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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PACIFIC COAST HORSESHOEING SCHOOL, INC., et al., Plaintiffs, **v.** **GRAFILO, et al.,** Defendants.	2:17-cv-02217-JAM-GGH **NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: February 27, 2018 Time: 1:30 p.m. Courtroom: 6, 14th Floor Judge: The Honorable John A. Mendez Action Filed: October 23, 2017

PLEASE TAKE NOTICE THAT, on February 27, 2018, at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable John A. Mendez, United States District Judge, in Courtroom 6 of the United States District Court for the Eastern District of California, located at 501 I Street, Sacramento, California 95814, Defendants Dean Grafilo, in his official capacity as Director of Consumer Affairs, and Michael Marion, in his official capacity as Chief of the Bureau for Private and Postsecondary Education (collectively, "Defendants"), will move this Court to dismiss the Complaint filed by Plaintiffs Pacific Coast Horseshoeing School, Inc., Bob Smith,

and Esteban Narez (collectively, "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 12(b)(6).

This motion to dismiss is brought on the ground that the Complaint fails to state a claim as a matter of law. This motion is based on this Notice, the Memorandum of Points and Authorities, the papers and pleadings on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

This motion is made following the conference of counsel pursuant to the Court's standing order which took place on December 21, 2017.

Dated: January 5, 2018

Respectfully Submitted,

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TAMAR PACHTER
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/s/ P. Patty Li

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INTRODUCTION

Plaintiffs challenge a state law and related regulation governing the enrollment practices of private postsecondary educational institutions. The complaint, however, fails as a matter of law to allege a viable First Amendment violation. The challenged requirement regulates conduct, not speech. It does not limit the speech of an educational institution or an instructor; rather, it limits the institution's ability to enroll a student by requiring verification that the student has an ability to benefit from the instruction. This regulation of conduct is subject to rational basis review, which it easily survives. And even if the requirement could be construed as a regulation of expressive conduct, it would satisfy *United States v. O'Brien*, 391 U.S. 367 (1968) as a matter of law. Accordingly, the complaint should be dismissed.

BACKGROUND

I. STATUTORY BACKGROUND

The Maxine Waters School Reform and Student Protection Act of 1989 was based upon legislative findings that "students have been substantially harmed and the public perception of reputable institutions has been damaged because of the fraudulent, deceptive, and unfair conduct of some institutions that offer courses of instruction for a term of two years or less that are supposed to prepare students for employment in various occupations." Cal. Educ. Code § 94316(b) (1990). The Legislature also found, "Some students have been enrolled who do not have the ability to benefit from the instruction," *id.*, and thus instituted a new requirement that a private postsecondary educational institution "shall not enter into an agreement for a course of instruction with a student unless the institution first administers to the student and the student passes a test that establishes the student's ability to benefit from the course of instruction" *id.* § 94319.2(a) (1990).

The modern iteration of this ability-to-benefit requirement was enacted in 2009, as part of the California Private Postsecondary Education Act of 2009 (the "Act"). Cal. Educ. Code §§ 94800, 94904. The Act also established the Bureau for Private and Postsecondary Education ("Bureau") within the Department of Consumer Affairs, as the entity charged with regulating private postsecondary educational institutions in California. Id. § 94875. The Act contains a

legislative finding that "concerns about the value of degrees and diplomas issued by private postsecondary schools, and the lack of protections for private postsecondary school students and consumers of those schools' services, have highlighted the need for strong state-level oversight of private postsecondary schools." *Id*. § 94801(b). The Legislature subsequently described the Act's "requirement that an ability-to-benefit student, as defined, must take and pass an independently administered examination" as a requirement designed to "ensure minimum standards of instructional quality and institutional stability." Cal. Stats. 2011, c. 167 (A.B. 1013).

