

BUREAU OF PRIVATE POSTSECONDARY EDUCATION

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The Bureau for Private Postsecondary Education (BPPE) is responsible for oversight of private postsecondary educational institutions. All non-exempt private postsecondary educational institutions operating in California, regardless of the school's actual physical location, must be approved by BPPE to operate in the state. The Bureau regulates over 1,000 institutions. BPPE's enabling act, the California Private Postsecondary Education Act of 2009, is codified at Education Code section 94800 et seq. The powers and duties specified in the Act are vested in the Director of the Department of Consumer Affairs (DCA), which in turn delegates that responsibility to BPPE as a departmental bureau. BPPE's regulations are in Division 7.5, Title 5 of the California Code of Regulations (CCR).

Operating within, and as a part of, the larger DCA, the law establishes BPPE's purpose as (a) protecting students and consumers against fraud, misrepresentation, or other business practices at postsecondary institutions that may lead to loss of student tuition and related educational funds; (b) establishing and enforcing minimum standards for ethical business practices and the health, safety, and fiscal integrity of postsecondary institutions; and (c) establishing and enforcing minimum standards for instructional quality and institutional stability for all students.

Private for-profit schools are of particular concern within the education sector given the last two decades of alleged abuses. The number of private for-profit schools has grown substantially in number and student attendance since the 1980s, as has its share of major public education public subsidies. The rationale for their regulation combines two concerns: (1) the irreparable harm to

students from years of investment and student loans without graduation or employment results; and (2) the possible waste of substantial public financing. Increased scrutiny of the for-profit industry arose in the aftermath of a series of studies beginning with the 2012 U.S. Senate [Harkin Report](#), which documented a host of problems with for-profit schools, including misleading claims of graduation benefits, payment of commissions to salespersons based on the number of students recruited, low graduation rates, low job acquisition, and unpaid loan accumulation by students.

Federal Regulation

The regulatory picture of the private for-profit education industry is complicated by its national implications. As of 2015, private for-profit schools received an average of 86% of their revenue from federal grants and loans.¹ In addition to the U.S. Department of Education (USDOE) funds, private for-profits received a similar increase in federal GI bill funding from the U.S. Department of Veterans Affairs. Title 38 of the Code of Federal Regulations provides veterans with public funding for tuition payments and some living expense amounts as well.

Recent efforts to regulate at the federal level include a “gainful employment” rule intended to require a record of employment success for federal funds receipt and a system of loan repayment for students who have been defrauded or left with a closed school and no chance for graduation. Both are at risk in the current federal administration under USDOE Secretary Betsy DeVos. The DeVos USDOE has hired numerous former lobbyists and officials of the private for-profit

¹ According to the 2017-year version of the National Center for Education Statistics, which is part of the U.S. Department of Education’s Institute of Education Sciences, 86.5% of private for-profit undergraduate degree-granting institutions received federal financial aid, and 69.8% of the students received federal grant during school year 2015–16. While the number of institutions that received federal aid has declined since 2010–11, the data show little change in the percentage of such institutions receiving federal aid from 2010–11 through—the 2015–2016 school year (see [data](#)).

industry, including noted abusers, as department officials.²

Complicating state regulation of the private for-profits is the substantial delegation of state regulation under “State Authorization Reciprocity Agreements” (SARA). This system essentially allows a school to choose its own state regulator and then arrange reciprocal approval by other states—thus bypassing performance requirements and other regulation at the state level. To date, California is the only state declining to join SARA. Its entry would substantially impact BPPE’s regulatory powers, particularly given the growth of distance learning—where California students may be enrolled in schools with a situs in another state. Effective July 1, 2017, certain out-of-state private schools who enroll California resident students must register with the Bureau, pay a \$1,500 registration fee, and submit required documentation.

California Regulation

BPPE is governed by the California Private Postsecondary Education Act of 2009. The Bureau has authority to cite, revoke, suspend, place on probation, or bring an action for equitable relief against any approved institution if it violated applicable laws. Its jurisdiction includes all private educational institutions, including private non-profits. However, most of its regulatory focus has been on the for-profit sector which has manifested most severely the serious problems noted *supra*.

To implement its standards, the BPPE maintains an Enforcement Section to handle complaints, investigations, and other actions. The Bureau also reviews institution applications for initial and renewal approval to operate within California.

