

Date of Hearing: January 14, 2020

ASSEMBLY COMMITTEE ON HIGHER EDUCATION

Jose Medina, Chair

AB 70 (Berman) – As Amended January 6, 2020

SUBJECT: Private postsecondary education: California Private Postsecondary Education Act of 2009

SUMMARY: Prohibits the Bureau for Private Postsecondary Education (BPPE) from verifying an exemption from BPPE oversight for a nonprofit that operated as a for-profit institution unless the Attorney General (AG) verifies certain information and provide notifications, as specified. Specifically, **this bill:**

- 1) Prohibits the BPPE from verifying the exemption from this chapter of, or contract for the complaint handling for, a nonprofit institution that operated as a for-profit institution during any period on or after January 1, 2010, unless the AG verifies all of the following:
 - a) The nonprofit institution acquired the for-profit institution's assets for no more than the fair value of the assets;
 - b) The nonprofit institution has not executed agreements for goods or services exceeding the fair value of the goods or services;
 - c) All core functions of the nonprofit institution are conducted by, or under the direction of, the nonprofit institution; and,
 - d) The nonprofit institution has not entered into any contracts, loans, or leases with a term of longer than 18 months with the former for-profit institution's owners and managers.
- 2) Establishes that an action taken pursuant to (1) above may be appealed to the superior court.
- 3) Establishes that "fair value" shall be demonstrated through one of the following:
 - a) A third-party appraisal based on comparable assets acquired by, or goods or services procured by, nonprofit corporations in similar market conditions;
 - b) Independent financing of the acquisition or procurement based upon the asset acquired or goods or services procured; and,
 - c) Full and open competition in the acquisition of the assets or procurement of the goods or services.
- 4) Requires that, within 90 days of the receipt of all information the AG has determined is necessary for its verification pursuant to (1) above, the AG shall notify the institution and the BPPE in writing of the AG's verification, as specified.
- 5) Defines "public institution of higher education," to mean any of the following:

- a) A campus, branch of the California Community Colleges, California State University of the University of California;
- b) An institution operated by the United States government, a state or Indian tribal government, as defined in federal law; and,
- c) An institution that is an instrumentality of a state or local government if it meets all of the following:
 - i) The institution's employees are government employees;
 - ii) The institution's liabilities are payable to the same degree as if they were liabilities of the state or local government, as specified; and,
 - iii) The institution is subject to the same financial oversight and open public records laws as the state or local government, as specified.
- 6) Defines a nonprofit corporation to mean an institution to which contributions have been determined by the United States Internal Revenue Service to be tax-deductible and is subject to the limitations described in the bill.
- 7) Specifies that only an institution of higher education meeting the act's definition of nonprofit corporation or public institution of higher education is exempt from the requirements imposed on an out-of-state private postsecondary educational institution.

EXISTING LAW:

- 1) Establishes the California Private Postsecondary Act of 2009 (Act) and requires the BPPE to, among other things, review, investigate and approve private postsecondary institutions, programs and courses of instruction and authorizes BPPE to take formal actions against an institution/school to ensure compliance with the Act, including seeking closure of an institution/school if determined necessary. The Act also provides for specified disclosures and enrollment agreements for students, requirements for cancellations, withdrawals and refunds, and that the BPPE shall administer the Student Tuition Recovery Fund (STRF) to provide refunds to students affected by the possible closure of an institution/school. Existing law repeals the act on January 1, 2021. (Education Code (EDC) Section 94800 et seq.)
- 2) Exempts the following from oversight by the BPPE:
 - a) An institution that offers solely avocational or recreational educational programs.
 - b) An institution offering educational programs sponsored by a bona fide trade, business, professional, or fraternal organization, solely for that organization's membership.
 - c) A bona fide organization, association or council that offers pre-apprenticeship training programs on behalf of one or more Division of Apprenticeship Standards-approved labor-management or apprenticeship programs that is not on the Eligible Training Provider List

(ETPL) currently but has met requirements for placement on the list, that is on the ETPL and that has not been removed from the ETPL for failure to meet performance standards.

