
**SENATE COMMITTEE ON
BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT**
Senator Steven Glazer, Chair
2019 - 2020 Regular

Bill No:	AB 70	Hearing Date:	August 8, 2020
Author:	Berman		
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Urgency:	No	Fiscal:	Yes
Consultant:	Sarah Mason		

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

SUMMARY: Prohibits the Bureau for Private Postsecondary Education (BPPE) from approving an exemption or handling complaints for a nonprofit institution that the Attorney General (AG) determines does not meet specified criteria of a nonprofit corporation.

NOTE: *Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee, as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Senate Committee on Education and Judiciary.*

Existing law:

- 1) Establishes the California Private Postsecondary Education Act of 2009 (Act), until January 1, 2021, and requires the BPPE or Bureau within the Department of Consumer Affairs (DCA) to, among other things, review, investigate and approve private postsecondary institutions, programs and courses of instruction pursuant to the Act and authorizes BPPE to take formal actions against an institution/school to ensure compliance with the Act to include closure of an institution/school, if determined necessary. The Act provides for specified disclosures and enrollment agreements for students, requirements for cancellations, withdrawals and refunds, and the BPPE is required to administer the Student Tuition Recovery Fund (STRF) to provide refunds to students affected by the possible closure of an institution/school. (Education Code (EC) § 94800 *et seq.*)
- 2) Establishes an Office of Student Assistance and Relief (Office) for the purpose of advancing and promoting the rights of prospective students, current students, or past students of private postsecondary educational institutions. Tasks the Office with: conducting outreach and providing information and assistance to students who have been affected by the unlawful activities or closure of an institution; serving as a primary point of contact to address the needs of private postsecondary education students and working in consultation with state and federal agencies, including, but not limited to, CSAC, the Office of the Chancellor of the California Community Colleges, the Department of Veterans Affairs, the federal Consumer Financial Protection Bureau, and the United States Department of Education. Authorizes the

Office to provide outreach to students and prospective students to provide them with, among other information, information on making informed decisions in selecting postsecondary educational institutions, student rights regarding school performance disclosures, enrollment agreements, and cancellation and refund policies, how to contact the office and the bureau for assistance, student loan rights and assistance, and free nonprofit community based resources. (EC §§ 94949.7 - 94949.73)

- 3) Defines “out-of-state private postsecondary educational institution” as a private entity without a physical presence in this state that offers distance education to California students for an institutional charge, regardless of whether the institution has affiliated institutions or institutional locations in California. (EC § 94850.5)
- 4) Requires an out-of-state private postsecondary educational institution (other than a nonpublic higher education institution that grants undergraduate degrees, graduate degrees, or both, formed as nonprofit corporation and accredited by an agency recognized by the United States Department of Education) to register with the BPPE, pay a fee and provide evidence of accreditation; evidence that the institution is approved to operate in the state where the institution maintains its main administrative location and; a copy of the institution’s catalog and sample enrollment agreement. Requires these institutions to comply with STRF requirements and disclosures. Prohibits an institution from operating in California for failure to comply with the registration requirements. Establishes the validity of a BPPE registration for two years. (EC § 94801.5)
- 5) Exempts the following from oversight by the Bureau: (EC § 94874)
 - 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 preapprenticeship 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 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, 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, that has programs on, or is applying for some or all of their programs to be on the ETPL, that is registered as a nonprofit entity, does not offer degrees or educational programs designed to lead to a specific job requiring licensure if BPPE approval is required for the student to be eligible for licensure; the institution would otherwise be exempt from BPPE oversight if not for the fact that it receives funding under the federal Workforce Innovation and Opportunity

Act (WIOA). Requires an institution exempt pursuant to these requirements to provide the Employment Development Department (EDD) information and data necessary to comply with performance reporting requirements pursuant to WIOA and cannot charge participants.

