

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Education Committee

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BILL: SB 2126

SPONSOR: Senator Wise

SUBJECT: Postsecondary Instruction

DATE: April 9, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill creates certain student and instructional personnel rights in public postsecondary education institutions. In particular, the bill provides that a student has the right to a learning environment in which the student has access to a broad range of serious scholarly opinions, to be graded without discrimination on the basis of the student's political or religious beliefs, and to a viewpoint-neutral distribution of student fee funds.

Faculty has the right to academic freedom in the classroom, but they should make students aware of serious scholarly viewpoints other than their own and should encourage intellectual honesty, debate, and analysis. Additionally, faculty has the right to expect that employment decisions are based on competence in the fields of expertise and not on the basis of political or religious beliefs.

Finally, the bill provides that students and faculty alike have the right to be informed of their rights and grievance procedures for violations of these rights by the public postsecondary education institutions.

This bill creates s. 1004.09, F.S., and adds a new subsection (7) to s. 1002.21, F.S.

## II. Present Situation:

### ACADEMIC FREEDOM

#### *American Association of University Professors (AAUP)*

Although not uniformly defined, the term “academic freedom” has been defined by the American Association of University Professors (AAUP) to mean that teachers are entitled to freedom in the classroom in discussing their subjects.<sup>1</sup> Founded in 1915, the AAUP shapes higher education by developing standards and procedures to maintain quality and academic freedom in the nation’s colleges and universities.<sup>2</sup> In 1967, AAUP issued a statement recognizing student freedom to take reasoned exception to the data or views offered in any course of study; however, this freedom does not absolve a student from learning the content of the course of study.<sup>3</sup>

#### *Current statutory and regulatory framework*

Section 1001.74(19), F.S., provides, in pertinent part, that each university board of trustees shall establish the personnel program for all employees of a university under chapter 1012, F.S., and State Board of Education rules, including academic freedom and responsibility. The Board of Governors has similarly required each university board of trustees to establish a personnel program for university employees including academic freedom and responsibility.<sup>4</sup> Rule 6C-5.945, F.A.C., provides, in pertinent part, that academic freedom and responsibility apply to teaching, research, creative activity, and assigned service.<sup>5</sup> The faculty is free to:<sup>6</sup>

- Cultivate a spirit of inquiry and scholarly criticism and present and discuss their own academic subjects, frankly and forthrightly, with freedom and confidence;
- Select instructional materials and determine grades in accordance with university procedure; and
- Engage in scholarly and creative activity and publish the results in a manner consistent with their professional obligations.

Additionally, the rule provides that faculty must:

- Objectively and skillfully present a variety of scholarly opinions on the subject matter;
- Respect students and not exploit students for private advantage;

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<sup>1</sup> 1940 *Statement on Principles on Academic Freedom and Tenure*, American Association of University Professors and the American Association of Colleges and Universities.

<sup>2</sup> Mission Statement, American Association of University Professors, <http://www.aaup.org/aboutaaup/description.htm>.

<sup>3</sup> <http://www.aaup.org/statements/Redbook/studentrights.pdf>.

<sup>4</sup> Adopted by the Board of Governors on January 7, 2003; [http://www.fldoe.org/bog/meetings/2003\\_01\\_07/Tab4Resolution-BOT.pdf](http://www.fldoe.org/bog/meetings/2003_01_07/Tab4Resolution-BOT.pdf).

<sup>5</sup> Adopted by the Board of Governors on January 7, 2003; [http://www.fldoe.org/bog/meetings/2003\\_01\\_07/Tab3Resolution-Rules.pdf](http://www.fldoe.org/bog/meetings/2003_01_07/Tab3Resolution-Rules.pdf).

<sup>6</sup> *Id.*

- Contribute to the orderly and effective functioning of the academic unit or the university and act in a collegial manner in all interactions; and
- Represent themselves as institutional representatives, only when authorized to do so.

