

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 Appropriations

BILL: CS/CS/SB 264

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Education); Education Committee; and Senator Rodrigues

SUBJECT: Higher Education

DATE: March 22, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brick</u>	<u>Bouck</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Underhill</u>	<u>Elwell</u>	<u>AED</u>	<u>Recommend: Fav/CS</u>
3.	<u>Underhill</u>	<u>Sadberry</u>	<u>AP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 264 adds requirements designed to protect the expression of diverse viewpoints at Florida College System (FCS) institutions and state universities. The bill:

- Requires each FCS institution and state university to annually assess the intellectual freedom and viewpoint diversity at that institution using a survey adopted by the State Board of Education (SBE) or the Board of Governors of the State University System (BOG), as applicable.
- Prohibits the SBE and the BOG from shielding students from protected free speech. In addition, the bill specifies that FCS institutions and state universities are prohibited from shielding students, faculty, or staff from protected free speech.
- Includes in the definition of protected expressive activities faculty research, lectures, writings, and commentary, whether published or unpublished. The bill clarifies that expressive activities do not include defamatory speech.
- Authorizes a student to record video or audio of class lectures for personal educational use, in connection with a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding.
- Modifies the cause of action for violations of student expressive rights to authorize a cause of action for persons injured by violations of specified rights to free speech activities or for violations related to the recording and publication of classroom lectures.

The bill does not have a state fiscal, but will have a minimal impact on state colleges and universities. See Fiscal Analysis section.

The bill takes effect July 1, 2021.

II. Present Situation:

Operation of State Universities and Florida College System Institutions

The Board of Governors of the State University System (BOG) is required to operate, regulate, control, and be fully responsible for the management of the state university system.¹ The State Board of Education (SBE) is responsible for supervising the state college system.² Each state university is administered by, and each Florida College System (FCS) institution is governed by, distinct local boards of trustees.³

Constitutional Guarantees of Free Speech and Expression

Speech and religious expression by students and teachers or professors is protected by the First Amendment of the U.S. Constitution and Article I of the State Constitution.⁴ The government or a public actor may nevertheless regulate an individual's freedom of speech or expression within constitutional limits.⁵ The ability to regulate expression on government-owned property is determined, in part, by the characterization of the type of public forum created on government property.⁶

There are three types of public forums: traditional public forums, limited public forums, and closed public forums.⁷

Traditional Public Forum

A "traditional" or "open public forum" is a place with a longstanding tradition of freedom of expression, such as a public park, sidewalk, or street corner.⁸ In an open public forum, the government may only impose content-neutral restrictions on the time, place, and manner of expression.⁹

Limited Public Forum

A limited public forum is a venue opened only for certain groups or topics.¹⁰ A public actor may regulate the subject area content or categories of organizations allowed in limited public forums,

¹ Art. IX, s. 7(d), Fla. Const.

² Art. IX, s. 8(b), Fla. Const.

³ Art. IX, ss. 7(c) and 8(c), Fla. Const.

⁴ U.S. Const. Amend. 1; and Art. I, s. 4, Fla. Const.

⁵ *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

⁶ *Id.* at 678-79.

⁷ *Id.*

⁸ *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45-46 (1992).

⁹ *Id.* at 45-46.

¹⁰ *Id.* at 46.

but may not restrict expression based on a favorable or unfavorable viewpoint of a speaker or organization.¹¹

Closed Public Forum

A “closed public forum” is a place that is not traditionally open to public expression, such as the teacher’s school mailroom or a military base. Restrictions on speech in a closed public forum may only be reasonable and may not be designed to silence an unfavorable viewpoint.¹²

Free Speech in Public Schools

Special rules apply to speech in public schools. A school is not an open public forum unless the school or a law has intentionally designated the school as an open public forum.¹³ A school creates a limited public forum by permitting outside groups to use a venue for certain subjects or categories of organizations.¹⁴

