

Department of Consumer Affairs
Bureau for Private Postsecondary Education

Initial Statement of Reasons

Hearing Date: October 4, 2010

Subject Matter of Proposed Regulations: Citations and Fines; Annual Reports; Method for Obtaining Date; Compliance Visits, Emergency Decisions

Sections Affected:

Adopt sections: 74112, 75020, 75030, 75040, 75050, and 75150

Amend section: 74110

Introduction

AB 48 (Portantino, Chapter 310, Statutes of 2009) enacted the California Private Postsecondary Education Act of 2009 (Act), and reestablished, after a two and one half year absence, regulation of private postsecondary educational institutions in California by the Bureau for Private Postsecondary Education (Bureau). Previously, the Bureau for Private Postsecondary and Vocational Education regulated these institutions. However, the law authorizing the existence of that entity and every statute and regulation related to ensuring the sound operation of these institutions, including all student protections, became inoperative on July 1, 2007, and was repealed as of January 1, 2008.

In addition to general authority to adopt regulations, the Legislature required the Bureau, at a minimum, to adopt regulations according to three timelines: emergency regulations had to be adopted by February 1, 2010; regulations addressing notices to comply and other areas of enforcement within one year of the enactment of the Act (October 11, 2010); and several other sections by January 1, 2011, including sections 94877, 94885, 94888, 94890, 94891, 94895, 94923, 94929.8, 94932.5, 94934, 94935, and 94938. These sections require processes for enforcement, minimum operating standards, applications for approvals to operate, and for approvals to operate by means of accreditation, renewals, substantive changes to an approval to operate, the Student Tuition Recovery Fund, uniform data reporting, compliance inspections, the format and method by which to file the required Annual Report, notices to comply, and the issuance of emergency decisions under relevant provisions of the Administrative Procedure Act (APA), respectively.

Regulations governing enforcement, minimum operating standards, applications for approvals to operate, and for approvals to operate by means of accreditation, renewals, substantive changes to an approval to operate, the Student Tuition Recovery Fund, and notices to comply were generally proposed in the prior rulemaking files for the first two time periods, filed with the Office of Administrative Law on or about January 21, 2010, and June 29, 2010. This instant rulemaking proposal addresses uniform data reporting, compliance inspections, the format and method by which to file the required Annual

Report, and the issuance of emergency decisions under relevant provisions of the APA, as well as the process for the Bureau to issue administrative citations and fines.

Presently, it is estimated that approximately 400,000 students are enrolled at the various private postsecondary institutions within California. Currently, there are approximately 1600 private postsecondary educational institutions regulated by the California Private Postsecondary Education Act of 2009. Without adoption of these regulations, the Bureau will have no clearly defined process for issuing citations and fines, resulting in the Bureau issuing citations on a case-by-case basis, or having no process to gain compliance except through formal discipline of an approval to operate, making the process more expensive for everyone. In addition, there will be no clear policies and practices for conducting compliance visits, or for submitting the Annual Reports that supply so much important information to the Bureau regarding compliance, as well as to prospective students regarding operations. The proposed regulations also spell out methods for obtaining data, such that students can compare data from different institutions and compare “apples-to-apples.”

Specific Purpose of each adoption or amendment:

1. Amend section 74100 (Annual Report) by adding a new subdivision (d) – This new subsection is necessary to specify the manner in which a person approved to operate an institution must file the required annual report.

Factual Basis/Rational:

The Bureau is required to prescribe the format and method of delivery of an institution’s annual report. The proposed regulatory change requires the institution to file the annual report electronically by submitting the information required by section 94934 of the Education Code via the Bureau’s website, and attaching the School Performance Fact Sheet and the school catalog.

