

HOUSE DOCKET, NO. 03528

HOUSE No.
00038

(House – [Enter text], 01/26/2011)



The Commonwealth of Massachusetts

IN THE YEAR TWO THOUSAND ELEVEN

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In the Year Two Thousand Eleven.

SECTION 1. Sections 1 to 11 of chapter 75C of the General Laws are hereby repealed.

SECTION 2. Sections 1 to 14 of chapter 75D of the General Laws are hereby repealed.

SECTION 3. Sections 20A to 21G of chapter 93 of the General Laws are hereby repealed.

SECTION 4. Chapter 112 of the General Laws is hereby amended by inserting after section 258 the following sections:-

Section 259. As used in this chapter, the following definitions shall apply:

Division – the division of professional licensure established pursuant to section eight of chapter thirteen acting by and through its director.

Private occupational school – a private educational organization, not specifically exempted by section 261 of this chapter, that engages for profit or by charging tuition in teaching, training, instructing, or preparing individuals in a course or courses of instruction or study for the purpose of training or preparing individuals for a field or endeavor in a business, trade, technical, or industrial occupation, as well as for any other vocational purpose.

For the purposes of this chapter, a private educational organization shall include any individual, firm, partnership, association, corporation, organization, trust, or other legal entity or combination of such entities that maintain a place of business within the commonwealth or solicits business within the commonwealth to provide classroom instruction as well as distance education. For purposes of this chapter, “private

occupational school” shall include correspondence schools, private business schools, private trade schools, and such similar entities as shall be designated by the division.

Section 260. The division shall have the following powers and duties: (i) to administer and enforce the provisions of this chapter; (ii) to adopt and promulgate such rules and regulations governing the licensure and the operation of private occupational schools as may be necessary to promote the public, health, welfare, and safety of citizens of the commonwealth including mandating liability insurance and other such requirements; (iii) to grant licenses to qualified applicants; (iv) to approve the curriculum, instructors, and staff of licensed schools; (v) to investigate complaints, conduct inspections, review billing and student records, and set and administer penalties as defined in sections 259 through 273 of this chapter for fraudulent, deceptive or professionally incompetent and unsafe practices and for violations of rules and regulations promulgated by the division, and (vi) to review, under subsection (b) of section 172 of chapter 6, the criminal offender record information of principals, administrators, employees, and other individuals related to private occupational schools for purposes of licensure and reviewing complaints.

Section 261. All private occupational schools operating in the commonwealth shall be licensed by the division; provided, however, that the provisions of this chapter shall not apply to:

1. A school, college or other educational institution regularly chartered and authorized by the commonwealth to grant degrees; however, this exemption shall not apply to non-degree programs offered through such a school, college or other educational institution by a third party;
2. A school conducted by any persons or entities for the education and training of their own employees with no fee or tuition being charged to the employee;
3. A school exclusively engaged in training persons with disabilities;
4. A school providing distance learning/online/correspondence services having no place of business in the commonwealth;
5. Recreational programs conducted for the purpose of relaxation and enjoyment regarding instruction in non-occupational pastimes, exercise, or other such diversions;
6. Programs owned and operated by established religious institutions for the purpose of providing religious instruction;
7. Courses of instruction conducted by a public school district or combination of public school districts;

8. Private schools or programs conducted for the education of students in grades pre-kindergarten through twelve;

9. Incidental training associated with the purchase of a product from said vendor, if the training is to familiarize the purchaser with its use and the purchaser is not awarded any form of a certificate or diploma for having received the training;

10. Tractor trailer schools licensed by the registry of motor vehicles; or

11. Such other programs as shall be designated by the division.

Section 262. Any person or entity desiring to operate a private occupational school within the commonwealth shall submit to the state auditor, in the manner prescribed by the auditor, such financial information as may be required, including but not limited to ownership and organization of the school, the financial condition of the school, and the form and content of the student enrollment agreement to be used by the school. In carrying out the provisions of this section, the auditor is authorized to review the full records of the school and may carry out on-site reviews of the school.

