

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Education

BILL: SB 1234

INTRODUCER: Senator Baxley

SUBJECT: Free Expression on Campus

DATE: February 5, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Androff</u>	<u>Graf</u>	<u>ED</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____

I. Summary:

SB 1234 establishes the “Campus Free Expression Act,” (the Act) to authorize individuals to engage in expressive activity on public institutions of higher education campuses, within reasonable limits enforced by such institutions. Specifically, the bill:

- Authorizes a person who wishes to engage in an expressive activity in the outdoor areas of campus of a public institution of higher education to do so freely, spontaneously, and contemporaneously as long as the person’s conduct is lawful and does not materially and substantially disrupt the functioning of the public institution.
- Designates the outdoor areas of campus of a public institution of higher education that accepts federal funding as a traditional public forums and specifies that such public institution may create and enforce restrictions that are:
 - Reasonable and content-neutral on time, place, and manner of expression.
 - Narrowly tailored to a significant institutional interest.
- Prohibits a public institution of higher education from designating a specific area as a free speech zone or otherwise restricting expressive activities to a particular area of campus.
- Establishes a cause of action for a violation of the Act and specifies available damages and a statute of limitations associated with such action.

The bill takes effect July 1, 2018.

II. Present Situation:

Freedom of speech is the right to engage in expression without censorship or interference from government or its agencies.¹

¹ See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

Free Speech and Expression

Both the U.S. Constitution and Florida Constitution provide that every person may speak, write, and publish sentiments on all subjects.² However, an individual's freedom of speech or expression may be limited by the government if the speech or expression occurs on government-owned property, such as a public elementary, middle, or high school, or at a public university.³ Such limitations are determined by the type of public forum created on government property.⁴

There are three types of public forums:⁵

- A “traditional” or “open public forum”⁶ is a place with a longstanding tradition of freedom of expression, such as a public park or street corner. In an open public forum, the government may only impose content-neutral time, place, and manner restrictions on speech and expression.⁷
- A “designated” or “limited public forum”⁸ is a place with a more limited history of expressive activity, usually only for certain groups or topics. Examples may include a university meeting hall.⁹ Such limitations must serve a compelling state interest.¹⁰
- A “closed public forum” is a place that is not traditionally open to public expression, such as a military base.¹¹

Generally, student speech and religious expression are protected by the First Amendment of the U.S. Constitution.¹² However, such rights may be limited.¹³ A student's right to freedom of speech and expression is protected to the extent it does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”¹⁴

Free Speech on Public Institutions of Higher Education

Public entities may preserve property under their control for its intended use by imposing restrictions on access to limited public fora that are viewpoint neutral and reasonable given the

² U.S. CONST. amend. 1 (Congress shall make no law abridging the freedom of speech.); Art. I., s. 4, Fla. Const. (Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right.)

³ *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

⁴ *Id.* at 678-79.

⁵ *Id.*

⁶ First Amendment Schools, *What is a public forum?* <http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012>, (last visited Feb. 5, 2018); see *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45-46 (1992).

⁷ *Perry*, 460 U.S. at 45-46.

⁸ First Amendment Schools, *What is a public forum?* <http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012>, (last visited Feb. 5, 2018); see *Perry*, 460 U.S. at 45-46.

⁹ *Perry*, 460 U.S. at 45-46.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 513-514 (1969) (stating “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates.”); see *Mergens*, 496 U.S. at 230, 250 (1990) and *Chandler v. Siegelman*, 230 F.3d 1313, 1316-1317 (11th Cir. 2001) *cert. denied*, 533 U.S. 916 (2001) (religious expression).

¹³ *Tinker*, 393 U.S. at 506, 512-13.

¹⁴ *Id.* at 513.

forum’s purpose.¹⁵ The United States Supreme Court extends such constitutional protections to public higher education institutions and has specifically recognized that “the college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”¹⁶ Public university and college campuses are generally considered limited public fora for purposes of regulating speech and the United States Supreme Court has ruled that public universities and colleges are forbidden from exercising any type of viewpoint discrimination, even when the limited public forum is of its own creation.¹⁷ However, reasonable time, place, and manner restrictions consistent with the purpose of the limited public forum have frequently been upheld.¹⁸

III. Effect of Proposed Changes:

SB 1234 establishes the “Campus Free Expression Act,” (the Act) to authorize individuals to engage in expressive activity on public institutions of higher education campuses, within reasonable limits enforced by such institutions. Specifically, the bill:

- Authorizes a person who wishes to engage in an expressive activity in the outdoor areas of campus of a public institution of higher education may do so freely, spontaneously, and contemporaneously as long as the person’s conduct is lawful and does not materially and substantially disrupt the functioning of the public institution.
- Designates the outdoor areas of campus of a public institution of higher education that accepts federal funding as a traditional public forums and specifies that such public institution may create and enforce restrictions that are:
 - Reasonable and content-neutral on time, place, and manner of expression.
 - Narrowly tailored to a significant institutional interest.
- Prohibits a public institution of higher education from designating a specific area as a free speech zone or otherwise restricting expressive activities to a particular area of campus.
- Establishes a cause of action for a violation of the Act and specifies available damages and a statute of limitations associated with such action.

