SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 249 (Melendez)
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Hearing Date: April 20, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Educational equity: political affiliation

DIGEST

This bill prohibits discrimination on the basis of political affiliation in the programs and activities of California educational institutions that benefit from state financial support or enroll students that receive state financial aid.

EXECUTIVE SUMMARY

California law prohibits discrimination based on certain protected characteristics such as race, gender, religion, disability, and sexual orientation, at educational institutions that receive, or benefit from, state financial assistance, or that enroll pupils who receive state student financial aid. The author of this bill contends that some California students have been treated adversely by their schools or universities because of their political opinions and that this has led to a chilling effect on free expression on campuses. In an attempt to address the concern, this bill would add "political affiliation" to the list of protected characteristics on the basis of which educational institutions cannot discriminate. Because the bill does not provide a definition of the phrase "political affiliation" and since the phrase is susceptible to a broad range of interpretations, the meaning and likely impact of the bill is hard to discern. To the degree the bill overrides constitutionally permissible limitations on students' right to free expression, the bill might interfere with school discipline or enable bullying and harassment. Beyond these concerns, the bill might be construed as an attempt to impose strict political neutrality on educators in the classroom. Such a standard would be impossible to meet in practice and might have profound chilling effects of its own.

The bill is author-sponsored. Support comes from a regional group of business councils. There is no opposition on file.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous and material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. (Ed. Code § 48907(a).)

2) Prohibits a school district operating one or more high schools, a charter school, or a private secondary school from making or enforcing a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the federal or state constitutions. (Ed. Code § 48950(a).)

3) Prohibits private postsecondary educational institutions from disciplining students solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus or facility of the private postsecondary education institution, would be protected by the state or federal constitution. (Ed. Code § 94367.)

4) Declares that it is the policy of the State of California to afford all persons in public schools equal rights and opportunities in the educational institutions of the state, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or immigration status. (Ed. Code § 200.)

5) Prohibits discrimination on the basis of, or the perception of, disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or immigration status, in the conduct of any program or activity by an educational institution that receives, or benefits from, state financial assistance, or that enrolls pupils who receive state student financial aid. (Ed. Code §§ 210.2 and 220.)

6) Directs the California Department of Education to conduct regular assessments to determine whether each local education agency has:
   a) adopted a policy that prohibits discrimination as described in (4), above; and

b) established a process, with specified components, for receiving and investigating complaints of discrimination, harassment, intimidation, or bullying on the basis of actual or perceived disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or immigration status, or on the basis of association with a person or group with one or more of these actual or perceived characteristics. (Ed. Code § 234.1(a) and (b).)

This bill:

1) Prohibits discrimination on the basis of actual or perceived "political affiliation" in any program or activity conducted by any educational institution in California that receives, or benefits from, state financial assistance, or that enrolls pupils who receive state student financial aid.

COMMENTS

1. California has strong constitutional and statutory protections for student expression

Existing California law provides strong protections for student expression. The U.S. Supreme Court has ruled that, although partially constrained by the First Amendment, K-12 educational institutions do have authority to limit their students' expression in ways that the government cannot generally do with adults. (*Bethel Sch. Dist. v. Fraser* (1986) 478 U.S. 675; *Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260; *Morse v. Frederick* (2007) 551 U.S. 393.) In contrast to these U.S. Supreme Court rulings, California's Legislature has enacted broader protections for students attending its public schools. California Education Code Section 48907 provides that:

> Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. (Ed. Code § 48907(a).)

Moreover, as to high school students in particular, existing California law goes even further. It makes high school students' right to free expression in the educational setting coextensive with the constitutional rights that the students would enjoy outside of the

educational setting. In other words, California high school students enjoy the full range of state and federal constitutional protections for free expression even within their educational institutions. (Ed. Code 48950.)

In the post-secondary realm, public university students also generally enjoy the full panoply of First Amendment rights that all adults in the U.S. possess. That is to say, since a public university is a state actor, the public university cannot ordinarily restrict its faculty, staff, or students from expressing their political viewpoints freely. The same rule would not ordinarily apply to students of private universities, since private universities are not state actors and the First Amendment is therefore inapplicable to them. (*Manhattan Cmty. Access Corp. v. Halleck* (2019) ___U.S.___ [139 S.Ct. 1921, 1928].) Here again, however, California law goes further. Specifically, Education Code Section 94367 prohibits private postsecondary education institutions from disciplining students solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus or facility of the private postsecondary education institution, would be protected by the state or federal constitution. In other words, California state law provides students at private post-secondary institutions with the same free expression rights enjoyed by their public university counterparts.

