

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

INITIAL STATEMENT OF REASONS

REPEAL OF ABILITY TO BENEFIT LANGUAGE

Hearing Date: No hearing has been scheduled.

Subject Matter of Proposed Regulations: Repeal of “Ability-to-Benefit” language

Sections Affected: Section 74110, Division 7.5 of Title 5 of the California Code of Regulations; Amend sections 71210, 71475, 71770, and 71920.

Specific purpose of each adoption, amendment, or repeal:

1. Background/Problem Addressed:

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, sections 94800–94950), including conducting qualitative reviews of educational programs and operating standards.

In 2021 the Act was amended by Senate Bill (SB) 607 to eliminate all references to “ability-to-benefit” tests in the Act by deleting California Education Code (CEC) sections 94811 and 94904, and removing the words, “admissions requirements for ability-to-benefit students” from CEC section 94909(a)(8)(A).

Ability-to-benefit tests are used as an alternative to a requirement that students have a high school diploma before enrolling in a postsecondary program by establishing that the student would benefit from the instruction regardless of not possessing a high school diploma. A list of ability-to-benefit tests that enable a student to be eligible for Title IV financial assistance is published by the U.S. Department of Education’s Office of Postsecondary Education.

For the Bureau’s regulations to accurately reflect the statutes that authorize them, the Bureau must eliminate the references to ability-to-benefit tests as being required by the statutory provisions that were repealed by SB 607, either by deleting the reference, or by replacing the reference to a statutory requirement with language that states the

ability-to-benefit test may be required under certain circumstances by the institution. The changes to the regulations are largely non-substantive.

2. Anticipated benefits from regulatory action:

Revising the language of the Bureau’s regulations to conform to the statutes authorizing the regulations is an essential part of the regulatory process. Government Code section 11349.1(a)(5) states that all regulations must have a reference, defined in Government Code section 11349(e) as “the statute . . . the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.” The statutes that authorize the Bureau’s regulations have been amended, requiring the Bureau to amend its regulations to conform to the authorizing statutes.

Factual Basis/Rationale:

The changes proposed by this regulatory package are as follows:

Amend section 71210 of Division 7.5 of Title 5 of the California Code of Regulations:

Proposed Change: Add the word, “skills,” in subdivision (c)(1). In subdivision (c)(2), delete the word “the” and add the word “any” before the words “ability-to-benefit” and add “the institution. For the purposes of this section an “ability-to-benefit examination” means 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.) as it is, from time to time, amended, that is designed to help identify students who possess the basic skills necessary to succeed in a post-secondary education program, but who lack a high school diploma;” and delete, “section 94904 of the Code;” from section 71210(c)(2).

Rationale: Section 71210 of the regulations lays out what information institutions must provide about their educational programs. Because of the repeal of CEC section 94904, regulatory language that states, “as required by section 94904 of the Code” is no longer accurate. Institutions still have the discretion to require ability-to-benefit tests as part of their admission process, so the language is being revised to say the requirement for an ability-to-benefit test is from the institution, not CEC section 94904.

Subdivision (c) requires institutions to list their admission requirements, which currently includes minimum levels of prior education, preparation, and training. This omits consideration of any skills the prospective student might have acquired that would help qualify them for admission to an educational program. Based on the Bureau’s

experience and the existing qualification criteria of private postsecondary institutions, individuals may possess or have developed skills that might make them able to successfully complete an educational program that were developed in ways other than through prior education, preparation, or training. Institutions should be able to consider such skills in their admissions policy, so the word “skills” is being added to the regulations here.

Because the statutory reference to “ability-to-benefit” has been deleted from the Act, it is necessary to provide a contextual definition for the reference. The phrase is defined by reference to the federal legislation that allows students without a high school diploma to be eligible for federal financial assistance while attending a postsecondary school in certain circumstances. This clarifies that the reference to an “ability-to-benefit examination” refers only to examinations recognized under federal law and not any other examination that might designate itself as an “ability-to-benefit examination.” The word “the” is being replaced by “any” as there may be multiple ability-to-benefit tests that may be utilized by an institution.