As a bureau within DCA, BPPE is not governed by a multimember board. Instead, BPPE

² See the extensive documentation in the [reporting](#) of journalist David Halperin.

operates under the oversight of a Bureau Chief appointed by the Governor and under the direct authority of the DCA Director. BPPE has a statutorily-mandated Advisory Committee tasked with advising BPPE on matters related to private postsecondary education and the administration of the Bureau's governing statutes, including an annual review of the fee schedule, licensing, and enforcement.

The twelve members of the Advisory Committee must include: three consumer advocates, one each appointed by the DCA Director, the Senate Rules Committee, and the Assembly Speaker; two current or past students of private postsecondary institutions appointed by the DCA Director; three representatives of private postsecondary institutions appointed by the DCA Director; two public members, one each appointed by the Senate Rules Committee and the Assembly Speaker; and two non-voting ex officio members (the chairs of the Senate and Assembly policy committees with jurisdiction over legislation relating to BPPE).

BPPE maintains the [Student Tuition Recovery Fund](#) (STRF) to mitigate student losses when institutions close, fail to pay or reimburse federal loan proceeds, or fail to pay judgments against them. The STRF is funded through student fees. Statutes require institutions to charge fifty cents per \$1,000 of institutional charges to be paid into the STRF. The 2017–18 state fiscal year's fund balance was \$26,295,000, and as of October 15, 2018, the fund balance is \$26,118,000.

BPPE also maintains the Office of Student Assistance and Relief (OSAR) to advance and promote the rights of students of private colleges and to assist students who suffer economic loss due to the unlawful activities or closure of a private college. The chief of the OSAR is statutorily required to attend, testify, and answer questions at each Advisory Committee meeting.

At this writing, the Advisory Committee has two vacancies: one for a past student of a private postsecondary institution and the other for a consumer advocate.

MAJOR PROJECTS

Regulating Out-of-State Institutions

◆ *Out-of-State School Registration Requirement.* Because California has not joined SARA, an out-of-state school which is initially authorized by a state other than California, must again be authorized by California for its distance education programs used by California students. [SB 1192 \(Hill\) \(Chapter 593, Statutes of 2016\)](#) required BPPE to implement regulations related to out-of-state postsecondary institutions. Although the Bureau had adopted Emergency Regulations that required out-of-state private postsecondary schools to register with the Bureau and participate in the STRF, the previous Emergency Regulations expired on February 27, 2018. Accordingly, the Bureau needed to adopt a replacement rule to provide the required “out-of-state school registration.”

On April 25, 2018, BPPE held a public hearing on its [proposal](#) to add Article 3.5 (commencing with section 71396) to Chapter 2 of Division 7.5, Title 5 of the CCR. BPPE originally published [notice](#) of its intent to add the Article on March 9, 2018, and according to its [Initial Statement of Reasons](#), it required out-of-state private postsecondary schools to register with the Bureau and participate in the STRF for California students in their respective distance education programs.

This proposal encompasses and makes permanent the Bureau’s Emergency Regulations to add section 71396 which sets forth the requirement for registration or re-registration of out-of-state institution applicants. [\[23:2 CRLR 195\]](#) BPPE also seeks to add section 71397 to provide procedures for the Bureau’s processing of out-of-state institution applications, and for appealing a denied application; section 71398 to set forth the procedures and requirements for re-registration; and section 71399 to specify the STRF requirements that the out-of-state institutions must follow.

On July 3, 2018, OAL approved the Bureau’s regulatory package with the exception of subdivision (c) of section 71398, which BPPE withdrew pursuant to the Government Code section 11349.3(c) after recognizing an inconsistency in the language as to the timing for re-registration.

On July 5, 2018, BPPE proposed [modified text](#) to section 71398(c) to clarify that if BPPE receives a fully compliant re-registration application before the registration’s expiration, the out-of-state institution shall be deemed re-registered. Public comment on the modified text expired on July 22, 2018. At this writing, DCA is reviewing the final rulemaking file for section 71398(c).

New sections 71396, 71397, and 71398 (except for the withdrawn subdivision (c)) became effective on July 3, 2018. New section 71399 became effective on October 1, 2018.

