

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 741 Anti-Semitism

SPONSOR(S): Education Committee, Criminal Justice Subcommittee, Fine, Caruso and others

TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	Frost	Hall
2) Education Committee	17 Y, 0 N, As CS	McAlarney	Hassell
3) Judiciary Committee			

SUMMARY ANALYSIS

This bill amends the Florida Educational Equity Act (FEEA) by adding religion as a protected class with regard to discrimination against students and employees in the Florida K-20 public education system.

The bill requires all public K-20 educational institutions to treat discrimination, motivated by anti-Semitic intent, by students or employees or resulting from institutional policies in an identical manner to discrimination motivated by race.

For Florida K-20 public schools, the bill adds to current law a definition of anti-Semitism similar to the definition adopted by the U.S. Department of Education, Office of Civil Rights. Specifically, the term "anti-Semitism" would include a certain perception of the Jewish people, which may be expressed as hatred toward Jewish people, rhetorical and physical manifestations of anti-Semitism directed toward a person, his or her property, or toward Jewish community institutions or religious facilities.

The bill adds to Florida law examples of what classifies as anti-Semitism including those related to Jewish people generally and the State of Israel.

The bill includes legislative intent stating that the newly-enacted law governing anti-Semitism does not diminish or infringe upon any right protected under the First Amendment to the United States Constitution, or the Florida Constitution. The bill prohibits construction of the law in conflict with federal or state discrimination laws.

The bill does not appear to have a fiscal impact.

The bill provides an effective date of upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal and State Constitutional Law Regarding Free Speech

The First Amendment to the U.S. Constitution, which guarantees freedom of expression, namely the right of an individual to speak freely.¹

The First Amendment to the U.S. Constitution states:

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.

Similarly, Article I, Section 4 of the Florida Constitution states:

Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. . . .

Also, Article I, Section 2 of the Florida Constitution states:

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Both the U.S. Constitution and the Florida Constitution contain free speech clauses, which protect an individual's freedom of speech and expression.² Florida courts have generally treated federal and state speech rights the same and have held that in any state issue the federal constitution represents the "floor" for basic freedoms, and the state constitution represents the "ceiling."³

European Monitoring Centre on Racism and Xenophobia Definition of Anti-Semitism

In 2005, the European Monitoring Centre on Racism and Xenophobia adopted a definition of anti-Semitism.⁴ In 2010, as part of the Special Envoy to Monitor and Combat Anti-Semitism,⁵ the U.S. Department of State adopted the definition of anti-Semitism. The definition of anti-Semitism provides that:

Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.⁶

¹ U.S. CONST., AMEND. 1.

² U.S. CONST., AMEND. 1; FLA. CONST. art. I, s. 4; FLA. CONST. art. I, s. 2.

³ *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1030 (Fla. 2004) (citing *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992)).

⁴ TIMES OF ISRAEL, *EU Drops its Working Definition of Anti-Semitism*, <https://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/> (last visited Mar. 19, 2019).

⁵ U.S. Department of State, *Monitoring and Combatting Anti-Semitism*, <https://web.archive.org/web/20171128034123/https://www.state.gov/s/rga/seas/index.htm> (last visited Mar. 13, 2019).

⁶ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Fact Sheets*, <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm> (last visited Mar. 20, 2019).

The definition of anti-Semitism describes examples of anti-Semitism as:

- Calling for, aiding, or justifying the killing or harming of Jews (often in the name of a radical ideology or an extremist view of religion).
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a collective – especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government, or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, the State of Israel, or even for acts committed by non-Jews.
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interest of their own nations.⁷

The definition of anti-Semitism describes examples of anti-Semitism regarding the State of Israel as:

- Using the symbols and images associated with classic anti-Semitism to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Blaming Israel for all inter-religious or political tensions.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Multilateral organizations focusing on Israel only for peace or human rights investigations.
- Denying the Jewish people their right to self-determination, and denying Israel the right to exist.⁸

The guidance regarding the definition indicates that criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic.⁹ According to the International Holocaust Remembrance Alliance, at least 17 countries have adopted the definition of anti-Semitism.¹⁰

