

TOP JOBS ACT
HIGHER EDUCATION REFORM LEGISLATION

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The most important piece of legislation affecting higher education passed by the 2011 Virginia General Assembly was Governor McDonnell’s higher education reform bill. The title of the bill is quite expressive—“Preparing for the Top Jobs of the 21st Century: The Virginia Higher Education Opportunity Act of 2011,” or “TJ21.”¹ It is significant because of its breadth, its innovative approach to funding, and the government relations strategy utilized to assure its passage.

I. THE LEGISLATIVE INTENT

Unlike most Virginia legislation, TJ21 is explicit about its legislative intent. The law states:

The objective of this chapter is to fuel strong economic growth in the Commonwealth and prepare Virginians for the top job opportunities in the knowledge-driven economy of the 21st century by *establishing a long-term commitment, policy, and framework for sus-*

¹ H.B. 2510, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as enacted April 6, 2011); S.B. 1459, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as enacted April 6, 2011).

tained investment and innovation that will enable the Commonwealth to build upon the strengths of its excellent higher education system and achieve national and international leadership in college degree attainment and personal income, and that will ensure these educational and economic opportunities are accessible and affordable for all capable and committed Virginia students² (emphasis added).

The italicized language is the key to understanding the innovative nature of this legislation. TJ21 is unique in that it seeks to create a vessel into which the Commonwealth can put future appropriations for higher education at a time when government resources for higher education have generally been scarce, at best. In fact, general fund appropriations for Virginia's four year institutions per in-state student have declined by an average of 18% between 1992 and 2010.³ TJ21 looks forward to a time when government expenditures will be more plentiful and seeks to create a more predictable, reliable funding stream for higher education.

Unlike elementary and secondary education, higher education is not mentioned in the Constitution of Virginia.⁴ A means of elevating it to a higher status, albeit lower than a constitutionally recognized function of government, is to create a statutory framework. This bill seeks to resolve a number of policy issues on how state

² VA.CODE ANN. § 23-837.87:10 (2011).

³ See Daniel J. LaVista, *Presentation: The Erosion of State Funding for Virginia's Higher Education Institutions*, STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, available at <http://schev.edu/council/presentations.asp> (last visited July 17, 2011).

⁴ Va. Const., art. VIII, § 1.

money will be applied and elevate higher education to a higher status than it now holds as a priority for funding.⁵

It is an open question whether the law will, in fact, elevate higher education in the minds of future legislators and governors and motivate them to make the “sustained investment” called for in TJ21.⁶ This becomes an even more interesting question in light of the fact that higher education appropriations have always been made on a biennial budget cycle,⁷ with modifications in the out years and each new budget bill pre-empting any other legislation that may be in conflict with the budget. It is clear that this Governor will treat higher education as a fundamental responsibility of government for the purpose of funding; however, the question is whether this will hold true in the not so distant future.

Virginia’s two year budget cycle and constitutional prohibition against having a Governor succeed himself have often thwarted long term planning and even implementation of short term plans. This

⁵ H.B. 2510, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as enacted April 6, 2011).

⁶ *Id.*

⁷ *Overview of Higher Education System in Virginia*, STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, <http://www.schev.edu/SCHEV/HigherEducationSysOverview.asp>? (last visited May 12, 2011).

legislation represents an attempt to circumvent this problem in the area of higher education funding.

II. WHAT PROMPTED THE LAW?

Legislation arises from a variety of sources, such as the campaign promises of governors and legislators, constituent requests, newspaper stories that prompt legislators to act, legislative study committees, court cases and fertile imaginations. The source of this legislation's stated premise—that higher education is about jobs and fueling economic growth⁸—is fairly easy to trace, as are the major stakeholders who provided the strategy and skilful lobbying to facilitate its passage.

The Virginia Business Higher Education Council was formed in 1994.⁹ It was based “on the principle that the prosperity of Virginia and well-being of its citizens is fundamentally tied to access to a strong system of public colleges and universities.”¹⁰ The Council is made up of a relatively small number of very influential businessmen

⁸ See H.B. 2510, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as enacted April 6, 2011).

⁹ *Who We Are*, VIRGINIA BUSINESS HIGHER EDUCATION COUNCIL, http://www.growbydegrees.org/who_we_are (last visited May 12, 2011).

