

**BUREAU FOR PRIVATE POSTSECONDARY EDUCATION  
DEPARTMENT OF CONSUMER AFFAIRS  
CALIFORNIA CODE OF REGULATIONS TITLE 5. DIVISION 7.5.  
CHAPTERS 1 AND 3.**

**NOTICE OF PROPOSED REGULATORY ACTION AND PUBLIC HEARING  
CONCERNING**

**REPEAL OF ABILITY-TO-BENEFIT LANGUAGE**

**NOTICE IS HEREBY GIVEN** that the Department of Consumer Affairs, Bureau for Private Postsecondary Education (hereinafter “Bureau” or “BPPE”) is proposing to take the action described in the Informative Digest below, after considering all comments, objections, and recommendations regarding the proposed action.

**PUBLIC HEARING**

The Bureau has not scheduled a public hearing on this proposed action. However, the Bureau will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days prior to the close of the written comment period. A hearing may be requested by making such request in writing addressed to the individuals listed under “Contact Person” in this Notice.

**WRITTEN COMMENT PERIOD**

Written comments relevant to the proposed regulatory action, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, to be considered by the Bureau, must be received by the Bureau at its office no later than **Tuesday, November 1, 2022, by 5 p.m.**, or must be received by the Bureau at the hearing, if a hearing is held.

**AUTHORITY AND REFERENCE**

Pursuant to the authority vested by Education Code sections 94803, 94877, 94888, and 94891 and to implement, interpret, or make specific sections 94802, 94885, 94887, 94888, 94889, 94900, 94904, 94909, 94910, 94927.5, and 94931 of the Education Code, the Bureau is proposing to adopt the following changes to California Code of Regulations Title 5, Division 7.5, Chapter 3.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

The Bureau for Private Postsecondary Education (Bureau) protects students and consumers through the regulatory oversight of California's private postsecondary educational institutions ("institutions") pursuant to the California Private Postsecondary Education Act of 2009 ("Act" – Ed. Code, §§ 94800–94950), including conducting qualitative reviews of educational programs and operating standards

In 2021 the legislature passed, and the Governor signed, SB 607 (Chapter 367, Statutes of 2021) which, among other things, repealed sections 94811 and 94904 of the Education Code and amended section 94909 of the Education Code to delete a reference to "Ability-to-Benefit" tests. These changes to the Education Code removed references to students being able to demonstrate their capacity for postsecondary study by passing an "Ability-to-Benefit" test in lieu of possessing a high school diploma or an equivalent. Ability-to-Benefit tests are tests approved by the United States Department of Education that, if passed, demonstrated that a student who lacked a high school diploma was capable of successfully completing study in a variety of subject matter areas and had the ability to benefit from the instruction.

References to Ability-to-Benefit tests occur in four of the Bureau's regulations. In section 71210 institutions are directed to list information for each educational program, including "If applicable, information regarding the ability-to-benefit examination as required by section 94904 of the Code." In section 71475 institutions applying for renewal of their approval to operate are directed to list in their application information about each educational program, including, "If applicable, information regarding the ability-to-benefit examination as required by section 94904 of the Code." In section 71770(a), institutions are told that in developing admissions standards, "Each 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." Finally, section 71920 states that an institution must maintain student records that include, "Verification of high school completion or equivalency or other documentation establishing the student's ability to do college level work, such as successful completion of an ability-to-benefit test."

Because of the removal of language referring to Ability-to-Benefit tests from the Education Code, it is no longer accurate for regulations to refer to Ability-to-Benefit tests as being required by statute. However, if institutions wish to incorporate Ability-to-Benefit tests in their admissions process, then that fact should be reported in the same way statutorily required tests were required before SB 607.

For the regulations to conform to the revised statutory language, the Bureau for Private Postsecondary Education is proposing to amend 5 CCR sections 71210, 71475, 71770, and 71920 to delete references to passing an Ability-to-Benefit test as required by statute, either by deleting the reference entirely (as in section 71770), or replacing the reference to the repealed statute with a reference to whether the institution chooses to use passage of an Ability-to-Benefit test in its admission process. The regulations will

also now contain a definition of what is meant by an “ability-to-benefit” test by reference to the federal statute creating them, the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1070a et seq.) as it is, from time to time, amended, as there is no longer a statutory reference to ability-to-benefit tests in statute.

