
SENATE COMMITTEE ON EDUCATION

Senator Benjamin Allen, Chair

2017 - 2018 Regular

Bill No: SB 1381 **Hearing Date:** April 4, 2018
Author: Nielsen
Version: February 16, 2018
Urgency: No **Fiscal:** Yes
Consultant: Lynn Lorber

Subject: Public postsecondary education: Campus Free Expression Act

NOTE: This bill has been referred to the Committees on Education and Judiciary. A "do pass" motion should include referral to the Committee on Judiciary.

SUMMARY

This bill requires a person who wishes to engage in expressive activity on the campus of a public postsecondary educational institution to be permitted to do so freely, as long as that person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution.

BACKGROUND

Existing federal law prohibits Congress from making any law respecting an establishment of religion, prohibiting the free exercise thereof, abridging the freedom of speech, the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (First Amendment to the United States Constitution)

Existing state law:

- 1) Provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. Existing law prohibits a law from restraining or abridging liberty of speech or press. (California Constitution, Article I, Section 2)
- 2) Prohibits the Regents of the University of California, the Trustees of the California State University, the governing board of a community college district, and an administrator of any campus of those institutions, from making or enforcing a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction. (Education Code § 66301)
- 3) Provides that #2 and 3 do not prohibit an institution from adopting rules and regulations that are designed to prevent hate violence from being directed at students in a manner that denies them their full participation in the educational process, if the rules and regulations conform to standards established by the

First Amendment to the United States Constitution and Section 2 of Article I of the California Constitution for citizens generally. (EC § 66301 and § 94367)

- 4) Requires the governing board of a community college district to adopt rules and regulations relating to the exercise of free expression by students upon the premises of each community college maintained by the district, which shall include reasonable provisions for the time, place, and manner of conducting such activities. Existing law provides that such rules and regulations shall not prohibit the right of students to exercise free expression, except that expression which is obscene, libelous or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on community college premises, or the violation of lawful community college regulations, or the substantial disruption of the orderly operation of the community college, shall be prohibited. (EC § 76120)
- 5) Authorizes a student to commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon a motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section. (EC § 66301 and § 94367)

ANALYSIS

This bill requires a person who wishes to engage in expressive activity on the campus of a public postsecondary educational institution to be permitted to do so freely, as long as that person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution. Specifically, this bill:

- 1) Requires a person who wishes to engage in expressive activity on the campus of a public postsecondary educational institution to be permitted to do so freely, as long as that person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution.
- 2) Provides that outdoor areas of public postsecondary educational institutions are traditional public forums.
- 3) Authorizes a public postsecondary educational institution to maintain and enforce reasonable time, place, and manner restrictions only when those restrictions are narrowly tailored in service of a significant institutional interest, employ clear, published, content-neutral and viewpoint-neutral criteria, and provide for ample alternative means of expression. This bill requires these restrictions to allow for members of the campus community to spontaneously and contemporaneously distribute literature and assemble.
- 4) Authorizes either of the following people to bring an action in a court of competent jurisdiction to enjoin a violation of this bill, or to recover compensatory damages, court costs, and reasonable attorney's fees, or all of these:
 - a) The Attorney General.

- b) A person whose right to engage in expressive activity was infringed through a violation of this bill.
- 5) Requires the court, if the court finds that a violation of this bill has occurred, to award an aggrieved person damages of no less than \$500 for the initial violation, plus \$50 for each day the violation remains ongoing which is to accrue starting on the day after the complaint is served on the public postsecondary educational institution. This bill prohibits the total damages, excluding court costs and attorney's fees, available to a plaintiff, or multiple plaintiffs, in a case or cases stemming from a single controversy from exceeding \$250,000 in total. This bill requires the court, if the court that finds a violation of this bill has harmed multiple plaintiffs, to divide damages, which shall not exceed \$250,000 in total, equally among those plaintiffs.
- 6) Provides that a violation of this bill is established by a person described in #4 demonstrating in an action brought in a court of competent jurisdiction either of the following:
- a) That a public postsecondary educational institution has a policy that does not conform with the requirements of this bill.
 - b) That a public postsecondary educational institution, by an act or actions of one of its employees, administrators, or any person contracted to perform a service at the institution or by the enforcement of an institutional policy, violated the requirements of this bill.
- 7) Limits a person's ability to bring an action alleging a violation of this bill to no later than one year after the date the cause of action accrues. This bill provides that each day that a violation persists, and each day that a policy that violates this bill remains in effect, constitutes a new violation of this bill and is, therefore, a new day on which a cause of action has accrued.
- 8) Provides that nothing in this bill is to be interpreted as doing any of the following:
- a) Alter the protections for expressive activity provided by the First Amendment.
 - b) Limiting the right of student expression in other areas of public postsecondary educational institutions.
 - c) Granting any person the right to materially and substantially disrupt the functioning of any public postsecondary educational institution, including intentional, material, or substantial disruptions to scheduled or reserved activities in a portion or section of the campus at the scheduled time.
- 9) States that the First Amendment of the United States Constitution and Sections 2 and 3 of Article I of the California Constitution protect expressive activities, including but not limited to all forms of peaceful assembly, protests, speeches, distribution of literature, carrying of signs, circulation of petitions, and online or

other publication of videos and audio recorded in the open outdoor areas of a public postsecondary educational institution.

