



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-3925/1
MDK:kjf

2019 SENATE BILL 403

September 16, 2019 - Introduced by Senators KAPENGA, STROEBEL, BERNIER, CRAIG and OLSEN, cosponsored by Representatives HORLACHER, VOS, MURPHY, ALLEN, BRANDTJEN, DITTRICH, DUCHOW, EDMING, FELZKOWSKI, GUNDRUM, JAMES, KATZMA, KITCHENS, KNODL, KRUG, KUGLITSCH, KULP, MACCO, MAGNAFICI, QUINN, RAMTHUN, ROHRKASTE, SKOWRONSKI, SORTWELL, STEFFEN, TAUCHEN, THIESFELDT and TUSLER. Referred to Committee on Universities, Technical Colleges, Children and Families.

1 **AN ACT to amend** 36.35 (1); and **to create** 36.02 and 227.01 (13) (Lo) of the
2 statutes; **relating to:** free expression within the University of Wisconsin
3 System, providing an exemption from rule-making procedures, and granting
4 rule-making authority.

Analysis by the Legislative Reference Bureau

This bill requires the Board of Regents of the University of Wisconsin System to adopt a policy on free expression that applies at the four-year and two-year institutions of the system and supersedes and nullifies any prior Board of Regents or institution policies or rules restricting free expression. The bill allows the Board of Regents to adopt the policy without promulgating rules and requires the policy to be adopted no later than 120 days after the bill's effective date. The policy must contain statements regarding the following: 1) that the primary function of an institution is the discovery, improvement, transmission, and dissemination of knowledge; 2) that it is not the proper role of an institution to shield individuals from speech protected by the First Amendment of the U.S. Constitution; 3) that students and faculty have the freedom to discuss any problem as permitted by the First Amendment and within specified limits; 4) that any person lawfully present on campus may protest or demonstrate, but that protests and demonstrations that interfere with the expressive rights of others are subject to sanction; 5) that campuses are open to invited speakers; 6) that public areas are public forums and open on the same terms to any speaker; and 7) that institutions must remain neutral on public policy controversies.

SENATE BILL 403

The policy must include a range of disciplinary sanctions for anyone under an institution's jurisdiction who engages in violent or other disorderly conduct that materially and substantially disrupts the free expression of others. In addition, the policy must provide that in disciplinary cases involving expressive conduct, students are entitled to a disciplinary hearing under published procedures that include specified rights. The policy must require a formal investigation and disciplinary hearing the second time a student is alleged to have interfered with the expressive rights of others. If a student is twice found responsible for interfering with the expressive rights of others at any time during his or her enrollment, the student must be suspended for a minimum of one semester. If a student is found responsible for such interference a third time, the student must be expelled.

The bill also requires the policy to allow any person to make a report that another person has violated the policy. In addition, a formal investigation and disciplinary hearing is required if two or more such reports are made regarding the same person.

The bill provides that institutions may restrict student expression only for expressive activity that is not protected by the First Amendment, including state or federal law violations, defamation, specified types of harassment and threats, certain invasions of privacy or confidentiality, and violations of reasonable time, place, or manner restrictions on expressive activities.

The bill also requires the Board of Regents to make annual reports to the legislature and governor that describe institutional neutrality, free expression barriers and disruptions, and administrative handling and discipline relating to those barriers and disruptions. Before a legislative standing committee can take any action regarding a report, the bill requires the committee to hold a public hearing.

In addition, the bill does the following:

1. Allows a person whose expressive rights are violated by a violation of the bill's requirements to bring an action to enjoin a violation and obtain reasonable attorney fees and damages.
2. Allows a defendant who prevails in an action described above to recover reasonable attorney fees if the action was frivolous or brought in bad faith.
3. Sets forth legislative findings regarding free expression at the institutions of the UW System.
4. Requires the Board of Regents to provide notice to students upon adopting the policy required under the bill.
5. Requires institutions to do the following: a) describe free expression policies and procedures in freshman and transfer student orientation programs; b) provide training on those policies and procedures to employees upon hiring; and c) provide annual training on those policies and procedures to instructors.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SENATE BILL 403

1 **36.02 Campus Free Speech Act. (1)** LEGISLATIVE FINDINGS. The legislature
2 finds all of the following:

3 (a) Article I, section 3, of the Wisconsin Constitution recognizes the right to
4 speak freely and prohibits laws abridging the liberty of speech.

5 (b) The system has historically embraced a commitment to freedom of
6 expression in policy.

7 (c) In recent years, institutions have abdicated their responsibility to uphold
8 free speech principles and these failures make it appropriate for the system to restate
9 and confirm its commitment in this regard.

10 (d) In 1974, the Committee on Free Expression at Yale issued a statement
11 known as the Woodward Report that stands as a classic defense of free expression
12 on campuses; in 2015, the Committee on Freedom of Expression at the University
13 of Chicago issued a similar and widely respected report; and in 1967, the Kalven
14 Committee Report of the University of Chicago articulated the principle of
15 institutional neutrality regarding political and social issues and the essential role of
16 such neutrality in protecting freedom of thought and expression at universities. The
17 principles affirmed by these 3 highly regarded reports are inspiring articulations of
18 the critical importance of free expression in higher education.