Taken altogether and as interpreted by the courts, this set of laws presently provide California's students with what two advocates associated with the Pacific Legal Foundation called "broad protection of politically incorrect speech" that provides "a model for other states."(Beard & Luther. *A Superintendent's Guide to Student Free Speech in California Public Schools* (2008) 12 UC Davis J. Juv. L. & Pol'y 381, 426.)

Of particular relevance to this bill, while the laws described above do allow educational institutions to restrict certain types of student expression – for example, expression that is obscene or incites imminent violence – they do not permit educational institutions to restrict student expression based upon the viewpoint expressed. In other words, a school may prohibit obscene political buttons on the ground that they are obscene, but if the school prohibits students from wearing obscene buttons that denigrate one candidate using obscenity, they must also ban political buttons that use obscenity in relation to any other candidate. This reflects the general First Amendment principle that, even within categories of speech that are not constitutionally protected, viewpoint discrimination is generally impermissible. (*R. A. V. v. St. Paul* (1992) 505 U.S. 377.)

2. Examples of the problem the bill is intended to address

The author of this bill contends that, notwithstanding the laws described in Comment 1, above, further protection is needed for student political expression at California educational institutions. As evidence to support this belief, the author points to the following incident:

> Last year, a student in the Senator's district was dropped from a class at College of the Desert because he refused to change the picture on his virtual profile, which showed his support for President Trump. The professor asked him to remove it twice, then dropped him from the class. The student double checked that this was not an allowable offense to be dropped from a class for and filed a grievance with the institution. Unfortunately, the student was not reinstated back into the class until the Senator became involved in the situation. The class was a computer class, and the student had never discussed his politics while in session.

More generally, the author cites a spokesperson for Turning Point, USA, as expressing concern that students are self-censuring before they make a statement or ask a question. Turning Point, USA is a non-profit organization that, among other things, operates a "watchlist" for "unmasking radicals" by documenting professors who "advance leftist propaganda in the classroom."[1] According to this spokesperson, the author states, roughly 68 percent of college students say that the current campus climate prevents them from expressing their opinions. Of this group, 83 percent identify as conservative.

The author goes on to highlight other examples of what the author apparently considers political affiliation discrimination. A National Review article suggests that universities have as high as a 32 to one ratio of left-leaning speakers compared with right-leaning speakers. The same article asserts that only three percent of 2018 commencement speakers were conservatives.[2]

In short, the author is of the belief that educational institutions either directly treat conservative students, faculty, and staff poorly in comparison to their progressive counterparts, or facilitate the silencing of conservative students, faculty, and staff by allowing their progressively-minded counterparts to drive the conservative students, faculty, and staff into intellectual hiding.

3. What does the phrase "political affiliation" mean?

Analyzing the likely impact of this bill, if enacted, is confounded by the fact that the bill outlaws discrimination on the basis of "political affiliation" but does not define what is meant by that phrase.

In the narrowest sense, "political affiliation" might refer only to one's formal membership in a political party, presumably as evidenced by voter registration. If "political affiliation" were interpreted in this way, the bill would only prohibit

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[1] *See* https://professorwatchlist.org/ (as of April 8, 2021).
[2] Hoffman, *The New Strategy to Suppress Conservative Voices on Campus* (Jan. 4, 2021) National Review https://www.nationalreview.com/2021/01/the-new-strategy-to-suppress-conservative-voices-on-campus/ (as of Apr. 13, 2021).

educational institutions from treating people differently according to the party with which they are officially affiliated. According to the California Secretary of State's website, the qualified parties with whom a Californian may register to vote are: American Independent, Democratic, Green, Libertarian, Peace and Freedom, and Republican.[3] Presumably, discrimination against people who declined to state a party preference would also be prohibited under the bill.

Given the things that the author cites as examples of what the bill is intended to combat, however, it seems unlikely that the author has such a narrow definition of "political affiliation" in mind. At a minimum, it would appear that the author intends "political affiliation" discrimination to encompass support for a particular candidate, not just membership in a party. In fact, the author's stated concern over the ratio of left-leaning to right-leaning campus speakers suggests that, more than just party membership or preference for particular political candidates, the author means the phrase "political affiliation" to refer to people's political viewpoints more generally.

