

Date of Hearing: June 30, 2016

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

SB 1146 (Lara) – As Amended June 29, 2016

SENATE VOTE: 26-13

SUBJECT: POSTSECONDARY EDUCATION: NONDISCRIMINATION

KEY ISSUES:

- 1) SHOULD A COLLEGE OR UNIVERSITY THAT RECEIVES STATE FUNDS AND CLAIMS A RELIGIOUS EXEMPTION TO TITLE IX BE REQUIRED TO DISCLOSE THE BASIS AND SCOPE OF THAT EXEMPTION TO CURRENT AND PROSPECTIVE STUDENTS, FACULTY, AND STAFF?
- 2) SHOULD A COLLEGE OR UNIVERSITY THAT IS CONTROLLED BY A RELIGIOUS ORGANIZATION AND RECEIVES STATE FINANCIAL ASSISTANCE BE SUBJECT TO STATE ANTI-DISCRIMINATION LAWS, SUBJECT TO CERTAIN EXCEPTIONS?

SYNOPSIS

This bill seeks to ensure that students who attend religiously-based colleges or universities, or any other postsecondary institution, have the same rights, and have the same protections against unlawful discrimination, as students who attend non-religiously-based postsecondary schools, whether public or private. The bill would achieve this goal by specifying that existing Government Code Section 11135 – which prohibits discrimination in any state-operated or state-funded program or activity – applies to any religious college or university that receives or benefits from state assistance. Recognizing that private religious schools have a right to exercise their religion, the bill would authorize certain exemptions, so long as those exemptions do not amount to discrimination on the basis of gender identity or sexual orientation. In addition, the bill would require postsecondary educational institutions that claim a religious exemption from federal Title IX laws and regulations to disclose to students, faculty, and staff the basis of that exemption. In this way, students, faculty, and staff will be fully informed about restrictions imposed by the school and whether they want to subject themselves to those conditions. The bill now before the Committee is substantially revised from prior versions, which means that it cannot be said with certainty whether prior supporters and opponents maintain their past positions on the bill. However, the general outlines of those positions remain the same: the author, sponsor, and supporters contend that students, especially LGBT students, should not be subject to forms of discrimination that are otherwise unlawful, even though it may be reasonable to expect those students conform to non-discriminatory religious practices and conduct. Opponents contend with equal vigor that any measure that requires them to permit conduct, or provide facilities, that are inconsistent with their religious beliefs is an affront to the religious liberty guaranteed to them under the Free Exercise clause of the First Amendment.

SUMMARY: Requires a college or university that claims a religious exemption from Title IX laws and regulations to make specified disclosures to students, faculty, and staff, and specifies that religious colleges and universities are subject to state anti-discrimination laws, as specified. Specifically, **this bill:**

- 1) Requires any postsecondary educational institution in this state that claims a religious exemption under federal Title IX of the Education Amendments of 1972 or the state Equity in Higher Education Act to disclose to current and prospective students, faculty members, and employees the basis for claiming the religious exemption and the scope of the allowable activities provided by the exemption. Specifies the manner in which the disclosures shall be made. Specifies that the postsecondary educational institution shall submit material relating to any claimed exemption to the Student Aid Commission and requires the Commission to post this information on its Internet website.
- 2) Provides that notwithstanding any other law, a postsecondary educational institution that is controlled by a religious organization and that receives financial assistance from the state or enrolls students who receive financial assistance is subject to a statute (Government Code Section 11135) that prohibits discrimination in any state-operated or state-funded program or activity, and provides that a violation of that statute may be enforced by a private right of action, as specified.
- 3) Provides that the above provision shall not prohibit a postsecondary educational institution controlled by a religious institution that receives financial assistance from the state or enrolls students who receive state financial assistance from doing any of the following:
 - a) Providing housing or restroom accommodations reserved for either male or female students if students are afforded housing or restroom accommodations consistent with their gender identity.
 - b) Providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them if "married" includes both married opposite-sex and married same-sex couples.
 - c) Enforcing rules of moral conduct and establishing housing policies in accordance with these rules of moral conduct if the rules are uniformly applicable to all students regardless of the student's sexual orientation or gender identity.
 - d) Enforcing religious practices if these practices are uniformly applicable to all students regardless of the student's sexual orientation or gender identity.
 - e) Admitting only students of one sex if the institution traditionally and continually from its establishment had that policy.
- 4) Specifies that the provisions of this bill do not apply to a religiously-controlled postsecondary educational institution if the purpose of the institution is to prepare students to become ministers of the religion or to enter upon some other vocation of the religion and if the application of this section would not be consistent with the religious tenets of the organization.
- 5) Specifies that the provisions of this bill do not prevent a religiously-controlled postsecondary educational institution from prohibiting the use of the institution's real property for any purpose that is inconsistent with the religious tenets of the organization.

