Education

Cyberbullying in Schools: Chapter 157 Updates the Law on Suspension for Online Conduct

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Code Section Affected

Education Code § 48900 (amended).
AB 1732 (Campos); 2012 STAT. Ch. 157.

I. INTRODUCTION

On May 2, 2012, a Palm Desert High School student climbed to the roof of his school and threatened suicide.[1] As school and law enforcement officials negotiated with the teen, some of his classmates took photos of the ordeal to share online.[2] Others complained that the suicidal boy was delaying their lunch period, posting remarks like "just jump already . . . im [sic] hungry" on popular social networking websites like Twitter and Facebook.[3]

Commentators say the problem of online bullying, or "cyberbullying," is becoming an epidemic.[4] Media outlets across the nation have increasingly reported on the connections between teen suicide and the creation of false profiles[5] and "burn pages,"[6] which are webpages "dedicated to the person being

1. Kate McGinty & Michelle Mitchell, *Kids Face Sanctions for Posts During Suicide Threat*, DESERT SUN, May 3, 2012.

2. *Id.*

3. *Id.*

4. Hannah Dreier, *Policing Cyberbullying: Unanimous Assembly OKs Measure to Expand Schools' Disciplinary Power Online,* SAN JOSE MERCURY NEWS, Apr. 17, 2012, at B1; *see also* NAT'L ASS'N OF ATTORNEYS GEN., TASK FORCE ON SCH. & CAMPUS SAFETY, REPORT AND RECOMMENDATION 3, 4 (2007), *available at* http://www.doj.state.or.us/hot_topics/pdf/naag_campus_safety_task_force_report.pdf (on file with the *McGeorge Law Review*) (warning of the need to address the growing problem of bullying through the use of technology and social networking sites); *see also* CTR. FOR DISEASE CONTROL & PREVENTION, STATE AND LOCAL YOUTH RISK BEHAVIOR SURVEY 6, 7 (2011), *available at* http://www.cdc.gov/healthyyouth/yrbs/pdf/questionnaire/2011_hs_questionnaire.pdf (on file with the *McGeorge Law Review*) (adding a question about cyberbullying to the biannual youth risk behavior survey for the first time). *See generally* Data Memo by Amanda Lenhart, Pew Internet & Am. Life Project, Re: Cyber Bullying and Teens (June 27, 2007), *available at* http://www.pewinternet.org/Reports/2007/Cyberbullying/1-Findings.aspx (on file with the *McGeorge Law Review*) (summarizing the rising prevalence of cyber bullying in American schools).

5. *See, e.g.*, Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23 (reporting on a thirteen-year-old Missouri girl who committed suicide after a friend's mother created a fictitious profile impersonating a sixteen-year-old boy, befriended the girl online, dumped her, and posted cruel messages about her on social media websites).

6. Dreier, *supra* note 4; *see also* Kamala D. Harris, *Digital Citizenship Must Be Taught to Halt Bullying*, SAN JOSE MERCURY NEWS, Oct. 16, 2011, at A14 (editorial from the California Attorney General discussing a Massachusetts girl who committed suicide due to online bullying and a California girl who was traumatized by

bullied [where] everyone . . . writes hurtful, demeaning things about those students."[7] The growing popularity of "burn pages" is connected to the 2004 cult film "Mean Girls," in which a group of high school girls write hurtful gossip about their classmates in a notebook called a "burn book," one of whom ultimately distributes copies of the book to the student body.[8] Assembly Member Nora Campos introduced Chapter 157 in order to direct legislative attention toward the new and different ways that students today are engaging in bullying.[9]

II. LEGAL BACKGROUND

California's legislature has recently enacted laws that address the growing ways social media websites can be used to bully students.[10] California's original cyberbullying laws were written in 2006, "before social networking had become an integral part of teen life."[11] Lawmakers have begun to respond to the recent rise in popularity of cyberbullying, as well as its tragic impacts, by enacting legislation that targets bullying through social media and the Internet.[12] Last year, new legislation amended the definition of "bullying" to include "any severe or pervasive physical or verbal act or conduct, including communications made . . . by means of an electronic act."[13] Shortly after, the legislature expanded the definition of bullying via electronic act to include "a post on a social network Internet Web site."[14] Lawmakers cite to the expansive and pervasive nature of cyberbullying[15] and the constant evolution of cyberbullying methods[16] as reasons to enact wider-reaching legislation that addresses cyberbullying in schools.[17]

harassment on a burn page).

7. Shawn S. Lealos, *California Passes New Laws to Fight Cyberbullying*, EXAMINER (Apr. 16, 2012), http://www.examiner.com/article/california-passes-new-laws-to-fight-cyberbullying (on file with the *McGeorge Law Review*).

8. Dreier, *supra* note 4.

9. Lealos, *supra* note 7 (quoting Assembly Member Nora Campos: "People today are bullying in a very different way . . . . I want to make sure that there are no loopholes.").

10. *See, e.g.*, CAL. EDUC. CODE § 48900(r)(1) (West Supp. 2012) (changing the definition of bullying to include electronic acts); *id.* § 32261(g) (adding "a post on a social network Internet Web site" to the definition of bullying via an electronic act).

11. Dreier, *supra* note 4.

12. *Cyber-Bullying Now Grounds for Expulsion at CA Schools*, EDUC. NEWS (July 12, 2011), www.educationnews.org/ednews_today/158615.html (on file with the *McGeorge Law Review*).

13. EDUC. § 48900(r)(1). Prior to this legislation, an electronic act within the meaning of "bullying" did not include transmission on a social network site. *Cyber-bullying Now Grounds for Expulsion at CA Schools*, *supra* note 12.

14. EDUC. § 48900(r)(2).

15. Press Release, Office of Congresswoman Linda Sanchez, Linda Sanchez Applauds Passage of Cyberbullying Legislation (Apr. 18, 2012), *available at* http://lindasanchez.house.gov/index.php?option=com_content&task=view&id=712&Itemid=57 (on file with the *McGeorge Law Review*) (quoting Congressional Representative Linda Sanchez of California: "Bullying doesn't just take place in the schoolyard anymore. It's happening in the virtual world and our children can now be bullied any hour of the day or night—even in their own homes. [Chapter 157] is an important step in making California schools safer.").

A. Existing Law on Cyberbullying

California law prohibits the suspension or recommendation for expulsion of a student from school unless the student commits any of various specified acts,[18] including, but not limited to, "[e]ngag[ing] in an act of bullying."[19] Bullying is defined as "any severe or pervasive physical or verbal act or conduct, including communications made in writing or [through] an electronic act," directed toward one or more students.[20] An act that is considered bullying under the statutory definition either "has or reasonably can be predicted to have the effect"[21] of "placing a reasonable pupil in fear of harm . . . [to their] person or property"[22] or "causing a reasonable pupil to experience a substantially detrimental effect on his or her mental health,"[23] academic performance,[24] or "ability to participate in or benefit from the services, activities, or privileges provided by a school."[25] The definition of electronic act under existing law includes the transmission of "a message, text, sound, or image,"[26] as well as "a post on a social network Internet Web site."[27]

Schools may also suspend or expel a student for engaging in "harassment, threats, or intimidation, directed either towards school personnel or towards students."[28] This conduct must be "severe or pervasive enough to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or students by creating an intimidating or hostile educational environment."[29]

16. Dreier, *supra* note 4 (reporting Assembly Member Nora Campos's decision to continue updating the list of bullying offenses "because young people use [the Internet] more than adults, sometimes we don't get current information as quick as we should.").

17. *See* Tanya Roscorla, *California Clarifies Cyberbullying Law to Include Social Networks*, CTR. FOR DIGITAL EDUC. (July 18, 2011), http://www.centerdigitaled.com/policy/California-Clarifies-Cyberbullying-Law.html (on file with the *McGeorge Law Review*) (commenting on the need to constantly address the changes in technology in California law's provisions on bullying).

18. EDUC. § 48900.

19. *Id.* § 48900(r).

20. *Id.* § 48900(r)(1).

21. *Id.*

22. *Id.* § 48900(r)(1)(A).

23. *Id.* § 48900(r)(1)(B).

24. *Id.* § 48900(r)(1)(C).

25. *Id.* § 48900(r)(1)(D).

26. *Id.* § 48900(r)(2).

27. *Id.* § 48900(r)(2).

28. *Id.* § 48900.4 (West 2006).

29. *Id.*

B. Suspension and Federal Constitutional Concerns

Schools may suspend or expel students for acts that relate to school activities or attendance.[30] These include acts performed while the student is on school grounds,[31] during lunch, on or off campus,[32] while going to and from school,[33] or while attending a school-sponsored activity.[34] Because public instruction is a fundamental right, a due process hearing is required before suspending or expelling a student.[35] Although this due process requirement is not "inflexible and universally applicable," a student threatened with deprivation of the right to public instruction at public expense is entitled to notice of the grounds of removal and an opportunity to be heard that is "appropriate to the nature of the case."[36]

The California Sixth District Court of Appeal has ruled that disciplinary action is contingent upon whether the action causes a substantial disruption to schoolwork or school activities.[37] If a school suspends a student whose actions did not cause substantial disruption, in certain contexts the suspension or expulsion could constitute a violation of the Federal Constitution's First Amendment protections of freedom of speech.[38]

In *Tinker v. Des Moines Independent Community School District*, three students were suspended for wearing black armbands to school to protest the Vietnam War after principals of the Des Moines schools adopted a policy of suspending students for such conduct.[39] The United States Supreme Court held that the First Amendment applied to minors in public schools,[40] and administrators who regulated speech would have to demonstrate constitutionally

30. *Id.* § 48900(s); *see also* Baker v. Downy City Bd. of Educ., 307 F. Supp. 517, 526 (C.D. Cal. 1969) (holding that when the bounds of decency are violated in publications distributed to high school students, whether on campus or off campus, the offenders become subject to discipline).

31. EDUC. § 48900(s)(1).

32. *Id.* § 48900(s)(3).

33. *Id.* § 48900(s)(2).

34. *Id.* § 48900(s)(4).

35. Goss v. Lopez, 419 U.S. 565, 574 (1975).

36. Abella v. Riverside Unified Sch. Dist., 65 Cal. App. 3d 153, 169, 135 Cal. Rptr. 177, 187 (4th Dist. 1976).

37. *See* Fremont Union High Sch. Dist. v. Santa Clara Cnty. Bd. of Educ., 235 Cal. App. 3d 1182, 1186–88, 386 Cal. Rptr. 915, 917–18 (6th Dist. 1991) (holding that a student could be expelled after using a stun gun during an altercation with another student during school hours on a campus that the expelled student did not attend because "related to school attendance" does not mean the act must be related to the school the student was attending or their own school activity because the act's connection to school attendance or school activity is the determinative aspect; thus, there is no rational basis for differentiating among acts that occur on a student's own campus and acts that occur on the campus of another student).

38. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (establishing the "*Tinker* test" for whether a school's disciplinary actions violate students' first amendment rights).

39. *Id.* at 504.

40. *Id.* at 506 (reasoning that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

valid reasons for doing so.[41] Following *Tinker*, schools may forbid conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[42] If the student's act does not reach this level of disruption, the student's activity is constitutionally protected.[43]

III. CHAPTER 157

Chapter 157 allows schools to suspend or expel students who participate in bullying through electronic acts.[44] Electronic acts include posting on a social networking site by participating in a "burn page,"[45] "[c]reating a credible impersonation of another actual person,"[46] or "[c]reating a false profile."[47] A "burn page" is "an Internet Web site created for the purposes of"[48] putting a reasonable student in fear of harm to their person or property[49] or "causing a reasonable student to experience substantial interference with his or her physical or mental health,[50]. . . academic performance,[51]. . . [or] ability to benefit from [school] services, activities or privileges."[52] Chapter 157 defines a "credible impersonation" as "knowingly and without consent" impersonating a student "for the purpose of bullying . . . such that another pupil would reasonably believe, or has reasonably believed, that the pupil was or is the person who was impersonated."[53] A "false profile" is "a profile of a fictitious pupil or a profile using the likeness or attributes of an actual pupil other than the pupil who created the false profile."[54] Chapter 157 also states, "an electronic act shall not constitute pervasive conduct," as required by the definition of bullying, "solely on the basis

41. *Id.* at 509 (requiring school officials to justify the prohibition of a particular expression of opinion by showing "that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

42. *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

43. *Id.* at 514 (holding that the actions of the suspended Des Moines students in wearing armbands protesting the Vietnam war did not cause a material and substantial interference and the activity thus represented constitutionally protected symbolic speech).

44. CAL. EDUC. CODE § 48900(r) (amended by Chapter 157); ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1732, at 1 (Mar. 28, 2012).

45. EDUC. § 48900(r)(2)(A)(ii)(I) (amended by Chapter 157).

46. *Id.* § 48900(r)(2)(A)(ii)(II) (amended by Chapter 157).

47. *Id.* § 48900(r)(2)(A)(ii)(III) (amended by Chapter 157).

48. *Id.* § 48900(r)(2)(A)(ii)(I) (amended by Chapter 157).

49. *Id.* § 48900(r)(1), (r)(1)(A) (amended by Chapter 157).

50. *Id.* § 48900(r)(1)(B) (amended by Chapter 157).

51. *Id.* § 48900(r)(1)(C) (amended by Chapter 157).

52. *Id.* § 48900(r)(1)(D) (amended by Chapter 157).

53. *Id.* § 48900(r)(2)(A)(ii)(II) (amended by Chapter 157).

54. *Id.* § 48900(r)(2)(A)(ii)(III) (amended by Chapter 157).

that it was been transmitted on the Internet or is currently posted on the Internet."[55]

IV. ANALYSIS

Chapter 157 was enacted to adapt California law to new cyberbullying technology.[56] Burn pages, credible impersonations, and false profiles are arguably already covered by the existing definitions of electronic acts.[57] Chapter 157 clarifies the Education Code's definition of cyberbullying rather than adding additional offenses.[58] According to the author, Chapter 157 is necessary because it "clarifies acts for school administrators who are trying to effectively identify and understand this ever evolving world of social media."[59]

Proponents of Chapter 157 consider the regulation of cyberbullying a necessary part of ongoing efforts to protect students.[60] In an editorial for the *San Jose Mercury News*, California Attorney General Kamala D. Harris stated that "[t]eenagers who are cyberbullied are more likely to struggle with depression and substance abuse . . . [and] are at a higher risk offline to be victims of sexual harassment and physical assault."[61] Commentators underline the necessity of comprehensive anti-cyberbullying legislation, pointing to increased youth access to the Internet; the appeal of not being punished for online intimidation; and the difficulty of punishing online, off-campus conduct.[62]

In contrast, opponents of Chapter 157 see the increased regulation of cyberbullying as unnecessary and detrimental to school safety and order.[63] According to the Public Counsel Law Center, "[i]t is of great significance not to add to this list of suspension grounds or make stylized specifications of existing

55. *Id.* § 48900(r)(2)(B) (amended by Chapter 157).

56. Roscorla, *supra* note 17 (quoting Assembly Member Campos, author of Chapter 157: "as technology changes, and as times change, we need to change with it, and that means the law has to change").

57. *See* EDUC. § 48900(r)(2) (West Supp. 2012) (authorizing schools to suspend or expel pupils for bullying through an electronic act meaning the "transmission of a communication including, but not limited to, a message, text, sound, or image, or a post on a social network Internet Web site, by means of an electronic device").

58. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 14, 2012).

59. SENATE COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 4 (June 12, 2012) (quoting Assembly Member Campos) (internal quotation marks omitted).

60. *See* Dreier, *supra* note 4 (quoting Assembly Member Charles Calderon on the Assembly floor: "Words kill, and we've seen examples of that.").

61. Harris, *supra* note 6.

62. Andrea Midd, *Should Off-Campus Cyberbullying Be Grounds for Suspension? The Supreme Court May Weigh in Soon*, BULLYING EDUC. (Jan. 27, 2012), http://www.bullyingeducation.org/2012/ 01/27/should-off-campus-cyberbullying-be-grounds-for-suspension-the-supreme-court-may-weigh-in-soon/ (on file with the *McGeorge Law Review*).