The current ability-to-benefit requirement applies to students lacking "a certificate of graduation from a school providing secondary education, or a recognized equivalent of that certificate." Cal. Educ. Code § 94811. Before such a student may "execute an enrollment agreement" with a private postsecondary educational institution, the institution "shall have the student take an independently administered examination from the list of examinations prescribed by the United States Department of Education pursuant to Section 484(d) of the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1070a et seq.)." *Id*. § 94904(a). Such a student "shall not enroll unless the student achieves a score, as specified by the United States Department of Education, demonstrating that the student may benefit from the education and training being offered." *Id*. "If the United States Department of Education does not have a list of relevant examinations that pertain to the intended occupational training, the [Bureau] may publish its own list of acceptable examinations and required passing scores." *Id*. § 94904(b). An implementing regulation requires that private postsecondary educational institutions' written admissions standards specify that "[e]ach student admitted to an undergraduate degree program, or a diploma program, shall possess a high school diploma or its equivalent, or otherwise successfully take and pass the relevant examination as required by section 94904 of the Code." Cal. Code Regs. tit. 5, § 71770(a)(1).

II. PROCEDURAL BACKGROUND

As alleged in the Complaint, Plaintiffs are: (1) Pacific Coast Horseshoeing School, Inc. ("PCHS"), a vocational school for farriers that qualifies as a private postsecondary educational institution under the Act (Compl. ¶¶ 5, 8, 34-38); (2) the founder and owner of PCHS, Bob Smith

(*id*. ¶6); and (3) a prospective student of PCHS, Esteban Narez, who does not have a high school diploma or its equivalent (*id*. ¶¶ 7, 9). Plaintiffs allege that the ability-to-benefit requirement as applied to Plaintiffs is a content-based restriction on First Amendment free speech rights. *Id*. ¶¶ 89-99. They seek a judicial declaration that the statutory ability-to-benefit requirement (Cal. Educ. Code § 94904(a)) and the implementing regulation (Cal. Code Regs. tit. 5, § 71770(a)(1)) (collectively, "ability-to-benefit requirement") are "unconstitutional to the extent that those provisions prohibit PCHS and [Smith] from teaching its horseshoeing curriculum to students . . . who neither have a high-school diploma, nor who have obtained a high-school equivalent, nor who have taken and passed an ability-to-benefit examination." *Id.*, Prayer for Relief ¶ A. The Complaint also seeks injunctive relief to this effect. *Id*., Prayer for Relief ¶ C.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *See North Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotations omitted). The court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678.

ARGUMENT

Plaintiffs contend that because "[t]eaching horseshoeing consists of communicating a message—meaning it is speech" (Compl. ¶ 89), and because "[t]he Act's differential treatment of vocational teaching, which is regulated, and avocational teaching, which is not, is content based" (*id*. ¶ 93), their challenge to the ability-to-benefit requirement should receive heightened scrutiny (*id*. ¶¶ 95-98). But under prevailing Supreme Court and Ninth Circuit authority, the ability-to-benefit requirement regulates conduct, not speech, and survives rational basis review. While the

requirement does not regulate protected expressive conduct, it nevertheless would survive the analysis set forth in *O'Brien*, 391 U.S. 367.

I. THE "ABILITY-TO-BENEFIT" REQUIREMENT REGULATES NON-EXPRESSIVE CONDUCT AND IS SUBJECT TO RATIONAL BASIS REVIEW, WHICH IT SATISFIES

The First Amendment to the United States Constitution prohibits laws that "abridg[e] the freedom of speech." U.S. Const. amend. I. The "first step" in the analysis of a free speech claim is to determine whether the challenged law "is a regulation of conduct or speech." *Pickup v. Brown*, 740 F.3d 1208, 1225, *as amended on denial of petition for reh'g en banc* (9th Cir. 2014). Courts routinely distinguish between the regulation of expressive speech under the First Amendment and the regulation of conduct carried out through speech. These distinctions are drawn because regulations that target expressions of opinion and/or "discourse on public matters" implicate the core values protected by the First Amendment. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011). In contrast, the First Amendment "has no application when what is restricted is not protected speech." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011). "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").

A. The Ability-to-Benefit Requirement Regulates Conduct

The ability-to-benefit requirement regulates the act of enrolling students in private postsecondary educational institutions. It does not restrict any expressive conduct of PCHS or its instructors or students. Academic institutions are "properly subject to numerous administrative regulatory schemes which do not implicate First Amendment concerns. Some of the most obvious examples include intervention of the Treasury Department in affairs of income, taxation and property, and regulation by the Department of Labor of employee matters." *Cuesnongle v. Ramos*, 835 F.2d 1486, 1501 (1st Cir. 1987) (rejecting argument that administrative review of "*any* matter concerning private Academia" abridges First Amendment academic freedom).

