



February 28, 2014

The Hon. Ted Lieu  
Chair, Senate Business, Professions & Economic Development Committee  
State Capitol, Room 2053  
Sacramento, CA 95814

Dear Senator Lieu:

On behalf of Public Advocates, and the Children’s Advocacy Institute, the Center for Public Interest Law and the Veterans Legal Clinic, all at the University of San Diego School of Law, we respectfully submit the following comments related to the Committee’s upcoming sunset review of the Bureau of Private Postsecondary Education.

**THE NEED FOR OVERSIGHT OF FOR-PROFIT POSTSECONDARY EDUCATION  
BUSINESSES**

***Four Principles: When Is Regulation Of A Business Needed?***

First, data and evidence should guide legislative responses and decision-making as to when some form of regulation of a private for-profit or non-profit business is required. If data and evidence indicate there are problems in one business sector and far fewer in another comparable one, government—if it responds at all—should respond proportionately, with regulatory oversight where the documented problems exist and less or no oversight where they do not.

Second, markets work best and should best be left alone when consumers can judge the value of the product or service they are buying. The ability of a high school student, a veteran, a former foster youth, an economically disadvantaged youth, to judge the educational quality of one for-profit institution versus another, or a community college versus a for-profit armed with sophisticated advertising, *is nil*. It is nil, *by definition*. The student is by definition uneducated about the very thing the student is buying.

Third, regulatory oversight of the private sector is not punishment. Regulatory oversight of the private sector should be seen simply as an acknowledgement that some for-profit ventures carry with them risks of significant and enduring harm that cannot be retroactively ameliorated by future marketplace competition. If, for example, a publicly traded business elects to increase quarterly earnings in the short-run by temporarily cutting back on product safety, market forces may over time self-correct for such shortsighted strategy, but that future market correction will

be cold comfort to a permanently disabled consumer or her family, even if they won compensation in an after-the-fact legal action.

Fourth, when the tension between short-term rewards for a few private actors and long-term success of the private enterprise results in *de minimus* harm, little if any regulation is required. But, if the possible harm is life-altering and permanent for some significant number of citizens, then regulation may wisely be weighed as an option to ensure that markets do not permit individuals to profit directly by inflicting permanent harms. The best regulatory schemes, instead, restrain or prevent harmful, short-run profit-making tactics in favor of offering individuals the opportunity to earn wealth solely by providing a quality service at a welcome price.

### ***The Critical Fact When It Comes To the Need to Regulate For-profit Educational Businesses***

**The student loans that students incur to attend these businesses are not dischargeable in bankruptcy.** The loan obligations these predominantly young people incur to attend these businesses will follow them the rest of their economic lives, affecting their creditworthiness and hence their employability and purchasing power, their ability to buy a home, and their ability to be prosperous for themselves and for their children and heirs.

For this reason, if there is evidence that for-profits are burdening students with life-altering debt while not sufficiently offering them the means to repay that debt, regulation of some kind is warranted.

### ***The Case for the Regulation of For-Profit Schools***

“[T]he rapid rise of the for-profit industry has largely been driven by the aggressive recruitment of low-income students and students of color”<sup>1</sup>

As the Attorney General Kamala Harris’s broad-ranging fraud suit against Corinthian Colleges makes clear,<sup>2</sup> and as the Consumer Financial Protection Bureau’s recent lawsuit against ITT for its allegedly fraudulent and deceptive financial dealings with students reinforces,<sup>3</sup> the evidence from every objective source is overwhelming and incontestable that the operations of for-profit educational businesses warrant sensible but also comprehensive and exacting scrutiny from California regulators to protect veterans, the poor, people of color, and former foster children from abusive and dishonest practices that permanently destroy their chances of economic success.<sup>4</sup>

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<sup>1</sup> THE EDUCATION TRUST, SUBPRIME OPPORTUNITY: THE UNFULFILLED PROMISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 2 (Nov. 2010), *available at*

[http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime\\_report\\_1.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf)

<sup>2</sup> See Jeremy White, *Heald College students echo California attorney general’s complaints about job prospects*, Oct. 27, 2013), <http://www.sacbee.com/2013/10/27/5855028/heald-college-students-echo-california.html>.