### **ANTICIPATED BENEFITS OF THE PROPOSED REGULATION**

#### **BENEFITS OF THE REGULATION TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS:**

The specific benefit anticipated from the proposed regulation is to have the Bureau’s regulations conform to existing statutory language. By removing the three references to Ability-to-Benefit tests that were in the Education Code, the legislature is signaling its intent to no longer require students without a high school diploma or the equivalent to have to do anything to be eligible for enrolling at postsecondary institutions. The Bureau’s regulations need to accurately reflect the current statutory language that they are interpreting. This regulation does not directly affect the health of California residents. This regulation may improve the welfare of California residents by conforming regulations to existing statutes that broaden access to postsecondary education.

#### **BENEFITS OF THE REGULATION TO THE STATE’S ENVIRONMENT:**

This regulation does not affect the state’s environment.

#### **BENEFITS OF THE REGULATION TO WORKER SAFETY:**

The Bureau has determined the proposed regulatory action will not affect worker safety.

### **CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS**

During the process of developing these regulations and amendments, the Bureau has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

### **DOCUMENTS INCORPORATED BY REFERENCE**

None.

### **DISCLOSURES REGARDING THE PROPOSED ACTION**

#### **MANDATED BY FEDERAL LAW OR REGULATIONS:**

No.

#### **LOCAL MANDATE:**

None.

## **FISCAL IMPACT ESTIMATES**

Fiscal impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

Cost: None

Revenue: None

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which section 17561 -17630 Require Reimbursement: None

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete: None.

Impact on Jobs/New Business: None

Cost Impact on Representative Private Person or Business: The Bureau is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs: None.

## **EFFECT ON SMALL BUSINESS**

The Bureau has determined that the proposed regulations will not affect small businesses. The regulation will not impose any costs to small businesses and will affect all regulated institutions equally regardless of size.

Business Reporting: The proposed regulations do not require a report to be made.

## **RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS**

Impact on Jobs/Businesses:

The Bureau has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the state of California.

Benefits of Regulation:

The proposed regulation will benefit the health and welfare of California residents by bringing the Bureau into compliance with the CEC by no longer stating that students

without a high school diploma need to pass an Ability-to-Benefit exam to be eligible to enroll at a postsecondary institution. This proposal is not anticipated to benefit worker safety or the state's environment.

#### Economic Impact Declaration

The Bureau for Private Postsecondary Education declares that this regulation proposal will not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

#### **CONSIDERATION OF ALTERNATIVES**

The Bureau must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be 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 proposal described in this Notice, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

#### **INITIAL STATEMENT OF REASONS AND INFORMATION**

The Bureau has prepared an initial statement of reasons for the proposed action and has available all information upon which the proposal is based.

#### **TEXT OF PROPOSAL**

Copies of the exact language of the proposed regulations, and any document incorporated by reference, and the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained upon request from the Bureau for Private Postsecondary Education, P.O. Box 980818, West Sacramento, CA 95798-0818.

#### **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

After holding any requested hearing and considering all timely and relevant comments received, the Bureau may adopt the proposed regulations substantially as described in this notice. If the Bureau makes modifications that are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Bureau adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the contact person listed in this Notice at the address indicated in the below 'contact person' section. The Bureau will accept written comments on the modified regulations for 15 days after the date on which they are made available.

**AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE**

All information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You can obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

**CONTACT PERSON**

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: David Dumble  
Address: P.O. Box 980818  
West Sacramento, CA 95798-0818  
Telephone No.: (279) 895-6091 Fax: (916) 263-1897  
E-Mail Address: David.Dumble@dca.ca.gov

The backup contact person is:

Name: Yvette Johnson  
Address: P.O. Box 980818  
West Sacramento, CA 95798-0818  
Telephone No.: (279) 895-6099 Fax: (916) 263-1897  
E-Mail Address: Yvette.Johnson@dca.ca.gov

**AVAILABILITY AND LOCATION OF THE RULEMAKING FILE AND THE FINAL STATEMENT OF REASONS**

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named above.

You may obtain a copy of the Final Statement of Reasons once it has been prepared, by making a written request to the contact person named above, or by accessing the website listed below.

**Website Access:**

The Bureau's website is: <http://bppe.ca.gov>. Materials regarding this proposal can be found at <http://bppe.ca.gov/lawsregs/current.shtml>. An archive of the Bureau's prior regulatory actions can be found at <http://bppe.ca.gov/lawsregs/archive.shtml>.