

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 837

Student and Faculty Academic Freedom in Postsecondary Education

**SPONSOR(S):** Baxley

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 2126

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Choice & Innovation Committee	6 Y, 2 N	Hunt	Aldis
2) Colleges & Universities Committee	(W/D)		
3) Education Council		Hunt	Cobb
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Current policies for academic freedom are mostly determined by each postsecondary institution. The only system-wide policy in place is for faculty in the state university system. Institutions are required by law and by rule to have policies for personnel, which may also be governed by collective bargaining agreements. Institutional policies differ in their definitions of academic freedom, the extent to which they have formal policies for student academic freedom, and the extent to which their policies are widely disseminated.

The bill would establish a statewide bill of rights for academic freedom that would enumerate principles of academic freedom for faculty, instructors, and students. These principles conform to long-standing principles of academic freedom and responsibility expressed in current policies. While codification could increase the role of administrators or the courts in determining whether or not a student's or faculty member's academic freedom has been infringed, the bill does not create a statutory cause of action for students or faculty who feel their rights have been infringed. The principles of academic freedom enumerated in the bill are:

- The right of students to expect:
  - A learning environment in which they will have access to a broad range of scholarly opinion;
  - That they will be graded solely on merit;
  - That their academic freedom and the quality of their education will not be infringed upon by the introduction of unrelated controversial matter into the classroom;
  - That their freedoms of speech, expression, assembly, and conscience will not be infringed;
  - That their student fee funds are distributed on a viewpoint-neutral basis; and
- The right of faculty to expect:
  - Academic freedom in the classroom in discussing their subjects, with the responsibility that they make their students aware of serious scholarly viewpoints;
  - That they will not be discriminated against on the basis of their political or religious beliefs; and
- The right of students and faculty to be informed of their institution's grievance procedures.

The bill requires that a copy of the act be disseminated to each university and community college president, but does not require any postsecondary institution to take any action.

These principles may differ from faculty academic freedom rights as currently found in collective bargaining agreements at some institutions. The right to collectively bargain is in the Florida Constitution. Please see the Constitutional Issues section for additional information.

The Division of Colleges and Universities of the Department of Education believes the bill may have a fiscal impact on state expenditures. Please see the Fiscal Comments section.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0837b.EDC.doc

**DATE:** 4/13/2005

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – The bill enumerates the academic freedom rights of students, faculty, and instructors. In codifying certain rights for students, the bill may limit some existing faculty autonomy.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

The principles of academic freedom began to be accepted at American postsecondary institutions in the late nineteenth century with the rise of the modern research university.<sup>1</sup> The American Association of University Professors (AAUP) formalized the concept with its *General Declaration of Principles* from the *1915 General Report of the Committee on Academic Freedom and Tenure*. The declaration primarily addressed “the freedom of the teacher” and included three elements in that freedom: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”<sup>2</sup> As in the *1915 General Report*, subsequent AAUP declarations have focused primarily on the faculty autonomy component of academic freedom. In 1967, however, the AAUP issued the *Joint Statement on Rights and Freedoms of Students*, which acknowledged the academic freedom of students with its declaration that “freedom to teach and freedom to learn are inseparable facets of academic freedom.”<sup>3</sup> AAUP declarations have been highly influential in the development of academic freedom’s principles.

The U.S. Supreme Court first recognized academic freedom as a First Amendment right in 1957 in *Sweezy v. New Hampshire*.<sup>4</sup> Addressing the importance of this freedom, the court held that “teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>5</sup>

##### Current Policies in Florida

Academic freedom policies in Florida are governed by rule, by institutional policy, and by collective bargaining agreements.