63. *See* ASSEMBLY COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 3 (Mar. 27, 2012) (quoting the Public Counsel Law Center as opposing the bill because it is already included in the categories of offenses for which students can be suspended).

offenses, especially since there is no evidence that suspension results in improved behavior."[64] Rather than reducing student misbehavior and improving safety and academic performance, the Public Counsel Law Center believes that it will add to a punitive disciplinary system that they claim results in a higher rate of classroom disruption.[65]

Current law provides that pupils cannot be suspended or expelled unless acts committed interfere with the school environment or pupil performance.[66] Civil rights groups like the ACLU have questioned school administrators' ability to make determinations regarding which conduct is subject to suspension.[67]

Earlier this year, the United States Supreme Court declined to hear two cases[68] involving the suspension of two students for online, off-campus speech.[69] In the first case, *J.S. ex rel. Snyder v. Blue Mountain School District* (*Snyder*), the Third Circuit held that a middle school student, who made an online profile depicting her principal as a sex addict and a pedophile, did not substantially disrupt school activity under the holding of *Tinker*.[70] The school district in *Snyder* attempted to apply an exception to the *Tinker* test allowing suspension of students if the conduct involves lewd, offensive, or vulgar speech.[71] The Third Circuit rejected this argument, reasoning that this exception does not apply to off-campus speech.[72]

In a companion case, *Layshock v. Hermitage School District*, the Third Circuit overturned the suspension of a high school student who created a false profile on Myspace impersonating his principal while using a computer at his grandmother's house.[73] The Third Circuit rejected any claims by the school district about a nexus between the parody and a substantial disruption of the school environment.[74]

64. *Id.*

65. *Id.* at 3; *see also* Sarah Carr, *Do 'Zero Tolerance' School Discipline Policies Go Too Far?*, TIME (May 22, 2012), http://www.time.com/time/nation/article/0,8599,2115402,00.html (on file with the *McGeorge Law Review*) (exploring the negative effects of discretionary suspensions, ranging from isolated feelings among suspended students to being held back a grade).

66. CAL. EDUC. CODE § 48900(s) (West Supp. 2012).

67. *See* Corey G. Johnson, *SF School Sparks Online Free-Speech Battle*, CAL. WATCH (Apr. 11, 2011), www.californiawatch.org/dailyreport/sf-school-sparks-online-free-speech-battle-15721 (on file with the *McGeorge Law Review*) (quoting ACLU attorney Linda Lyle: "Speech does not become 'disruptive' just because a teacher doesn't like it or finds it offensive.").

68. The two cases were combined on appeal. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012).

69. *Layshock*, 650 F.3d at 219.

70. 650 F.3d at 929–30.

71. *Id.* at 931–32.

72. *Id.* (citing Morse v. Frederick, 551 U.S. 393 (2007)).

73. 650 F.3d 205.

74. *Id.* at 214–16 (affirming the district court's finding that the disruption caused by the online profile was minimal because no classes were cancelled and no widespread disorder occurred, there were other fake

Following these cases, commentators have criticized legislation that provides wide latitude to school administrators to punish online, off-campus conduct.[75] Responding to the Third Circuit decisions in *Snyder* and *Layshock*, Adam Cohen, a lawyer and lecturer at Yale Law School, stated, "there clearly can be student Facebook or MySpace speech that goes too far—for example, serious threats that really do disrupt educational activities."[76] However, this is not always the case for students subjected to disciplinary action for cyberbullying.[77] According to Mr. Cohen, "[w]hen speech is merely offensive, and taking place outside of school hours and property, principals and teachers should ignore it—and think of it as the price we pay for living in a free country."[78]

In response to opposition,[79] legislators included language in Chapter 157 that prohibits school administrators from considering online acts as "pervasive conduct," as required for punishment of bullying, solely because the content exists online.[80] This language addresses the wide degree of discretion given to administrators who suspend students for online, off-campus conduct.[81] While Chapter 157 may not add any new offenses to the list of conduct subject to suspension, it still raises concerns for those who want to limit government involvement in student expression.[82]

profiles of the teacher on the Internet created by other students, and there was no proof that any discussions were prompted by the profile itself rather than the administration's investigations).

75. *See* Chelsea Keenan, *The State of Cyberbullying*, 32 STUDENT PRESS L. CTR. REP. MAG. 20 (2011), *available at* http://www.splc.org/news/report_detail.asp?edition=54&id=1582 (on file with the *McGeorge Law Review*) (surveying the variety of cyberbullying legislation, proposed or in effect, across the nation and the free speech implications of legislative action in this area).

76. Adam Cohen, *Why Students Have the Right to Mock Teachers Online*, TIME (June 20, 2011), http://www.time.com/time/nation/article/0,8599,2078636,00.html (on file with the *McGeorge Law Review*).

77. *See* Carmen Gentile, *Free Speech or Cyberbullying?*, N.Y. TIMES (Feb. 8, 2009), http://www.nytimes.com/2009/02/08/world/americas/08iht-08cyberbully.20008426.html (on file with the *McGeorge Law Review*) (reporting on a high school senior who was suspended for writing complaints online about her English teacher's failure to assist with her homework assignments).

78. Cohen, *supra* note 76.

79. *Compare* ASSEMBLY COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 3 (Mar. 27, 2012) (including the Public Law Center as being in opposition to Chapter 157 and objecting to the addition of punitive disciplinary offenses to the education code), *with* SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012) (showing that the Public Council Law Center was no longer in opposition to AB 1732 (signed into law as Chapter 157) after the legislature added language limiting administrators' discretion in considering online conduct to be pervasive as required by law to suspend a student for bullying).

80. CAL. EDUC. CODE § 48900(r)(2)(B) (amended by Chapter 157).

81. *See* ASSEMBLY COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 3 (Mar. 27, 2012) (including analysis of an amendment to AB 1732 that prohibits online acts from qualifying as pervasive conduct solely on the basis of transmission over the Internet or being currently posted on the Internet).

82. *See* Becky Yeh, *AB 1732 Toeing Fine Line*, ONENEWSNOW (Apr. 20, 2012), http://onenewsnow.com/culture/2012/04/19/ab-1732-toeing-fine-line (on file with the *McGeorge Law Review*) (quoting the president of Americans For Truth About Homosexuality as supporting efforts to address cyberbullying, but expressing concerns that such action will encroach upon "students' right to share the gospel and to share their moral beliefs").

V. CONCLUSION

Assembly Member Campos authored Chapter 157 to "clarify[] acts for school administrators who are trying to effectively identify and understand [the] ever evolving world of social media."[83] Bullying through electronic acts like cell phone messages and online activity is already codified in California education law as an offense subject to suspension or expulsion;[84] therefore, Chapter 157 clarifies the law rather than adding to it.[85]

Civil rights groups have responded to examples of suspensions for cyberbullying with criticism of the discretion given to administrators in punishing online conduct.[86] Legislators have restricted administrators' discretion to punish students for cyberbullying by adding language to Chapter 157 that instructs schools not to consider cyberbullying "pervasive conduct," as required by the statutory definition of bullying, simply because the conduct was transmitted through the Internet.[87] Even with such limiting language, suspension for cyberbullying could be considered a violation of free speech protections if the conduct is not considered a material disruption of school activities.[88]

Ultimately, the effect of Chapter 157 will depend on how school administrators utilize its provision.[89] Following the attempted-suicide and resulting offensive online comments at Palm Desert High School, a district administrator spoke directly to the large role discretion plays in punishment of cyberbullying.[90] At a minimum, Chapter 157 attempts to provide more structure to this discretion given to California public schools by addressing the growth of cyberbullying among young people.[91]

83. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012).

84. EDUC. § 48900(r)(1)–(2) (West Supp. 2012).

85. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012).

86. Johnson, *supra* note 67.

87. EDUC. § 48900(r)(2)(B) (amended by Chapter 157).

88. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (establishing the "*Tinker* test" for whether a school's disciplinary actions violate student's first amendment rights).

89. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012) (quoting the author of Chapter 157 as introducing the legislation to guide administrators in their determinations of online conduct subject to suspension).

90. Michelle Mitchell, *Principal Punishes Some over Cyber-Taunts*, DESERT SUN, May 4, 2012 (quoting a Desert Sands Unified administrator as stating "[d]iscipline [for the students who engaged in cyberbullying] would vary depending on the extent of the bullying").

91. *See* Lealos, *supra* note 7 (quoting Chapter 157 author Nora Campos as saying, "people today are bullying in a very different way . . . . I want to make sure that there are no loopholes," and "because young people use it more than adults, sometimes we don't get current information as quick as we should."); SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012) (quoting the author of Chapter 157 as introducing the legislation to guide administrators in their determinations of online conduct subject to suspension).

"When in Doubt, Sit Them Out": Chapter 173 Effectively Supplements California Concussion Law and Raises Awareness Among Coaches

Josh Hunsucker

Code Section Affected

Education Code § 35179.1 (amended).
AB 1451 (Hayashi); 2012 STAT. Ch. 173.

I. INTRODUCTION

Jaquan Waller was a star high-school football player from North Carolina.[1] During a practice in 2008, Waller suffered an undiagnosed concussion.[2] Because coaches and first responders never received training on concussions, they did not properly remove Waller from practice.[3] Despite demonstrating signs and symptoms of a concussion, Waller played in a game less than forty-eight hours later and suffered a second concussion.[4] He died less than twenty-four hours after suffering the second hit.[5]

Each year, doctors estimate that roughly 300,000 people in America will suffer from sports-related concussions.[6] While injuries in professional sports make headlines, "[f]or every concussion . . . occurring at the professional sports level, there are tens of thousands of injuries at the high school level and below."[7]

1. BIG HITS, BROKEN DREAMS (CNN 2011), *available at* http://www.sportconcussionlibrary.com/content/big-hits-broken-dreams (on file with the *McGeorge Law Review*).

2. *Id.*

3. *Id.* at 2:24–3:12.

4. *Id.* at 4:09–4:44.

5. Stephanie Cary, *Tackling the Danger of Concussions: Documentary Raises Severity of Injury, How to Prevent It*, L.A. DAILY NEWS, Jan. 26, 2012, at L1, *available at* http://www.dailynews.com/lalife/ci_19820561 (on file with the *McGeorge Law Review*); *see also* BIG HITS, BROKEN DREAMS, *supra* note 1 (explaining that Waller's death was from bleeding and swelling of the brain called a subdural hematoma, and linked directly to second impact syndrome). Second impact syndrome is a rare but fatal complication that happens when a person sustains a second head injury before the first injury heals. Erika A. Diehl, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 92 (2010).

6. Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 244 (2010) (citing Sergio R. Russo & Kevin M. Guskiewicz, *Sport-Related Concussion in the Young Athlete*, 18 CURRENT OPINION IN PEDIATRICS 376, 376 (2006)); *see also Concussion and Mild TBI*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 27, 2012), http://www.cdc.gov/Concussion/ (on file with the *McGeorge Law Review*) ("[A] type of traumatic brain injury, or TBI, caused by a bump, blow, or jolt to the head that can change the way your brain normally works."); CAL. INTERSCHOLASTIC FED'N, CONCUSSION: A FACT SHEET FOR COACHES (2011), *available at* http://www.cifstate.org/images/PDF/Coaches_Fact_Sheet.PDF (on file with the *McGeorge Law Review*) (explaining that young athletes are particularly vulnerable to severe or fatal injury from a concussion, specifically if they sustain a second concussion prior to the initial injury fully healing).

7. Diehl, *supra* note 5, at 85 (quoting Dr. Micky Collins, the Director of the Sports Medical Concussion

The issue of concussions in sports has risen to the forefront of national debate over the past five years because of lawsuits, high profile suicides, and rule changes involving the National Football League (NFL).[8] In 2011, California passed a concussion return-to-play[9] law that requires coaches to adopt the policy of "when in doubt, sit them out."[10] Current law requires all coaches to take CPR and first-aid courses.[11] Although some of the CPR and first-aid courses include training on concussions, concussion training is not mandatory and the law "assumes that . . . coaches . . . are properly educated and informed."[12] In an effort to provide "state-wide uniformity" in concussion training that promotes a greater awareness of the signs and symptoms of concussions, Assembly Member Mary Hayashi introduced Chapter 173.[13] Hayashi believes that Chapter 173 clarifies

Program at University of Pittsburgh Medical Center (UMPC), which has the largest sports medical concussion program and is an international leader in concussion research and treatment). Although football accounts for the most concussions in youth sports, girls' soccer ranks second. *See* Kate Snow et al., *Concussion Crisis Growing in Girls' Soccer*, ROCK CENTER (May 9, 2012, 9:50 AM), http://rockcenter.nbcnews.com/_news/2012/05/09/11604307-concussion-crisis-growing-in-girls-soccer?lite (on file with the *McGeorge Law Review*) (detailing the prevalence of concussions in girls soccer and the rising safety concerns about the sport).

8. *See* Bill Patterson, *Concussion Care Now Priority in Prep Sports*, SACRAMENTO BEE, Nov. 28, 2011, at 1A, *available at* http://www.sacbee.com/2011/11/28/4083456/concussion-care-now-priority-in.html (on file with the *McGeorge Law Review*) (attributing increased awareness to the NFL's recognition of the serious nature of head trauma); *see also* Associated Press, *Concussion Lawsuits Are Next Big U.S. Litigation*, USA TODAY (June 30, 2012 8:08 PM), http://www.usatoday.com/sports/football/nfl/story/2012-06-30/concussion-lawsuits-are-next-big-US-litigation/55948928/1 (on file with the *McGeorge Law Review*) (detailing pending NFL concussion litigation); Mark Fainaru-Wada & Steve Fainaru, *CTE Identifier Involved in Autopsy*, ESPN (May 4, 2012, 12:26 AM), http://espn.go.com/nfl/story/_/id/7888497/sources-forensic-pathologist-credited-identifying-cte-involved-junior-seau-autopsy (on file with the *McGeorge Law Review*) (detailing the suicide of former NFL player Junior Seau); Jacquelyn Martin, *New NFL Rules Designed to Limit Head Injuries*, NFL (Aug. 6, 2010, 5:33 PM), http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries (on file with *McGeorge Law Review*) (describing rules designed to protect "defenseless" players and improve player safety); Alan Schwarz, *Duerson's Brain Trauma Diagnosed*, N.Y. TIMES, May 2, 2011, at B11, *available at* http://www.nytimes.com/2011/05/03/sports/football/03duerson.html (on file with the *McGeorge Law Review*) (explaining how an autopsy on former NFL player Dave Duerson, who committed suicide, found brain damage linked to repeated concussions).

9. *Lystedt Law Overview*, NFLEVOLUTION.COM (Aug. 9, 2012), http://www.nflevolution.com/article/The-Zackery-Lystedt-Law?ref=270 (on file with the *McGeorge Law Review*) (illustrating that if an athlete demonstrates signs or symptoms of a concussion, he or she "must be removed from a game or practice and not be permitted to return to play," and may only return to play after a doctor clears the athlete to play).

10. Richard H. Adler, *Youth Sports and Concussions: Preventing Preventable Brain Injuries. One Client, One Cause, and a New Law*, 22 PHYSICAL MED. & REHAB. CLINICS OF N. AM. 721, 726 (2011) [hereinafter *Preventing Preventable Brain Injuries*]; Cary, *supra* note 5 (explaining that when coaches are unsure of whether a concussion has occurred, they should sit the student athlete out). In response to the growing concern about concussions in sports, the state of Washington passed the nation's first comprehensive concussion law, named the Zackery Lystedt Law, in 2009. WASH. REV. CODE § 28A.600.190 (West Supp. 2012); *see also Lystedt Law Overview*, *supra* note 9 (explaining that Washington named the law after Zackery Lystedt, a middle-school football player who suffered a debilitating brain injury when he returned to a football game after sustaining an undiagnosed concussion in 2006). Of the forty states that have passed concussion legislation, thirty-nine modeled their law after Washington's, including California. *Id.*

11. CAL. EDUC. CODE § 35179.1(c)(2)–(6) (West 2012).

12. *Preventing Preventable Brain Injuries*, *supra* note 10, at 722.

