SENATE COMMITTEE ON EDUCATION
Senator Connie Leyva, Chair
2019 - 2020 Regular

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

SUMMARY

This bill revises existing restrictions on private postsecondary school enrollment recruitment compensation to prohibit institutions from paying a person by means of a commission, bonus, quota, or other similar method contingent upon student recruitment, enrollment, admissions, attendance, financial aid, or sales of educational materials.

BACKGROUND

1) Establishes the California Private Postsecondary Act of 2009 and requires the bureau to, among other things, review, investigate and approve private postsecondary institutions, programs and courses of instruction and authorizes bureau 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 bureau shall administer the Student Tuition Recovery Fund 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 (EC) § 94800 et seq.)

2) Exempts the following institutions from the California Private Postsecondary Education Act:

   a) An institution offering programs solely for the purpose of personal entertainment, pleasure, or enjoyment.

   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 postsecondary educational institution established, operated, and governed by the federal government or by the government in California.

   d) An institution offering either test preparation for postsecondary education admissions examinations, or continuing education or license examination preparation.

e) An institution owned, controlled, and operated and maintained by a religious organization lawfully operating as a nonprofit religious corporation, limited to education relevant to the beliefs and practices of the church, religious denomination, or religious organization.

f) An institution that does not award degrees and that solely provides educational programs for total charges of $2,500 or less when no part of the total charges is paid from state or federal student financial aid programs.

g) 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 that is subject to the approval, regulation, and oversight of the Committee of Bar Examiners.

h) A nonprofit school organized specifically to provide workforce development or rehabilitation services that is accredited by the Department of Rehabilitation.

i) An institution that is accredited by the Accrediting Commission for Senior Colleges and Universities, Western Association of Schools and Colleges, or the Accrediting Commission for Community and Junior Colleges, Western Association of Schools and Colleges.

j) Flight instruction providers or programs that provide flight instruction pursuant to Federal Aviation Administration regulations.

k) An institution owned by a nonprofit community-based organization that does not award degrees and does not offer educational programs designed to lead to licensure, and that would not have been subject to oversight if it did not receive funding under the federal Workforce Innovation and Opportunity Act. (EC §94874)

3) States that as of January 1, 2016, an institution that is approved to participate in veterans' financial aid programs that is not an independent institution of higher education shall not be exempt from the California Private Postsecondary Education Act. (EDC § 94874.2)

4) Requires institutions exempt from the California Private Postsecondary Education Act to still comply with laws relating to school closure and laws relating to fraud, abuse, and false advertising. (EDC § 94874.9)

5) Makes various findings and declarations regarding private postsecondary schools, including a finding that numerous reports and studies have concluded that California's regulation of private postsecondary schools has consistently failed to ensure student protections or provide effective oversight of private postsecondary schools. (EC § 94801)

6) Defines "postsecondary education" as a formal institutional educational program whose curriculum is designed primarily for students who have completed or terminated their secondary education or are beyond the compulsory age of

secondary education, including programs whose purpose is academic, vocational, or continuing professional education. (EDC § 94857)

7) Defines "private postsecondary educational institution" as a private entity with a physical presence in the state that offers postsecondary education to the public for an institutional charge. (EDC § 94858)

8) 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.

9) Includes in the definition of "public higher education" the California Community Colleges, the California State University, and the University of California; defines "independent institutions of higher education" as nonpublic higher education institutions that grant undergraduate degrees or graduate degrees and are accredited by an agency recognized by the United States Department of Education. (EDC § 66010)

10) Requires the bureau to adopt regulations establishing minimum operating standards for a private postsecondary educational institution that ensures all of the following:

    a) The content of each educational program can achieve its stated objective.

    b) The institution maintains specific written standards for student admissions for each educational program and those standards are related to the particular program.

    c) The facilities, instructional equipment, and materials are sufficient to enable students to achieve the educational program's goals.

    d) The institution maintains a withdrawal policy and provides refunds.

    e) The directors, administrators, and faculty are properly qualified.

    f) The institution is financially sound and capable of fulfilling its commitments to students.

    g) That, upon satisfactory completion of an educational program, the institution gives students a document signifying the degree or diploma awarded.

    h) Adequate records and standard transcripts are maintained and are available to students.

    i) The institution is maintained and operated in compliance with all applicable laws.(EC § 94885)