U.S. Department of Education, Office of Civil Rights

The U.S. Department of Education (U.S. DOE), Office of Civil Rights (OCR) has a complaint-resolution process to enforce civil rights claims under Title VI of the Civil Rights Act of 1964.¹¹ The OCR ensures equal access to education and enforces civil rights laws.¹² OCR has jurisdiction to enforce civil rights laws which prohibit discrimination on the basis of race, ethnicity, or national origin in programs and activities receiving financial assistance from the U.S. DOE.¹³ While, OCR does not have jurisdiction to enforce constitutional rights regarding religious discrimination or political speech,¹⁴ it has interpreted Title VI as protecting students of any religion from discrimination, including harassment, based on a

⁷ U.S. Department of State, Bureaus, Office of Religious and Global Affairs, Resources, *Defining Anti-Semitism*, Jan. 20, 2017, <https://web.archive.org/web/20171128034125/http://www.state.gov/s/rga/resources/267538.htm> (last visited Mar. 19, 2019).

⁸ *Id.*

⁹ *Id.*

¹⁰ International Holocaust Remembrance Alliance, *Working Definition of Anti-Semitism*, Jul. 19, 2018, <https://www.holocaustremembrance.com/index.php/news-archive/working-definition-antisemitism> (last visited Mar. 19, 2019).

¹¹ See The Civil Rights Act of 1964, 42 U.S.C.S s. 2000d-2.

¹² U.S. Department of Education, Office of Civil Rights, *About OCR*, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Mar. 19, 2019).

¹³ OCR letter to Morton A. Klein, President, Zionists of America, Case No. 02-11-2157, Rutgers University, Jul. 31, 2014, <https://assets.documentcloud.org/documents/1300803/ocr-decision-on-title-vi-complaint-7-31-14.pdf> (last visited Mar. 19, 2019).

¹⁴ U.S. Department of Education, Office of Civil Rights, *RE: Rutgers University – OCR Case No. 02-11-2157*, Letter to Susan B. Tuchman, Footnote 1,

<https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5bae6de471c10b08c080420a/1538158057692/US+Department+of+Education+and+Working+Definition%5B1%5D+%281%29.pdf> (last visited Mar. 20, 2019).

student's actual or perceived shared ancestry or ethnic characteristics, or citizenship or residency in a country with a dominant religion or distinct religious identity.¹⁵

A complaint of discrimination may be filed by any person or organization which believes that an educational institution that receives federal funds has discriminated against someone on the basis of race, color, national origin, sex, disability, or age. The person or organization filing the complaint need not be the alleged victim.¹⁶

OCR's jurisdiction extends to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive federal funds. The OCR investigates complaints regarding: academic programs, grading, classroom, assignment, admissions, recruitment, financial aid, student treatment services, guidance counseling, discipline, vocational education, recreation, physical education, athletics, housing, and employment.¹⁷

To be actionable by OCR, alleged discrimination must include something beyond the mere expression of views, words, symbols, or thought that a student finds personally offensive.¹⁸ The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. In order to establish a hostile environment, conduct must be sufficiently severe, persistent, or pervasive as to limit or deny the student's ability to participate in or benefit from the educational program.¹⁹

Kenneth S. Stern, former director on anti-Semitism for the American Jewish Committee and the lead author of the definition of anti-Semitism, opposes the use of the definition in an educational setting. He stated that the definition of anti-Semitism was intended for data collectors writing reports about anti-Semitism in Europe and for the U.S. State Department to use when discussing anti-Semitism with other countries. He stated it was never supposed to be used to curtail speech on campuses.²⁰ Stern expressed concern that even if lawsuits alleging Title VI violations fail, students and faculty members will be scared into silence, and administrators will err on the side of suppressing or censoring speech.²¹

For purposes of civil rights cases at educational institutions, the OCR adopted a similar definition of anti-Semitism in 2018. As of March 1, 2019, the OCR has no pending cases in Florida regarding Title VI – National Origin Discrimination Involving Religion.²² However, there are 24 pending cases regarding Title VI – Racial Harassment.²³

¹⁵ ¹⁵ U.S. Department of Education, Office of Civil Rights, About ED, Offices, *Religious Discrimination*, <https://www2.ed.gov/about/offices/list/ocr/religion.html> (last visited Mar. 20, 2019).

¹⁶ U.S. Department of Education, Office of Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, <https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf> (last visited Mar. 20, 2019).