STAFF COMMENTS

- 1) ***Need for the bill.*** According to the author, “Despite decades of legal precedent establishing that the First Amendment applies in full for students on public university campuses, many public institutions of higher education in California dramatically limit the areas on campus available for expressive activity to tiny designated areas – so call ‘free speech zones.’ This bill would guarantee that open areas at California’s public campuses are what they have always been intended to be: public forums where expressive activity may flourish subject only to content- and viewpoint-neutral reasonable, time, place, and manner restrictions. Quarantining student speech to tiny free speech zones violates the First Amendment and diminishes the quality of debate and discussion on campus by preventing expression from reaching its target audience. Moreover, many of the institutions that maintain these restrictive policies also employ burdensome permitting schemes that require students to obtain administrative and law enforcement permission days or even weeks before being allowed to speak their minds. Making matters worse, many of these policies grant campus administrators unfettered discretion to deny applications based on the viewpoint or content of the speakers’ intended message.”
- 2) ***Protected speech.*** This bill does not alter what is considered protected or unprotected speech. This bill requires public postsecondary institutions’ policies to be reasonable, narrowly tailored, and use viewpoint-neutral criteria; requires policies to be applied evenly; requires institutions’ policies to be consistent with the requirements of this bill; and authorizes a person to bring an action in court for violations.
- 3) ***Materially and substantially disrupt the functioning of the institution.*** This bill requires a person who wishes to engage in expressive activity on the campus of a public postsecondary institution to be permitted to do so freely, as long as that person’s conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution. This bill does not define “materially and substantially disrupt”; existing law includes several references to the disruption of the orderly operation of institutions. The determination as to whether an action is a disruption is left to postsecondary institutions through their policies and codes of conduct.

Freedom of speech on public postsecondary educational institutions is allowed within the confines of codes of conduct and time, place and manner restrictions. Institutions cannot discipline a student for engaging in a free speech activity, but can discipline a student if the free speech activity crosses into unlawful behavior, or otherwise violates the institution’s time, place and manner restrictions.

- 4) ***Existing time, place, and manner restrictions.*** This bill authorizes a public postsecondary institution to maintain and enforce reasonable time, place, and manner restrictions only when those restrictions are narrowly tailored in service of a significant institutional interest, employ clear, published, content-neutral and

viewpoint-neutral criteria, and provide for ample alternative means of expression.

Postsecondary educational institutions maintain time, place, and manner restrictions to ensure safety, security, and order. As an example, California State University, Sacramento's policy states:

"A. Overview: All activities set forth in this policy are subject to these general time, place, and manner restrictions in addition to any other time, place, and manner restrictions specified below.

B. TIME: At all times, except for non-University affiliated organizations and individuals, who are limited to normal operating hours.

C. PLACE: Freedom of expression activities may take place anywhere on campus with the following exceptions: inside parking lots and structures, inside University buildings, and near any location in which instructional, educational, and/or official business activities are being conducted (generally within 20 feet). Popular locations for freedom of expression activities are the Library Quad, Main Quad, and South Green.

D. MANNER:

1. Freedom of expression, which includes marches and/or moving protests, must be conducted in a manner that (1) shall not interfere with or obstruct the free flow of pedestrian or vehicular traffic; (2) shall not interfere with or disrupt the conduct of University business; (3) shall be carried out without creating excessive noise by use of a device; (4) shall not unreasonably interfere with classes in session or other scheduled academic, educational, co-curricular, and/or cultural/arts programs; (5) shall not promote an unlawful end, such as promoting actual violence or bodily or property harms, terrorist threats, defamation, obscenity, and false advertising; and (6) shall not violate any federal, state, or local safety code, such as regulations set by the State Fire Marshal, or University policy.
2. For any public meeting, demonstration, rally, etc., held on University grounds, advance reservations are advised to avoid conflict with previously reserved activities. Use of space shall not conflict with prior reservation of that space for another use. (Casual or unscheduled users will not be allowed to interfere with scheduled, organized, or traditional use). Use of any campus buildings for this purpose requires advance reservations and is restricted to non-profit organizations or student organizations, and faculty-, staff- or administration-sponsored events. To maintain access and safety, the use of ramps, entrances, breezeways, hallways, and other pedestrian pathways is not authorized for such purposes.
3. The scheduling process will ensure order and adequate preparation for the event and a suitable space for the intended use and expected attendance. Policies and procedures for reserving campus facilities are available in the Student Organizations & Leadership office and the Office of Space Management. Requests for student organization-sponsored events shall be

directed to the Student Organizations & Leadership office. Requests for faculty-, staff- and administration-sponsored, and community events shall be directed to the Office of Space Management or the office that oversees reservations for that particular venue (e.g., requests for University Union space must be made through the University Union Events Services Office). Please consult the University's Office of Space Management's website for information relating to the appropriate office to contact to make reservations for a particular location on the University's campus."