13. Telephone Interview with Ross Warren, Chief Consultant, Cal. Assembly Bus. & Professions

existing concussion law by requiring coaches to "receive [critical] training that will help them better respond to head injuries."[14]

II. LEGAL BACKGROUND

The California State Legislature enacted the California High School Coaching Education and Training Program (Program) in 1998, intending that local school districts emphasize eight specific and evolving areas in coaching.[15] The Program codified existing rules and training requirements for coaches established by the California Interscholastic Federation (CIF), the state's governing body for high-school athletics.[16] The growing social concern about concussions in sports contributed to the enactment of California's return-to-play concussion law in 2011, and was a driving factor in further expanding training requirements for coaches.[17]

A. The Changing Nature of Law Governing Coaches' Training

The legislature enacted the Program in direct response to "many concerns about safety, training, . . . and general management in coaching."[18] After signing the Program into law, then-Governor Pete Wilson stated, "we need to ensure that [coaches] are trained in adequate coaching philosophies and practices to protect the well-being of our students."[19] In order to accomplish this, the Program established eight components of coaching that the legislature intended school districts to emphasize and develop over time.[20] The first component embodies the evolving nature of the Program, highlighting the legislature's intent of

Comm. (June 6, 2012) [hereinafter Warren Interview] (notes on file with the *McGeorge Law Review*) (Mr. Warren is staff member for Assembly Member Hayashi, who chairs the Assembly Committee for Business and Professions.); Press Release, Mary Hayashi, Cal. State Assembly Mem., Assembly Member Mary Hayashi Introduces Legislation to Provide Concussion Training for High School Coaches (Jan. 30, 2012), *available at* http://asmdc.org/members/18a/news-room/press-release/item/3088-assemblymember-mary-hayashi-introduces-legislation-to-provide-concussion-training-for-high-school-coaches.htm [hereinafter Hayashi Press Release] (on file with the *McGeorge Law Review*).

14. Hayashi Press Release, *supra* note 13.

15. EDUC. § 35179.1.

16. *Id.*; *see also* CAL. INTERSCHOLASTIC FED'N CONST., BYLAWS, & STATE CHAMPIONSHIP REGULATIONS 2011–2012 (2011), *available at* http://205.214.168.16/governance/constitution_bylaws/pdf/CIF%20CONSC%20BYLAW%20BOOK%201011.pdf [hereinafter CIF CONST.] (on file with the *McGeorge Law Review*) ("[CIF] retains its original responsibility to enforce the rules, but has expanded its duties to include much more," including educational programs for coaches and parents.).

17. *See* Warren Interview, *supra* note 13 (explaining how national awareness of concussion helped pass existing California concussion law and may have helped with the passage of Chapter 173).

18. EDUC. § 35179.1.

19. Nancy LaCasse, *Governor Signs CIF's $1 Million High School Coaching Education Bill*, 18 FISCAL REP.: AN INFORMATIONAL UPDATE 19 (1998), *available at* http://www.sscal.com/fiscal/0925prss.htm (on file with the *McGeorge Law Review*).

20. EDUC. § 35179.1.

"develop[ing] . . . coaching philosophies consistent with school, school district, and school board goals."[21] The succeeding five components encompass specific training areas to apply the legislature's intent: sport psychology, pedagogy, management, and training, specifically CPR and first-aid.[22] The Program reinforces CIF regulations by requiring coaches to have "[k]nowledge of, and adherence to, statewide rules and regulations . . . ."[23] The legislature's final component reemphasizes the evolutionary nature of the Program by requiring "[s]ound planning and goal setting" in coaches' training, which inherently changes as new issues, like concussions, become a priority in high-school sports.[24]

B. Current California Law Governing Concussion Management

Existing concussion law in California, passed in 2011, requires coaches to immediately remove an athlete participating in an after-school game or practice if the coach "suspect[s] [the athlete] of sustaining a concussion or head injury."[25] Furthermore, an athlete cannot return-to-play until cleared, in writing, by a healthcare provider.[26] The law codified the existing standard of care for concussion management and return-to-play under CIF Bylaw 313.[27]

III. CHAPTER 173

Chapter 173 requires CPR and first-aid training for all high-school coaches "to include a basic understanding of the signs and symptoms of concussions and

21. *Id.* § 35179.1(c)(1).

22. *Id.* § 35179.1(c)(2)–(6).

23. *Id.* § 35179.1(c)(7).

24. *Id.* § 35179.1(c)(8); *see also* Justin J. Simpson, *Chapter 673: Addressing the Use of Steroids and Performance Enhancing Dietary Supplements by High School Athletes*, 37 MCGEORGE L. REV. 239, 250 (2006) (explaining how the 2005 amendment to the Program "represent[ed] California's determination to protect its adolescents" from a dangerous facets of sports that came into the national conscience); NAT'L CTR. FOR INJURY PREVENTION & CONTROL, HEADS UP: CONCUSSION IN YOUTH SPORTS, ACTIVITY REPORT (2007–2008) 6–7 (2008), *available at* http://www.cdc.gov/concussion/pdf/heads_up_activity_report_final-a.pdf (on file with the *McGeorge Law Review*) (explaining the goals of raising concussion awareness among administrators coaches, parents, and athletes).

25. EDUC. § 49475(a)(1). The law additionally requires athletes and their parents (or legal guardians) to sign "a concussion and head injury information sheet" each year. *Id.* The California concussion law generally mirrors the state of Washington's law, which set the standard for subsequent state concussion laws. *Lystedt Law Overview*, *supra* note 9. The purpose of return-to-play laws are to ensure that coaches remove athletes that exhibit the signs and symptoms of a concussion from play, and that athletes do not return to play until they are asymptomatic of a concussion. *Id.*

26. *See* EDUC. § 49475(a)(1) (athletes removed from competition cannot return to play until "a licensed healthcare provider, trained in the management of concussions, acting within the scope of his or her practice," clears the athlete to return).

27. CIF CONST., *supra* note 16, at art. 30, § 313.

the appropriate response to concussions."[28] Coaches can complete required concussion training "through entities offering free, online, or other types of training courses."[29]

IV. ANALYSIS

Chapter 173 aims to add training on the "signs and symptoms . . . and the appropriate response to concussions" at a minimal cost to the state.[30] The success of the new law depends on the cost effectiveness and uniformity of training, which must meet the criteria of the Program and whether the law helps reduce preventable brain injuries in high-school athletes.[31] Proponents of the new law argue that uniformity will increase awareness of the current standard of care for concussion management among coaches, which will help them mitigate the harmful effects of concussions.[32]

A. Cost-Effective Training

Chapter 173 eliminates potential costs by "limiting the scope [of training] to concussions."[33] This makes it possible for coaches to meet Chapter 173's training requirement by completing free online training, available at websites such as: the CIF, National Federation of High School (NHFS), or Centers for Disease Control and Prevention (CDC).[34] Additionally, all online training provided by NFHS will

28. EDUC. § 35179.1 (amended by Chapter 173).

29. *Id.*

30. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1451, at 1 (Mar. 28, 2012); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1451, at 1 (June 28, 2012) (reflecting Senate amendments that permit concussion training to come from free sources).

31. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1451, at 3 (May 23, 2012) (training can be "offered by a [school] district, CIF, or other organizations such as the Red Cross," CDC, and the National Federation of High School Associations); *see also* Richard Adler, *Changing the Culture of Concussion: Education Meets Legislation*, 3 AM. ACAD. PHYSICAL MED. & REHAB. S468, S469 (2011) [hereinafter *Education Meets Legislation*] (discussing how concussion education is more effective used to supplement state concussion laws).

32. *Id.*; *see also* Interview with Richard Adler, Principal, Adler Giersch PS., in L.A., Cal. (June 22, 2012) (notes on file with the *McGeorge Law Review*) (asserting that knowledge of the standard of care will reduce the amount of injuries and claims).

33. Warren Interview, *supra* note 13 (explaining that limiting the scope to only cover concussions "eliminate[d] other requirements that would put a perception of costs" on the bill); *see also* ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1451, at 2–3 (Mar. 28, 2012) (estimating the fiscal effect of Chapter 173 to be between $183,000–$458,000 to implement the training program based on previous legislative attempts). *But see* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1451, at 3 (May 23, 2012) (asserting no fiscal effect).

34. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1451, at 3 (May 23, 2012); *see also, e.g.*, *Coaches Concussion Resources*, CIF, http://205.214.168.16/health_safety/concussion/coaches.html (last visited Feb. 2, 2013) (on file with the *McGeorge Law Review*) (offering links to concussion information, including free concussion training).

remain free indefinitely, ensuring cost-effective training for coaches.[35] Coaches can also meet the training requirement by participating in required CPR and first-aid courses that include concussion training, such as the current American Red Cross course.[36] Since the Red Cross course already includes concussion training, the overall cost of required training for coaches will not increase as a result of Chapter 173, remaining at approximately sixty dollars per person.[37]

B. Establishing Uniform Concussion Training Within the Program

Although some CPR and first-aid courses already include concussion training, "of the 67,929 coaches in California, [only] 5,323 have taken the [free] online course [from CIF]."[38] The lack of a statewide standard in concussion training creates a gap in the law that results in only some coaches learning the standard of care for concussions, as established by California law.[39] The interconnectivity between CIF, NFHS, and CDC will likely provide coaches with similar and effective training on the signs and symptoms of concussions.[40] For example, NFHS and CDC collaborated to provide their current concussion training materials.[41] Additionally, the free online training offered by CIF links directly to NHFS's free online concussion training, ensuring that training pursuant to Chapter 173 is substantially similar regardless of the entity that provides it.[42]

35. *See* Interview with Bob Colgate, Dir. Sports & Sports Med., NFHS, in L.A., Cal. (June 22, 2012) (notes on file with the *McGeorge Law Review*) (detailing the features of the free online concussion training). The concussion training will also be available for free on mobile applications for tablets and smart phones. *Id.*; *Free Concussion Course Now Available on Mobile Devices*, NFHS (2012), http://www.nfhs.org/content.aspx?id=7556 (on file with the *McGeorge Law Review*). Since NFHS is an out-of-state private organization, California will not incur any hidden costs. *About Us*, NFHS, http://www.nfhs.org/Activity3.aspx?id=3260 (last visited Feb. 22, 2013) (on file with the *McGeorge Law Review*).

36. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1451, at 3 (May 23, 2012); Letter from Dawn Lindblom, CEO, Am. Red Cross, to Julia Brownley, Chair, Assembly Educ. Comm. (Mar. 22, 2012) (on file with the *McGeorge Law Review*) (asserting that the American Red Cross currently incorporates concussion training into CPR and first-aid training).

37. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1451, at 3 (May 23, 2012).

38. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1451, at 2 (Mar. 28, 2012).

39. Warren Interview, *supra* note 13; *see also Education Meets Legislation*, *supra* note 31 (asserting that in order to have a uniform concussion policy there must be both concussion education and legislation).

40. CAL. EDUC. CODE § 35179.1(d) (amended by Chapter 173); *see also NFHS Learning Center*, NFHS, http://nfhslearn.com/electiveDetail.aspx?courseID=15000 (last visited Feb. 2, 2013) (on file with the *McGeorge Law Review*) (explaining that NFHS and the CDC "teamed up to provide information and resources to help educate coaches, officials, parents and students on the importance of proper concussion recognition and management in high school sports").

41. *NFHS Learning Center*, *supra* note 40.

42. *Id.*; *Coaches Concussion Resources*, CIF, http://205.214.168.16/health_safety/concussion/coaches.html (last visited Feb. 2, 2013) (on file with the *McGeorge Law Review*).

C. Clarifying the Current Standard of Care for Coaches

Effective concussion prevention in youth sports "requires both education and legislation."[43] While Chapter 173 does "not giv[e] coaches medical training,"[44] it does give coaches "a basic understanding of the signs and symptoms of concussions and the appropriate response to concussions."[45] Chapter 173 equips coaches with training that will help them make effective on-field decisions to remove athletes from games or practices.[46]

By detailing a fundamental base of what coaches should know about concussion symptoms, Chapter 173 clarifies the current standard of care for concussion management established in Section 49475(a)(1) of the California Education Code.[47] Although there is no scientific data that explicitly shows that Chapter 173 will lower the amount of preventable brain injuries, increasing the education level of coaches will help coaches identify potentially concussed athletes.[48] Chapter 173 makes coaches more informed on when to remove potentially concussed athletes, which will allow athletes to seek proper medical care and return-to-play without suffering an aggravating injury.[49] The educational benefits of Chapter 173 combined with California's current concussion return-to-play law should help reduce avoidable brain injuries in student athletes.[50]

V. CONCLUSION

Concussions are an inherent risk in all high-school sports.[51] However, preventable tragedies, such as the death of Jaquan Waller, have no place in high-school sports.[52] Chapter 173 effectively supplements the previous efforts of CIF

43. *Education Meets Legislation*, *supra* note 31, at S469.

44. Warren Interview, *supra* note 13.

45. EDUC. § 35179.1 (amended by Chapter 173); *see also* Warren Interview, *supra* note 13 (asserting the main goal of Chapter 173 is to give coaches more awareness about concussions).

46. Wilson, *supra* note 6, at 275 (asserting that uniform concussion guidelines will also reduce concussion litigation and the number of injuries resulting from athletes returning to play before they are fully healed).

47. EDUC. § 49475(a)(1); *see also* Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 679 N.W.2d 198, 203–04 (Neb. 2004) (discussing the first prong of the Nebraska common law standard of care of concussion management); Wilson, *supra* note 6, at 244. Note, Chapter 173 does not increase the standard of care or expose coaches to any additional liability because it does not change Section 49475(a)(1) of the Education Code; it merely educates coaches on how to meet that standard of care. EDUC. § 49475(a)(1); Warren Interview, *supra* note 13 (asserting that Chapter 173 gives coaches more awareness about concussions).

48. *See Preventing Preventable Brain Injuries*, *supra* note 10 (illustrating that the earlier anecdotal data from the state of Washington showed that in the year after the Lystedt concussion law passed, there were no reported deaths or required surgeries stemming from head injuries in youth sports).

49. *Id.*

50. *Education Meets Legislation*, *supra* note 31, at S470.

51. Wilson, *supra* note 6, at 242.

52. BIG HITS, BROKEN DREAMS, *supra* note 1.

and the legislature by providing an affordable, uniform standard of education that spreads awareness and helps coaches "better respond to head injuries in high school sports."[53] Chapter 173 is a "good advancement for concussion awareness" that will reinforce California's concussion law and could lead to better concussion management practices within the state.[54]

53. Hayashi Press Release, *supra* note 13; *see also* Wilson, *supra* note 6, at 275 (arguing that uniform concussion guidelines will also reduce concussion litigation and the number of injuries before an athlete is ready to return to play).

54. *See* Telephone Interview with Dr. Michael Collins, Dir., UPMC Sports Med. Concussion Program (June 6, 2012) (notes on file with the *McGeorge Law Review*) (describing how Chapter 173 is moving concussion management in the right direction from a scientific perspective); Dr. Collins asserts that the future goals of concussion management at the high-school level are to have baseline testing becoming part of the standard of care, with coaches increasing their awareness of concussions through regional concussion seminars, and ensuring injured athletes receive treatment from clinicians specializing in concussion management. *Id.* "A [n]eurocognitive [baseline] assessment can help to objectively evaluate the concussed athlete's post-injury condition and track recovery for safe return to play, thus preventing the cumulative effects of concussion. . . . Neurocognitive testing has been called the 'cornerstone' of proper concussion management by an international panel of sports medicine experts." *Overview and Features of the ImPACT Test*, IMPACT, http://impacttest .com/about/background (last visited Oct. 2, 2012) (on file with the *McGeorge Law Review*).

