

Department of Consumer Affairs
Bureau for Private Postsecondary Education

Addendum to Initial Statement of Reasons

Hearing Date: August 2, 2010

Subject Matter of Proposed Regulations: Notice to Comply; Surrender of Approval; Stipulations; Suspension, Revocation or Probations of Approval to Operate; Disciplinary Guidelines

Sections Affected:

Adopt sections: 75010, 75100, 75500

Amend sections: 74120 (renumber to 75060), 74130 (renumbered to 75070), 74160 (renumbered to 75080), 74170 (renumbered to 75090)

Specific Purpose:

Adopt 75500 (Disciplinary Guidelines) establishes guidelines for the application of discipline when institutions are found in violation of the law.

The following information is added to the Initial Statement of Reasons:

Factual Basis/Rational

It is necessary to provide guidelines for discipline in order to provide consistency in the application of discipline for institutions.

More specifically, the Guidelines are meant to be a “stand alone” document for use by an Administrative Law Judge (ALJ), respondent (which is defined), counsel, and the Bureau as a reference in disciplinary actions against an approval to operate. This is why it includes the language of the regulation itself, as well as general considerations in the writing of a proposed decision, factors to be considered in the imposition of a penalty, if any, and definitions of the terms used in disciplinary decisions.

The Guidelines provide for minimum and maximum penalties for all sections of the Act that provide a basis for discipline. The maximum penalty for all violations, as is very common for disciplinary guidelines used by other agencies, is revocation or denial of an approval to operate. This is true for several reasons. First, as the disciplinary guidelines point out, section 94937 of the Code provides that the Bureau may place an institution on probation or may suspend or revoke an institution’s approval to operate for: (1) obtaining an approval to operate by fraud; or (2) a material violation or repeated violations of the Act or regulations adopted pursuant to the Act that have resulted in harm to students. If an institution has committed an act or acts that is a basis or are bases for discipline, the grounds are the most egregious – either it should not have been approved to begin with,

and was only approved because of fraud, or there has been student harm. Accordingly, denial or revocation may be an appropriate outcome.

Second, it is the practice of most regulatory agencies, and is the decision of the Bureau, to request revocation or denial in its charging documents for discipline or denial of an approval to operate because if the institution does not respond, or fails to appear for hearing, revocation or denial of the approval is the default decision of the Bureau. It is unadvisable and unreasonable to provide any terms and conditions for an institution that has not responded to the charging document, and due process dictates that the institution have notice that revocation or denial is the potential ultimate consequence of failing to respond. Accordingly, almost all charging documents are going to request revocation or denial, and the Disciplinary Guidelines must support that.

Lastly, the Bureau must have the flexibility to seek the ultimate penalty of revocation or denial of an approval for the violation of its laws and regulations in order to adequately protect the public. Even if an institution is placed on probation with terms and conditions, the Bureau must have the means to enforce those terms and conditions, which is the possibility of revocation, if the terms and conditions are not met. Public protection requires that the Bureau always have the option to revoke the approval of an institution if it continues to violate the laws and regulations governing its operations.

Clearly, revocation or denial would not be appropriate in every instance, even though it is appropriate to request it in the charging documents, and support that in the Disciplinary Guidelines. Accordingly, the Guidelines include factors that are to be considered in determining whether revocation, suspension or probation is to be imposed in a given case.

There are 15 standard terms and conditions that are to be imposed in all cases where an institution is to be placed on probation. These are the basic terms and conditions that the Bureau considers necessary to ensure that there is sufficient ability to monitor the operations of an institution that has been found in violation of the law, and adequately protect the public. These conditions require: obeying all laws, compliance with probation and quarterly reporting, personal appearances, notice to the Bureau of address and telephone number changes, notice to prospective students of the discipline imposed, providing the student roster, providing approved instruction, providing the Bureau with the location of the repository for all records, maintaining a current and valid active approval to operate, complying with all final orders resulting from citations, payment of cost recovery, the Bureau's continuing jurisdiction over the matter and the ability to revoke probation if probation is violated, an inability to obtain approvals to operate in the future unless in compliance with probation, compliance with any applicable accreditation standards, and a provision that the approval to operate will be fully restored upon successful completion of the institution's term of probation.

The Bureau amended the cost recovery provision with its modified text because the wrong language had been used, which added the following provision: "The filing of bankruptcy by respondent shall not relieve respondent of the responsibility to repay

investigation and enforcement costs.” In the Bureau’s opinion, cost recovery is non-dischargeable in bankruptcy. (See *In re John William Findley, III* (9th Cir. 2010) 593 F.3d 1048, 1054.) The issue, however, is one determined by the laws of bankruptcy, subject to change, and not within the authority of the Bureau to decide. Including language within a disciplinary decision regarding the dischargeability of cost recovery may be confusing if the bankruptcy laws change, or if case law determines otherwise. In addition, while having such language in a decision may be helpful in terms of notice to a respondent, it is not necessary in order to allow the Bureau to continue to enforce a cost recovery order whether or not the respondent has petitioned for a discharge of debts in a bankruptcy proceeding. Other laws will determine that.

