



State of Wisconsin
2019 - 2020 LEGISLATURE

LRBs0167/1
MDK:kjf&amn

**SENATE SUBSTITUTE AMENDMENT 1,
TO SENATE BILL 403**

November 19, 2019 - Offered by Senator KAPENGA.

1 **AN ACT** *to amend* 36.35 (1); and *to create* 36.02, 38.002 and 227.01 (13) (Lo) of
2 the statutes; **relating to:** free expression within the University of Wisconsin
3 and Technical College Systems, providing an exemption from rule-making
4 procedures, and granting rule-making authority.

Analysis by the Legislative Reference Bureau

This bill requires both the Board of Regents of the University of Wisconsin System and the Technical College System Board each to adopt a policy on free expression that applies at each UW institution and technical college and supersedes and nullifies any prior policies or rules restricting free expression. The bill allows each board 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 a UW institution or technical college is the discovery, improvement, transmission, and dissemination of knowledge; 2) that it is not the proper role of a UW institution or technical college 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 may not engage in conduct that materially and substantially disrupts another's expressive

activity in a campus space reserved for that activity under the exclusive control of a particular group; 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 UW institutions and technical colleges may not take action on public policy controversies in such a way that requires students or faculty to publicly express a given view of social policy.

The policy must include a range of disciplinary sanctions for anyone under a UW institution's or technical college'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 UW institutions and technical colleges 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 boards 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 UW institutions and technical colleges.

4. Requires the boards to provide notice to students upon adopting the policy required under the bill.

5. Requires UW institutions and technical colleges 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:

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.

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

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

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

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

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

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

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

9 (b) “Materially and substantially disrupts” means when a person, with the
10 intent to or knowledge of doing so, significantly hinders another person’s or group’s
11 expressive activity, prevents the communication of a message, or prevents the
12 transaction of the business of a lawful meeting, gathering, or procession by engaging
13 in fighting, violence, or seriously disruptive behavior, or physically blocking or
14 hindering another person from attending, listening to, viewing, or otherwise
15 participating in an expressive activity. “Materially and substantially disrupts” does
16 not include engaging in conduct that is protected under the First Amendment of the
17 U.S. Constitution, including any of the following:

18 1. Lawful protests or counterprotests in the outdoor areas of campus generally
19 accessible to the members of the public, except during times when those areas have
20 been reserved in advance for other events.

21 2. Minor, brief, or fleeting nonviolent disruptions of events that are isolated and
22 short in duration.

23 (c) “Peer-on-peer harassment” means conduct directed by one student towards
24 another individual student, on the basis of that other student’s race, color, creed,
25 religion, political views, sex, national origin, disability, ancestry, age, sexual

1 orientation, gender identity, pregnancy, marital status, parental status, or military
2 status, that is so severe, pervasive, and objectively offensive that it effectively
3 deprives the victim of access to the educational opportunities or benefits provided by
4 an institution.

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

10 (e) “True threat” means a statement that a speaker would reasonably foresee
11 that a listener would reasonably interpret as a serious expression of an intent to
12 commit an unlawful act of violence to a particular individual or group of individuals,
13 as distinguished from hyperbole, jest, innocuous talk, expressions of political views,
14 or other speech that is similarly protected under the First Amendment of the U.S.
15 Constitution, regardless of whether the speaker has the ability to carry out the
16 threat.

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

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

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

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

14 4. That any person lawfully present on campus may protest or demonstrate
15 there. This statement shall make clear that persons may not engage in conduct that
16 materially and substantially disrupts another's expressive activity if that activity is
17 occurring in a campus space reserved for that activity under the exclusive control of
18 a particular group.

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

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

23 7. That each institution may not take action, as an institution, on the public
24 policy controversies of the day in such a way as to require students or faculty to
25 publicly express a given view of social policy.

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

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

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

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

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

11 c. The right to confront witnesses against them.

12 d. The right to present a defense.

13 e. The right to call witnesses.

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

15 g. The right of appeal.

16 h. The right to active assistance of counsel.

