

**BUREAU FOR PRIVATE POSTSECONDARY EDUCATION
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing Date: December 3, 2019

Subject Matter of Proposed Regulations: Intensive English Language Programs

**One (1) Section Affected: Division 7.5 of Title 5 of the California Code of Regulations:
Amend section 70000(k).**

Introduction:

The Bureau for Private Postsecondary Education (“Bureau” or “BPPE”) has statutory authority to approve and regulate private postsecondary institutions in California. However, the California Private Postsecondary Act of 2009 (Act) provides for exemptions from the Act under Education Code Section 94874. Specifically, Section 94874(a) allows an institution that offers solely avocational or recreational educational programs to be exempt. Section 94818 defines “avocational education” as “education offered for the purpose of personal entertainment, pleasure, or enjoyment.” Using its regulatory authority to interpret, implement, and make specific the Act, the Bureau provided a specific definition for “Education offered for purpose of personal entertainment, pleasure or enjoyment” as part of the definitions found in California Code of Regulations, Title 5, Division 7.5, Section 70000(k).

At the time the Bureau first promulgated the current regulation, the Bureau determined that Intensive English Language Programs (IELPs) are not clearly avocational and therefore they should be subject to regulatory oversight. At that time, IELPs received only minimal oversight from federal authorities and were not required to be accredited under federal law. In order to fulfill the Bureau’s primary function of protecting the public, the Bureau through regulation, defined “education offered for purpose of personal entertainment, pleasure, or enjoyment” to not include these IELPs so that they would be subject to the Bureau’s oversight. IELPs, however, in practice, are unlike traditional educational programs the Bureau regulates. They do not offer a diploma or degree, and the Bureau believes some of them are more like programs offered for personal entertainment, pleasure, or enjoyment. Moreover, the federal government has through statute and regulation increased its oversight of IELPs, including requiring that IELPs be accredited and laying out strict regulations (8 Code of Federal Regulations, Section 214.3) under the Student and Exchange Visitor Program (SEVP) for certifying and recertifying IELPs. Accordingly, the Bureau believes that some of these programs should be defined as “avocational education”, but current regulations require them to be regulated by the Bureau. This proposal seeks to fix that problem by altering the Bureau’s definition of “education offered for the purpose of personal entertainment, pleasure or enjoyment” to allow IELPs to be exempt from the Act, but only if they meet specific criteria laid out under this proposal. IELPs which do not meet these criteria would not be exempt and would continue to be under the Bureau’s authority.

Specific Changes, Purpose, Factual Basis/Rationale:

When the Bureau was promulgating the current regulations, it determined that IELPs were not “avocational education” and therefore should fall within the Bureau’s regulatory jurisdiction. Accordingly, the regulations were promulgated in such a manner that IELPs could not fall under the definition of “avocational education” within the Act, unless they were exclusively touristic in nature, and therefore could not be exempt from the Bureau’s authority and oversight. The Bureau has since determined that certain IELPs are avocational and therefore should not fall within the Bureau’s regulatory scope. IELPs are not and do not fit under the “traditional” model of postsecondary education and should, under certain circumstances, be considered programs offered for personal entertainment, pleasure, or enjoyment. Specifically, they are not educational programs which lead to a diploma or degree; and students generally choose the length of time they will attend and simply receive a certificate for their time.

Accordingly, the Bureau proposes to refine its definition of “avocational education” to better reflect which programs are avocational and which are not in actual practice. Moreover, in the years since the Bureau’s inception, the federal government has increased its role where IELPs are concerned. Changes in federal law and regulations now provide for federal oversight, which makes the Bureau’s oversight redundant. In addition, because IELPs are unlike more traditional postsecondary education, this causes serious difficulties and even confusion for both the Bureau and IELPs when trying to make the IELPs fit within the Bureau’s statutes and regulations.

This proposal provides a definition change, which would define IELPs that meet specific criteria as “avocational education” and therefore exempt from the Bureau’s oversight and jurisdiction. However, any institutions not meeting all of these specific criteria would not be exempt as avocational education and would continue to be subject to the Bureau’s jurisdiction.

This creates a narrow exemption for specific institutions, and also frees up valuable resources for the Bureau to use on more traditional postsecondary education institutions.