Chapter 585: A Renewed Effort to Restore Integrity to California's Vocational and Postsecondary Educational Institutions

Michael Coleman

Code Sections Affected

Education Code § 94913 (new), §§ 94897, 94909, 94910, 94911, 94928, 94929.5, 94929.7 (amended).
AB 2296 (Block); 2012 STAT. Ch. 585.

I. INTRODUCTION

California has been struggling for decades to create a suitable regulatory scheme to govern the State's private vocational and postsecondary educational institutions.[1] The outcry for legislative reform began in the late 1980s,[2] as newspapers began reporting on the proliferation of so-called "diploma mills."[3] Since then, the legislature has enacted a number of reforms, all of which have been criticized for failing to adequately protect students and the public from disingenuous private institutions.[4]

1. *Private Postsecondary Overview*, BUREAU FOR PRIVATE POSTSECONDARY EDUC., http://www.bppe.ca.gov/about_us/history.shtml (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (detailing the legislature's efforts to regulate private postsecondary education since the late 1980s, and the resulting criticism of those efforts); *see also* CAL. EDUC. CODE § 94897(p) (amended by Chapter 585) (defining private postsecondary institutions as institutions that offer "associate, baccalaureate, master's, or doctoral degree[s]").

2. Editorial, *Bogus Education*, S.F. CHRON., Apr. 9, 1989, *available at* 1989 WLNR 1605588 (on file with the *McGeorge Law Review*) (calling for legislative reform that will prevent "diploma mills" from threatening the integrity of legitimate postsecondary degrees).

3. Herbert A. Sample, *Private College Regulation Gets Failing Grade*, Mar. 1, 1989, *available at* 1989 WLNR 2936140 (on file with the *McGeorge Law Review*) (reporting that a report to the legislature concludes that reputation of California's legitimate educational institutions suffers due to the large number of illegitimate institutions, and that regulation is necessary to protect the integrity of legitimate degrees); William Trombley, *Foes Call Legislation 'Elitist': Stricter Scrutiny Sought for Unaccredited Schools*, L.A. TIMES, Sept. 6, 1989, *available at* http://articles.latimes.com/1989-09-06/news/mn-1620_1_postsecondary-schools (on file with the *McGeorge Law Review*) (reporting that, throughout California, institutions purporting to be schools and universities offer students advanced degrees with little-to-no instruction, after payment of a fee).

4. *Private Postsecondary Overview*, *supra* note 1 (detailing the legislature's efforts from 1989 to 2007 to enact lasting reform, and highlighting periodic government reports concluding that the original problems "continue to persist"); Jennifer Gollan, *More Than 130 Vocational Schools Are Operating Without State Approval*, N.Y. TIMES, Apr. 6, 2012, at A19, *available at* http://www.nytimes.com/2012/04/06/us/california-vocational-schools-operating-without-approval.html?pagewanted=all (on file with the *McGeorge Law Review*) (reporting that the regulatory bureau responsible for enforcing postsecondary education reforms has failed to crack down on institutions that operate illegally, thus endangering students who believe their schools to be credible, and the public who relies on the integrity of conferred degrees).

Recently, the discussion concerning postsecondary education reform has focused on schools' reporting requirements.[5] The thrust of this discussion is that prospective students need to be adequately informed, prior to enrollment, of the limitations of the degree they seek and the viable employment opportunities and salaries that await them after graduation.[6] By passing Chapter 585, the legislature seeks to protect prospective students by closing reporting loopholes created by prior laws.[7] However, due in part to the limited enforcement capabilities of the State's regulatory body, it is unclear whether Chapter 585 will effectively protect students and the public from disingenuous private institutions.[8]

II. LEGAL BACKGROUND

In the late 1980s, California was known as the "diploma mill capital of the world."[9] To combat this problem, the legislature passed the Private Postsecondary and Vocational Education Reform Act of 1989 (the 1989 Act).[10] This comprehensive legislation was meant to address "concerns about the integrity and value of the degrees and diplomas issued, widely varying standards, the lack of enforcement provisions, and the exemptions from oversight authorized in statute."[11] During the 1990s and early 2000s, the legislature enacted a series of legislative reforms to cure perceived deficiencies in the 1989 Act, including charges that it was difficult to interpret and that the regulatory bureau in charge of enforcement was merely "a passive regulator."[12]

5. *See generally* SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 2296 (June 19, 2012) (stating that the purpose of both the Postsecondary Education Reform Act of 2009 and Chapter 585 is to expand on the reporting requirements "to be met by private postsecondary educational institutions subject to state oversight").

6. Heather W. Hines, *California Attorney General Warns Sailors Against Scams*, U.S. NAVY (Apr. 2, 2011), http://www.navy.mil/search/print.asp?story_id=59528&VIRIN=84438&imagetype=1&page=1 (on file with the *McGeorge Law Review*) (reporting that many private postsecondary institutions are for-profit businesses that mislead prospective students by making "unrealistic guarantees . . . including employment following graduation"); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 4 (Aug. 22, 2012) (reporting that Assembly Member Marty Block authored Chapter 585 in part to address concerns that, under prior law, institutions were not required to provide prospective students with accurate statistics reflecting graduates' salaries).

7. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2296, at 3–4 (May 11, 2012).

8. Gollan, *supra* note 4.

9. BENJAMIN M. FRANK, CAL. DEP'T OF CONSUMER AFFAIRS, INITIAL REPORT, ES-3 (2005).

10. CAL. EDUC. CODE § 94700 (West 2002); *id.* § 94705(a)–(f) (stating that the legislative intent of the 1989 Act was to establish minimum standards for institutional and instructional quality, as well as to prohibit "the granting of false or misleading educational credentials" to protect "the consumer and students against fraud, misrepresentation, or other practices that may lead to an improper loss of funds paid for educational costs"); FRANK, *supra* note 9, at ES-3., 9 n.1 (noting that the 1989 Act was introduced by Senator Morgan as SB 190); Trombley, *supra* note 3 (reporting that Senator Becky Morgan introduced the legislation to protect California's legitimate educational institutions from suffering diminished reputations due to "diploma mills").

11. FRANK, *supra* note 9, at ES-3.

12. *Private Postsecondary Overview*, *supra* note 1.

On June 30, 2007, the 1989 Act sunsetted, resulting in the dissolution of the Bureau for Private Postsecondary and Vocational Education.[13] The dissolution caused concern for many who feared that diploma mills would once again begin operating with impunity, resulting in scores of students receiving expensive, but worthless degrees.[14] In vetoing legislation that would have extended the 1989 Act's provisions, Governor Schwarzenegger stated that extending the life of the 1989 Act would simply "allow[] problems that have been well documented to continue to exist," because it did "nothing to enhance protections for students."[15]

From 2007 to 2009, the legislature attempted, without success, to enact new, comprehensive legislation to restore regulatory oversight over these institutions.[16] Finally, in 2009, the legislature passed the California Private Postsecondary Education Reform Act of 2009 (the 2009 Act), which reestablished the old regulatory body under a new name—the Bureau for Private Postsecondary Education (the Bureau).[17]

The 2009 Act also codified a number of reform measures, including a statutory definition of how to determine whether graduates are employed in their field of study,[18] minimum reporting requirements for unaccredited private

13. 1997 Cal. Stat. ch. 78, § 4, at 579 (enacting EDUC. § 94999) (extending the life of the 1989 Act until January 1, 2005, unless otherwise extended by further legislation); 2004 Cal. Stat. ch. 740, § 7, at 5785–86 (amending EDUC. § 94999) (extending the 1997 extension to June 30, 2007); Judy Lin, *Oregon Warns Governor on Loss of Schools Watchdog*, SACRAMENTO BEE, July 3, 2007, *available at* 2007 WLNR 12576451 (on file with the *McGeorge Law Review*) (reporting that the legislature did not extend the life of the 1989 Act by the June 30, 2007 deadline); *Students Urged to Research Carefully When Choosing Private Postsecondary or Vocational School*, U.S. ST. NEWS, July 5, 2007, *available at* 2007 WLNR 12879968 (on file with the *McGeorge Law Review*) (reporting that the California Legislature allowed the 1989 Act to sunset).

14. *Students Urged to Research Carefully when Choosing Private Postsecondary or Vocational School*, *supra* note 13 (reporting the California Department of Consumer Affairs' position that, with the dissolution of Bureau, students need to research especially carefully before spending thousands of dollars on educational programs); Editorial, *Failing Vocational Students: California Students Will Have Few Protections from Bogus Schools*, FRESNO BEE, July 6, 2007, *available at* 2007 WLNR 12840190 (on file with the *McGeorge Law Review*) (expressing opinion that closure of the Bureau "marks a return to the days when California was known for being the nation's worst center for 'diploma mills,' turning a blind eye to schools that provide neither an education nor a usable credential").

15. *Private Postsecondary Overview*, *supra* note 1 (quoting the Governor's veto message).

16. *Id.* (stating that in 2008, Governor Schwarzenegger vetoed Senate Bill 823); SB 823, 2008 Leg., 2007–2008 Sess. (Cal. 2008) (as amended on Aug. 13, 2008, but not enacted) (proposing the creation of a subsequent bureau to oversee secondary education and other comprehensive reform measures to ensure legislative oversight); *see also* EDUC. § 94801 (West Supp. 2012) (declaring that the California Private Postsecondary Education Act of 2009 was the first piece of comprehensive legislation to govern private postsecondary education since expiration of the 1989 Act).

17. EDUC. §§ 94800, 94800.5. The Bureau falls under the purview of the California Department of Consumer Affairs. *Glossary of Terms, Higher Education Systems or Segments*, CAL. POSTSECONDARY EDUC. COMM'N, http://www.cpec.ca.gov/SecondPages/Glossary.asp?ListType=5 (last visited Mar. 30, 2013) (on file with the *McGeorge Law Review*). Private postsecondary institutions that fall within the ambit of the 2009 Act must get approval from the Bureau to operate legally within California. Gollan, *supra* note 4.

18. EDUC. § 94928(e) (defining "graduates employed in the field" as those employed "within six months of graduation" in a job where the skills acquired through obtaining the degree played a significant participating role "in obtaining the position").

institutions,[19] and requirements that both accredited and unaccredited private institutions provide prospective students with graduates' salary data[20] and job placement statistics.[21] Additionally, the 2009 Act required institutions to include specific language in their student enrollment agreements informing students that they must be given, prior to enrollment, a student brochure and a School Performance Fact Sheet (Fact Sheet).[22] The purpose of this statement was to inform students of the types of data contained within these documents.[23] Finally, the 2009 Act mandated specific methods for determining the required statistical data.[24]

Despite reestablishment of the Bureau and the 2009 Act's new statutory reforms, oversight over California's vocational and postsecondary institutions remained lackluster.[25] The reestablished Bureau was understaffed and made it a practice to pursue violators only after receiving specific complaints from the public.[26] As a result, the Bureau allowed more than 130 schools to continue operating illegally.[27] Additionally, the 2009 Act's statutory reforms were also limited in scope, providing loopholes and reporting exemptions for swaths of private institutions.[28]

III. CHAPTER 585

Chapter 585 amends the 2009 Act by attempting to close reporting loopholes.[29] This attempt may be broken into four broad categories: (A) new disclosure requirements for unaccredited institutions;[30] (B) new disclosure requirements for all regulated institutions;[31] (C) new criteria for calculating

19. *Id.* § 94897(p).

20. *Id.* § 94910(d)(1)–(2).

21. *Id.* § 94910(b).

22. *Id.* § 94911(i)(1).

23. *Id.* (requiring institutions' enrollment agreements to inform students that the Fact Sheets must include "completion rates, placement rates, license examination passage rates, salaries or wages").

24. *Id.* § 94929.5(a), (c).

25. Gollan, *supra* note 4 (reporting that the Bureau does not make it a practice to pursue violators unless it receives complaints from the public regarding specific institutions).

26. *Id.*

27. *Id.*

28. EDUC. § 94897(p) (stating that only unaccredited *doctoral* programs—as opposed to all unaccredited postsecondary programs—must honestly report accreditation status to students); *id.* § 94910(b) (mandating that only postsecondary institutions that make claims regarding students' employment and salary potential must accurately report these figures to prospective students; institutions that do not make any such claims are exempt).

29. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 2–3, 6 (Aug. 22, 2012).

30. EDUC. § 94897(p)(1)–(3) (amended by Chapter 585).

31. *Id.* § 94909(a)(16)(A)–(C) (amended by Chapter 585); *id.* § 94910(b), (d) (amended by Chapter 585); *id.* § 94911(i)(1)–(2) (amended by Chapter 585); *id.* § 94913 (enacted by Chapter 585).

employment statistics;[32] and (D) expanded authority of the Bureau to define standards and create regulations concerning private postsecondary institutions.[33]

A. New Disclosure Requirements for Unaccredited Institutions

Prior law mandated that only unaccredited doctoral programs inform prospective students of their accreditation status.[34] These programs were also required to disclose to prospective students "whether the degree issued is in a field requiring licensure in California, and any known limitations of the degree."[35]

Chapter 585 expands on this provision by requiring that doctoral programs, as well as "associate, baccalaureate, [and] master's" programs disclose their accreditation status to prospective students.[36] Institutions offering these programs must also disclose the accreditation status of each specific regulated program.[37]

Chapter 585 also expands the statutory definition of "any known limitations of the degree."[38] At a minimum, schools must disclose whether a student is eligible to sit for licensure in California and other states,[39] disclose that unaccredited degrees are "not recognized for some employment positions," including within California,[40] and disclose that students attending unaccredited institutions are ineligible for federal financial aid.[41]

B. New Disclosure Requirements for All Regulated Institutions

Prior law required all regulated private institutions to "provide a prospective student with a School Performance Fact Sheet containing" a mandatory list of minimum disclosures.[42] Chapter 585 expands this list by requiring the Fact Sheets to include job placement rates for graduates of each of the institution's programs,[43] if those programs are meant to lead to a "recognized career,

32. *Id.* § 94928(e)(1)–(3) (amended by Chapter 585).

33. *Id.* § 94928(e)(2)–(3) (amended by Chapter 585); *id.* § 94929.5(b) (amended by Chapter 585); *id.* § 94929.7(c) (amended by Chapter 585).

34. *Id.* § 94897(p) (West Supp. 2012).

35. *Id.*

36. *Id.* § 94897(p) (amended by Chapter 585); *id.* § 94909(a)(16) (amended by Chapter 585).

37. *Id.* § 94909(a)(16)(B)–(C) (amended by Chapter 585).

38. *Id.* § 94909(a)(16) (amended by Chapter 585).

39. *Id.* § 94897(p)(1) (amended by Chapter 585); *id.* § 94909(a)(16)(A) (amended by Chapter 585).

40. *Id.* § 94897(p)(2) (amended by Chapter 585). This provision requires that institutions provide prospective students with a written provision that reads: "A degree program that is unaccredited or a degree from an unaccredited institution is not recognized for some employment positions, including, but not limited to, positions within the State of California." *Id.* § 94909(a)(16)(B) (amended by Chapter 585).

41. *Id.* § 94897(p)(3) (amended by Chapter 585); *id.* § 94909(a)(16)(C) (amended by Chapter 585).

42. *Id.* § 94910 (West Supp. 2012).

43. *Id.* § 94910(b) (amended by Chapter 585). This provision amends prior law by changing the requirement from "[p]lacement rates" of graduates to "placement rates [of graduates] for each educational

occupation, vocation, job, or job title."[44] Fact Sheets must now also contain statistics reflecting graduates' salaries or wages.[45] In addition, if the institution participates in federal financial aid programs, Fact Sheets must include the institution's most recent three-year cohort default rate,[46] as well as "the percentage of enrolled students receiving federal [loans]."[47]

Prior law required institutions to include a verbatim statement in their student enrollment agreements informing students that schools must provide to the student a student brochure and Fact Sheet prior to enrollment.[48] Chapter 585 adds to this statement by requiring institutions to provide students with the institution's three-year cohort default rate, where applicable, the school's three-year cohort default rate is a required disclosure within the Fact Sheet.[49] Immediately following this statement, enrolling students must certify by signature that they have received these documents prior to enrollment.[50]

Chapter 585 also amends prior law by adding a statutory provision requiring all regulated institutions "maintain[ing] an Internet Web site" to include specific information on that site.[51] This includes the school's catalogue, student brochures, the Fact Sheet, and a link to the Bureau's website.[52]

program." *Compare id.* § 94910(b) (West Supp. 2012), *with id.* § 94910(b) (amended by Chapter 585).

