

DEPARTMENT OF CONSUMER AFFIARS

STATE OF CALIFORNIA

In the Matter of the Emergency Decision Against:

HOLBERTON SCHOOL, Appellant

972 Mission Street – 1st Floor

San Francisco, CA 94103

School Code 47845455

DECISION

INTRODUCTION

To protect students, prevent misrepresentations to the public, and prevent loss of student funds, on January 24, 2020, the Bureau for Private Postsecondary Education (the Bureau) issued an Emergency Decision (Decision) against Holberton School (Holberton), directing it to cease enrolling new students, cease all instruction, and cease collecting tuition and fees. The Decision is scheduled to take effect at close of business on February 4, 2020.

Holberton requested an opportunity to be heard before the Director of the Department of Consumer Affairs before the Decision's effective date. The matter was heard on January 30, 2020, before the Director's designee, Deputy Director Ryan Marcroft. Attorney Katherine Lee Carey appeared on behalf of Holberton and attorney Douglas L. Smith appeared on behalf of the Bureau. At the conclusion of the hearing, the matter was submitted for a final decision.

After considering the evidence and argument submitted by Holberton and the Bureau, the Decision is MODIFIED and AFFIRMED.

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FACTUAL AND PROCEDURAL BACKGROUND

I. HOLBERTON SCHOOL'S APPROVAL TO OPERATE

Holberton School, like all private postsecondary educational institutions in California, was not authorized to operate in the State until the Bureau approved it and its educational program. (Ed. Code, §§ 94817, 94838 & 94886.) Nonetheless, since early 2016, Holberton operated and enrolled students prior to receiving the Bureau's approval in July 2018.¹

Before and after it was approved to operate, Holberton entered into income sharing agreements with students. Income sharing agreements (hereafter "income sharing agreements" or "ISAs") allow students to forgo paying their tuition at the beginning of their education in exchange for paying the institution 17 percent of their annual income in excess of \$40,000 for three and one-half years after graduating. The amount of the agreement is capped at \$85,000. Holberton presently enforces income sharing agreements it entered into prior to its approval in 2018.

Holberton applied for approval in April 2016. On March 21, 2018, the Bureau notified Holberton that it would not at that time approve it to operate. In relevant part, the Bureau stated that it would not approve income sharing agreements (also called "deferred tuition agreements" or "DTAs"), since they are based on a percentage of future income.² The Bureau cited four reasons for its decision: (1) enrollment agreements must disclose the total program charges; (2) Holberton would need to provide a pro rata refund if a student withdrew from the program, but such amounts could not be calculated under a deferred tuition agreement based on future income; (3) the Bureau would not be able to determine the amount of student loss under such agreements for purposes of calculating amounts owed to students from the Student

¹ The Bureau became aware of the School's operation by July 2016, but it did not cite Holberton for operating without approval. (See Ed. Code, § 94944.)

² No income sharing agreements were included in the record on appeal.

Tuition Recovery Fund (STRF); and, (4) Holberton could not identify the total charges for the program for reporting purposes. (See Ed. Code, §§ 94911, 94920, & 94923; Cal. Code Regs., tit. 5, §§ 71750, 71800, & 74112.) The Bureau stated that “[t]he only solution is for the institution to determine the true cost of the institution’s program and charge the appropriate tuition.”

On April 20, 2018, Holberton responded to each point raised in the Bureau’s March 21, 2018, letter, and it asked the Bureau for comments on its responses. Holberton noted that its total tuition cost was \$85,000, which it would disclose in the enrollment agreement and its reports, and which could be used to calculate student loss for purposes of the STRF. Holberton also noted that students would receive a pro rata refund based on either the total program cost of \$85,000, if they paid up front, or on a pro rata percentage of their future income, as determined by the number of completed program hours.

The Bureau replied to the School on May 30, 2018:

Good Morning! The institution’s response is acceptable. Please provide a new enrollment agreement and catalog that does not reference income sharing agreements and/or deferred tuition agreements. The Bureau will not approve an application that contains ISA/DTA in the application.