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

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

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

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

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

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

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

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

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

20 1. A description of any barriers to or disruptions of free expression within
21 institutions.

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

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

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

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

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

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

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

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

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

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

- 1 (a) Violations of state or federal law.
- 2 (b) Expression that a court has deemed unprotected defamation.
- 3 (c) Peer-on-peer harassment.
- 4 (d) Quid pro quo sexual harassment.
- 5 (e) True threats.
- 6 (f) An unjustifiable invasion of privacy or confidentiality not involving a matter
7 of public concern.
- 8 (g) An action that unlawfully disrupts the function of an institution.
- 9 (h) A violation of a reasonable time, place, and manner restriction on expressive
10 activities that is consistent with sub. (4) (a) 3.
- 11 **(10) ENFORCEMENT.** (a) A person whose expressive rights are violated by a
12 violation of this section or the policy adopted under sub. (4) (a) may bring an action
13 to enjoin the violation of this section or the policy.
- 14 (b) In an action brought under par. (a), if the court finds that a violation
15 occurred, the court shall award injunctive relief for the violation, and,
16 notwithstanding s. 814.04 (1), reasonable attorney fees and costs. The court shall
17 also award the actual damages caused by the violation or \$1,000, whichever is
18 greater.
- 19 (c) A person specified in par. (a) shall bring an action for a violation within one
20 year after the date the cause of action accrues. For the purpose of calculating the
21 one-year limitation period, each day that the violation persists or each day that a
22 policy in violation of this section remains in effect constitutes a new violation and
23 shall be considered a day that the cause of action has accrued.
- 24 (d) If a defendant prevails in an action brought under par. (a) and the court
25 finds the action was frivolous or brought in bad faith, then, notwithstanding s. 814.04

1 (1), the defendant shall recover reasonable attorney fees incurred in connection with
2 defending the action.

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

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

8 **SECTION 3.** 38.002 of the statutes is created to read:

9 **38.002 Campus free speech.** (1) LEGISLATIVE FINDINGS. The legislative
10 findings regarding the institutions of the University of Wisconsin System under s.
11 36.02 (1) apply with equal force to technical colleges.

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

13 (3) DEFINITIONS. In this section:

14 (a) “Materially and substantially disrupts” has the meaning given in s. 36.02
15 (3) (b).

16 (b) “Peer-on-peer harassment” has the meaning given in s. 36.02 (3) (c), except
17 that, for purposes of this section, the word institution in s. 36.02 (3) (c) means a
18 technical college.

19 (c) “Quid pro quo sexual harassment” has the meaning given in s. 36.02 (3) (d).

20 (d) “True threat” has the meaning given in s. 36.02 (3) (e).

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

24 1. That the primary function of a technical college is the discovery,
25 improvement, transmission, and dissemination of knowledge by means of research,

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

4 2. That it is not the proper role of a technical college 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 in furtherance of a significant technical college 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 a technical college, 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 persons may not engage in conduct that
19 materially and substantially disrupts another's expressive activity if that activity is
20 occurring in a campus space reserved for that activity under the exclusive control of
21 a particular group.

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

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

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

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

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

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

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

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

14 c. The right to confront witnesses against them.

15 d. The right to present a defense.

16 e. The right to call witnesses.

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

18 g. The right of appeal.

19 h. The right to active assistance of counsel.

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

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

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 a technical college district, or a technical college that restrict speech on campus and
16 are, therefore, inconsistent with the policy. The board and each technical college
17 district and technical college shall remove or revise any such provisions in its policies
18 and rules to ensure compatibility with the policy required under par. (a).

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

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

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 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 shall make the report required under par. (a) available to the
12 public on the technical college system's Internet site.

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

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

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

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

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

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
19 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 within one
24 year after the date the cause of action accrues. For the purpose of calculating the
25 one-year limitation period, each day that the violation persists or each day that a

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

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

7 **SECTION 4.** 227.01 (13) (Lo) of the statutes is created to read:

8 227.01 (13) (Lo) Adopts a policy required under s. 36.02 (4) (a) or 38.002 (4) (a).

9 (END)