44. *Id.* § 94910(b) (amended by Chapter 585). This provision amends prior law by changing the requirement from "particular career, occupation," et cetera, to a "recognized career." *Compare id.* § 94910(b) (West Supp. 2012), *with id.* § 94910(b) (amended by Chapter 585).

45. *Id.* § 94910(d) (amended by Chapter 585). Chapter 585 amends this section by striking a provision that institutions only disclose this data if the institution makes an "express or implied claim about the salary that may be earned after" graduation. *Compare id.* § 94910(d) (West Supp. 2012), *with id.* § 94910(d) (amended by Chapter 585).

46. *Id.* § 94910(h) (amended by Chapter 585). "A cohort default rate is the percentage of a school's borrowers who enter repayment on federal loans during a particular fiscal year and default . . . . These default rates are 'officially' reported by the U.S. Department of Education once per year." SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 3 (Aug. 22, 2012).

47. EDUC. § 94910(h) (amended by Chapter 585). As a practical matter, this provision only applies to students attending accredited institutions, because current federal law only allows students attending accredited private postsecondary and vocational institutions to receive federal student loans. *See generally* 20 U.S.C. §§ 1091(a), 1094(a) (1994) (requiring enrollment in an eligible institution for students to receive federal aid); 34 C.F.R. §§ 600.4(a)(5)(i), 600.5(a)(6)–(7), 600.6(a)(5)(i) (2012) (collectively defining institutions of higher education, proprietary institutions of higher education, and postsecondary vocational institutions). However, were federal law to be amended to extend aid to students attending unaccredited institutions, this provision would become applicable to those unaccredited institutions that choose to participate in federal aid programs. EDUC. § 94910(h) (amended by Chapter 585).

48. EDUC. § 94911(i)(1) (West Supp. 2012).

49. *Id.* (amended by Chapter 585).

50. *Id.*

51. *Id.* § 94913 (enacted by Chapter 585).

52. *Id.*

C. New Criteria for Calculating Employment Statistics

Prior law defined "graduates employed in the field" as those employed "within six months of graduation" in a job where the skills acquired through obtaining the degree played a significant participating role "in obtaining the position."[53] Chapter 585 changes this definition by striking the significant participating role provision, instead making the deciding factor whether the graduate is employed "in a single position for which the institution represents the program prepares its graduates."[54]

Chapter 585 also extends the six-month "period of employment" in situations where the graduate is attempting to obtain a position for which the state requires they must first pass an exam.[55] Where this extension applies, "the period of employment shall begin within six months of the announcement of the examination results for the first examination available after" graduation.[56]

D. Expanded Authority of the Bureau

Under both prior and current law, institutions must provide the Bureau with an annual report containing the same statistical data published in an institution's Fact Sheet.[57] Chapter 585 expands the Bureau's authority by allowing it to define the information institutions must use to compute these statistics, and by empowering it to require institution to substantiate their reports by turning over to the Bureau the raw data used.[58] However, Chapter 585 limits the scope of this authority to information that is "[u]seful to students," "[u]seful to policymakers," "[b]ased upon the most credible and verifiable data available," and which "[d]oes not impose undue compliance burdens on an institution."[59]

IV. ANALYSIS

Chapter 585 amends prior law by expanding the number of institutions and programs subject to certain reporting requirements,[60] creating new criteria to

53. *Id.* § 94928(e) (West Supp. 2012).

54. *Id.* § 94928(e)(1) (amended by Chapter 585).

55. *Id.*

56. *Id.*

57. *Id.* § 94929.5(a), (c) (West Supp. 2012) (annual report must include "job placement rate[s] . . . license examination passage rates" and "[s]alary and wage information"); *id.* § 94929.5(a)(4) (amended by Chapter 585) (in addition to disclosures required under prior law, report must also include three-year cohort default rate, if applicable).

58. *Id.* § 94929.5(b) (amended by Chapter 585); *id.* § 94929.7(c) (amended by Chapter 585).

59. *Id.* § 94929.5(b)(1)–(4) (amended by Chapter 585).

60. *Id.* § 94897(p) (amended by Chapter 585) (requiring unaccredited institutions that offer associate, baccalaureate, master's, or doctoral degrees to report their accreditations status and all known limitations of the degree to prospective students). Prior to passage of Chapter 585, only unaccredited institutions that offer a

calculate graduates' employment statistics,[61] and expanding the Bureau's authority to make new regulations.[62] But while this legislation may accomplish some of its goals, Chapter 585 raises several questions, including whether targeted institutions will actually comply with the new regulations,[63] whether the new requirements actually improve the accuracy of institutional reporting,[64] and whether the Bureau will be able to effectively police and punish non-compliant institutions.[65]

A. Chapter 585 Takes Aim at Unaccredited Institutions

An institution's status as "unaccredited"[66] is often a mark of poor educational quality.[67] Consequently, graduates of unaccredited institutions may be ineligible for certain civil service jobs, and may be excluded from professional licensure exams.[68]

The concern surrounding unaccredited private institutions harkens back to the 1980s, when California was known as the "diploma mill capital of the world."[69] The legislature's passage of the 1989 Act seemed to alleviate some of the problem.[70] However, with the rise of the Internet, diploma mills continue to thrive in California and throughout the country.[71]

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doctoral degree were subject to this provision. *Id.* § 94897(p) (West Supp. 2012).

61. *Id.* § 94928(e)(1)–(3) (amended by Chapter 585).

62. *Id.* § 94928(e)(2)–(3) (amended by Chapter 585); *id.* § 94929.5(b) (amended by Chapter 585); *id.* § 94929.7(c) (amended by Chapter 585).

63. Tami Abdollah, *California Lawmakers Target Diploma Mills*, S. CAL. PUB. RADIO (May 10, 2012), http://www.scpr.org/blogs/education/2012/05/10/6063/california-lawmakers-target-diploma-mills/ (on file with the *McGeorge Law Review*) (reporting that more than half of the PhDs conferred in California each year may be "fake" or "fraudulent," and that institutions granting these degrees do not seek Bureau approval to operate).

64. *Infra* Part IV.B.

65. Gollan, *supra* note 4 (reporting that "up to 10 percent of the state's approved private postsecondary schools have been allowed to operate with expired approvals," that "some schools with expired approvals are still listed as approved on the state's Web site," that the Bureau does not make it a "general enforcement practice" to track down institutions that operate illegally, and that the Bureau has not been able to effectively follow through on the disciplinary measures it metes out).

66. Accreditation is a voluntary "peer review process" undertaken by an accreditation agency that is approved by the U.S. Department of Education. EDUC. § 94813 (West Supp. 2012); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 3 (Aug. 22, 2012).

67. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 3 (Aug. 22, 2012) (stating that the purpose of accreditation is to determine the quality of private postsecondary institutions and the degree programs they offer); *Accredited Institutions & Unaccredited Institutions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/students/prep/college/diplomamills/accreditation.html (last visited Mar. 30, 2013) (on file with the *McGeorge Law Review*) (stating that the purpose of accreditation is to ensure educational quality, and that unaccredited institutions may, though do not necessarily, provide a poor quality education).

68. *Unaccredited Institutions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/students/prep/college/diplomamills/accreditation.html (last visited Mar. 30, 2013) (on file with the *McGeorge Law Review*).

69. FRANK, *supra* note 9, at ES-3; Editorial, *Failing Vocational Students, supra* note 14.

70. Stephanie Grace, *Degrees of Deception*, NEW ORLEANS TIMES PICAYUNE, Aug. 9, 1998, *available at* 1998 WLNR 1195088 (on file with the *McGeorge Law Review*) (describing California as a "one-time safe

1. Chapter 585 Attempts to Protect Students by Targeting Diploma Mills

Diploma mills fraudulently induce students to purchase fake degrees.[72] With the growth of the Internet, major, legitimate institutions, such as Harvard and UCLA, have begun offering online courses and degree programs.[73] The large number of legitimate institutions offering online degrees has created fertile ground "for diploma mills to flourish."[74] Chapter 585 seeks to address this problem by requiring that all unaccredited private institutions disclose their accreditation status and the limits of the prospective degree before students commit to paying.[75]

Chapter 585 may induce a broader array of legitimate, unaccredited institutions to report their accreditation status and the limits of the degrees they offer.[76] However, Chapter 585 is unlikely to have an effect on a majority of diploma mills, because the very nature of these institutions is to "fly[] under the radar" selling "fake" degrees.[77] And while Chapter 585 does attempt to curb diploma mills by imposing greater statutory requirements upon them,[78] it seems

haven for diploma mills," which has since corrected the problem after passage of the 1989 Act); Judy Lin, *The Governor Says Flaws Must Be Fixed in Bureau that Regulates For-Profit Operations: Vocational Schools Face Loss of State Oversight*, FRESNO BEE, Jan. 22, 2007, *available at* 2007 WLNR 1279248 (on file with the *McGeorge Law Review*) (reporting that consumer advocates feared that dissolution of the Bureau would bring back the days when diploma mills openly operated).

71. Stephanie Armour, *Diploma Mills Insert Degree of Fraud into Job Market*, USA TODAY (Sept. 29, 2003, 12:48 AM), http://usatoday30.usatoday.com/money/workplace/2003-09-28-fakedegrees_x.htm (on file with the *McGeorge Law Review*) (reporting that the operator of ten-million dollar diploma mill was arrested for running sham school over the Internet from an office in San Clemente, California).

72. Grace, *supra* note 70 (reporting that diploma mills use "fraudulent advertising gimmicks" to induce students to purchase fake degrees (quoting Attorney General Richard Ieyoub)); Judy Lin, *Vocational Schools Face Loss of State Oversight*, CAL. ST. UNIV. (Jan. 22, 2007), http://www.calstate.edu/pa/clips2007/january/22 jan/oversight.shtml (on file with the *McGeorge Law Review*) (reporting that the purpose of governmental oversight in California is to ensure "that private colleges and universities don't defraud their students"); Abdollah, *supra* note 63 (stating that diploma mills "offer fraudulent degrees and certificates for little to no work and an often significant fee").

73. Armour, *supra* note 71; HARVARD EXTENSION SCH., http://www.extension.harvard.edu/degrees-certificates (last visited Oct. 15, 2012) (on file with the *McGeorge Law Review*); UCLA EXTENSION, https:// www.uclaextension.edu/pages/fos/ProgramLanding.aspx (last visited Oct. 15, 2012) (on file with the *McGeorge Law Review*).

74. Armour, *supra* note 71 (reporting that many diploma mills create names similar to legitimate universities offering online extension programs, making the imposters difficult to spot).

75. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2296, at 2 (May 11, 2012); Abdollah, *supra* note 63 (stating that lawmakers sought "to determine how best to identify [diploma mills] and root them out without quashing innovation").

76. CAL. EDUC. CODE §§ 94897(p), 94909(a)(16) (amended by Chapter 585).

77. Abdollah, *supra* note 63.

78. EDUC. § 94909(a)(16) (amended by Chapter 585) (requiring all "associate, baccalaureate, master's, or doctoral" programs to inform students of their accreditation status and the limitations of the degree); *id.* § 94897(p) (West Supp. 2012) (requiring only unaccredited doctoral programs to accurately report their accreditations status and the limitations of the degree).

that the Bureau is ill-equipped to track down and discipline institutions that simply choose to be noncompliant.[79]

2. *Chapter 585 Does Not Address the Dangers that Diploma Mills Pose to the General Public*

As the name suggests, many diploma mills serve as little more than professional counterfeiting services that, for a fee, print fake degrees that look legitimate.[80] The general public relies on degreed professionals for a broad range of services, including legal services, healthcare, education, and counseling.[81] The public views these degrees as an indicator of a professional's qualifications.[82]

Diploma mills endanger the public by allowing unqualified people to masquerade as qualified professionals.[83] While many students who turn to diploma mills do so innocently, believing that the degree they seek is legitimate, many more do so with the understanding that they will receive an advanced diploma after completing virtually no course work.[84] These diplomas allow "graduates" to fool prospective employers and clients by creating an air of legitimacy and competence, even though the graduate is unqualified to perform the work.[85] Thus, because diploma mills confer a large number of degrees to people who knowingly wish to fool the public, it is unclear what, if any, effect Chapter 585 will have in curbing the lucrative services diploma mills provide.[86]

B. *Chapter 585 Attempts to Improve the Accuracy of Institutional Reporting by Changing the Statutory Definition of "Graduates Employed in the Field"*

Chapter 585 changes the statutory definition of "graduates employed in the field."[87] The author of this provision argues this change is necessary to correct an ambiguity in the law.[88] For instance, law schools often create short-term, paid

79. Gollan, *supra* note 4 (reporting that, due to understaffing, the Bureau does not make it a practice to track down and discipline institutions that operate illegally).

80. Abdollah, *supra* note 63; Armour, *supra* note 71; Grace, *supra* note 70.

81. Armour, *supra* note 71 (reporting that people who have purchased degrees from diploma mills "have held jobs as sex-abuse counselors, college vice presidents, child psychologists, athletic coaches and engineers").

82. *Id.* (reporting that a mother who relied on diploma mill medical degrees that lined the walls of her daughter's doctor's office followed the doctor's medical advice, resulting in the death of her child).

83. *Id.*

84. Abdollah, *supra* note 63; Grace, *supra* note 70.

85. Armour, *supra* note 71 (reporting cases where people have knowingly purchased and used fake degrees to obtain jobs as medical doctors, "sex-abuse counselors, college vice presidents, child psychologists, athletic coaches and engineers").

86. Abdollah, *supra* note 63; Armour, *supra* note 71 (reporting that, nationwide, diploma mills make an estimated $500 million each year).

87. CAL. EDUC. CODE § 94928(e)(1) (amended by Chapter 585).

88. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 4 (Aug. 22, 2012).

positions for recent graduates to boost schools' employment statistics.[89] Under the old definition, these graduates would be considered employed within the field, because their degree played a significant role in the acquisition of their short-term position.[90] Chapter 585 aims to abate this practice by changing the definitional character of "graduates employed in the field" to mean those employed in a "single position for which the institution represents the program prepare[d]" such graduates.[91]

However, Chapter 585 could make it more difficult for schools to receive accurate employment data.[92] Opponents argue that institutions attempting to determine whether a graduate's job requirements meet the statutory definition will hound employers, discouraging employers from hiring the institution's graduates.[93] Moreover, graduates will be discouraged from providing their alma maters with accurate information due to the stringent statutory tracking requirements.[94] Opponents believe that students may simply stop communicating with the school after graduation, making it difficult for schools to comply with the regulations, and potentially increasing the cohort default rate for future students.[95]

C. Does Chapter 585 Accomplish What It Sets Out to Do?

Chapter 585 attempts to protect prospective students from fraud and deception by creating greater transparency.[96] While on paper, Chapter 585 may accomplish its goal; historically, the Bureau has had problems enforcing its regulations.[97] Where schools are in violation of Bureau regulations and operate without state approval, the Bureau does not make it a practice to track down

89. *Law, Education Remain Among Nation's Best in Rankings*, WILLIAM & MARY (Mar. 17, 2012), http://www.wm.edu/news/stories/2012/law,-education-remain-among-nations-best-in-rankings.php (on file with the *McGeorge Law Review*).

90. EDUC. § 94928(e) (West Supp. 2012).

91. *Id.* § 94928(e)(1) (amended by Chapter 585). A short-term position stacking books in a law-school library, for instance, would likely not qualify under Chapter 585, because the law school does not represent to prepare its students to stack books professionally. *Id.*

92. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 6 (Aug. 22, 2012).