Section 1001.64(18), F.S., similarly requires a community college board of trustees to adopt personnel policies for community college employees consistent with chapter 1012, F.S., and State Board of Education rules. These policies must include academic freedom and responsibility.

In accordance with the statutory directive to address academic freedom and responsibility, the public postsecondary education institutions may have adopted certain institutional policies or rules, or incorporated certain academic freedom and responsibility provisions in collective bargaining agreements or contracts for tenure. There may be a wide variance in the manner in which these provisions are applied.

### III. Effect of Proposed Changes:

#### ACADEMIC FREEDOM

##### *Student rights*

The bill creates certain student rights in public postsecondary education institutions. Namely, students have the right to expect that:<sup>7</sup>

- They will be in a learning environment in which they will have access to a broad range of serious scholarly opinion pertaining to the subjects they study;
- They will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects they study;
- They will not be discriminated against on the basis of their political or religious beliefs;
- Their academic freedom and quality of education will not be infringed upon by instructors who persistently introduce controversial matter into the classroom or coursework that has no relation to the subject of study and that serves no legitimate pedagogical purpose;
- Freedom of speech, freedom of expression, freedom of assembly, and freedom of conscience of students and student organizations will not be infringed upon by postsecondary administrators, student government organizations, or institutional policies, rules, or procedures; and
- Their academic institutions will distribute student fee funds on a viewpoint-neutral basis and will maintain a posture of neutrality with respect to substantive political and religious disagreements, differences, and opinions.

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<sup>7</sup> The bill creates s. 1002.21, F.S., which provides that a student has a right to a learning environment in which they have access to a broad range of serious scholarly opinion, to be graded without discrimination on the basis of their political or religious beliefs, and to a view-point neutral distribution of student fee funds. However, the bill also creates s. 1004.09, F.S., which provides that a student has the right to expect these items but not a right to these items as provided in s. 1002.21, F.S.

The bill elevates student expectations in academic instruction to the level of an academic freedom protected by the courts. Arguably, this academic freedom of students has not been recognized as a constitutional right. However, the bill appears to create a cause of action for students to litigate against the public postsecondary education institution in which they are enrolled. This cause of action could produce some unintended consequences. For example, in a course on study of the bible, a student could file suit demanding that the professor discuss evolution. As noted in *Edwards v. Aguillard*, even if academic freedom means teaching all of the evidence, academic freedom is not furthered by outlawing the teaching of evolution or by requiring the teaching of creation science.<sup>8</sup>

#### *Faculty rights*

The bill provides that faculty and instructors have the following rights:

- A right to academic freedom in the classroom in discussing their subjects; however, they should make their students aware of serious scholarly viewpoints other than their own and should encourage intellectual honesty, civil debate, and critical analysis of ideas in the pursuit of knowledge and truth;
- A right to expect that they will be hired, fired, promoted, and granted tenure on the basis of their competence and appropriate knowledge in their fields of expertise, not on the basis of their political or religious beliefs; and
- A right to expect that they will not be excluded from tenure, search, or hiring committees on the basis of their political or religious beliefs.

The bill does not define serious scholarly viewpoints. Accordingly, this provision invites student complaints as to the proper pedagogical method employed by the faculty. Moreover, the lack of a definitive standard would place the courts in a Hobson's position of denying a cause of action based on a lack of standards by which to measure the complaint, thereby rendering this provision meaningless, or creating a standard by which to measure serious scholarly viewpoints thereby arguably intruding upon separation of powers concerns.

#### *Institutional obligations*

The bill provides that the fostering of a plurality of serious scholarly methodologies and perspectives in the humanities, social sciences, and the arts should be a significant institutional purpose.

Again, the bill does not define serious scholarly methodologies. Accordingly, this provision could be used by faculty to litigate against their employer for failing to properly foster a faculty member's viewpoints.

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<sup>8</sup> 482 U.S. 578, 586, 107 S.Ct. 2573, 2579, 96 L.Ed.2d 510 (1987) (*invalidating a Louisiana statute which forbids the teaching of the theory of evolution unless accompanied by instruction in creation science*).