¹⁷ *Id.*

¹⁸ OCR letter to Morton A. Klein, President, Zionists of America, Case No. 02-11-2157, Rutgers University, Jul. 31, 2014, <https://assets.documentcloud.org/documents/1300803/ocr-decision-on-title-vi-complaint-7-31-14.pdf> (last visited Mar. 19, 2019).

¹⁹ *Id.*

²⁰ Kenneth S. Stern, *Will Campus Criticism of Israel Violate Federal Law?*, On Campus, *THE NEW YORK TIMES*, Dec. 12, 2016, <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html> (last visited Mar. 19, 2019).

²¹ *Id.*

²² OCR, Pending Cases Currently Under Investigation, *Race and National Origin Discrimination*, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tvi.html?perPage=1000&queries%5Bstate%5D=FL&queries%5Btod%5D=Title+VI++National+Origin+Discrimination+Involving+Religion> (last visited Mar. 20, 2019).

²³ OCR, Pending Cases Currently Under Investigation, *Racial Harassment*, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tvi.html?perPage=1000&queries%5Bstate%5D=FL&queries%5Btod%5D=Title+VI++Racial+Harassment> (last visited Mar. 20, 2019).

Access to Courts

A complainant in a Title VI civil rights case has the right to file a private lawsuit against the educational institution in federal court regardless of whether the OCR finds a civil rights violation against the institution.²⁴ The court applies strict scrutiny to review a case because the case would be based upon racial discrimination.²⁵ Strict scrutiny means the court presumes the law or action is unconstitutional. The institution has the burden of proving that the institution's challenged policy or action is constitutional. To withstand strict scrutiny review, the institution must show that the law, rule, policy, or action is necessary to achieve a compelling state interest. If this is proved, the institution must then demonstrate that the activity is narrowly tailored to achieve the intended result. If the institution cannot do so, the complainant prevails.²⁶

Title VI Complaint against Rutgers University, The State University of New Jersey

In 2011, the Zionist Organization of America (ZOA) filed a Title VI complaint against Rutgers University (a public university in New Jersey) alleging that Jewish students were subjected to a hostile environment in violation of Title VI of the Civil Rights Act because the University failed to protect Jewish students from harassment and discrimination.²⁷ The ZOA's complaint alleged that Jewish students were harassed and treated differently than other students and the University failed to respond appropriately.²⁸ The OCR investigated and determined that, regarding one of the allegations, there was insufficient evidence that the alleged victim was subjected to unlawful harassment because of his national origin. Also, the OCR found the evidence supported the conclusion that the alleged perpetrator's speech was protected under the First Amendment of the U.S. Constitution and therefore there was insufficient evidence that the University failed to respond appropriately.²⁹ The OCR closed the case in 2014.³⁰

The OCR reopened the Rutgers University investigation in 2018 and is currently reevaluating the evidence using the definition of anti-Semitism similar to the U.S. State Department's definition of anti-Semitism.³¹ The investigation seeks to determine whether a hostile environment on the basis of national origin or race existed at the University for students of actual or perceived Jewish ancestry or ethnic characteristics.³²

Florida Department of Education, Office of Equal Educational Opportunity

The Florida Department of Education, Office of Equal Educational Opportunity (OEEO) provides services and information to Florida schools, school districts, parents, students, and community groups on topics impacting educational equity.³³ The OEEO, for institutions receiving federal funds, monitors the equal access and equal opportunity in institutional programs, services, and activities to all students and staff on the basis of race, sex, national origin, disability, age, and marital status.³⁴ The OEEO also ensures that the educational environment is free of bias, stereotyping, discrimination, and harassment

²⁴ OCR letter, *supra* note 18.

²⁵ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁶ *Id.*

²⁷ OCR letter, *supra* note 18.

²⁸ OCR letter, *supra* note 18.

²⁹ OCR letter, *supra* note 18.

³⁰ OCR letter, *supra* note 18.

³¹ See Letter to Susan B. Tuchman, *supra* note 14.

³² *Id.*

³³ Florida Department of Education, Schools, *Equal Educational Opportunity*, <http://www.fldoe.org/schools/equal-educal-opportunity/index.stml> (last visited Mar. 19, 2019).