93. *Id.*

94. *Id.*

95. *Id.*

96. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2296, at 2–4 (May 11, 2012); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 6 (Aug. 22, 2012); Lin, *Vocational Schools Face Loss of State Oversight*, *supra* note 72 (reporting that the purpose of governmental oversight in California is to ensure "that private colleges and universities don't defraud their students").

97. Gollan, *supra* note 4 (reporting that, due to understaffing, the Bureau is unable to proactively ensure that institutions operate in compliance); Elizabeth Redden, *California Regulatin'*, INSIDE HIGHER ED. (Jan. 29, 2007), http://www. insidehighered.com/news/2007/01/29/california (on file with the *McGeorge Law Review*) (reporting that the Bureau's enforcement capabilities have historically been hampered by understaffing and a backlog of consumer complaints).

violators.[98] Chapter 585 does not include a provision providing for greater enforcement.[99] Thus, even if schools fail to comply with the mandates of Chapter 585, it does not appear that the Bureau is in a position to enforce these provisions.[100]

V. CONCLUSION

Chapter 585 represents an attempt by the legislature to close reporting loopholes present in prior law by mandating additional disclosure requirements from private postsecondary institutions regarding accreditations status,[101] known limitations on degrees,[102] wage and employment data,[103] and cohort default rates.[104] Chapter 585 also mandates that institutions provide prospective students with this data prior to enrollment.[105] Additionally, the Bureau overseeing enforcement of regulated institutions is given the authority to define standards[106] and make regulations.[107] The purpose of this reform is to make California's private postsecondary and vocational institutions more transparent so that prospective students can adequately weigh their options.[108] However, without a statutory mechanism providing the Bureau with greater resources, the long-term effects of Chapter 585 are unknown because the Bureau does not appear to have the resources necessary to discipline institutions that are currently non-complaint.[109]

98. Gollan, *supra* note 4 (reporting that, even after the Bureau was recently made aware that 137 schools are operating illegally, it "had no plans to follow up" beyond the issuance of "courtesy" notices informing the institutions of their non-complaint status).

99. *See generally* 2012 Cal. Stat. ch. 585.

100. Gollan, *supra* note 4.

101. CAL. EDUC. CODE § 94897(p)(1) (amended by Chapter 585)

102. *Id.* § 94897(p)(1)–(3) (amended by Chapter 585).

103. *Id.* § 94910(b), (d) (amended by Chapter 585).

104. *Id.* § 94910(h) (amended by Chapter 585).

105. *Id.* § 94911(i)(1)–(2) (amended by Chapter 585).

106. *Id.* § 94928(e)(2) (amended by Chapter 585).

107. *Id.* § 94929.5(b) (amended by Chapter 585).

108. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2296, at 4 (Aug. 22, 2012).

109. Gollan, *supra* note 4.

Friend Request Denied: Chapter 619 Prohibits Colleges from Requesting Access to Social Media Accounts

Katherine Pankow

Code Sections Affected

Education Code §§ 99120, 99121, 99122 (new).
SB 1349 (Yee); 2012 STAT. Ch. 619.

It's just a technology; it can be used either benevolently or harmfully. . . . And I'm sure after Facebook it will be the little cameras that we have implanted into the palms of our hands and we'll be debating whether we should get them, and then we'll all get them.

—Jesse Eisenberg, star of *The Social Network*[1]

I. INTRODUCTION

Some say that when you accommodate a request for your social media information, it is analogous to allowing a stranger to open your mail.[2] Picture the stranger pulling a fistful of letters from your mailbox, getting cozy on the wicker furniture that adorns your porch, and swiftly ripping open the envelopes.[3] Others might observe that it is more like dropping your house keys into anyone's hands and giving them free rein to inspect your medicine cabinet, poke around in your delicates drawer, and maybe even grab a quick snack from your fridge.[4] Still others might posit that disclosing the user names and passwords to your social media accounts is exactly like being "virtually strip searched"—feel the shame as a college official's cold, emotionless gaze casually drifts over your bare and vulnerable online persona.[5]

1. Catherine Shoard, *Jesse Eisenberg: Privacy Settings Engaged*, GUARDIAN (Oct. 14, 2010), http://www.guardian.co.uk/film/2010/oct/14/jesse-eisenberg-the-social-network (on file with the *McGeorge Law Review*).

2. *E.g.*, Doug Gross, *ACLU: Facebook Password Isn't Your Boss' Business*, CNN TECH (Mar. 22, 2012), http://www.cnn.com/2012/03/22/tech/social-media/facebook-password-employers/index.html (quoting attorney Catherine Crump) (on file with the *McGeorge Law Review*) (describing an employer's obtaining access to an employee's Facebook account as analogous to the employer opening and reading the employee's personal mail).

3. *Id.*

4. *See* Shannon Mcfarland, *Job Seekers Getting Asked for Facebook Passwords*, USA TODAY (Mar. 21, 2012, 10:56 AM), http://www.usatoday.com/tech/news/story/2012-03-20/job-applicants-facebook/53665606/1 (quoting law professor Orin Kerr) (on file with the *McGeorge Law Review*) (likening an employer's request for an employee's Facebook password to a requirement that the employee turn the keys to their home over to the employer).

5. *See* Editorial, *State: Vetting Overreach*, PRESS-ENTERPRISE (Apr. 26, 2012), http://www.pe.com/opinion/editorials-headlines/20120426-state-vetting-overreach.ece (on file with the *McGeorge Law Review*) (concluding that bosses' efforts to get details about their workers should not become a "virtual strip search").

The social media phenomenon is undeniable.[6] As of October 2012, Facebook boasts one-billion active users.[7] Estimates indicate that Twitter has around 500 million users[8] and that roughly seventy-million blogs are floating around in cyberspace.[9] Social media is an excellent way to stay in touch with friends and family and keep current on all of the latest happenings in the world.[10] However, social media is a blessing and a curse; while it sometimes is an effective form of communication, it can cause social-media users to inadvertently embarrass themselves.[11]

The word "overshare" won the title of Webster's 2008 Word of the Year, and it describes situations when social-media users reveal too much personal information, either on purpose or inadvertently.[12] It is "a new word for an old habit made astonishingly easy by modern technology."[13] Case in point: Anthony Weiner, the aptly named Democratic Senator from New York who sent lewd photos of himself to a female college student from his Twitter account.[14] The scandal played out in the media for nearly one month and culminated with Senator Weiner's admission of guilt and his resignation.[15] In light of these often uninhibited displays of personal information, Chapter 619 attempts to provide increased protections to social-media users who attend or are applying to college.[16]

6. *See* Christopher E. Parker, *The Rising Tide of Social Media*, 58 FED. LAWYER 13, 14 (2011) ("The prevalence of social media is quite clear.").

7. FACEBOOK, http://newsroom.fb.com/content/default.aspx?NewsAreaId=22 (last visited June 7, 2012) (on file with the *McGeorge Law Review*).

8. Shea Bennett, *Twitter on Track for 500 Million Total Users by March, 250 Million Active Users by End of 2012*, ALL TWITTER (Jan. 13, 2012, 6:00 AM), http://www.mediabistro.com/alltwitter/twitter-active-total-users_b17655 (on file with the *McGeorge Law Review*).

9. Parker, *supra* note 6, at 14.

10. *See* FACEBOOK, *supra* note 7 (stating that Facebook users "stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them").

11. *See, e.g.*, Alex Altman, *Weinergate: Anatomy of a Social Media Scandal*, TIME (May 31, 2011), http://swampland.time.com/2011/05/31/weinergate-anatomy-of-a-social-media-scandal (on file with the *McGeorge Law Review*) (describing the "Weinergate" scandal, which was the result of the lewd photo that Anthony Weiner posted on Twitter).

12. *Webster's New World Word of the Year, Word of the Year 2008: Overshare*, WORDPRESS, http://wordoftheyear.wordpress.com/2008/12/01/2008-word-of-the-year-overshare (on file with the *McGeorge Law Review*).

13. *Id.*

14. Raymond Hernandez, *Weiner Resigns in Chaotic Final Scene*, N.Y. TIMES (June 16, 2011), http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html (on file with the *McGeorge Law Review*).

15. *Id.*

16. *See* CAL. EDUC. CODE § 99121(a) (enacted by Chapter 619) (prohibiting colleges from requesting a student's user name and password to their social media accounts).

II. LEGAL BACKGROUND

California education law charges the governing bodies of each college with establishing rules to govern student conduct.[17] If a student violates the rules that govern conduct, then California law vests the governing boards of public colleges with the power to reprimand the student.[18]

The power to discipline students rests with the respective governing boards of the University of California, California State Universities, and California Community Colleges (collectively, governing boards).[19] A governing board may discipline a student if a "campus body" holds a timely hearing and determines that the student "willfully disrupted the orderly operation of the campus."[20] However, the board may impose immediate suspension in special circumstances.[21]

The Education Code charges each of the governing boards with adopting or delegating their authority to adopt rules and regulations that govern student behavior along with corresponding penalties that apply should students violate those rules.[22] As an example, the California State University sets forth various campus values along with disciplinary measures for violating those values in the Section 41301 of the California Code of Regulations.[23]

Suspension and expulsion are among the tools that the boards have in their arsenal of punishment, but certain restrictions still apply.[24] A board cannot suspend a student without good cause, for example.[25] Expulsion also requires good cause, but it is reserved for instances when other punishments fail or the student's presence on campus endangers others.[26] While presidents and instructors have the power to suspend, the Education Code does not give them authority to expel.[27] The statute reserves that power for the governing board.[28]

17. *Id.* § 66017 (West 2012).

18. *Id.* § 66300.

19. *Id.* § 66017.

20. *Id.*

21. *Id.* Immediate suspension is appropriate when it "is required in order to protect lives or property and to insure the maintenance of order . . . ." *Id.*

22. *Id.* § 66300.

23. CAL. CODE REGS. tit. 5, § 41301 (2012).

24. *See* EDUC. § 76030 (West 2003) (stating that the law grants the governing board the power to expel a student).

25. *Id.* Good cause will usually exist if the student has broken any of the college's rules. *See id.* § 76033 (presenting examples of student conduct that violate rules for student conduct and constitute good cause). For example, the board would have good cause if a student is under the influence of drugs or sells drugs on campus. *Id.* Good cause may also exist if a student commits an assault, a battery, or some other act of violence on another student. *Id.* Section 76033 lists other instances where good cause might exist, but the list is not exhaustive. *Id.*

26. *Id.* § 76030.

27. *Id.*

28. *Id.*

The punishment that a private college may render is subject to regulation.[29] Private colleges cannot subject students to rules that discipline off-campus conduct protected by the First Amendment of the California Constitution.[30] If a private college violates the statute, the aggrieved student may bring a civil action.[31] An analogous provision applies to public universities.[32]

III. CHAPTER 619

Chapter 619 prohibits public and private colleges from requiring or requesting that students disclose their user names and passwords to their social media accounts.[33] Chapter 619 defines social media as "an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations."[34] Although colleges are legally prohibited from requesting the information, if they do so despite the illegality and thereby violate Chapter 619, the college may not impose a penalty of any kind if the student refuses to furnish the information that the college would need to access the student's social media accounts.[35] The new law does not change anything regarding investigations of student misconduct, and it does not prohibit the college from punishing a student for "any lawful reason."[36] The statute protects current and prospective students.[37] Additionally, private colleges must now post their social media privacy policies on their websites.[38] Finally, Chapter 619 implements a broad catch-all provision that prohibits colleges from asking students to "[d]ivulge any personal social media information."[39]

29. *See id.* § 94367 (West 2002 & Supp. 2012) (prohibiting private colleges from punishing student speech in certain instances).

30. *Id.* § 94367(a).

31. *Id.* § 94367(b).

32. *See id.* § 66301 (West 2012) (prohibits the governing boards of California's public university systems from adopting and enforcing rules that discipline students based on conduct protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution).

33. *Id.* § 99121 (enacted by Chapter 619).

34. *Id.* § 99120 (enacted by Chapter 619). Specific examples of user-generated content include blogs, podcasts, instant messages, e-mail, and online accounts. *Id.*

35. *Id.* § 99121(b) (enacted by Chapter 619).

36. *Id.* § 99121(c) (enacted by Chapter 619).

37. *Id.* § 99121(a) (enacted by Chapter 619).

38. *Id.* § 99122 (enacted by Chapter 619). Chapter 619 does not require public colleges to post their social media policies on their websites. *Id.*

39. *Id.* § 99121(a)(3) (enacted by Chapter 619).

IV. ANALYSIS

The plain language of Chapter 619 clearly prohibits any requests by colleges for the social media passwords of students.[40] However, the implications of Chapter 619's catch-all provision are less clear.[41] Further, Chapter 619 does not set forth any consequences for colleges that may violate its provisions.[42] It also does not address the fact that a college may simply conduct an internet search to view students' public social media profiles.[43] Chapter 619 might increase privacy protections for college students,[44] but there was not a widespread problem of California colleges requesting access to students' social media accounts in the first place.[45]

A. Legal Implications

Along with prohibiting colleges from requesting a student's user name and password to their social media accounts,[46] Chapter 619 also sets forth a catch-all provision.[47] This provision likely exists to prohibit any methods that a college might invent so that they may gain access to a social media account without actually asking for a password.[48]

Chapter 619 bolsters the laws that prohibit discrimination based on a person's protected status by further restricting the ways that a college may discover information like age, race, and sexual orientation, because the college may no longer gain access to a student's private social media account.[49] However, the new legislation does not address the fact that this information can be obtained without requesting access to a social media account if a student has configured their account settings so that the public may view the account.[50]

40. *Id.* § 99121(a) (enacted by Chapter 619).

41. *Id.* § 99121(a)(3) (enacted by Chapter 619); *see also supra* note 39 and accompanying text.

42. *See id.* §§ 99120–22 (enacted by Chapter 619) (failing to provide any consequences for violations of Chapter 619).

43. *See id.* § 99121(a) (enacted by Chapter 619) (prohibiting colleges from requesting a student's social media password, but not prohibiting the college from conducting an internet search to discover the student's social media accounts).

44. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 2 (Apr. 18, 2012).

45. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012).

46. EDUC. § 99121(a) (enacted by Chapter 619).

47. *Id.* § 99121(a)(3) (enacted by Chapter 619).

48. *E.g.*, Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES (Mar. 30, 2012), http://www.newyorktimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all (on file with the *McGeorge Law Review*) (noting that some student athletes were required to give the university access to their social media accounts by downloading monitoring software or adding a coach to their friend list).

49. EDUC. § 99121 (enacted by Chapter 619).

50. *See State: Vetting Overreach*, *supra* note 5 (explaining that public sections of social media accounts, unlike the private sections of an account that are reserved by the social media user for friends only, can be

Chapter 619 also imposes limits on a college's investigative power and its authority to reprimand students.[51] It further restricts the college's power to punish students, including with suspension or expulsion, by prohibiting the college from disciplining a student or student groups who refuse to disclose the user names and passwords to their social media accounts.[52] However, it remains to be seen why a college should avoid violating the newly enacted code sections in Chapter 619, because the new law does not provide for any penalties if a college violates them.[53] Thus, it is unclear what kind of deterrent effect Chapter 619 will have.[54]

B. Protecting University Officials from Themselves

By providing added student social media protections, Chapter 619 may help colleges avoid legal battles over discriminatory enrollment practices.[55] Supporters note that a college could run afoul of laws that prohibit colleges from obtaining an applicant's private information by looking at an applicant's social media account;[56] moreover, if the practice goes unchecked it could be used as a way around antidiscrimination laws entirely.[57] As an example, California voters have already decided that colleges may not consider race when admitting students,[58] but applicants may also "decline to state" their race on their college applications.[59] In this situation, Chapter 619 would not prevent an admissions officer from simply putting the student's name into a search engine and discovering the student's social media profiles.[60] If the student's social media

readily examined by anyone with an internet connection). There is reason for college applicants to be wary: admissions officers at their school of choice may be running applicant's names in an internet search to vet their suitability for admission. *See* Kashmir Hill, *What College Admission Officers Don't Like Seeing on Facebook: Vulgarity, Drinking Photos & 'Illegal Activities'*, FORBES (Oct 12, 2012, 11:11 AM), http://www.forbes.com/sites/kashmirhill/2012/10/12/what-college-admission-officers-dont-like-seeing-on-facebook-profiles-vulgarity-drinking-photos-and-illegal-activities/ (on file with the *McGeorge Law Review*) (discussing a recent survey by Kaplan, which showed that twenty-seven percent of admissions officers Google applicants when the officers are reviewing their applications).