Section 100 Filing—Change Without Regulatory Effect³

On May 8, 2018, OAL filed a change of section 75020(b), title 5, CCR with the California Secretary of State. This change, which BPPE originally submitted to OAL, updated the maximum administrative fine from \$50,000 to \$100,000, following the change of section 94944 of the California Education Code (CEC). CEC section 94944 originally provided that any person who was cited by BPPE shall be subject to a fine not to exceed \$50,000, for operating an institution without proper approval to operate issued by the Bureau, and CCR section 75020(b) provided that BPPE was authorized to issue citations containing orders of abatement and administrative fines not to exceed \$50,000 pursuant to CEC section 94944. However, [SB 1192 \(Hill\) \(Chapter 593,](#)

³ According to section 100 of title 1 of the CCR, if OAL determines that the change submitted by an agency is a change without regulatory effect, *i.e.* does not materially alter any regulatory element of any CCR provision, the agency may add to, revise, or delete such text without complying with the rulemaking procedure. Because this change need not so comply, “Notice,” “Statement of Reasons,” and “Text” are not published on the California Regulatory Notice Register. “Summary of Regulatory Actions” in the California Regulatory Notice Register lists this “change without regulatory effect,” which is known as a “section 100 filing.”

[Statutes of 2016](#)) amended CEC section 94944 to change the maximum allowable fine from \$50,000 to \$100,000, and accordingly, CCR section 75020(b) was inconsistent with CEC section 94944. Accordingly, BPPE amended CCR section 75020, and OAL approved it, meeting the requirements of 1 CCR, title 1, section 100, and filed with the Secretary of State.

Adjudication

Assessments of Fines and Orders of Abatement

During the coverage period of this Reporter, BPPE has issued orders of abatement and imposed fines to the following institutions:

- American Liberty University (September 6, 2018)
- Avid Career College (August 16, 2018)
- Black Fox Timber Management Group Inc. (August 9, 2018)
- Blush School of Makeup (August 10, 2018)
- Brandon College (August 10, 2018)
- California Career School (May 10, 2018)
- California International Theological Seminary (September 28, 2018)
- Camino Real Career Schools (August 17, 2018)
- Capstone Pacific College (April 26, 2018)
- Cen Beauty Academy, Inc. (August 17, 2018)
- Codify Academy (May 10, 2018)
- Code District (May 10, 2018)
- Creative Career Options (August 17, 2018)
- Crescent College, Inc. (April 30, 2018)
- Design's School of Cosmetology (August 20, 2018)
- Dessin Design College (October 10, 2018)
- Dialysis Career Institute, Inc. (August 20, 2018)
- Difai City College (April 30, 2018)
- Dunnhill Barber Academy (April 26, 2018)
- Explore Beyond ESL, Inc. (April 30, 2018)
- Exquisite Permanent Makeup & Training Center (September 6, 2018)
- Flawless Make-up Academy (September 7, 2018)
- Financial Recovery Institute (August 2, 2018)
- Future College America (September 18, 2018)
- Geos Languages Plus-Los Angeles (August 20, 2018)
- Herguan University (July 27, 2018)
- International Education Center (August 21, 2018)
- International Public Safety United (May 17, 2018)

- International Theological Seminary (August 21, 2018)
- International University of California (August 10, 2018)
- John Lopez Welding School (May 10, 2018)
- Kamana Academy (July 10, 2018)
- Kingston University (May 30, 2018)
- LA Barber School (May 17, 2018)
- Learn Academy (July 16, 2018)
- Lions Den Barber Lounge (July 25, 2018)
- Magnum Security Academy (September 7, 2018)
- Make School, Inc. (May 2, 2018)
- Master Truck School (April 30, 2018)
- MD Mobile Labs, Inc. (July 25, 2018)
- Newport International University (June 12, 2018)
- Origin Code Academy (May 16, 2018)
- Park University (August 9, 2018)
- Princess Institute of Beauty (August 8, 2018)
- Private Security Training Center (June 5, 2018)
- Revere Academy of Jewelry Arts (April 20, 2018)
- Rithm School (April 27, 2018)
- Royal Thai Holistic Massage Institute (August 8, 2018)
- Ruby Makeup Academy (July 13, 2018)
- Santa Monica Montessori, Inc. (August 8, 2018)
- School of Self-Healing (August 8, 2018)
- School of Trucking (September 6, 2018)
- Southern California International University (April 20, 2018)
- Sum Bible College (August 8, 2018)
- TCA Business Institute (April 26, 2018)
- The University of America (September 7, 2018)
- Toni & Guy Hairdressing Academy (April 20, 2018)
- Tri Med Institute, Inc. (May 21, 2018)
- Trinity International University (August 8, 2018)
- Trinity School of Health and Allied Sciences (August 15, 2018)
- Union University of California (June 19, 2018)
- United Medical Institute (May 9, 2018)
- Warner Pacific College (August 8, 2018)
- Xavier College (August 8, 2018)