<sup>3</sup> Compl. for Injunctive Relief and Damages, *Consumer Fin. Prot. Bureau v. ITT Educ. Serv., Inc.*, (Feb. 26, 2014), *available at* [http://files.consumerfinance.gov/f/201402\\_cfpb\\_complaint\\_ITT.pdf](http://files.consumerfinance.gov/f/201402_cfpb_complaint_ITT.pdf).

<sup>4</sup> See UNITED STATES SENATE HEALTH, EDUC., LABOR AND PENSIONS COMM., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, 4-5 (July 30, 2012), *available at* [http://www.help.senate.gov/imo/media/for\\_profit\\_report/PartI.pdf](http://www.help.senate.gov/imo/media/for_profit_report/PartI.pdf).

Indeed, as the introductory quote to this section reveals, the evidence is that some in this sector **purposefully target** for recruitment veterans, former foster children, the economically disadvantaged.

Available data from California substantiates these conclusions. African-American and Latino students make up 37 percent of all undergraduates in California, but they represent fully 57 percent of undergraduates attending California for-profit colleges.<sup>5</sup>

For-profit education businesses as a sector have disproportionately high loan burdens and default rates, and dismal graduation rates and job placement numbers.<sup>6</sup> For example, while only 20% of degrees and certificates in California are awarded by for-profit schools, **a whopping 67% of the state's student loan defaulters attended a for-profit school.**<sup>7</sup>

And, as the debts these Californians incur are not dischargeable in bankruptcy, every objective analyst also concludes that far too many consumers of profit educational businesses have dramatically worse financial outcomes than if they never attended a for-profit institution at all.<sup>8</sup>

**Moreover, for-profit educational businesses are, in essence, vendors of a government program.** As much as 80 to 90 percent or more of their revenues and hence eventual profits come from government sources.<sup>9</sup> This means the entire sector is literally and by

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<sup>5</sup> Calculations by The Institute for College Access and Success on data from the U.S. Department of Education, National Postsecondary Student Aid Study (NPSAS), 2007-08.

<sup>6</sup> See, e.g., THE GOVERNMENT ACCOUNTABILITY OFFICE, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 13-18 (2009), available at <http://www.gao.gov/assets/300/294057.pdf> (finding students who attended for-profit colleges were more likely to default on federal student loans than students from other colleges); See DROWNING IN DEBT: FINANCIAL OUTCOMES OF STUDENTS AT FOR-PROFIT COLLEGES, TESTIMONY TO THE SENATE HEALTH, EDUCATION, LABOR AND PENSIONS COMMITTEE OF LAUREN ASHER, PRESIDENT, THE INSTITUTE OF COLLEGE ACCESS AND SUCCESS (2011), available at <http://www.help.senate.gov/imo/media/doc/Asher.pdf>; see also THE GOVERNMENT ACCOUNTABILITY OFFICE, POSTSECONDARY EDUCATION: STUDENT OUTCOMES VARY AT FOR-PROFIT, NONPROFIT, AND PUBLIC SCHOOLS (2011), available at <http://www.gao.gov/new.items/d12143.pdf> (discussing what research shows about “graduation rates, employment outcomes, student loan debts, and default rates for student at for-profit schools compared to those at nonprofit and public schools, taking differences in student characteristics into account”).

<sup>7</sup> Calculations by The Institute for College Access and Success on data from U.S. Department of Education, FY 2008 Cohort Default Rates (April 2011) and Integrated Postsecondary Education Data System (IPEDS), National Center for Education Statistics (NCES), U.S. Department of Education. (discussing what research shows about “graduation rates, employment outcomes, student loan debts, and default rates for student at for-profit schools compared to those at nonprofit and public schools, taking differences in student characteristics into account”).

<sup>8</sup> See, e.g., SANDY BAUM ET AL., EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 42 (The College Board 2010), available at [http://trends.collegeboard.org/downloads/Education\\_Pays\\_2010.pdf](http://trends.collegeboard.org/downloads/Education_Pays_2010.pdf) (finding the six-year graduation rate for full-time, first-time bachelor's degree students at four-year for-profit colleges is 22 percent, while the rate is 55 percent at public four-year schools and 65 percent at non-profit four year schools).