Furthermore, educators are entitled to exercise greater control over school-sponsored student expression than over students’ personal speech.¹⁵ In this regard, “a school may in its capacity as publisher of a school newspaper or producer of a school play disassociate itself, not only from speech that would substantially interfere with its work ... or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”¹⁶ On the other hand, “[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁷ A student’s right to free speech and expression of personal speech 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.”¹⁸

In *Tinker v. Des Moines Independent Community School District*, where several high school students expressed opposition to the Vietnam war by wearing black armbands to school which did not cause disruption or interfere with the rights of others, the students’ suspension by school administration was deemed a violation of the students’ first amendment rights.¹⁹ On the other

¹¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

¹² *Perry*, 460 U.S. 37.

¹³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁴ *Good News Club v. Milford Central School*, 533 U.S. 98, 106–07 (2001) (school’s exclusion of Christian children’s club from meeting after hours based on its religious nature was unconstitutional viewpoint discrimination because the public school had opened a limited public forum).

¹⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁶ *Id.* (internal citations omitted).

¹⁷ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969) (“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 also *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).

¹⁸ *Id.* at 513.

¹⁹ *Id.* at 503.

hand, in *Morse v. Frederick*, a high school principal did not violate a student’s first amendment rights by confiscating a banner the student was waiving at a school event which advocated the use of illegal drugs, when the student could not demonstrate that the banner served a political purpose.²⁰

Free Speech on Public University and College Campuses

The U.S. Supreme Court has recognized that “the college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”²¹ Further, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools[,]’ . . . and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”²²

Notably, there is a distinction between the public expression of adults, which includes most college students, and the public expression of minors, which includes most high school students; college students have wider latitude in expressing themselves in public places than minors have in public schools.²³

The U.S. Supreme Court has characterized public universities and college campuses generally as limited public fora for purposes of regulating speech. Once the forum is created and opened, the university or college is forbidden from exercising any type of viewpoint-based discrimination.²⁴ In addition, outdoor areas of campus at public institutions of higher education in Florida have been specifically designated by law as traditional public forums.²⁵

Expressive activities protected on campuses of public institutions of higher education include, but are not limited to, any lawful oral or written communication of ideas, including all forms of peaceful assembly, protests, and speeches; distributing literature; carrying signs; circulating petitions; and the recording and publication, including the Internet publication, of video or audio recorded in outdoor areas of campus. Protected expressive activities do not include commercial speech.²⁶

Intellectual Freedom and Viewpoint Diversity in Higher Education

All state universities and FCS institutions in Florida are accredited by the Commission on Colleges of the Southern Association of Colleges and Schools (commission).²⁷ The commission requires member institutions to preserve intellectual and academic freedom²⁸ and asserts that “[t]he essential role of institutions of higher education is the pursuit and dissemination of

²⁰ *Morse v. Frederick*, 551 U.S. 393 (2007).

²¹ *Healy v. James*, 408 U.S. 169, 180, 187 (1972).

²² *Id.* at 180-81 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

²³ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986).

²⁴ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

²⁵ Section 1004.097(3)(c), F.S.

²⁶ Section 1004.097(3)(a), F.S. Commercial speech is expression related solely to the economic interests of the speaker and its audience. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).

²⁷ Commission on Colleges of the Southern Association of Colleges and Schools, *Accredited and Candidate List* (May 2020), available at <https://sacscoc.org/app/uploads/2019/11/Institutionswebmemlist.pdf> (last visited Jan. 15, 2021).