Section 70000(k)(1) This renumbers subsection (k) to subsection (k)(1). Two non-substantive changes were made to the regulatory language of this subsection to align it with the statute and for grammatical clarity. It is also altered to maintain the logical flow of the overall regulations.

Section 70000(k)(1)(A-C) This adopts the new subsections and reorganizes the section so that all the portions which describe what personal entertainment, pleasure, or enjoyment education is and is not are in one subsection, thus making it easier to find the relevant information for anyone working with or under these regulations.

Section 70000(k)(1)(A) This new section takes the language from the current section 76000(k)(3) and moves it into the new subsection. Additionally, it updates the language to provide an example of a test which assists students with admission for undergraduate or graduate programs. Since specified IELPs will be exempt from regulation, this subsection also exempts

education that prepares students for tests measuring English proficiency for the purposes of placing a student within an IELP. These updates are necessary to clarify that education that assists students to prepare for undergraduate or graduate admission tests are not considered “avocational” as the benefit of the education is to enter an academic program, but education that assists students prepare for an English language proficiency test merely to place students into an IELP program is avocational because the benefit of the education is to be placed into a non-academic program.

Section 70000(k)(1)(B) This new section takes the language from the current section 76000(k)(4) and moves it into the new subsection, which is necessary for clarity.

Section 70000(k)(1)(C) This new section takes the language from the current section 76000(k)(5) and moves it into the new subsection. Additionally, it separates language skills from all other skills since the purpose is to allow IELPs which meet the requirements of new proposed section 76000(k)(2) to be exempt from the Bureau’s oversight.

Section 70000(k)(1) This repeals the current subsection (1), which excludes from the avocational definition education that enables a student to qualify for immigration status in cases where the institution is permitted to issue a “Certificate of Eligibility for Nonimmigrant Student Status” by the United States Immigration and Customs Enforcement. When the regulations were adopted, the Bureau determined that IELP programs were not avocational in nature. Because IELPs generally include education that enables a student to qualify for that immigrational status, this subsection was adopted to exclude IELPs with that characteristic from the definition of avocational. As the Bureau is now refining the definition to better reflect that certain IELPs are avocational in nature, this subsection must be removed to be consistent with the primary purpose of the proposed regulations; namely, to allow IELPs that meet the requirements set out under the new proposed section 70000(k)(2) to be exempt.

Section 70000(k)(2) This deletes the current subsection (2), which excludes from the avocational definition educational that “facilitates the development of learning skills or language proficiency to assist students to.... [learn English as a second language].” This change is made for the same reason as the deletion of current subsection (1) above. The section introduces specific carve-outs to the avocational definition that are characteristics of IELPs, which allow the Bureau to have regulatory authority over IELPs. Since the Bureau now is refining its definition to reflect that IELPs are avocational, these characteristics must be removed.

Section 70000(k)(2)(A) & (B) This deletes the current subsections (A) & (B). These provided specific definitions under the current subsection (2) of IELPs and therefore like current subsections (1) and (2) must be deleted for the proposal to accomplish its primary goal.

Section 70000(k)(2) This new proposed subsection provides that the definition for “education offered for the purpose of personal entertainment, pleasure, or enjoyment” includes education to facilitate development of language skills or proficiency for students learning English as a second language so long as they meet all the requirements laid out in subsections (A-K). This provides the specific requirements for IELPs to qualify for the exemption and therefore not be under the Bureau’s oversight. Failure to meet any one of these requirements will mean that the institution

does not meet this exemption. This is narrowly tailored to allow only the specific IELPs to be exempt given the general reasons outlined above, and because such criteria are indicative of a program offered for personal entertainment, pleasure, or enjoyment.

Section 70000(k)(2)(A) This new subsection requires that the institution be accredited as required by federal law. The Bureau has made this a requirement for exemption because it ensures that even without Bureau oversight, the institution has a recognized agency that has reviewed a school and determined that it holds academic merit, according to set standards.