<sup>9</sup> Some for-profit schools, including some very large ones, receive 80 to 90 percent or more of their revenues from federal and state student aid and other public sources (sometimes using elaborate methods to skirt the federal “90/10” rule designed to assure that at least a minimum share of school revenue comes from students, employers and other non-government sources) while earning hundreds of millions of dollars in profits. See U.S. SENATE HEALTH, EDUCATION, LABOR AND PENSIONS COMMITTEE, EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 4-5 (2010), available at

definition suffused both with the public interest and the need for government to hold its vendors accountable for how taxpayer dollars are spent. It also means that the marketplace is distorted, as students do not decide to shop and buy education with their own savings but with taxpayer subsidies.

Finally, studies have documented that the poor outcomes at many for-profit schools are very likely due, at least in part, to the schools' profit-motivated disinclination to make up-front quality-enhancing expenditures, given that such expenditures decrease each quarter's earnings. There is nothing wrong in and of itself with a business keeping overhead low to increase profits. Publicly traded companies indeed may have a fiduciary obligation to shareholders to do so, to the extent possible.

**And, that is part of the for-profit problem.** This tension between increasing shareholder value every three months by growth in profits and market share, on the one hand, and the cost of investing in long-term student success, on the other, has been amply documented. According to the a United States Senate analysis, "in 2010, the for-profit colleges examined employed 35,202 recruiters compared with 3,512 career services staff and 12,452 support services staff, more than two and a half recruiters for each support services employee."<sup>10</sup>

For these reasons, states serving similar populations to California, such as New York,<sup>11</sup> states with a large number of private postsecondary institutions, such as Massachusetts,<sup>12</sup> and states that have recently overhauled their regulatory scheme and are hailed as national models, such as Maryland,<sup>13</sup> have codified legal distinctions between nonprofit and for-profit

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<http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf> (finding federal Title IV dollars accounted for an average of 77.4 percent of the revenue of the five largest for-profit schools in 2009 and that "[t]he average operating profit in FY2005 among publicly traded for-profit higher education companies was \$127 million. The same number in FY2009 was \$229 million, an increase of 81 percent."); *see also* THE GOVERNMENT ACCOUNTABILITY OFFICE, FOR-PROFIT SCHOOLS: LARGE SCHOOLS AND SCHOOLS THAT SPECIALIZE IN HEALTHCARE ARE MORE LIKELY TO RELY HEAVILY ON FEDERAL STUDENT AID 3 (2010), *available at* <http://www.gao.gov/new.items/d114.pdf> (finding that "schools that were (1) large, (2) specialized in healthcare, or (3) did not grant academic degrees were more likely than others to have very high 90/10 rates (above 85 percent), when controlling for the effects of other characteristics").

<sup>10</sup> FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, *supra* note 4, at p. 8

<sup>11</sup> N.Y. Educ. Law § 5001(4)(f)(3); 8 NYCRR § 3.58(c) (New York provides for alternate licensing for nonprofit career schools and adds substantial additional requirements for for-profit degree-granting institutions); *New York State Ass'n of Career Schools v. State Educ. Dept. of the State of N.Y.* ("NYSACS I"), 749 F. Supp. 1264, 1272-4 (S.D.N.Y. 1990). The court noted several rational reasons cited by New York for separate classification of for-profit institutions, including "the long and substantial history of proprietary schools of student abuses, closure rates, loan default rates, and program deficiencies such as a lack of equipment and teachers," as well as differing structures between for-profit and non-profit institutions. *Id.* The Court noted that the plaintiff schools' default rate was not significantly worse than CUNY's, though found that "one exception does not prove the classification arbitrary." *Id.* at 1273-4.

<sup>12</sup> *See* 610 CMR 2.07(4), 2.05 (for-profit degree-granting institutions must meet additional requirements, including: 1/3 of Board membership unaffiliated with school; submit annual report with disclosures on student outcomes; receive more regular reviews).

<sup>13</sup> S.B. 695 (Md. 2011). *See* S.B. 695, Fiscal and Policy Note, Maryland Dep't of Legislative Services, 2011, [http://mgaleg.maryland.gov/2011rs/fnotes/bil\\_0005/sb0695.pdf](http://mgaleg.maryland.gov/2011rs/fnotes/bil_0005/sb0695.pdf) (This legislation strengthened consumer protections for unfair or deceptive sale of educational services; created a separate Guaranty Fund to reimburse students at for-profit degree-granting institutions that breach agreements with students or the state, similar to the fund that existed

postsecondary institutions. Other states—such as Rhode Island,<sup>14</sup> Colorado,<sup>15</sup> and Kentucky,<sup>16</sup> have heightened or differentiated regulatory requirements for for-profit schools, such as in the areas of advertising, accreditation, and general oversight.