<http://www.csus.edu/umannual/student/stu-0125.htm>

This policy appears to meet the requirements of this bill. This bill provides that a violation is established in an action brought in a court of competent jurisdiction in either of the following scenarios:

- a) A public postsecondary educational institution has a policy that does not conform with the requirements of this bill.
 - b) A public postsecondary educational institution, by an act or actions of one of its employees, administrators, or any person contracted to perform a service at the institution or by the enforcement of an institutional policy, violated the requirements of this bill.
- 5) ***Free speech zones and safe spaces.*** This bill essentially eliminates the ability of postsecondary educational institutions to limit free speech activities to "free speech zones" and prohibit free speech activities in "safe spaces" (when safe spaces are the entire campus, or based on a certain viewpoint). This bill could limit the ability of institutions to require students to get a permit prior to holding free speech activities, as it requires the time, place and manner restrictions to allow for members of the campus community to spontaneously and contemporaneously distribute literature and assemble.

Consistent with existing law, this bill allows people to protest:

- a) A speech being given by an outside speaker, but does not allow people to disrupt that speech.
- b) An increase in tuition, but does not allow people to block the doors to a building on campus.

The author cites incidents related to free speech activities on California campuses that resulted in lawsuits against those institutions:

- A lawsuit was filed in 2017 against Pierce College in the Los Angeles Community College District, related to the college's designation of an area for free speech activities, while all other areas of campus are considered non-public forums.
- California State Polytechnic University, Pomona settled a lawsuit in 2015 related to the college's designation of an area for free speech activities and the requirement that a permit be obtained prior to engaging in free

speech activities.

- Citrus Community College District settled a lawsuit in 2014, related to the college's designation of an area for free speech activities, while all other areas of campus are considered non-public forums. According to a news article that cited a post-settlement statement from Citrus College, "As part of the settlement, the District will be implementing new procedures that will expand its current free speech area to include most open spaces on campus, enhance the District's co-curricular program by streamlining internal procedures that apply to activities of recognized student clubs and organizations, and help to ensure the safety and security of students involved in such activities."

- 6) **Related legislation.** SB 1388 (Anderson) prohibits a public institution of higher education from denying a belief-based student organization a benefit or privilege available to any other student organization, and requires a person who wishes to engage in expressive activity on the campus of a public postsecondary educational institution to be permitted to do so freely, as long as that person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution. SB 1388 is scheduled to be heard by the Senate Education Committee on April 4, 2018.

AB 2081 (Melendez) requires the governing board or body for each higher education institution to develop and adopt a policy on free expression that contains specified components, establish a Committee on Free Expression for the institution or segment, include in its freshman orientation programs a section describing to its students the institution's policies and regulations regarding free expression, authorizes institutions to restrict expressive conduct in the public areas of campus only if it demonstrates that the restriction meets specified requirements, conditions the receipt of any state funding except Cal Grant funds on compliance with this bill, and exempts religious organizations if this bill would be inconsistent with the religious tenets of that organization. AB 2081 is scheduled to be heard by the Assembly Higher Education Committee on April 3, 2018.

AB 2374 (Kiley) establishes the Free Speech on Campus Act which, among other things, requires a campus of the California Community Colleges and California State University, and requests a campus of the University of California, make and disseminate a free speech statement that affirms the importance of, and the campus's commitment to promoting, freedom of expression. AB 2374 requires the statement to include assurances that students and controversial speakers will be protected from exclusionary behavior that violates freedom of expression. AB 2374 is scheduled to be heard by the Assembly Higher Education Committee on April 3, 2018.

- 7) **Prior legislation.** SB 472 (Nielsen) was nearly identical to this bill. SB 472 passed this Committee on 7-0 vote on April 19, 2017, passed the Senate Judiciary Committee on a 7-0 vote on April 25, 2017, and was subsequently held in the Senate Appropriations Committee.

AB 1212 (Grove, 2015) would have required the governing bodies of the California Community Colleges and California State University, and requests the Regents of the University of California, to adopt a policy prohibiting their campuses from discriminating against a student organization with respect to a benefit available to any other student organization, based on that organization's requirement that its leaders or voting members satisfy specified criteria. AB 1212 failed passage in the Assembly Higher Education Committee.

ACR 21 (Kiley) urges all private and public universities in California, to the extent that they do not already have free speech statements consistent with the principles articulated by the Chancellor of the UC at Irvine, or the Free Speech Statement formally adopted by the University of Chicago, to consider such statements as a model for developing similar free speech statements. ACR 21 is pending on the Assembly Floor.

SUPPORT

Foundation for Individual Rights in Education (sponsor)

OPPOSITION

None received

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