If, after investigation, the state auditor finds the applicant is financially qualified to operate a private occupational school, the division shall be notified of the applicant's eligibility to apply for a license to operate a private occupational school. The state auditor shall thereafter re-establish the eligibility of licensees as requested by the division as well as when the state auditor deems, in his or her discretion, that such an evaluation is appropriate; provided, however, that each licensee shall be reviewed by the auditor at least once every 3 years. License renewal shall be granted only after such an investigation has been conducted and certification of the financial eligibility of the applicant for renewal has been made by the state auditor. The state auditor's finding of eligibility shall not be construed as the granting of a license by the division.

If the state auditor finds that an applicant or licensee is not financially responsible and qualified to operate a private occupational school, certification of financial eligibility shall be denied and the auditor shall state the reasons for denial in writing.

Notwithstanding the provisions of section 12 of chapter 11 pertaining to maintenance of the records in the department of the state auditor, such financial information submitted to the state auditor shall be retained in the office of the state auditor and shall not be classified as public records.

Section 263. The division shall determine the license term, renewal cycle, and renewal period for licenses issued by the division. Each licensee shall apply to the division for license renewal on or before the expiration date, as determined by the division, unless such license was revoked, suspended, or canceled earlier by the division as a result of a

disciplinary proceeding instituted pursuant to this chapter. Applications for initial licenses and renewal shall be in the manner approved by the division and accompanied by payment of a fee, as prescribed by the executive office of administration and finance pursuant to section 3B of chapter 7. Licenses shall be non-transferrable. A change in ownership or location shall require a new application. Upon closure of a private occupational school, all student records shall be conveyed to the division and a fee determined by the secretary of administration and finance under the provision of section 3B of chapter 7 paid by the school to cover any costs associated with the maintenance of such records.

No application for licensure shall be approved unless all principals and employees of said school are of good moral character.

Section 264. The division shall conduct routine inspections and investigate all complaints filed relating to the operations of a private occupational school, and any violation of sections 259 through 273 of this chapter or any rule or regulation of said division. Such complaints may be brought by any person, or the division. The division shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the investigation. The division may administer oaths and affirmations, examine witnesses, and receive evidence. The power to issue subpoenas may be exercised by any person or persons designated by the division for such purpose. Any witness summoned may petition the division to vacate or modify a subpoena issued.

After such investigation as deemed appropriate, the division may grant the petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that the subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested. Upon the failure of any person to comply with a subpoena issued by the division, any justice of the superior court, upon application by the division, may in his or her discretion issue an order requiring the attendance of such person before the agency and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court for contempt.

Section 265. For the purposes of this chapter, conduct which places into question the school's fitness to conduct educational operations shall include, but not be limited to the school or the school's principals, employees, or other representatives: (1) committing fraud or misrepresentation in obtaining a license; (2) engaging in criminal conduct which the division determines to be of such a nature as to render such a school or its principals as unfit to operate as a licensed educational facility, as evidenced by criminal proceedings

which resulted in a conviction, guilty plea or plea of nolo contendere or an admission of sufficient facts; (3) engaging in conduct which places into question the holder's competence to operate a private occupational school including, but is not limited to, gross misconduct or misconduct in the practice of the education activities, dishonesty, fraud or deceit, operating beyond the authorized scope, or operating the school with negligence; (4) allowing instructors, staff, or other associated personnel to function when such personnel are not able to perform the essential functions of their positions while impaired by alcohol, drugs or other such cause; (5) aiding or abetting an unqualified person to perform activities requiring a qualified instructor; (6) holding a license, certificate, registration, or authority issued by another state or territory of the United States, the District of Columbia, or foreign state or nation with authority to issue such a license, certificate, registration, and that is or has been revoked, canceled or suspended, not renewed or otherwise acted against, or the holder has been disciplined, if the basis for the action would constitute a basis for disciplinary action in the commonwealth; (7) violating any rule or regulation of the division; (8) failing to cooperate with the division or its agents in the conduct of an inspection or investigation; (9) violating any ethical standard which the division determines to be of such a nature as to render such a school unfit, such as:

1. Failing to establish and maintain minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility;
2. Failing to protect students against substandard, transient, unethical, deceptive, or fraudulent practices;
3. Granting of false educational credentials;
4. Authorizing or otherwise failing to protect the public from misleading literature, advertising, solicitation, or representation by the school or its agents;
5. Failing to preserve essential records.

