
SENATE COMMITTEE ON EDUCATION

Senator Benjamin Allen, Chair

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Subject: Postsecondary education: Forming Open and Robust University Minds 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 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.

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 establishes the Forming Open and Robust University Minds Act (FORUM):

- 1) Requires a person who wishes to engage in non-commercial expressive activity in the outdoor areas of a public institution of higher education to be permitted to do so freely, as long as the person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the public institution of higher education, subject only to the requirements in #3 and #4 below.
- 2) Prohibits a public institution of higher education from denying a belief-based student organization a benefit or privilege available to any other student organization, or otherwise discriminate against a belief-based organization, based on the expression of the organization, including by requiring that a leader or member of a belief-based organization do any of the following:
 - a) Affirm and adhere to the organization's sincerely held beliefs.
 - b) Comply with the organization's standards of conduct.
 - c) Further the organization's mission or purpose, as defined by the student organization.
- 3) Provides that the outdoor areas of a public institution of higher education are to be deemed traditional public forums.
- 4) Authorizes a public institution of higher education to maintain and enforce reasonable time, place, and manner restrictions narrowly tailored in service of a significant institutional interest only when those restrictions employ clear, published, content- and viewpoint-neutral criteria, and provide for ample

alternative means of expression. This bill requires these restrictions to allow for a member of the campus community to spontaneously and contemporaneously assemble and distribute literature.

- 5) Provides that nothing in this bill is to be interpreted as doing any of the following:
 - a) Limiting the right of student expression elsewhere on campus.
 - b) Preventing a public institution of higher education from prohibiting, limiting, or restricting expression that the First Amendment does not protect, including but not limited to true threats and expression directed to provide imminent lawless actions and likely to produce it, or from prohibiting harassment.
 - c) Limiting the right of a member of the campus community to hold a counter demonstration, if the conduct of the counter demonstration is not unlawful and does not materially and substantially prohibit the expressive activities of others on campus, or disrupt the functioning of the institution of higher education.
- 6) Provides that expressive activities protected under the provisions of this bill include but are not limited to any lawful verbal or written means by which an individual communicates ideas to others, including all forms of peaceful assembly, protests, speeches, guest speakers, distribution of literature, carrying signs, and circulating petitions.
- 7) Requires the Board of Governors of the California Community Colleges and the Trustees of the California State University, and encourages the Regents of the University of California, to develop and adopt a policy on free expression that contains, at a minimum, the following statements:
 - a) The primary function of an institution of higher education is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. This bill requires this statement to provide that, to fulfill this function, the institution must strive to ensure the fullest degree of intellectual freedom and free expression.
 - b) It is not the proper role of an institution of higher education to shield individuals from speech protected by the First Amendment including, without limitation, ideas and opinions a person may find unwelcome, disagreeable, or even deeply offensive.
 - c) Students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and within the limits of reasonable viewpoint- and content-neutral restrictions on time, place, and manner of expression that are consistent with this bill and that are necessary to achieve a significant institutional interest, provided that these restrictions are clear, published, and provide ample alternative means of expression. Students and faculty shall be permitted to assemble and engage in spontaneous expressive activity, if the activity is not unlawful

and does not materially and substantially disrupt the functioning of the institution, subject to the requirements of this bill.

- d) The public outdoor areas of an institution of higher education are traditional public forums, open on the same terms to any speaker.
 - e) The institution shall strive to remain neutral, as an institution, on the public policy controversies of the day, and shall not take action, as an institution, on the public policy controversies of the day in such a way as to require students or faculty to publicly express a given view of social policy.
- 8) Requires a public institution of higher education to make public in its handbooks, on its website, and through its orientation programs for students the policies, regulations, and expectations of students regarding free expression on campus consistent with this bill.
- 9) Requires a public institution of higher education to develop materials, programs, and procedures to ensure that those persons who are responsible for the discipline or education of students, including but not limited to administrators, campus police officers, residence life officials, and professors, understand the policies, regulations, and duties of public institutions of higher education regarding free expression on campus consistent with this bill.
- 10) Requires a public institution of higher education to post on its website and submit to the Governor and Legislature, by December 1, 2019, and annually thereafter, a report that details the course of action being taken in order to comply with this bill. This bill requires the report to include all of the following:
- a) A description of any barriers to, or incidents of disruption of, free expression occurring on campus, including but not limited to attempts to block or prohibit speakers and investigations into students or student organizations for their expressive activities. This bill requires the description to include the nature of each barrier or incident and any disciplinary action taken against members of the campus community determined to be responsible for those specific barriers or incidents. This bill prohibits the description from revealing a student's personally identifying information.
 - b) Any other information the public institution of higher education deems valuable in order for the public to evaluate whether free expression rights for all members of the campus community have been equally protected and enforced consistent with this bill.
- 11) Requires the report to meet the following requirements:
- a) Be accessible from the institution's website homepage by use of not more than three links to reach the report.
 - b) Be searchable by keywords and phrases.