²⁸ Southern Association of Colleges and Schools, *The Principles of Accreditation: Foundations for Quality Enhancement* (Dec. 2017), available at <https://sacscoc.org/app/uploads/2019/08/2018PrinciplesOfAccreditation.pdf> at principles 6.1 and 6.4.

knowledge. Academic freedom respects the dignity and rights of others while fostering intellectual freedom of faculty to teach, research, and publish. Responsible academic freedom enriches the contributions of higher education to society.”²⁹

In January 2015, the Committee on Freedom of Expression at the University of Chicago produced a free speech policy statement (referred to as the “Chicago Statement”) that affirmed the centrality of unfettered debate to the university’s mission.³⁰ The statement provided in part:

[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The 2017 National Survey of Student Engagement revealed that most students surveyed (64 percent) felt that postsecondary coursework generally respected the expression of diverse ideas, and that the postsecondary institution generally demonstrated a commitment to diversity (71 percent). This was reflected when specific forms of diversity were considered, such as gender, religious affiliation, or disability status. When political affiliation was considered, only half of students surveyed felt their postsecondary institution was generally supportive of different political ideas.³¹

The Campus Free Expression Act became Florida law in 2018.³² Under the law, outdoor areas of campus are considered traditional public forums for individuals, organizations, and guest speakers. A public institution of higher education may create and enforce restrictions that are reasonable and content-neutral on time, place, and manner of expression and that are narrowly tailored to a significant institutional interest. Restrictions must be clear and published and must provide for ample alternative means of expression.³³ A public institution of higher education may not otherwise designate any area of campus as a free-speech zone or create policies restricting expressive activities to a particular outdoor area of campus.³⁴ A person whose expressive rights are violated may bring an action against a public institution of higher education in a court of

²⁹ Southern Association of Colleges and Schools, *Resource Manual for the Principles of Accreditation: Foundations for Quality Enhancement* (2018), available at https://www.usf.edu/system/documents/system-consolidation/referential_guiding_documents/sacscoc-resource-manual-section-06-faculty.pdf at 53.

³⁰ University of Chicago, *Report of the Committee on Free Expression* (2015), available at <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> (last visited Jan. 13, 2021).

³¹ National Survey of Student Engagement, *2017 Topical Module: Inclusiveness and Engagement with Cultural Diversity*, available at https://scholarworks.iu.edu/dspace/bitstream/handle/2022/23392/NSSE_2017_Annual_Results.pdf?sequence=1&isAllowed=y (last visited Jan. 15, 2021).

³² Chapter 2018-4, s. 6, L.O.F.

³³ Section 1004.097, F.S.

³⁴ *Id.*

competent jurisdiction to obtain declaratory and injunctive relief, reasonable court costs, and attorney fees.³⁵

In April of 2019, the president of the state university system, all twelve state university presidents, and the chair of the FCS Council of Presidents signed resolutions affirming their commitment to providing for free expression on campus.³⁶

In 2020, according to the Foundation for Individual Rights in Education (FIRE) only three out of the eleven state universities in Florida that FIRE evaluated had policies that did not inhibit free expression.³⁷ A national survey revealed, in part, that:

- 22 percent of students would have felt very uncomfortable publicly disagreeing with a professor about a controversial topic.
- 29 percent of students felt that the college administration did not make it clear that free speech was protected on campus.
- 60 percent of students had felt they could not express their opinion on a subject because of how students, a professor, or the administration would respond.
- 60 percent of students could recall at least one time during their college experience when they did not share their perspective for fear of how others would respond. Students who identified as Conservative were more likely to report a prior self-censorship incident (72 percent for Conservative students, 55 percent for Liberal students).³⁸

Nonconsensual Interception of Communications

Federal law authorizes private individuals to record wire, oral, or electronic communications if one of the parties consents. Thirty-eight states have laws following the federal one-party consent regime. Eleven states, including Florida, require the consent of all recorded parties.³⁹

Chapter 934, F.S., governs the security of various types of communications in the state, limits the ability to intercept, monitor, and record such communications, and provides criminal penalties⁴⁰ and civil remedies.⁴¹ Section 934.03, F.S., makes it a third degree felony⁴² to intentionally

³⁵ *Id.*

³⁶ William Mattox, The James Madison Institute, *Combatting 'Idea Suppression' How Florida Universities Can Continue their Rise to National Prominence* (2020), https://www.jamesmadison.org/wp-content/uploads/2020/10/PolicyBrief_CampusSpeech_Oct2020_v02.pdf (last visited Jan. 14, 2021); see also Executive Office of the Governor, *Governor Ron DeSantis Calls on State Colleges and Universities to Adopt Free Speech Resolution* (Apr. 15, 2019), available at <https://www.flgov.com/2019/04/15/governor-ron-desantis-calls-on-state-colleges-and-universities-to-adopt-free-speech-resolution/>.

