

Date of Hearing: March 15, 2016

ASSEMBLY COMMITTEE ON HIGHER EDUCATION

Jose Medina, Chair

AB 1888 (Low) – As Introduced February 11, 2016

SUBJECT: Cal Grants: nondiscrimination

SUMMARY: Prohibits an institution participating in the Cal Grant Program from discriminating against a student or employee on the basis of a protected class. Specifically, **this bill:**

- 1) Requires, as a condition of voluntary participation in the Cal Grant Program, each Cal Grant participating institution to, commencing with the 2017–18 academic year, certify to the California Student Aid Commission (CSAC) in the institution’s participation agreement (IPA) for the Cal Grant program both of the following:
 - a) The institution shall not subject a student or employee of the institution to discrimination on any basis listed in Education Code (EDC) Section 220, including sex, sexual orientation, gender identity, or gender expression.
 - b) The institution shall not apply for, or receive, a waiver by the United States Department of Education (USDE) from federal nondiscrimination requirements for the receipt of funds under Title IV of the federal Higher Education Act of 1965, as amended (20 U.S.C. Sec. 1070 et seq.).

EXISTING STATE LAW

- 1) Establishes the Equity in Education/Higher Education acts to prohibit, among other protections, a person from being subjected to discrimination on the basis of 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, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid (EDC Sections 200 and 66270). An exemption is provided 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. (EDC Sections 221 and 66271)
- 2) Establishes the Unruh Civil Rights Act to provide free and equal accommodations, advantages, facilities, privileges, or services in all business establishments regardless of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. (Civil Code Section 51)

EXISTING FEDERAL LAW establishes Federal Title IX of the Education Amendments of 1972 (Title IX) to prohibit discrimination, on the basis of sex, in educational programs or activities receiving Federal financial assistance. Various exemptions are provided, including for fraternities and sororities, military institutions, traditional male or female institutions, and institutions controlled by religious organizations. (Title 20 U.S.C. Sections 1681-1688)

- 1) 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 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. § 106.12)

FISCAL EFFECT: Unknown.

COMMENTS: *Purpose of this bill.* According to the author, this bill upholds California's commitment to nondiscrimination by requiring all Cal Grant participating institutions to certify to CSAC that they shall not discriminate on the basis of a protected class, including, sex, sexual orientation, gender identity, or gender expression. The author argues that allowing religion to be used as an instrument for discrimination goes against California public policy and should not be supported with state funding.

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.

Arguments in support. Equality California (EQCA) is the sponsor of this bill and argues that religious protection should not be used to justify discrimination. According to EQCA, overly broad religious exemptions leave room for individuals and institutions to discriminate depending on how they apply, or choose not to apply, their religious beliefs. According to EQCA, this discrimination can take many forms, from the termination of employees or expulsion of students based on sexual orientation or gender identity, to forbidding faculty from talking about subjects that don't conform to the school's ideology. The American Civil Liberties Union of California argues that, by prohibiting funding to academic institutions that seek to discriminate in a private setting, this bill makes Cal Grant funding consistent with California public policy.

Comments of concern. The Association of Independent California Colleges and Universities (AICCU) and Seyfarth Shaw LLP have expressed concern regarding this proposal. According to AICCU, the Cal Grant program was started to allow low-income students to attend private, nonprofit institutions of their choice. By eliminating this student choice, this bill could deny the lowest income students access to the same quality education that their better-off peers have access to and may be denying them a spot at a California institution all together. Seyfarth Shaw LLP argues this bill conflicts with the right of "private choice" recognized by the U.S. Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Seyvarth Shaw LLP also argues that conditioning Cal Grants on a federally-guaranteed right to seek a Title IX waiver is not legally justifiable for a number of reasons; including the conflict it creates with federal law.

Amendments and Issues to Consider. The author and committee may wish to consider the following issues and suggested amendments:

- 1) Committee staff suggests an amendment, on page 2, line 9 to change the reference to the EDC nondiscrimination requirements in the Higher Education Equity Act (Section 66270).
- 2) Committee staff suggests an amendment, on page 2, line 15 to correct the reference to federal law, to reflect Title IX of the Education Amendments of 1972.
- 3) As previously outlined, exceptions to nondiscrimination requirements exist in state and federal law for specific college and university activities, such as membership of fraternities and sororities, granting of characteristic-based scholarships, and enrollment at traditionally all-female, or –male colleges. The author may wish to work with Legislative Counsel to ensure this bill is consistent with existing unlawful discrimination provisions governing colleges and universities.
- 4) This bill would prohibit an institution from applying for, or receiving a Title IX waiver from the USDE. Committee staff is aware of at least one California-based college that obtained a Title IX waiver and subsequently surrendered the waiver after determining that the institution could comply with the provisions of Title IX. The author may wish to clarify this provision to allow for an institution to relinquish its waiver. Further, moving forward the author may wish to consider, if an institution is compliant with California's nondiscrimination laws, is it necessary to also prohibit an institution from seeking a Title IX exemption?

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California
Equality California

Opposition

None on File

Analysis Prepared by: Laura Metune / HIGHER ED. / (916) 319-3960