EXISTING LAW:

- 1) Declares, under the Equity in Higher Education Act, that it is the policy of this state to afford all persons equal rights and opportunities in the postsecondary educational institutions of this state, regardless of a person's disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes as set forth in the Penal Code, including the perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. (Education Code Sections 66251 and 66260.6.)
- 2) Provides that no person shall be subject to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes as set forth in the Penal Code, in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid. (Education Code Section 66270.)
- 3) Requires a postsecondary educational institution, prior to receipt of any state financial assistance or state financial aid, to provide assurances to the agency administering the funds that each program or activity conducted by the postsecondary educational institution will be conducted in compliance with the Equity in Higher Education Act and all other applicable provisions of state law prohibiting discrimination on the basis of sex. (Education Code Section 66290.)
- 4) Provides that the Equity in Higher Education Act shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization. (Education Code Section 66271.)
- 5) Specifies that the Equity in Higher Education Act may be enforced through a civil action. (Education Code Section 66292.4.)
- 6) Provides, under the Unruh Civil Rights Act, that persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civil Code Section 51.)
- 7) Provides that no person in this state shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully be subject to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Specifies that these provisions may be enforced by a civil action for equitable relief, which shall be independent of any other rights or remedies. (Government Code Sections 11135 and 11139.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: According to the author, this bill seeks to ensure that students who attend religiously-based colleges or universities have the same rights, and have the same protections against unlawful discrimination, as students who attend non-religiously-based schools, whether public or private. The bill would achieve this by specifying that Government Code Section 11135 – which prohibits discrimination in any state-operated or state-funded program or activity – applies to any religious college or university that receives or benefits from state assistance. Recognizing that private religious schools have a right to exercise their religion, the bill affords reasonable accommodations from the strictest applications of existing anti-discrimination law. For example, a religious school could reserve certain housing for married students only, enforce rules of moral conduct consistent with their religious tenets, or require certain religious practices so long as those rules were applicable to all students regardless of sexual orientation or gender identity. In addition to clarifying that anti-discrimination law applies to religious colleges and universities, the bill would also require postsecondary educational institutions that claim a religious exemption from the federal Title IX regulations, or from California's Equity in Higher Education Act, to disclose to students, faculty, and staff the basis and scope of that exemption.

In short, the bill seeks to strike a balance to allow religious colleges and universities to enforce codes of moral conduct or housing policies – that might otherwise infringe upon student rights – so long as those policies do not violate established state laws and policies protecting persons from discrimination on the basis of gender identity or sexual orientation. Just as our society has long accepted that religious belief should not be a pretext for racial discrimination, our society is clearly moving in the direction, however haltingly, to the view that religious belief should not be a pretext for discriminating against a person because of his or her sexual orientation or gender identity. Some celebrate the direction that society is moving on this issue, while others clearly disapprove and even condemn it. But in whatever direction the arc of justice may eventually bend, in the meantime it is the law and policy of this state that state funds should not support discrimination of any kind.

Opponents of this bill may contend that this bill somehow discriminates against them on the basis of religion. To the contrary, state law prohibits discrimination in state-operated or state-funded programs or activities on the basis of religion, just as it does for any other protected characteristic. Moreover, not only does the state allow discrimination against religion, it *accommodates* religion by allowing religious schools to discriminate, if they so choose, by restricting enrollment to members of their own religion. (Government Code Sections 12940 and 12926.2 (a)-(f).) Few religious schools actually restrict admission in this way, not only because they wish to reach more people, but also because they quite understandably wish to benefit from state assistance – which they could not do, under Government Section 11135, if they only admitted persons of a particular religion.

Background: Title IX and the Religious Exemption: Existing federal law, Title IX of the Education Amendments of 1972, bars sex discrimination in an educational institution that receives or benefits from federal aid. While perhaps best known for its requirement that schools provide equal funding for athletic programs, Title IX covers several academic, extracurricular, and administrative matters related to discrimination on the basis of sex. It applies not only to admissions, but also to treatment of students once they are admitted, including housing and facilities, courses and other educational activities, counseling, student financial aid, student health and insurance benefits, marital or parental status, and athletics. One very significant exception to Title IX is that it allows same-sex colleges at the undergraduate level in order to

accommodate the many historically all-male and all-female colleges. However, graduate and professional programs must be open to both sexes.