Current system-wide rules regarding academic freedom for the state university system were adopted by the Board of Governors at their January 7, 2003, meeting when they adopted existing State Board of Education rules regarding state universities. Rule 6C-5.945, regarding employee ethical obligations and conflicts of interest, provides that:

- Academic freedom and responsibility apply to teaching, research, creative activity, and assigned service.
- Faculty shall be free to:
  - Cultivate a spirit of inquiry and scholarly criticism and present and discuss their own academic subjects with freedom and confidence.
  - Select instructional materials and determine grades in accordance with procedure.
  - Engage in scholarly and creative activity and publish the results in a manner consistent with their professional obligations.

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<sup>1</sup> Byrne, J.P. (1989). Academic freedom: A “special concern of the First Amendment.” Yale Law Journal, 99(2), p. 269-270.

<sup>2</sup> Reprinted as Appendix A to *Law and Contemporary Problems* 53(3), p. 393-406.

<sup>3</sup> AAUP *Joint Statement on Rights and Freedoms of Students* (1967). Available at <http://www.aaup.org/statements/Redbook/studentrights.pdf>

<sup>4</sup> Byrne, J.P. (1989). Academic freedom: A “special concern of the First Amendment.” Yale Law Journal, 99(2), p. 256

<sup>5</sup> 354 U.S. 234 (1957).

- Faculty shall have the responsibility to:
  - Objectively and skillfully present a variety of scholarly opinions on the subject matter.
  - Respect students and not exploit students for private advantage.
  - Contribute to the orderly and effective functioning of the University and act collegially.
  - Represent themselves as institutional representatives only when authorized.

There is no system-wide rule or policy relating to university *student* academic freedom. There is also no system-wide rule or policy on academic freedom for community college students or faculty.

University and community college boards of trustees are required to establish policies that address academic freedom and responsibility for personnel. They are also required to establish personnel programs to govern recruitment and selection, evaluation, promotion, and tenure. (1001.64, F.S.; 1001.74, F.S.; Board of Governors Resolution, January 7, 2003). Additionally, faculty rights with respect to academic freedom are frequently governed by collective bargaining agreements.

Institutional policies and collective bargaining agreements differ in their specific definitions of academic freedom, the extent to which they have formal policies for the academic freedom of students, and the extent to which their policies are printed or posted in faculty and student handbooks, in course catalogs, and on websites.

### **Proposed Changes**

The bill would establish a statewide bill of rights for academic freedom that would enumerate principles of academic freedom for faculty, instructors, and students. These principles largely conform to long-standing principles of academic freedom and responsibility expressed in AAUP declarations and current policies but differ in the extent of their emphasis on the academic freedom of students.

There is a tension inherent in some of these freedoms and responsibilities. Under the bill, faculty and instructors have freedom in discussing their subjects in the classroom. However, students have the right to expect that faculty will not persistently introduce unrelated controversial matter, and faculty and instructors have the responsibility to make their students aware of the range of serious scholarly viewpoints on a subject. This tension has been existent in well-established principles of academic freedom and responsibility. In current practice, the responsibility to balance the academic freedom of faculty with faculty responsibilities and the academic freedom of students has been exercised by faculty themselves, in accordance with any institutional policies and procedures. While codification could increase the role of administrators or the courts in determining whether or not a student's or faculty member's freedom has been infringed, the bill does not create a statutory cause of action for students, instructors, or faculty who feel their rights have been infringed.<sup>6</sup>

To the extent these principles limit absolute faculty autonomy in the matters discussed in the classroom and in the determination of grades, they may contradict faculty academic freedom rights as currently found in collective bargaining agreements at some institutions. The right to collectively bargain is in the Florida Constitution. Please see the Constitutional Issues section of the analysis for additional information.

The principles of academic freedom delineated in the bill are:

- The right of students to expect a learning environment in which they will have access to a broad range of scholarly opinion. In the humanities, the social sciences, and the arts, the fostering of a plurality of serious scholarly methodologies and perspectives should be a significant institutional purpose.

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<sup>6</sup> A cause of action may be judicially inferred when not expressly created in statute; however, the Florida Supreme Court has held that "legislative intent...should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one." *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (1994).

