

November 6, 2013

MEMORANDUM

TO: State Board of Regents

FROM: David L. Buhler

SUBJECT: R555, Competition with Private Sector Policy Revisions

Issue

On July 8, 2013, the Legislative Audit of Higher Education's Competition with the Private Sector was finalized and released to the general public. The Legislative Auditor General's recommendations included:

1. We recommend that the Legislature consider providing statutory policy guidance that addresses higher education competition with the private sector.
2. We recommend that the Board of Regents provide greater oversight and enforcement of its policy pertaining to institutions of higher education competition with the private sector.
3. We recommend that the Board of Regents update policy R555: Providing Facilities, Goods and services in Competition with Private Enterprise.

The USHE response to the audit recommendations concurred with the findings and indicated that the Commissioner's office would work with the USHE institutions in careful consideration of how best to implement them moving forward. In light of the fact that the first audit recommendation is directed to the Legislature to consider providing statutory guidance on auxiliary and/or service enterprises, I believe it is in the best interest of the system for the Board of Regents to update its policy in a way that increases the likelihood that the legislature would not act.

Background

The Commissioner's staff has researched this topic and gathered ideas and suggestions from all eight USHE institutions as well as other states. First, the information gathered from other states is summarized and second, the key decision points have been identified and recommended for consideration by the Board of Regents. Suggestions and feedback provided by the institutions are reflected in revisions to the R555 policy draft.

Other States

In staff's research of other states' policies, they found seven states which have formal auxiliary enterprise policies, either at the higher education system level or in statute. However, they could find only two which had language regarding competition with the private sector and these are Colorado and Arizona. Colorado

and Arizona have similar “exception” language to Utah, but both states have statutory guidance on grievance procedures which we do not have at the present time in USHE policy. The attached policy draft includes some possible language for handling grievances. Researching other states, and even reviewing a dissertation on this topic, staff found that the issue of competition with the private sector is present at most public institutions but few states have written guidance or policy. Since Utah is one of three states identified that have some level of policy, it makes it necessary to work within those parameters.

Possible Policy Changes for Board Consideration

As pointed out in the audit there are two basic needs with regard to revising R555:

- There is a need to update the current policy R555
- There is the need to provide improved oversight and enforcement of R555.

Key decision points for the Board’s consideration and future action are:

- 1) Adding prospective students and alumni to the definition of “campus community”, and adding a definition of “non-academic self-support services.”
- 2) Addressing competition in the private sector and providing reasonable yet limited exceptions for when institutional auxiliary services advertise goods and services to the general public.
- 3) Requiring institutions to establish policies regarding competition with the private sector consistent with Regent policy.
- 4) Directing institutions, via Regents policy, to establish an institutional grievance process for resolution of complaints filed by a business regarding perceived competition.
- 5) Enforcement of exceptions to R555.

To assist the Board with addressing these decision points, there are two attachments accompanying this memorandum. First, there is a copy of the most pertinent portion of the Legislative Audit with general concerns directed towards the Board of Regents. Second, there is a draft copy of proposed policy language.

Commissioner’s Recommendation

This is an information item; no action is needed. The Commissioner recommends, however, that the Board discuss the attached materials and possible policy changes and provide feedback and direction in anticipation of Policy R555 being brought back to the January 2014 Regents’ meeting for action.

David L. Buhler
Commissioner of Higher Education

DLB/GLS/DAM/CRW
Attachment

Board of Regents Needs to Improve Enforcement And Oversight of Policy R555

Regardless of whether the Legislature acts, we think the Board of Regents needs to improve enforcement and oversight of its policy limiting private sector competition. The fact that the Red Zone stores have been in business for the last three years shows a lack of oversight and enforcement by the Board of Regents. In addition, the Board of Regents should review and consider updating the policy, which has not been amended in many years. By clarifying policy and providing better oversight, the Board of Regents can prevent unwarranted competition with the private sector.

Board of Regents Needs to Improve Policy Oversight and Enforcement. The Board of Regents needs to improve its enforcement and oversight of policy R555 as business activities of institutions of higher education have gradually encroached on the private sector. As previously illustrated, both the off-campus Red Zone stores and a number of on-campus business enterprises routinely advertise and provide goods and services to the general public. The Board of Regents needs to better monitor the institutions of higher education to ensure compliance with policy R555.

The Board of Regents can improve oversight and enforcement of its policy by directing audit staff to monitor higher institutions' compliance with policy R555. Likewise, college and university administrators or internal auditors could be directed to annually report on policy compliance.

The Board of Regents Also Needs to Improve and Update Policy R555. The Board of Regents needs to improve policy R555 in order to prevent higher education institutions' unauthorized competition with the private sector.

One way the Board of Regents could improve policy R555 is by including a grievance process. This process would allow private individuals or businesses to submit complaints against colleges or universities who may be directly competing with the private sector. We found that Arizona, Colorado, and Iowa Boards of Regents have included a grievance process in their policies that deals with higher education competition with the private sector.

The Utah Board of Regents also needs to update its policies to address higher education business enterprises that function off-campus. The current language or intent of policy R555 is directed towards on-campus business enterprises. The policy does not account for business enterprises located off-campus. The University of Utah believes that, since policy R555 does not specifically address off-campus business enterprises, the university is allowed to operate them. The Board of Regents needs to update policy R555 to include guidelines to address higher education's business enterprises operating off-campus.