Section 266. (a) Except as otherwise provided by law, the division may, upon determination made after a hearing finding the holder of a license issued responsible for any of the offenses enumerated in this chapter, undertake the following actions:

1. suspend, revoke, cancel or place on probation such license;
2. reprimand or censure a holder;
3. assess upon such holder a civil administrative penalty not to exceed \$5,000 for each violation;

4. require such holder or staff of such holder to complete additional education and training as a condition of retention or future consideration or reinstatement of said license;

5. require such holder to practice under appropriate supervision for a period of time as determined by the division as a condition of retention or future consideration of reinstatement of said license;

6. require restitution of student fees and tuition, where appropriate; and/or

7. issue orders to licensees directing them to cease and desist from unethical or unprofessional conduct.

(b) Nothing in this section shall be deemed a limitation on the division's authority to impose such sanctions by consent agreement as are deemed reasonable and appropriate by the division. Any person aggrieved by any disciplinary action taken by the division pursuant to this chapter may, pursuant to section 14 of chapter 30A, file a petition for judicial review with the Supreme Judicial Court.

(c) The division shall not be required to defer action upon any charge because of pending criminal charges against a person or school accused, nor shall the pendency of any charge before the division act as a continuance or ground for delay in a criminal action.

Section 267. Upon determination that a school's continued operation poses an immediate and serious threat to the public health, safety, or welfare, the division may suspend or refuse to renew the holder's license, pending a hearing on the merits of the allegation against the holder; provided that the division shall hold a hearing pursuant to chapter 30A on the necessity for the emergency action within 10 days of the action. The division shall issue to the licensee a written order of summary suspension which specifies the findings of the division and the reasons for its summary suspension and which also includes notice of the date, time and place of the aforementioned seven-day hearing. At the request of a licensee the division may reschedule this hearing to a date and time mutually agreeable to the division and licensee. Any such rescheduling of the hearing granted at the licensee's request shall not operate to lift or stay the summary suspension order. If such hearing is not held within 10 days of the division's emergency action, the license against which action was taken shall be deemed reinstated.

At the adjudicatory hearing on the necessity for summary suspension, the division shall receive evidence limited to determining whether the summary suspension order shall continue in effect pending the final disposition of the complaint. Following such hearing, any continuing suspension imposed by the division shall remain in effect until the conclusion of any formal proceeding on the merits of the allegations against the holder,

including judicial review thereof, or withdrawn by such division. The division shall adopt rules and regulations governing the emergency suspension procedure authorized by this section.

Section 268. Notwithstanding any general or special law to the contrary, the division may, after a consent agreement between the parties or after an opportunity for an adjudicatory proceeding held pursuant to chapter 30A, assess and collect a civil administrative penalty not to exceed 10,000 dollars for the first violation and a civil administrative penalty not to exceed 25,000 dollars for a second or subsequent violation upon a person or entity who, without holding the required license, operates a private occupational school. The division may also order the individual or entity to cease and desist from continued practice without a license. Nothing in this section shall affect, restrict, diminish or limit any other penalty or remedy provided by law. The division may apply to the appropriate court for an order enjoining the unlicensed practice of a trade or profession, to enforce an order issued after a hearing conducted per this section, and/or for such other relief as may be appropriate to enforce this section.

Any court review of an order of the division issued after a hearing shall be conducted in accordance with the standards of review provided in paragraphs (3) to (7), inclusive, of section 14 of chapter 30A. An assessment of a civil administrative penalty under this section shall bar a subsequent imposition of a criminal penalty for the same violation.

