

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

April 16, 2019

Opinion No. 19-06

Anti-Semitism Awareness Act

Question

Would proposed legislation that requires state institutions of higher education and local education agencies to use a particular definition of “anti-Semitism” when reviewing, investigating, or determining whether there has been a violation of laws and regulations preventing discrimination based on Jewish ancestry or ethnic characteristics violate the state or federal constitutional protections for the freedom of speech and religion?

Opinion

No. The proposed legislation does not regulate speech or religious activity directly. And if it becomes law, institutions of higher education and local education agencies in the State will be required to implement it in a manner consistent with the state and federal Constitution.

ANALYSIS

Proposed legislation, HB 600/SB 1250, 111th Tenn. Gen. Assem. (2019), would provide a definition of “anti-Semitism” that institutions of higher education and local education agencies (LEAs) in Tennessee would be required to use when investigating and enforcing anti-discrimination laws and policies. It defines “anti-Semitism” as “a certain perception of Jews that may be expressed as hatred toward Jews,” and recognizes that “[r]hetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals or property, Jewish community institutions, and Jewish religious facilities.” The proposed legislation also notes that the definition it provides is “the same as that used in the fact sheet issued by the United States [D]epartment of [S]tate on June 8, 2010, by the Special Envoy to Monitor and Combat Anti-Semitism.” In addition, the proposed legislation includes a list of “[e]xamples of anti-Semitism” and a list of “[e]xamples of ways, taking into account the overall context, in which anti-Semitism is manifested with regard to the state of Israel.” Again, it notes that both lists of examples are taken from the June 8, 2010, fact sheet issued by the U.S. State Department.

Under the proposed legislation, Tennessee public educational entities at all levels—including LEAs, public schools, and state institutions of higher education—would be required to “take into consideration the definition and examples of anti-Semitism provided” in the proposed legislation when “reviewing, investigating, or determining whether there has been a violation” of a policy or law “prohibiting discriminatory practices on the basis of an individual’s actual or perceived shared Jewish ancestry or Jewish ethnic characteristics.” The educational entity would be required to take the definition and examples into consideration for “purposes of determining whether the alleged practice was motivated by anti-Semitic intent.”

The proposed legislation does not violate the expressive and religious freedoms protected by the federal and state Constitutions. Most importantly, the bill does not regulate speech or religious activity at all. State and federal anti-discrimination laws and policies—including those adopted in accordance with Title VI of the Civil Rights Act of 1964, which applies to every educational “program or activity receiving Federal financial assistance”—prohibit not speech but a particular type of conduct, namely “discrimination.”¹ The proposed legislation provides a definition to guide state and local officials in identifying one particular type of that conduct, i.e. discrimination motivated by anti-Semitism,² but does not itself restrict speech or religious rights or regulate any primary conduct. Instead, it requires state educational institutions to “take into consideration” the definition and examples of “anti-Semitism” in their investigation and evaluation of discriminatory practices for the purposes of determining whether those practices were motivated by animus toward Jewish ancestry or ethnic characteristics. The U.S. Department of Education has indicated it relies on the same definition of anti-Semitism in enforcing Title VI.³

Hateful, offensive speech, including anti-Semitic speech, is fully protected by the First Amendment. *See Synder v. Phelps*, 562 U.S. 443, 458 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992). The proposed legislation would do nothing to alter or undermine that protection. Neither a State nor a public educational institution may suppress that speech or punish such expression unless it can satisfy exacting scrutiny under the First Amendment.

But the Supreme Court has also recognized that protected expression may be relevant evidence in evaluating whether an individual has engaged in prohibited conduct. In *Wisconsin v. Mitchell*, for example, a unanimous Court made clear that the “First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” 508 U.S. 476, 489 (1993); *see also R.A.V.*, 505 U.S. at 389 (noting that some speech “can be swept up incidentally within the reach of a statute directed at conduct rather than speech”). Similarly, courts have repeatedly recognized that state officials are permitted to examine protected expression when enforcing Title VI and other anti-discrimination laws and policies, particularly for the purpose of evaluating motive or intent. *See, e.g., Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 933-34 (10th Cir. 2003); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 409 (5th Cir. 2015).