Plaintiffs mistakenly contend that the ability-to-benefit requirement abridges Plaintiffs' freedom of speech because it "restricts PCHS and [Smith] from teaching students who never finished high school," and because "[t]eaching horseshoeing consists of communicating a message—meaning it is speech." Compl. ¶ 94, 89. However, the statute and regulation at issue require only that certain students demonstrate they have the ability to benefit from the proposed course of instruction before enrolling in a private postsecondary educational institution. Cal. Educ. Code § 94904(a); Cal. Code Regs. tit. 5, § 71770(a)(1). The challenged law and regulation do not limit what Plaintiffs may teach once a student is properly enrolled. Plaintiffs' argument is squarely at odds with the approach taken by the Supreme Court in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). There, the Court held that the Solomon Amendment, which prohibited law schools from discriminating against military recruiters when providing campus access to outside employers, was not a regulation of the law schools' speech. *Id*. at 60. The Court found that the Solomon Amendment regulated "conduct, not speech" because "[i]t affects what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id*. That reasoning applies equally here. The ability-to-benefit requirement affects what private postsecondary schools "must do"—verify a prospective student's ability to benefit from the proposed course of instruction—"not what they may or may not say."

While it is not proper to focus on the secondary effects of the ability-to-benefit requirement and treat it as a regulation of "teaching horseshoeing," a law does not regulate speech, for First Amendment purposes, simply because it regulates conduct involving speech. "The Supreme Court has consistently rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (quoting *O'Brien*, 391 U.S. at 376 (analyzing a prosecution for the symbolic burning of a draft card to protest the draft)). In *Pickup*, the Ninth Circuit considered legislation forbidding state-licensed mental health providers from engaging in "sexual orientation change efforts" with patients under 18 years of age. *Pickup*, 740 F.3d at 1221. The court held that this restriction was

a regulation of non-expressive conduct, not speech, even though the regulation could "have an incidental effect on speech." *Id*. at 1229. As the court found, "the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech." *Id.* As in *Pickup*, the use of speech in performing the conduct at issue (teaching horseshoeing) does not convert the requirement into one that regulates speech.

B. The Conduct at Issue Is Not Expressive

While the First Amendment protects conduct "with a significant expressive element," *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986)), "[t]he Supreme Court has made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive,'" *Pickup*, 740 F.3d at 1225 (citing *FAIR*, 547 U.S. at 66). Thus, "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of [speech]." *FAIR*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). *See also Int'l Franchise Ass'n*, 803 F.3d at 408 (minimum wage ordinance was "plainly an economic regulation that does not target speech or expressive conduct" because formation of "a business relationship and . . . resulting business activities" was not expressive activity). Conduct intending to express an idea may be constitutionally protected only if it is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," which means that "[a]n intent to convey a particularized message [is] present, and . . . the likelihood [is] great that the message w[ill] be understood by those who view [ ] it." *Spence v. State of Wash.*, 418 U.S. 405, 409, 11 (1974).

The conduct that is actually regulated by the ability-to-benefit requirement—the enrollment of students at private postsecondary educational institutions—would not be understood to convey a message by outside observers. By focusing on "teaching horseshoeing," as opposed to the conduct that is actually regulated by the ability-to-benefit requirement—enrollment in a private postsecondary educational institution—Plaintiffs attempt to convert the requirement into a regulation of expressive activity. But even assuming that the ability-to-benefit requirement is, by

extension, a regulation of "teaching horseshoeing," such an activity does not have the "expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *FAIR*, 547 U.S. at 64. Unlike flag burning, tattooing, and distributing handbills, "teaching horseshoeing" does not evince the requisite "intent to convey a particularized message" of the instructor's choosing, nor would the instructor likely be understood by the student as attempting to communicate such an expressive message.