This broad construction of the phrase "political affiliation" as encompassing political ideology generally is also probably how courts would interpret this statute, if enacted. For one thing, the bill would encompass both discrimination on the basis of political affiliation and discrimination based on "perceived" political affiliation. Campaigning for a particular candidate or espousing certain ideological viewpoints will often lead to the perception of what a person's party registration is, even if the actual registration is unknown. As a practical matter, therefore, discrimination based on general political viewpoints will get swept up into discrimination based on perceived party registration. For another thing, when called upon to interpret the meaning of similarly open ended language about what the modifier "political" means, the California courts have construed the term broadly. Specifically, in applying a law prohibiting California employers from trying to control or direct the "political activities or affiliations" of their employees, the California courts have observed that:

> [t]hese statutes cannot be narrowly confined to partisan activity. […] The term "political activity" connotes the espousal of a candidate *or a cause*, and some degree of action to promote the acceptance thereof by other persons. The Supreme Court has recognized the political character of activities such as participation in litigation, the wearing of symbolic armbands, and the association with others for the advancement of beliefs and ideas. (*Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 487. Internal quotation and citations omitted. Emphasis in the original.)

[3] *See* https://www.sos.ca.gov/elections/political-parties/qualified-political-parties (as of April 9, 2021).

Thus, though it is far from clear, the likely impact of this bill, if enacted, would be to prohibit educational institutions from discriminating on the basis of people's political viewpoints, broadly interpreted and however expressed.

4. Enabling bullying, harassment, or disruptive behavior in the guise of political affiliation?

It is a well-worn trope that students do not shed their right to free expression when they enter the schoolhouse gates. (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503, 506.) At the same time, the courts have recognized that educational institutions may still censor or discipline student expression in a number of contexts. For example, existing constitutional and statutory law allows schools to censor and discipline students for expression if, among other things, the expression incites imminent violence, or involves obscenity.

One question raised by this bill is whether such expression would gain newly heightened protection if it contained a political component. In other words, under this bill, would schools have to worry about facing liability if they prevented students from wearing "F**k Biden!" or "¡Ch**gatuMAGA!" t-shirts to class? Could students get away with shouting slogans like "Pussy grabs back!" or "Bong hits for Biden!" in the hallways?

The response to these concerns may be relatively simple, at least in theory: educational institutions would still be permitted to censor or discipline student expression to the degree permissible under other constitutional and statutory limitations, but in doing so, they could not discriminate among political viewpoints. If that response is correct, the bill effectively operates as little more than a restatement of the constitutional doctrine described in Comment 1: that viewpoint discrimination is impermissible even within unprotected categories of speech. (*R. A. V. v. St. Paul* (1992) 505 U.S. 377.)

In practice, it may be difficult and costly for school districts and universities to defend themselves against claims that they are discriminating based on political affiliation when they act to suppress student expression that is not constitutionally or statutorily protected. And, since viewpoint discrimination by public educational institutions is already prohibited by standard constitutional principles and extended to private post-secondary institutions by operation of Education Code Section 94367, the Committee may wish to inquire exactly what it is this bill adds to the protection of student expression in exchange.

Even more troubling issues could arise in bullying and harassment scenarios. Educational institutions have the legal duty to provide equal educational opportunity to their students and, accordingly, have a legal obligation to prevent bullying and harassment on the basis of race, nationality, ethnicity, gender, religion, disability, and sexual orientation, among other things. (Ed. Code § 220; 20 U.S.C. §1681 *et seq*.) Where

students, faculty, or campus speakers engage in hate speech in the educational setting, there is what can at best be described as a thin line between what is protected by free expression principles and what is punishable harassment.

If this bill passes, will educational institutions become more reluctant to stand up for students who are being bullied or harassed on account of their membership in a protected group for fear of triggering lawsuits alleging political affiliation discrimination? Supposing that a group of students of apparently Latinx descent is walking through the campus courtyard when another group of students surrounds them, yelling "Vote for leaders who will keep all you good-for-nothing Mexicans out of this country!" Under anti-discrimination law, the educational institution might very well have a duty to discipline the students. Under this bill, the educational institution would almost certainly face a lawsuit for political affiliation discrimination if it tried.