Accusations of Violations

BPPE filed accusations—requesting revocation or suspension of previous approvals to operate—against the following institutions:

- American Beauty Institute: [Accusation](#) of violations, including failure to maintain a cancellation and withdrawal log, failure to maintain verification of high school completion of students, and failure to have faculty files immediately available for inspection (August 27, 2018).
- John Ridgel’s Academy of Beauty, Inc.: [Accusation](#) of violations, including failure to obtain authorization required for substantive change, unapproved programs, failure to maintain financial resources, and institutional record violations (July 20, 2018).
- Orange Valley College: [Accusation](#) of violations, including misleading statements in enrollment agreement, misleading statements regarding attendance and grades, failure to meet minimum requirements for instructors in educational program, and failure to provide School Performance Fact Sheet (July 20, 2018).
- Queenston College of America: [Accusation](#) of violations, including failure to verify high school completion in student record, failure to comply with STRF record-keeping requirements, and failure to report correct job placement rates (July 20, 2018).
- Silicon Valley University: [First Amended Accusation](#) of violations, including failure to provide each student with a syllabus or course outline, submission of inaccurate STRF Assessment Reporting forms, failure to maintain student records, and failure to maintain accreditation from an accrediting agency (April 26, 2018).

Statements of Issues to Deny Approval

BPPE filed statements of issues against following institutions, to deny approvals to operate, alleging that institutions failed to file required documentation compliant with the California Private Postsecondary Education Act of 2009 and with other applicable law:

- A-1 Truck Driving School, Inc. ([Second Amended Statement of Issues](#) on September 20, 2018)
- Giglia College ([Statement of Issues](#) on May 21, 2018)
- H & H Truck Driving School ([Statement of Issues](#) on April 26, 2018)
- Los Angeles Beauty College ([First Amended Statement of Issues](#) on October 9, 2018)
- Online Vocational Academy, Inc. ([Statement of Issues](#) on June 25, 2018)

- The Brothers & Sisters Barbercosmo Academy ([Fourth Amended Statement of Issues](#) on June 5, 2018. [Decision and Order](#), on October 8, 2018, denied the approval but stayed the denial to allow the institution to comply with Education Code)
- Vocational Technical School ([Statement of Issues](#) on August 6, 2018)

LEGISLATION

[SB 1348 \(Pan\)](#), as amended August 24, 2018, as it applies to BPPE, amends section 94934 of the Education Code to require postsecondary institutions to report in their annual compliance reports specific information about programs for health certificates or degrees where practice requires clinical training. According to the author, “without adequate data to effectively align educational programs, clinical training sites, and projected allied healthcare workforce demands and shortages, California’s system of higher education will be unable to track openings and place students in the clinical internships they need.” One of the underlying problems of concern occurs with a lengthy and expensive education that does not lead to the clinical training necessary for remunerative practice. Thus, new section 94934 requires private postsecondary institutions that offer certificates or degrees regarding allied health professions, to include in their respective annual reports: (1) the number of students participating at each clinical training site, (2) information about proficiency in languages other than English, (3) whether any donation, money, compensation, or exchange of consideration was offered or provided to the business, nonprofit, or other organization, clinic, hospital, or other location where the student was placed and, if so, the amount, and (4) the licensed number of each such clinical training site or its employer identification number. Although this bill does not directly require BPPE to affirmatively act, it will include the requirements in its review of compliance.

Governor Brown signed SB 1348 on September 28, 2018 (Chapter 901, Statutes of 2018).

[SB 1492 \(Committee on Business, Professions and Economic Development\)](#), as amended on August 20, 2018, alters sections 94874, 94880, 94927.5, and 94947 of the Education Code to propose minor, technical, and updating changes. While a previous statute required a closing institution to provide BPPE with pertinent student records, this Bill would make it clear that the institution keep original records and provide the Bureau with copies (amendment of section 94927.5). More important, the bill also clarifies that institutions must comply with this submission requirement regardless of their exempt status from the California Private Postsecondary Education Act of 2009 (amendment of section 94874). In addition, while a previous statute defined the requirement for a quorum for the BPPE advisory committee to be a majority of the appointed members of the committee, this Bill would make it clear that a majority of the appointed “voting members” (a smaller number) is required (amendment of section 94880).