- d) A postsecondary educational institution established, operated, and governed by the federal government or by this state or its political subdivisions.
- e) An institution offering either test preparation for examinations required for admission to a postsecondary educational institution or continuing education or license examination preparation, if the institution or the program is approved, certified, or sponsored by a government agency, other than the BPPE, that licenses persons in a particular profession, occupation, trade, or career field, a state-recognized professional licensing body, such as the State Bar of California, that licenses persons in a particular profession, occupation, trade, or career field or a bona fide trade, business, or professional organization.
- f) An institution owned, controlled, and operated and maintained by a religious organization lawfully operating as a nonprofit religious corporation whose instruction is limited to the principles of that religious organization and the diploma or degree granted is limited to evidence of completion of that education. The institution is only eligible to offer degrees and diplomas in the beliefs and practices of the church, religious denomination, or religious organization and shall not award degrees in any area of physical science. Any degree or diploma granted by an institution owned, controlled, and operated and maintained by a religious organization lawfully operating as a nonprofit religious corporation shall contain on its face, in the written description of the title of the degree being conferred, a reference to the theological or religious aspect of the degree's subject area. The degree must reflect the nature of the degree title, such as "associate of religious studies," "bachelor of religious studies," "master of divinity," or "doctor of divinity."
- g) An institution that does not award degrees and that solely provides educational programs for total charges of two thousand five hundred dollars (\$2,500) or less when no part of the total charges is paid from state or federal student financial aid programs.
- h) A law school that is accredited by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association or a law school or law study program that is subject to the approval, regulation, and oversight of the Committee of Bar Examiners.
- i) A nonprofit public benefit corporation that is qualified under Section 501(c)(3) of the United States Internal Revenue Code, is organized specifically to provide workforce development or rehabilitation services and is accredited by an accrediting organization for workforce development or rehabilitation services recognized by the Department of Rehabilitation.
- j) An institution that is accredited by the Accrediting Commission for Senior Colleges (ACSC) and Universities, Western Association of Schools and Colleges (WASC), or the Accrediting Commission for Community and Junior Colleges (ACCJC).
- k) Flight instruction providers or programs that provide flight instruction pursuant to Federal Aviation Administration (FAA) regulations and do not require students to enter

into written or oral contracts of indebtedness and do not require or accept prepayment of instruction-related costs in excess of \$2,500.

- l) An institution owned, controlled, operated, and maintained by a community-based organization, as specified. (EDC Section 94874)
- 3) Also provides an exemption from the Act and oversight by the BPPE for an institution that is accredited by the ACSC and WASC, or ACCJC that meets all of the following:
 - a) Has been accredited by a United States Department of Education (USDE) recognized accrediting agency for at least 10 years and has not been placed on probation or on monitoring or sanctioned.
 - b) Is headquartered in California and has operated continuously for at least 25 years.
 - c) Is privately held and was previously granted an approval to operate by the BPPE or the former bureau and has not changed ownership since its last approval.
 - d) Has not filed for bankruptcy protection.
 - e) Maintains an equity ratio composite score of at least 1.5.
 - f) Derives at least 12.5 percent of its revenues from sources other than state or federal student assistance like Title 38 and Cal Grant monies.
 - g) Does not have a cohort default rate over 13 percent for the most recent three years.
 - h) Has a graduation rate that exceeds 60 percent.
 - i) Has not been subject to any legal or regulatory actions by a state AG that resulted in monetary settlement, fines or other documented violations.
 - j) Provides a pro-rata refund of unearned institutional charges to students who complete 75 percent or less of the period of attendance.
 - k) Provides to all students the right to cancel the enrollment agreement and obtain a refund of charges paid through attendance at the second class session, or the 14th day after enrollment, whichever is later.
 - l) Complies with other reasonable criteria established by the California State Approving Agency for Veterans Education.
 - m) Verifies its exemption with the BPPE, as specified. (EDC Section 94947)
- 4) Requires institutions exempt from the Act to still comply with laws relating to school closure and laws relating to fraud, abuse, and false advertising. (EDC Section 94874.9)

FISCAL EFFECT: A substantively similar bill, AB 1341 (Berman, 2019), was heard by the Senate Appropriations Committee on Appropriations. The Committee estimated \$295,000

General Fund in FY 2019-20 and \$512,000 General Fund in FY 2020-21, and ongoing, for 1.0 Investigative Auditor, 1.0 Deputy AG, and 1.0 Legal Secretary for the AG to investigate whether the institution meets the definition of a non-profit corporation to ensure that institutions are independently run, have not engaged in questionable activities, and does not compensate staff on an equity or revenue basis. There were no additional costs estimated for the BPPE.

COMMENTS: *Need for the bill.* According to the author, “Rampant deceptive or unfair treatment of students is rare at legitimate nonprofit and public colleges because financial restrictions make it difficult for school leaders to profit from bad behavior. Being a nonprofit has traditionally required an institution to devote all of its revenues to its educational purpose, and prohibit any form of profit-taking, so that those in control are not tempted to take advantage of students or the public.”

“These restrictions have been so effective in protecting students that state and federal laws frequently provide funding only to nonprofit and public institutions, or apply stricter guidelines if for-profit colleges seek access to taxpayer funds. Some for-profit colleges, however, are starting to use a ‘nonprofit’ or ‘public’ label to attract students who are suspicious of for-profit colleges, and to escape regulatory oversight.”