11) Authorizes the bureau to grant approval to operate only after an applicant has presented sufficient evidence to the bureau, and the bureau has independently verified the information provided by the applicant through site visits or other

methods deemed appropriate by the bureau, that the applicant has the capacity to satisfy the minimum operating standards; requires the BUREAU to deny an application for an approval to operate if the application does not satisfy those standards. (EC § 94887)

12) Provides that a standard approval to operate shall be valid for five years. (EC § 94888)

13) Requires the bureau to grant an institution that is accredited an approval to operate by means of its accreditation. (EC § 94890)

14) Requires an institution to seek approval from the BUREAU if it intends to make a substantive change to its approval to operate, such as changes in its education objectives, the addition of a new degree program, a change in ownership, or a change in name. (EC § 94893)

15) States that an institution is prohibited from doing any of the following:

    a) Use of the Great Seal of the State of California on a diploma.

    b) Promise or guarantee employment, or overstate the availability of jobs upon graduation.

    c) Advertise concerning job availability, degree of skill, or length of time required to learn a trade or skill unless the information is accurate and not misleading.

    d) Advertise, or indicate in promotional material, without including the fact that the educational programs are delivered by means of distance education.

    e) Advertise, or indicate in promotional material, that the institution is accredited if it is not.

    f) Solicit students for enrollment by causing an advertisement to be published in “help wanted” columns in a magazine, newspaper, or publication, or use “blind” advertising that fails to identify the institution.

    g) Offer to compensate a student to act as an agent of the institution with regard to the solicitation, referral, or recruitment of any person for enrollment in the institution.

    h) Pay any consideration to a person to induce that person to sign an enrollment agreement.

    i) Use a name in any manner improperly implying that the school is affiliated with a government agency, is a public institution, or grants degrees if it does not.

    j) In any manner make an untrue or misleading statement related to a test score, grade or record of grades, attendance record, record indicating student completion, placement, employment, salaries, or financial information.

k) Willfully falsify, destroy, or conceal any document of record.

l) Use the terms such as “approval” without stating clearly and conspicuously that approval to operate means compliance with state standards.

m) Direct any individual to perform an unlawful act, to refrain from reporting unlawful conduct to the BPPE, or to engage in any unfair act to persuade a student not to complain.

n) Compensate an employee involved in recruitment, enrollment, admissions, student attendance, or sales of educational materials to students on the basis of a commission, commission draw, bonus, quota, or other similar method related to the recruitment, enrollment, admissions, student attendance, or sales of educational materials to students.

o) Require a prospective student to provide personal contact information in order to obtain, from the institution’s website, educational program information that is required to be contained in the school catalog.

p) Offer an associate, baccalaureate, master’s, or doctoral degree without disclosing to prospective students prior to enrollment whether the institution or the degree program is unaccredited and any known limitation of the degree. (EC § 94897)

16) Requires an institution that offers an educational program in a profession, occupation, trade, or career field that requires state licensure to have an educational program approval from the appropriate state licensing agency to conduct that educational program in order that a student who completes the educational program is eligible to sit for any required licensure examination. (EC § 94899)

17) Requires an institution’s recruiters to be its employees. (EC § 94901)

18) Requires an enrollment agreement to be written in language that is easily understood. (EC § 94905)

19) Requires an institution to provide a prospective student with a school catalog containing various program information and policies. (EC § 94909)

20) Requires an institution to provide a prospective student with a School Performance Fact Sheet containing information including but not limited to completion rates, placement rates for each program, license examination passage rates, starting salary or wage information, and information about how to contact the BPPE. (EC § 94910)

21) Requires an institution to post its school catalog, School Performance Fact Sheet, and student brochures on its website. (EC § 94913)

22) Establishes the Student Tuition Recovery Fund (STRF) to relieve or mitigate economic loss suffered by a student while enrolled in an institution at the time that institution, location, or program was closed or discontinued. (EDC § 94923)

23) Requires an institution to annually report to the BPPE, as part of an annual report, and publish in its School Performance Fact Sheet, all of the following:

   a) The job placement rate for each program that is either designed, or advertised, to lead to a particular career, or advertised or promoted with any claim regarding job placement.

   b) The license examination passage rates for the immediately preceding two years for programs leading to employment requiring passage of a state licensing examination.

   c) Salary and wage information, consisting of the total number of graduates employed in the field and the annual wages or salaries of those graduates stated in increments of $5,000.

   d) If applicable, the most recent official three-year cohort default rate reported by the United States Department of Education for the institution and the percentage of enrolled students receiving federal student loans. (EC § 94929.5)