Most relevant to this bill, Title IX also has a religious exemption. Title IX does not apply to an educational institution that is controlled by a religious organization to the extent the application of Title IX would be "inconsistent with the religious tenets of the organization." (34 CFR Section 106.12.) This same principle – indeed nearly the identical language – is incorporated into California's Equity in Higher Education Act. Under Title IX, an institution is considered to be "controlled by a religious organization" if one or more of the following is true: (1) It is a school or department of divinity, even if existing as a branch or department of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter some other religious vocation, including preparing the students to teach theological subjects; (2) It requires faculty, students, or staff to be members of, or otherwise espouse a personal belief in the religion of the organization; and (3) Its charter or other official publication contains an explicit statement that it is controlled by the religious organization, and the members of its governing body are appointed by the controlling organization, and it receives a significant amount of financial support from the controlling religious organization.

An institution that wants to claim an exemption generally submits a statement to the U.S. Department of Education (DOE) stating what specific provisions of Title IX or its regulations conflict with specific tenets of the religion. (34 CFR 106.12 (b).) Copies of these requests, along with the DOE response, may be found on the DOE website. It appears that these requests are rather leniently granted. Indeed, while some DOE response letters asked for more information from the schools seeking a religious exemption from Title IX, the Committee is not aware of any exemption request that was flatly refused. DOE recently made these documents available to the public on its website in response from pressures by LGBT and other civil rights groups, so as to inform prospective students, faculty, and staff. At least one California school, Pepperdine University, had claimed a Title IX religious exemption since 1976. However, Pepperdine recently asked that its exemption be rescinded, presumably because its positions on the issues that prompted the original request have, like much of the rest of society, changed.

Equity in Higher Education Act: Similar to Title IX, California's Equity in Higher Education Act (Equity Act) generally prohibits discrimination. While Title IX only prohibits discrimination based on "sex" (defined in recent case law and policy memos to include sexual orientation and gender identity), the state Equity Act prohibits discrimination in higher education on the basis of several suspect classifications: disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes as set forth in the Penal Code. The Equity Act applies to any postsecondary educational institution that receives or benefits from state assistance, including by enrolling students who receive financial aid. Any college or university who wishes to accept state assistance must provide an "assurance" to the state agency that administers the state funds that it complies with the Act. Also, like Title IX, the Equity Act has a religious exemption: it does not apply to an educational institution that is controlled by a religious organization, if the application of any provision of the Act would not be consistent with the religious tenets of that organization.

Disclosure of Religious Exemptions Under This Bill: In addition to clarifying that anti-discrimination law applies to religious colleges and universities, this bill would require postsecondary educational institutions that claim a religious exemption from either the federal

Title IX laws or regulations, or from California's Equity Act, to disclose to students, faculty, and staff the basis of that exemption and the scope of allowable activities under that exemption. In this way, students, faculty, and staff will be aware of any restrictions imposed by the school and thereby make an informed decision about whether to attend or accept employment at the school. The fact that disclosures are made does not mean that schools are free to discriminate. Any college or university would still be required to comply with Section 11135 (as modified by this bill), the Equity Act, and any other applicable state or federal anti-discrimination laws.

Free Exercise Issues: Opponents of this bill generally claim that this bill infringes upon their rights under the Free Exercise clause of the First Amendment. That clause, as incorporated by the Fourteenth Amendment, says that no state shall enact any law that infringes upon the "free exercise" of religion. As interpreted in a long line of Supreme Court cases, the free exercise is generally interpreted to mean that government may not discriminate against anyone on the basis of religion and, perhaps more significant, may not enact laws or adopt policies that unduly "burden" people in the free exercise of religion.