19 (e) The legislature views freedom of expression as being of critical importance
20 and requires that each institution ensure free, robust, and uninhibited debate and
21 deliberation by students whether on or off campus.

22 (f) The legislature has determined that it is a matter of statewide concern that
23 all institutions officially recognize freedom of speech as a fundamental right.

24 **(2) SHORT TITLE.** This section shall be known as the “Campus Free Speech Act.”

25 **(3) DEFINITIONS.** In this section:

SENATE BILL 403**SECTION 1**

1 (a) "Institution" means a college campus or university.

2 (b) "Peer-on-peer harassment" means conduct directed by one student
3 towards another individual student, on the basis of that other student's race, color,
4 creed, religion, political views, sex, national origin, disability, ancestry, age, sexual
5 orientation, gender identity, pregnancy, marital status, parental status, or military
6 status, that is so severe, pervasive, and objectively offensive that it effectively
7 deprives the victim of access to the educational opportunities or benefits provided by
8 an institution.

9 (c) "Quid pro quo sexual harassment" means explicitly or implicitly
10 conditioning a student's participation in an education program or activity or basing
11 an educational decision on the student's submission to unwelcome sexual advances,
12 requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual
13 nature.

14 (d) "True threat" means a statement that a speaker would reasonably foresee
15 that a listener would reasonably interpret as a serious expression of a purpose to
16 inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of
17 political views, or other speech that is similarly protected under the First
18 Amendment of the U.S. Constitution, regardless of whether the speaker has the
19 ability to carry out the threat.

20 (4) FREE EXPRESSION POLICY. (a) *Statements*. No later than 120 days after the
21 effective date of this paragraph ... [LRB inserts date], the Board of Regents shall
22 develop and adopt a policy on free expression that contains statements of at least all
23 the following:

24 1. That the primary function of an institution is the discovery, improvement,
25 transmission, and dissemination of knowledge by means of research, teaching,

SENATE BILL 403

1 discussion, and debate. This statement shall provide that, to fulfill this function, an
2 institution must strive to ensure the fullest degree of intellectual freedom and free
3 expression.

4 2. That it is not the proper role of an institution to shield individuals from
5 speech protected by the First Amendment of the U.S. Constitution, including ideas
6 and opinions they find unwelcome, disagreeable, or even deeply offensive.

7 3. That students and faculty have the freedom to discuss any problem that
8 presents itself, as the First Amendment of the U.S. Constitution permits and within
9 the limits of reasonable viewpoint-neutral and content-neutral restrictions on time,
10 place, and manner of expression that are consistent with this section and that are
11 necessary to achieve a significant institutional interest, provided that these
12 restrictions are clear, published, and provide ample alternative means of expression.
13 Students and faculty shall be permitted to assemble and engage in spontaneous
14 expressive activity as long as such activity is not unlawful and does not materially
15 and substantially disrupt the functioning of an institution, subject to the
16 requirements of this section.

17 4. That any person lawfully present on campus may protest or demonstrate
18 there. This statement shall make clear that protests and demonstrations that
19 interfere with the rights of others to engage in or listen to expressive activity shall
20 not be permitted and shall be subject to sanction. This statement shall not prohibit
21 professors or other instructors from maintaining order in the classroom.

22 5. That the campuses of the institution are open to any speaker whom students,
23 student groups, or members of the faculty have invited.

24 6. That the public areas of institutions are public forums and open on the same
25 terms to any speaker.

SENATE BILL 403**SECTION 1**

1 7. That each institution shall strive to remain neutral, as an institution, on the
2 public policy controversies of the day, and may not take action, as an institution, on
3 the public policy controversies of the day in such a way as to require students or
4 faculty to publicly express a given view of social policy.

5 (b) *Discipline.* The policy required under par. (a) shall satisfy all of the
6 following:

7 1. Include a range of disciplinary sanctions for anyone under the jurisdiction
8 of the institution who engages in violent or other disorderly conduct that materially
9 and substantially disrupts the free expression of others.

10 2. Provide that in all disciplinary cases involving expressive conduct, students
11 are entitled to a disciplinary hearing under published procedures, including, at least
12 all of the following:

13 a. The right to receive advanced written notice of the charges.

14 b. The right to review the evidence in support of the charges.

15 c. The right to confront witnesses against them.

16 d. The right to present a defense.

17 e. The right to call witnesses.

18 f. A decision by an impartial arbiter or panel.

19 g. The right of appeal.

20 h. The right to active assistance of counsel.

21 3. Require informing a student that he or she has the option to record his or her
22 disciplinary hearing under subd. 2.

23 4. Require a formal investigation and disciplinary hearing the 2nd time a
24 student is alleged to have interfered with the expressive rights of others.

SENATE BILL 403

1 5. Require suspension for a minimum of one semester of any student who has
2 twice been found responsible for interfering with the expressive rights of others at
3 any time during the student's enrollment.

4 6. Require the expulsion of any student who has thrice been found responsible
5 for interfering with the expressive rights of others at any time during the student's
6 enrollment.