*Notice*

This bill provides that students, faculty, and instructors have a right to be fully informed of their rights and the grievance procedures for violations of academic freedom by means of notices prominently displayed in course catalogs and student handbooks and on the institutional website.

The Chancellors of Colleges and Universities and Community Colleges and Workforce Education must provide a copy of the act to the presidents of the state universities and community colleges respectively.

*Effective date*

This bill shall take effect July 1, 2005.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:***Board of Governors; Art. IX, Section 7 of the State Constitution*

Section 7, Art. IX of the State Constitution provides that the Board of Governors shall operate, regulate, control, and be fully responsible for the management of the whole university system. The courts have not interpreted this provision with respect to the extent of the powers and duties of the Board of Governors. A lawsuit was filed on December 21, 2004, against the Board of Governors and the State Board of Education seeking a declaratory action, among other things, regarding the Board of Governor's powers and duties with respect to the state university system. The results of this lawsuit may have an impact on the bill with respect to the state universities.

*Contracts*

The State Constitution provides, in pertinent part, that no law impairing the right of contracts shall be passed.<sup>9</sup> To the extent that public postsecondary education institutions

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<sup>9</sup> Art. 1, s. 10, FLA CONST.

may have addressed academic freedom and responsibility in their contracts with tenured professors, the bill may be challenged under the contracts clause if this bill is applied to an existing contract.

### *Collective Bargaining*

The State Constitution provides, in pertinent part, that the right of employees to bargain collectively through a labor organization may not be abridged or denied.<sup>10</sup> The courts have interpreted this right to apply to public employees.<sup>11</sup> However, while the courts recognized that public employees have the same rights to collective bargaining as private employees, the courts have also indicated that public bargaining is inherently different from private bargaining.<sup>12</sup>

The constitutional right to bargain is construed in accordance with all provisions of the State Constitution, including separation of powers doctrine.<sup>13</sup> The Legislature maintains exclusive control over public funds.<sup>14</sup> Accordingly, the courts have held that the Legislature's failure to fund a collective bargaining agreement at the level requested by the public employer is not an impairment of contracts proscribed by Art. 1, s. 10 of the State Constitution.<sup>15</sup> Moreover, the Legislature may impose conditions on the use of the funds when it does not fund the collective bargaining agreement at the level requested by the public employer even if contradictory to the negotiated agreement.<sup>16</sup> However, if the Legislature provides enough money to implement the negotiated benefit, the Legislature may not unilaterally change the benefit.<sup>17</sup>

Finally, once the executive bargaining unit has negotiated a collective bargaining agreement and the Legislature has accepted and funded the agreement, the state and all of its organs are bound by the agreement under contract law.<sup>18</sup> The right to contract is sacrosanct and is enforceable in labor contracts by virtue of Art. I, ss. 6 and 10 of the State Constitution.<sup>19</sup> Accordingly, if the Legislature attempts to unilaterally change a collective bargaining agreement that has been funded, the statute would be subject to strict scrutiny, which would require the Legislature to demonstrate a compelling state interest justifying the abridgement of the right to collectively bargain.<sup>20</sup> To demonstrate a compelling state interest, the Legislature would need to show no other reasonable

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<sup>10</sup> Art. 1, s. 6, FLA CONST.

<sup>11</sup> *Dade County Classroom Teachers' Association v. Ryan*, 225 So.2d 903, 905 (Fla. 1969).

<sup>12</sup> *State v. Florida Police Benevolent Association, Inc.*, 613 So.2d 415, 417 (Fla. 1992) citing *United Teachers of Dade v. Dade County School Board*, 500 So.2d 508, 512 (Fla. 1986) and *Antry v. Illinois Educational Labor Relations Board*, 195 Ill.App.3d 221, 141 Ill.Dec. 945, 552 N.E.2d 313 (1990).