Note:

Proposed Change: Add “94885” and “94909” and delete “94904” from the Reference section.

Rationale: Section 94904 of the Code was repealed by SB 607, so it should no longer be cited as a reference to section 71210. Therefore, it is being deleted. CEC section 94885 is being added to the reference section as section 71210 requires schools to list information regarding admissions policies in 71210(c)(1) and (2) and CEC section 94885 establishes that schools must maintain, “specific written standards for student admissions for each educational program” as part of their Minimum Operating Standards. CEC section 94909 is being added to the reference section as subdivision 94909(a)(8)(A) requires schools to list a detailed description of admissions policies in their catalog, and section 717210 deals with admissions requirements, including those related to ability-to-benefit examinations.

Amend section 71475 of Division 7.5 of Title 5 of the California Code of Regulations:

Section 71475(t)(2):

Proposed change: Delete the word “the” and add the word “any” before the words “ability-to-benefit examination,” and add “the institution. For the purposes of this section an “ability-to-benefit examination” means 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.) as it is, from time to time, amended, that is designed to help identify students who possess the basic skills necessary to succeed in a post-secondary education program, but who lack a high school diploma;” and delete, “section 94904 of the Code.” from section 71475(t)(2).

Rationale: Section 71475 of the regulations deals with the renewal of an approval to operate a non-accredited institution in California. Because of the repeal of section 94904, regulatory language that states institutions must list information on ability-to-benefit examinations, “as required by section 94904 of the Code” is no longer accurate. Institutions still have the discretion to require ability-to-benefit tests as part of their admission process, so the language is being revised to say the requirement for an ability-to-benefit test is from the institution, not CEC section 94904.

Because the statutory reference to “ability-to-benefit” has been deleted from the Act, it is necessary to provide a contextual definition for the reference. The phrase is defined by reference to the federal legislation that allows students without a high school diploma to be eligible for federal financial assistance while attending a postsecondary school in certain circumstances. This clarifies that the reference to an “ability-to-benefit examination” refers only to examinations recognized under federal law and not any other examination that might designate itself as an “ability-to-benefit examination.” The word “the” is being replaced by “any” as there may be multiple ability-to-benefit tests that may be utilized by an institution.

Section 71475(t)(2) in the current regulations ends with a period, which is incorrect as it is the second in a series of requirements that should each end with a semicolon. For this reason, the period is being deleted and a semicolon is being inserted at the end of the text.

Amend section 71770 of Division 7.5 of Title 5 of the California Code of Regulations:

Section 71770(a):

Proposed change: Add, “and shall describe in its admissions policy the criteria used by the institution to determine whether each student is qualified for admission to the educational program (“qualified candidate for admission”)” after “An institution shall not admit any student who is obviously unqualified or who does not appear to have a reasonable prospect of completing the program” Amend subdivision (1) by deleting, “successfully take and pass the relevant examination as required by section 94904 of the Code” and adding, “meet the institution’s criteria for a qualified candidate for admission, including minimum levels of prior education, preparation, skills, or training.”

Rationale: Section 71770 of the regulations deals with admissions standards for educational programs. With the deletion of the reference to “admissions requirements for ability-to-benefit students,” from section 94909(a)(8)(A) of the Code, admission standards now no longer have to reference ability-to-benefit students. The Bureau is deleting the specific reference to section 94904 of the Code.

The Bureau is replacing the deleted language with language that references the institution’s criteria for admissions. The added language is taken almost verbatim from 5 CCR section 71210(c)(1), which requires institutions to list the admissions requirements for each educational program offered. The word “skills” is being added here as it was to the language in section 71210(c)(1) to expand the permissible factors seen by the Bureau in common criteria for admission to include qualifications that might be applicable to programs where acquired skills might be a relevant criterion for admission.

Amend section 71920 of Division 7.5 of Title 5 of the California Code of Regulations:

Section 71920(b):

Proposed change: Add “if required by the institution. For the purposes of this section an “ability-to-benefit test” means 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.) as it is, from time to time, amended, that is designed to help identify students who possess the basic skills necessary to succeed in a post-secondary education program, but who lack a high school diploma” to section 71920(b)(1)(A).