Section 269. Whoever operates or acts as a representative of an unlicensed private occupational school, or operates or acts as a representative during the suspension or after the revocation of a license issued pursuant to this chapter, shall be punished by imprisonment for not more than 6 months or by a criminal fine of not more than 10,000 dollars, or both. An imposition of a criminal penalty under this section shall bar a subsequent assessment of a civil administrative penalty for the same violation.

The division shall not defer action upon any charge before it until the conviction of the person accused, nor shall the pendency of any charge before the division act as a continuance or ground for delay in a criminal action.

Section 270. Any complaint, report, record or other information received or kept by the division in connection with an investigation shall be considered a public record only following the final action by the division, provided however, that the identity of the person filing a complaint shall be exempt from disclosure as a public record at all times. These provisions shall not be deemed to prohibit the division from providing a licensee with such information for purposes of preparing a defense in a formal adjudicatory hearing nor shall it prevent the division from providing records in response to requests from other state or federal agencies, divisions or institutions as determined by the division.

Section 271. All application fees, licensure fees, renewal fees, late fees, civil administrative penalties, and other such revenue collected pursuant to this chapter shall be deposited into the trust fund established in section 35V of chapter 10.

Section 272. No private occupational school shall represent that it is an accredited school unless it has been accredited by a national or regional accrediting agency recognized by the United States Department of Education. All schools that obtain such an accreditation shall notify the division in writing. In addition, schools must notify the division in writing of any changes to such accreditation.

Section 273. There shall be within the division an advisory council of private occupational schools comprising 9 members, 8 of whom shall be appointed by the division and shall be a cross-section of individuals with a knowledge and understanding of the fiscal and educational issues of post-secondary education. The remaining member shall be a designee of the state auditor.

Members shall be appointed for a term of 3 years and serve at the pleasure of the division. Members whose appointments have expired may continue to serve until a replacement is appointed. All members shall be subject to the provisions of chapter 268A and the division may remove any member of the council for neglect of duty, misconduct, malfeasance or misfeasance in office, or for failure, as a representative or associate of an individual licensee, to follow the rules and regulations of the division. The members shall be considered public employees for the purposes of chapter 258 for all acts or omissions within the scope of their duties as division members. Members shall be immune from liability for actions taken in good faith in the discharge of their responsibilities. Members acting in good faith in the discharge of their duties shall be defended by the attorney general and shall be eligible for indemnification of all costs and damages arising from claims and suits against them.

The division shall appoint a chair who shall serve at the pleasure of the division. The council may designate additional roles to its members as necessary for the conduct of its business. Members shall serve without compensation but shall be reimbursed for actual and reasonable expenses incurred in the performance of their duties.

The advisory council shall be considered a governmental body and all meetings of the advisory committee shall be announced and conducted in accordance with section 11A1/2 of chapter 30A with the exception that remote participation is specifically authorized so long as 2 or more members are physically present at the public site. At the discretion of the chair, additional members, staff, or interested parties may remotely participate by any live, 2-way medium such as audio or video conferencing.

Section 274. Any pupil of a private occupational school, who is misled by an officer or representative of said school, or by any advertisement or circular issued by said school,

which representation is false, deceptive or misleading, may recover treble damages, or 10,000 dollars, whichever is greater, and court costs and reasonable attorney's fees.

No license shall issue under the provisions of this chapter until the prospective licensee, or 2 or more prospective licensees who intend to secure a joint indemnification, shall furnish either a bond with surety or a form of indemnification acceptable to the division in the amount determined by the state auditor in a sum not less than 5,000 dollars in the case of a school's license, and in the amount of at least 1,000 dollars in the case of a license for a representative of a private business school; provided, however, that the liability of the person providing indemnification shall be limited to indemnifying the claimant only for his actual damages.