³⁷ The James Madison Institute, *Combatting 'Idea Suppression' How Florida Universities Can Continue their Rise to National Prominence* (2020). The three Florida universities with policies that were not found to inhibit free speech include the University of Florida, Florida State University, and the University of North Florida. Florida Polytechnic University has never been rated by FIRE.

³⁸ College Pulse, et al., *College Free Speech Rankings: What's the Climate for Free Speech on America's College Campuses?* (2020), available at <https://reports.collegepulse.com/college-free-speech-rankings>, p. 2, 53-59 (enter name and e-mail in designated fields to download report) (last visited Jan. 20, 2021).

³⁹ 18 U.S.C. s. 2511; Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 Harv. L. & Pol'y Rev. 177, 179 (2018).

⁴⁰ Sections 934.04, 934.21, 934.215, 934.31, and 934.43, F.S.

⁴¹ Section 934.05, F.S.

⁴² A third degree felony is punishable by up to 5 years in state prison and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

“intercept” an “oral communication.”⁴³ For example, the law prohibits an individual from using an electronic scanning device to monitor private telephone calls.⁴⁴

Family Educational Rights and Privacy Act (FERPA)⁴⁵

With limited exceptions, the FERPA prohibits the distribution of federal funds to an educational agency that has a policy or practice of disclosing the education records of a student without parental or student consent. Section 1002.225, F.S., incorporates the FERPA into Florida law as it applies to public postsecondary educational institutions. The FERPA only applies to records created for an educational purpose and maintained by an educational agency.⁴⁶

III. Effect of Proposed Changes:

Free speech at State Universities and Florida College System Institutions

The bill amends s. 1001.03, F.S., to require the State Board of Education (SBE) to select or create an objective, nonpartisan, and statistically valid survey which considers the extent to which competing ideas and perspectives are presented and members of the college community feel free to express their beliefs and viewpoints on campus and in the classroom. The bill amends s. 1001.706, F.S., to require the Board of Governors of the State University System (BOG) to select or create a survey for an identical purpose applicable to the university community. The bill also:

- Directs the SBE and the BOG to require each state college or university, as applicable, to conduct an annual assessment of the intellectual freedom and viewpoint diversity at that institution. The bill defines “intellectual freedom and viewpoint diversity” as the exposure of students to, and the encouragement of students’ exploration of, a variety of ideological and political perspectives.
- Requires the SBE and the BOG to annually compile and publish the assessments by September 1 of each year, beginning on September 1, 2022.
- Authorizes the SBE to adopt rules to implement the survey.

To comply with the timeline specified in the bill, the SBE and the BOG are required to select a survey for use at Florida College System (FCS) institutions and state universities during the 2021-2022 academic year. The required surveys on intellectual freedom and viewpoint diversity may assist the SBE and the BOG to identify strengths and weaknesses in public postsecondary institutions’ efforts to protect free speech rights.

The bill specifies that the SBE, the BOG, FCS institutions, and state universities may not shield students, faculty, or staff at FCS institutions or state universities, as applicable, from free speech protected under the First Amendment to the United States Constitution and Art. I of the State

⁴³ Section 934.02(3), F.S., defines “intercept” as the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. Section 934.02(2), F.S., defines “oral communication” as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

⁴⁴ *State v. Mozo*, 655 So. 2d 1115, 1116 (Fla. 1995).

⁴⁵ 20 U.S.C. s. 1232g.

⁴⁶ *Id.*

Constitution. The bill defines “shield” to mean to limit students’, faculty members’, or staff members’ access to, or observation of, ideas and opinions they may find uncomfortable, unwelcome, disagreeable, or offensive.