- c) Be accessible to the public without requiring registration or use of a username, password, or other user identification.
- 12) Requires a public institution of higher education, if it is sued for an alleged violation of First Amendment rights, to submit to the Governor and Legislature a supplementary report with a copy of the complaint within 30 days of notice of the suit.
 - 13) Authorizes a person or student association aggrieved by a violation of this bill to bring an action against the public institution of higher education and any other persons responsible for the violation, and seek appropriate relief including but not limited to injunctive relief, monetary damages, reasonable attorneys' fees, and court costs. This bill authorizes a person or student organization aggrieved by a violation of this bill to assert that violation as a defense or counterclaim in any disciplinary action or in any civil or administrative proceedings brought against the student or a student organization. This bill provides that nothing is to be interpreted to limit any other remedies available to any person or student organization.
 - 14) Authorizes a person to bring suit for violation of this bill no later than one year after the day the cause of action accrues. For purposes of calculating the one-year limitation period, each day that the violation persists, and each day that a policy in violation of this bill remains in effect, shall constitute a new violation and therefore a new day that the cause of action has accrued.
 - 15) Provides that the state waives immunity under the Eleventh Amendment to the United States Constitution and consents to suit in a federal court for lawsuits arising out of this bill. This bill provides that a public institution of higher education that violates this bill is not immune from suit or liability for the violation.
 - 16) Includes a severability clause, whereby if any provision of this bill or any application of a provision of this bill to any person or circumstance is held to be unconstitutional, the remainder of this chapter and the application of the provision to any other person or circumstance shall not be affected.
 - 17) Provides the following definitions:
 - a) "Benefit" includes recognition, registration, the use of facilities for meetings or speaking purposes, the use of channels of communication, and funding sources that are otherwise available to other student associations.
 - b) "Campus community" means students, administrators, and faculty and staff of the institution of higher education, and invited guests of any of those persons.
 - c) "Counter demonstration" means lawful action or conduct that criticizes or objects to the free expression activities of others on campus, and does not violate the rights of others in the campus community by materially disrupting previously scheduled or reserved activities in a portion or

section of the campus at that scheduled time.

- d) “First Amendment” means the First Amendments of the United States Constitution.
 - e) “Harassment” means expression that is so severe, pervasive, and subjectively and objectively offensive that it unreasonably interferes with an individual’s access to educational opportunities or benefits provided by the public institution of higher education.
 - f) “Outdoor areas” means the generally accessible outside areas of campus where members of the campus community are commonly allowed, including grassy areas and walkways. This bill provides that “outdoor areas of campus” do not include outdoor areas that a majority of the campus community is restricted from accessing.
 - g) “Public institution of higher education” means a campus of the California Community Colleges, the California State University, or the University of California.
 - h) “Student” means a person who is enrolled on a full-time or part-time basis in a public institution of higher education.
 - i) “Student organization” means an officially recognized group at a public institution of higher education, or a group seeking official recognition, comprised of students who receive, or are seeking to receive, benefits through the institution of higher education.
- 18) States legislative findings and declarations regarding First Amendment rights, and the failure of public universities to provide adequate safeguards for the First Amendment rights of students which leads to a stifling of expression on campus.