- 6) Also provides an exemption from the Act and oversight by BPPE for one school located in Sacramento which meets the following requirements: the institution is accredited by the ACSC and WASC, or ACCJC and has been accredited by a USDE recognized accrediting agency for at least 10 years and has not been placed on probation or on monitoring or sanctioned; is headquartered in California and has operated continuously for at least 25 years; 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; has not filed for bankruptcy protection; maintains an equity ratio composite score of at least 1.5; derives at least 12.5 percent of its revenues from sources other than state or federal student assistance like veterans GI bill monies (Title 38) and state loan monies (Cal Grant); does not have a cohort default rate over 13 percent for the most recent 3 years; has a graduation rate that exceeds 60 percent; has not been subject to any legal or regulatory actions by a state AG that resulted in monetary settlement, fines or other documented violations; provides a pro rata refund of unearned institutional charges to students who complete 75 percent or less of the period of attendance; complies with other reasonable criteria established by the California State Approving Agency for Veterans Education (CSAAVE); and verifies its exemption with BPPE. (EC § 94947)
- 7) Requires a nonprofit corporation that operates or controls a health facility to provide written notice to, and obtain the written consent of, the AG prior to selling or otherwise disposing of a material amount of its assets to a for-profit corporation or entity, a mutual benefit corporation, or to another nonprofit corporation, regardless of whether it is currently operating or providing health care services or has a suspended or canceled license. (Corporations Code (CC) § 5914(a)(1))
- 8) Provides the AG discretion to consent to, give conditional consent to, or not consent to any agreement or transaction regarding the sale or disposal of a nonprofit health facility's assets. Requires the AG to notify the nonprofit corporation in writing of the decision to consent to, give conditional consent to, or not consent to the agreement or transaction. In making this determination, requires the AG to consider any factors the AG deems relevant, including, but not limited to, whether any of the following apply:
 - a) the terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporation;
 - b) the proposed agreement or transaction is in the public interest; and
 - c) the agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community. (CC §§ 5917 and 5921)

- 9) Specifies that the Uniform Supervision of Trustees for Charitable Purposes Act applies to all charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes, commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial coventurers, over which the state or the AG has enforcement or supervisory powers. Exempts a charitable corporation or unincorporated association organized primarily as an educational institution from the filing, registration, and reporting provisions of this act. (Government Code §§ 12580-12599.8)

This bill:

- 1) Defines “nonprofit corporation” as an institution to which contributions have been determined by the United States Internal Revenue Service to be tax-deductible pursuant to 501(c)(3) of the Internal Revenue Code, subject to the limitations described in this bill.
- 2) Defines “public institution of higher education” as:
 - a) An institution that meets the existing definition of higher public education, including a district or campus of the California Community Colleges.
 - b) An institution operated by the United States government, a state, or Indian tribal government.
 - c) An institution that is an instrumentality of a state or local government if its employees are government employees, if its liabilities are payable to the same degree as if they were liabilities of the state or local government, in the state or local government jurisdiction where the institution is formed, and if it is subject to the same financial oversight and open public records laws as the state or local government, in the state or local government jurisdiction where the institution is formed.
- 3) Prohibits BPPE from verifying the exemption of, or contracting 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 determines all of the following:
 - a) The institution acquired the institution’s assets for no more than the value of the assets.
 - b) The institution has not executed agreements for goods or services exceeding the value of the goods or services.
 - c) All core functions of the institution are conducted by, or under the direction of, the nonprofit institution.
 - d) The institution has not entered into any contracts, loans, or leases with a term of longer than three years with the former for-profit institution’s owners and managers.

- 4) States 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.
 - b) Independent financing of the acquisition or procurement based upon the asset acquired or goods or services procured.
 - c) Full and open competition in the acquisition of the assets or procurement of the goods and services.
- 5) Specifies that a verification may be appealed to the superior court.
- 6) Requires the AG to, within 90 days of the receipt of all information necessary for its verification, to notify the institution and the BPPE in writing of the verification.

FISCAL EFFECT: This bill is keyed fiscal by Legislative Counsel. According to the Assembly Committee on Appropriations it will result in ongoing General Fund costs, potentially in the hundreds of thousands of dollars annually, for the AG to comply with the bill’s requirements. The AG likely would have higher up-front costs due to any backlog of institutions warranting review. The bill will also result in minor and absorbable costs to BPPE. Some BPPE processes may be slowed by waiting for AG approval and verification, but would not result in significant costs.

COMMENTS:

1. **Purpose.** The Author is the Sponsor of this bill. According to the Author, “some for-profit colleges are using complicated financial schemes and shell corporations to covertly pose as nonprofit or public institutions, misleading students while dodging appropriate oversight. AB 70 would prevent these covert for-profit colleges from evading state oversight and deceiving students; a problem even more paramount in light of the current pandemic. A decline in enforcement of nonprofit status by the federal Internal Revenue Service is allowing some for-profit colleges to get away with laying claim to nonprofit status, but without adopting the restrictions that actually protect students.”