51. EDUC. § 99121(b)–(c) (enacted by Chapter 619).

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 3 (Apr. 18, 2012) (questioning how reasonable it is to restrict postsecondary educational institutions' access to information concerning student activity).

56. Press Release, Leland Yee, Senator, Cal. State Senate, Committee 'Likes' Yee's Social Media Bill (Apr. 25, 2012) (on file with the *McGeorge Law Review*).

57. *Id.*

58. *See* Jean Cowden Moore, *Not Stating Race for College Entry a Growing Trend*, VENTURA CNTY. STAR, July 6, 2008, *available at* 2008 WLNR 12680151 (on file with the *McGeorge Law Review*) (stating that Proposition 209 amended the California Constitution to prohibit California colleges from using a student's race, religion, age, or gender as a factor in admittance); CAL. CONST. of 1879, art. I, § 31 (1996).

59. *See* Moore, *supra* note 58 (stating that some students who applied to California colleges elected to check "decline to state" in response to the application question that asks applicants to identify their race).

60. *See* CAL. EDUC. CODE § 99121(a) (enacted by Chapter 619) (prohibiting colleges from requesting a

profile is public, the admissions officer may be able to discover the applicant's race.[61]

C. Privacy in the Age of Overshare

Chapter 619's proponents also tout the law as a mechanism to ensure the privacy of students.[62] According to Chapter 619's author, the risk that curious colleges will infringe on the rights of students is real,[63] and this practice may violate the California Constitution.[64] Additionally, by accessing a student's social media, a college may simultaneously invade the privacy expectations of friends and family who shared personal information with the student.[65]

While Chapter 619 requires private colleges to post their social media privacy policies on their websites, it does not require public colleges to do so.[66] This could be because public colleges assert that they do not request social media information from students.[67] However, it seems just as important that students at public schools be as aware of their rights related to social media privacy as students at private schools, especially because Chapter 619's prohibitions apply equally to both public and private schools.[68]

D. A Missile to Kill a Mouse?

It is unclear how widespread the practice of colleges requesting social media user names and passwords really is.[69] Although the author of Chapter 619 insists that there is a growing nationwide trend of colleges who request social media passwords, he does not set forth any numerical data to corroborate this

student's social media password, but not prohibiting the colleges from conducting an internet search to discover the student's social media accounts).

61. *See State: Vetting Overreach*, *supra* note 5 (explaining that public sections of social media accounts, unlike the private sections of an account that are reserved by the social media user for friends only, can be readily examined by anyone with an internet connection).

62. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 2 (Apr. 18, 2012).

63. *Id.*

64. CAL. CONST. of 1879, art. I, § 1 (1974); Press Release, Leland Yee, Senator, Cal. State Senate, California Senate Approves Social Media Privacy Act (May 25, 2012) [hereinafter Yee Press Release May 2012] (on file with the *McGeorge Law Review*) ("SB 1349 is a significant step towards securing Californian's constitutional right to privacy, both online and offline, in the workplace and in school" (quoting Jon Fox, Consumer Advocate of CALPIRG)).

65. Yee Press Release May 2012, *supra* note 64.

66. CAL. EDUC. CODE § 99122 (enacted by Chapter 619).

67. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012).

68. EDUC. §§ 99121–22 (enacted by Chapter 619).

69. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012) (stating that although public postsecondary educational institutions claim they do not search students' media sites, there are some private universities that require student athletes to provide access to their social media accounts).

assertion.[70] The state's public colleges claim they do not request social media information from students.[71] According to the author of Chapter 619, "some" private institutions do, but he failed to give any specific examples.[72] Instead of referring to the practice of requesting social media passwords as a pervasive problem at California colleges, the author couched the importance of the legislation in terms of "risk."[73] Thus, there are probably no specific instances that the author can point to.[74] Since most colleges do not appear to be requesting social media information from students, one may wonder why the legislation was introduced in the first place.[75] Chances are that Chapter 619 was the legislature's reaction to a perceived, but not necessarily real, problem; the law is partly a byproduct of the media attention surrounding employers who requested access to the social media accounts of job applicants.[76]

V. CONCLUSION

Chapter 619 may at least provide the students who are aware of it with a sense of relief or justice knowing that it is illegal for a college to require its students to disclose their social media information.[77] Additionally, colleges might now have a better idea of what the law prohibits with respect to social media.[78] That new knowledge may not matter, though, because Chapter 619 does not impose any penalties on colleges that violate it.[79] The most certain aspect of Chapter 619 is that it cannot cure a social media user's bad judgment.[80] The responsibility is still on the social media user to exercise caution with respect to their postings to ensure that they do not get caught up in a scandal of "Weinergate" proportions.[81]

70. *Id.*

71. *Id.*

72. *Id.*

73. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 1349, at 2–3 (Apr. 18, 2012). "[T]he author contends that [social media] has also put employees, job applicants, and students at risk of having their privacy blatantly violated by employers and schools." *Id.* at 3.

74. *See id.*

75. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1349, at 4 (Aug. 17, 2012) (mentioning that public universities claim to not request social media information from their students, while some private universities do).

76. *See* SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1349, at 3 (Apr. 21, 2012) (noting a news story that discussed the Maryland Department of Public Safety and Correctional Services request to access Robert Collins' Facebook profile).

77. CAL. EDUC. CODE § 99121 (enacted by Chapter 619).

78. *Id.*

79. *Id.*

80. *Id.*

81. Altman, *supra* note 11.

Chapter 621: Using Open-Source Textbooks to Lower the Cost of Education

Benjamin Grimes

Code Sections Affected

Education Code § 66409 (new), §§ 67302, 67302.5 (amended).
SB 1052 (Steinberg); 2012 STAT. Ch. 621.

I. INTRODUCTION

A California college student spends an average of $1,000 per year on textbooks.[1] For some students, like those at California's community colleges, this amount may exceed the price of tuition.[2] In the past two decades, textbook prices increased at twice the rate of inflation, making it increasingly difficult for students to afford their textbooks.[3] As textbook costs continue to rise, college becomes less affordable, and some students "forgo purchasing [textbooks] altogether."[4]

There are numerous reasons why textbooks are so expensive.[5] Textbook publishers release new editions of a book every three to four years, on average.[6] Typically, faculty adopt these editions despite the fact that the new editions often contain little, if any, new substantive material, but instead have merely undergone cosmetic changes.[7] This publication cycle forces old editions into obsolescence, limiting the supply of cheaper, used books for students to buy.[8] Publishers also increasingly bundle textbooks with expensive supplements and

1. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 6 (Aug. 28, 2012); *How Much Does College Cost*, CALIFORNIACOLLEGES.EDU, http://www.californiacolleges.edu/finance/how-much-does-college-cost.asp (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (stating the average cost of textbooks and supplies is $1,656 annually); *Trends in College Pricing 2011*, COLLEGE BOARD, http://trends.collegeboard.org/college_pricing/report_findings/indicator/883#f9007 (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (stating that the average cost of textbooks and supplies at a four-year public university is $1,168 annually).

2. *How Much Does College Cost*, *supra* note 1. For the 2012–2013 school year, California community college fees and tuition are estimated to be $1,104. *Id.*

3. CORNELIA M. ASHBY, U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-806, COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE RECENT PRICE INCREASES 8 (2005), *available at* http://www.gao.gov/assets/250/247332.pdf (on file with the *McGeorge Law Review*).

4. 2012 Cal. Stat. ch. 621, § 1(a)(2).

5. NATSUOKO HAYASHI NICHOLLS, UNIV. OF MICH., THE INVESTIGATION INTO THE RISING COST OF TEXTBOOKS 7 (2009), *available at* www.lib.umich.edu/files/SPOTextbookBackground.pdf (on file with the *McGeorge Law Review*).

6. *Id.*

7. *Id.*

8. ASHBY, *supra* note 3, at 18.

pass the cost of production onto the consumer.[9] While the bundled materials might offer valuable instructional tools, students and faculty often do not use them.[10]

In response to constantly increasing prices, the California Legislature passed Chapter 621, which will make low-cost, open-source textbooks available to the students of fifty lower-division courses.[11]

II. LEGAL BACKGROUND

In recent years, both the United States Congress and the California Legislature enacted legislation aimed at lowering textbook prices.[12]

A. Federal Efforts: The Higher Education Opportunity Act

In 2008, Congress passed the Higher Education Opportunity Act (HEOA).[13] Part of the legislation sought to "ensure that students have access to affordable course materials by decreasing costs to students and enhancing transparency and disclosure with respect to the selection, purchase, sale, and use of course materials."[14] By including textbook provisions in the HEOA, Congress intended to

> encourage all of the involved parties, including faculty, students, administrators, institutions of higher education, bookstores, distributors, and publishers, to work together to identify ways to decrease the cost of college textbooks and supplemental materials for students while supporting the academic freedom of faculty members to select high quality course materials for students.[15]

9. *Id.* at 14; NICHOLLS, *supra* note 5, at 8.

10. NICHOLLS, *supra* note 5, at 8.

11. CAL. EDUC. CODE § 66409 (enacted by Chapter 621). Chapter 621 provides select textbooks to students free of charge as a digital edition, or for twenty dollars as a print edition. *Id.*

12. Higher Education Opportunity Act (HEOA), § 133, 20 U.S.C. § 1015b (Supp. IV 2011); EDUC. §§ 66406.7, 66410 (West 2012). In addition to the above acts by the U.S. Congress and California Legislature, both schools and the textbook industry have made efforts to make textbooks more affordable, notably through offering alternative textbook formats and creating textbook rental programs. *See* ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, TURN THE PAGE: MAKING COLLEGE TEXTBOOKS MORE AFFORDABLE 11–25 (2007), *available at* http://www2.ed.gov/about/bdscomm/list/acsfa/turnthepage.pdf (on file with the *McGeorge Law Review*) (providing numerous examples of industry efforts to lower textbook costs).

13. Higher Education Opportunity Act (HEOA), Pub. L. No. 110-315, 122 Stat. 3110 (codified as amended in scattered sections of title 20 of the United States Code). The HEOA reauthorized the Higher Education Act of 1965 (HEA) and made a number of changes to programs authorized under the HEA. *Id.*

14. 20 U.S.C. § 1015b(a).

15. *Id.* § 1015b(a).

The HEOA places several requirements on publishers and higher-education institutions.[16] Any publisher that provides information about a textbook to a faculty member or other person in charge of textbook adoption must also provide: (1) the price that the publisher would sell the book to a bookstore;[17] (2) the price that the publisher would sell the book to the public;[18] (3) the copyright dates of the three previous editions of the textbook;[19] (4) a description of the differences between an old edition and the current edition;[20] (5) any alternative formats in which the book is available;[21] and (6) if there are alternative formats, the price of those alternatives to both the bookstore and the public.[22] Further, the law requires publishers that sell bundled versions of a textbook make the individual components available for purchase as separate items.[23]

The HEOA also requires that colleges and universities disclose both the International Standard Book Number (ISBN) for any textbook that is adopted and the retail price of that book on the school's online course schedule.[24] Schools must also make available to campus bookstores[25] the course schedule for the subsequent academic period,[26] the books required for those courses,[27] the number of students enrolled in each course,[28] and the maximum enrollment for each course.[29]

By requiring publishers and schools to disclose this information, the HEOA has made it easier for students to comparison shop and to purchase their textbooks ahead of time.[30] The Government Accountability Office (GAO) is required to report back to Congress regarding the law and its impacts.[31]

16. *Id.* § 1015b.

17. *Id.* § 1015b(c)(1)(A).

18. *Id.*

19. *Id.* § 1015b(c)(1)(B).

20. *Id.* § 1015b(c)(1)(C).

21. *Id.* § 1015b(c)(1)(D)(i).

22. *Id.* § 1015b(c)(1)(D)(ii).

23. *Id.* § 1015b(c)(2).

24. *Id.* § 1015b(d)(1).

25. *Id.* § 1015b(e). The law does not require schools to provide this information to bookstores unless the bookstore is operated by the campus, is in a contractual relationship with the campus, or is otherwise affiliated with the campus. *Id.* This would mean that competing, off-campus bookstores are not entitled to this information unless they have one of the aforementioned relationships with the school. *Id.*

26. *Id.* § 1015b(e)(1).

27. *Id.* § 1015b(e)(2)(A).

28. *Id.* § 1015b(e)(2)(B).

29. *Id.* § 1015b(e)(2)(C).

30. *Federal Textbook Disclosure Law*, STUDENT PIRGS (last updated Mar. 16, 2012), http://www.studentpirgs.org/resources/textbook-price-disclosure-law (on file with the *McGeorge Law Review*).

31. 20 U.S.C. § 1015b(g).

B. State Efforts to Lower Textbook Prices

The California Legislature has passed two notable pieces of legislation in recent years to address the problem of high textbook prices.[32] In 2007, it passed the College Textbook Transparency Act (CTTA), adding several provisions to the Education Code affecting textbook publishers, textbook adopters, and college bookstores.[33] Under the CTTA, publishers are required to print a list of substantive changes in any new edition of a textbook published after January 1, 2010.[34] Further, publishers must provide to requesting faculty textbook pricing information and copyright dates of any previous editions.[35]

The CTTA also requires that campus bookstores disclose, either online or in-store, their new and used book pricing policies.[36] In addition, the law requires schools to encourage faculty to provide the campus bookstore with their orders far enough in advance for the store to confirm the availability of the required materials.[37] The law "encourage[s faculty] to consider cost in the adoption of textbooks."[38]

In 2009, the legislature passed Senate Bill 48, adding section 66410 to the California Education Code.[39] The law requires publishers who sell their books at University of California (UC), California State University (CSU), or California Community College (CCC) campuses to make the books available in an electronic format whenever practicable.[40] Publishers have until January 1, 2020 to comply with this law.[41]

III. CHAPTER 621

Chapter 621 represents the latest effort of the California Legislature to lower the cost of textbooks, by making select free and low-cost course materials available to students of the UC, CSU, and CCC systems.[42] The law establishes the California Open Education Resources Council (COERC), a nine-member panel comprised of three representatives from each of the three public higher education systems, to oversee this process.[43]

32. CAL. EDUC. CODE §§ 66406.7, 66410 (West Supp. 2012).

33. *Id.* § 66406.7.

34. *Id.* § 66406.7(d)(1)(A). This information must either be included inside the book or on its cover. *Id.* § 66406.7(d)(1).

35. *Id.* § 66406.7(e)(1)(B)–(C).

36. *Id.* § 66406.7(f).

37. *Id.* § 66406.7(g).

38. *Id.* § 66406.7(c)(1).

39. 2009 Cal. Stat. ch. 161, at 94–95 (enacting CAL. EDUC. CODE § 66410).

40. EDUC. § 66410(a).

41. *Id.*

42. 2012 Cal. Stat. ch. 621, § 1(a)(3).

