that's worked out, I don't know. But I think the Department has gotten into a difficult position there. And short of saying, "We're going to change the foreign ownership rule to require a whole different set of reporting requirements that are not onerous and that allows you to be a foreign owner," that may be what deep-sixes what the department is doing right.

Drumm McNaughton 28:35
One last question before we wrap up. Does the Department have the bandwidth to be able to administer this?

Mike Goldstein 28:43
The short answer is no. And I'll give you a very simple example. A few weeks ago, the Department sent out a notification to institutions that it was going to do secret shopping with Department of Education investigators. They were planning to go online and inquire about institutions to see their marketing practices. This was going to be managed through the Department's enforcement arm. That is a tiny organization. However, it accomplishes exactly what the Department wants because it is saying to everyone, "We're not going to be listening to everything, but you don't know whether we're listening. So you better be good." Is the Department going to be able to review every document? It's not going to be able to review more than a tiny number. But it's telling institutions, "We want you to have all of that." Is the Department going to review the audits of every third-party servicer? No. But it's going to have them. These have to be submitted to the

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Department so that when it wants to look where it wants to look, it will have the opportunity to do so.

So, does the Department have the bandwidth to review everything? No. Does everybody get audited by the IRS? No. Will everybody be thinking in the back of their mind that they might be audited? Yes. So, it succeeds. If the IRS tomorrow says, “Oh, by the way, we are never going to audit anybody's tax return ever again.” I always suspect Tax Compliance would drop by a very measurable number.

Drumm McNaughton 30:26
I suspect you're right about that. Well, Mike, this has been fascinating. Thank you. What are three takeaways for university presidents and boards?

Mike Goldstein 30:35
Number one: Don't panic.

Drumm McNaughton 30:38
Good advice.

Mike Goldstein 30:40
This is very much a work in progress. There is sufficient pushback by highly respected entities across the spectrum, so this will undergo at least significant revision if not rescinded and await a rulemaking.

Number two, I don’t think there is an increased reason to be mindful of the agreements that one enters into. But institutions should always be mindful of the agreements they enter into, and the entities entering into the agreements need to be mindful of writing their agreements carefully and be

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sure that if it does come into the public view, there's nothing there that's going to result in an “OMG” moment.

The third is that higher education is evolving. One thing that I would argue is that while the pandemic effect on K-12 education has been devastatingly bad, its impact on higher education has been to accelerate the use of delivery technologies. We’ve probably moved the needle five, maybe ten years. That's a good thing. I think we're doing a better job. I think we're reaching more students better. And we must be careful that in making it perfect, we're not impeding the ability to serve the students.

Drumm McNaughton 32:23
Thank you. Those are great takeaways.

Mike, what's next for you? What's exciting you these days?

Mike Goldstein 32:31
Well, aside from dealing with panic over third-party services, I'm on a panel at the ASU+GSV Summit next month in San Diego with 5,000 of my closest friends. This is a topic that we're going to be talking about that everyone is concerned about. But I’m really excited about the kinds of innovative things institutions are coming up with, the sorts of inter-institutional relationships institutions are creating to be more efficient and effective and to provide a better suite of services to a broader range of students. It’s the ability of specialized institutions to be able to configure themselves in different ways, whether it's domestically or internationally, whether it's collaborating with other institutions, or whether it's collaborating with other kinds of entities, employers, service providers, or community-based organizations. The notion of the campus on a hill, I think, is an anachronism. The notion of

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higher education institutions as being far more broad-based that operate across domains is really what the future holds. And that's what's exciting.

Drumm McNaughton 33:49
I think so as well. Mike, it's been a pleasure having you on the show again. I look forward to our continued Association and having you back.

Mike Goldstein 33:57
Drumm, I certainly look forward to that.

Drumm McNaughton 34:02
Thanks for listening today. And I'd like to give special thanks to Mike Goldstein of Tyton Partners for sharing his views on the recent Dear Colleague letter regarding third-party services and their potential implication on all higher education institutions.

Tune in next week for our 150th with our guest Amrit Ahluwalia, senior director of Strategic Insights at *Modern Campus* and editor-in-chief of *The EvoLLLution*, an online newspaper developed by *Modern Campus* that focuses on non-traditional higher education in the transforming post-secondary marketplace. Until next week.

34:45
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