24) Requires the Director of Consumer Affairs to provide written updates to the Legislature describing the BPPE's progress in protecting consumers and enforcing the provisions of the California Private Postsecondary Education Act. (EC § 94948)

25) Establishes the Office of Student Assistance and Relief for the purpose of advancing and promoting the rights of prospective students, current students, or past students of private postsecondary educational institutions. (EC § 94949.7)

26) Subjects the bureau to legislative oversight through the sunset review process, which provides for the California Private Postsecondary Education Act and the authority of the bureau to be automatically repealed as of January 1, 2021 unless a later enacted statute deletes or extends that date. (EC § 94950)

ANALYSIS

This bill:

1) Exempts nonprofit regionally accredited institutions that grant undergraduate or graduate degrees from being subject to the California Private Postsecondary Education Act.

2) Deletes provisions that prohibit an institution from offering to compensate a student to act as an agent of the institution with regard to solicitation, referral or recruitment of any person for enrollment in the institution, except for token gifts under $100 as specified.

3) Modifies provisions that prohibit an institution from compensating employees for certain activities on a commission basis by prohibiting an institution from directly or indirectly compensating, or conditioning a contract or any benefit under a contract with, any for the following persons on the basis of a commission, commission draw bonus, quota, or other similar method contingent upon recruitment, enrollment continued enrollment, admissions, or attendance of, or sales of education materials to , a student:

   a) A person involved in student recruitment, enrollment, continued enrollment, admissions, or attendance.

   b) A person involved in awarding financial aid based on the enrollment of a student.

   c) A person involved in sales of any educational materials to a student.

4) Allows an institution to provide compensation or bonus compensation to an employee based on the number or percentage of students recruited by the employee who complete or graduate from the program in which the students were enrolled.

5) Prohibits institutions for any of the specified persons from conditioning employment contingent upon quotas or other similar metrics related to continued enrollment, admissions, attendance, financial aid, or sales of educational materials.

6) Removes the exemption from existing compensation restrictions for institutions participating in federal student financial aid programs that allows payment of compensation to those involved in recruitment, admissions, or awarding of financial aid so long as those payments are in conformity with federal regulations governing an institution’s participation in federal aid.

7) Removes the exemption from existing compensation restrictions that allows an institution to pay compensation related to a particular student only if that student completes an educational program, as defined.

8) Defines “financial aid,” to mean any loan, grant, or award that is based on the enrollment of a student, provided by a federal or state government program, provided or arranged by the institution, or provided by or arranged by an entity to which the student was referred by the institution.

STAFF COMMENTS

1) *Need for the bill.* According to the author, “According to the Author, “AB 1345 seeks to strengthen current law regarding kickbacks, loopholes, and exemptions. This will ensure that college recruiters can no longer use high-pressure sales tactics with kickbacks and incentives to exploit and enroll students in their colleges.”

The Author states that "California law already strives to ban kickbacks, but loopholes and exemptions have weakened the law to the point of ineffectiveness. The loopholes include permitting recruiters to be given 'token gifts' for recruiting students; having anti-kickback prohibitions apply only to employees not independent contractors; and relying on federal bans on such compensation. Simply deleting the loopholes and exemptions will go a long way to eliminating the front-end, admissions, financial incentives that have caused so many ruined California lives."

According to the Author, "After student loan scandals in the 1980s, Republican Secretary of Education Lamar Alexander proposed to prohibit commission-paid recruitment of students eligible for federal aid, a ban that Congress adopted in 1992. In the 2000s, however, the Bush Administration weakened the ban through loopholes and weak enforcement, prompting many for-profit colleges to test the boundaries of the restriction. The weakened ban, along with other weakened rules, contributed to a rapid increase in for-profit enrollment fueled by federal aid and, ultimately more than 100,000 student loan borrowers who allege that they were defrauded by the college where they enrolled. (Doug Lederman, For-Profits and the False Claims Act, InsideHigherEd, August 14, 2011.)"

2) *Private for-profit sector.* According to the Legislative Analyst's Office (LAO), California's higher education system (public and private) serves 3.7 million students (2016-17 academic year). Private for-profit colleges represent 9 percent of that enrollment among approximately 180 campuses. In comparison, California community colleges have the largest share of students at 59 percent with 114 campuses and the private nonprofit sector serving 10 percent of students spread amongst 700 campuses. The majority of degrees produced by private for-profit colleges are certificates and associate degrees, 61 percent of students are over the age of 25 and 57 percent are from historically underrepresented communities. Notably, the sector serves a significant portion of Californians.