**In sum, the data are unambiguous and largely uncontested: compared to the non-profit educational sector, those who attend for-profit educational businesses fare worse by every objective measure, the businesses are the frequent targets of law enforcement,<sup>17</sup> the businesses are almost entirely funded by taxpayer dollars, and as a sector such businesses ambitiously recruit from among our most vulnerable populations.**

## FEDERAL REQUIREMENTS

In 2010, the U.S. Department of Education promulgated regulations aimed to ensure states implement oversight processes for all of their resident private postsecondary institutions. After several extensions, these regulations go in to effect on July 1, 2014.<sup>18</sup>

Accordingly, to maintain eligibility for federal Title IV funding, private postsecondary institutions must be authorized by the States in which they are physically located. *See* 34 CFR §§ 600.4(3), 600.5(4), 600.6(a)(3). 34 CFR § 600.9 establishes the requirements for state authorization.

First, states must actively approve institutions to operate.

Second, and most relevant, institutions must be subject to a complaint process. On complaints, the regulation provides:

An institution described under §§ 600.4, 600.5, and 600.6 is legally authorized by a State if the State has a process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws . . . 34 CFR § 600.9(a)(i).

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for private career schools; and altered the approval process for programs offered by degree-granting for-profit schools. The law explicitly distinguished three categories of degree-granting postsecondary institutions: public, private nonprofit, and private for-profit institutions).

<sup>14</sup> *Berger v. Rhode Island Bd. Of Governors for Higher Educ.*, 832 F.Supp. 515, 516 (D.R.I. 1993) (Rhode Island's Board of Governors of Higher Education passed a regulation requiring that all advertising by for-profit schools be approved by the Board prior to publication).

<sup>15</sup> H.B. 12-1155 (Colo. 2012), *available at* [www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/64C3361BBB1CA6C187257981007DBE2F?Open&file=1155\\_enr.pdf](http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/64C3361BBB1CA6C187257981007DBE2F?Open&file=1155_enr.pdf) (requiring that for-profit schools granting baccalaureate and higher degrees be accredited by an agency recognized by the U.S. Department of Education).

<sup>16</sup> *See* Ky. Rev. Stat. 165A.310 (2012) (Kentucky's Commission on Proprietary Education only regulates for-profit institutions).

<sup>17</sup> Between January 2011 and August 2013 there have been over 50 cases filed by students, shareholders, and governmental entities against at least 16 for-profit institutions. *See* Rick Waltman, Children's Advocacy Institute, Adjudication Against Private, For-Profit Educational Institutions from January 2011-August 2013, [http://www.caichildlaw.org/Misc/private\\_forprofit\\_litigation.pdf](http://www.caichildlaw.org/Misc/private_forprofit_litigation.pdf).

<sup>18</sup> Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Delay of Implementation Date, 78 Fed. Reg. 29652 (May 21, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-05-21/pdf/2013-12087.pdf>

The nature of that complaint process must relate “not only [to] laws related to licensure and approval to operate but also any other State laws including, for example, laws related to fraud or false advertising.”<sup>19</sup>

## CALIFORNIA’S RECORD

California has in the past not covered itself in credit when it comes to protecting its citizens in this sector. Long and accurately derided as the “diploma mill of the world,”<sup>20</sup> California is—along with Hawaii—currently alone among all the states in exempting huge swaths of the for-profit sector from any regulatory oversight. If a business is approved by certain accreditors in California, they are entirely exempt from the BPPE’s jurisdiction, including not just a review of educational quality up front (the core competency of accreditors), but also exempt from the BPPE’s complaint process, something that the Legislative Analyst’s Office and every other analyst rightly observe have no parallel within accreditation agencies:

For business practices (including marketing and recruitment, disclosures, and tuition refund policies, the Bureau has more exacting standards than both regional and national accreditors ... Unlike the Bureau, most accreditors do not seek to resolve individual student complaints. Instead, they focus on whether colleges maintain adequate complaint procedures. For example, the Bureau can require a college to refund tuition payments to a student with a valid complaint whereas an accreditor more likely would confirm that the school has a complaint resolution process in place and is following it. As a result, students attending accredited, exempt institutions do not have comparable recourse for their complaints as students attending schools overseen by the Bureau.<sup>21</sup>

But, BPPE’s reach is broadening, and the reason is fascinating. Because some for-profit educational businesses fear enforcement of the federal regulation in part requiring a government-administered complaint process being in place as a pre-requisite to the institution being eligible to receive federal financial aid, many for-profit, regionally-accredited institutions currently exempt from any oversight under California law have laudably begun *voluntarily* to opt-in to BPPE oversight. SB 71, a 2013 budget trailer bill, established the conditions for exempt schools voluntarily to come under the complaint process of the BPPE.

However, this has led to a bizarre, arbitrary, and entirely unprecedented regulatory topography in California (and, maybe nationally) where some students are provided the protection of a BPPE complaint and resolution process outside of litigation if the school has voluntarily come under the aegis of the BPPE, while other students are not.

This schism is not based on any public policy rationale. It exists solely because of how some of the resistant schools’ executives and lawyers weigh the risk of federal regulatory enforcement against them.

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<sup>19</sup> 34 C.F.R. §§ 600.4(a)(3), 600.5(a)(4), 600.6(a)(3), 600.9, and 668.43(b)), 75 Fed. Reg. 66858, 66865 (Oct. 29, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-10-29/pdf/2010-26531.pdf>

<sup>20</sup> Bureau for Private Postsecondary Education, [http://www.bppe.ca.gov/about\\_us/history.shtml](http://www.bppe.ca.gov/about_us/history.shtml).

<sup>21</sup> LEGISLATIVE ANALYST’S OFFICE, OVERSIGHT OF PRIVATE COLLEGES IN CALIFORNIA, 3-4 (Dec. 17, 2013), available at [www.lao.ca.gov/reports/2013/edu/oversight/oversight-121713.pdf](http://www.lao.ca.gov/reports/2013/edu/oversight/oversight-121713.pdf).

Thus, while many of the biggest and highest-profile for-profit businesses have elected to subject themselves to BPPE oversight and its complaint process (University of Phoenix, DeVry University, EDMC-Argosy, for example) many others have not.

While the BPPE does not disclose the schools that have applied to it voluntarily pending final approval, by our count the following exempt regionally accredited businesses have yet to come voluntarily under the jurisdiction of the BPPE:<sup>22</sup>

1. Academy of Art University
2. Ashford University
3. California Northstate University
4. Carrington College (ACCJC, 8 Campuses)
5. Cogswell Polytechnical College
6. FIDM (WASC ACS/ACCJC, 3 Campuses)
7. Heald College (ACCJC, 12 Total Campuses)
8. New School of Architecture and Design
9. San Joaquin Valley College (ACCJC, 8 Campuses)
10. Pacifica Graduate Institute
11. Patten University
12. The National Hispanic University
13. Trident University International
14. United States University
15. Walden University
16. West Coast University

These businesses have contracted with thousands of California students who have no idea that their institutions are not subject to Bureau oversight, and who lack a complaint process at their disposal if their institution engages in false or deceptive practices.

### **OUR INTEREST**

Public Advocates Inc. is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. Public Advocates works to ensure that California's postsecondary education system provides quality education programs to our students, trains our workforce capacity, and rewards taxpayers' investment in education.

At Public Advocates we are particularly committed to rooting out the problems in the for-profit sector because, while most low-income students and students of color still attend public colleges, for-profit schools enroll these students disproportionately and in growing numbers.

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<sup>22</sup> Based on entering these institutions' names into the Bureau's Approved Schools search engine. According to the National Center for Education Statistics, there are 460 private for-profit postsecondary institutions in California. College Navigator, <http://nces.ed.gov/collegenavigator/?s=CA&ct=3>. As of the date of this submission, we have not had the opportunity to verify which of these schools are regionally accredited and therefore eligible for total exemption from Bureau oversight.