“A decline in enforcement of nonprofit status by the federal Internal Revenue Service is allowing some for-profit colleges to get away with using complicated financial schemes and shell corporations to lay claim to nonprofit status, but without adopting the restrictions that actually protect students.”

“California cannot rely on the U.S. Department of Education to solve this problem. Despite the poor record of some federally-funded for-profit colleges and scandals that have plagued the for-profit industry, Secretary of Education Betsy DeVos and the Trump administration refuse to admit that investor control of colleges is hazardous to students and taxpayers and require greater oversight and scrutiny. Therefore, California must step up and step in to protect our students and ensure that appropriate oversight remains.”

Background. The Century Foundation published a report in September of 2015 titled *The Covert For-Profit*. Prompted by news of several conversions of for-profit colleges into nonprofits, The Century Foundation obtained IRS and USDE records and communications that called into question the legitimacy of some of these conversions. The Century Foundation wrote that “...through four case studies, based on hundreds of pages of documents obtained from government agencies, the examination reveals a dangerous regulatory blind spot, with the two federal agencies each assuming, wrongly, that the other is monitoring the integrity of the “nonprofit” claims of these colleges.”

Since *The Covert For-Profit* was released, several large national for-profit colleges that serve California students have transitioned, or begun the transition, to a nonprofit status. These colleges are:

- 1) *Grand Canyon University.* The CEO of Grand Canyon Education, Inc., a for-profit company traded on NASDAQ, also serves as the President of an affiliated nonprofit, Grand Canyon University, and about 60% of the tuition revenue that the “nonprofit” college receives flows through to the for-profit company. Grand Canyon University reported more than 7,000 California enrollments in 2016-17. The U.S. Department of Education announced in

November of 2019 that it does not consider Grand Canyon University to be a nonprofit for the purposes of Title IV funding.

- 2) *Ashford University*. Owned by Bridgepoint Education, Inc., and based in San Diego, Ashford University has been sued by the California AG for misleading prospective students. Meanwhile, the company announced in March 2018 that it would follow the Grand Canyon University approach to claiming nonprofit status. In fact, on February 15, 2019, Ashford University announced that it received determination from the Internal Revenue Service that it is exempt from federal income tax under Internal Revenue Code (IRC) Section 501 (c) (3). In 2018 Ashford University reported more than 35,000 students. State-specific figures are not available for Ashford University.
- 3) *Purdue University Global*. While claiming to be a “public” college because of its affiliation with Indiana’s public Purdue University, Purdue University Global (PUG) is actually a limited liability corporation for which the state refuses any financial responsibility, and which is exempt from state public records laws; exempt from state audit requirements; and exempt from state open meeting laws. The institution is jointly operated by Purdue and PUG, which was formerly owned by Kaplan Higher Education. Kaplan Higher Education, which is traded on the New York Stock Exchange, has formal roles in governing PUG and gets a share of profits. Kaplan Higher Education reported more than 2,000 California enrollments in 2016-17.

AB 70 prevents the BPPE from verifying the exemption of, or contract for the complaint handling for, a nonprofit institution that operated as a for-profit institution during any period on or after January 1, 2010, unless the AG verifies all of the following:

- 1) The nonprofit institution acquired the for-profit institution’s assets for no more than the fair value of the assets.
- 2) The nonprofit institution has not executed agreements for goods or services exceeding the fair value of the goods or services.
- 3) All core functions of the nonprofit institution are conducted by, or under the direction of, the nonprofit institution.
- 4) The nonprofit institution has not entered into any contracts, loans, or leases with a term of longer than 18 months with the former for-profit institution’s owners and managers.

Nonprofit status. The vast majority of public and private universities and colleges are tax-exempt entities as defined by IRC Section 501(c)(3) because of their educational purposes—purposes that the federal government has long recognized as fundamental to fostering the productive and civic capacity of its citizens—and/or the fact that they are state governmental entities. In turn, states generally grant tax-exempt status to organizations, including universities and colleges, which qualify as tax-exempt entities under federal law.

Income from activities that are substantially related to the purpose of an institution’s tax exemption, charitable contributions received, and investment income are not subject to federal income tax. The federal tax code classifies tax-exempt colleges and universities and their

foundations as public charities. Consequently, they have historically not been subject to tax on investment income, payout requirements, or other rules that apply to private foundations.

The IRS requires all private universities and public charitable foundations that support public universities to submit an IRS Form 990 each year. Institutions are required to report on their mission, revenues, expenditures, endowments, salaries and benefits of top officials, charitable gifts, lobbying activities, and more. This information is made available to the public.