Section 70000(k)(2)(B) This new subsection requires that an institution's refund policy be at least that which is required by the institution's accreditor. This is necessary for clarity because while a refund policy is required by virtue of the requirement of accreditation, some schools go beyond the minimum required refund policy. This clarifies that an institution may have a refund policy that is more generous than that required by the accreditor without causing the institution to lose its exemption because its refund policy is different (but more generous to students) than what the accreditor requires.

Section 70000(k)(2)(C) Since IELPs must be certified by the Student and Exchange Visitor Program (SEVP), this new subsection requires that the institution be certified by the SEVP. Title 8, Code of Federal Regulations, Section 214.3 provides the requirements for meeting this requirement and renewing this approval. The Bureau has made this a requirement for exemption because it ensures that without Bureau oversight, another entity is ensuring compliance with federal law.

Section 70000(k)(2)(D) This new subsection specifies that in order to meet this portion of the definition, an institution can only offer English language instruction and other education which would meet the definition of "personal entertainment, pleasure, or enjoyment" as provided in section 70000(k)(1). Any other educational programs would result in this subsection not being satisfied and the institution not being exempt from the Bureau's oversight. Therefore, an institution cannot use this narrow exemption for IELPs as a way to provide other education programs which would not be exempt otherwise and still maintain its exemption. This limitation is needed to conform to Education Code section 94874, which exempts institutions that "solely" offer avocational, educational programs.

Section 70000(k)(2)(E) This new subsection specifies that to meet this regulatory exemption, an institution shall not receive any state or federal student financial aid. Part of the reason for exempting IELPs is that they are not typical postsecondary educational programs. Receipt of financial aid is more indicative of traditional diploma and degree granting programs the Bureau regulates, whereas programs that offer education for personal entertainment, pleasure, or enjoyment do not receive such aid. The criteria also assists the Bureau in easily identifying exempt and non-exempt programs for the purposes of enforcement. Therefore, they should not receive postsecondary financial aid, and less oversight is needed when no financial aid is involved.

Section 70000(k)(2)(F) This new subsection specifies that, in order to meet the requirements for this exemption, an institution cannot provide any financial aid to students. As provided above,

IELPs are not typical postsecondary education and therefore should not provide financial aid, which is indicative of programs offered for entertainment, pleasure, or enjoyment and furthers the separation between IELPs and typical postsecondary education institutions and programs. The criteria also assists the Bureau in easily identifying exempt from non-exempt programs for the purpose of enforcement.

Section 70000(k)(2)(G) This new subsection specifies that the institution shall not provide any loans to students. Having already specified that these institutions cannot receive or provide financial aid, this requirement is created to make certain that the institution does not become a lending front for international students coming to study in these programs. Like financial aid, educational loans are more indicative of traditional private postsecondary institutions, and by limiting the exemption to programs that do not offer such loans, the institutions better reflect those offering education for entertainment, pleasure, or enjoyment. The criteria also assists the Bureau in enforcement in easily identifying exempt from non-exempt programs.

Section 70000(k)(2)(H) This new subsection specifies that institutions are prohibited from facilitating or brokering private third-party loans for students. As provided above, this ensures that the IELPs remain focused on their primary purpose and do not engage in practices or act in any way to assist students in obtaining aid or loans. Like financial aid, educational loans are more indicative of traditional private postsecondary institutions, and by limiting the exemption to programs that do not offer such loans, the institutions better reflect those offering education for entertainment, pleasure, or enjoyment. The criteria also assists the Bureau in enforcement in easily identifying exempt from non-exempt programs.

Section 70000(k)(2)(I) This new subsection prohibits the offering of any degree-granting programs. IELPs are not typical postsecondary education institutions and therefore should not engage in any degree-granting. Moreover, granting degrees, such as bachelors, masters, and doctorate degrees, is a feature more indicative of regulated institutions, whereas programs offering education for personal entertainment, pleasure, or enjoyment do not typically grant degrees, but instead issue certificates. The criteria also assists the Bureau in distinguishing exempt from non-exempt programs for purposes of enforcement. Furthermore, subsection (D) has already limited the types of programs which may be offered while using this regulatory exemption, and those limitations only help to further divide these institutions from other postsecondary education.