“The importance of addressing this problem has become much more urgent as a result of the COVID-19 pandemic, which has set the stage for a resurgence of online, for-profit colleges. Similar to the 2008 recession, more Americans are seeking education, specifically virtual education, as a result of the pandemic. Many for-profit colleges have already seen a surge in enrollment amid the COVID-19 pandemic, as the for-profit industry ramps up marketing and recruiting to capitalize on the crisis.”

The Author states that “This emerging problem is already affecting California students” and cites the following examples: “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.” The Author also notes that Ashford University, “owned by Bridgepoint Education, Inc.,

and based in San Diego...has been sued by the California Attorney General for misleading prospective students and has been called a 'poster child for the ills of the for-profit college sector.' 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 2016, Ashford University reported more than 16,000 online students. According to a June 19th article in the San Diego Union-Tribune, 'Bridgepoint/Zovio is spinning off Ashford University into an independent, not-for-profit higher education institution. Ashford has agreed to contract with Bridgepoint/Zovio to provide online education technology tools.' State-specific figures are not available for Ashford University.'

According to the Author, "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."

The Author notes, "Several smaller chains with ground campuses, including one in California (California College San Diego), are attempting to illicitly claim nonprofit status. Their tactics include disguising profits as rent and loan payments to former owners who take on governance roles in the nonprofit entity, and installing employees and business partners as nonprofit trustees. Unfortunately, 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, the federal government refuses 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."

2. **Background.**

BPPE. BPPE is generally responsible for protecting consumers and students against fraud, misrepresentation, or other business practices at private postsecondary institutions that may lead to loss of students' tuition and related educational funds; establishing and enforcing minimum standards for ethical business practices and the health and safety and fiscal integrity of postsecondary education institutions; and establishing and enforcing minimum standards for instructional quality and institutional stability for all students in all types of private postsecondary educational and vocational institutions.

The United States Department of Education (USDE) establishes that states are responsible for providing primary protection of consumers and students attending postsecondary educational institutions. BPPE approval not only authorizes institutions to operate and serve students in California but also enables institutions

to receive public funds through the federal Title IV financial aid programs.

The BPPE is responsible for oversight of private postsecondary educational institutions operating with a physical presence in California. Established by AB 48 (Portantino, Chapter 310, Statutes of 2009) after numerous legislative attempts to remedy the laws and structure governing regulation of private postsecondary institutions, the bill took effect January 1, 2010, to make many substantive changes that created a foundation for oversight and gave the BPPE enforcement tools to ensure schools comply with the law.

AB 48 established BPPE's authority to regulate private postsecondary institutions and enforce the provisions of the new Act and to respond to the major problems with the former laws governing the industry in California. The Act provides for prohibitions on false advertising and inappropriate recruiting and requires disclosure of critical information to students such as program outlines, graduation and job placement rates, and license examination information, and ensures colleges justify those figures. The Act also provides BPPE with enforcement powers necessary to protect consumers. The Act directs BPPE to:

- Create a structure that provides an appropriate level of oversight, including approval of private postsecondary educational institutions and programs;
- Establish minimum operating standards for California private postsecondary educational institutions to ensure quality education for students;
- Provide students a meaningful opportunity to have their complaints resolved;
- Ensure that private postsecondary educational institutions offer accurate information to prospective students on school and student performance; and,
- Ensure that all stakeholders have a voice and are heard in the operations and rulemaking process of BPPE.

BPPE is also tasked with actively investigating and combatting unlicensed activity, administering the STRF, and conducting outreach and education activities for students and private postsecondary educational institutions within the state. The STRF is an important tool to assist harmed students. STRF exists to relieve or mitigate economic loss suffered by students enrolled at non-exempt private postsecondary education institutions due to the institutions' closure, the institutions' failure to pay refunds or reimburse loan proceeds, or the institutions' failure to pay students' restitution award for a violation of the Act.