The Free Exercise Clause and "Laws of General Applicability:" One of the more difficult questions that courts have faced in the Free Exercise cases concerns the extent to which persons or entities, in the name of religion, may be exempted from "laws of general applicability" – that is, a law that applies to everyone alike and the purpose of which is neither to advance nor inhibit religion. To what extent, that is, can a person be excused from general laws because its application, in a particular instance, would interfere with a person's constitutional right to freely exercise his or her religion? At one end of the spectrum, almost everyone would agree that a person could not engage in human sacrifice and expect to be exempt from a murder conviction because the human sacrifice was a religious exercise. On the other hand, courts have held, in narrow circumstances, that the Constitution may require reasonable "accommodations" for people's religious belief. For example, the courts have held that a state cannot deny unemployment benefits to someone who cannot accept work offered because it would require work on his or her Sabbath; and the Amish may take their children out of school after the eighth grade even though a state's compulsory education law requires students to attend school until the age of sixteen. However, despite a few cases where the court has required a state to make accommodations to religious belief, the prevailing view appears to be that laid down by the late Justice Scalia in *Employment Division v. Smith*: the free exercise clause does not require a state to exempt a person from "laws of general applicability." So long as the law was not motivated by any religious purpose, and applies to all alike, the Constitution does not *require* an exemption. States elect to make reasonable accommodations for religious belief; but, if it is a law of general applicability, the Constitution does not require a statutory exemption. (*Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872 (holding that the Free Exercise clause does not excuse a person from compliance with an otherwise valid law prohibiting conduct that the law is free to regulate); *cf. Sherbert v. Verner* (1963) 374 U.S. 398 (denying unemployment benefits because a person refuses to accept work on the Sabbath imposes a burden on the free exercise of religion); *Wisconsin v. Yoder* (1972) 406 U.S. 205 (holding that the First and Fourteenth Amendments prevent a state from compelling Amish parents to send their children to school until the age of sixteen.)

Government Code Section 11135 is a law of general applicability, and the free exercise clause of the First Amendment does not require a religious exemption, though the state may elect to provide one. Section 11135 prohibits discrimination against any state-operated or state-funded program or activity that is offered to the public. The law was not motivated by a religious

purpose, nor does it seek to advance or inhibit religion. Rather, the Act sought, consistent with the state's other anti-discrimination laws, to prevent discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes as set forth in the Penal Code. While a government may voluntarily accommodate religion by providing an exemption, it is not required to do so by statute. If a person or entity believes that the statute, as applied, would infringe upon the Free Exercise clause of the First Amendment, that person or entity could bring an action challenging the application. But that would be true whether there is a statutory exemption or not. California already provides one accommodation in this regard. The Equity Act, as noted, includes an exemption for a postsecondary educational institution that is controlled by a religious organization if application of the statute would conflict with the tenets of the religious organization.

Remaining Issues/Amendments that the Author May Wish to Consider: Although the author has worked diligently with various stakeholders on all sides of this issue, there remain a number of outstanding issues that the author may wish to consider should the bill pass out of this committee and move on to the Assembly Committee on Appropriations.

Groups that generally support the purpose of this bill – preventing discrimination against LGBT students, whether at religious or non-religious schools – have communicated to the Committee their discomfort with certain provisions of the bill, in particular the various exemptions or "carve outs" from the general application of Government Code Section 11135.

First, while the exemptions provided in the bill appear to be appropriately qualified by the requirement that the exempted activity may still not discriminate on the basis of sexual orientation and gender identity, some who support the spirit of this bill fear that some of the exemptions are ambiguous. For example, paragraph (3) of subdivision (b) of proposed new section 11135.5 states that schools may enforce rules of moral conduct so long as the rules are "uniformly applicable to all students regardless of the student's sexual orientation or gender identity." While the intent of this provision is clearly to make sure that codes of moral conduct are applied even-handedly without regard to sexual orientation, it is conceivable that religious schools could draft codes that, while appearing to apply to all students could, as a practical matter, only affect LGBT students. To cite an extremely blatant example, a school could prohibit homosexual conduct and claim that it was non-discriminatory because it applied to all students – gay or straight – even though as a practical matter it would only affect gay students. Or a school could prohibit "sodomy," but then define sodomy in such a way that it only applied to homosexual sodomy. There is also the prospect that a code of moral conduct could be applied unevenly – so that a prohibition against pre-marital sex would only be applied to same-sex relationships and ignored for opposite-sex relationships. It certainly appears to be the intent of the author that any such moral codes would be applied even-handedly, and the author assumed that such even-handedness was implicit in the requirement that the rules be "uniformly applicable to all students regardless of the student's sexual orientation or gender identity."

Second, some have expressed concern that proposed subdivision (c) exempts "an institution," the main purpose of which is to prepare students for a religious vocation. For example, this provision would exempt a seminary. While it seems reasonable that a religious seminary could impose codes of moral conduct on seminarians – including sexual conduct or advocacy of positions at odds with religious teachings – not all employees of the institution are training for a religious vocation. In addition, some institutions mix training in a religious vocation with more

general courses of study, so that it is not always clear whether the "purpose" of the institution is vocational training or general education. Last year this Committee held an informational hearing in San Francisco on the so-called "ministerial exemption – i.e. the doctrine that "ministers" are not employees under labor laws – as it applied to teachers in Catholic schools. If those hearings revealed anything, it was that the "ministerial exemption" is a malleable doctrine that could be used to evade state labor laws. Therefore, as the bill moves forward, the author may wish to consider whether this subdivision should be amended to specify that the exemption does not apply to "the institution" as a whole, but only applies as to those persons preparing for a religious vocation.