Section 70000(k)(2)(J) This new subsection prohibits any promises or representations that courses lead to employment. The purpose of IELPs is to develop language skills and English proficiency, not to establish eligibility for employment. Private postsecondary vocational programs that lead to employment are traditionally regulated by the Bureau. While such skills may ultimately be helpful in employment as well as everyday life, the purpose of IELPs is personal entertainment, pleasure, and enjoyment, not job eligibility. Thus, this subsection is needed to prevent IELPs from improperly luring students with the promise or representation that they will get a job.

Section 70000(k)(2)(K) This new subsection prohibits institutions from falsely representing in any manner that they are approved by the Bureau. While institutions approved by the Bureau

may say as much, they may not represent that the Bureau in any way endorses them, only that they have met the minimum operating standards to receive a license from the Bureau. Exempt institutions such as exempt IELPs are not approved by the Bureau, and should not falsely represent that they are.

Section 70000(k)(3) This deletes this subsection. The regulatory language from this subsection is moved to new section 70000(k)(1)(A) where it has been expanded to further specify what is and is not included as test preparation.

Section 70000(k)(4) This deletes this subsection. The regulatory language from this subsection is moved to new section 70000(k)(1)(B).

Section 70000(k)(5) This deletes this subsection. The regulatory language from this subsection is moved to new section 70000(k)(1)(C) where it is amended to separate language skills from other skills.

Underlying Data

The Bureau did not rely on any technical, theoretical, or empirical study, report, or similar document in preparing this action.

Business Impact

This regulation will not have a significant adverse economic impact on businesses. The proposal would make a specific subset of institutions exempt from Bureau oversight. Thus, these institutions would no longer be required to submit annual reports, renewals, or produce student performance fact sheets thereby saving the particular institutions money. Yet, these institutions would remain under the federal regulations for these types of programs.

Economic Impact Assessment

The regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the altered definition would simply remove a small subset of institutions from the Bureau's jurisdiction.
- It will not create new business or eliminate existing businesses in the State of California because the regulations provide a specific set of circumstances, which if met, would allow a small subset of institutions to be exempt from the Act and thereby the Bureau's jurisdiction.
- It will not affect the expansion of businesses currently doing business within the State of California because the regulations make exempt a subset of institutions from the Act. Federal accreditation and other regulations are still required for these institutions to

operate, so it is not anticipated that exemption from the Bureau's laws will affect expansion of these institutions.

- The regulatory proposal benefits the health and welfare of California residents as this subset of institutions is subject to federal regulations; the Bureau can turn its limited resources to more typical postsecondary institutions which enroll more California residents and fewer international individuals.
- The regulatory proposal does not affect the state's environment because these are regulations changing a definition regarding exemptions from an Act that oversees private postsecondary education.
- The regulatory proposal would not enhance worker safety because the regulations make IELPs exempt from the California Private Postsecondary Education Act of 2009 if they meet specific requirements.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. While this would be a viable possibility, the purpose of these regulations is to remove a specific subset of institutions from the Bureau's jurisdiction. These IELPs are not the typical postsecondary educational programs and are more like programs that are exempt from the Bureau's jurisdiction. The Bureau originally promulgated regulations to ensure these institutions were under the jurisdiction of the Bureau as federal oversight was lax. Today, new federal regulations and oversight provide requirements of these institutions making the Bureau's oversight unnecessary.

2. Require institutions under this section to post a statement that they are not approved by the State of California. No other type of exempt institution is required to make such a posting, and this would single out these institutions. Also, enforcement of the requirement would be problematic as these institutions would no longer be under the Bureau's jurisdiction.

Anticipated Benefits

IELPs are not generally considered traditional postsecondary educational programs. They generally do not offer degrees or diplomas, just certificates showing how much time has been completed in the immersive study. Their beginning and ending enrollment is generally based on how long a student wants to spend learning the language, not the program itself. In these ways, IELPs are more akin to educational programs offered for personal entertainment, pleasure or enjoyment. Moreover, when the regulations were originally created, federal oversight of IELPs was minimal. Today, the federal government has enacted numerous new regulations and oversight of these programs, and the Bureau's oversight is redundant. The Bureau has limited resources and it benefits everyone for the Bureau to use its resources where they can best serve the people of the state of California by no longer overseeing certain IELPs that meet the specific requirements set forth in the proposed regulations.