



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-2408/1
MDK:kjf

2017 BILL

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.

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The policy must include a range of disciplinary sanctions for anyone under an institution's jurisdiction who engages in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud, or other disorderly conduct that interferes with 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. Also, the second time that a student is found responsible for interfering with the expressive rights of others, the policy must require the student to be suspended for a minimum of one semester or expelled.

The bill also 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 appoint a council on free expression to make annual reports to the Board of Regents, legislature, and governor that describe institutional neutrality, free expression barriers and disruptions, and administrative handling and discipline relating to those barriers and disruptions. The council must consist of 13 members who represent each four-year university and the chairpersons of the assembly and senate standing committees with jurisdiction over universities.

The bill also 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.
2. Sets forth legislative findings regarding free expression at the institutions of the UW system.
3. Requires institutions to describe free expression policies and rules in freshman orientation programs.

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

1 **SECTION 1.** 36.02 of the statutes is created to read:

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

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

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

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

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

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

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

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

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

20 (a) “Institution” means a college campus or university.

21 (b) “Peer-on-peer harassment” means conduct directed by one student
22 towards another individual student, on the basis of that other student’s race, color,
23 creed, religion, political views, sex, national origin, disability, ancestry, age, sexual
24 orientation, gender identity, pregnancy, marital status, parental status, or military
25 status, that is so severe, pervasive, and objectively offensive that it effectively

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1 deprives the victim of access to the educational opportunities or benefits provided by
2 an institution.

3 (c) “Quid pro quo sexual harassment” means explicitly or implicitly
4 conditioning a student’s participation in an education program or activity or basing
5 an educational decision on the student’s submission to unwelcome sexual advances,
6 requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual
7 nature.

8 (d) “True threat” means a statement that a speaker would reasonably foresee
9 that a listener would reasonably interpret as a serious expression of a purpose to
10 inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of
11 political views, or other speech that is similarly protected under the First
12 Amendment of the U.S. Constitution, regardless of whether the speaker has the
13 ability to carry out the threat.

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

18 1. That the primary function of an institution is the discovery, improvement,
19 transmission, and dissemination of knowledge by means of research, teaching,
20 discussion, and debate. This statement shall provide that, to fulfill this function, an
21 institution must strive to ensure the fullest degree of intellectual freedom and free
22 expression.

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

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

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

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

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

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

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

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1 1. Include a range of disciplinary sanctions for anyone under the jurisdiction
2 of the institution who engages in violent, abusive, indecent, profane, boisterous,
3 obscene, unreasonably loud, or other disorderly conduct that interferes with the free
4 expression of others.

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

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

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

10 c. The right to confront witnesses against them.

11 d. The right to present a defense.

12 e. The right to call witnesses.

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

14 g. The right of appeal.

15 h. The right to active assistance of counsel, if suspension for longer than 9 days
16 or expulsion are potential penalties.

17 3. Require suspension for a minimum of one semester or expulsion of any
18 student who has twice been found responsible for interfering with the expressive
19 rights of others.

20 (c) *Inconsistent policies and rules.* The policy required under par. (a)
21 supersedes and nullifies any prior provisions in the policies and rules of the Board
22 of Regents or an institution that restrict speech on campus and are, therefore,
23 inconsistent with the policy. The Board of Regents and each institution shall remove
24 or revise any such provisions in its policies and rules to ensure compatibility with the
25 the policy required under par. (a).

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1 **(5) COUNCIL ON FREE EXPRESSION.** (a) The Board of Regents shall create a single
2 council on free expression consisting of no less than 15 members. Thirteen of the
3 members shall each represent one of the universities of the system and 2 of the
4 members shall be the chairpersons of the assembly and senate standing committees
5 having jurisdiction over universities as determined by the speaker of the assembly
6 and the president of the senate.

7 (b) Annually no later than September 1, the council shall submit to the Board
8 of Regents, the governor, and the chief clerk of each house of the legislature, for
9 distribution to the appropriate standing committees under s. 13.172 (3), a report that
10 includes all of the following:

11 1. A description of any barriers to or disruptions of free expression within
12 institutions.

13 2. A description of the administrative handling and discipline relating to
14 disruptions or barriers described in subd. 1.

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

18 4. Any assessments, criticisms, commendations, or recommendations the
19 council sees fit to include in the report.

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

22 **(6) FRESHMAN ORIENTATION.** Each institution shall include in freshman
23 orientation programs a section describing to all students the policies and rules
24 regarding free expression consistent with this section.

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

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

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

9 (a) Violations of state or federal law.

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

11 (c) Peer-on-peer harassment.

12 (d) Quid pro quo sexual harassment.

13 (e) True threats.

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

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

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

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

22 (b) In an action brought under par. (a), if the court finds that a violation of this
23 subsection occurred, the court shall award injunctive relief for the violation, and,
24 notwithstanding s. 814.04 (1), reasonable attorney fees and costs. The court shall

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1 also award the actual damages caused by the violation or \$1,000, whichever is
2 greater.

3 (c) A person specified in par. (a) 2. shall bring an action for a violation of this
4 subsection within one year after the date the cause of action accrues. For the purpose
5 of calculating the one-year limitation period, each day that the violation persists or
6 each day that a policy in violation of this subsection remains in effect constitutes a
7 new violation of this subsection and shall be considered a day that the cause of action
8 has accrued.

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

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

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

15 227.01 (13) (Lo) Adopts the policy required under s. 36.02 (4) (a).

16 (END)