On June 26, 2018, Holberton complied with the Bureau’s request to remove references to income sharing agreements from its enrollment agreement and school catalog:

Following your email – please find enclosed the documents updated with no mention of ISA/DTA.

- Enrollment agreement
- Catalog

On July 11, 2018, the Bureau approved Holberton to offer a two-year, 2,160-hour educational program.

II. HOLBERTON SCHOOL'S APPROVED EDUCATIONAL PROGRAM

The approved program was comprised of nine months of foundational instructional training, a six-month internship, and nine months of specialized instructional training. The approved program did not include a component where students could complete a period of employment, instead of instructional training, and exchange the employment period for qualifying instructional training.

In June 2019, Holberton notified the Bureau of an increase in the instructional hours for its program, from 2,160 hours to 4,331 hours. It did not, however, submit an application to the Bureau to make a substantive change to its program that would include a component where students could complete a period of employment in lieu of instructional training. (See Ed. Code, §§ 94893 & 94894; Cal. Code Regs., tit. 5, §§ 71600 & 71650.)

Holberton is currently approved to offer a two-year, 4,331-hour, "Full Stack Software Engineer" program. The approved program is comprised of nine months of foundational instructional training followed by a series of training modules. Holberton eliminated the internship requirement from its original program. The educational objective of the program is to teach students to develop websites, applications, and databases. Holberton reported that it has approximately 200 enrolled students.

At some point between July 11, 2018, and June 2019, Holberton started offering a different, unapproved, educational program, comprised of nine months of foundational instructional training and six months of employment (hereafter, the "unapproved program"). After six months of employment, an employer could submit a verification letter to the school, and the school would consider the student to have completed the program and issue a graduation certificate. The School, however, required such students to pay the full cost of the approved program, \$85,000.

III. THE BUREAU'S EMERGENCY DECISION

On January 24, 2020, the Bureau issued its Decision and ordered Holberton to cease enrolling new students in its program, cease all instruction, and cease collecting all tuition and fees for its program, effective close of business February 4, 2020. The Bureau determined that the institution posed an immediate danger to the public health, safety, and welfare, requiring immediate action to protect students, prevent misrepresentations to the public, and prevent the loss of monies paid by students. The Bureau's decision was based on three grounds:

- Holberton substantially failed to meet institutional minimum operating standards when it charged students for an approved educational program that was not actually provided, and in misrepresenting the cost for the programs and quality of the education. Holberton issues graduation certificates to students after they complete nine months of education and are employed for six months. Once an employer verifies six months of employment, Holberton credits students with completing their educational program and requires that they pay the full \$85,000 price for completing the program. Students informed the Bureau that they were harmed by having to pay back income agreements for an education they did not receive.
- As a condition of Holberton's approval, it was prohibited from using income sharing agreements as a method for having students pay for their education. After the Bureau approved Holberton, however, it continued offering and enforcing income sharing agreements as a tuition payment method. Thus, Holberton obtained its approval in 2018 by fraud, falsified its application for approval, enrollment agreements, and catalog, and engaged in prohibited business practices.
- Holberton operated without approval before July 2018 and presently enforces unlawful enrollment agreements and income sharing agreements that were executed before the school was approved. Students informed the Bureau that they were harmed by having to pay back income agreements for an education they did not receive.

IV. HOLBERTON SCHOOL'S OPPORTUNITY TO BE HEARD

At Holberton's timely request, a hearing in this matter was held on January 30, 2020. Representatives of the Bureau appeared at the hearing and offered testimony in support

of the Bureau's Decision. Representatives of Holberton also appeared and offered testimony in the matter.

Evidence Relating to Holberton's Approval

The Bureau testified at the hearing that it conditioned Holberton's approval to operate on the school not offering income sharing agreements to students, and that Holberton agreed to this condition. The Bureau's belief was based on a series of correspondence between Holberton and the Bureau.