Governor Brown signed SB 1492 on September 14, 2018 (Chapter 422, Statutes of 2018).

[AB 1858 \(Calderon\)](#), as amended on August 24, 2018, adds sections 94912.5 to the Education Code. It requires, by January 1, 2020, all California higher education institutions to use the United States Department of Education’s [Financial Aid Shopping Sheet](#) to inform students or potential students of financial aid award packages.

Governor Brown signed AB 1858 on September 22, 2018 (Chapter 671, Statutes of 2018).

LITIGATION

◆ *California v. Ashford University, L.L.C.* On August 14, 2018, the California Superior Court, Alameda County, completed its Case Management Conference in *California v. Ashford University, L.L.C.*, Case RG17883963 (Alameda Super Ct.). Specifically, the Court granted the motion to transfer venue. Then on November 29, 2017, California Attorney General Xavier Becerra filed a [complaint](#) against Ashford University, L.L.C., and its parent corporation,

Bridgepoint Education, Inc. The complaint seeks civil penalties, a permanent injunction, and other equitable relief, alleging that the school made many misrepresentations to students in an effort to maximize enrollment and profit. If the Court finds such misrepresentations, it will trigger equitable remedies (including possible injunctive relief and civil penalties). If such findings occur and in addition to those remedies, California residents will be able to file a related complaint with BPPE, which may invoke its powers, including disapproval of continued approval and eligibility for tuition restitution. At this writing, a further Case Management Conference is scheduled on October 23, 2018.

In addition, the California State Approving Agency for Veterans Education (CSAAVE), part of the state's agency for veterans' affairs charged with approving schools for Title 38 GI Bill eligibility, has suspended approval of Ashford pending the outcome of the above proceedings. That state agency is delegated the task of such approval—a major role in regulation of the schools private for-profit schools relying substantially federal Title 38 veterans' benefit funding. There are concerns that the federal Office of Veterans Administration opposes sanctions or suspension of approval for Ashford schools and may possibly attempt to intervene against California enforcement. There are additional concerns about Ashford and other allegedly violative for-profits seeking to obtain possibly illusory “non-profit legal status” to facilitate future operations.

◆ *Pacific Coast Horseshoeing School, Inc. v. Dean Grafilo*. On May 9, 2018, in *Pacific Coast Horseshoeing School, Inc. v. Dean Grafilo*, 315 F. Supp. 3d 1195 (E.D. Cal. 2018), the plaintiffs filed an appeal with the United States Court of Appeals for the Ninth Circuit. Plaintiffs are, respectively, a horseshoeing school and a student who did not have his high school diploma or pass an equivalency examination. The school wanted to admit the plaintiff student but was compelled to reject his application because he did not meet ability-to-benefit requirements under

the California Private Postsecondary Education Act of 2009 (“the Act”). On October 23, 2017, plaintiffs filed a [complaint](#) with the U.S. District Court for the Eastern District of California against Dean Grafilo, in his official capacity as Director of DCA, and Michael Marion, as chief of BPPE. Plaintiffs alleged that the Act violated the First Amendment freedom of speech of those who wanted to teach horseshoeing and those who wanted to learn it because the Act required unnecessary ability-to-benefit examination for horseshoeing.

The District Court’s ruling was in favor of defendants. The Court held that the Act’s requirement did not violate the First Amendment by applying rational basis review because the Act regulated non-expressive conduct. *Id.* at 1201. The Court reasoned that California had a legitimate interest in prohibiting private postsecondary schools from harming students and such interest in preventing harm was rationally related to the ability-to-benefit requirement. The argument of the State included the “legitimate state interest” in preventing the irreparable harm of burdening students with financial debt and years of travail without legitimate prospect of beneficial result.⁴

If the appellate court were to find the Act’s requirement unconstitutional, BPPE may be impeded from taking disciplinary actions against private postsecondary institutions that admit students who do not meet ability-to-benefit requirement. At this writing, the Court has reviewed *amici* briefs.

⁴ Arguably, the involvement of the state in terms of school subsidy and financing, as well as the implications of irreparable harm from student debt, may elevate the interest of the state from “legitimate” to “compelling.” Such a status may follow the inability of education loans to be discharged, even via bankruptcy, and the public costs that attend private credit ruination.