C. The Ability-to-Benefit Requirement Survives Rational Basis Review

As a regulation of non-expressive conduct, the ability-to-benefit requirement does not implicate the First Amendment, and is "only subject to rational basis review, which it survives." *Nat'l Conference of Pers. Managers, Inc. v. Brown*, 690 F. App'x 461, 464 (9th Cir. 2017) (citing *Pickup*, 740 F.3d at 1230). *See also Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 201 (1990) ("Because we conclude that the EEOC subpoena process does not infringe any First Amendment right enjoyed by petitioner, the EEOC need not demonstrate any special justification").

Under rational basis review, duly enacted laws are presumed to be constitutional. *See Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) ("*NAAP*"). "We do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Id.* at 1050 (internal quotation marks and citation omitted). Courts "ask only whether there are plausible reasons for [the legislature's] action, and if there are, [the] inquiry is at an end." *Romero–Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013) (internal quotation marks and citation omitted).

The ability-to-benefit requirement easily satisfies rational basis review. California has a legitimate interest in regulating private postsecondary educational institutions. The ability-to-benefit requirement promotes California's interest in protecting students from the harm that may result from being enrolled in courses when they "do not have the ability to benefit from the instruction." Cal. Educ. Code § 94316(b) (1990). The Legislature has determined that "concerns about the value of degrees and diplomas issued by private postsecondary schools, and the lack of protections for private postsecondary school students and consumers of those schools' services,

have highlighted the need for strong state-level oversight of private postsecondary schools," *id.* § 94801(b), and the ability-to-benefit requirement is intended to "ensure minimum standards of instructional quality and institutional stability," as part of this important oversight function. Calif. Stats. 2011, c. 167 (A.B. 1013). Thus, the Legislature had a legitimate reason for enacting the ability-to-benefit requirement, which satisfies rational basis review.

II. The Ability-to-Benefit Requirement Does Not Implicate First Amendment Rights, but It Nevertheless Satisfies the *O'Brien* Analysis

The ability-to-benefit requirement is not properly interpreted to impact protected First Amendment conduct, however, it would also survive scrutiny under *O'Brien*. "Restrictions on protected expressive conduct are analyzed under the four-part test announced in *O'Brien*, a less stringent test than those established for regulations of pure speech." *Anderson*, 621 F.3d at 1059.

A. The Ability-to-Benefit Requirement Does Not Regulate Expressive Conduct, and It Is Content-Neutral

Plaintiffs attempt to allege a content-based regulation of speech, by contending that "[t]he Act's differential treatment of vocational teaching, which is regulated, and avocational teaching, which is not, is content-based." Compl. ¶ 93 (citing Cal. Educ. Code §§ 94857, 94874(a)). This characterization is not supported by the case law. Even if the law did regulate expressive conduct (it does not), the law does not "dictate what can be said." *NAAP*, 228 F.3d at 1055.

"The 'principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted [the] regulation . . . because of [agreement or] disagreement with the message it conveys.'" *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)). "The content-based/content-neutral dichotomy is not grounded in the text of the First Amendment itself, but was created by the Supreme Court as a tool for distinguishing those regulations that seek to advance 'legitimate regulatory goals' from those that seek to 'suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.'" *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 433 (9th Cir. 2008) (quoting *Turner*, 512 U.S. at 641).

Plaintiffs do not allege that the ability-to-benefit requirement was motivated by a disagreement with the message conveyed by vocational teaching, as opposed to avocational teaching, if such a message even exists. There is no indication that the requirement is an attempt to "inundate the marketplace of ideas with [certain] messages or to starve that marketplace of contrary opinions." *Jacobs*, 526 F.3d at 433. The statutory distinction between vocational and avocational instruction supports the legitimate regulatory goal of ensuring that private postsecondary educational institutions holding themselves out to students with the promise of vocational training—that is, training necessary to perform a trade or craft and thereby support oneself financially—comply with requirements meant to safeguard those students, including the ability-to-benefit requirement. These concerns do not apply to institutions offering "solely avocational or recreational educational programs," which are exempt from the Act. Cal. Educ. Code § 94874(a). Nor does the statute or regulation dictate what can be said while providing vocational training, or prevent anyone from engaging in the speech necessary to train someone in a vocation, outside of the context of a private postsecondary educational institution. *See NAAP*, 228 F.3d at 1055 ("Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis if no fee is charged.") There is thus no basis for finding the ability-to-benefit requirement to be a content-based regulation of speech or expressive conduct.