- Since the first formulation of academic freedom in the 1915 *General Declaration of Principles*, it has been understood that academic freedom carries with it certain responsibilities.<sup>7</sup> The responsibility of faculty to present a variety of scholarly opinions is included in the existing state university system rule regarding academic freedom.
- The right of students to expect they will be graded solely on merit; and not discriminated against on the basis of their political or religious beliefs.
  - The 1967 *Joint Statement on Rights and Freedoms of Students* recognizes that, while students are “responsible for learning the content of any course,” they “should have protection through orderly procedures against prejudiced or capricious academic evaluation.” Institutional policies currently differ with respect to procedures for student grievances regarding grades.
- The right of students to expect that their academic freedom and the quality of their education will not be infringed upon by instructors who persistently introduce controversial matter into the classroom that is unrelated to the subject matter and serves no legitimate pedagogical purpose.
  - This principle is based on a recognized faculty responsibility to “be careful not to introduce into their teaching controversial matter which has no relation to their subject” (AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure*).<sup>8</sup>
- The right of students to expect that their freedoms of speech, expression, assembly and conscience will not be infringed upon by postsecondary administrators, student government, or institutional policies.
  - These freedoms are governed by the First Amendment to the U.S. Constitution.<sup>9</sup>
- The right of students to expect that their academic institutions will distribute student fee funds on a viewpoint-neutral basis, and that the institutions will maintain a posture of neutrality with respect to substantive political and religious debates.
  - The distribution of student fee funds is covered by case law. In *Board of Regents of the University of Wisconsin System v. Southworth*, the U.S. Supreme Court held that the distribution of mandatory student fees for extracurricular student organizations required “viewpoint neutrality in the allocation of funding support.”<sup>10</sup>
  - While the rights of university personnel and students to express opinions as individuals is not in question, there is a debate within the academic community on the propriety of institutions of higher learning making an official, substantive statement on public issues. Many suggest that the proper role for the institution is to remain neutral and ensure “that freedom of speech is not impaired for others and that both sides are heard.”<sup>11</sup>

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<sup>7</sup> In the words of the 1915 General Declaration, the instructor “should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions....” *General Declaration of Principles* (1915), reprinted as Appendix A to *Law and Contemporary Problems* 53(3), p. 393-406.

<sup>8</sup> Interpretive comments made by the AAUP in 1970 further clarified that the intent “is not to discourage what is ‘controversial.’ Controversy is at the heart of the free academic inquiry.... The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.” AAUP *1940 Statement of Principles on Academic Freedom and Tenure*. Available at <http://www.aaup.org/statements/Redbook/1940stat.pdf>

<sup>9</sup> The First Amendment states that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” The U.S. Supreme Court has long held “the individual’s freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment,” in *Wallace v. Jaffree*, summarizing court doctrine, 105 S.Ct. 2479 (1985).

<sup>10</sup> 120 S.Ct. 1346 (2000).

<sup>11</sup> Keohane, N. (2003, February 7). When should a college president use the bully pulpit? *The Chronicle of Higher Education*, p. 20.

- The right of faculty and instructors to academic freedom in the classroom in discussing their subjects, with the responsibility that they make their students aware of serious scholarly viewpoints, and that they encourage civil debate.
  - See the discussion above regarding the responsibility associated with academic freedom, discussed with respect to the first principle expressed in the bill.
- The right of faculty and instructors to expect that they will be hired, fired, promoted, and granted tenure on the basis of their competence, and that they will not be discriminated against on the basis of their political or religious beliefs.
  - Hiring, firing, promotion, and tenure procedures are governed by institutional policies. Many collective bargaining agreements currently include provisions prohibiting discrimination based on religion or political affiliation. The U.S. Supreme Court has held that, absent a compelling government interest, public employment may not be conditioned on an individual's political beliefs.<sup>12</sup>
- The right of faculty and instructors to expect that they will not be excluded from tenure, search, or hiring committees on the basis of their political or religious beliefs.
  - See above discussion.
- The right of students, faculty, and instructors to be fully informed of their rights and their institution's grievance procedures for violations of academic freedom.
  - Current institutional policies and collective bargaining agreements provide grievance procedures for faculty with respect to their academic freedom. Policies also exist for student grievances, though in most cases there are no specific grievance procedures expressly for student academic freedom.