³⁴ *Id.*

through on-site compliance reviews, review of annual equity updates from school districts, and providing appropriate technical assistance.³⁵

Florida Educational Equity Act

The Florida Educational Equity Act³⁶ (FEEA) governs students' and employees' civil rights in Florida's public educational systems. The FEEA mirrors civil rights protections under Title VI of the federal Civil Rights Act.³⁷

The FEEA requires equal access for all people to the Florida K-20 public education system and prohibits discrimination against any student or employee in the system. The FEEA prohibits discrimination based on race, ethnicity, gender, national origin, disability, or marital status,³⁸ and requires all education opportunities offered by public educational institutions be made available without discrimination on those basis.³⁹

Freedom of religion is protected by both the state and federal constitutions. According to the Florida Department of Education, religion is not included in the FEEA because it is a constitutional right.⁴⁰

Effect of Proposed Changes:

This bill amends the Florida Educational Equity Act (FEEA) by adding religion as a protected class with regard to discrimination against students and employees in the Florida K-20 public education system.

The bill requires all public K-20 educational institutions to treat discrimination, motivated by anti-Semitic intent, by students or employees or resulting from institutional policies in an identical manner to discrimination motivated by race.

The bill adopts a definition of anti-Semitism similar to the definition adopted by the OCR. The definition includes a certain perception of the Jewish people, which may be expressed as hatred toward Jewish people, rhetorical and physical manifestations of anti-Semitism directed toward a person, his or her property, or toward Jewish community institutions or religious facilities.

The bill specifies examples of what classifies as anti-Semitism including those related to Jewish people generally and the State of Israel.

The bill includes legislative intent stating that the newly-enacted law governing anti-Semitism would not diminish or infringe upon any right protected under the First Amendment to the United States Constitution, or the Florida Constitution. The bill prohibits construction of the law in conflict with federal or state discrimination laws.

The bill provides an effective date of upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Amends s. 1000.05, F.S., prohibiting discrimination in the Florida K-20 public education system based on religion; requiring a public K-20 educational institution to take into

³⁵ *Id.*

³⁶ Section 1000.05, F.S.

³⁷ E-mail from Legislative Affairs Director, Florida Department of Education, *RE: Office of Equal Educational Opportunity*, Feb. 19, 2019.

³⁸ Section 1000.05, F.S.

³⁹ Section 1002.20, F.S.

⁴⁰ *See* E-mail from Legislative Affairs Director, *supra* note 37.

consideration anti-Semitism under certain instances of discrimination; defining the term "anti-Semitism"; providing construction.

Section 2: Amends s. 1002.20, F.S., conforming K-12 student and parent rights to changes made.

Section 3: Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None noted.

2. Expenditures:

None noted.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None noted.

2. Expenditures:

None noted.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None noted.

D. FISCAL COMMENTS:

None noted.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

The Supreme Court of the United States has emphasized that the First Amendment right to free speech includes a right to make hate speech, holding recently as a “bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”⁴¹ The Establishment Clause of the First Amendment prohibits the government from making any law respecting an establishment of religion.⁴² The clause prohibits any government action that unduly favors one religion over another.

⁴¹ *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

⁴² U.S. CONST. amend. I. *See also* FLA. CONST. art. I.

The Fourteenth Amendment of the U.S. Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.⁴³ The Fourteenth Amendment prevents unreasonable discrimination based on the use of classification, thereby preventing laws which draw distinctions between individual classes based solely on differences that do not relate to a legitimate governmental objective.

This bill defines anti-Semitism as it relates to discrimination in public educational institutions and the State of Israel in a way that may be interpreted by a court to indicate preference for one religion, ethnicity, race, or national origin over another.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2019, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Prohibited discrimination against a public education system student or employee based on religion;
- Defined anti-Semitism as it relates to public educational institutions;
- Required a public educational institution to treat discrimination based on anti-Semitism in an identical manner to discrimination based on race; and
- Prohibited discrimination based on religion in public educational institution programs, activities, and opportunities;
- Revised the bill's effective date to upon becoming a law.

On March 21, 2019, the Education Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Clarified that a public K-20 educational institution must treat discrimination motivated by anti-Semitic intent in an identical manner to discrimination motivated by race.
- Clarified language on how courts must construe the statute.

This analysis is drafted to the committee substitute as passed by the Education Committee.

⁴³ U.S. CONST. amend. XIV. *See also* FLA. CONST. art. I.
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