Rationale: Section 71920 of the regulations deals with student records to be maintained by an institution. With the elimination of references to ability-to-benefit testing from sections 94811, 94904, and 94909 of the Code, there is no longer any reason to require an institution to keep records concerning a student’s passage of an ability-to-benefit test as required by law. However, institutions are still free to include ability-to-benefit tests in their own admissions requirements, so the regulation is being amended to clarify that ability-to-benefit tests used in admissions at the institution’s discretion still must be retained in the student’s record.

Because the statutory reference to “ability-to-benefit” has been deleted from the Act, it is necessary to provide a contextual definition for the reference. The phrase is defined by reference to the federal legislation that allows students without a high school diploma to be eligible for federal financial assistance while attending a postsecondary school in certain circumstances. This clarifies that the reference to an “ability-to-benefit

examination” refers only to examinations recognized under federal law and not any other examination that might designate itself as an “ability-to-benefit examination.” The word “the” is being replaced by “any” as there may be multiple ability-to-benefit tests that may be utilized by an institution.

Underlying Data (Technical, Theoretical, and/or Empirical Studies, Reports or Documents)

1. List of Approved “Ability-to-Benefit” (ATB) Tests and Passing Scores, Office of Postsecondary education, Department of Education, Noticed in the Federal register on 11/09/2020, at <https://www.federalregister.gov/documents/2020/11/09/2020-24795/list-of-approved-ability-to-benefit-atb-tests-and-passing-scores>
2. Draft version presented in meeting materials for Bureau of Private Postsecondary Education Advisory Committee meeting on February 23, 2022, located on pages 65-67 at https://www.bppe.ca.gov/about_us/meetings/materials/20220223_acm.pdf.

Business Impact

The Bureau has made the initial determination that the proposed regulations will not have a statewide adverse economic impact directly affecting businesses including the ability of California businesses to compete with businesses in other states.

This initial determination is based on the following facts:

Of the four regulations being amended, three are largely not substantive. The amendments to 71210, 71475, and 71920 merely eliminate requirements that institutions notify students or potential students about an admission criterion that no longer exists, or maintain student records about the now non-existent admission criteria. The amendment to section 71770 relaxes admission criteria, but still requires institutions to establish standards for each educational program and not admit students who are “obviously unqualified or who does not appear to have a reasonable prospect of completing the program.” Therefore, this amendment should not impose any significant cost to institutions operating in California.

Economic Impact/Assessment analysis

The regulatory proposal will have the following effects:

- It will not create or eliminate any jobs within the State of California because the regulations only permit postsecondary educational institutions in California to no longer refer to or administer details concerning students qualifying for admissions

through ability-to-benefit tests, which should not cause either the creation or elimination of any jobs within California.

- It will not create new businesses or eliminate businesses in the State of California because the regulations only permit postsecondary educational institutions in California to no longer refer to or administer details concerning students qualifying for admissions through ability-to-benefit tests, which has no known fiscal impact and should not create or eliminate any businesses in California.
- It will not affect the expansion of businesses currently doing business in the State of California because the regulations only require permit postsecondary educational institutions in California to no longer refer to or administer details concerning students qualifying for admissions through ability-to-benefit tests, which has no known fiscal impact and should not affect the decision of any business to expand in California.
- The regulatory proposal benefits the health and welfare of California residents by eliminating regulatory requirements for private postsecondary institutions that are no longer supported in statute, allowing institutions to operate as intended by the legislature.
- The regulatory proposal does not affect the state’s environment because they only require private postsecondary institutions to convey information about their programs to the Bureau, which should not affect the state’s environment.
- The regulatory proposal would not affect worker safety because these regulations are not relevant to the enhancement of worker safety and are to conform the Bureau’s regulations to statutory language.

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 or businesses 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. This alternative was rejected because it would allow the Bureau's regulations to be out of compliance with the statutes that create the Bureau's regulatory authority.