¹⁰ *Id.*

who have been active in the public affairs and politics of the Commonwealth on many fronts.¹¹

The Virginia Business Higher Education Council was the prime mover in the establishment of a coalition called “Grow by Degrees.”¹² The Coalition is made up of business, community, education and economic development interests as represented by individuals, business organizations as well as public and private educational institutions.¹³ As stated on its website, these individuals and organizations:

[S]hare a conviction that Virginians, regardless of income, should have access to the broader economic horizons opened by a college education . . . [and that] only a sustained program of investment and innovation in higher education—embodied in state law and in the business plans of our education institutions—will make Virginia a national and international leader in attracting new business investment, research grants, and excellent job opportunities in the new economy¹⁴

The Coalition retained the services of McGuire Woods Consulting and the law firm of Reed Smith LLP to conduct the government relations effort including a significant grass roots communication effort.¹⁵ From the outset, the legislative strategy involved a significant attempt to put higher education funding on a plane above

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Who We Are*, VIRGINIA BUSINESS HIGHER EDUCATION COUNCIL, http://www.growbydegrees.org/who_we_are (last visited May 12, 2011).

partisan politics.¹⁶ The Coalition made visits to both gubernatorial candidates, Democrat Creigh Deeds and Republican Robert McDonnell.¹⁷ The meetings resulted in agreements by both candidates to support the efforts of Grow by Degrees—specifically, the goal of increasing the number of undergraduate and two year degrees awarded in Virginia.¹⁸

After assuming office, Governor McDonnell issued Executive Order No. 9.¹⁹ The Order established a 30 member commission on higher education reform, stating in part, that

There is a pressing need for the Commonwealth to establish a long-term policy of reform, innovation and investment that will ensure instructional excellence, create affordable pathways to college degree attainment for many thousands more Virginians [to] prepare our citizens for employment in the high-income, high-demand fields of the new economy. . . .²⁰

Executive Order No. 9 was the basis for the formation of the Governor's Commission on Higher Education Reform, Innovation and Investment.²¹ The Governor appointed business leaders, presi-

¹⁶ *Supra* note 14.

¹⁷ *Empty Promises; What Virginia's Candidates Propose for Higher Education is Meaningless Without A Lot More Money*, WASHINGTON POST, Oct. 11, 2009, at A22, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/10/AR2009101001918.html>.

¹⁸ *Id.*

¹⁹ See Va. Exec. Order No. 9 (Mar. 26, 2010), available at http://governor.virginia.gov/issues/executiveorders/pdf/EO_9.pdf.

²⁰ *Id.* at 1, 2.

²¹ See Andy Fogarty, Moderator, *Major Issues in Virginia Public Higher Education*, STATE COUNCIL OF HIGHER EDUC. FOR VIRGINIA. (Oct. 20, 2010), available at <http://www.schev.edu/bov/ForgaryPresentation2010.pdf>.

dents of colleges, and government leaders from both the executive and legislative branches to comprise its membership.²² He also named Tom Farrell, the CEO of Dominion Resources, a former rector of the University of Virginia, and a prominent member of the Higher Education Business Council as Chair, and Kirk Cox, the Majority Leader of the House of Delegates, to serve as Vice Chair of the Commission.²³

The Commission issued an interim report entitled “Preparing for the Top Jobs of the 21st Century.”²⁴ The Commission’s recommendations focused on three major areas— economic opportunity, reform-based investment and affordable access (which concentrated on funding issues).²⁵ An analysis of the report is beyond the scope of this article, but suffice it to say that the Governor’s legislation follows the conceptual framework set out in the Commission’s interim report very closely.

TJ21 was introduced in the Senate of Virginia as Senate Bill 1459 by a Democrat, Senator Edward Houck and a Republican, Sena-

²² *Id.*

²³ *Id.*

²⁴ Press Release, Office of the Governor, Governor McDonnell Announces “Top Jobs of the 21st Century” Higher Education Legislation (Jan. 17, 2011), *available at* <http://www.governor.virginia.gov/news/viewrelease.cfm?id=563>.

²⁵ *Id.*

tor Thomas Norment.²⁶ It was introduced in the House as House Bill 2510 by a Republican, Delegate Kirk Cox, and a Democrat, Delegate Rosalyn Dance,²⁷ again elevating the bill over partisan considerations. Befitting its legislative intent to form a framework for future appropriations to higher education, the bill was heard only by the Senate Finance Committee and the House Appropriations Committee, the so called “money committees,” and not by the education committee of either body.²⁸ At the same time, it must be noted that prominent members of the education committees of both bodies serve on the money committees of their respective bodies as well.²⁹

Given the origins and stakeholders, the legislation predictably focused on the link between post-secondary degree rates of employment and the ensuing benefit to the Commonwealth’s economic growth. As will be evident in the subsequent discussion of the policy

²⁶ *S.B. 1459, Virginia Higher Education Act of 2011; Established, Report*, LEGISLATIVE INFORMATION SYSTEM (2011), available at <http://leg1.state.va.us/cgi-bin/legp604.exe?111+mbr+SB1459> (last visited June 26, 2011).