Cases Against U.S. Department of Education for Failure to Grant Relief

The following 4 cases—(a) *California v. U.S. Department of Education*, Case 3:17-cv-07106 (N.D. Cal.), (b) *Calvillo Manriquez v. DeVos*, Case 3:17-cv-07210 (N.D. Cal.), (c) *Bauer v. DeVos*, Case No. 17-1330 (D.D.C.), and (d) *California Ass’n of Private Postsecondary Schools v. DeVos*, Case 17-999 (D.D.C.)—were filed against the U.S. Department of Education and Betsy DeVos, in her official capacity as Secretary of Education. Note that although a resulting adverse court order would not directly apply to BPPE, if the courts do not compel the Department to grant full relief, the students will likely apply for California STRF reimbursement for the failure to recover their prepaid tuition from the school.

(a) On September 12, 2018, in *California v. U.S. Department of Education*, Case 3:17-cv-07106, the U.S. District Court for the Northern District of California issued an order that approved a Briefing Schedule for Defendant’s Motion to Dismiss. On December 14, 2017, California Attorney General Xavier Becerra had filed a [complaint](#) against the U.S. Department of Education and Betsy DeVos, in her official capacity as Secretary of Education. Plaintiff alleged that the Department unreasonably delayed approval of more than 50,000 federal loan forgiveness claims submitted by former Corinthian College students and denied granting expedited, full relief to the borrowers. Note that Corinthian was successfully sued by the Attorney General for unfair competition and numerous violations of law, which resulted in its closure. As of this writing, the Hearing for Motion to Dismiss for lack of jurisdiction filed by Secretary DeVos has been set for December 17, 2018.

(b) On October 15, 2018, in *Calvillo Manriquez v. DeVos*, Case 3:17-cv-07210, the U.S. District Court, Northern District of California granted plaintiffs’ motion for class certification,

permitting plaintiffs to pursue the case as a class action. Plaintiffs are former Corinthian College students who attended the institution because of its misrepresentation of its education quality and job placement rates. Under the Borrower Defense Regulations of the U.S. Department of Education, the Department determined that the plaintiffs are entitled to have their federal student loans discharged because of Corinthian's illegal conduct. On December 20, 2017, plaintiffs filed a complaint against the U.S. Department of Education and Betsy DeVos, in her official capacity as Secretary of Education. Plaintiffs alleges that although the Department designed a special rule for former Corinthian students, it has unlawfully withheld application of the rule to the students' borrower defense claims. The Complaint contends that the Department has illegally and unfairly denied relief to the students. At this writing, this lawsuit is in the discovery stage.

(c) In *Bauer v. DeVos*, Case No. 17-1330, the DC Circuit has been controlling the timing of borrower relief against Department of Education attempts to delay or prevent those remedies for alleged student victims.

On November 1, 2016, the U.S. Department of Education issued the Borrower Defense Regulations ("Regulations") for borrowers who receive educational loans from the federal government. This Regulation prevented schools from obtaining a borrower's waiver of his or her right to initiate or participate in a class action lawsuit against school's misconduct or from requiring students to engage in a dispute resolution process before contacting government agencies. To explain, under the *Concepcion* doctrine, a controversial 5-4 U.S. Supreme Court decision, a commercial entity, including a school, may include a "term and condition" in a consumer (student) contract requiring only arbitration to enforce contract violations and categorically precluding class actions. As a practical matter, the resolution of borrower rights by thousands of students *vis-à-vis* a school only by individual arbitration is unworkable. The

purported basis for that holding is the Federal Arbitration Act and it may supersede contrary state law. But where federal funding is involved, the grouping of victims for efficient resolution may be possible. Accordingly, federal Department of Education authorized such groupings—aware that they are an essential practical prerequisite to recovery.

However, the DeVos Department has opposed and attempted to negate that rule adopted by the previous administration. On June 16, 2017, the Department issued a stay pursuant to the APA section 705, to postpone their effective date (a “Section 705 Stay”) On July 6, 2017, students, coalition of states, and District of Columbia filed this complaint against the U.S. Department of Education and Betsy DeVos, in her official capacity as Secretary of Education. The plaintiffs challenged the Department’s delay in implementation of Regulations. In addition to the Section 705 Stay, on February 14, 2018, the Department issued its own alleged final rule that delayed the effective date of the Regulations until July 1, 2019 (“Final Delay Rule”). This Final Delay Rule was meaningful because even if the Department lifted the Section 705 Stay before July 1, 2019, this “Final Delay Rule” could independently postpone the effective date of the Regulations until at least that date.