43. EDUC. § 66409(a) (enacted by Chapter 621). The Intersegmental Committee of the Academic

Chapter 621 requires the COERC to determine a list of "fifty strategically selected lower-division courses" between the UC, CSU, and CCC systems "for which high quality, affordable digital open source textbooks" will be created.[44] Chapter 621 sets forth a number of criteria that COERC will consider in selecting the fifty courses.[45] These criteria include: enrollment levels in a course,[46] potential cost savings for students,[47] the "consistency of content" between different textbooks,[48] the opportunity for faculty to bring in additional faculty-authored materials,[49] and the advantages that utilization of digital content will provide to a specific course.[50]

Once the COERC determines which fifty courses will receive open-source textbooks, it begins the process of commissioning materials for these courses.[51] Potential authors may apply for funds to create "digital open source textbooks or other materials" for the fifty courses (open educational resources, or OERs) through a competitive process established by the COERC.[52] However, the law makes clear that the COERC does not have to commission completely new works.[53] Instead, the COERC may develop or acquire preexisting works either by purchasing them from their current owner or by using free materials created in other contexts.[54] Once COERC creates or acquires an OER, the California Digital Open Source Library (CDOSL) houses the material.[55] Students enrolled in a qualifying course may obtain an electronic copy of the OER via download from the CDOSL[56] or purchase a print version for approximately twenty dollars from their campus bookstores.[57] The law requires the COERC to promote the production, access, and use of these OERs.[58]

Senates of the three public university systems is responsible for administering the COERC. *Id.* Chapter 621 requires that the council be selected within ninety days of the law's effective date. *Id.* § 66409(b) (enacted by Chapter 621).

44. *Id.* § 66409(c)(1) (enacted by Chapter 621). "Open source textbooks," a form of Open Educational Resource, are a "teaching and learning material[] that" may be "freely use[d] and reuse[d], without charge." OER COMMONS, http://www.oercommons.org/about (last visited Apr. 22, 2013) (on file with the *McGeorge Law Review*).

45. EDUC. § 66409(c)(1)(B) (enacted by Chapter 621).

46. *Id.* § 66409(c)(1)(B)(i) (enacted by Chapter 621).

47. *Id.* § 66409(c)(1)(B)(ii) (enacted by Chapter 621).

48. *Id.* § 66409(c)(1)(B)(iii) (enacted by Chapter 621).

49. *Id.* § 66409(c)(1)(B)(iv) (enacted by Chapter 621).

50. *Id.* § 66409(c)(1)(B)(v) (enacted by Chapter 621).

51. *Id.* § 66409(c)(2) (enacted by Chapter 621).

52. *Id.* § 66409(d) (enacted by Chapter 621).

53. *Id.*

54. *Id.*

55. *Id.* § 66409(f)(4) (enacted by Chapter 621). The legislature created the CDOSL through the enactment of Senate Bill 1053 (a companion bill to Senate Bill 1052), enacted and chaptered as Chapter 622. *Id.* § 66408 (enacted by 2012 Cal. Stat. ch. 622).

56. *Id.* § 66409(f)(3) (enacted by Chapter 621).

57. 2012 Cal. Stat. ch. 621, § 1(a)(3).

58. EDUC. § 66409(c)(3) (enacted by Chapter 621).

OERs created through this process must conform to several requirements.[59] First, Chapter 621 places the OERs under a creative commons attribution license.[60] This license "allows others to use, distribute, and create derivative works based upon the digital material while still allowing the authors or creators to receive credit for their efforts."[61] Second, the OERs must be modular, allowing customization.[62] Third, the textbooks must be encoded in Extensible Markup Language (XML) format or some "other appropriate successor format."[63] This will help to guarantee the books will be compatible with a wide range of platforms, and that they will be accessible by persons with disabilities.[64] Fourth, the OERs must comply with "Section 508 of the federal Rehabilitation Act of 1973[[65]] . . . and the Web Content Accessibility Guidelines adopted by the World Wide Web Consortium for accessibility."[66] Chapter 621 requires the COERC to create and administer a "standardized, rigorous review and approval process" to ensure that the OERs "have been tested and validated as having met accessibility requirements for students with disabilities" before the OERs can be approved and distributed for use in the fifty courses.[67]

Chapter 621 places two communication requirements on the COERC.[68] First, the COERC must regularly solicit and consider feedback from the student associations of the UC, CSU, and CCC systems.[69] The legislature hopes to ensure that the COERC adequately considers and values students' perspectives towards OERs.[70] Second, the law requires the COERC to submit a report to the legislature and governor within six months of the law becoming active and "to submit a final report by January 1, 2016."[71]

59. *Id.* § 66409(f) (enacted by Chapter 621).

60. *Id.* § 66409(f)(1) (enacted by Chapter 621).

61. *Id.*

62. *Id.* § 66409(f)(2) (enacted by Chapter 621).

63. *Id.*

64. *Id.*

65. 29 U.S.C. § 794d (2006).

66. EDUC. § 66409(f)(3) (enacted by Chapter 621); *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C, http://www.w3.org/TR/WCAG/ (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*).

67. EDUC. § 66409(c)(3) (enacted by Chapter 621). The law also requires that each OER contain documentation describing its accessibility features. *Id.*

68. *Id.* § 66409(c)(4) (enacted by Chapter 621).

69. *Id.*

70. *Id.*

71. *Id.* § 66409(e) (enacted by Chapter 621).

IV. ANALYSIS

Chapter 621 has the potential to significantly lower the cost of textbooks for students.[72] The law may benefit both students and faculty, but it will be expensive to implement and may have unintended consequences.[73]

A. The Importance of Faculty Adoption Choices

OERs offer students and faculty advantages that are not available with traditional course materials.[74] The most obvious benefit for students is the cost savings that OERs can provide.[75] However, in order for students to realize this savings, faculty must actually adopt these materials in their courses.[76] Chapter 621 does not require faculty to actually adopt OERs.[77] While the California Education Code encourages faculty to consider cost in making their adoption decisions,[78] there is no requirement for faculty to use Chapter 621 commissioned textbooks.[79] There is a real possibility that OERs will not be widely adopted, preventing students from enjoying the cost savings that they can provide.[80]

However, faculty who do choose to use the OERs will have flexibility in how they use the materials.[81] Because Chapter 621 requires the books to be modular and available in common file formats, faculty can easily mix-and-match sections of different books.[82] And, as Chapter 621 requires the books to be available under a creative commons license, faculty will be able to modify and enhance the textbooks however they see fit with no concerns of copyright infringement, so long as they attribute the original author's contributions.[83] It is conceivable that this flexibility will incentivize some faculty to embrace the use of OERs, resulting in an ultimate cost savings to students.[84]

72. *Id.* § 66409 (enacted by Chapter 621).

73. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (Aug. 28, 2012) (describing the expected implementation costs and potential for adverse effects to campus bookstores).

74. *Id.* at 4.

75. *See* EDUC. § 66409 (enacted by Chapter 621) (making OERs available to students free of charge).

76. *See id.* (containing no requirement that faculty actually adopt the OERs).

77. *Id.* The companion law to Chapter 621 (Chapter 622) makes it expressly clear that faculty remain free to adopt whatever materials they wish, and have no obligation to adopt OERs commissioned by the COERC. *Id.* § 66408(c) (enacted by 2012 Cal. Stat. ch. 622).

78. *Id.* § 66406.7(c)(1) (West Supp. 2012).

79. *Id.* § 66408 (enacted by 2012 Cal. Stat. ch. 622).

80. *See* ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF SB 1052, at 4 (July 3, 2012) (recognizing faculty may choose to adopt different books for different sections of the same course).

81. EDUC. § 66409(e)(1)–(2) (enacted by Chapter 621).

82. *Id.*

83. *Id. See generally About Creative Commons*, CREATIVE COMMONS, http://creativecommons.org/about (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (providing information about creative commons licensing).

84. EDUC. § 66409(e)(1)–(2) (enacted by Chapter 621).

The digital format of the textbooks may give some faculty pause.[85] Many teachers have never used an electronic-format book and may feel uncomfortable fitting such materials into their curriculum.[86] They may also be concerned that the digital format may provide a barrier to use for their lower-income students, as the use of such materials requires a computer or tablet device.[87] However, these teachers may opt to use print versions of the OERs, or students may choose to print a copy of the materials themselves.[88]

B. The Unintended Effects of Chapter 621

While Chapter 621 may make some textbooks more affordable for some students,[89] implementing the law may have unintended negative consequences.[90] For example, campus bookstores could see a substantial drop in their revenues.[91] While the fact that sales will likely decline may seem obvious, the effects that such a drop would have on campuses are less obvious.[92] Student associations often operate campus bookstores,[93] meaning these associations could suffer a significant drop in revenue, which would negatively impact these organizations' budgets, thus affecting students.[94] For-profit companies such as Follett Higher Education Group[95] and Barnes & Noble[96] contractually operate many of California's campus bookstores. While these companies do keep much of the profit generated in their stores,[97] they also send money back to the schools in the

85. Mark R. Nelson, *E-Books in Higher Education: Nearing the End of the Era of Hype?*, EDUCAUSE REV., Mar.–Apr. 2008, at 40, 46–51, *available at* http://net.educause.edu/ir/library/pdf/ERM0822.pdf (on file with the *McGeorge Law Review*).

86. *Id.*

87. *Id.*

88. 2012 Cal. Stat. ch. 621, § 1(a)(3).

89. *See* EDUC. § 66409 (enacted by Chapter 621) (providing free OERs to students of fifty courses, should faculty choose to adopt the open-source material).

90. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (Aug. 28, 2012) (describing the negative fiscal impacts that Chapter 621 will likely have on campus bookstores).

91. *Id.*

92. *See id.* (alluding to the impact of declining campus bookstore revenues to campus programs); *see also infra* notes 93–101 (detailing the potential effect on student organization funding and potential student job loss).

93. *See, e.g.*, *UCLA Store*, ASSOCIATED STUDENTS, UCLA, http://www.uclastore.com (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (noting that Associated Students operates the bookstore); *Chico State Wildcat Store*, ASSOCIATED STUDENTS, CSU CHICO, http://www.aschico.com/bookstore (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (describing another situation where a student organization runs the campus bookstore).

94. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (Aug. 28, 2012) (alluding to the impact of declining campus bookstore revenues to campus programs).

95. FOLLETT HIGHER EDUC. GRP., http://www.fheg.follett.com/ (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*).

96. BARNES & NOBLE COLLEGE, http://www.bncollege.com/ (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*).

97. ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, *supra* note 12, at 17.

form of leasing fees, commissions, and even scholarships.[98] A drop in their sales will likely represent a drop in the revenue they provide to schools.[99] College bookstores also provide flexible employment to students.[100] Lower revenue as a result of Chapter 621 may result in fewer jobs being offered to a school's students.[101]

C. Fiscal Impact

Without funding, Chapter 621 cannot be implemented, as the statute requires that funding be secured before it becomes effective.[102] The legislature did not allocate funding to Chapter 621 in the 2012–2013 budget, and private sources have not yet emerged.[103] However, the legislature did pass a related education finance bill, Chapter 525, shortly before the end of the 2012 legislative session.[104] Chapter 525 allocated $5 million to the CSU Chancellor from the General Fund for the establishment of the COERC and CDSOL and for the development of OERs.[105] However, Chapter 525 made this funding contingent upon obtaining additional outside funding.[106] Chapter 525 requires that one-hundred percent of the $5 million be matched by outside sources before the money can be transferred to the CSU.[107] If outside matching funds do not emerge, the CSU will not receive the $5 million.[108] Instead, the money will remain in the General Fund and subsequently be allocated for other educational programs.[109] If matching

98. *See Bookstore Management*, FOLLETT HIGHER EDUC. GRP., http://www.fheg.follett.com/retail/follett_partner.cfm (last visited Oct.13, 2012) (on file with the *McGeorge Law Review*) (describing the income a campus can expect to receive from Follett); *see also University Students Receive Scholarships for Writing "Greatest Book Never Written,"* SACRAMENTO ST. NEWS (Dec. 6, 2007), http://www.csus.edu/news/120607book.stm (on file with the *McGeorge Law Review*) (detailing a textbook scholarship program funded by Follett Higher Education Group at Sacramento State).

99. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (Aug. 28, 2012) (alluding to the impact of declining campus bookstore revenues on campus programs).

100. *Jobs on Campus*, FOLLETT HIGHER EDUC. GRP., http://www.bookstorejobs.com/career/tempjobsbystate.cfm?state=CA (last visited Oct. 13, 2012) (on file with the *McGeorge Law Review*) (listing Follett managed stores in California currently seeking applicants).

101. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (Aug. 28, 2012) (describing the negative fiscal impact that Chapter 621 will likely have on campus bookstores).

102. 2012 Cal. Stat. ch. 621, § 5. The law contains express language requiring funding for the COERC and the development of OERs before the law can take effect. *Id.*

103. ENACTED BUDGET SUMMARY, CAL. STATE BUDGET, FISCAL YEAR 2012–2013, at 23–27, *available at* http://www.ebudget.ca.gov/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf (on file with the *McGeorge Law Review*).

104. 2012 Cal. Stat. ch. 525.

105. CAL. EDUC. CODE § 69999.6(f)(1) (amended by 2012 Cal. Stat. ch. 525).

106. *Id.* § 69999.6(f)(2) (amended by 2012 Cal. Stat. ch. 525).

107. *Id.*

108. *Id.*

109. *Id.*

funding sources emerge, the funds from Chapter 525 will allow Chapter 621 to take effect.[110]

Assuming that Chapter 621 does receive funding, there will be "[s]ubstantial one-time costs" associated with establishing the COERC.[111] The Intersegmental Committee of the Academic Senates, the organization responsible with administering the COERC, may absorb some of these costs.[112] In addition, as the COERC commissions OERs, the storage and maintenance of these materials will create additional ongoing costs.[113]

The legislature estimates textbooks for the fifty most widely taken courses can be published for $25 million.[114] If the textbooks produced by Chapter 621 are widely adopted, California will likely see a "significant" drop in sales tax revenues from the sale of textbooks.[115] Many OERs will generate no sales taxes at all, as the digital materials will be provided to students for no charge.[116]

V. CONCLUSION

California lawmakers appear concerned that high textbook prices significantly burden students.[117] Chapter 621 may represent a sea-change in how schools, faculty, and students think about purchasing and using textbooks.[118] However, only time will tell if Chapter 621 can overcome the significant financial obstacles set before it.[119] Before Chapter 621 can successfully lower textbook prices, funding must be located or the law will fail before ever taking effect.[120] Even if Chapter 621 is funded, authors must actually come forth and produce high-quality OERs before any new materials will be available for

110. 2012 Cal. Stat. ch. 621, § 5.

111. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 1052, at 1 (May 24, 2012). The exact amount of the costs to establish the COERC is unknown. *Id.* However, the Assembly Committee on Appropriations estimates the total annual cost to maintain the COERC at $450,000. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1052, at 2 (Aug. 7, 2012).

112. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 1052, at 1 (May 24, 2012).

113. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1052, at 2 (Aug. 7, 2012) (estimating the first-year costs of managing the OERs at $200,000, and $30,000 per year thereafter).

114. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (Aug. 28, 2012). It is worth noting that in the final version of the bill, the legislature removed a reference to the $25 million estimated cost. *See* SB 1052, § 1(a)(3), 2012 Leg., 2011–2012 Sess. (Cal. 2012) (as amended Aug. 6, 2012, but not enacted) (estimating that a $25 million investment in OERs would be sufficient to finance the program). It is possible that the actual costs associated with this program could be more or less expensive than estimated. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 2 (Aug. 28, 2012) (noting the deletion of the reference to $25 million in the final version of the bill).

115. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1052, at 5 (May 29, 2012).

116. 2012 Cal. Stat. ch. 621, § 1(a)(3).

117. *Id.* § 1(a)(1).

118. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1052, at 5 (July 3, 2012) (highlighting the potential benefits of the legislation and obstacles faced in its implementation).

119. *Id.*

120. 2012 Cal. Stat. ch. 621, § 5.

adoption.[121] Finally, faculty will have to be open to the idea of using OERs and be willing to change their conceptions of what constitutes a proper course material.[122] If Chapter 621 can overcome these significant obstacles, students will likely pay significantly less for many of their lower-division course materials, allowing them to graduate with less debt and to allocate their cost savings toward the rest of their education.[123]

121. CAL. EDUC. CODE § 66409(c)(2) (enacted by Chapter 621).

122. Nelson, *supra* note 85, at 50 (discussing the reluctance of some faculty in adopting e-books).

123. EDUC. § 66409 (enacted by Chapter 621).