²⁷ *H.B. 2510, Virginia Higher Education Act of 2011; Established, Report*, LEGISLATIVE INFORMATION SYSTEM (2011), available at <http://leg1.state.va.us/cgi-bin/legp604.exe?111+sum+HB2510S> (last visited June 26, 2011).

²⁸ See *S.B. 1459, Virginia Higher Education Act of 2011; Established, Report*, LEGISLATIVE INFORMATION SYSTEM (2011), available at <http://leg1.state.va.us/cgi-bin/legp604.exe?111+mbr+SB1459> (last visited June 26, 2011).

²⁹ See *House of Delegates 2011 Session Standing Committees*, VIRGINIA GENERAL ASSEMBLY, available at <http://hodcap.state.va.us/publications/housecommitteechart.pdf>.

decisions codified in the law itself, this linkage is more than an aspiration. The funding framework for higher education contains explicit incentives to create the types of jobs that lead to higher incomes and create the educated workforce that will attract and retain business in Virginia.³⁰

As in most things legislative, those who ask often receive. In this case, the legislative strategy of making the funding of higher education a priority of the business community, raising it above partisan conflict, and focusing on the well recognized goal of preparing college students to become economically contributing members of society was very astute and ultimately very successful. The bills passed unanimously in each legislative body and, signed by the Governor on April 6, 2011.³¹

III. CODIFYING HIGHER EDUCATION POLICY

TJ21 makes and codifies a number of higher education policy decisions which both include and range beyond the broad intent discussed

³⁰ 2011 Va. Legis. Serv. 2067 (West) (codified at VA. CODE ANN. § 23-38.87:10).

³¹ See *supra*, note 28; *H.B. 2510, Virginia Higher Education Act of 2011; Established, Report*, LEGISLATIVE INFORMATION SYSTEM (2011), available at <http://leg1.state.va.us/cgi-bin/legp604.exe?111+sum+HB2510S> (last visited June 26, 2011).

above.³² In fact, many of the policy decisions made in TJ21 are merely codifying decisions that have already been made in many Virginia universities.

The law sets out the “purposes” which “shall inform the development and implementation of funding policies, performance criteria, economic opportunity metrics, and recommendations required by this chapter.”³³

Subparagraph 4 of this section makes two significant policy decisions. The first is to enhance college degree attainment especially in “high-demand, high-income fields such as science, technology, engineering, mathematics, and health care.”³⁴ These are popularly known as STEM degrees.³⁵ It is a policy decision to base funding on enhancing undergraduate STEM degrees as opposed to other types of degrees. The policy decision is then implemented, in part, by the creation of funding incentives. Section 23-38.87:16(5) gives the Governor the power to recommend “targeted economic and innovation incentives” for increased degree production in STEM areas.³⁶

³² *See supra*, note 1.

³³ 2011Va. Legis. Serv. 2067 (West) (codified at VA. CODE ANN. § 23-38.87:10).

³⁴ H.B. 2510, 2011 Va. Gen. Assemb, Reg. Sess. (Va. 2011) (as enacted April 6, 2011).

³⁵ *Id.*

³⁶ *Id.*

The policy decision is also implemented by the creation of a STEM public-private partnership to help guide higher degree attainment in these fields.³⁷

Subparagraph 4 seeks to further this goal “by providing information about the economic value and impact of individual degree programs by institution.”³⁸ The intent appears to be to provide parents and students with a method of valuing the benefit of a particular degree from a particular institution, and that value will be in economic terms. Effectively, TJ21 creates a demand for STEM degrees by the measure of the value of degrees chosen, and then creates the supply to fill the demand through incentive funding and a public-private partnership.

Another example of a higher education policy decision is found in Subparagraph 5 of the same section, which states that one purpose of the act is, “[t]o promote university-based research that produces outside investment in Virginia, fuels economic advances, triggers commercialization of new products and processes, [and] fosters the formation of new businesses”³⁹ University research programs engage in both pure research and translational research. The terms of

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

TJ21 clearly promote translational research that has a direct economic benefit to the Commonwealth.⁴⁰ TJ21 does not denigrate or take away funding for research in areas such as history, social science, or linguistics.⁴¹ It simply does not promote it as it does translational research of direct economic value.