The University of San Diego School of Law’s Center for Public Interest Law (CPIL) serves as an academic center of research and advocacy in regulatory and public interest law, representing the interests of the unorganized and underrepresented in California’s legislature, courts, and regulatory agencies. CPIL attempts to make the regulatory functions of California government more efficient and visible by serving as a public monitor of state regulatory activity.

The University of San Diego School of Law’s Children’s Advocacy Institute (CAI) is one of the nation’s premiere academic, research, and advocacy organizations working to improve the lives of children and youth. The CAI is deeply committed that underserved youth, especially those in foster care, have access to promising postsecondary educational opportunities.

The Veterans Legal Clinic is one of 11 legal clinics at USD School of Law committed to training law students and providing free legal services to the community. The Veterans Clinic provides free legal services to veterans struggling to resolve disputes with for-profit education companies over the use of GI Bill funds and related loans.

## **THE LEGISLATURE’S SUNSET REVIEW PRIORITIES FOR THE BPPE**

We respectfully submit the following recommendations for the priorities of the Bureau for Private Postsecondary Education’s Sunset Review.

### ***1. Complaint Process***

The number one priority of the Legislature should be that every veteran, every poor person of color, every former foster child, every California student should have the ability to file a complaint with the BPPE against a for-profit school and have their complaints about fraud, misrepresentation, false promises, and the like investigated and resolved, without resorting to litigation. For four reasons, this should now be entirely uncontroversial.

First, currently, a large swath of the for-profit sector has voluntarily—let us emphasize this, *voluntarily*—elected to subject itself to regulatory oversight by the BPPE, including the Bureau’s complaint process. This virtually unprecedented movement of private businesses to live under state regulation underscores (1) that the current BPPE regulatory framework is and should be at least minimally acceptable to the broader sector; and (2) that those schools that have yet to volunteer are likely those most in need of regulatory accountability.

Second, peer and model states differentiate between for-profits and non-profits when it comes to regulation, with the weightier regulatory scheme never falling on the non-profits.<sup>23</sup>

Third, as the survey of available data reveal, there is ample reason to scrutinize the for-profit sector and certainly a sufficient evidence to ensure that students of for-profit businesses have access to state aid in simply resolving their complaints.<sup>24</sup>

Fourth, it is senseless, arbitrary, confusing, and terrible public policy to allow some businesses and hence student protections to exist for some for-profit institutions and not for others.

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<sup>23</sup> See *supra* pp. 4-5.

<sup>24</sup> See *supra* pp. 2-4.



What is a complaint process? As seen with every other Department of Consumer Affairs (DCA) licensing agency, the hallmark of such a process is a mandatory administrative responsibility to investigate and address in some fashion every complaint received, plus the ability of the agency to exercise its own regulatory discretion to restrain the ability of the regulated entity to do business if the complaint reveals unlawful conduct without having to go to court first.

This is what differentiates the “complaint process” for regulated entities from unregulated ones. Agencies overseeing regulated entities have some power to restrain the entity’s behavior not to prevent future harms unlawfully inflicted. For unregulated entities, the remedies are judicial and the aim is typically retrospective and compensatory in nature. Phrased another way, in the parlance of administrative law and procedure, a “complaint process” cannot be equated with a simple ability of a law enforcement agency to file a lawsuit in response to a complaint.<sup>25</sup>

Indeed, the point of a “complaint process” housed in an administrative arm of government is not punishment or compensation for past wrongs, the twin motivations for filing civil or criminal actions. The main point of being overseen by a regulator versus being subject to civil or criminal action is that, under an administrative regime embracing a “complaint process,” some entitlement can be taken away from or restrained by the regulator acting alone, without a threshold court order, so that *future consumers or patients will not be harmed* by allowing the regulated entity to continue to operate. This is why, among regulated professions or businesses, so called “regulatory gag clauses” are invalid both under case law and, more recently, for the DCA licensing boards other than the BPPE, state statute.<sup>26</sup>

## **2. Prioritize Enforcement**

Both for-profit education businesses and students agree that BPPE enforcement should emphasize enforcement actions that truly aid students. This is not easy. There is an unfortunate

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<sup>25</sup> The Attorney General does not under current California law have a “complaint process” that satisfies the federal 34 C.F.R. § 600.9 complaint process requirement for all postsecondary institutions in the State. In contrast, the California Private Postsecondary Education Act of 2009 establishes a traditional “complaint process” for institutions overseen by the BPPE.