The bill does not require postsecondary institutions to take any action, but it is possible that institutions may review and revise their academic freedom policies and bargaining agreements to align them with these principles. Institutions may take greater steps to ensure that those policies and related grievance procedures are easily available to students, faculty, and instructors.

The bill requires the Chancellor of Colleges and Universities to provide a copy of the act to the president of each state university and requires the Chancellor of Community Colleges and Workforce Education to provide a copy of the act to the president of each community college.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 1002.21, F.S., to specify student rights to academic freedom.

Section 2. Creates s. 1004.09, F.S., relating to the postsecondary student and faculty academic bill of rights, to specify the rights of students, faculty, and instructors to academic freedom.

Section 3. Requires the Chancellor of Colleges and Universities to provide a copy of the act to the president of each state university; requires the Chancellor of Community Colleges and Workforce Education to provide a copy of the act to the president of each community college.

Section 4. Provides that the act shall take effect on July 1, 2005.

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<sup>12</sup> See *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

This bill does not appear to have a fiscal impact on state government revenues.

#### 2. Expenditures:

See FISCAL COMMENTS section.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

This bill does not appear to have a fiscal impact on local government revenues.

#### 2. Expenditures:

This bill does not appear to have a fiscal impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a fiscal impact on the private sector.

### D. FISCAL COMMENTS:

Because institutions already have some policies dealing with issues of academic freedom, discrimination, and student and faculty rights and grievances, it is likely that existing institutional legal and policy staff will be adept at handling these types of issues. It is unlikely that additional staff would be required.

However, the Department of Education's Division of Colleges and Universities assessment is that each institution would incur significant costs related to legal assistance and training to comply with the bill. The department estimates a potential total cost of \$4.2 million, based on the cost of hiring one additional junior attorney and associated costs of \$109,503 total at each institution, multiplied by 39 institutions.<sup>13</sup>

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to spend funds or to take any action requiring the expenditure of funds.

#### 2. Other:

The Florida Constitution guarantees the right of employees to bargain collectively through a labor organization. Art. 1, s. 6, Fla. Const. Chapter 447, Part II, Florida Statutes, governs the collective bargaining process for public employees in Florida. Specifically, s. 447.301(2), F.S., provides that public employees shall have the right to be represented by any employee organization of their own choosing and to negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment. Public employees shall have the

<sup>13</sup> Florida Department of Education 2005 Legislative Bill Analysis, HB 837, March 8, 2005, at 9.

right to be represented in the determination of grievances on all terms and conditions of their employment. Public employees shall have the right to refrain from exercising the right to be represented.

The Florida Supreme Court has held that the Legislature may not interfere with a collectively-bargained for contract once that contract has been funded, on the grounds that such interference violates the constitutionally guaranteed right to collective bargaining and the right to contract.<sup>14</sup> However, the Legislature has no legal obligation to fund a collectively-bargained for contract between a public employer and public employees.<sup>15</sup>

Section 447.309(3), F.S., renders ineffective any provision of a collective bargaining agreement that conflicts with any law, ordinance, rule, or regulation over which the chief executive officer of the public employer has no amendatory power unless the Legislature amends the provision of law that is in conflict. Therefore, no collective bargaining agreements may contain terms in conflict with HB 837 (once enacted). It is not clear whether this will affect existing collective bargaining agreements or will be limited to those entered into in the future.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

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<sup>14</sup> *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla 1993)

<sup>15</sup> *State of Florida v. Florida Police Benevolent Association, Inc.*, 613 So. 2d 415 (Fla. 1992)