The standard terms and conditions are important because, at a minimum, the Bureau needs to be able to enforce knowing the contact information for the institution, know where the institution’s record are, know who the students are and have been, know that the prospective students are being informed about the violations in order to make more informed decisions, and be able to enforce these requirements to gain greater compliance, and investigate whether there have been violations of the terms and conditions of probation.

The optional terms and conditions are available to be imposed based upon the type of violations found or admitted.

For violations of the laws and regulations related to the Student Tuition Reimbursement Fund (STRF), condition 16 is appropriate. Term 16 requires the filing of annual reports or STRF Reports because STRF violations involve violations of fee collections, remittance and reporting, warranting the submission of accurate reports. As the note to Term 16 states: “In disciplinary proceedings involving non- or under-payment of STRF assessments or annual fees, remitting those amounts and submitting or amending reporting documents is a necessary term of probation. Evidence relating to the amount of fees or assessments owed would have to be introduced at the Administrative hearing.”

Term 17 requires amending the School/Student Performance Fact Sheet. This term is recommended for consideration where the violations found involved an intentional or unintentional error or omission in the Fact Sheet, as in enrollment violations pursuant to the requirements of sections 94902-94912 of the Education Code. Because the California Private Postsecondary Education Act of 2009 achieves consumer protection primarily through disclosure of information rather than the ability to enforce a minimum quality of education, a necessary term of probation must be the dissemination or re-dissemination of accurate information.

Term 18 requires the appointment of an Operations Auditor or Billing Auditor. When an institution’s ability to operate independently is in doubt or when financial improprieties have occurred as a result of a deficiency in knowledge or skills, or as a result of questionable judgment, auditing is a recommended tool for ensuring appropriate and minimally competent operations, as in insufficient record-keeping violations (sections 94900-94900.5 of the Code), violations by a recruiter (section 94901), enrollment

violations (sections 94902-94912 of the Education Code), consumer loan violations (sections 94916, 94917, 94918 of the Education Code), cancellation, withdrawal, and refund violations (sections 94919, 94920, 94922 of the Education Code), closure and teach-out violations (sections 94926, 94927, or 94927.5 of the Education Code), violations involving the disclosure completion, placement, licensure, and salary data (sections 94929, 94929.5, or 94929.7 of the Education Code) failure to pay fees, and STRF violations (sections 76000, and 76120, 76130, 76140 of these regulations).

Term 19 requires suspension of operations. Suspension is not a recommended term for any particular violation or category of violations. Suspensions are warranted when it is necessary to protect the public to give the Bureau and the institution the time to ensure that the institution can operate without the risk of further harm to students.

Term 20 requires maintenance of student (academic and financial) records. This term is recommended when the institution is found to have engaged in inappropriate or improper records retention and maintenance procedures. Because proper records maintenance is so important to students who must often demonstrate the completion of an educational program for certification or licensure requirements, the Bureau must be able to ensure the institution is properly maintaining those records after a finding of a related violation.

Term 21 requires restitution to students. Where there has been a finding of a violation involving economic harm to students, restitution is recommended. This makes sense in order to help make students who have been economically harmed whole, such as when an institution was operating without an approval, where there has been an unfair business practice, changing or merging classes, wrongful collection of tuition, enrollment violations (sections 94902-94912 of the Education Code), consumer loan violations (sections 94916, 94917, 94918 of the Education Code), cancellation, withdrawal, and refund violations (sections 94919, 94920, 94922 of the Education Code), closure and teach-out violations (sections 94926, 94927, or 94927.5 of the Education Code), violations involving the disclosure completion, placement, licensure, and salary data (sections 94929, 94929.5, or 94929.7 of the Education Code), obtaining an approval to operate by fraud, and acts that would be grounds for denial under section 480 of the Business & Professions Code. While requiring other terms to help protect the public in the future will help, such as an auditor or providing notice or prospective students of violations, restitution is a very direct way in which to correct specific wrongs.

Term 22 requires that the institution provide the Bureau with a copy of the standard conditions of the criminal probation, copies of all criminal probation reports and the name of the probation officer. Where a violation has been found because of a criminal conviction, this helps the Bureau track whether the respondent is complying with all other laws and terms of probation. This is where there have been violations based upon criminal convictions, most likely where the approval has been obtained by fraud, and acts that constitute grounds for denial under section 480 of the Business & Professions Code.

