

Date of Hearing: June 21, 2016

ASSEMBLY COMMITTEE ON HIGHER EDUCATION

Jose Medina, Chair

SB 1146 (Lara) – As Amended June 13, 2016

[Note: This bill is double referred to the Assembly Judiciary Committee and will be heard as it relates to issues under its jurisdiction.]

SENATE VOTE: 26-13

SUBJECT: Postsecondary education: nondiscrimination

SUMMARY: Would narrow the religious exemption contained in the Equity in Higher Education Act (Act), an Act which applies only to institutions that benefit from public funds; and, would require institutions that receive California public funds and that claim an exemption from state or federal discrimination laws and regulations, as specified, to provide public disclosures. Specifically, **this bill:**

- 1) Provides that the Act, which applies only to institutions that receive public funds, does not apply to educational programs or activities, as outlined below, offered by an institution that is controlled by a religious organization, if the application of the Act would not be consistent with the religious tenets of that organization:
 - a) Programs or activities to prepare students to become ministers of the religion.
 - b) Programs or activities to enter upon some other vocation of the religion.
 - c) Programs or activities to teach theological subjects pertaining to the religion.
- 2) Specifies that nothing in the aforementioned religious exemption shall limit a religious institution from requiring a student to participate in religiously based curriculum or activities as a condition of his or her attendance or graduation.
- 3) Requires postsecondary educational institutions, if they receive public funds in this state, that claim an exemption from the federal Title IX of the Education Amendments of 1972 or the California non-discrimination requirements of the Act to disclose to current and prospective students, faculty members, and employees the basis for claiming the exemption, as follows:
 - a) Requires the disclosure to be displayed in a prominent location of the campus or school site. Defines “prominent location” to mean that location, or those locations, in the main administrative building or other area where notices regarding the institution’s rules, regulations, procedures, and standards of conduct are posted;
 - b) Requires the disclosure to be included in written materials sent to prospective students seeking admission to the postsecondary educational institution;
 - c) Requires the disclosure to be provided as part of orientation programs conducted for new students at the beginning of each quarter, semester, or summer session, as applicable;

- d) Requires the disclosure to be provided to each faculty member, member of the administrative staff, and member of the support staff at the beginning of the first quarter or semester of each school year; and to be provided to each new employee upon hire;
 - e) Requires the disclosure to be included in any publication of the institution that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the institution.
- 4) Requires postsecondary educational institutions that receive public funds in this state and that claim an exemption from the federal Title IX of the Education Amendments of 1972 or California non-discrimination laws to submit to the California Student Aid Commission (CSAC) copies of all materials submitted to, and received from, a state or federal agency concerning the granting of the exemption.
 - 5) Requires CSAC to collect the aforementioned information and post and maintain a list on the commission's Internet Web site of the institutions that have claimed the exemption with their respective basis for claiming the exemption.
 - 6) Provides that the provisions of the Act are severable if any portion or its application is held invalid.

EXISTING LAW: Numerous state and federal laws exist to prevent discrimination in public programs, programs that receive or benefit from public funding, and in K-12 and higher education. These laws are, in some cases, inconsistent. A specific exemption for religious entities is contained in some nondiscrimination laws. What follows is a non-exhaustive list of relevant existing laws related to discrimination, public funding, and higher education.

- 1) Federal law establishes Title IX of the Education Amendments of 1972 (Title IX: Title 20 U.S.C. Sections 1681-1688) to prohibit discrimination, on the basis of sex, in educational programs or activities receiving federal financial assistance (including grants and loans to students). Exemptions are provided, including for fraternities and sororities, military institutions, traditional male or female institutions, and institutions controlled by religious organizations. For purposes of the Title IX religious exemption, an institution will be considered to be controlled by a religious organization if one or more of the following conditions is true:
 - a) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or
 - b) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or,
 - c) Its charter and catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof. (34 C.F.R. Section 106.12)

- 2) The California Equity in Education/Higher Education Act (Equity Acts) (Education Code Sections 200 et seq. and 66270 et seq.) apply to educational institutions that receive public funds and prohibits those institutions, among other protections, from discriminating against a person on the basis of any of California's protected classes (disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes). The Equity Acts can be enforced through a civil action.

According to Legislative history, the Equity Acts were first adopted in 1982, and were based on federal Title IX. At the time of adoption, the Equity Acts applied only to gender discrimination. In 1982, an exemption was provided, consistent with Title IX, for an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.