STAFF COMMENTS

- 1) ***Need for the bill.*** According to the author, “Freedom of speech is paramount for the American system of government and American culture. Freedom of speech is not an isolated topic. Free speech and First Amendment law bleed into multiple public policy areas such as education, criminal justice, civic participation, health care, commerce and even technology. Failure by our institutions of higher education (University of California, California State University and California Community Colleges) to protect the First Amendment rights of all of their students; to recognize their unique role as, in the words of the Supreme Court, “a marketplace of ideas”; and for failing to guarantee with clear and consistent policy that First Amendment protections should apply with equal force on college campuses as in the community at large, requires that the Legislature, through their policy, budgetary and oversight role, require them to do so.”
- 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) ***Belief-based student organizations.*** This bill prohibits a public institution of higher education from denying a belief-based student organization a benefit or privilege available to any other student organization, or otherwise discriminate against a belief-based organization, based on the expression of the organization. It is unclear why this provision is necessary; a belief-based organization is currently protected under existing law. According to the author, this provision is necessary because there appear to be many problems on college campuses in protecting the free speech rights of belief-based student organization.

This bill prohibits a public institution of higher education from requiring a leader or member of a belief-based organization to affirm and adhere to the organization's beliefs, comply with the organization's standards of conduct, or further the organization's mission or purpose. This provision appears to reinforce existing policies held by the state's public institutions of higher education, whereby a student organization shall not be formally recognized if it is discriminatory or if its membership and leadership are not open to all currently enrolled students at that campus (also known as "open membership"). According to the state's three public higher education systems, their policies for the creation of campus recognized student organizations are aligned to current law and the rulings of the United States Supreme Court and California's Ninth Circuit Court, which ruled that non-restrictive rules for membership and leadership are constitutionally sound under federal law.

Nothing in the segments' policies preclude student groups from forming that choose to hold exclusive member and leadership roles, said groups are just not recognized as official campus groups. Although there are several benefits to student groups having official recognition status, such as discounted usage fees for campus facilities, most campuses within the segments still provide significantly discounted facilities usage fees to non-recognized groups; some campuses do not even charge non-recognized groups usage fees.

- 4) ***Counter-demonstration.*** This bill provides that it is not to be interpreted as limiting the right of a member of the campus community to hold a counter-demonstration, if the conduct of the counter-demonstration is not unlawful and does not materially and substantially prohibit the expressive activities of others on campus, or disrupt the functioning of the institution of higher education. This bill defines "campus community" as students, administrators, and faculty and staff of the institution of higher education, and *invited guests of any of those persons*. It is unclear why this provision is necessary; demonstrations, including counter demonstrations, are currently protected under existing law. According to the author, this provision is necessary because there appear to be many problems on college campuses in protecting the free speech rights of counter-demonstrators.
- 5) ***Diminishes discretion to adopt policies.*** This bill requires the governing bodies of the California Community Colleges and the California State University,

and requests the governing body of the University of California, to adopt policies on free expression that include specified statements. Those statements include: it is not the proper role of an institution of higher education to shield individuals from speech protected by the First Amendment; public outdoor areas of an institution of higher education are public forums open on the same terms to any speaker; the institution shall strive to remain neutral on the public policy controversies of the day, and shall not take action on the public policy controversies of the day in such a way as to require students or faculty to publicly express a given view of social policy. Is the provision allowing any speaker to use public outdoor areas of an institution as a public forum appropriate? Could this provision preclude public institutions of higher education to declare their campuses as a sanctuary from federal immigration efforts, for example?

- 6) ***Materially and substantially disrupt the functioning of the institution.*** This bill requires a person who wishes to engage in non-commercial 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.

- 7) ***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.
- 8) ***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>

- 9) **Associated legislative hearings.** The following informational hearings related to free speech have occurred:
- a) Senate Judiciary Committee, *Combating Hate While Combating the Constitution*; October 3, 2017.
 - b) Senate Public Safety Committee, *Violent Protests and Police Response*; October 18, 2017.
 - c) Joint Legislative Committee on Emergency Management, *When Free Speech Crosses the Line: Protecting Public Safety in California*; November 15, 2017.
- 10) **Related legislation.** SB 1381 (Nielsen) 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 1381 is scheduled to be heard in this 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.

- 11) **Prior legislation.** 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.

SB 472 (Nielsen) was nearly identical to SB 1381 (see #5 above). 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.

ACR 21 (Kiley, Ch. 103, 2017) 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 University of California 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.

SUPPORT

None received

OPPOSITION

None received

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