Third, some have expressed concern that subdivision (d) of Section 11135.5, which provides that the provisions of this bill will not prevent an institution from prohibiting the use of the institution's real property for any purpose inconsistent with its religious tenets, could be used to prevent LGBT students from holding meetings on campus. This is clearly not the author's intent. Rather, the purpose of this subdivision was apparently to assuage fears expressed by some opponents that this bill would force religious schools to conduct same-sex marriages in campus churches. To the extent that the meaning of this provision needs to be clarified, the author may consider amendments in the next committee.

Finally, some of have expressed concern that the remedy provided by this bill is very limited. The bill specifies that any violations of its provisions shall be enforceable by a private right of action as described in Government Code Section 11139. This section in turn, provides for enforcement of Section 11135 "by a civil action *for equitable relief*, which shall be independent of any other rights of remedies." In other words, a plaintiff would not be entitled to damages, but only an injunction ordering the school to take some corrective action, whether it be to undo whatever action was taken against the person who brings the action, or to end the policy that gave rise to the action. Less clear is whether a prevailing plaintiff would be entitled to attorney's fees and court costs. Generally speaking, a prevailing party is not entitled to attorney's fees unless the statute expressly provides for them. That is, California follows the so-called "American Rule," which holds that each side pays its own attorney's fees unless otherwise provided by statute or contract. Nonetheless, California Code of Civil Procedure Section 1021.5 permits a court to award attorney's fees to a prevailing party where the action results in "the enforcement of an important right affecting the public interest." So it is possible that a person who brought an action under this bill could obtain an injunction and attorney's fees. However, if the author wants to allow a prevailing party to be awarded attorney's fees, it would be best to expressly state it in the statute. Without at least attorney's fees, it seems unlikely that a student would find a lawyer willing to take his or her case.

GENERAL ARGUMENTS IN SUPPORT AND OPPOSITION: Because all of the support and opposition letters submitted to the committee addressed different versions of this bill and elaborated on specific provisions that are no longer in the bill, this analysis will not, as is customary, summarize those letters. However, the general lines of arguments of supporters and opponents – as to the overarching policy objective of the author – can at least be briefly summarized. Those who support the general intent of this bill argue that it is necessary in order to ensure that students at religious colleges and universities have the same rights and protections as their peers in other colleges. Supporters have noted studies demonstrating that LGBT students on college campuses suffer disproportionately from sexual harassment and assault, depression, and suicide. Supporters believe that LGBT students should not face the additional burden of facing official discrimination from the colleges that they have chosen to attend. More generally,

supporters see the policy goal of this bill as a progressive and logical extension of civil rights to LGBT students. No one would seriously argue that a college that overtly discriminated on the basis of race should benefit from state and taxpayer funds. By the same token, it does not seem consistent with California law and policy to permit discrimination on the basis of gender identity and sexual orientation, much less to allow such institutions to reap the benefits of state funds.

Opponents counter, however, that the First Amendment of the U.S. Constitution protects religious liberty. They contend that religious colleges and universities have a right to demand that students who choose to attend their schools conform to the religious teachings of those schools; if a student cannot abide by those teachings, then the student should attend a different school. The religious-based schools argue that their approach to education is holistic, and as such spiritual and educational life is not neatly separated. They believe that laws which require them to tolerate conduct that is inconsistent with their religious belief as a condition of receiving state funds effectively constitutes an "unconstitutional condition" – that is, it is asking them to forgo a constitutional right as a condition of receiving a public benefit that would otherwise be available to them. Finally, opponents contend that the private right of action authorized by this bill will subject religious schools to costly litigation.

Related Legislation: AB 1888 (Low) would have prohibited any institution that participates in the Cal Grant student aid program, as a condition of participation, to certify that the institution does not discriminate against any student on the basis of sex, sexual orientation, gender identity, or gender expression, among other things, and that the institution shall not have, apply, or receive a religious exemption under the federal Title IX program. This bill was held on suspense in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION.

Support (to prior version of the bill)

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

Opposition (to prior version of the bill)

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
Numerous Individuals

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