While the Office of the California Attorney General appears willing to accept complaints from all Californians –and thus the subset of students at private postsecondary institutions –it is clear that this discretionary, law enforcement opportunity cannot be equated with a “complaint process” as intended by federal law. Indeed, the Attorney General recognizes this. While the Attorney General provides an online form for consumer complaints against any businesses, including the subset of educational businesses, the form includes language stating, “I also understand that the Attorney General may need to refer my complaint to a more appropriate agency.” The Attorney General’s website also refers complaints regarding all adult vocational schools to the BPPE. *See* “Schools – Adult Vocational,” Office of the Attorney General, [http://oag.ca.gov/consumers/general/schools\\_vocational](http://oag.ca.gov/consumers/general/schools_vocational) (last accessed February 19, 2014) (“For information about choosing a postsecondary school or to file a complaint, visit the bureau’s website or call (916) 445-3427.”).

Moreover, when it comes to nonprofit educational institutions, the Attorney General is barred by statute from requiring them to register as is the case with most other nonprofits and is thus barred from taking any administrative action against their ability to operate, whether prompted to do so via a “complaint process” that does not exist or not. Gov. Code § 12583.

<sup>26</sup> *Cariveau v. Halferty*, 83 Cal. App. 4th 126, 136 (2000); *Picton v. Anderson Union High School*, 50 Cal. App. 4th 726 (1996); *Mary R. v. Division of Medical Quality of the Board of Medical Quality Assurance*, 149 Cal. App. 3d 308 (1983). Bus. & Prof. Code section 143.5. BPPE is excluded from this gag clause ban statute only because the statute applies to the boards and bureaus in the B&P Code, whereas the BPPE’s program is in the Education Code.

tendency of government enforcement agencies to shy away from the most ambitious cases because such cases cost more in Attorney General legal fees and success is less certain than in easy cases. However, the hard cases are the ones most likely to protect students and the ones most like to incentivize sector-wide good and lawful behavior.

For these reasons, it is essential for meaningful BPPE enforcement that regulatory benchmarks for identifying schools to receive targeted be formally adopted, either in statute or by regulation. These benchmarks alone should not determine where the BPPE's enforcement resources oversight (targeted audits, targeted inspections, eventual enforcement) will be devoted. Rather, they should be factors that aid the BPPE in determining which businesses deserve the most attention, as between two similar complaints.

Such factors for prioritizing enforcement resources as between like complaints could, for example, include:

- If accredited, 3-year cohort default rate of greater than 15%;
- Schools with highest numbers of California students enrolled;
- Businesses that recently changed ownership or control or changed their form of business (from non-profit to for-profit school or vice-versa);
- Higher cost programs (e.g. with a cost of attendance of over \$10,000) or degree programs to which students are admitted without having to demonstrate their aptitude for the program on a test regularly used for admission decisions by public colleges in California, such as the SAT or ACT;
- Businesses in which more than 50% of students are enrolled in distance education;
- Businesses in which more than 85% of students receive federal aid to pay for the cost of attendance;
- Businesses that have recently been the subject of a qui tam action or an investigation, judgment or settlement by a government agency related to its offering of postsecondary education programs; and
- Institutions that have been placed on some type of restriction on its institutional or programmatic accreditation, such as probation or order to show cause, are subject to an injunction by a government agency; or have been placed on a cash, rather than reimbursement status by the U.S. Department of Education.

### ***3. Simplified and More Robust Disclosures***

These should include some of the issues left open by AB 2296 (Block), enacted in 2012. The open issues include a) well-defined placement rate disclosures (in which, for example, the placement rate is based on the number of students who completed the program, and a placement is defined to ensure students “placed” are actually working in one job for at least 60 days or more).<sup>27</sup>

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<sup>27</sup> Education Code section 94913(e)(2) currently tasks the BPPE, by July of this year, to do the following: “The bureau shall define by July 1, 2014, specific measures and standards for determining whether a student is gainfully employed in a full-time or part-time position for which the institution represents the program prepares its graduates, including self-employment or conducting freelance work, and may set the standards for the hours per week and duration of employment and utilize any job classification methodology the bureau determines appropriate for this

Disclosures between federal and state law should, to the extent advantageous to students and fair and accurate to businesses, be aligned and conformed, to result in streamlined and simple disclosures for both students and businesses.