¹ Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

² Both the U.S. Department of Education and the U.S. Department of Justice have concluded that, although Title VI does not prohibit discrimination on the basis of religion, it protects Jewish students, as well as Muslim or Sikh students, from “discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics.” *See* U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter (Oct. 26, 2010), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; U.S. Department of Justice, Civil Rights Division, Letter to U.S. Department of Education, Office of Civil Rights (Sept. 8, 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf.

³ *See* Letter to Susan B. Tuchman, Zionist Organization of America, from Kenneth L. Marcus, Asst. Sec. for Civil Rights, U.S. Department of Education (Aug. 27, 2018), *available at* <https://www.politico.com/f/?id=00000165-ce21-df3d-a177-cee9649e0000>.

Critics of similar legislation proposed at the federal level and in other States have raised constitutional objections based, in part, on their contention that some of the examples of anti-Semitism provided in the 2010 State Department definition, such as “denying Israel the right to exist,” would allow an educational institution to punish students for protected expression that is not motivated by anti-Semitism but by political beliefs.⁴ But, as noted, the proposed legislation would not prohibit or punish any speech itself; it would only guide education officials in investigating and enforcing existing prohibitions against discriminatory conduct. The concerns expressed by those scholars and advocates arise only if education officials apply the definition in a manner that violates the First Amendment, which, of course, the Constitution prohibits.

Indeed, the text of the bill itself explicitly prohibits education officials from applying the definition in the manner suggested by these critics. The proposed legislation makes clear that the definition provided “does not diminish or infringe upon any right protected under the Constitution of Tennessee . . . or the First Amendment to the Constitution of the United States.” And the definition of anti-Semitism also distinguishes its examples from traditional political speech, clarifying that “[c]riticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic.” Moreover, numerous existing state statutes already prevent public institutions of higher education and LEAs in Tennessee from infringing on students’ freedom of speech or religion.⁵

In short, the proposed legislation would not undermine the protections provided by the state and federal Constitutions—as well as numerous state statutes—for the expressive and religious rights of students. If enacted it would be—indeed, *must* be—interpreted and applied in a manner consistent with those constitutional protections. The definition of anti-Semitism it provides would guide state officials in enforcing existing prohibitions against discrimination but would not regulate speech or religious activity directly. Accordingly, the proposed legislation would not violate the state or federal Constitution.

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⁴ See, e.g., American Civil Liberties Union, *Statement on Senate Introduction of “Anti-Semitism Awareness Act”* (May 23, 2018), available at <https://www.aclu.org/news/aclu-statement-senate-introduction-anti-semitism-awareness-act>; Erwin Chemerinsky & Howard Gillman, “A Bill to Police Campus Speech,” *Wall St. Journal* (Dec. 15, 2016), available at <https://www.wsj.com/articles/a-bill-to-police-campus-speech-1481846338>; Eugene Volokh, “The University of California, ‘Microaggressions,’ and Supposedly Anti-Semitic Criticism of Israel,” *The Volokh Conspiracy* (Aug. 31, 2015), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/the-university-of-california-microaggressions-and-supposedly-anti-semitic-criticism-of-israel/?utm_term=.3697d8fd979c&wpisrc=nl_volokh&wpm=1.

⁵ For example, the Campus Free Speech Protection Act mandates, among other things, that Tennessee institutions of higher education “shall be committed to maintaining a campus as a marketplace of ideas for all students and all faculty in which the free exchange of ideas is not to be suppressed because the ideas put forth are thought by some or even by most members of the institution’s community to be offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.” Tenn. Code Ann. § 49-7-2405(3). And the Tennessee Student Religious Liberty Act of 1997, among other provisions, makes it clear that elementary and secondary school students retain expressive and religious rights while in school. See Tenn. Code Ann. § 49-6-2901 et seq.

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