Exemption from BPPE oversight. The BPPE has oversight of all of the non-exempt, private postsecondary institutions located in California. Current law contains exemptions to state-level oversight, including for avocational or recreational programs, educational programs offered for members of a business or professional association, pre-apprenticeship programs offered by specific types of organizations, test preparation providers, religious institutions, low-cost programs that do not receive public funds, WASC-accredited institutions, specified nationally accredited nonprofit institutions, and flight schools. An exempt institution is not regulated by the BPPE. Students enrolled in exempt institutions are not protected by the Act, including access to the STRF, which provides reimbursement to students for BPPE-regulated institutions that violate the law or closed abruptly. This measure specifies that prior to the BPPE making the determination to exempt for its oversight a nonprofit institution that operated as a for-profit from, the AG's office must first make certain determinations.

AG review of conversions. Since 1997, California law has required nonprofit health facilities that are subject to public benefit corporation law to obtain written consent from the AG prior to entering into an agreement to sell, transfer, lease, exchange, option, convey, or otherwise dispose of assets, or transfer control or governance of assets. Additionally, the AG is required to conduct at least one public meeting in the county where the health facility is located before issuing a written opinion making the determination whether to consent to, give conditional consent to, or not consent to any elimination or reduction of emergency medical services. The AG has also had the ability to contract with experts regarding information needed to make this determination and obtain reimbursement for the costs of this contract from the health facilities being reviewed since 1997.

Arguments in support. A group of student, veteran, civil rights, and higher education advocates wrote in support of AB 70, noting that the this legislation would prevent "...institutions from misleading students and taxpayers by defining what constitutes a 'nonprofit corporation' and 'public institution of higher education' in California, an essential step in developing a standard for what a college must demonstrate in order to claim to be a nonprofit or public institution...The federal government's failure to recognize that investor control of colleges requires greater oversight and scrutiny puts Californians at risk. AB 70 would prevent these covert for-profit institutions from evading state oversight and deceiving students."

Prior legislation. AB 1340 (Chiu), Chapter 519, Statutes of 2019, requires institutions regulated by the BPPE to report identifying, program enrollment, and loan debt information to BPPE. Authorizes BPPE to match student information with wage data provided by the Employment Development Department (EDD). Requires BPPE to make information available on its Web site when the Director of the Department of Consumer Affairs (DCA) certifies that an updated information technology system is capable of processing data.

AB 1341 (Berman, 2019), which was substantively similar to this bill, was held in the Senate Committee on Appropriations.

AB 1342 (Low, 2019), required a nonprofit corporation that operates or controls a private postsecondary educational institution to obtain AG approval before entering into certain agreements or transactions, including an agreement or transaction to sell or convey its assets to a for-profit corporation entity. AB 1432 was held in the Senate Committee on Appropriations.

AB 1343 (Eggman, 2019), prohibits a private postsecondary educational institution, beginning January 1, 2023, from enrolling residents of California not already enrolled as of that date, unless the institution meets either the requirement that no more than 85% of the institution's tuition revenue, determined as specified, is derived from student financial aid and loans, or not less than 50% of the institution's tuition revenue is dedicated to student instruction, as defined in regulations adopted by the BPPE no later than July 1, 2022, as specified. AB 1343 is awaiting action in the Senate Committee on Business and Professions.

AB 1344 (Bauer-Kahan), Chapter 520, Statutes of 2019, replaces current requirements, as of July 1, 2022, for the information out-of-state institutions are required to provide the BPPE, if they enroll California students in online programs, with the same and expanded information requirements, specifically adding adverse actions to the list of information that has to be provided. This bill also authorizes the BPPE to place these out-of-state private postsecondary institutions on a probationary status and revoke authorization to enroll California students.

AB 1345 (McCarty, 2019), established and revised existing restrictions on private postsecondary school institutions from providing specified financial incentives, compensation, commission, bonus, or payment contingent upon quotas based on securing student enrollments, admissions, financial aid awards, or sales of educational materials. AB 1345 was held in the Senate Committee on Appropriations.

AB 1346 (Medina), Chapter 521, Statutes of 2019, expanded the definition of economic loss, as specified, and expanded STRF eligibility to students residing in California and attending a campus of a Corinthian Colleges, Inc. (CCI), institution on or after January 1, 2010 and who would be eligible but for the Corinthian College's exemption from the act, or a student of a Corinthian College who was enrolled as of June 20, 2014, or withdrew within 120 days of that date, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California Low-Income Consumer Coalition
Center for Public Interest Law
Children's Advocacy Institute
Consumer Federation of California
Consumer Reports Advocacy
Housing and Economic Rights Advocates
NextGen California
Public Advocates

Public Counsel
Public Law Center
Seiu California
Student Defense
The Century Foundation
The Institute for College Access and Success
Veterans Education Success
Veterans Legal Clinic

Opposition

None on file.

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