The prohibition against shielding students from protected free speech may clarify to students the range of expressive activities that are protected on the campuses of FCS institutions and state universities.

Nonconsensual Recording and Publication of Video and Audio Recordings

The bill amends s. 1004.097, F.S., to expand the definition of protected expressive activities, allows for the recording of class lectures, and expands the related cause of actions.

The bill includes faculty research, lectures, writing, and commentary, regardless of their publication status, as protected expressive activities.

The bill authorizes a student to record video or audio of a class lecture, subject to the privacy protections provided in the Family Educational Rights and Privacy Act (FERPA),⁴⁷ for the following purposes: personal educational use; in connection with a complaint to the public institution of higher education where the recording was made; or as evidence in, or in preparation for, a criminal or civil proceeding. However, a student is prohibited from publishing a recorded lecture without the consent of the lecturer.

The bill modifies the cause of action for violations of student expressive rights to authorize a cause of action for persons injured by violations of specified rights to free speech activities or for violations related to the recording and publication of classroom lectures. The bill authorizes a cause of action against a public institution of higher education to bring suit against such institution and to recover monetary damages plus court costs and reasonable attorney fees. A judgement against a public institution of higher education must be paid from nonstate funds. The bill also creates a cause of action for an individual, such as a faculty member, against a person who has published video and audio recorded in a classroom in violation of the bill’s authorized purposes. A person injured by the publication of such a recording without the lecturer’s consent is able to seek declaratory or injunctive relief and is permitted to receive damages, court costs, and reasonable attorney fees, with the total recovery not to exceed \$200,000.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁴⁷ 20 U.S.C. s. 1232g.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill does not affect state expenditures or revenues. However, the bill would result in a minimal increase in expenditures for Florida College System and State University System institutions to administer the annual intellectual freedom and viewpoint diversity assessment.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 1001.03, 1001.706, and 1004.097.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Appropriations on March 18, 2021:

The committee substitute:

- Specifies that the Student Government, that is part of the University, is subject to all applicable federal and state laws and regulations and policies of the Board of Governors
- Adds ‘faculty members’ and ‘staff members’ to the persons protected from shielding by a state university or FCS institution.
- Specifies that a student may record video or audio of a class lecture for the following purposes:
 - For personal educational use;
 - In connection with a complaint to the public institution of higher education where the recording was made; or
 - As evidence in, or in preparation for, a criminal or civil proceeding.
- Prohibits a recorded lecture from being published without the consent of the lecturer.
- Includes faculty research, lectures, writing, and commentary, regardless of their publication status, as protected expressive activities.
- Modifies the cause of action for violations of student expressive rights to authorize a cause of action for persons injured by violations of specified rights to free speech activities or for violations related to the recording and publication of classroom lectures. The committee substitute authorizes a cause of action:
 - Against a public institution of higher education to recover damages plus court costs and reasonable attorney fees.
 - For an individual, such as a faculty member, against a person who has published video or audio recorded in a classroom in violation of the bill’s authorized purposes, for declaratory or injunctive relief and damages, court costs, and reasonable attorney fees, with the total recovery not to exceed \$200,000.
 - Require that a judgement against the public institution of higher education be paid from nonstate funds.

CS by Education on January 26, 2021

The committee substitute:

- Extends to Florida College System institutions and state universities the provision of the bill prohibiting the State Board of Education (SBE) and the Board of Governors of the State University System from shielding students from constitutionally protected free speech.
- Defines the term “shield” to mean to limit students’ access to or observation of ideas and opinions they may find uncomfortable, unwelcome, disagreeable, or offensive.
- Clarifies that the right provided in the bill to record and publish audio and video recorded in classrooms and outdoor areas of campus is subject to the privacy protections provided by the Family Educational Rights and Privacy Act.
- Authorizes the SBE to adopt rules to implement the survey on intellectual freedom and viewpoint diversity, which is required by the bill.

B. Amendments:

None.