Private postsecondary institutions play an important role in ensuring access to higher educational opportunities for California's students. The landscape of schools that are now regulated under BPPE, and that have become central in California's discussion of private postsecondary education, has evolved significantly in recent decades. The smaller, independent for-profit institutions that made up the bulk of the former-Bureau's licensee population have shifted. Today, a large number of California students are being served by multi-campus, publicly-traded institutions

with a national presence. These institutions also receive significant public funds; under federal law, up to 90 percent of revenues can come from the Title IV financial aid program and at least 10 percent of revenues must come from non-Title IV sources ("90/10 rule"); however, this can include state aid, veteran's aid, and private loans (among other sources). High-profile state and federal investigations have revealed deceptive and illegal practices by some institutions within the sector. Federal regulators responded by increasing student outcome and institutional accountability measures. Specifically, in California, BPPE's approval can enable these institutions to access the Title IV program; USDE relies on the Bureau to provide oversight and student protection.

Students, the public, and quality private postsecondary educational institutions are best served by a well-functioning regulatory entity that effectively enforces the Act. BPPE has faced significant difficulties in implementing the law. It is important that California's approval and oversight of an institution assure minimum quality and student protections.

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 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.

3. **Senate Judiciary Committee Considerations.** This bill touches upon various issues within the jurisdiction of the Senate Judiciary Committee, including civil actions. The bill authorizes an appeal of the Attorney General's verification to the superior court. The bill does not specify what standard of review will be used to review an appeal. Existing law in Section 1094.5 of the Code of Civil Procedure provides a specific standard of review in cases inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. It is unclear from the language of the bill if the verification of the Attorney General is to be considered a final administrative order or decision to be reviewed pursuant to the standard under Section 1094.5 of the Code of Civil Procedure or if it is to be reviewed under a different standard when appealed to the superior court. The Legislature may wish to clarify what standard of review the superior court is to use for an appeal of the Attorney General's verification.
4. **Related Legislation.** This bill is almost identical to AB 1341 (Berman) of 2019. (Status: *The measure was held under submission in the Senate Committee on Appropriations.*)

5. **Arguments in Support.** Supporters state the same information as contained in the Author's purpose above.
6. **Arguments in Opposition.** According to Ashford University, "Ashford seeks to return to being an independent, nonprofit university to focus more exclusively on helping students develop the knowledge and skills employers need...To support this transition, Ashford is entering into a series of agreements with Zovio which include the purchase of the University and a continued education technology services agreement on market terms to support University functions..

Ashford notes that "the duration of a contract, loan or lease should not be the operative review point; term is a single element of a contract. Focusing on a single element of a complex, multi-variant contract eliminates negotiated benefits and efficiencies in the contracting process and may actually harm nonprofit institutions relative to typical market contracts...It bears emphasizing that the Ashford/Zovio services agreement is being thoroughly negotiated by independent negotiating teams, each with its own independent legal and financial advisors, and the final contract terms are being examined by an independent third party valuation firm to ensure that the fees being paid to Zovio are not in excess of the value of the services being received by the institution.

"Adding the term limitation to AB 70 does nothing to further advance the purposes for which AB 70 is intended and may actually be harmful to new nonprofits. The duration of a contract should not be considered on its own in a vacuum. It should be sufficient that a contract is at fair value, as is already required under existing clause (2). As long as the contract is at fair value, AB 70 should not displace the judgment of the nonprofit's independent contract negotiators who are in the best position to determine what terms (including contract duration) are in the best interests of the institution.

As such, we propose that AB 70 be amended such that clause (4) is either deleted or revised to eliminate consideration of the term and instead focus on the economic value of the benefits provided by the nonprofit institution not exceeding the fair value of the consideration received by the nonprofit institution. This is consistent with the language utilized throughout section (a)(1) to (3) of the bill and brings conformity to the legislation."

7. **Recent Amendments.** In California, the Act defines private postsecondary educational institutions as private entities with a physical presence in California offering postsecondary education programs to the public for a charge. Until SB 1192 (Hill, Chapter 593, Statutes of 2016) passed, California students enrolled in distance/online programs offered by institutions located outside of California did not benefit from any oversight provided by the Act, including access to the STRF. Nonprofit educational institutions are not subject to the same oversight standards, but are eligible to contract with BPPE to process student complaints in order to comply with federal financial aid requirements.

The Author recently amended this bill to specify that a nonprofit institution must not enter into contracts, loans, or leases for longer than 3 years with the former institution owner, one of the necessary standards the institution must meet in order

to be determined as a nonprofit institution for purposes of an exemption from Bureau oversight. The amendments attempt to respond to the opposition concerns outlined above related to the term of a contract. It is unclear, however, whether a certain amount of time constraint on a contract is an element that affects educational quality and leads to student harm.

SUPPORT AND 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:

Ashford University

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