<sup>13</sup> *Id.* At 418.

<sup>14</sup> Art. VII, s. 1(c), FLA CONST. ("No money shall be drawn from the treasury except in pursuance of appropriation made by law.").

<sup>15</sup> *United Faculty of Florida v. Board of Regents*, 365 So.2d 1073, 1078 (Fla. 1<sup>st</sup> DCA 1979).

<sup>16</sup> *State v. Police Benevolent Association, Inc.*, 613 So.2d at 421.

<sup>17</sup> *Id.*

<sup>18</sup> *Chiles v. United Faculty of Florida*, 615 So.2d 671, 672-673 (Fla. 1993).

<sup>19</sup> *Id.* at 673.

<sup>20</sup> See *State v. Police Benevolent Association, Inc.*, 613 So.2d at 421 (FN11).

alternative means of preserving the collective bargaining agreement, in whole or in part, exists.<sup>21</sup>

The bill may be found unconstitutional on collective bargaining grounds if a court were persuaded that academic freedom was a term or condition of employment subject to collective bargaining.<sup>22</sup>

### *First Amendment*

The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment provides, in pertinent part, that the states may not abridge the freedom of speech. The Speech Clause of the First Amendment protects at least two separate rights: (1) the right to freedom of expression, and (2) the right to be free from compelled expression.<sup>23</sup> Teachers or students do not shed their First Amendment rights at the schoolhouse gate.<sup>24</sup> However, classrooms are not public forums.<sup>25</sup>

The Supreme Court has repeatedly held that academic freedom is a right of professors protected by the First Amendment.<sup>26</sup> Not all speech by professors in the classroom is protected. However, when the speech is germane to the classroom subject, it is protected by the First Amendment.<sup>27</sup> Courts have expressed reluctance, however, to intercede in questions concerning academic freedom. Teachers and not the courts should decide what classroom instruction should include.<sup>28</sup>

This bill may be constitutionally challenged on First Amendment grounds. The challenge would likely occur upon application of the act by the public postsecondary education institutions. The challenge would likely arise if a professor is compelled to express certain viewpoints other than his or her own.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

<sup>21</sup> See *Chiles v. United Faculty of Florida*, 615 So.2d at 673.

<sup>22</sup> See *United Teachers of Dade County v. Dade County School Board*, 500 So.2d 508 (Fla. 1986).

<sup>23</sup> *Holloman ex rel Holloman v. Harland*, 370 F.3d 1252, 1264 (11<sup>th</sup> Cir. 2004) citing *United States v. United Foods*, 533 U.S. 405, 410, 121 S.Ct. 2334, 2338, 150 L.Ed.2d 438 (2001).

<sup>24</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

<sup>25</sup> See *Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne (IPFW)*, 260 F.3d 757, 759 (7<sup>th</sup> Cir. 2001).

<sup>26</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 77, S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985).

<sup>27</sup> *Kracunas v. Iona College*, 119 F.3d 80, 88 (2<sup>nd</sup> Cir. 1997); compare *Vega v. Miller*, 273 F.3d 460 (2<sup>nd</sup> Cir. 2001) cert denied 533 U.S. 1097 (2002).

<sup>28</sup> See *Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne (IPFW)*, 260 F.3d at 759..

**B. Private Sector Impact:**

There is an indeterminate fiscal impact associated with the bill as there are no reliable predictions on the number of potential lawsuits that could arise. Additionally, certain student groups may no longer receive funding generated through tuition and fees.

**C. Government Sector Impact:**

There is an indeterminate fiscal impact associated with the bill as there are no reliable predictions on the number of potential lawsuits that could arise. According to the Department of Education, there is an estimated \$4.2 million fiscal impact on the state in implementing the bill's requirements.<sup>29</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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<sup>29</sup> This estimate is based on the cost of hiring one additional attorney and associated costs of \$109,503 at each of the 39 public postsecondary institutions affected by the bill.

## **VIII. Summary of Amendments:**

None.

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