As discussed, on April 20, 2018, Holberton responded to several points raised by the Bureau as reasons to not grant the school approval. On May 30, 2018, the Bureau notified Holberton that its April response was "acceptable," it specifically asked the school to remove references to income sharing agreements or deferred tuition agreements from its enrollment agreement and catalog, and it informed the School that it would "not approve an application that contains ISA/DTA in the application." Thereafter, Holberton removed the references from the enrollment agreement and catalog, as the Bureau requested, and resubmitted them to the Bureau. Two weeks later, the Bureau approved Holberton to operate.

At the hearing, the Bureau testified that it has never approved the use of income sharing agreements, and that it understood the correspondence exchange with Holberton to mean that the school would refrain from using income sharing agreements. Holberton, however, asserted that this was not clear from the correspondence, and the Bureau acknowledged that its May 30 response was "a little bit vague," inasmuch as it told Holberton that its April response was "acceptable." No Holberton representative testified as to the school's understanding of the correspondence, nor was there evidence as to whether Holberton submitted (or omitted) an exemplar income sharing

agreement with its application.³ It was also not established that Holberton's omission of specific references to income sharing agreements from its enrollment agreement and catalog—at the Bureau's request—necessarily meant that the school was, by virtue of the omission, prohibited from using such agreements.

Evidence Relating to the Unapproved Program

Holberton was approved on July 11, 2018, to offer a two-year 2,160-hour education program comprised of nine months of foundational instructional training, a six-month internship, and nine months of specialized instructional training. Holberton indicated at the hearing that it notified the Bureau of a non-substantive change to its program in June 2019, when it changed the number of approved-program hours from 2,160 hours to 4,331 hours. (See Cal. Code Regs., tit. 5, § 71660.) The Bureau, however, testified that significant changes in program hours should be considered substantive changes, not non-substantive changes, and would require prior Bureau approval before making the change.

In all events, Holberton did not change only the number of hours in its approved program. It fundamentally changed the program to exchange instructional hours for work experience. According to the Bureau, the approved non-substantive change was limited to a change in the number of hours.

Evidence of Holberton's Enforcement of Income Sharing Agreements Entered Before Approval

The Bureau presented evidence at the hearing that Holberton executed at least eight income sharing agreements with students before the school was approved to operate.

³ The Bureau's regulations require institutions to submit exemplars of instruments of indebtedness to the Bureau for approval. (Cal. Code Regs., tit. 5, § 71180.) The application was not a part of the record and it is not clear whether the approved application included an exemplar income sharing agreement as an instrument of indebtedness, as required under the regulation.

Holberton testified at the hearing that it presently enforces income sharing agreements executed before the school was approved to operate.

LEGAL STANDARDS

I. EMERGENCY DECISIONS

An emergency decision may be issued if there is an immediate danger to the public health, safety, or welfare that requires immediate action to protect students, prevent misrepresentation to the public, or prevent the loss of public funds or moneys paid by students. (Ed. Code, § 94938; Cal. Code Regs., tit. 5, § 75150, subd. (b).) Activities that warrant the Bureau's emergency intervention include fraud, substantial misrepresentations in the institution's school catalog or enrollment agreement, or a substantial failure to meet institutional minimum operating standards. (Cal. Code Regs., tit. 5, § 75150, subd. (b).)

The Bureau may order temporary, interim relief in the form of the following:

- (1) Cease or limit enrollment of new students;
- (2) Cease part or all instruction for some or all programs; and
- (3) Cease collection of tuition or fees for some or all programs.

(Cal. Code. Regs., tit. 5, § 75150, subd. (c).)

Institutions subject to an emergency decision may request an opportunity to be heard before the Director of the Department of Consumer Affairs or her designee. (Cal. Code. Regs., tit. 5, § 75150, subd. (f).)