3) *Role of the bureau.* The bureau 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. The bureau 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 bureau 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 bureau enforcement tools to ensure schools comply with the law.

AB 48 established the bureau'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 the bureau with enforcement powers necessary to protect consumers. The Act directs the bureau 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.

4) *Dual objectives.* This bill seeks restrict the manner in which recruiters can and cannot be compensated or for which their employment can be condition upon. Additionally, it creates a new exemption from bureau oversight and regulation under the Act for any private nonprofit that is a regionally accredited college. In so doing, it exempts those colleges from certain regulations designed to monitor business practices of private colleges and identify deception associated with fraudulent or substandard degrees. These provisions may likely capture an out-of-state nonprofit institution with a physical branch in California. Arguably, this sector may appear to have acceptable business practices in comparison to others however, the decision to limit the state's ability in protecting the interests of its students, particularly in the current political climate, warrants a larger policy discussion overall.

As noted in the Senate Business, Professions and Economic Development (BPED) committee analysis, the bureau and the Act will come under sunset review oversight by the committees on BPED and Senate Education beginning in late 2019, culminating in hearings, discussions, and legislation, a process that may provide a more appropriate venue for this change and allows for the

Legislature to engage in a thorough review of the existing exemptions and potentially necessary new exemptions. For the reasons stated above ***staff recommends that the bill*** be amended to remove the exemption proposed in Education Code section 94874 (l)(1)(2)(3).

5) *Other things to consider.* Current state law prohibits institutions from compensating an employee based on a commission, bonus, quota or other similar method related to the recruitment, enrollment admissions, student attendance, or sales of educational materials to students. It also provides an exception for those institutions subject to and comply with federal regulations related to financial aid. This bill removes that exception thereby capturing institutions that are not otherwise subject to the specified state compensation restrictions. The opponents of this measure also argue that by striking the exception, it also prohibits in state law, tuition share agreements with third parties such as online program management companies. Through these agreements, the third party receives a share of tuition in exchange for all services provided. A USDE policy statement allows for these types of tuition share agreements. This bill could have boarder implications and it is not clear if that is what the bill is intended to do. Nonetheless, the outsourcing of the management of online programs is a discussion best suited for and merits a deeper evaluation during the sunset review process mentioned in comment 4) of this analysis.

6) *Related activity at the federal level.* Under the federal incentive compensation prohibition, postsecondary educational institutions that participate in Title IV programs are barred from providing incentive payments to any person or entity engaged in any student recruiting or admissions activities, or in making decisions regarding the award of student financial assistance based directly or indirectly upon success in securing enrollments or financial aid. Institutions agree that they will comply with the incentive compensation prohibition as a condition of their participation in the Title IV programs and their receipt of Title IV program funds.

   According to a February 2010 report issued by the U.S. Government Accountability Office (GAO), Congress instituted this incentive compensation ban to eliminate abusive recruiting practices in which schools enrolled unqualified students who then received federal student aid funds. The report found that between 1998 and 2009, the United States Department of Education (USDE) determined that 32 schools had violated the incentive compensation ban and that prior to the implementation of safe harbor regulations in 2002, 18 schools were found to have incentive compensation violations over a period of 5 years. After the implementation of safe harbor regulations, 14 schools were found to have violations over a period of 7 years.

   In addition to the 32 schools with substantiated violations between 1998 and 2009, 27 schools were identified through the use of USDE data, program reviews, Office of Inspector General audits, or independent audits as having potential violations of the incentive compensation ban during this time period. USDE entered into settlement agreements with 22 schools and many of the cases leading to settlement involved incentive payments made to school employees based on the number of students enrolled.