Electronic filing by the institutions ensures the most efficient and accurate collection of pertinent data. Previously, under the former law and Bureau, annual reports were submitted in hard copy to the Bureau. The data was then manually transferred by Bureau staff into an electronic format, which allowed the Bureau to manipulate the data to compare it, run industry reports, etc. This process, however, was inefficient and allowed much more room for error as numerous pieces of data were transferred from a hard copy to electronic format. If each institution enters its own data electronically, the information is almost immediately available to the public, is much more likely to be accurate, and allows the Bureau a much more effective ability to review “snapshots” of the industry in a way that allows greater analysis.

The proposed language, however, provides for the possibility that a person approved to operate an institution cannot file the Report electronically by permitting that person to contact the Bureau to seek an alternative method of complying. While it is likely that most

institutions can file electronically, the Bureau is making every attempt to be “user-friendly.”

2. Add section 74112 (Uniform Data Reporting) - this new section is required to ensure that the data that is reported is done so in a uniform way such that students and the Bureau can review and compare it effectively.

Factual Basis/Rational:

The Act requires each institution to report certain data, such as program completion rates, job placement rates, license passage rates, and salary and wage information. The information must be reported both to the Bureau in an institution’s Annual Report, as well as to students in the Performance Fact Sheet (the Act refers to the School Performance Fact Sheet, and the Student Performance Fact Sheet, apparently interchangeably). Section 94929.8 of the Education Code requires the Bureau to establish a uniform method for institutions to obtain statistically valid, current, and representative data in order to comply. The Bureau has determined that each institution must report the data by collecting it for the calendar year prior to submitting the report for the Annual Report, and the prior two calendar years for the Performance Fact Sheet. The Bureau believes that a two-year snapshot of the data is much more informative to a prospective student, but the Bureau only needs data for a year at a time, since the information is collected annually. In addition, the regulations include a chart format for reporting the data in the Performance Fact Sheet, so that students can clearly review the data in a standard format, rather than some institutions reporting the data in a narrative form, some in a chart, etc.

3. Add Article 2 to Chapter 5, Enforcement and Discipline, to read as Citations and Fines. This new article name only segregates the Citation and Fine scheme into the chapter for all enforcement and disciplinary tools.

Factual Basis/Rational:

The organization for the regulations promulgated pursuant to the Act continues to evolve as the Bureau adopts new regulations in separate stages. For organizational purposes, it makes sense to include a chapter governing enforcement and discipline, of which citations and fines are one part.

4. Add section 75020 (Issuance of Citations) – this new section authorizes the Bureau Chief, or the Bureau Chief’s or Director’s designee to issue citations containing orders of abatement and fines to people who are approved to operate a private, postsecondary institution that have committed any acts or omissions that are in violation of the Act or any of the Bureau’s regulations. It also authorizes the Bureau Chief, or the Bureau Chief’s or Director’s designee to issue citations containing orders of abatement and fines of up to \$50,000 pursuant to section 94944 of the Education Code to people operating a private, postsecondary institution without proper approval. The section also specifies the information that each citation must contain including requesting a hearing, requesting an informal conference, payment of the fine, and the consequences of not paying the fine.

Factual Basis/Rational:

Section 94936 of the Education Code authorizes the Bureau to issue a citation upon an investigation. Citations are important tools in an enforcement program. They help to gain compliance with the Act and the regulations in an efficient and effective way, particularly when there is no evidence of student harm. It is necessary for the Bureau to promulgate regulations to specify who has the authority to issue the citations, when the fine is due, and how to request a hearing or informal conference.

Included within these provisions is the process pursuant to the authorization to issue a citation for the unapproved operation of a private postsecondary institution, which allows the Bureau to act swiftly to order the abatement of an institution operating without approval.

Because the Director (or his or her designee) will operate as the Agency Head for proceedings under the APA, the proposed language does not include the Director as a person with citation-issuing authority, since he or she would be acting on a decision after an adjudicatory proceeding. Even if the Director delegates his or her authority to act on a decision as Agency Head, the Department also operates with a Chief Deputy Director, as well as several Deputy Directors. Accordingly, if the Director's designee issues a citation, there are several options for delegation to another designee for the purpose of acting on a decision, should the citation go to hearing.