II. APPROVAL TO OPERATE, MINIMUM OPERATING STANDARDS, AND PROGRAM CHANGES

Approval to Operate

To operate in California, private postsecondary educational institutions and their educational programs must be approved by the Bureau. (Ed. Code, §§ 94817, 94838 &

94886.) An approved educational program consists of “a planned sequence composed of a single course or module, or set of related courses or modules, that provides education, training, skills, or experience, or a combination of these.” (Ed. Code, § 94837.) In applying for approval, an institution must describe the educational program it offers or proposes to offer, the title of the educational programs and other components of instruction offered, and the method of instruction. (Cal. Code Regs., tit. 5, §§ 71210, subds. (a) & (c), 71220, subd. (a).)

Minimum Operating Standards

The Bureau adopted minimum operating standards for approved institutions, and an institution may only operate in California if it presents sufficient evidence to the Bureau that it can satisfy the standards. (Ed. Code, §§ 94885, 94887 & 94891; Cal. Code Regs., tit. 5, § 71700.)

Minimum operating standards are designed to ensure that the content of each educational program can achieve its stated objective, that upon satisfactory completion of the approved program, the institution gives students a document signifying the diploma awarded, and that the institution is maintained in compliance with the law. (Ed. Code, § 94885, subd. (a).)

Under the Bureau’s minimum standards, institutions must adopt objectives for each educational program that describe the kind of education offered, for whom the instruction is intended and the expected outcomes for graduates. (Cal. Code Regs., tit. 5, § 71705.) “Objectives” are the “goals and methods by which the institution fulfills its mission and transforms it into measurable student learning outcomes for each educational program.” (Cal. Code Regs., tit. 5, § 70000, subd. (r).)

Educational programs must be comprised of the subject areas necessary for a student to achieve the program’s objectives. (Cal. Code Regs., tit. 5, § 71710, subd.

(a.) The minimum standards also require instruction to be the central focus of the resources and services of the institution, and require direct instruction, where students and faculty are physically present in the same location during the instruction. (Cal. Code Regs., tit. 5, § 71715.)

Program Changes

Institutions may make substantive and non-substantive changes to an approved program. Substantive program changes require the Bureau’s approval: “[i]f an institution intends to make a substantive change to its approval to operate, the institution shall receive prior authorization from the bureau.” (Ed. Code, § 94893.) Substantive changes include, “[a] change in educational objectives, including the addition of a new diploma . . . educational program unrelated to the approved educational programs offered by the institution,” and “[a] significant change in the method of instructional delivery.” (Ed. Code, § 94894.) A significant change in the method of instructional delivery is “any change that alters the way students interact with faculty or access significant equipment.” (Cal. Code Regs., tit. 5, § 71600.) Institutions seeking to make substantive changes to their program must apply to the Bureau to make the change. (Cal. Code Regs., tit. 5, §§ 71600, 71650, & 71655.)

In contrast to substantive changes, institutions may implement non-substantive changes by simply notifying the Bureau of the change. (Cal. Code Regs., tit. 5, § 71660.) Non-substantive changes include minor changes to a program, such as a change of location within 10 miles, the change of a mailing address, the addition of a related program, the addition of a new branch within five miles of the main campus, or the addition of a satellite. (*Ibid.*)

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DISCUSSION

I. THE EMERGENCY DECISION IS APPROPRIATE IN RELATION TO THE UNAPPROVED PORTION OF THE FULL STACK SOFTWARE ENGINEER PROGRAM

An emergency decision is proper if there is an immediate danger to the public health, safety, or welfare that requires immediate action to protect students, prevent misrepresentation to the public, or prevent the loss of student money. Circumstances that may warrant the Bureau's immediate intervention include substantial failures to meet institutional minimum operating standards, substantial misrepresentations to the school catalog or enrollment agreement, and fraud. (Cal. Code. Regs., tit. 5, § 75150, subd. (b).)