**4. *Banning Businesses from Offering or Enrolling a Student in a Program where the Student is Ineligible for Employment in the Occupation for which the Program is Represented to Prepare the Student***

A business should not be allowed to offer a program that is supposed to lead to a particular job requiring a certificate or license to a student if the program does not meet all educational requirements to qualify a student to take a certification or licensing exam, to obtain a certification or license, or to satisfy employment criteria generally required in California.

Similarly, a business should not be able to enroll a student in a program if the student has a criminal conviction, or other limitation that would preclude the student from qualifying to take a certification or licensing exam, to obtain a certification or license, or to satisfy employment criteria generally required in California. Other limitations include, for example, if the license exam is only offered in English, or most employment requires a person to be bilingual, but the person neither speaks the needed language, nor is enrolled in a program to learn it; for a truck-driving program, the person is completely blind; or the person is legally precluded from carrying a firearm, is enrolled in a security guard program, which includes firearm training, and the student needs a firearm certification to obtain employment.

Offering or enrolling a student the institution knows would be impeded from obtaining employment in the occupation for which the program is represented should trigger automatic refunds and eligibility for the Student Tuition Recovery Fund if the institution does not pay the refunds.

**5. *Distance Education Offered in California Should be Subject to the Same Oversight as Schools Physically Located in California***

The BPPE should be granted explicit statutory authority to enter into cooperative agreements with agencies in other states to rely on the state where the business is located and approved, if those states' laws, regulations, and enforcement are at least as protective of California students as under California law. The agreements could also address the sharing of documentation on the businesses, such as inspection reports, annual reports and disciplinary files.

**6. *Required Reporting of Settlements to the Bureau***

As with many other DCA agencies, businesses should be required to report to the BPPE all administrative or legal actions brought against them, the persons in control, or any of its officers or directors. This includes investigative demands from any agency, civil or criminal complaints filed, arbitrations undertaken, administrative actions brought by the U.S. Department of Education or any state agency, judgments, settlements, administrative decisions, and arbitration awards.

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purpose, including, but not limited to, the United States Department of Labor's Standard Occupational Classification codes."

Such reporting is common among the DCA boards. (*See*, B&P sections 805, 801, for example, relating to physicians and surgeons.)

And as with **all other** DCA regulatory boards and bureaus, regulatory “gag” clauses should be banned for the BPPE.

**7. Expanded Availability of Data from Other Agencies to Increase Accuracy of Disclosures**

Any barriers to the BPPE’s receipt of information from other California agencies about employment and salaries of students should be removed so that more accurate reporting of placement and salaries can be achieved by use of those state databases, including that of the Employment Development Department.

**8. Increased Public Control and Stability of BPPE by Changing it to a Board or Commission**

For the DCA licensing boards, sunset review has never meant a sunset of the underlying licensing laws and program. Indeed, no longer does sunset review even threaten a board with becoming a bureau.

The sunseting of the BPPE where both the bureau and the program itself vanished proved to be disastrous for California’s students, tossing the regulation of these businesses and student protections into complete chaos and uncertainty. However, the accountability of sunset review is welcome, given the importance of the BPPE’s statutory mission.

Just as sunset review has been modified for the DCA boards to retain the board structure even after sunset, leaving untouched the underlying regulatory program, so too should the BPPE be changed to retain a consequence that ensures accountability but amended to ensure that the underlying regulatory structure endures after a sunset.

Changing the BPPE into a board with a majority of public members and holding the bureau accountable by reconstitution of the board, as with all other DCA boards, accomplishes this while laudably subjecting decision-making to the sunshine and transparency of the Bagley-Keene Act.

**CONCLUSION**

Public Advocates, CPIL, CAI and the Veterans Legal Clinic all appreciate the opportunity to comment on a regulatory program that is of pivotal importance to California’s most vulnerable populations.

Sincerely,



Rigel S. Massaro  
Policy & Legal Advocate  
Public Advocates Inc.

Ed Howard  
Senior Counsel  
CPIL, CAI

Robert Muth  
Supervising Attorney  
Veterans Legal Clinic

Robert Fellmeth  
Executive Director  
CPIL, CAI