The point is not to say that this bill would create a new problem. The line between harassment and protected hate speech is already thin and highly contested. [4] The point is rather that protections against harassment and protections for political viewpoints, including hateful political viewpoints, already exist and are already in tension. The Committee may therefore wish to inquire to what degree this bill would elucidate and alleviate that tension, or serve to exacerbate it.

At a minimum, to ensure that this bill would not undermine educational institutions' existing obligation and authority to prevent bullying or harassment, the Committee may wish to consider amendments that would clarify that nothing in the bill should be construed to stop educational institutions from prohibiting or disciplining student expression that does any of the following: materially or substantially interferes with the educational mission; incites violence, meets the definition of bullying, or constitutes harassment on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or immigration status.

5. Mandating political neutrality from educators?

As previously discussed, the absence of a definition for the phrase "political affiliation" in the bill leaves many questions about how far the bill reaches. Since the bill bars discrimination on the basis of political affiliation, a key question is whether the author intends to impose a mandate for political neutrality on California's educational institutions. More precisely, could California's educational institutions be sued under this bill for discrimination based on political affiliation if their programs and activities are not politically neutral?

[4] *See* Chemerinsky & Gillman, Free Speech on Campus (Paperback ed. 2018) Yale University Press, pp. 128-134 for an attempt to navigate this line.

In describing the problem this bill is intended to address, for example, the author cites claims that colleges invite thirty-two times as many left-wing speakers to campus as they do right-wingers. The author also points to assertions that only three percent of commencement speakers in 2018 were considered conservative. Presumably the author considers these to be examples of the type of political affiliation discrimination that the bill is intended to address. In other words, it does appear that the author intends the bill to mandate political neutrality from California's educational institutions.

Even assuming that political neutrality is generally desirable, there are immediate and obvious questions about how it could be measured or achieved. Under this bill, could progressive students sue their educational institutions for discrimination if, in any given academic year, 51 of the invited speakers to campus were registered Republicans and only 49 were registered Democrats? What about the relative clout of the speakers? How many relatively unknown, but fervently left-wing deputy mayors would a campus need to invite to counterbalance one devoutly right-wing Fox News host with a prime time audience and a million Twitter followers? What about the relative ideological purity of each speaker? Could three moderate Republicans balance out a single Social Democrat? Does it matter if some Republicans consider these moderate Republicans to be Republicans in name only?

On a more micro-scale, how would individual educators operationalize a political neutrality mandate? Would a history of political economy professor need to mete out the course syllabus so as to carefully assign one page of reading from Karl Marx for every page of Adam Smith? Would the theology course on the Book of Genesis need to give equal time to a discussion of the Darwinian theory of evolutionary biology? Would the class on critical race theory need to devote half of its time studying white supremacist ideology? Would a lecture on the works of Ayn Rand need to be paired with a lecture debunking Objectivism? Would both lectures have to be the same length? In the same lecture hall? If the answer to these questions is no, then how exactly *would* political affiliation discrimination be measured, and how *could* political neutrality be achieved? When would people be able to bring suits against an educational institutional and when would they not?

In addition to inquiring about the practicality of trying to mandate political neutrality in the educational setting, the Committee may also want to ponder its desirability. As the above questions suggest, mandating political neutrality from educators and educational institutions might actually put them in something of an intellectual straitjacket. Whether conservatively or progressively inclined, educators would all be forced to teach their courses and operate their campuses by a strict reductionist formula. They would be obliged to take any given subject matter, identify the full range of political viewpoints on it, and carefully parcel out each educational activity and program to give equal weight to each viewpoint. Any deviation from this formula – intentional or not – would expose the educator to liability for discrimination based on political affiliation.

Such a world seems far removed from the sort of robust diversity of thought that the author seeks to promote.

Finally, the Committee may wish to inquire about the bill's potential impacts on educator's mindset when interacting with students. Imagine a teacher with conservative leanings, or simply suppose that the students in the class perceive the teacher to be conservative. The teacher assigns an essay on Othello and one of the students returns a paper that is rife with errors, poorly reasoned, sloppily written, and that concludes with the statement "Shakespeare reveals the same anti-Muslim bias in Othello that President Trump revealed in enacting his Muslim travel ban." The teacher is about to give the essay a bad grade, but hesitates. Will the student accuse the teacher of political affiliation discrimination? Could the teacher provide sufficient non-political grounds for the grade? Does the teacher want to have to deal with mounting such a defense? Perhaps it is easier simply to give the student a pass for their shoddy work.