The policy decisions also range into questions of who will get financial aid. Section 23-38.87:15 requires institutions to provide an institutional student financial aid commitment in their six year plans that must be submitted to the General Assembly for review.⁴² This commitment must provide “assistance to students from both low-income and middle-income families.”⁴³ The provision of financial aid to middle-income families as opposed to only low-income families is a significant change in policy. This is evidenced by the fact that the Higher Education Advisory Committee formed in TJ21 is charged with the responsibility for determining the criteria for which families

⁴⁰ *Id.*

⁴¹ *Supra*, note 1.

⁴² H.B. 2510, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as enacted April 6, 2011).

⁴³ *Id.*

qualify as “low income” and “middle income” in this statutory context because no such criteria currently exist for middle income families.⁴⁴

Yet another example of a policy decision is found in Section 23-38.87:14 of the law.⁴⁵ The section is entitled “per student enrollment based funding.”⁴⁶ The concept is that a specific amount of money will follow each student enrolled in a public or private Virginia higher education institution. Virginia has a Tuition Assistance Grant Act which provides money to students enrolled in private Virginia higher education institutions.⁴⁷ For the first time, this model will also be applied to those attending a public institution; but more importantly, the amount of the money will be the same no matter where the student enrolls in Virginia.⁴⁸ While public universities will still be funded through other funds and formulas not available to private institutions, the creation of a per student funding amount and equalizing that amount between those attending public and private in-

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ VA. CODE ANN. §§ 23-38.11–23-38.12.

⁴⁸ H.B. 2510, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as enacted April 6, 2011).

stitutions is a change in policy. In fact, TJ21 explicitly recognizes the role of private institutions in meeting the policy goals of the law.⁴⁹

One final paragraph further illustrates the breadth of the law's reach. Section 23-38.87:10(7) states the following examples of "reform based investment" as one of the funding decisions purposes:

optimal use of physical facilities and instructional resources throughout the year, technology-enhanced instruction, sharing of instructional resources between and among colleges, universities and other degree-granting entities in the Commonwealth, increased online learning opportunities for nontraditional students, improved rate and pace of degree completion, expanded availability of dual enrollment and advanced placement options and early college commitment programs, expanded community college transfer options leading to bachelor's degree completion, and enhanced college readiness before matriculation.⁵⁰

It is for another time and forum to discuss all of the many education policy decisions made in TJ21. Even in its breadth, it does not reach questions of how to promote graduate education and many other issues. It is, however, a clear statement of the priorities of the Commonwealth; and as such, an innovative utilization of the legislative prerogative in regard to education.

IV. OPEN QUESTIONS

At the same time TJ21 answers many policy questions, it raises others. The legislation also raises questions about the future governance of public universities. The law explicitly reaffirms that Boards

⁴⁹ *Id.*

⁵⁰ *Id.*

of Visitors set tuition rates.⁵¹ At the same time, Boards are required to submit six year plans to the General Assembly, the Governor and the State Council of Higher Education, setting out proposed tuition increases, enrollment plans, proposals for new programs and other matters.⁵² The plans must be submitted by the first of July of each odd numbered year.⁵³ This begins an iterative process of discussion between the General Assembly, the Executive Branch and the universities. There is no approval process set forth in the law for these plans.⁵⁴ Under this arrangement, it remains to be seen how this process will influence Board decisions on matters of governance such as the setting of tuition rates. In fact, there has always been an inherent tension between Board autonomy and the role of state government in university governance. The question is whether the balance has been shifted by the new law. A great deal depends on implementation measures which are left for subsequent decision.

Even small universities are sizeable institutions. Inertia is inherent in any large body. TJ21 is, among other things, an attempt to overcome resistance to change. It does this through a series of car-

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ H.B. 2510, 2011 Va. Gen. Assemb., Reg. Sess. (Va. 2011) (as passed April 6, 2011 by *Committee on Appropriations*).

rots—incentive based funding, and some sticks—increased oversight and accountability measures. The conceptual policy framework, although broadly stated, is quite clear. The question is whether the Commonwealth can fund the carrots sufficiently to affect the policy goals of the act, or if the sticks will predominate as the agents of change. In a time of scarce resources, the reallocation of government funding to higher education will be essential. The ability of the state to fulfill the promise of TJ21 is, therefore, an open question.

V. CONCLUSION

Higher education institutions in Virginia are quite fortunate that the Governor and the General Assembly have established a framework to encourage the expenditure of future funds for higher education in a time of scarce public resources. The details of the framework and their subsequent implementation hold great promise and potentially great change in Virginia's higher education system.