In the time since adoption in 1982, the Equity Acts have been expanded to encompass all of California's protected classes. The religious exemptions, however, were not amended. Today, the Equity Acts appear to provide a religious institution the right to accept public funds and discriminate on the basis of any of California's protected classes, including race, ethnicity, sexual orientation, disability, etc.

- 3) Federal Title VI (42 U.S.C. Section 2000d et seq.) was enacted as part of the Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. If a recipient of federal assistance is found to have discriminated and voluntary compliance cannot be achieved, the federal agency providing the assistance is directed to either initiate fund termination proceedings or refer the matter to the Department of Justice for appropriate legal action. Aggrieved individuals may file administrative complaints with the federal agency that provides funds to a recipient, or the individuals may file suit for appropriate relief in federal court.

Title VI does not contain an exemption for religious organizations or religious educational institutions that receive public funds.

- 4) California Government Code Section 11135, which was enacted in 1977 and appears to be based on Federal Title VI, prohibits any program or activity that is operated by the state directly, or funded directly by the state, or an organization that receives financial assistance from the state, from unlawfully denying, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, any person full and equal access to the benefits of these programs or activities. California law provides that these rights may be enforced by a civil action for equitable relief, which may be independent of any other rights and remedies.

Similar to Title VI, California statute does not provide for a religious exemption. Currently, Govt. Code 11135 is inconsistent with the Equity Acts, in regards to public funds used for education, and it is unclear if the Legislature intended to provide a religious exemption to allow religious institutions to receive public funds and discriminate on the basis of gender (which the Act(s) covered at the time of the adoption of the exemption) or on the basis of all of California's protected classes (which the Equity Acts have been expanded to include).

FISCAL EFFECT: According to the Senate Appropriations Committee:

- 1) The Department of Justice notes minimal fiscal impact for potential litigation resulting from this bill.
- 2) Minor costs to CSAC to collect required information from each postsecondary educational institution that claims a federal Title IX or state exemption and to post a list of these institutions with their respective bases for claiming the exemption on its website.
- 3) Potential significant costs to affected institutions to develop and disseminate required disclosures as well as update publications, orientation materials, and hiring documents to include disclosures, furnish required information to the CSAC, and address potential lawsuits. These costs would not result in a state fiscal impact as these institutions are private. The Association of Independent California Colleges and Universities notes that 34 campuses would be affected by this bill.

COMMENTS: *Background.* According to the Human Rights Campaign (HRC) report *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, the Civil Rights Act of 1964 prohibits discrimination in public educational institutions on the basis of race, color, national origin, sex, and religion. However, Title IV of the Civil Rights Act, which prohibits public and private educational institutions from accepting federal funding for noncompliance, is limited to race, color and national origin. Title VII of the Civil Rights Act prohibits discrimination, including on the basis of sex, in employment. According to HRC, courts have increasingly allowed claims of employment discrimination based on an employee's sexual orientation or gender identity under Title VII sex discrimination provisions.

Title IX was enacted to protect students from discrimination on the basis of sex. An exemption is provided for religious colleges that fall within specified guidelines. Federal guidance issued in 2014 clarified that the Title IX discrimination prohibition “extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.” In response to the USDE guidance, a number of religious institutions have applied for exemption to Title IX.

According to the HRC report, six California colleges have requested a Title IX exemption from the USDE. Based on information available from CSAC, four of these institutions participate in the Cal Grant Program: Biola University, Fresno Pacific University, Simpson University, and William Jessup University.

In requesting approval of an exemption to Title IX, Biola University cites the governing board's "Statement on Transsexualism and Transgenderism" that provides, in part, Biola University, in employment and student life "will not support persistent or exaggerated examples of cross-dressing that are grounded in the fundamental rejection of biological birth sex, or other actions or expressions that are deliberately discordant with birth sex, or advocacy of such viewpoints that are inconsistent with the University's theological positions." Biola further notes that any individual who violates Biola's Standards of Conduct is subject to discipline, including possible dismissal from the university.

Fresno Pacific University's student handbook outlines the Values and Behavioral Standards that all students are required to abide by, and states, in part "Certain sexual behaviors are prohibited. These include but are not limited to: fornication, adultery, and same-sex romantic relations." In requesting USDE grant an exemption, the university writes "Fresno Pacific University has

admitted openly gay students who are willing and choose to live in accordance with the Confession of Faith and the Fresno Pacific Idea. However, in keeping with our biblical beliefs regarding the morality of actions, we cannot in good conscience support or encourage an individual to live in conflict with biblical principles in any area, including gender and gender identity."