Recommendations

1. We recommend that the Legislature consider providing statutory policy guidance that addresses higher education competition with the private sector.

2. We recommend that the Board of Regents provide greater oversight and enforcement of its policy pertaining to institutions of higher education competition with the private sector.

3. We recommend that the Board of Regents update policy R555: Providing Facilities, Goods and Services in Competition with Private Enterprise.

R555, Providing Facilities, Goods and Services in Competition with Private Enterprise¹

R555-1. Purpose: To establish policy and guidelines for ~~institutions on public colleges and universities~~ providing facilities, goods and services in competition with the private sector. ~~The following policy shall apply to all non-academic, self-support services.~~

R555-2. References

- 2.1. Utah Code §53B-7-101(10) (Each Institution Handles Its Own Financial Affairs Under the General Supervision of the Board)
- 2.2. Policy and Procedures ~~R510~~ R550, Auxiliary Enterprises Operation and Accountability

R555-3. Definitions

- 3.1. **"Institutions"**: colleges and universities which are part of the Utah System of Higher Education.
- 3.2. **"Campus Community"**: an institution's ~~prospective students~~, students, faculty, staff, ~~alumni~~ and campus guests.
- 3.3. **"Institutional Services"**: an institution's facilities, goods, and services.
- 3.4. **"Non-academic Self-support Services"**: ~~services that are complimentary to an institution's teaching, research, and public service functions and are funded through the services own activities or by charging a fee directly related to the costs of providing the goods or services.~~

R555-4. Policy: Institutions shall not sell or provide services to their campus community or to the general public except as set forth below.

- 4.1. **Services Necessary for the Education of Students or Basic Research:** Institutions are expected to provide their campus communities appropriate services which are necessary for the education of students, or the performance of basic research in accordance with the institution's mission as established by the Utah State Board of Regents. This responsibility includes, but is not limited to, instructional, research, and public service programs; libraries; computing programs; and other academic support services.
- 4.2. **Educationally Related Activities:** Institutions may provide other services to their campus communities even though such services are practically available elsewhere providing that the services satisfy reasonable educationally related needs of the campus community, e.g. campus newspapers, campus store(s), campus dining facilities, student housing, etc. ~~and provided such services are not advertised to the general public and are not generally provided to persons who are not members of the campus community.~~

4.2.1 Institutions may advertise institutional services to the campus community.

¹ Adopted November 14, 1986, amended January 24, 1997.

4.2.2. Institutions may advertise or share information with the general public via an institution's webpage, the internet, social media, and e-mail.

4.2.3. Except as is necessary to meet the purposes of services listed in section 4.3, institutional services may not otherwise be advertised to the general public.

4.3. Services to Persons Other Than Members of the Campus Community: An institution shall not provide services to persons other than members of the campus community unless:

4.3.1. The service offers a substantial and valuable educational or research experience for registered students and faculty;

4.3.2. The service fulfills the institution's public service mission;

4.3.3. The service is incidental to the ordinary and authorized function of a campus entity, i.e., occasional sales by bookstores, food service, etc., to campus visitors;

4.3.4. The service consists of recreational, cultural, and athletic events; health services and medical treatment; public service radio and TV broadcasting; events of functions which have as their principal purposes the improvement of relations between the institutions and the general public; and sales of contributed services, if related to fund raising activities;

4.3.5. The equivalent service is not available in the local area; or

4.3.6. The service to persons not members of the campus community has been specifically authorized by the State Board of Regents.

4.4. Private Enterprise on Campus: Private enterprise entities which operate service or auxiliary units on a campus under contract with an institution are subject to this policy.

4.5. Exceptions Authorized by State Board of Regents: An institution may submit a proposal to the State Board of Regents requesting an exception to policy R555. Exceptions to this policy may be authorized if the Board determines, upon consideration and weighing of the various interests and public policies pertinent to providing the facilities, goods or services in competition with private enterprise, that the public interest favoring an exception outweighs the interest favoring denial of an exception.

4.6. Monitoring Institutional Services Which May Compete with Private Enterprise: Where an institution claims to provide services to persons other than members of the campus community in accordance with Sections 4.3. of this policy, the Board of Regents requires that the institution comply with the following requirements:

4.6.1. Each institution must establish a written policy regarding competition with private enterprise. This policy shall include the following provisions: (1) a requirement that the institution's provision of facilities, goods and services to persons other than members of the campus community complies with Policy R555; and (2) a description of the institution's grievance process, which must meet the requirements described in Section 4.7. The policy must designate an individual within the institution to whom complaints should be addressed. The policy must be accessible via the institution's website.

4.7. Grievance Review Procedures: In the event that the provision of a good or service by a higher education institution is perceived to be in competition with a privately owned business, that business shall be provided the opportunity for a hearing of such a complaint according to the following guidelines:

4.7.1. Each institution must establish a grievance hearing process as well as a first point of contact for that hearing process.

4.7.2. If resolution is not reached as a result of the institutional grievance hearing process, appeal may be made to the Board of Trustees of the institution.