Term 23 requires the replacement of an owner or person in control. This is recommended where the grounds for discipline involved the acts of a single owner or person in control without the knowledge of other owners or persons in control, such as making substantive changes without approval, obtaining an approval to operate by fraud, and acts that constitute grounds for denial under section 480 of the Business & Professions Code, and where revocation of the institution's approval to operate is not required to protect the public. However, the Bureau can protect the public by ensuring that the responsible person is no longer in control of the institution's operations.

Term 24 requires a respondent to relinquish Approval to Operate and Wall Certificate where there is a decision for surrender or revocation of an approval that is not stayed, most likely where approval to operate has been obtained by fraud, and where there have been acts that constitute grounds for denial under section 480 of the Business & Professions Code. This helps the Bureau protect the public by not allowing such a document to be misused by the respondent or anyone else.

Term 25 requires a respondent to cease enrollment of new students in all or specific educational programs or at a specific branch or location for a specified period of time. This term is to be used when recruiting and enrollment improprieties have occurred, as a result of a deficiency in knowledge or skills, or as a result of questionable judgment, or where a new branch or location was operating without approval, and cannot be approved. This allows the Bureau to protect the public by allowing operations to continue to give the institution an opportunity to come into compliance, and allow the current students to continue in their educational programs, but to not expand any found problems with a particular program or location by not increasing the student population in the programs or areas that are in violation. It is particularly effective because it can be aimed at a specific program, branch or location, and can be used in conjunction with the requirement of an operations or billing auditor who can ensure that enrollment is accomplished pursuant to permissible recruitment, enrollment, and billing statutes and regulations.

Term 26 requires notification to students regarding the cessation or suspension of operations. This requires respondent to comply with procedures provided by the Bureau regarding notification to, and management of, students. This is particularly useful where there are violations regarding unapproved operations, making substantial changes without approval, unfair business practices, improperly changing or suspending classes, wrongful collection of tuition, closure and teach-out violations, and any violation that would be grounds for denial or discipline under section 480 of the Business & Professions Code, since those are the types of violations where getting sufficient and accurate information to students regarding their educational programs and their rights under the statute is especially important.

Term 27 requires notification to students of their rights under STRF. Where there have been violations either caused by, or necessitating the closure of an institution or a program, notification of rights under STRF is a recommended term of probation.

Term 28 requires proposing a teach-out plan for the branch, satellite, or program at issue where there have been violations involving closure to adequately address the continuation of the educational programs for the currently enrolled students. This term should also be used together with the provision for cessation of enrollment to provide for an orderly closure with appropriate student protection.

Term 29 requires the payment of an administrative penalty. An administrative penalty is not a recommended term for any particular violation or category of violations, but are warranted where public protection can be advanced by the Bureau by financially motivating the institution to comply with the laws and regulations.

Enrollment and Cancellation, Withdrawal, or Refund Violations -- Sections 94902, 94922

In addition, the Bureau can take action for an enrollment violation, or for cancellation, withdrawal, or refund violations under sections 94902 or 94922 of the Education Code, respectively, when an institution has obtained a waiver of any of those provisions in contravention of the statute. It does not make sense to say that these sections apply only to students – the Bureau does not take action against students. It would not take action against a student because the student has decided to waive some of his or her rights. It would take an action against a school because that school has either required or negotiated the waiver by a student of his or her enumerated rights, which are not subject to waiver.

Moreover, the Bureau is entitled under section 94937 of the Education Code to take action to suspend, revoke, or place on probation an institution that has obtained an approval to operate by fraud, in addition to other material or repeated violations of the statute or regulations. Accordingly, it is clear that a finding of fraud in the obtaining of an approval to operate can be grounds for revoking or suspending that approval in an administrative proceeding even in the absence of a criminal conviction for fraud, a civil action where there is a finding of fraud, or some other statutorily stated grounds for discipline. Since it can be grounds for disciplinary action, it should be listed in the disciplinary guidelines.

Adopt Section 75100 (Suspension, Revocation, or Probation of Approval to Operate) to establish the definition of material violation and specify that suspension, revocation or probation actions shall take place under the administrative procedures act.

The following information is added to the Initial Statement of Reasons:

In this section, section 94937(a) is in part duplicated in subsection (a): “The Bureau may suspend, revoke or place on probation with terms and conditions an approval to operate.” This minor duplication is to provide context for the definition of “material violation,” in regards to the specification of proceedings under the APA, and for the adoption of an article (Article 3), entitled “Standards Related to Denial, Discipline, and Reinstatement of Approvals to Operate.”