On September 12, 2018, the Court granted plaintiff’s motion for summary judgment, holding that the Final Delay Rule and Section 705 Stay were both unlawful. *Bauer v. DeVos*, 325 F. Supp. 3d 74, 74 (2018). The Court reasoned that issuance of the Final Delay Rule failed to comply with the Higher Education Act procedures and that Section 705 Stay was arbitrary and capricious. *Id.* at 97–98, 108–110.

In the Status Conference on September 14, 2018, all parties agreed on the Final Delay Rule’s vacatur as an appropriate remedy. *Bauer v. DeVos*, 332 F. Supp. 3d 181, 184–85 (D.D.C. 2018). However, while the plaintiffs asked the Section 705 Stay’s immediate vacatur as well, the

Department argued that remand without vacatur (allowing the 705 suspension to remain in effect) would be a more appropriate remedy. On September 17, 2018, the Court ordered that the Section 705 Stay to be vacated, with the vacatur stayed only until October 12, 2018. In other words the Department's supposed suspension of the previous rule allowing borrower group remedies would end on October 12. That three week extension to the unilateral suspension of the rule was approved to allow the Department to attempt to remedy the deficiencies in the purported "Section 705 Stay." *Id.* at 185–86. As of this writing the parties had not appealed.

(c) On September 14, 2018, in *California Ass'n of Private Postsecondary Schools v. DeVos*, Case 17-999, the United States District Court for District of Columbia held a Status Conference. The California Association of Private Postsecondary Schools (CAPPS) represents schools subject to the Borrower Defense Regulations ("Regulations"). On May 24, 2017, CAPPS filed a complaint against the U.S. Department of Education and Betsy DeVos, in her official capacity as Secretary of Education. CAPPS sought a preliminary injunction against provisions of the Obama administration regulations allowing group remedies. CAPPS seeks the confinement of remedies to individual arbitrations and affirmation of their "term and condition" student contract clauses precluding class actions. CAPPS alleges that the existing regulations exceed the Department's statutory authority under the Higher Education Act, that the regulations are arbitrary and capricious, and that they violate the Due Process Clause of the U.S. Constitution. They contend that the Borrow Defense Provisions in the rule allowing group remedies would allegedly deprive private postsecondary schools of the "right to be heard and to present evidence" and because Arbitration and Class Action Provisions retroactively "void private contracts." At this writing, the Court's issuance of Memorandum Opinion and Order is scheduled on October 16, 2018.

RECENT MEETINGS

At its May 15, 2018 [meeting](#), Dr. Michael Marion, Jr., the Bureau Chief, stated that BPPE's draft on the regulation of "English as a Second Language Programs" (Section 70000(k), Title 5 of CCR) was under review by DCA. Some public comment contended that if the draft were approved, its latitude might hinder the Bureau's duty to protect students.

Dr. Marion's remarks also noted that the Bureau's draft of Application for Verification of Exempt Status was under review by OAL.

Acknowledging that many questions had arisen regarding Income-Share Agreements (ISA) and how they related to the Bureau's structure, the meeting included discussion of such ISAs in private postsecondary education. According to Tonio DeSorrento, CEO of a company that provides and services ISAs to students, an ISA exists where a school credits tuition into a student's account in exchange for the student's promise to pay a percentage of his or her post graduate income during a designated time period. He stated that the ISA gives schools the incentive to ensure that its graduates get jobs that pay a fair salary and helps alleviate the debt to income ratios for graduates. He contended that his company provides consumer protections in ISAs, such as payment caps, minimum income thresholds, maximum payment terms, no control over students' post graduate choices, disclosures, and interactive financial literacy.

At its August 16, 2018 [meeting](#), Dr. Marion stated that the BPPE's draft of the regulation of "English as a Second Language Programs" (Section 70000(k), Title 5 of CCR) was under review by DCA. Dr. Marion also noted that the Bureau's draft of Application for Verification of Exempt Status was also under review by DCA and the Bureau.

According to Beth Scott, BPPE Compliance Inspections Chief, the Bureau has collaborated with other boards and bureaus for efficient investigations. She cited data indicating that the number

of Bureau inspections was increasing. She also stated that the Bureau recently started proactive and direct assistance to new schools regarding their mandatory annual report submission process.

According to BPPE Complaint Investigations Chief Yvette Johnson, the Bureau has established a specialized team to help students who seek for tuition refunds—a growing issue for the Bureau given the increase in school prosecutions and closures.