5. Add section 75030 (Assessment of Administrative Fines) – this new section specifies the categories of citations that the Bureau may issue in order to guide its staff, as well as create uniformity among Bureau staff, and give the approved institutions a broad idea of what they can expect if receiving a citation.

Factual Basis/Rational:

Because section 94936 of the Education Code permits the issuance of citations up to \$5,000, creating categories of citations based upon the level of violation gives both Bureau staff and those approved to operate an institution guidance on the consequences of violating the Act and the Bureau's regulations.

6. Add section 75040 (Appeal of Citations; Informal Conference) – this new section provides for an informal conference after the issuance of a citation.

Factual Basis/Rational:

An informal conference, while not required, is a more cost-efficient option for the cited person to offer a defense to the conduct that gave rise to the citation. It is an opportunity for the parties to discuss the evidence and any mitigation that might exist, which the Bureau might not know about, that would assist the Bureau in reviewing the citation

issued. Resolving the issue in an informal manner helps both sides save the expense of going to hearing, especially since the Bureau may conduct the hearing via telephone.

The regulatory proposal makes clear that unless waived pursuant to stipulation between the parties, a decision after the informal conference still permits a hearing to contest the citation, although not another informal conference, so that the process continues to move forward.

7. Add section 75050 (Compliance with Citations) – this new section provides for the extension of time within which to comply with an order of abatement and for the consequences of not complying.

Factual Basis/Rational:

This section allows some leeway in complying with an order of abatement if the cited person has exercised due diligence, but is not able to comply within the time period set by the citation. Allowing such leeway is a more effective alternative to immediately taking action against the cited person, if that cited person has shown due diligence and has the ability to comply. On the other hand, it protects the public to allow the Bureau to take further action against a cited person who has not shown due diligence, or has simply not seriously attempted to comply with an order of abatement. The proposed regulatory language makes clear that failure to comply is grounds for denial or discipline of an approval to operate.

8. Add section 75150 (Emergency Decisions) – this new section allows for the Bureau to make emergency decisions pursuant to the appropriate provisions, commencing with section 11460.10, of the APA.

Factual Basis/Rational:

Provisions of the APA permit an agency to make an emergency decision for temporary interim relief where there is an immediate danger to the public health, safety, or welfare that requires immediate action. The APA requires an agency seeking to use these provisions to adopt regulations defining the circumstances in which the provisions may be used, the temporary, interim relief that may be sought, and the procedures before and after the issuance of the emergency decision. Section 94938 of the Education Code provides specific authority for the Bureau to adopt regulations implementing this provision of the APA.

Accordingly, the proposed regulatory language permits the Bureau to make an emergency decision where immediate action is required to protect students, prevent misrepresentations to the public, or prevent the loss of public funds or monies paid by students. Specifically, the situations where the Bureau anticipates needing immediate action include, but are not limited to, fraud; a substantial misrepresentation in the institution's Performance Fact Sheet, school catalog, or enrollment agreement; a substantial failure to meet institutional minimum operating standards; or a substantial failure to obtain a necessary approval or

permit from another agency or regulatory body, affecting public health, safety, or welfare. These are the areas where violations present the most potential harm to students and the public.

The proposed language allows the Bureau to order temporary, interim relief in these forms: (1) cease enrollment of new students; (2) cease part or all instruction for some or all programs; and/or (3) cease collection of tuition or fees for some or all programs. These measures are the most likely ones to create the immediate, albeit temporary, protection of students and the public – that which halts the offending institution from encumbering a potential student by preventing the enrollment in the first place, then that which stops the institution from continuing substantially substandard or potentially dangerous instruction, and that which protects the coffers of the students at risk, and immediately prevents the institution from continuing to benefit from its wrongdoing.