Definitions

The bill defines:

- A public institution of higher education to mean any public technical center, state college, state university, law school, medical school, dental school, or other Florida College System institution as defined in law.¹⁹
- A free speech zone to mean a designated area on a public institution of higher education’s campus for the purpose of political protesting.

¹⁵ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993).

¹⁶ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁷ *Rosenberger*, 515 U.S. 819, 829 (1995) (stating “The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics... Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.”)

¹⁸ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (finding that a high school could restrict a student’s lewd speech at a school assembly where the manner of speech was inconsistent with the forum’s purpose; see also *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (finding a student held banner with the words “BONG HiTS 4 JESUS” during a nationally televised event was an inappropriate method of communicating a political idea that disrupted the purpose of the forum).

¹⁹ The bill references the definition of Florida College System institution under section 1000.21, F.S.

- Outdoor area of campus to mean a generally accessible area of the campus where members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas. The bill specifies that the term does not include outdoor areas where access is restricted.

Right to Free Speech Activities

The bill provides that the Act protects expressive activities which include, but are not limited to, any lawful verbal or written means by which an individual may communicate ideas to others, including:

- All forms of peaceful assembly, protests, speeches, and guest speakers;
- Distributing literature;
- Carrying signs;
- Circulating petitions; and
- The recording and publication, including Internet publication, of video or audio recorded in outdoor areas of campus of public institutions of higher education.

The bill also specifies that a person who wishes to engage in an expressive activity in the outdoor areas of campus of a public institution of higher education may do so freely, spontaneously, and contemporaneously as long as the person's conduct is lawful and does not materially and substantially disrupt the functioning of the public institution of higher education.

The bill identifies the outdoor areas of campus of a public institution of higher education that accept federal funding as traditional public forums and authorizes a public institution of higher education to create and enforce restrictions that are:

- Reasonable and content-neutral on time, place, and manner of expression.
- Narrowly tailored to a significant institutional interest.

The bill states that any such restrictions must be clear, be published, and provide for ample alternative means of expression.

Additionally, the bill prohibits:

- A public institution of higher education from designating any area of campus as a free speech zone or otherwise creating policies that restrict expressive activities to a particular area of campus.
- Students, faculty, and staff of a public institution of higher education from materially disrupting previously scheduled or reserved activities on campus that occur at the same time as the free expression.

The provisions of the bill appear to be consistent with the federal and state constitutions. The bill provides that the outdoor areas of campus of a public institution of higher education are traditional public fora.

Cause of Action

The bill creates a cause of action, whereby the Florida Attorney General or a person whose expressive rights are violated by an action prohibited under the Act may bring an action in court

of competent jurisdiction to recover compensatory damages, reasonable court costs, and attorney fees.

The bill provides that if such court finds that a violation of the Act occurred, the court must award the aggrieved party a minimum of \$500 for the initial violation, plus an additional \$50 for each day the violation remains ongoing, beginning the day after the date the complaint is served on the public institution of higher education.

The bill limits the total compensatory damages available to a plaintiff in a case arising from a single violation of the Act to \$100,000, excluding reasonable court costs and attorney fees. The bill specifies that in the event of multiple plaintiffs, the court must divide the damages equally among the plaintiffs until the maximum award is exhausted.

Additionally, the bill provides a one-year statute of limitations for a cause of action. Accordingly, the Attorney General or a person aggrieved by a violation of this section must bring suit against the institution no later than 1 year after the date the cause of action accrues. The bill specifies that for purposes of the one-year statute of limitations, each day that a violation of the Act persists or each day that a policy in violation of the Act remains in effect constitutes a new violation of, and therefore, a new day that the cause of action accrues.

Accordingly, the bill provides a specific remedy in law for an individual whose expressive rights have been violated by a public institution of higher education.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

SB 1234 defines a public institution of higher education to include a state college or other Florida College System (FCS) institution as defined in s. 1002.21, F.S., which may suggest a state college to be different from an FCS institution defined under Florida law. Section 1002.21, F.S., lists each of the 28 FCS institutions and specifies the local service delivery areas for such institutions.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 1004.097 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.