7 (c) *Reporting.* The policy required under par. (a) shall include requirements
8 and procedures for all of the following:

9 1. Allowing any person to make a report that another person has violated this
10 section or the policy.

11 2. Requiring a formal investigation and disciplinary hearing if 2 or more
12 reports are made regarding the same person's violation of this section or the policy.

13 (d) *Inconsistent policies and rules.* The policy required under par. (a)
14 supersedes and nullifies any prior provisions in the policies and rules of the Board
15 of Regents or an institution that restrict speech on campus and are, therefore,
16 inconsistent with the policy. The Board of Regents and each institution shall remove
17 or revise any such provisions in its policies and rules to ensure compatibility with the
18 the policy required under par. (a).

19 **(5) LEGISLATIVE REPORT.** (a) Annually, no later than September 1, the Board of
20 Regents shall submit to the governor and the chief clerk of each house of the
21 legislature, for distribution to the appropriate standing committees under s. 13.172
22 (3), a report that includes all of the following:

23 1. A description of any barriers to or disruptions of free expression within
24 institutions.

SENATE BILL 403**SECTION 1**

1 2. A description of the administrative handling and discipline relating to
2 disruptions or barriers described in subd. 1. and a description of all disciplinary
3 hearings involving expressive conduct and the outcomes of those hearings.

4 3. A description of substantial difficulties, controversies, or successes in
5 maintaining a posture of administrative and institutional neutrality with regard to
6 political or social issues.

7 4. Any assessments, criticisms, commendations, or recommendations the
8 Board of Regents sees fit to include in the report.

9 (b) Each standing committee that receives a report under par. (a) shall hold a
10 public hearing before taking any action regarding that report.

11 (c) The Board of Regents shall make the report required under par. (a) available
12 to the public on the system's Internet site.

13 **(6) NOTICE; ORIENTATION; TRAINING.** (a) Upon adoption of the policy required
14 under sub. (4) (a), the Board of Regents shall provide a notice to all students enrolled
15 in the system informing the students about the policy.

16 (b) Each institution shall include in orientation programs for freshmen and
17 transfer students a section describing the policies and rules regarding free
18 expression consistent with this section. Upon hiring, each institution shall provide
19 training to employees on those policies and rules. Each institution shall provide
20 annual training to instructors on those policies and rules.

21 **(7) RULES.** The Board of Regents may promulgate rules to further the purposes
22 of the policy required under sub. (4) (a).

23 **(8) CONSTRUCTION.** Nothing in this section shall be construed to prevent
24 institutions from regulating student speech or activity that is prohibited by law.

SENATE BILL 403

1 **(9) RESTRICTION OF STUDENT EXPRESSION.** Except as further limited by this
2 section, institutions may restrict student expression only for expressive activity not
3 protected by the First Amendment of the U.S. Constitution, including any of the
4 following:

5 (a) Violations of state or federal law.

6 (b) Expression that a court has deemed unprotected defamation.

7 (c) Peer-on-peer harassment.

8 (d) Quid pro quo sexual harassment.

9 (e) True threats.

10 (f) An unjustifiable invasion of privacy or confidentiality not involving a matter
11 of public concern.

12 (g) An action that unlawfully disrupts the function of an institution.

13 (h) A violation of a reasonable time, place, and manner restriction on expressive
14 activities that is consistent with sub. (4) (a) 3.

15 **(10) ENFORCEMENT.** (a) A person whose expressive rights are violated by a
16 violation of this section or the policy adopted under sub. (4) (a) may bring an action
17 to enjoin the violation of this section or the policy.

18 (b) In an action brought under par. (a), if the court finds that a violation of this
19 subsection occurred, the court shall award injunctive relief for the violation, and,
20 notwithstanding s. 814.04 (1), reasonable attorney fees and costs. The court shall
21 also award the actual damages caused by the violation or \$1,000, whichever is
22 greater.

23 (c) A person specified in par. (a) shall bring an action for a violation of this
24 subsection within one year after the date the cause of action accrues. For the purpose
25 of calculating the one-year limitation period, each day that the violation persists or

SENATE BILL 403**SECTION 1**

1 each day that a policy in violation of this subsection remains in effect constitutes a
2 new violation of this subsection and shall be considered a day that the cause of action
3 has accrued.

4 (d) If a defendant prevails in an action brought under par. (a) and the court
5 finds the action was frivolous or brought in bad faith, then, notwithstanding s. 814.04
6 (1), the defendant shall recover reasonable attorney fees incurred in connection with
7 defending the action.

8 **SECTION 2.** 36.35 (1) of the statutes is amended to read:

9 36.35 (1) POWER TO SUSPEND; RULES. The board may delegate the power to
10 suspend or expel students for misconduct or other cause prescribed by the board.
11 Subject to sub. (4) and s. 36.02 (4) (b), the board shall promulgate rules under ch. 227
12 governing student conduct and procedures for the administration of violations.

13 **SECTION 3.** 227.01 (13) (Lo) of the statutes is created to read:

14 227.01 (13) (Lo) Adopts the policy required under s. 36.02 (4) (a).

15 (END)