Here, the evidence demonstrates Holberton's substantial failure to meet minimum operating standards with respect to its unapproved practice of crediting work experience in lieu of instructional training in the Full Stack Software Engineer program. The gravamen of the Bureau's Decision is that the school does not provide students in the unapproved program with the educational program that the students pay for.

As discussed, Holberton was originally approved to offer a two-year educational program comprised of nine months of instruction, a six-month internship, and nine months of specialized training. The educational objective of the program was to teach students to develop websites, applications, and databases. Holberton was not approved to substitute work experience for instructional training. At some point between July 11, 2018, and June 2019, however, the School started offering the unapproved program, comprised of nine months of training and six months of employment, in lieu of instructional training. Students do not need to complete the balance of training to qualify for graduation.

The Bureau's minimum operating standards require that educational programs be comprised of the subject areas necessary for a student to achieve the program's

objectives, that instruction be the central focus of the institution's resources, and that the instruction be direct, where students and faculty are physically in the same location. (Cal. Code Regs., tit. 5, §§ 71710, subd. (a), 71715.) Here, because Holberton graduates students in the unapproved program that do not satisfy the requirements or complete the subject areas of the approved educational program, the school substantially failed to meet minimum operating standards with respect to the unapproved portion of the Full Stack Software Engineer program. Moreover, since the school is exchanging work experience for instructional training, instruction is not the central focus of the unapproved program.

Holberton asserted at the hearing that the Bureau approved it in June 2019 to make a non-substantive increase in its program hours, from 2,160 hours to 4,133 hours, implying that it was approved to exchange work experience for instructional training. Nonetheless, the School was required to apply to the Bureau to make a substantive change to its program, but it did not: “[i]f an institution intends to make a substantive change to its approval to operate, the institution shall receive prior authorization from the bureau.” (Ed. Code, § 94893; Cal. Code Regs., tit. 5, §§ 71600, 71650 & 71655.) Education Code section 94894 provides that substantive changes include, “[a] change in educational objectives, including the addition of a new diploma . . . educational program unrelated to the approved educational programs offered by the institution,” and “[a] significant change in the method of instructional delivery.” (Ed. Code, § 94894.)

The Bureau testified at the hearing that the school's change from a two-year instructional training program to nine months of instructional training and six months of work experience should be considered a substantive change to the program's educational objectives that required the Bureau's prior approval as a substantive change.

Additionally, the unapproved program change was a significant change in the method of instructional delivery, which required prior Bureau approval as a substantive change. (Ed. Code, § 94894.) Such significant changes include “any change that alters the way students interact with faculty or access significant equipment.” (Cal. Code Regs., tit., 5, § 71600.) Here, the school’s change from 15 months of instructional training to six months of work experience altered the way that students are educated and interact with the approved program. Consequently, the change was a substantive change that required the school to apply to the Bureau for prior approval.

Since the school did not apply to the Bureau to make a substantive change, it was not approved to change its program to add the unapproved portion. The harm to the school’s students under these circumstances is evident. If, as the Bureau contends and as the evidence demonstrates, students graduate from the program without completing the approved educational program, the students do not receive the education they pay for. The Bureau’s immediate action is necessary to protect students and prevent the loss of their money, in that the purpose of the program is to train students to develop websites, applications, and databases, but there is a substantial risk that this will not be achieved, since students are not completing the approved program.

II. THE CURRENT RECORD ON APPEAL DOES NOT SUPPORT A BROADER EMERGENCY ORDER

The evidence supports the Bureau’s emergency action with respect to the unapproved program, but an emergency decision is an extraordinary remedy, and it is difficult to conclude on the current record that the Bureau established the need for a broader order prohibiting the school from enrolling any new students, providing any instruction, or collecting any tuition and fees, pending the outcome of a full disciplinary proceeding.