The proposed process will allow for not less than 48 hours before the effective date of the emergency decision if practicable. This time period is reasonable, as it is consistent with the notice provisions required in civil court before obtaining temporary orders. The Bureau can inform the affected person by informing him or her that the decision will be heard before the Director or his or her designee. In this way, the process will operate similarly to a civil court. If the person subject to the emergency decision seeks an opportunity to be heard prior to the effective date, it is reasonable to place that opportunity before the Director or a designee.

The Bureau does not anticipate wide-spread use of this process.

9. Add Article 4 to Chapter 5, Enforcement and Discipline, to read as Compliance Inspections. This new article name only adds the scheme for compliance inspections into the chapter for all enforcement and disciplinary tools.

Factual Basis/Rational:

The organization for the regulations promulgated pursuant to the Act continues to evolve as the Bureau adopts new regulations in separate stages. For organizational purposes, it makes sense to include a chapter governing enforcement and discipline, of which compliance inspections are one part and comprise one Article.

10. Add section 75200 (Compliance Inspections) – this new section sets forth the process for the Bureau’s conducting of announced and unannounced compliance inspections.

Factual Basis/Rational:

Section 94932.5 of the Education Code provides that the Bureau shall perform both announced and unannounced visits of all institutions at least every two years, and by regulation is required to set forth the policies and practices for ensuring that institutions are subject to an equal number of announced and unannounced visits.

Accordingly, the proposed language provides for the first compliance inspection to be an announced inspection with at least 7-days notice of such inspection. This process seemed to be the most reasonable in order to perform the most complete inspection by ensuring institution access, as well as gaining more complete compliance, which is the primary goal. In addition, the Bureau wanted the process to set forth the method for determining the number of total compliance inspections for any institution. This provides guidance to both the institutions in knowing what to expect from the Bureau, as well as Bureau staff by helping set priorities in the inspection process. Therefore, the proposed language defines the relevant factors to be considered in determining the number of inspections that an institution may be subject to in any two year period, including: size of the institution; number and types of programs offered; time elapsed since last inspection; history of its approval to operate; and enforcement history. These are the factors most likely to be relevant in formulating an inspection plan, and allowing the Bureau to make decisions about when institutions will be subject to inspection, and how often. For example, it makes sense that public protection dictates that the Bureau perform more frequent inspections of an institution with a dubious enforcement history, or one that has not been inspected for a long period of time.

In addition, the proposed language clarifies that the inspection program is separate from conducting an investigation. Therefore, if the Bureau were to receive a complaint prior to ever performing its first compliance inspection, which would be announced, it is not precluded from conducting an investigation for any possible violation of the Act or its regulations.

11. Add section 75210 (Notice to Students of Results of Inspection) – this new section provides the manner in which the Bureau can inform students or potential students about the outcome of a compliance inspection.

Factual Basis/Rational:

Section 94932.5 of the Education Code provides that the Bureau shall by regulation set forth the policies and practices of notifying students of the results of each inspection of the institution. The Bureau is required to post information on each institution on its website. In addition to such posting, the proposed language requires that the Bureau cause to be posted at conspicuous places at the institution, a notice regarding the inspection. This posting is the most reasonable addition to the Bureau's website, since it is while Bureau staff is performing the inspection that it will become much more obvious where such a notice or notices should be posted in order to be seen by the greatest number of students or potential students.

Underlying Data

None

Business Impact:

The Bureau has made an initial determination that the proposed regulatory action may save institutions a significant amount of money by establishing a voluntary informal conference process to contest a citation. The alternative would be to permit an appeal only through the APA, which would add a significant cost to both the person cited and the Bureau, when considering the travel required and the preparation for a more formal hearing, as well as the staff time and involvement of other state agencies.

Specific Technologies or Equipment

These regulations do not require specific technologies or equipment. The provisions for filing the Annual Report, while requiring that they be submitted electronically to the Bureau, provides for an alternative method of submission if the institution notifies the Bureau in a timely manner that it does not have the capability of submitting the Report electronically.

Consideration of Alternatives

No reasonable alternative to the regulations would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.