According to the Human Rights Campaign report, nationwide 56 schools have requested an exemption, 33 have received an exemption from the law as it pertains to protecting students on the basis of gender identity and 23 have obtained an exemption based on laws pertaining to protecting students on the basis of sexual orientation. Schools most commonly requested exemptions from provisions of the law relating to housing, access to facilities, and athletics.

Purpose of this bill. The author notes that the religious exemption contained in California's Equity Act is much more far reaching than the federal Title IX exemption. Universities that receive California public funds do not have to apply or report to any California entity in order to fall under the exemption. According to the Association of Independent Colleges and Universities (AICCU) thirty-one (31) of their institutional members reported that they participate in the Cal Grant Program and operate under the California exemption. As there is no requirement for approval of an exemption, or related reporting, it is unclear what aspects of the Equity Act, or its non-discrimination requirements, with which these institutions do not comply.

According to the author, "classrooms are supposed to be places where students feel safe and can learn without fear of discrimination or harassment. California has established some of the strongest protections for the LGBT community, and private universities should not be able to use faith as an excuse to discriminate and avoid complying with state laws. SB 1146 would require universities who operate under a federal Title IX exemption, or an exemption to California's Equity Act, to disclose that information to CSAC and disseminate the information to students and staff. Additionally, the bill would allow an individual that has encountered discrimination at a religiously controlled university that receives public funds, and does not meet the new narrowed religious exemption, to pursue a remedy through a civil action, like any of their peers can at other higher education institutions."

Issues to consider and requested amendments. The Committee has received numerous letters and comments on this bill, containing several requested amendments. The following is a summary of the provisions of the bill, the major comments received, and a discussion of the requested amendments.

- 1) *Religious freedom.* Numerous commenters argue that this bill undermines the First Amendment to the United States Constitution and Article I of the California Constitution, which generally prohibit laws impeding the free exercise of religion.

Through consultation with Legislative Counsel, Committee staff understands that limits to religious freedom for entities that receive public funds or public benefit have been established, for example:

- a) *Bob Jones University vs. United States, 461 U.S. 574 (1983).* Bob Jones University, citing biblical principles, excluded black applicants until 1971, and after 1975 denied "admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating." In 1983, the United States Supreme Court held that the

religion clauses of the First Amendment did not prohibit the Internal Revenue Service from revoking the tax exempt status of a religious university whose practices are contrary to a compelling government public policy, such as eradicating racial discrimination.

- b) *Loma Linda University Policy on Immigration.* According to a June 9, 2016, letter from the American Civil Liberties Union (ACLU) address to administrators at Loma Linda University (LLU), on April 27, 2016, LLU informed a California student that she would not be admitted to LLU's doctor of physical therapy program because she is a recipient of the federal Deferred Action for Childhood Arrivals (DACA). According to the ACLU letter, the LLU disqualifies DACA students for, among other reasons, "being a religious-sponsored institution, we require legal/lawful status that covers the duration of the program of study." In their letter to LLU, ACLU notes that the Section 1981 of the federal Civil Rights Act prohibits both public and private actors from discriminating on the basis of alienage. Committee staff understands that LLU has indicated that the enrollment notification sent to the student on April 27, 2016, was a mistake and has agreed that immigration status is not a legitimate basis for admission denial.

This bill would apply the Equity Act to religious institutions that do not fall within the scope of the narrowed exemption, to the extent that those institutions continue to receive public funds, for example, through the Cal Grant program.

Some institutions have raised concerns that by applying the provisions of the Equity Act to their institutions, their rights and ability to conduct religious curriculum or activities or to require students and faculty to participate in religious observances or ceremonies would be infringed. Committee staff understands it is not the intent of the author to prevent religious colleges from conducting education consistent with their religious beliefs, but to ensure that religious colleges are not discriminating on the basis of a protected class.

The author has proposed conceptual amendments to address these concerns, which would strike the current contents of the religious exemption (Section 66271 (a) and (b)) and instead provide that a "religious educational institution shall be subject to the provisions of this chapter except with respect to the prohibitions concerning religion."

Committee staff notes, however, that "except with respect to the prohibitions concerning religion" is undefined, and it is unclear whether this exception could result in allowable discrimination against a California protected class if the religious institutions determines that discrimination is consistent with the tenets of the religion.