B. The Ability-to-Benefit Requirement Satisfies the *O'Brien* Test

A content-neutral law regulating conduct that incidentally burdens freedom of speech survives a First Amendment challenge if "it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Such a law need only promote a substantial interest "that would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

The ability-to-benefit requirement satisfies all of these factors. The requirement serves the important government interest in protecting students from enrolling in courses when they "do not

have the ability to benefit from the instruction," Cal. Educ. Code § 94316(b) (1990), as part of the "strong state-level oversight of private postsecondary schools" necessary to address "concerns about the value of degrees and diplomas issued by private postsecondary schools, and the lack of protections for private postsecondary school students and consumers of those schools' services," *id.* § 94801(b). The requirement has no relation to the "suppression of free expression," because it does not concern itself with expression at all. And, the requirement achieves the regulatory objective more effectively than the absence of such a requirement would. *See FAIR*, 547 U.S. at 67. The requirement directly addresses the problem of the enrollment of students who might not benefit from the proposed course of instruction, by requiring some demonstration of those students' ability to benefit.

Plaintiffs object that requiring Narez to have a high-school diploma or equivalent certification, or to pass an ability-to-benefit examination, "substantially advances no compelling or important government interest" and burdens Plaintiffs' First Amendment rights "more than is necessary to serve any government interest." Compl. ¶¶ 95-98. This objection assumes that the requirement serves no purpose with respect to "teaching horseshoeing," because there is no need for a high school diploma, or any other qualification, in order to learn horseshoeing. This assumption is flawed in several respects.

First, Plaintiffs suggest, without sufficient supporting factual allegations, that any concerns regarding the enrollment of students who cannot benefit from PCHS's course of instruction are unfounded. Plaintiffs allege that "in [Smith]'s opinion," no educational prerequisites to admission to PCHS are necessary (Compl. ¶ 52), and that "[Smith] takes great care not to charge students who are unable to benefit from PCHS's curriculum" (*id.* ¶ 54). These conclusory assertions fall far short of plausibly alleging that the Legislature's concerns regarding the enrollment of students who may lack the ability to benefit from a course of instruction have no application to "teaching horseshoeing" or to PCHS. *See Iqbal*, 556 U.S. at 678 (a pleading based on "labels and conclusions" or assertions "devoid of further factual enhancement" will not survive a motion to dismiss (internal quotation marks and citation omitted)).

Second, the ability-to-benefit requirement does not require Narez to obtain a high school diploma or its equivalent. Narez may "take an independently administered examination from the list of examinations prescribed by the United States Department of Education," and if there is no "list of relevant examinations that pertain to the intended occupational training, the [Bureau] may publish its own list of acceptable examinations and required passing scores." Cal. Educ. Code §§ 94904(a), (b). Thus, although Plaintiffs contend that "[n]one of the skills tested by the approved ability-to-benefit exams are necessary in order to learn how to shoe a horse" (Compl. ¶ 46), the statute permits the use of an alternative examination, which Plaintiffs may propose for approval by the Bureau.[1] The ability-to-benefit requirement is therefore sufficiently tailored and flexible to support the Legislature's goal of protecting students, even in the context of "teaching horseshoeing," and thereby satisfies the *O'Brien* factors.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint.

Dated: January 5, 2018

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[1] The Bureau's website contains the following instructions for seeking approval of an alternative examination: "An institution seeking Bureau approval of an alternative to the [ability-to-benefit] test should submit, in writing, the proposed alternative test, evidence that the USDE-approved examinations are not relative to the intended occupational training, and evidence of the relation of the proposed test to the occupational training program." *Ability-to-Benefit (ATB) Examination, Alternative to the ATB Examination*, Department of Consumer Affairs, Bureau for Private Postsecondary Education, http://www.bppe.ca.gov/schools/ability_exam.shtml (last visited January 5, 2018).