The state auditor shall require additional security in those cases where he is of the opinion that the cash resources of the licensee may not be sufficient to make tuition refunds to students as required under section 13K of chapter 255; and provided further, that the amount of the indemnification in the case of the school shall not exceed the anticipated maximum unearned tuitions. The state auditor may adopt regulations, issue guidelines and prescribe forms to carry out the provisions of this section.

For the purposes of this section the forms of indemnification other than a surety bond which shall be furnished to the division for licensure are the following:

1. An irrevocable letter of credit, maintained for a period of 1 year, issued by a financial institution as defined in section 1 of chapter 140E in an amount determined annually by the state auditor and approved by the division payable to the commonwealth in which the commonwealth is designated as the beneficiary.

2. A term deposit account held in a financial institution as defined in section 1 of chapter 140E, payable to the commonwealth, shall be held in trust for the benefit of students entitled thereto under section 13K of chapter 255 or subject to refund provisions and policies approved by the division. Said account shall be maintained for a period of 1 year, the amount to be determined annually by the state auditor and acceptable to the division. All interest shall be paid annually to the appropriate school, unless the term deposit account is activated due to a school closing. Should the licensee for any reason, while not in default, discontinue operation, all monies on deposit, including interest, shall be released to the appropriate school subject to the approval of the division.

A joint indemnification shall be defined as an indemnification issued to cover all prospective licensees to be insured under the indemnification in an amount sufficient to cover the tuition refunds of the participating schools.

Each such indemnification shall be conditioned to provide that the obligor shall satisfy all valid claims, as determined by the division, to recover damages sustained by students

resulting from a breach of contract; provided, however, that the aggregate liability of the person providing indemnification for all breaches of the conditions of the indemnification shall not, under any circumstances, exceed the sum of such indemnification. Such indemnification shall not limit or impair any right of recovery otherwise available pursuant to law nor shall the amount of the indemnification be relevant in determining the amount of damages or other relief to which any plaintiff may be entitled. The surety on any bond may cancel the bond upon giving 60 days' notice in writing to the division and thereafter shall be relieved of the liability for any breach of condition occurring after the effective date of said cancellation.

The indemnification shall be procured only from companies or institutions legally authorized to do business in the commonwealth.

SECTION 5. Until such time as the division promulgates applicable regulations, licensure and enforcement activities as they apply to private occupational schools shall be subject to the rules and regulations in place at the time these statutes are enacted. Private occupational schools holding a valid license at the time the division promulgates applicable regulations shall have 18 months to comply with any new prerequisites to licensure established by those regulations.

SECTION 6. Upon enactment of this act, the department of elementary and secondary education shall transfer to the division of professional licensure the functions and staff of the department associated with overseeing the licensing of proprietary schools. Employees and members of the department of elementary and secondary education whose office has been transferred to the division of professional licensure by this act shall become employees and members of the division of professional licensure without impairment of civil service status and seniority and without reduction in compensation, notwithstanding any change in job titles or duties and without loss of accrued rights to holidays, sick leave, vacation and benefits, and shall thereafter perform their duties under the direction, control and supervision of the division of professional licensure.

Terms of office of employees and members of a office formerly under the department of elementary and secondary education and transferred to the division of professional licensure by this act shall not be deemed to be interrupted by such transfer and all such employees and members shall maintain the same rights and entitlements with respect to retirement, pension and group insurance benefits as previously existed under their employment with such boards or offices transferred by this act. Rights and obligations under collective bargaining agreements with respect to employees and members transferred from such offices shall be assumed by and imposed upon the division of professional licensure. Every employee and member transferred to the division of professional licensure under this section who immediately prior to such transfer holds a permanent appointment classified under chapter 31 or has tenure by reason of section 9A

of chapter 30 shall be entitled to the rights and benefits of and shall be subject to the provisions relating to tenured employees and members under chapter 31 or section 9A of chapter 30, respectively.

All books, papers, records and documents related to the licensure of private occupational schools, which immediately before the effective date of this act are in the custody of the department of elementary and secondary education, shall be transferred to the division of professional licensure.