Alternatively, if the concern is to clearly allow religious teachings, ceremonies and observances of a religious institution, the existing language of the bill could be amended to clearly allow religious ceremonies, teachings and other activities that may be required of students, faculty and staff of religious institutions.

- 2) *Discrimination and continued participation in the Cal Grant Program.* Numerous commenters have requested an amendment to allow a religious college or university to continue to receive public funds through the Cal Grant Program, regardless of whether that institution is compliant with the amended Equity Act requirements.

According to AICCU, the author has committed “to retain the rights of students attending faith-based colleges and universities to receive a Cal Grant award,” and recent amendments that remove the rights of these institutions to continue to receive Cal Grant awards “were inadvertently deleted from the bill.” AICCU argues that without an amendment to allow religious colleges non-compliant with the Equity Act to continue to receive Cal Grant awards “over 16,000 low-income students attending their institutions of choice would have faced losing financial aid to pursue their college degree.”

As previously outlined, unlike Title IX, the Equity Acts no longer apply only to gender discrimination, but to all of California’s protected classes. Additionally, because the Equity Acts do not require institutions to provide information regarding which aspects of the Acts they are not able to comply, it is unclear what types of noncompliance or discrimination might be allowed through an exemption for Cal Grant participation.

As previously outlined, current laws are inconsistent with regards to religious exemptions and non-discrimination requirements for entities that receive public funds. The Equity Acts currently provide an exemption to religious institutions for discrimination based on all of California’s protected classes, including disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes. The non-discrimination requirements of Government Code Section 11135 apply to all public funding recipients, and do not contain a statutory religious exemption.

In consultation with Legislative Counsel, Committee staff understands it is an unsettled question as to whether or not existing law authorizes (under the Equity Act) or prohibits (under the Government Code, federal Civil Rights Act, etc) a religious college from receiving public funds and discriminating on the basis of a protected class. However, by explicitly amending the Equity Acts to explicitly allow a religious college to participate in Cal Grant and receive public funds, concerns have been raised that such a change could inadvertently limit a student’s rights provided under other California laws.

Does the Legislature intend for religious institutions to receive public funds, through the Cal Grant program, and be exempt from all of California’s non-discrimination requirements? Is the intent of the Legislature to protect some classes such as race, immigration status, where other laws may provide such protection, but not gender or sexual identity, where that protection may not be provided by other laws? Alternatively, if the primary concern is that application of the Equity Acts would infringe on freedom of religious teachings, observances and ceremonies, the author and committee may wish to specifically address those issues.

The author has proposed amendments to specify that this bill would not affect Cal Grant participation. The amendments are designed to ensure that the changes proposed in this bill do not limit or enhance Cal Grant participation; meaning that where other laws prevent discrimination, those laws would still be enforceable.

- 3) *Disclosure of religious exemptions.* Many private and religious colleges and universities have expressed support for the provisions of this bill that require disclosure of exemptions to Title IX and the Equity Act. According to La Sierra University, this bill would “create a new transparency and accountability requirement to ensure that students, faculty, staff and others

including policymakers, are aware of any United States Department of Education (USDE) Title IX waivers, that have been sought and approved.”

Committee staff notes that this bill would require disclosure relative to Title IX and Equity Act exemptions. Title IX exemption information is currently available on the USDE website; however, as previously discussed, Equity Act exemption information is not publicly available.

Committee staff recommends an amendment to require institutions, in addition to disclosing the basis for the Title IX or Equity Act exemption, also disclose the scope of activities authorized by the exemption. For example, whether these activities relate to admissions and discipline, housing or student services, etc. Prospective students and employees may want to know if an institution sought an exemption for purposes of transgender housing policies, or for purposes of allowing a student to be denied admission or expelled based on a California protected class, for example.

Related legislation. AB 1888 (Low), which was approved by this committee on March 15, 2016, and subsequently held on suspense in Assembly Appropriations Committee, would have prohibited an institution participating in the Cal Grant Program from discriminating against a student or employee on the basis of a protected class, or from applying for and receiving a federal Title IX waiver for gender discrimination.

REGISTERED SUPPORT / OPPOSITION:

Support

Equality California (Sponsor)
City of Los Angeles
Los Angeles LGBT Center
Transgender Law Center
Secular Coalition for California

Opposition

California Catholic Conference, Inc.
California Family Alliance
Church State Council
John Paul the Great Catholic University
Loma Linda University
National Center for Law & Policy
Pacific Justice Institute
Pacific Union College
14 Individuals

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