7) *Greater clarity needed.* Concerns have been raised from opponents that the bill includes undefined and board terms such as "*other similar metrics*" and "*any benefit*," that could, among other things, limit the ability to manage any employee based on their performance. For purposes of providing clarity with how certain practices are prohibited the ***author wishes, staff agrees, that the bill be amended*** as follows:

> §94897(m) *(1)* Directly or indirectly compensate, or pay a ~~condition a contract or any benefit under a contract with, or condition the employment, by means any of the following persons on the basis of a~~ commission, ~~commission draw,~~ bonus, ~~quota,~~ or other payment to any person engaged in student recruitment, or admission activities, or awarding of ~~similar method contingent upon recruitment, enrollment, continued enrollment, admissions, attendance, financial aid, or attendance of, or~~ *financial aid* or sales of educational materials ~~to a student, of any of the following persons:~~ directly to a student~~:~~ if said payment or compensation is contingent upon quotas or the success of securing enrollments, admissions, awarding financial aid to a student or sales of educational materials directly to a student.
>
> ~~(A) A person involved in student recruitment, enrollment, continued enrollment, admissions, or attendance.~~
>
> ~~(B) A person involved in awarding financial aid based on the enrollment of a student.~~
>
> ~~(C) A person involved in sales of any educational materials to a student.~~
>
> (2) This subdivision shall not prohibit an institution from providing compensation or bonus compensation to an employee based on the number or percentage of students recruited by the employee who complete or graduate from a program in which the students were enrolled. (**As currently drafted in the bill)**
>
> *(n)* ~~For any of the persons described in subparagraphs (A) to (C), inclusive, of paragraph (1) of subdivision (m), condition~~ *Make employment contingent upon an employee meeting a quota of enrolling students, securing a specific amount of student financial aid, or selling educational materials directly to a student.* ~~quotas or other similar metrics related to continued enrollment, admissions, attendance, financial aid, or sales of educational materials.~~

8) *Double referral.* This bill was previously heard by the Senate Business, Professions and Economic Development Committee which has jurisdiction over bills relating to business and professional practices and periodically conducts sunset review of various boards and licensing agencies, including the Bureau.

9) *Related legislation.*
AB 1341 (Berman, 2019) prohibits the Bureau for Private For-Profit Postsecondary Education (bureau) from verifying an exemption from bureau oversight for a non-profit that operated as a for-profit institution unless the

Attorney General makes certain determinations. AB 1341 is also on the committee's agenda today.

AB 1344 (Bauer-Kahan, 2019) expands existing requirements that out-of-state private postsecondary educational institutions register with, and report information to, the Bureau for Private Postsecondary Education (bureau) to include additional information regarding adverse actions and to authorize the bureau upon review to revoke an out-of-state school's ability to enroll students in California, as specified. AB 1344 is also on the committee's agenda today.

AB 1340 (Chiu, 2019) requires certain private postsecondary schools to report to the Bureau for Private Postsecondary Education information about their graduates and match that information with wage data from the Employment Development Department. It also requires the Bureau to make available on its website information regarding the earnings levels of graduates and student debt information. AB 1340 is also on the committee's agenda today.

AB 1345 (McCarty, 2019) revises existing restrictions on private postsecondary school enrollment recruitment compensation to prohibit institutions from paying a person by means of a commission, bonus, quota, or other similar method contingent upon student recruitment, enrollment, admissions, attendance, financial aid, or sales of educational materials. AB 1345 is also on the committee's agenda today.

AB 1346 (Medina, 2019) expands the definition of "economic loss," as it pertains to the Student Tuition Recovery Fund (STRF), to include all amounts paid by a student to the institution, any amounts paid in connection with attending the institution, and all principal, interest, and charges of any kind for any loan incurred by the student to pay these amounts. AB 1346 is also on the committee's agenda today.

AB 1342 (Bauer-Kahan, 2019) requires a nonprofit corporation that operates or controls a private postsecondary educational institution to obtain the Attorney General's (AG) consent before entering into certain agreements or transactions, including an agreement or transaction to sell or convey its assets to, or to transfer control, responsibility, or governance of a material amount of its assets to, a for-profit corporation or mutual benefit corporation. AB 1342 was approved by this committee and is pending in Senate Appropriations Committee.

SUPPORT

California Faculty Association
Children's Advocacy Institute
Faculty Association of California Community Colleges
The Century Foundation
The Institute for College Access and Success
Student Debt Crisis
National Student Legal Defense Network
Housing and Economic Rights Advocates
Center for Responsible Lending

Public Law Center
Consumer Federation of California
Public Advocates
Consumer Reports Advocacy
California Low-Income Consumer Coalition
Public Counsel
SEIU California
The Century Foundation
NextGen California
Veterans Education Success

OPPOSITION

2U, Inc.
American Career College, Inc.
California Northstate University
Ontario Health Education Company, Inc.
San Joaquin Valley College
UEI Colleges
West Coast University, Inc.
Zovio

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