6. Void for vagueness?

For the same reason that the likely impact of this bill is difficult to analyze, it may well run afoul of constitutional doctrine rendering certain statutes void for vagueness. Specifically, when statutes potentially infringe upon expression, the courts generally require those statutes to be especially clear about what can and cannot be expressed. (*NAACP v. Button* (1963) 371 U.S. 415, 433 ["standards of permissible statutory vagueness are strict in the area of free expression"].) Otherwise, people may be inhibited from expressing themselves in ways that are protected because it is not clear what the statute does or does not allow.

In this case of this bill, the phrase "political affiliation" is susceptible to so many interpretations that if the bill were enacted, nobody would know exactly what it meant. For the reasons discussed in Comment 5, above, the bill might cause teachers and professors to censor what they say, assign, and cover in their classrooms based on a lack of clarity about what would or would not run afoul of the requirement not to discriminate on the basis of political affiliation. It is possible, therefore, that this bill, if enacted, might be successfully challenged on the ground that it is void for vagueness. (*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391 [holding that a law is unconstitutionally vague if people "of common intelligence must necessarily guess at its meaning."].)

7. Arguments in support of the bill

According to the author:

> SB 249 is one of the measures in my Anti-Discrimination bill package which aims to protect against cancel culture discrimination. A free society shouldn't allow thoughts and ideas to be censored. Free speech covers all speech, not just that with

> which you agree. Cancel culture and the efforts to silence differing opinions and voices should be a growing concern for all of us. A climate of intolerance has been established and has stifled healthy and normal debate.

In support, the Southwest California Legislative Council writes:

> […] [W]ith the growing emphasis on "cancel culture" and the efforts to silence differing opinions and voices, extending these protections to educational opportunities needs to be done. A climate of intolerance has been established and has already stifled healthy and normal debate on many campuses, including cancelling speakers and student events simply because they represent a different point of view not in vogue. Anyone who values their own freedom of speech should be concerned.

SUPPORT

Capitol Resource Institute
Southwest California Legislative Council

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: SB 238 (Melendez, 2021) bans business establishments from discriminating against customers on the basis of political affiliation or belief. The bill also prohibits employment discrimination on the basis of political affiliation and bars employers from taking adverse action against applicants or employees on the basis of political affiliation or association with any political organization. SB 238 will be heard by the Senate Judiciary Committee on the same day as this bill.

Prior Legislation:

SB 1381 (Nielsen, 2018) was nearly identical to SB 472. SB 1381 died in the Senate Appropriations Committee.

SB 1388 (Anderson, 2018), the Forming Open and Robust University Minds Act, would have required the University of California and the California State Universities to develop and adopt a policy on free expression with specified contents. Among other things, the bill would also have required that the outdoor areas of a public institution of higher education be deemed traditional public forums, with specified exceptions, and would have required that a person who wishes to engage in noncommercial expressive activity in the outdoor areas of a public institution of higher education be permitted to

do so freely, as long as the person's conduct was not unlawful and did not materially and substantially disrupt the functioning of the public institution of higher education. SB 1388 died in the Senate Education Committee.

SB 472 (Nielsen, 2017), the Campus Free Expression Act, would have declared that the outdoor areas of public postsecondary educational institutions are traditional public forums for purposes of free expression legal analysis under the state and federal constitutions. SB 1381 died in the Senate Appropriations Committee.

ACR 76 (Lowenthal, 2013) would have recognized the importance of the right of freedom of speech, would have condemned biased, hurtful, and dangerous speech intended to stoke fear and intimidation in its listeners, and would have encouraged public postsecondary educational institutions to ensure that they provide a safe, encouraging environment for exercising the right of freedom of speech. ACR 76 died on the Assembly Floor.

SB 1412 (Morrow, 2006) would have called upon the University of California, California State University, and California Community Colleges to develop a student bill of rights, including provisions regarding free speech on campus. SB 1412 died in the Senate Education Committee.

SB 5 (Morrow, 2005) was similar to SB 1412. SB 5 failed passage in the Senate Education Committee.

SB 1335 (Morrow, 2004) was nearly identical to SB 5. SB 1335 failed passage in the Senate Education Committee.

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