As discussed, prior to the Bureau’s approval of the school in 2018, Holberton executed income sharing agreements with students to attend its educational program, and it presently enforces the agreements. Education Code section 94917 provides that “[a] note, instrument, or other evidence of indebtedness relating to payment for an educational program is not enforceable by an institution unless, at the time of execution of the note, instrument, or other evidence of indebtedness, the institution held an approval to operate.”⁴

Here, any such agreements entered by the school prior to its approval are not enforceable. In other words, students that executed such agreements may have a statutory defense to their enforcement, irrespective of the Bureau’s emergency decision. Moreover, no such agreements were made part of the record of this proceeding. Consequently, it is not possible to conclude on the current record that the Bureau’s decision is necessary at this time.

The Bureau also contends that Holberton obtained its approval by fraud and questions the validity of all of the income sharing agreements the school executed since it was approved in 2018. “Fraud” is among the grounds the Bureau may invoke when issuing an emergency decision: “[t]he Bureau may make an emergency decision . . . to protect students, prevent misrepresentations to the public, or prevent the loss of public funds or monies paid by students, including but not limited to fraud . . .” (Cal. Code Regs., tit. 5, § 75150, subd. (b), emphasis supplied.)

Fraud generally includes “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” (Civ.

⁴ Enrollment agreements executed before the school was approved are similarly unenforceable. (Ed. Code, § 94902, subd. (b).)

Code, § 3294, subd. (c)(3); see also 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, §§ 883 & 890, pp. 1208-1209 & 1218-1219.)

Here, the Bureau asserts that the correspondence between the school and the Bureau demonstrates that Holberton agreed to refrain from using income sharing agreements once approved, and that the Bureau conditioned its approval to operate on this representation. Holberton, on the other hand, argued that it made no such representation. No representative of the school testified as to their understanding of the correspondence exchange with the Bureau, nor was there evidence presented as to whether the school submitted (or omitted) an exemplar income sharing agreement with its application, as is required under the Bureau's regulations. (See Cal. Code Regs., tit. 5, § 71180.) It was also not established on the limited record available in this proceeding that because Holberton omitted specific references to income sharing agreements from its enrollment agreement and catalog—at the Bureau's request—the school was, by virtue of the omission, prohibited from using such agreements once it was approved. Thus, on the current record, it is not clear that Holberton obtained its approval by fraud.

To be clear, however, this conclusion is based on the limited record available on appeal from the Emergency Decision and should not be construed as a limitation on the formal administrative proceedings. Moreover, this decision does not address the propriety of the school's use of income sharing agreements. The Bureau raised important questions with respect to whether such agreements are compatible generally with the Private Postsecondary Education Act of 2009, insofar as institutions that use the agreements may not be able to disclose costs or charges in enrollment agreements, catalogs or reports, or grant refunds to students. But again, because no income sharing agreements, enrollment agreements, school catalogs, or reports are a part of the record of this proceeding, it is not possible to evaluate such claims on the current record.

CONCLUSION

The Bureau's Decision is appropriate as it relates to the unapproved portion of the Full Stack Software Engineer program, but the Decision sweeps too broadly in directing the school to cease all enrollment, cease all instruction, and cease collecting tuition in connection with all of its programs. Consequently, the Decision must be modified to address only the unapproved program.

DECISION

The Bureau's Emergency Decision and order is MODIFIED as follows, and otherwise AFFIRMED. The Emergency Decision at page 1 is modified to read:

"The Bureau hereby orders Holberton School, Inc. (Institution) to:

1. **CEASE ENROLLMENT OF NEW STUDENTS IN THE UNAPPROVED PORTION OF THE PROGRAM;**
2. **CEASE ALL INSTRUCTION FOR STUDENTS IN THE UNAPPROVED PORTION OF THE PROGRAM; AND**
3. **CEASE COLLECTION OF TUITION AND FEES FOR THE UNAPPROVED PORTION OF THE PROGRAM.**"

The modified order is effective upon close of business February 11, 2020.

DATED "2/4/2020"

"Original signature on file"

RYAN MARCROFT
Deputy Director, Legal Affairs Division
Department of Consumer Affairs